Court File No. T-577-20

FEDERAL COURT

Between

CANADIAN COALITION FOR FIREARM RIGHTS, RODNEY GILTACA, LAURENCE KNOWLES, RYAN STEACY, MACCABEE DEFENSE INC. and WOLVERINE SUPPLIES LTD.

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

MOTION RECORD OF THE APPLICANTS

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Canada Gazette Part II

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OTTAWA, FRIDAY, MAY 1, 2020

OTTAWA, LE VENDREDI 1er MAI 2020

Registration
SOR/2020-96 May 1, 2020

CRIMINAL CODE

P.C. 2020-298 May 1, 2020

Whereas the Governor in Council is not of the opinion that any thing prescribed to be a prohibited firearm or a prohibited device, in the Annexed Regulations, is reasonable for use in Canada for hunting or sporting purposes;

Therefore, Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to the definitions "non-restricted firearm"[a], "prohibited device"[b], "prohibited firearm"[b] and "restricted firearm"[b] in subsection 84(1) of the *Criminal Code*[c] and to subsection 117.15(1)[b] of that Act, makes the annexed *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*.

Enregistrement
DORS/2020-96 Le 1er mai 2020

CODE CRIMINEL

C.P. 2020-298 Le 1er mai 2020

Attendu que la gouverneure en conseil n'est pas d'avis que toute chose désignée comme arme à feu prohibée ou dispositif prohibé dans le règlement ci-après peut raisonnablement être utilisée au Canada pour la chasse ou le sport,

À ces causes, sur recommandation du ministre de la Justice et en vertu des définitions de « arme à feu à autorisation restreinte »[a], « arme à feu prohibée »[a], « arme à feu sans restriction »[b] et « dispositif prohibé »[a] au paragraphe 84(1) du *Code criminel*[c] et du paragraphe 117.15(1)[a] de cette loi, Son Excellence la Gouverneure générale en conseil prend le *Règlement modifiant le Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés, à autorisation restreinte ou sans restriction*, ci-après.

[a] S.C. 2015, c. 27, s. 18
[b] S.C. 1995, c. 39, s. 139
[c] R.S., c. C-46

[a] L.C. 1995, ch. 39, art. 139
[b] L.C. 2015, ch. 27, art. 18
[c] L.R., ch. C-46

ISSN 1494-6122

Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted

Règlement modifiant le Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés, à autorisation restreinte ou sans restriction

Amendments

1 The title of the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*[1] is replaced by the following:

Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted

2 Sections 3.1 to 3.2 of the Regulations are repealed.

3 (1) Item 83 of Part 1 of the schedule to the Regulations is replaced by the following:

83 The firearms of the designs commonly known as the SG-550 rifle and SG-551 carbine, and any variants or modified versions of them, including the SAN Swiss Arms

(a) Aestas;

(b) Autumnus;

(c) Black Special;

(d) Black Special Carbine;

(e) Black Special CQB;

(f) Black Special Target;

(g) Blue Star;

(h) Classic Green;

(i) Classic Green Carbine;

(j) Classic Green CQB;

(k) Classic Green Sniper;

(l) Heavy Metal;

[1] SOR/98-462; SOR/2015-213, s. 1

Modifications

1 Le titre du *Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés, à autorisation restreinte ou sans restriction*[1] est remplacé par ce qui suit :

Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés ou à autorisation restreinte

2 Les articles 3.1 et 3.2 du même règlement sont abrogés.

3 (1) L'article 83 de la partie 1 de l'annexe du même règlement est remplacé par ce qui suit :

83 Les armes à feu des modèles communément appelés fusil SG-550 et carabine SG-551, ainsi que les armes à feu des mêmes modèles qui comportent des variantes ou qui ont subi des modifications, y compris les armes à feu SAN Swiss Arms suivantes :

a) Aestas;

b) Autumnus;

c) Black Special;

d) Black Special Carbine;

e) Black Special CQB;

f) Black Special Target;

g) Blue Star;

h) Classic Green;

i) Classic Green Carbine;

j) Classic Green CQB;

k) Classic Green Sniper;

[1] DORS/98-462; DORS/2015-213, art. 1

(m) Hiemis;

(n) Red Devil;

(o) Swiss Arms Edition; and

(p) Ver.

(2) Part 1 of the schedule to the Regulations is amended by adding the following after item 86:

Other

87 The firearms of the designs commonly known as the M16, AR-10 and AR-15 rifles and the M4 carbine, and any variants or modified versions of them — other than one referred to in item 47, 49 or 50 of this Part — including the

(a) 2 Vets Arms 2VA-10;

(b) 2 Vets Arms 2VA-15;

(c) Accuracy Systems A-15 Custom Edition LR Tech Tactical;

(d) Adams Arms AA15;

(e) Adams Arms AASF-308;

(f) Adams Arms Multical;

(g) ADC ADC234;

(h) ADC ADC253;

(i) Adcor Defense A556 Elite GI;

(j) Adcor Defense ADC15;

(k) Adcor Defense B.E.A.R.;

(l) Adcor Defense Elite;

(m) Addax Tactical ADDAX-ZK;

(n) Addax Tactical AT-15;

(o) AdeQ Firearms L-Tac;

(p) AdeQ Firearms Paladin;

(q) AdeQ Firearms Venator;

(r) Advanced Armament Corporation MPW;

(s) Advanced Armaments Incorporated M15;

l) Heavy Metal;

m) Hiemis;

n) Red Devil;

o) Swiss Arms Edition;

p) Ver.

(2) La partie 1 de l'annexe du même règlement est modifiée par adjonction, après l'article 86, de ce qui suit :

Autres

87 Les armes à feu des modèles communément appelés fusils M16, AR-10 et AR-15 et carabine M4, ainsi que les armes à feu des mêmes modèles qui comportent des variantes ou qui ont subi des modifications, à l'exception de celles visées aux articles 47, 49 ou 50 de la présente partie, mais y compris les armes à feu suivantes :

a) 2 Vets Arms 2VA-10;

b) 2 Vets Arms 2VA-15;

c) Accuracy Systems A-15 Custom Edition LR Tech Tactical;

d) Adams Arms AA15;

e) Adams Arms AASF-308;

f) Adams Arms Multical;

g) ADC ADC234;

h) ADC ADC253;

i) Adcor Defense A556 Elite GI;

j) Adcor Defense ADC15;

k) Adcor Defense B.E.A.R.;

l) Adcor Defense Elite;

m) Addax Tactical ADDAX-ZK;

n) Addax Tactical AT-15;

o) AdeQ Firearms L-Tac;

p) AdeQ Firearms Paladin;

q) AdeQ Firearms Venator;

r) Advanced Armament Corporation MPW;

(t) Aero Precision A15;

(u) Aero Precision AP15;

(v) Aero Precision G15 Ghost Gun;

(w) Aero Precision H15;

(x) Aero Precision M4 Carbine;

(y) Aero Precision M4E1;

(z) Aero Precision M5;

(z.001) Aero Precision M16A4;

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(z.007) Alamo Tactical AT-15;

(z.008) Alberta Tactical Rifle AT15;

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(z.01) Alexander Arms AAR15 Beowulf;

(z.011) Alexander Arms AAR15 Beowulf Overwatch;

(z.012) Alexander Arms AAR15 Genghis;

(z.013) Alexander Arms AAR15 Grendel;

(z.014) Alexander Arms AAR15 Grendel Overwatch;

(z.015) Alexander Arms AAR17;

(z.016) Alien Armory UFO-10;

(z.017) Ambush Firearms A11;

(z.018) Ameetec Arms AM-15 General;

(z.019) Ameetec Arms AM-15 Modular;

(z.02) Ameetec Arms AM-15 M4 Tactical Master;

(z.021) Ameetec Arms AM-15 Standard Tactical;

(z.022) Ameetec Arms AM-15 Standard Varmint;

(z.023) Ameetec Arms AM-15 Tactical Predator;

(z.024) Ameetec Arms AM-15 Varmint Master;

s) Advanced Armaments Incorporated M15;

t) Aero Precision A15;

u) Aero Precision AP15;

v) Aero Precision G15 Ghost Gun;

w) Aero Precision H15;

x) Aero Precision M4 Carbine;

y) Aero Precision M4E1;

z) Aero Precision M5;

z.001) Aero Precision M16A4;

z.002) Aero Precision Pistol;

z.003) Aero Precision P-15 PEW;

z.004) Aero Precision STS15;

z.005) Aero Precision X15;

z.006) Airtronic DMR;

z.007) Alamo Tactical AT-15;

z.008) Alberta Tactical Rifle AT15;

z.009) Alexander Arms AAR15;

z.01) Alexander Arms AAR15 Beowulf;

z.011) Alexander Arms AAR15 Beowulf Overwatch;

z.012) Alexander Arms AAR15 Genghis;

z.013) Alexander Arms AAR15 Grendel;

z.014) Alexander Arms AAR15 Grendel Overwatch;

z.015) Alexander Arms AAR17;

z.016) Alien Armory UFO-10;

z.017) Ambush Firearms A11;

z.018) Ameetec Arms AM-15 General;

z.019) Ameetec Arms AM-15 Modular;

z.02) Ameetec Arms AM-15 M4 Tactical Master;

z.021) Ameetec Arms AM-15 Standard Tactical;

z.022) Ameetec Arms AM-15 Standard Varmint;

z.023) Ameetec Arms AM-15 Tactical Predator;

(z.025) Ameetec Arms AM-15 9MM;

(z.026) Ameetec Arms WM-15;

(z.027) America Remembers Colt AR15A2 Match HBar Vietnam Commemorative;

(z.028) American Defense Manufacturing UICH;

(z.029) American Defense Manufacturing UIC 10A;

(z.03) American Historical Foundation Colt AR15A2 Sporter Match HBar Vietnam Tribute Special Edition;

(z.031) American Historical Foundation Colt AR15A2 Sporter Target Operation Desert Storm Commemorative;

(z.032) American Precision Arms A15;

(z.033) American Spirit Arms ASA15;

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(z.047) Angstadt Arms JACK9;

(z.048) Anvil Arms AA15;

(z.049) Area 53 El Capitan;

(z.05) Area 53 El Jefe;

(z.051) Ares Defense Systems Ares-15;

(z.052) Ares Defense Systems Ares-15 MCR;

z.024) Ameetec Arms AM-15 Varmint Master;

z.025) Ameetec Arms AM-15 9MM;

z.026) Ameetec Arms WM-15;

z.027) America Remembers Colt AR15A2 Match HBar Vietnam Commemorative;

z.028) American Defense Manufacturing UICH;

z.029) American Defense Manufacturing UIC 10A;

z.03) American Historical Foundation Colt AR15A2 Sporter Match HBar Vietnam Tribute Special Edition;

z.031) American Historical Foundation Colt AR15A2 Sporter Target Operation Desert Storm Commemorative;

z.032) American Precision Arms A15;

z.033) American Spirit Arms ASA15;

z.034) American Spirit Arms ASA15 Pistol;

z.035) American Spirit Arms ASA308;

z.036) American Spirit Arms Canadian Carbine;

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(z.062) Armalite AR-10 KLM;

(z.063) Armalite AR-10 Magnum;

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z.061) Armalite AR-10B;

z.062) Armalite AR-10 KLM;

z.063) Armalite AR-10 Magnum;

z.064) Armalite AR-10NM;

z.065) Armalite AR-10T;

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z.077) Armi Jager AP15;

z.078) Armi Jager AP74;

z.079) Armitage International BR-15-A6S;

z.08) Armscorp AC-15;

z.081) Arms East N8S;

z.082) Armtech X;

z.083) Ascend Armory A15;

(z.084) AR15 Chatterbox CB-15;

(z.085) AR15.Com ARFCOM;

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(z.102) BCM Rifle Company M4A1;

(z.103) Bean Firearms BFC-15A;

(z.104) Bear Creek Arsenal BCA15;

(z.105) Black Creek Labs BCL15;

(z.106) Black Creek Labs BCL102;

(z.107) Black Creek Labs BCL102B;

(z.108) Black Dawn BDR-15;

(z.109) Black Forge BF15;

(z.11) Blackheart International BHI-15;

(z.111) Black Leaf Industries BL10;

(z.112) Black Leaf Industries BL10B Prototype;

(z.113) Black Leaf Industries BL15;

(z.114) Black Rain Ordnance Fallout 10;

z.084) AR15 Chatterbox CB-15;

z.085) AR15.Com ARFCOM;

z.086) AR15.Com AR15.Com;

z.087) AXTS AX556;

z.088) Badrock Tactical BR10;

z.089) Badrock Tactical BR15;

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z.102) BCM Rifle Company M4A1;

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z.107) Black Creek Labs BCL102B;

z.108) Black Dawn BDR-15;

z.109) Black Forge BF15;

z.11) Blackheart International BHI-15;

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(z.115) Black Rain Ordnance Fallout 15;

(z.116) Black Rain Ordnance SPEC15;

(z.117) Black Rifle Company BRC15B;

(z.118) Blackwater BW-15;

(z.119) Black Weapons Armory BWA-15;

(z.12) Blue Line BL-15LE1;

(z.121) Boberg CDH-15;

(z.122) Bohica M16SA;

(z.123) BPM BP15;

(z.124) BPM CQB-10;

(z.125) BPM LR-10;

(z.126) Breda B4;

(z.127) Brownell's BRN-16A1;

(z.128) Brownell's BRN-601;

(z.129) Brownell's XBRN16E1;

(z.13) Bushmaster Carbon 15;

(z.131) Bushmaster XM15E2S;

(z.132) Bushmaster XM15E2S Law Enforcement;

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z.118) Blackwater BW-15;

z.119) Black Weapons Armory BWA-15;

z.12) Blue Line BL-15LE1;

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z.122) Bohica M16SA;

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z.132) Bushmaster XM15E2S Law Enforcement;

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z.135) Bushmaster XM15E2S Predator;

z.136) Bushmaster XM15E2S Varminter;

z.137) Bushmaster XM15E2S 450 Bushmaster;

z.138) Bushmaster XM15E2S DCM Competition Rifle;

z.139) Bushmaster Bushmaster 308;

z.14) Bushmaster BAR-10;

z.141) Bushmaster XM15E2S V Match;

z.142) Bushmaster BR-308;

z.143) C3 Defense C3-15;

z.144) Cadex AR15 Karpat SPVM;

z.145) Cadex CDX-10;

(z.146) Cadex CDX-15;

(z.147) Calguns AR15;

(z.148) Canstar Arms AR 338 Lapua;

(z.149) Cavalry Arms CAV-15;

(z.15) Cavalry Arms CAV-15 MARK 2;

(z.151) Cavalry Arms CAV-15 Rifleman;

(z.152) Centurion Arms C4;

(z.153) Centurion Tactical CT-15;

(z.154) Century Arms C15A1 Sporter;

(z.155) Century Arms C15 Sporter;

(z.156) Century International Arms Centurion 15 Sporter;

(z.157) Charles Daly Defense CDD-15;

(z.158) Chiappa Firearms M Four-22;

(z.159) Chiappa Firearms M Four-22 Pistol;

(z.16) Chirstensen Arms Carbon CA-10 DMR;

(z.161) Christensen Arms Carbon CA-10 G2;

(z.162) Christensen Arms Carbon CA-10 Recon;

(z.163) Christensen Arms Carbon CA-15;

(z.164) Christensen Arms Carbon CA-15 Predator;

(z.165) Christensen Arms Carbon CA-15 Recon;

(z.166) Christensen Arms Carbon CA TAC 10;

(z.167) Clark Custom Guns Gator;

(z.168) CLE MR15;

(z.169) CMMG Mod4SA;

(z.17) CMMG MK3;

(z.171) CMMG MK-4;

(z.172) CMMG MK-5;

(z.173) CMMG MK-8;

(z.174) CMMG MK-9;

(z.175) CMMG MKG-45;

(z.176) CMMG MKW-15;

z.146) Cadex CDX-15;

z.147) Calguns AR15;

z.148) Canstar Arms AR 338 Lapua;

z.149) Cavalry Arms CAV-15;

z.15) Cavalry Arms CAV-15 MARK 2;

z.151) Cavalry Arms CAV-15 Rifleman;

z.152) Centurion Arms C4;

z.153) Centurion Tactical CT-15;

z.154) Century Arms C15A1 Sporter;

z.155) Century Arms C15 Sporter;

z.156) Century International Arms Centurion 15 Sporter;

z.157) Charles Daly Defense CDD-15;

z.158) Chiappa Firearms M Four-22;

z.159) Chiappa Firearms M Four-22 Pistol;

z.16) Chirstensen Arms Carbon CA-10 DMR;

z.161) Christensen Arms Carbon CA-10 G2;

z.162) Christensen Arms Carbon CA-10 Recon;

z.163) Christensen Arms Carbon CA-15;

z.164) Christensen Arms Carbon CA-15 Predator;

z.165) Christensen Arms Carbon CA-15 Recon;

z.166) Christensen Arms Carbon CA TAC 10;

z.167) Clark Custom Guns Gator;

z.168) CLE MR15;

z.169) CMMG Mod4SA;

z.17) CMMG MK3;

z.171) CMMG MK-4;

z.172) CMMG MK-5;

z.173) CMMG MK-8;

z.174) CMMG MK-9;

z.175) CMMG MKG-45;

z.176) CMMG MKW-15;

(z.177) CMT LT-15;

(z.178) Cobalt Kinetics BAMF;

(z.179) Cobalt Kinetics CARS;

(z.18) Cobb MCR;

(z.181) Cobb MCR 30-06 SPRG 100th Anniversary Commemorative;

(z.182) Colt AR15A2 Sporter 2;

(z.183) Colt AR15;

(z.184) Colt AR15 SP1;

(z.185) Colt AR15A2 Match Target Lightweight;

(z.186) Colt AR15A2 Government;

(z.187) Colt AR15A2 Sporter Delta HBar;

(z.188) Colt AR15A2 Government Carbine;

(z.189) Colt AR15A2 Sporter Competition HBar;

(z.19) Colt AR15A2 Match Target HBar;

(z.191) Colt AR15A2;

(z.192) Colt AR15A2 Sporter HBar;

(z.193) Colt AR15 Match HBar;

(z.194) Colt AR15 Sporter;

(z.195) Colt M4 Carbine Match Target;

(z.196) Colt AR15A2 Match Target Target Model;

(z.197) Colt AR15A3 Tactical Carbine;

(z.198) Colt AR15A3 Match Target Competition HBar;

(z.199) Colt AR15A2 Sporter Match Target Competition HBar 2;

(z.2) Colt AR15 Sporter Lightweight;

(z.201) Colt AR15A2 Sporter Match Target Lightweight;

(z.202) Colt AR15A2 Sporter Target;

(z.203) Colt AR15A2 Government Target;

(z.204) Colt AR15A2 Sporter Match Target HBar;

(z.205) Colt AR15A2 Sporter Match Delta HBar;

(z.206) Colt AR15A2 Match Delta HBar;

z.177) CMT LT-15;

z.178) Cobalt Kinetics BAMF;

z.179) Cobalt Kinetics CARS;

z.18) Cobb MCR;

z.181) Cobb MCR 30-06 SPRG 100th Anniversary Commemorative;

z.182) Colt AR15A2 Sporter 2;

z.183) Colt AR15;

z.184) Colt AR15 SP1;

z.185) Colt AR15A2 Match Target Lightweight;

z.186) Colt AR15A2 Government;

z.187) Colt AR15A2 Sporter Delta HBar;

z.188) Colt AR15A2 Government Carbine;

z.189) Colt AR15A2 Sporter Competition HBar;

z.19) Colt AR15A2 Match Target HBar;

z.191) Colt AR15A2;

z.192) Colt AR15A2 Sporter HBar;

z.193) Colt AR15 Match HBar;

z.194) Colt AR15 Sporter;

z.195) Colt M4 Carbine Match Target;

z.196) Colt AR15A2 Match Target Target Model;

z.197) Colt AR15A3 Tactical Carbine;

z.198) Colt AR15A3 Match Target Competition HBar;

z.199) Colt AR15A2 Sporter Match Target Competition HBar 2;

z.2) Colt AR15 Sporter Lightweight;

z.201) Colt AR15A2 Sporter Match Target Lightweight;

z.202) Colt AR15A2 Sporter Target;

z.203) Colt AR15A2 Government Target;

z.204) Colt AR15A2 Sporter Match Target HBar;

z.205) Colt AR15A2 Sporter Match Delta HBar;

z.206) Colt AR15A2 Match Delta HBar;

(z.207) Colt AR15A2 Sporter Match Target Competition HBar;

(z.208) Colt AR15A2 Sporter Competition HBar Range Selected;

(z.209) Colt AR15A2 Match Target Competition HBar 2;

(z.21) Colt CAR15A3 HBar Elite;

(z.211) Colt AR15 9MM Carbine;

(z.212) Colt AR15A2 Carbine;

(z.213) Colt AR15A2 Sporter Match HBar;

(z.214) Colt Colts Law Enforcement Carbine;

(z.215) Colt C7CT;

(z.216) Colt C7A1;

(z.217) Colt C7A2;

(z.218) Colt IUR;

(z.219) Colt M4 Carbine Sporter;

(z.22) Colt Modular Carbine;

(z.221) Colt M4A1 Carbine;

(z.222) Colt M4 Carbine;

(z.223) Colt SA15.7;

(z.224) Colt SA20;

(z.225) Colt AR-15A4;

(z.226) Colt AR15A4 Lightweight LE Carbine;

(z.227) Colt AR15 M16A1;

(z.228) Colt AR15 Target Model;

(z.229) Colt M4LE;

(z.23) Colt M4 Light Carbine;

(z.231) Colt M16 Rifle;

(z.232) Colt M16 SPR;

(z.233) Colt M16A2;

(z.234) Colt AR15A2 Sporter Carbine;

(z.235) Colt M16A2 Carbine;

(z.236) Colt SMG;

z.207) Colt AR15A2 Sporter Match Target Competition HBar;

z.208) Colt AR15A2 Sporter Competition HBar Range Selected;

z.209) Colt AR15A2 Match Target Competition HBar 2;

z.21) Colt CAR15A3 HBar Elite;

z.211) Colt AR15 9MM Carbine;

z.212) Colt AR15A2 Carbine;

z.213) Colt AR15A2 Sporter Match HBar;

z.214) Colt Colts Law Enforcement Carbine;

z.215) Colt C7CT;

z.216) Colt C7A1;

z.217) Colt C7A2;

z.218) Colt IUR;

z.219) Colt M4 Carbine Sporter;

z.22) Colt Modular Carbine;

z.221) Colt M4A1 Carbine;

z.222) Colt M4 Carbine;

z.223) Colt SA15.7;

z.224) Colt SA20;

z.225) Colt AR-15A4;

z.226) Colt AR15A4 Lightweight LE Carbine;

z.227) Colt AR15 M16A1;

z.228) Colt AR15 Target Model;

z.229) Colt M4LE;

z.23) Colt M4 Light Carbine;

z.231) Colt M16 Rifle;

z.232) Colt M16 SPR;

z.233) Colt M16A2;

z.234) Colt AR15A2 Sporter Carbine;

z.235) Colt M16A2 Carbine;

z.236) Colt SMG;

(z.237) Colt Competition CCR Competition;

(z.238) Colt Competition CSR Sporting;

(z.239) Combat Shooters BMF;

(z.24) Conquest Arms CA-15;

(z.241) Core Core-15;

(z.242) Cross Machine Tool UHP-15;

(z.243) Cross Machine Tool UHP15A;

(z.244) Cross Machine Tool UHP15H;

(z.245) Cross Machine Tool UHP15-PDW;

(z.246) Cross Machine Tool UHP15SSA;

(z.247) Cross Machine Tool UHP-10;

(z.248) Dalphon BFD;

(z.249) Dane Armory DAR-15;

(z.25) Daniel Defense DD-15;

(z.251) Daniel Defense M4 Carbine;

(z.252) Daniel Defense DD MK762;

(z.253) Daniel Defense DDM4;

(z.254) Daniel Defense DD5;

(z.255) Daniel Defense M4 Carbine Pistol;

(z.256) Dark Storm Industries DS-15;

(z.257) Defiance DMK22;

(z.258) Defiance Machine XG14;

(z.259) Delaware Machinery AR15;

(z.26) Delphi Tactical Delphi-15;

(z.261) Dennys Guns DG-AR16;

(z.262) Desert Ordnance XM4 Rifle;

(z.263) Detroit Gun Works DGW15;

(z.264) Devil Dog Arms DDA-15B;

(z.265) Devil Dog Arms DDA-10B;

(z.266) Dez Arms DTA-10;

(z.267) Diamondback Firearms DB-10;

z.237) Colt Competition CCR Competition;

z.238) Colt Competition CSR Sporting;

z.239) Combat Shooters BMF;

z.24) Conquest Arms CA-15;

z.241) Core Core-15;

z.242) Cross Machine Tool UHP-15;

z.243) Cross Machine Tool UHP15A;

z.244) Cross Machine Tool UHP15H;

z.245) Cross Machine Tool UHP15-PDW;

z.246) Cross Machine Tool UHP15SSA;

z.247) Cross Machine Tool UHP-10;

z.248) Dalphon BFD;

z.249) Dane Armory DAR-15;

z.25) Daniel Defense DD-15;

z.251) Daniel Defense M4 Carbine;

z.252) Daniel Defense DD MK762;

z.253) Daniel Defense DDM4;

z.254) Daniel Defense DD5;

z.255) Daniel Defense M4 Carbine Pistol;

z.256) Dark Storm Industries DS-15;

z.257) Defiance DMK22;

z.258) Defiance Machine XG14;

z.259) Delaware Machinery AR15;

z.26) Delphi Tactical Delphi-15;

z.261) Dennys Guns DG-AR16;

z.262) Desert Ordnance XM4 Rifle;

z.263) Detroit Gun Works DGW15;

z.264) Devil Dog Arms DDA-15B;

z.265) Devil Dog Arms DDA-10B;

z.266) Dez Arms DTA-10;

z.267) Diamondback Firearms DB-10;

(z.268) Diamondback Firearms DB-15;

(z.269) Diemaco Rifle C10;

(z.27) Diemaco Rifle Experimental 84;

(z.271) Dlask Arms AR15 Type;

(z.272) Dlask Arms DAR701;

(z.273) Dlask Arms DAR701 Canada 150 Birthday;

(z.274) Dlask Arms PAC-5;

(z.275) Dominion Arms DA556;

(z.276) Double Star Star-15;

(z.277) Double Star Star-15 Carbine;

(z.278) Double Star Star-15 Super Match Rifle;

(z.279) Double Star Star-15 CritterSlayer;

(z.28) Double Star Star-15 Expedition Rifle;

(z.281) Double Star Star-15 Dissipator;

(z.282) Double Star Star-15 Target Rifle;

(z.283) Double Star Star-15 Lightweight Tactical;

(z.284) Double Star Star-15 Pistol;

(z.285) Double Star Star-10B;

(z.286) Dow FAL-15;

(z.287) DPMS A-15;

(z.288) DPMS A-15 Panther Bull;

(z.289) DPMS A-15 Panther Bull Twenty-Four;

(z.29) DPMS A-15 Panther Bull Twenty-Four Special;

(z.291) DPMS A-15 Panther Bull Twenty-Four Super;

(z.292) DPMS A-15 Panther Bulldog;

(z.293) DPMS A-15 Panther Bull Sixteen;

(z.294) DPMS A-15 Panther Bull SST Sixteen;

(z.295) DPMS A-15 Panther Bull Classic;

(z.296) DPMS A-15 Panther Prairie;

(z.297) DPMS A-15 Panther Arctic;

(z.298) DPMS A-15 Panther Classic;

z.268) Diamondback Firearms DB-15;

z.269) Diemaco Rifle C10;

z.27) Diemaco Rifle Experimental 84;

z.271) Dlask Arms AR15 Type;

z.272) Dlask Arms DAR701;

z.273) Dlask Arms DAR701 Canada 150 Birthday;

z.274) Dlask Arms PAC-5;

z.275) Dominion Arms DA556;

z.276) Double Star Star-15;

z.277) Double Star Star-15 Carbine;

z.278) Double Star Star-15 Super Match Rifle;

z.279) Double Star Star-15 CritterSlayer;

z.28) Double Star Star-15 Expedition Rifle;

z.281) Double Star Star-15 Dissipator;

z.282) Double Star Star-15 Target Rifle;

z.283) Double Star Star-15 Lightweight Tactical;

z.284) Double Star Star-15 Pistol;

z.285) Double Star Star-10B;

z.286) Dow FAL-15;

z.287) DPMS A-15;

z.288) DPMS A-15 Panther Bull;

z.289) DPMS A-15 Panther Bull Twenty-Four;

z.29) DPMS A-15 Panther Bull Twenty-Four Special;

z.291) DPMS A-15 Panther Bull Twenty-Four Super;

z.292) DPMS A-15 Panther Bulldog;

z.293) DPMS A-15 Panther Bull Sixteen;

z.294) DPMS A-15 Panther Bull SST Sixteen;

z.295) DPMS A-15 Panther Bull Classic;

z.296) DPMS A-15 Panther Prairie;

z.297) DPMS A-15 Panther Arctic;

z.298) DPMS A-15 Panther Classic;

(z.299) DPMS A-15 Panther DCM;

(z.3) DPMS A-15 Panther Southpaw;

(z.301) DPMS A-15 Panther Classic Sixteen;

(z.302) DPMS A-15 Panther Kitty Kat;

(z.303) DPMS A-15 Panther Carbine;

(z.304) DPMS A-15 Panther Race Gun;

(z.305) DPMS A-15 Panther Tactical;

(z.306) DPMS A-15 Panther Classic Lo-Pro;

(z.307) DPMS LR-308 Panther;

(z.308) DPMS A-15 Panther Carbine M-4;

(z.309) DPMS A-15 Panther Lite;

(z.31) DPMS A-15 Panther Tuber;

(z.311) DPMS LR-300 Panther;

(z.312) DPMS A-15 Panther 20th Anniversary;

(z.313) DPMS LR-243 Panther;

(z.314) DPMS LR-260 Panther;

(z.315) DPMS LR-204 Panther;

(z.316) DPMS LR-30S Panther;

(z.317) DPMS A-15 Panther Pardus;

(z.318) DPMS LR-338 Panther;

(z.319) DPMS LR-6.5 Panther;

(z.32) DPMS A-15 Panther Sportical;

(z.321) DPMS A-15 Panther The Agency;

(z.322) DPMS A-15 Panther CSAT;

(z.323) DPMS A-15 Panther LBR Carbine;

(z.324) DPMS A-15 Panther Hunter;

(z.325) DPMS A-15 Panther 300 Blackout;

(z.326) DPMS LR-G2 Panther;

(z.327) DPMS A-15 Panther VRS Single Shot;

(z.328) DPMS A-15 Panther Pump Rifle;

(z.329) DPMS A-15 Panther 22;

z.299) DPMS A-15 Panther DCM;

z.3) DPMS A-15 Panther Southpaw;

z.301) DPMS A-15 Panther Classic Sixteen;

z.302) DPMS A-15 Panther Kitty Kat;

z.303) DPMS A-15 Panther Carbine;

z.304) DPMS A-15 Panther Race Gun;

z.305) DPMS A-15 Panther Tactical;

z.306) DPMS A-15 Panther Classic Lo-Pro;

z.307) DPMS LR-308 Panther;

z.308) DPMS A-15 Panther Carbine M-4;

z.309) DPMS A-15 Panther Lite;

z.31) DPMS A-15 Panther Tuber;

z.311) DPMS LR-300 Panther;

z.312) DPMS A-15 Panther 20th Anniversary;

z.313) DPMS LR-243 Panther;

z.314) DPMS LR-260 Panther;

z.315) DPMS LR-204 Panther;

z.316) DPMS LR-30S Panther;

z.317) DPMS A-15 Panther Pardus;

z.318) DPMS LR-338 Panther;

z.319) DPMS LR-6.5 Panther;

z.32) DPMS A-15 Panther Sportical;

z.321) DPMS A-15 Panther The Agency;

z.322) DPMS A-15 Panther CSAT;

z.323) DPMS A-15 Panther LBR Carbine;

z.324) DPMS A-15 Panther Hunter;

z.325) DPMS A-15 Panther 300 Blackout;

z.326) DPMS LR-G2 Panther;

z.327) DPMS A-15 Panther VRS Single Shot;

z.328) DPMS A-15 Panther Pump Rifle;

z.329) DPMS A-15 Panther 22;

(z.33) DPMS A-15 Panther VAS Single Shot;

(z.331) DPMS A-150 Panther;

(z.332) DPMS G2;

(z.333) DRD Paratus;

(z.334) DRD M762;

(z.335) DRD CDR-15;

(z.336) DRD Kivaari;

(z.337) DRD D8;

(z.338) DSA Incorporated ZM4;

(z.339) DTI DTI-15;

(z.34) Dynamic Arms Research (DAR) DAR-10;

(z.341) Dynamic Arms Research (DAR) DAR-15;

(z.342) E3 Arms Omega-15;

(z.343) Eagle Arms Division of Armalite AR-10;

(z.344) Eagle Arms Division of Armalite Eagle-15;

(z.345) Eagle Arms Division of Armalite M15;

(z.346) Eagle Arms Division of Armalite M15A2;

(z.347) Eagle Arms Division of Armalite M15A3;

(z.348) Eagle Arms Division of Armalite M15P;

(z.349) Eagle Arms Incorporated EA-15;

(z.35) EDs Tactical Armory 2A;

(z.351) Elite Machining GRX15;

(z.352) Emtan EM-15;

(z.353) Enfield Rifle Company MERC415;

(z.354) EP Armory AR15/M16 Type;

(z.355) Essential Arms Company J15;

(z.356) Essential Arms Company J15F;

(z.357) Essential Arms Company J15-2;

(z.358) F&D Defense FD308;

(z.359) F-1 Firearms BDR-10 CA;

(z.36) F-1 Firearms BDR-10-3G CA;

z.33) DPMS A-15 Panther VAS Single Shot;

z.331) DPMS A-150 Panther;

z.332) DPMS G2;

z.333) DRD Paratus;

z.334) DRD M762;

z.335) DRD CDR-15;

z.336) DRD Kivaari;

z.337) DRD D8;

z.338) DSA Incorporated ZM4;

z.339) DTI DTI-15;

z.34) Dynamic Arms Research (DAR) DAR-10;

z.341) Dynamic Arms Research (DAR) DAR-15;

z.342) E3 Arms Omega-15;

z.343) Eagle Arms Division of Armalite AR-10;

z.344) Eagle Arms Division of Armalite Eagle-15;

z.345) Eagle Arms Division of Armalite M15;

z.346) Eagle Arms Division of Armalite M15A2;

z.347) Eagle Arms Division of Armalite M15A3;

z.348) Eagle Arms Division of Armalite M15P;

z.349) Eagle Arms Incorporated EA-15;

z.35) EDs Tactical Armory 2A;

z.351) Elite Machining GRX15;

z.352) Emtan EM-15;

z.353) Enfield Rifle Company MERC415;

z.354) EP Armory AR15/M16 Type;

z.355) Essential Arms Company J15;

z.356) Essential Arms Company J15F;

z.357) Essential Arms Company J15-2;

z.358) F&D Defense FD308;

z.359) F-1 Firearms BDR-10 CA;

z.36) F-1 Firearms BDR-10-3G CA;

(z.361) F-1 Firearms BDR-15 CA;

(z.362) F-1 Firearms BDR-15-3G CA;

(z.363) F-1 Firearms FDR-15 CA;

(z.364) F-1 Firearms UDR-15-3G;

(z.365) Falkor Defense FD-15A;

(z.366) Faxon Firearms ARAK-21 XRS;

(z.367) Ferfrans SOACR;

(z.368) Fightlite Industries MCR;

(z.369) Firebird Precision Firearms FPX-15;

(z.37) FMK AR-1 Patriot;

(z.371) FMK AR1 Extreme;

(z.372) FN FNX-01;

(z.373) FN FN15;

(z.374) FN FN15 Carbine;

(z.375) FN FN15 Rifle;

(z.376) Fortis Manufacturing FM15;

(z.377) Frankford Arsenal XM-177E2;

(z.378) Franklin Armory F17-L;

(z.379) Franklin Armory F17-V4;

(z.38) Franklin Armory HSC-15;

(z.381) Franklin Armory Libertas;

(z.382) Fulton Armory FAR-15;

(z.383) Fulton Armory FAR-308;

(z.384) GA Precision GAP-10;

(z.385) GA Precision GAP-10 G2;

(z.386) Gilboa Shorty 7;

(z.387) Gilboa Commando 11.5;

(z.388) Gilboa SMG;

(z.389) Gilboa M-43;

(z.39) Gilboa Carabine 14.5;

(z.391) Gilboa DMR;

z.361) F-1 Firearms BDR-15 CA;

z.362) F-1 Firearms BDR-15-3G CA;

z.363) F-1 Firearms FDR-15 CA;

z.364) F-1 Firearms UDR-15-3G;

z.365) Falkor Defense FD-15A;

z.366) Faxon Firearms ARAK-21 XRS;

z.367) Ferfrans SOACR;

z.368) Fightlite Industries MCR;

z.369) Firebird Precision Firearms FPX-15;

z.37) FMK AR-1 Patriot;

z.371) FMK AR1 Extreme;

z.372) FN FNX-01;

z.373) FN FN15;

z.374) FN FN15 Carbine;

z.375) FN FN15 Rifle;

z.376) Fortis Manufacturing FM15;

z.377) Frankford Arsenal XM-177E2;

z.378) Franklin Armory F17-L;

z.379) Franklin Armory F17-V4;

z.38) Franklin Armory HSC-15;

z.381) Franklin Armory Libertas;

z.382) Fulton Armory FAR-15;

z.383) Fulton Armory FAR-308;

z.384) GA Precision GAP-10;

z.385) GA Precision GAP-10 G2;

z.386) Gilboa Shorty 7;

z.387) Gilboa Commando 11.5;

z.388) Gilboa SMG;

z.389) Gilboa M-43;

z.39) Gilboa Carabine 14.5;

z.391) Gilboa DMR;

(z.392) Gilboa Snake;

(z.393) GPI Manufacturing SLR15;

(z.394) Grande Armeria Camuna (GAC) GAC-15;

(z.395) Grey Ghost Precision GGP-SBL;

(z.396) Grey Ghost Precision GGP-S Grim;

(z.397) Grey Ghost Precision GGP-S Heavy;

(z.398) Grey Ghost Precision GGP-SLF;

(z.399) Grey Ghost Precision GGP-S Light;

(z.4) Grey Ghost Precision Specter Light;

(z.401) GT Virtual Concepts GT15;

(z.402) GTO Core-15;

(z.403) GTO Hard Core 15;

(z.404) Gun Room Company Noreen Bad News;

(z.405) Gunwerks WY15;

(z.406) Haenel CR223;

(z.407) Haenel CR308;

(z.408) Hayes Custom Guns H15;

(z.409) Head Down HD-15;

(z.41) Heckler & Koch HK416D;

(z.411) Heckler & Koch HK417;

(z.412) Heckler & Koch HKM4C;

(z.413) Heckler & Koch MR;

(z.414) Heckler & Koch MR223;

(z.415) Heckler & Koch MR308;

(z.416) Heckler & Koch MR556A1;

(z.417) Heckler & Koch MR762A1;

(z.418) Hera Arms HLS;

(z.419) Hera Arms HCL;

(z.42) Hera Arms HCL9M;

(z.421) Hesse Arms HAR15A2;

(z.422) Hesse Arms HAR15A2 Bull Gun;

z.392) Gilboa Snake;

z.393) GPI Manufacturing SLR15;

z.394) Grande Armeria Camuna (GAC) GAC-15;

z.395) Grey Ghost Precision GGP-SBL;

z.396) Grey Ghost Precision GGP-S Grim;

z.397) Grey Ghost Precision GGP-S Heavy;

z.398) Grey Ghost Precision GGP-SLF;

z.399) Grey Ghost Precision GGP-S Light;

z.4) Grey Ghost Precision Specter Light;

z.401) GT Virtual Concepts GT15;

z.402) GTO Core-15;

z.403) GTO Hard Core 15;

z.404) Gun Room Company Noreen Bad News;

z.405) Gunwerks WY15;

z.406) Haenel CR223;

z.407) Haenel CR308;

z.408) Hayes Custom Guns H15;

z.409) Head Down HD-15;

z.41) Heckler & Koch HK416D;

z.411) Heckler & Koch HK417;

z.412) Heckler & Koch HKM4C;

z.413) Heckler & Koch MR;

z.414) Heckler & Koch MR223;

z.415) Heckler & Koch MR308;

z.416) Heckler & Koch MR556A1;

z.417) Heckler & Koch MR762A1;

z.418) Hera Arms HLS;

z.419) Hera Arms HCL;

z.42) Hera Arms HCL9M;

z.421) Hesse Arms HAR15A2;

z.422) Hesse Arms HAR15A2 Bull Gun;

(z.423) Hesse Arms HAR15A2 National Match;

(z.424) Hesse Arms HAR15A2 Standard;

(z.425) Hesse Arms HAR25;

(z.426) Hesse Arms Omega Match;

(z.427) High Standard HSA-15;

(z.428) High Standard HSA-15 Crusader;

(z.429) High Standard HSA-15 Enforcer;

(z.43) High Standard HSA-15 Enforcer 300;

(z.431) Hogan Manufacturing H-308;

(z.432) Hogan Manufacturing H223;

(z.433) Hogan Manufacturing H-415;

(z.434) Hogan Manufacturing H-416;

(z.435) Holland Gunworks HGW15;

(z.436) Hughes Precision HR-15F;

(z.437) Huldra MARK 4;

(z.438) Imperial Defence Services M16A3;

(z.439) Interarms ISA-15;

(z.44) Inter Ordnance IO-G9;

(z.441) Intrepid Tactical Solutions RAS-12;

(z.442) Iron City Rifle Works IC-9;

(z.443) Iron City Rifle Works IC-15;

(z.444) Iron Ridge Arms IRA-10D;

(z.445) Irunguns Anarchy;

(z.446) ISSC PAR223 Delta;

(z.447) Jager AP74;

(z.448) Jard J15;

(z.449) JC Weaponry JC Weaponry;

(z.45) JD Machine PR3;

(z.451) Jesse James Firearms Unlimited M4 Carbine;

(z.452) Joe Firearms JOE-15;

(z.453) JP Enterprises JP-15 Match;

z.423) Hesse Arms HAR15A2 National Match;

z.424) Hesse Arms HAR15A2 Standard;

z.425) Hesse Arms HAR25;

z.426) Hesse Arms Omega Match;

z.427) High Standard HSA-15;

z.428) High Standard HSA-15 Crusader;

z.429) High Standard HSA-15 Enforcer;

z.43) High Standard HSA-15 Enforcer 300;

z.431) Hogan Manufacturing H-308;

z.432) Hogan Manufacturing H223;

z.433) Hogan Manufacturing H-415;

z.434) Hogan Manufacturing H-416;

z.435) Holland Gunworks HGW15;

z.436) Hughes Precision HR-15F;

z.437) Huldra MARK 4;

z.438) Imperial Defence Services M16A3;

z.439) Interarms ISA-15;

z.44) Inter Ordnance IO-G9;

z.441) Intrepid Tactical Solutions RAS-12;

z.442) Iron City Rifle Works IC-9;

z.443) Iron City Rifle Works IC-15;

z.444) Iron Ridge Arms IRA-10D;

z.445) Irunguns Anarchy;

z.446) ISSC PAR223 Delta;

z.447) Jager AP74;

z.448) Jard J15;

z.449) JC Weaponry JC Weaponry;

z.45) JD Machine PR3;

z.451) Jesse James Firearms Unlimited M4 Carbine;

z.452) Joe Firearms JOE-15;

z.453) JP Enterprises JP-15 Match;

(z.454) JP Enterprises JP-15;

(z.455) JP Enterprises JP-15 IPSC Limited Class;

(z.456) JP Enterprises JP-15 NRA Match;

(z.457) JP Enterprises JP-15 Tactical/SOF;

(z.458) JP Enterprises AR-10;

(z.459) JP Enterprises Edge Grade 3;

(z.46) JP Enterprises CTR-02;

(z.461) JP Enterprises LRP-07;

(z.462) JP Enterprises SCR-11;

(z.463) JP Enterprises JPE-15;

(z.464) JP Enterprises MBRG-13;

(z.465) JP Enterprises GMR15;

(z.466) Juggernaut Tactical JT-10;

(z.467) Juggernaut Tactical JT-15;

(z.468) Kaiser Defense Calguns.Net;

(z.469) Kaiser Defense KR5;

(z.47) Kaiser Military Technologies KR7;

(z.471) KE Arms KE-15;

(z.472) Kiss Tactical KISS-15;

(z.473) Kiss Tactical K-15SE;

(z.474) Knights Manufacturing Company SR-15;

(z.475) Kodiak Defence JTF2 Silver Edition;

(z.476) Kodiak Defence KD9;

(z.477) Kodiak Defence KD15;

(z.478) Kodiak Defence Kodiak-15;

(z.479) Kodiak Defence Kodiak-39;

(z.48) Lancer Systems LP L15;

(z.481) Lancer Systems LP L30;

(z.482) Lantac LA-N15;

(z.483) Lantac LA-R15;

(z.484) Lantac LA-SF15;

z.454) JP Enterprises JP-15;

z.455) JP Enterprises JP-15 IPSC Limited Class;

z.456) JP Enterprises JP-15 NRA Match;

z.457) JP Enterprises JP-15 Tactical/SOF;

z.458) JP Enterprises AR-10;

z.459) JP Enterprises Edge Grade 3;

z.46) JP Enterprises CTR-02;

z.461) JP Enterprises LRP-07;

z.462) JP Enterprises SCR-11;

z.463) JP Enterprises JPE-15;

z.464) JP Enterprises MBRG-13;

z.465) JP Enterprises GMR15;

z.466) Juggernaut Tactical JT-10;

z.467) Juggernaut Tactical JT-15;

z.468) Kaiser Defense Calguns.Net;

z.469) Kaiser Defense KR5;

z.47) Kaiser Military Technologies KR7;

z.471) KE Arms KE-15;

z.472) Kiss Tactical KISS-15;

z.473) Kiss Tactical K-15SE;

z.474) Knights Manufacturing Company SR-15;

z.475) Kodiak Defence JTF2 Silver Edition;

z.476) Kodiak Defence KD9;

z.477) Kodiak Defence KD15;

z.478) Kodiak Defence Kodiak-15;

z.479) Kodiak Defence Kodiak-39;

z.48) Lancer Systems LP L15;

z.481) Lancer Systems LP L30;

z.482) Lantac LA-N15;

z.483) Lantac LA-R15;

z.484) Lantac LA-SF15;

(z.485) Lantac MK-4;

(z.486) LAR Manufacturing Grizzly-15;

(z.487) LAR Manufacturing AA15;

(z.488) LAR Manufacturing SK15;

(z.489) LaRue Tactical LT-15;

(z.49) LaRue Tactical LT-762;

(z.491) Lauer Custom Weaponry LCW15;

(z.492) Lead Star LSA9;

(z.493) LEI LM7;

(z.494) Leitner-Wise Rifle LW15-7.82;

(z.495) Leitner-Wise Rifle LW15-22;

(z.496) Leitner-Wise Rifle LW15-499;

(z.497) Les Baer Custom Ultimate AR;

(z.498) Les Baer Custom Ultimate;

(z.499) Les Baer Custom Match;

(z.5) Les Baer Custom Match AR;

(z.501) Les Baer Custom Thunder Ranch Special;

(z.502) Les Baer Custom Monolith SWAT;

(z.503) Les Baer Custom AR IPSC Action;

(z.504) Les Baer Custom AR Super Match;

(z.505) LMT Defender 2000;

(z.506) LMT L129A1;

(z.507) LMT LM308MWS;

(z.508) LMT MARS LS;

(z.509) Loki Weapon Systems LWSF;

(z.51) Lone Wolf R & D LWD-AR9G;

(z.511) Lone Wolf R & D LWD-AR9G Pistol;

(z.512) LRB Arms M15SA;

(z.513) Luvo BL-15LE;

(z.514) Luvo BL-15LE1;

(z.515) Luvo LA-15;

z.485) Lantac MK-4;

z.486) LAR Manufacturing Grizzly-15;

z.487) LAR Manufacturing AA15;

z.488) LAR Manufacturing SK15;

z.489) LaRue Tactical LT-15;

z.49) LaRue Tactical LT-762;

z.491) Lauer Custom Weaponry LCW15;

z.492) Lead Star LSA9;

z.493) LEI LM7;

z.494) Leitner-Wise Rifle LW15-7.82;

z.495) Leitner-Wise Rifle LW15-22;

z.496) Leitner-Wise Rifle LW15-499;

z.497) Les Baer Custom Ultimate AR;

z.498) Les Baer Custom Ultimate;

z.499) Les Baer Custom Match;

z.5) Les Baer Custom Match AR;

z.501) Les Baer Custom Thunder Ranch Special;

z.502) Les Baer Custom Monolith SWAT;

z.503) Les Baer Custom AR IPSC Action;

z.504) Les Baer Custom AR Super Match;

z.505) LMT Defender 2000;

z.506) LMT L129A1;

z.507) LMT LM308MWS;

z.508) LMT MARS LS;

z.509) Loki Weapon Systems LWSF;

z.51) Lone Wolf R & D LWD-AR9G;

z.511) Lone Wolf R & D LWD-AR9G Pistol;

z.512) LRB Arms M15SA;

z.513) Luvo BL-15LE;

z.514) Luvo BL-15LE1;

z.515) Luvo LA-15;

(z.516) LWRC SABR;

(z.517) LWRC REPR;

(z.518) LWRC Six8;

(z.519) LWRC CSASS;

(z.52) LWRC REPR MARK 2;

(z.521) LWRC 224 Valkyrie;

(z.522) LWRC M6IC;

(z.523) LWRC M6/M6A2;

(z.524) M2 M16C;

(z.525) M2 M16SP;

(z.526) M2 M16X;

(z.527) M2 M4N;

(z.528) M2 Patrol;

(z.529) M2 M16Z1;

(z.53) MAG Tactical Systems MG-G4;

(z.531) Magpul Armament MPLA;

(z.532) Manta Machining PA15;

(z.533) Manta Machining JH 308-F2;

(z.534) Matrix Aerospace MA-15;

(z.535) Matrix Aerospace M-762;

(z.536) Matrix Aerospace M762-D;

(z.537) Maxim Firearms B7075;

(z.538) McDuffee Arms MAR15;

(z.539) McDuffee Arms MLR308;

(z.54) McKay Enterprises RM16A2;

(z.541) Mega Arms MEGA MA-Ten;

(z.542) Mega Arms GTR-3H;

(z.543) Mega Machine Shop MEGA MMS;

(z.544) Mega Machine Shop MEGA Gator;

(z.545) Mega Machine Shop MEGA GTR-3H;

(z.546) Mega Machine Shop MEGA GTR-3S;

z.516) LWRC SABR;

z.517) LWRC REPR;

z.518) LWRC Six8;

z.519) LWRC CSASS;

z.52) LWRC REPR MARK 2;

z.521) LWRC 224 Valkyrie;

z.522) LWRC M6IC;

z.523) LWRC M6/M6A2;

z.524) M2 M16C;

z.525) M2 M16SP;

z.526) M2 M16X;

z.527) M2 M4N;

z.528) M2 Patrol;

z.529) M2 M16Z1;

z.53) MAG Tactical Systems MG-G4;

z.531) Magpul Armament MPLA;

z.532) Manta Machining PA15;

z.533) Manta Machining JH 308-F2;

z.534) Matrix Aerospace MA-15;

z.535) Matrix Aerospace M-762;

z.536) Matrix Aerospace M762-D;

z.537) Maxim Firearms B7075;

z.538) McDuffee Arms MAR15;

z.539) McDuffee Arms MLR308;

z.54) McKay Enterprises RM16A2;

z.541) Mega Arms MEGA MA-Ten;

z.542) Mega Arms GTR-3H;

z.543) Mega Machine Shop MEGA MMS;

z.544) Mega Machine Shop MEGA Gator;

z.545) Mega Machine Shop MEGA GTR-3H;

z.546) Mega Machine Shop MEGA GTR-3S;

(z.547) Mega Machine Shop MEGA GTR-MA-Ten;

(z.548) Mega Machine Shop MEGA MG-XTR;

(z.549) MG Arms K-Yote;

(z.55) MG Arms Taranis Light;

(z.551) MGI Marck 15;

(z.552) MGO Zombie;

(z.553) Midwest Industries MI-15F;

(z.554) Miller Precision Arms MPA300 Guardian;

(z.555) Miller Precision Arms MPA556;

(z.556) Miller Precision Arms MPA762;

(z.557) Miller Precision Arms MPAR10;

(z.558) Mil-Sport AR15;

(z.559) Mil-Sport AR15 Pistol;

(z.56) Mitchell Arms CAR15/22;

(z.561) Mitchell Arms M16/22;

(z.562) Mitchell Arms M16A1/22;

(z.563) Mitchell Arms M16A3/22;

(z.564) MKE KNT-76;

(z.565) MMC Armory MA-15;

(z.566) MOLOT Vepr-15;

(z.567) Moores Machine Company MMC M4;

(z.568) Mossberg MMR Tactical;

(z.569) Mossberg MMR Hunter;

(z.57) Motiuk Manufacturing MRC-15;

(z.571) MVB Industries MVB-15F;

(z.572) Nemesis Arms 11X10;

(z.573) NEMO Battle Light;

(z.574) NEMO Omen;

(z.575) NEMO Battle Light 1.0;

(z.576) New Frontier Armory C9;

(z.577) New Frontier Armory G-15;

z.547) Mega Machine Shop MEGA GTR-MA-Ten;

z.548) Mega Machine Shop MEGA MG-XTR;

z.549) MG Arms K-Yote;

z.55) MG Arms Taranis Light;

z.551) MGI Marck 15;

z.552) MGO Zombie;

z.553) Midwest Industries MI-15F;

z.554) Miller Precision Arms MPA300 Guardian;

z.555) Miller Precision Arms MPA556;

z.556) Miller Precision Arms MPA762;

z.557) Miller Precision Arms MPAR10;

z.558) Mil-Sport AR15;

z.559) Mil-Sport AR15 Pistol;

z.56) Mitchell Arms CAR15/22;

z.561) Mitchell Arms M16/22;

z.562) Mitchell Arms M16A1/22;

z.563) Mitchell Arms M16A3/22;

z.564) MKE KNT-76;

z.565) MMC Armory MA-15;

z.566) MOLOT Vepr-15;

z.567) Moores Machine Company MMC M4;

z.568) Mossberg MMR Tactical;

z.569) Mossberg MMR Hunter;

z.57) Motiuk Manufacturing MRC-15;

z.571) MVB Industries MVB-15F;

z.572) Nemesis Arms 11X10;

z.573) NEMO Battle Light;

z.574) NEMO Omen;

z.575) NEMO Battle Light 1.0;

z.576) New Frontier Armory C9;

z.577) New Frontier Armory G-15;

(z.578) New Frontier Armory LW-15;

(z.579) Next Generation Arms MFR;

(z.58) Next Generation Arms MP168 SPC;

(z.581) Next Level Armament NLX556;

(z.582) NoDak Spud NDS-16A1;

(z.583) NoDak Spud NDS-16A2;

(z.584) NoDak Spud NDS-601;

(z.585) NoDak Spud NDS-635;

(z.586) NoDak Spud NDS-XM16E1;

(z.587) Nord Arms NA-308;

(z.588) Nordic Components NC-PCC;

(z.589) Noreen Firearms Noreen Bad News;

(z.59) Noreen Firearms Noreen BN36;

(z.591) Noreen Firearms Noreen BN308;

(z.592) Norinco 311-3;

(z.593) Norinco Type CQ 311;

(z.594) Norinco Type CQ 311-1;

(z.595) Norinco Type CQ Semi-Automatic Rifle;

(z.596) Norinco Type CQ-A Semi-Automatic Rifle;

(z.597) Norinco Type CQ-A-1 Semi-Automatic Rifle;

(z.598) North Eastern Arms NEA-15;

(z.599) North Eastern Arms NEA-15 Pistol;

(z.6) North Eastern Arms NEA-25;

(z.601) North Eastern Arms NEA102;

(z.602) Northtech Defense NT15S;

(z.603) Noveske N4;

(z.604) Noveske N6;

(z.605) Noveske Varmageddon AR;

(z.606) Oberland Arms OA10;

(z.607) Oberland Arms OA15;

(z.608) Olympic Arms PCR;

z.578) New Frontier Armory LW-15;

z.579) Next Generation Arms MFR;

z.58) Next Generation Arms MP168 SPC;

z.581) Next Level Armament NLX556;

z.582) NoDak Spud NDS-16A1;

z.583) NoDak Spud NDS-16A2;

z.584) NoDak Spud NDS-601;

z.585) NoDak Spud NDS-635;

z.586) NoDak Spud NDS-XM16E1;

z.587) Nord Arms NA-308;

z.588) Nordic Components NC-PCC;

z.589) Noreen Firearms Noreen Bad News;

z.59) Noreen Firearms Noreen BN36;

z.591) Noreen Firearms Noreen BN308;

z.592) Norinco 311-3;

z.593) Norinco Type CQ 311;

z.594) Norinco Type CQ 311-1;

z.595) Norinco Type CQ Semi-Automatic Rifle;

z.596) Norinco Type CQ-A Semi-Automatic Rifle;

z.597) Norinco Type CQ-A-1 Semi-Automatic Rifle;

z.598) North Eastern Arms NEA-15;

z.599) North Eastern Arms NEA-15 Pistol;

z.6) North Eastern Arms NEA-25;

z.601) North Eastern Arms NEA102;

z.602) Northtech Defense NT15S;

z.603) Noveske N4;

z.604) Noveske N6;

z.605) Noveske Varmageddon AR;

z.606) Oberland Arms OA10;

z.607) Oberland Arms OA15;

z.608) Olympic Arms PCR;

(z.609) Olympic Arms MFR;

(z.61) Olympic Arms K3B;

(z.611) Olympic Arms K40GL;

(z.612) Olympic Arms K9GL;

(z.613) Olympic Arms LTF;

(z.614) Olympic Arms Plinker Plus;

(z.615) Olympic Arms UM1P Ultramatch;

(z.616) Olympic Arms UMAR;

(z.617) Olympic Arms MPR 308-15;

(z.618) Olympic Arms CAR15 AR;

(z.619) Olympic Arms CAR97;

(z.62) Olympic Arms UM1 Ultramatch;

(z.621) Olympic Arms ML1 Multimatch;

(z.622) Olympic Arms ML2 Multimatch;

(z.623) Olympic Arms K4B;

(z.624) Olympic Arms Bill of Rights Bicentennial Commemorative;

(z.625) Olympic Arms SM1 Servicematch;

(z.626) Olympic Arms Titanium;

(z.627) Olympic Arms Plinker;

(z.628) Olympic Arms FAR-15;

(z.629) Olympic Arms K8;

(z.63) Olympic Arms MQ356;

(z.631) Olympic Arms Vietnam Limited Edition Commemorative;

(z.632) Olympic Arms SM1P Servicematch;

(z.633) Olympic Arms K22 Rimfire Target Match;

(z.634) Palmetto Armory BH15A1;

(z.635) Palmetto State Armory GX-9;

(z.636) Palmetto State Armory PA-10;

(z.637) Palmetto State Armory PA-15;

(z.638) Palmetto State Armory PX9;

z.609) Olympic Arms MFR;

z.61) Olympic Arms K3B;

z.611) Olympic Arms K40GL;

z.612) Olympic Arms K9GL;

z.613) Olympic Arms LTF;

z.614) Olympic Arms Plinker Plus;

z.615) Olympic Arms UM1P Ultramatch;

z.616) Olympic Arms UMAR;

z.617) Olympic Arms MPR 308-15;

z.618) Olympic Arms CAR15 AR;

z.619) Olympic Arms CAR97;

z.62) Olympic Arms UM1 Ultramatch;

z.621) Olympic Arms ML1 Multimatch;

z.622) Olympic Arms ML2 Multimatch;

z.623) Olympic Arms K4B;

z.624) Olympic Arms Bill of Rights Bicentennial Commemorative;

z.625) Olympic Arms SM1 Servicematch;

z.626) Olympic Arms Titanium;

z.627) Olympic Arms Plinker;

z.628) Olympic Arms FAR-15;

z.629) Olympic Arms K8;

z.63) Olympic Arms MQ356;

z.631) Olympic Arms Vietnam Limited Edition Commemorative;

z.632) Olympic Arms SM1P Servicematch;

z.633) Olympic Arms K22 Rimfire Target Match;

z.634) Palmetto Armory BH15A1;

z.635) Palmetto State Armory GX-9;

z.636) Palmetto State Armory PA-10;

z.637) Palmetto State Armory PA-15;

z.638) Palmetto State Armory PX9;

(z.639) Palmetto State Armory PX-10;

(z.64) Patriot Defense Arms PDA-15;

(z.641) Performance Engineering SOT-15;

(z.642) Phase 5 Tactical P5T15;

(z.643) Phase 5 Tactical Atlas One;

(z.644) Plumcrazy Firearms C15;

(z.645) POF CMR;

(z.646) POF P-15;

(z.647) POF P300;

(z.648) POF P308;

(z.649) POF P415;

(z.65) POF P416;

(z.651) Poly Technologies Type CQ-A Semi-Automatic Rifle;

(z.652) Precision Firearms PF15;

(z.653) Precision Firearms PF-X08;

(z.654) PWA AR15 Commando;

(z.655) PWA Commando;

(z.656) PWS MARK 1;

(z.657) PWS MARK 2;

(z.658) PWS MARK 1 Modern Musket;

(z.659) PWS PCC9;

(z.66) PWS MARK 1 Pistol;

(z.661) PWS MARK 1 Modern Musket Pistol;

(z.662) PWS MARK 1 Mod 2-M;

(z.663) Q Honey Badger;

(z.664) Quartercircle10 GSF Pistol;

(z.665) Quentin Defense QD-15;

(z.666) Quentin Defense SBR;

(z.667) Quentin Defense ZRT;

(z.668) Radian 1;

(z.669) Radical Firearms RF-15;

z.639) Palmetto State Armory PX-10;

z.64) Patriot Defense Arms PDA-15;

z.641) Performance Engineering SOT-15;

z.642) Phase 5 Tactical P5T15;

z.643) Phase 5 Tactical Atlas One;

z.644) Plumcrazy Firearms C15;

z.645) POF CMR;

z.646) POF P-15;

z.647) POF P300;

z.648) POF P308;

z.649) POF P415;

z.65) POF P416;

z.651) Poly Technologies Type CQ-A Semi-Automatic Rifle;

z.652) Precision Firearms PF15;

z.653) Precision Firearms PF-X08;

z.654) PWA AR15 Commando;

z.655) PWA Commando;

z.656) PWS MARK 1;

z.657) PWS MARK 2;

z.658) PWS MARK 1 Modern Musket;

z.659) PWS PCC9;

z.66) PWS MARK 1 Pistol;

z.661) PWS MARK 1 Modern Musket Pistol;

z.662) PWS MARK 1 Mod 2-M;

z.663) Q Honey Badger;

z.664) Quartercircle10 GSF Pistol;

z.665) Quentin Defense QD-15;

z.666) Quentin Defense SBR;

z.667) Quentin Defense ZRT;

z.668) Radian 1;

z.669) Radical Firearms RF-15;

(z.67) Radical Firearms RM-15;

(z.671) Radical Firearms RMR-10;

(z.672) Rainier Arms Overthrow;

(z.673) Rainier Arms RB-15;

(z.674) Rainier Arms RB308;

(z.675) Rainier Arms RM-15;

(z.676) Rat Worx M-7;

(z.677) Red River Tactical RRT-TAC15;

(z.678) Red Stag Technologies Red Stag;

(z.679) Remington R15 VTR;

(z.68) Remington LRP-07;

(z.681) Remington R4;

(z.682) Remington R25;

(z.683) Remington R25 G2;

(z.684) Revolution Armory AR-410;

(z.685) RGM Incorporated Marksman;

(z.686) RGuns TRR15;

(z.687) Rhino Arms RA-4;

(z.688) Rhino Arms RA-4R;

(z.689) Rise Armament Ripper;

(z.69) RND Edge;

(z.691) Rock Island Armory M15A1;

(z.692) Rock Island Armory XM15;

(z.693) Rock Island Armory XM15E2;

(z.694) Rock River Arms LAR-15;

(z.695) Rock River Arms LAR-15 Law Enforcement;

(z.696) Rock River Arms LAR-15 Varmint;

(z.697) Rock River Arms LAR-15/9MM;

(z.698) Rock River Arms LAR-15 Pistol;

(z.699) Rock River Arms LAR-15 Elite;

(z.7) Rock River Arms LAR-15 Coyote;

z.67) Radical Firearms RM-15;

z.671) Radical Firearms RMR-10;

z.672) Rainier Arms Overthrow;

z.673) Rainier Arms RB-15;

z.674) Rainier Arms RB308;

z.675) Rainier Arms RM-15;

z.676) Rat Worx M-7;

z.677) Red River Tactical RRT-TAC15;

z.678) Red Stag Technologies Red Stag;

z.679) Remington R15 VTR;

z.68) Remington LRP-07;

z.681) Remington R4;

z.682) Remington R25;

z.683) Remington R25 G2;

z.684) Revolution Armory AR-410;

z.685) RGM Incorporated Marksman;

z.686) RGuns TRR15;

z.687) Rhino Arms RA-4;

z.688) Rhino Arms RA-4R;

z.689) Rise Armament Ripper;

z.69) RND Edge;

z.691) Rock Island Armory M15A1;

z.692) Rock Island Armory XM15;

z.693) Rock Island Armory XM15E2;

z.694) Rock River Arms LAR-15;

z.695) Rock River Arms LAR-15 Law Enforcement;

z.696) Rock River Arms LAR-15 Varmint;

z.697) Rock River Arms LAR-15/9MM;

z.698) Rock River Arms LAR-15 Pistol;

z.699) Rock River Arms LAR-15 Elite;

z.7) Rock River Arms LAR-15 Coyote;

(z.701) Rock River Arms LAR-15 Predator Pursuit;

(z.702) Rock River Arms LAR-458;

(z.703) Rock River Arms LAR-6.8;

(z.704) Rock River Arms LAR-8;

(z.705) Rock River Arms LAR-15 ATH;

(z.706) Rock River Arms LAR-15 Operator;

(z.707) Rock River Arms LAR-8 Operator;

(z.708) Rock River Arms LAR-47;

(z.709) Rock River Arms LAR-15LH;

(z.71) Rock River Arms LAR-15 Hunter;

(z.711) Rock River Arms LAR-15 Fred Eichler Series;

(z.712) Rock River Arms LAR-15 R3 Competition;

(z.713) Rock River Arms LAR-15 Texas;

(z.714) Rock River Arms LAR-15 Tactical;

(z.715) Rock River Arms LAR-15 Government;

(z.716) Rock River Arms LAR-15 TASC;

(z.717) Rock River Arms LAR-15 National Match;

(z.718) Rock River Arms LAR-15 DEA;

(z.719) Rock River Arms LAR-9;

(z.72) Rock River Arms LAR-9 Pistol;

(z.721) Rock River Arms LAR-40;

(z.722) Rock River Arms LAR-PDS;

(z.723) Rock River Arms LAR-40 Pistol;

(z.724) Rock River Arms LAR-6;

(z.725) Rock River Arms LAR-8M;

(z.726) Rock River Arms LAR-10;

(z.727) Rocky Point Guns LE15;

(z.728) Roggio RA15;

(z.729) Royal Arms Rak15;

(z.73) Ruger SR556;

(z.731) Ruger SR556 VT;

z.701) Rock River Arms LAR-15 Predator Pursuit;

z.702) Rock River Arms LAR-458;

z.703) Rock River Arms LAR-6.8;

z.704) Rock River Arms LAR-8;

z.705) Rock River Arms LAR-15 ATH;

z.706) Rock River Arms LAR-15 Operator;

z.707) Rock River Arms LAR-8 Operator;

z.708) Rock River Arms LAR-47;

z.709) Rock River Arms LAR-15LH;

z.71) Rock River Arms LAR-15 Hunter;

z.711) Rock River Arms LAR-15 Fred Eichler Series;

z.712) Rock River Arms LAR-15 R3 Competition;

z.713) Rock River Arms LAR-15 Texas;

z.714) Rock River Arms LAR-15 Tactical;

z.715) Rock River Arms LAR-15 Government;

z.716) Rock River Arms LAR-15 TASC;

z.717) Rock River Arms LAR-15 National Match;

z.718) Rock River Arms LAR-15 DEA;

z.719) Rock River Arms LAR-9;

z.72) Rock River Arms LAR-9 Pistol;

z.721) Rock River Arms LAR-40;

z.722) Rock River Arms LAR-PDS;

z.723) Rock River Arms LAR-40 Pistol;

z.724) Rock River Arms LAR-6;

z.725) Rock River Arms LAR-8M;

z.726) Rock River Arms LAR-10;

z.727) Rocky Point Guns LE15;

z.728) Roggio RA15;

z.729) Royal Arms Rak15;

z.73) Ruger SR556;

z.731) Ruger SR556 VT;

(z.732) Ruger AR556;

(z.733) S&J Hardware SJ-15;

(z.734) Sabatti SAR;

(z.735) Sabertooth Defence M4;

(z.736) Sabre Defence Industries SR-15;

(z.737) Sabre Defence Industries XR10;

(z.738) Sabre Defence Industries XR15;

(z.739) Safir T12;

(z.74) Safir T14;

(z.741) Salient Arms International GRY;

(z.742) Salient Arms International SAI-T2;

(z.743) Savage MSR-10;

(z.744) Savage MSR-15;

(z.745) Schmeisser AR15;

(z.746) Schmeisser MR-BA19;

(z.747) Seekins Precision NX15;

(z.748) Seekins Precision SBA15;

(z.749) Seekins Precision SP15;

(z.75) Seekins Precision SP223;

(z.751) Seekins Precision SPX;

(z.752) Sendra Corp M15A1;

(z.753) Sendra Corp XM15E2;

(z.754) SFRC SFRC-15;

(z.755) SGW AR15;

(z.756) SGW AR15A1;

(z.757) SGW AR15A2;

(z.758) SGW CAR15;

(z.759) SGW CAR15 AR;

(z.76) SGW K3B;

(z.761) SGW Ultra Match Rifle;

(z.762) SGW XM15A1;

z.732) Ruger AR556;

z.733) S&J Hardware SJ-15;

z.734) Sabatti SAR;

z.735) Sabertooth Defence M4;

z.736) Sabre Defence Industries SR-15;

z.737) Sabre Defence Industries XR10;

z.738) Sabre Defence Industries XR15;

z.739) Safir T12;

z.74) Safir T14;

z.741) Salient Arms International GRY;

z.742) Salient Arms International SAI-T2;

z.743) Savage MSR-10;

z.744) Savage MSR-15;

z.745) Schmeisser AR15;

z.746) Schmeisser MR-BA19;

z.747) Seekins Precision NX15;

z.748) Seekins Precision SBA15;

z.749) Seekins Precision SP15;

z.75) Seekins Precision SP223;

z.751) Seekins Precision SPX;

z.752) Sendra Corp M15A1;

z.753) Sendra Corp XM15E2;

z.754) SFRC SFRC-15;

z.755) SGW AR15;

z.756) SGW AR15A1;

z.757) SGW AR15A2;

z.758) SGW CAR15;

z.759) SGW CAR15 AR;

z.76) SGW K3B;

z.761) SGW Ultra Match Rifle;

z.762) SGW XM15A1;

(z.763) Sharps Bros The Jack;

(z.764) Sharps Bros Warthog;

(z.765) Sharps Rifle Company Sharps 15;

(z.766) ShoeLess Ventures FAB10;

(z.767) Shooting Edge OA15;

(z.768) SI Defense SI AR-15;

(z.769) SI Defense SI-D;

(z.77) SI Defense SI-HK;

(z.771) SI Defense SI-C;

(z.772) SIG Sauer SIG 516;

(z.773) SIG Sauer SIG 716;

(z.774) SIG Sauer SIG M400;

(z.775) SIG Sauer SIG M400 Elite;

(z.776) Six Sigma Arms P18-32;

(z.777) Smith & Wesson M&P 15T;

(z.778) Smith & Wesson M&P 15;

(z.779) Smith & Wesson M&P 15-22;

(z.78) Smith & Wesson M&P 15FT;

(z.781) Smith & Wesson M&P 15-22PC;

(z.782) Smith & Wesson M&P 15 Magpul;

(z.783) Smith & Wesson M&P 10;

(z.784) Smith & Wesson M&P 15A;

(z.785) Smith & Wesson M&P 15PC;

(z.786) Smith & Wesson M&P 15OR;

(z.787) Smith & Wesson M&P 15PS;

(z.788) Smith & Wesson M&P 10 Creedmoor;

(z.789) Smith & Wesson M&P 15i;

(z.79) SMOS SM-15;

(z.791) SMOS Rogue-15;

(z.792) SMOS Rogue-50;

(z.793) Sniper Central SI-C;

z.763) Sharps Bros The Jack;

z.764) Sharps Bros Warthog;

z.765) Sharps Rifle Company Sharps 15;

z.766) ShoeLess Ventures FAB10;

z.767) Shooting Edge OA15;

z.768) SI Defense SI AR-15;

z.769) SI Defense SI-D;

z.77) SI Defense SI-HK;

z.771) SI Defense SI-C;

z.772) SIG Sauer SIG 516;

z.773) SIG Sauer SIG 716;

z.774) SIG Sauer SIG M400;

z.775) SIG Sauer SIG M400 Elite;

z.776) Six Sigma Arms P18-32;

z.777) Smith & Wesson M&P 15T;

z.778) Smith & Wesson M&P 15;

z.779) Smith & Wesson M&P 15-22;

z.78) Smith & Wesson M&P 15FT;

z.781) Smith & Wesson M&P 15-22PC;

z.782) Smith & Wesson M&P 15 Magpul;

z.783) Smith & Wesson M&P 10;

z.784) Smith & Wesson M&P 15A;

z.785) Smith & Wesson M&P 15PC;

z.786) Smith & Wesson M&P 15OR;

z.787) Smith & Wesson M&P 15PS;

z.788) Smith & Wesson M&P 10 Creedmoor;

z.789) Smith & Wesson M&P 15i;

z.79) SMOS SM-15;

z.791) SMOS Rogue-15;

z.792) SMOS Rogue-50;

z.793) Sniper Central SI-C;

(z.794) SNS Industries Max 15;

(z.795) SNS Industries LFT-15;

(z.796) SNS Industries NO-15;

(z.797) SNS Industries Max 15 Pistol;

(z.798) Socom Firearms Corporation Recon AR15;

(z.799) Socom Manufacturing BR-15-A6S;

(z.8) Spartan Precision SP15;

(z.801) Special Ops Tactical SO15;

(z.802) Spike's Tactical ST-15;

(z.803) Spike's Tactical SL-15;

(z.804) Spike's Tactical ST-22;

(z.805) Spike's Tactical CJ15;

(z.806) Spike's Tactical Hellbreaker;

(z.807) Spike's Tactical Warthog;

(z.808) Spike's Tactical The Jack;

(z.809) Spike's Tactical Spartan;

(z.81) Spike's Tactical Jack 10;

(z.811) Spirit Gun Manufacturing Company SGM9;

(z.812) Springfield Armory Saint;

(z.813) STAG Arms STAG-6L;

(z.814) STAG Arms STAG-6.8;

(z.815) STAG Arms STAG-9;

(z.816) STAG Arms STAG-10;

(z.817) STAG Arms STAG-10S;

(z.818) STAG Arms STAG-15;

(z.819) STAG Arms STAG-223;

(z.82) Sterling Arms SAI 102;

(z.821) STI International AR15 Custom Rifle;

(z.822) Stillers Precision Firearms Predator XT;

(z.823) Stoner SR-25;

(z.824) Stoner SR-15;

z.794) SNS Industries Max 15;

z.795) SNS Industries LFT-15;

z.796) SNS Industries NO-15;

z.797) SNS Industries Max 15 Pistol;

z.798) Socom Firearms Corporation Recon AR15;

z.799) Socom Manufacturing BR-15-A6S;

z.8) Spartan Precision SP15;

z.801) Special Ops Tactical SO15;

z.802) Spike's Tactical ST-15;

z.803) Spike's Tactical SL-15;

z.804) Spike's Tactical ST-22;

z.805) Spike's Tactical CJ15;

z.806) Spike's Tactical Hellbreaker;

z.807) Spike's Tactical Warthog;

z.808) Spike's Tactical The Jack;

z.809) Spike's Tactical Spartan;

z.81) Spike's Tactical Jack 10;

z.811) Spirit Gun Manufacturing Company SGM9;

z.812) Springfield Armory Saint;

z.813) STAG Arms STAG-6L;

z.814) STAG Arms STAG-6.8;

z.815) STAG Arms STAG-9;

z.816) STAG Arms STAG-10;

z.817) STAG Arms STAG-10S;

z.818) STAG Arms STAG-15;

z.819) STAG Arms STAG-223;

z.82) Sterling Arms SAI 102;

z.821) STI International AR15 Custom Rifle;

z.822) Stillers Precision Firearms Predator XT;

z.823) Stoner SR-25;

z.824) Stoner SR-15;

(z.825) Stoner MARK 11 Model 0;

(z.826) Stoner M110;

(z.827) Stoner XM110;

(z.828) Stoner MARK 11 Model 1;

(z.829) Sun Devil SD15;

(z.83) Sun Devil SD308;

(z.831) Superior Arms S-15;

(z.832) Surplus Ammo & Arms LOW15;

(z.833) Surplus Ammo & Arms LOW16;

(z.834) Surplus Ammo & Arms SA15;

(z.835) SWAT Firearms SF-15;

(z.836) SWORD International MARK 15 Model 0;

(z.837) SWORD International MARK 16 Model 0;

(z.838) SWORD International MARK 17 Model 0;

(z.839) SWORD International MARK 18 Model 0;

(z.84) SWORD International MARK 18 Model 0 Mjolnir;

(z.841) Tactical Armz TA-15;

(z.842) Tactical Innovations T-15;

(z.843) Tactical Innovations T-15BDX;

(z.844) Tactical Machining TM-15;

(z.845) Tactical Machining TM308;

(z.846) Tactical Machining TSG-15;

(z.847) Tactical Rifles Government;

(z.848) Tactical Rifles Tactical M4C;

(z.849) Tactical Rifles Tactical SPG;

(z.85) Tactical Rifles Tactical SVR;

(z.851) Talon Arms TA-15;

(z.852) Taran Tactical TR-1;

(z.853) Tech Designs AR-15;

(z.854) Territorial Gunsmiths SLR15;

(z.855) Thor TR15 Carbine;

z.825) Stoner MARK 11 Model 0;

z.826) Stoner M110;

z.827) Stoner XM110;

z.828) Stoner MARK 11 Model 1;

z.829) Sun Devil SD15;

z.83) Sun Devil SD308;

z.831) Superior Arms S-15;

z.832) Surplus Ammo & Arms LOW15;

z.833) Surplus Ammo & Arms LOW16;

z.834) Surplus Ammo & Arms SA15;

z.835) SWAT Firearms SF-15;

z.836) SWORD International MARK 15 Model 0;

z.837) SWORD International MARK 16 Model 0;

z.838) SWORD International MARK 17 Model 0;

z.839) SWORD International MARK 18 Model 0;

z.84) SWORD International MARK 18 Model 0 Mjolnir;

z.841) Tactical Armz TA-15;

z.842) Tactical Innovations T-15;

z.843) Tactical Innovations T-15BDX;

z.844) Tactical Machining TM-15;

z.845) Tactical Machining TM308;

z.846) Tactical Machining TSG-15;

z.847) Tactical Rifles Government;

z.848) Tactical Rifles Tactical M4C;

z.849) Tactical Rifles Tactical SPG;

z.85) Tactical Rifles Tactical SVR;

z.851) Talon Arms TA-15;

z.852) Taran Tactical TR-1;

z.853) Tech Designs AR-15;

z.854) Territorial Gunsmiths SLR15;

z.855) Thor TR15 Carbine;

(z.856) Tippmann Arms M4-22;

(z.857) Titusville Armory TA-15;

(z.858) TKS Engineering AR15HD;

(z.859) TNW SGP15;

(z.86) Tom Sawyer M4-Z1;

(z.861) Tom Sawyer Jolly Roger;

(z.862) Trojan Firearms PRO9V1;

(z.863) Trojan Firearms TFA-PCC9G;

(z.864) Trojan Firearms ULV1;

(z.865) Troy Defense Troy 102;

(z.866) Troy Defense Troy Carbine;

(z.867) Troy Defense Troy M4A1 Carbine;

(z.868) Troy Defense Troy M4A1 SOCC;

(z.869) Troy Defense Troy M7A1 CQB;

(z.87) Troy Defense Troy M7A1 PDW Carbine;

(z.871) Troy Defense Troy M16A2 Mogadishu;

(z.872) Troy Defense Troy Northern Guard;

(z.873) Troy Industries Troy CQB-SPC;

(z.874) True North Arms TNA-15;

(z.875) Turnbull Manufacturing TAR-15;

(z.876) Turnbull Manufacturing TAR-10;

(z.877) Umbrella Corporation AR15;

(z.878) Umlaut Industries U4;

(z.879) Unik Alpha;

(z.88) United Defense S7;

(z.881) US Arms Patriot 15;

(z.882) US Autoweapons USM4;

(z.883) US Firearms Academy BB-16;

(z.884) USA Tactical Firearms USA-15;

(z.885) UT Arms GEN-1AR;

(z.886) Utas XTR-12;

z.856) Tippmann Arms M4-22;

z.857) Titusville Armory TA-15;

z.858) TKS Engineering AR15HD;

z.859) TNW SGP15;

z.86) Tom Sawyer M4-Z1;

z.861) Tom Sawyer Jolly Roger;

z.862) Trojan Firearms PRO9V1;

z.863) Trojan Firearms TFA-PCC9G;

z.864) Trojan Firearms ULV1;

z.865) Troy Defense Troy 102;

z.866) Troy Defense Troy Carbine;

z.867) Troy Defense Troy M4A1 Carbine;

z.868) Troy Defense Troy M4A1 SOCC;

z.869) Troy Defense Troy M7A1 CQB;

z.87) Troy Defense Troy M7A1 PDW Carbine;

z.871) Troy Defense Troy M16A2 Mogadishu;

z.872) Troy Defense Troy Northern Guard;

z.873) Troy Industries Troy CQB-SPC;

z.874) True North Arms TNA-15;

z.875) Turnbull Manufacturing TAR-15;

z.876) Turnbull Manufacturing TAR-10;

z.877) Umbrella Corporation AR15;

z.878) Umlaut Industries U4;

z.879) Unik Alpha;

z.88) United Defense S7;

z.881) US Arms Patriot 15;

z.882) US Autoweapons USM4;

z.883) US Firearms Academy BB-16;

z.884) USA Tactical Firearms USA-15;

z.885) UT Arms GEN-1AR;

z.886) Utas XTR-12;

(z.887) V Seven Weapons GI Seven;

(z.888) VC Defense VC-15;

(z.889) Vidalia Police Supply VPS-15;

(z.89) VM Hy-Tech VM15;

(z.891) Vulcan Armament V15;

(z.892) Web Arms WA-15;

(z.893) Wilson Combat AR15 UT;

(z.894) Wilson Combat AR15 TPR;

(z.895) Wilson Combat AR15 M4;

(z.896) Wilson Combat AR15 TL;

(z.897) Wilson Combat AR15 SM;

(z.898) Wilson Combat AR15 SS;

(z.899) Wilson Combat AR15;

(z.9) Wilson Combat AR-10;

(z.901) Wilson Combat AR9G;

(z.902) Wilson Tactical WT-15;

(z.903) Windham Weaponry MCS;

(z.904) Windham Weaponry WW-15;

(z.905) Windham Weaponry WW-308;

(z.906) Windham Weaponry WW-CF;

(z.907) WMA WMA-15;

(z.908) Wolverine Tactical Firearms WAR-15;

(z.909) Wolverine Tactical Firearms WT-15;

(z.91) Xtreme Gun XG15;

(z.911) Xtreme Machining XR15;

(z.912) YHM 57;

(z.913) YHM YHM-15;

(z.914) ZEV Technologies Mega-LF;

(z.915) ZEV Technologies Mega-TR15;

(z.916) ZEV Technologies ZEV-BL;

(z.917) ZEV Technologies ZEV-FL;

z.887) V Seven Weapons GI Seven;

z.888) VC Defense VC-15;

z.889) Vidalia Police Supply VPS-15;

z.89) VM Hy-Tech VM15;

z.891) Vulcan Armament V15;

z.892) Web Arms WA-15;

z.893) Wilson Combat AR15 UT;

z.894) Wilson Combat AR15 TPR;

z.895) Wilson Combat AR15 M4;

z.896) Wilson Combat AR15 TL;

z.897) Wilson Combat AR15 SM;

z.898) Wilson Combat AR15 SS;

z.899) Wilson Combat AR15;

z.9) Wilson Combat AR-10;

z.901) Wilson Combat AR9G;

z.902) Wilson Tactical WT-15;

z.903) Windham Weaponry MCS;

z.904) Windham Weaponry WW-15;

z.905) Windham Weaponry WW-308;

z.906) Windham Weaponry WW-CF;

z.907) WMA WMA-15;

z.908) Wolverine Tactical Firearms WAR-15;

z.909) Wolverine Tactical Firearms WT-15;

z.91) Xtreme Gun XG15;

z.911) Xtreme Machining XR15;

z.912) YHM 57;

z.913) YHM YHM-15;

z.914) ZEV Technologies Mega-LF;

z.915) ZEV Technologies Mega-TR15;

z.916) ZEV Technologies ZEV-BL;

z.917) ZEV Technologies ZEV-FL;

(z.918) ZM Weapons LR300ML;

(z.919) ZM Weapons LR300SR; and

(z.92) Zombie Defense Z-4.

88 The firearm of the design commonly known as the Ruger Mini-14 rifle, and any variant or modified version of it, including the

(a) Clark Custom Guns Ruger Mini-14;

(b) Ruger Mini-14 GB;

(c) Ruger Mini-14 Ranch Rifle;

(d) Ruger Mini-14 Ranch Rifle Deluxe;

(e) Ruger Mini-14 Ranch Rifle LE;

(f) Ruger Mini-14 Ranch Rifle LET;

(g) Ruger Mini-14 Ranch Rifle NRA Edition;

(h) Ruger Mini-14 Ranch Target Rifle; and

(i) Ruger Mini Thirty.

89 The firearm of the design commonly known as the US Rifle, M14, and any variant or modified version of it, including the

(a) American Historical Foundation Federal Ordnance M14 US Rifle Vietnam War Commemorative;

(b) Armscorp US Rifle M14;

(c) Armscorp US Rifle M14 National Match;

(d) AR Sales MARK 4;

(e) Bula Defense Systems M14;

(f) Dominion Arms Socom 18;

(g) Entreprise Arms US Rifle M14A2;

(h) Federal Ordnance M14SA US Rifle;

(i) Fulton Armory M14;

(j) Hesse Arms M14H Brush;

(k) Hesse Arms M14H;

(l) James River Armory M14;

(m) La France Specialties M14K;

(n) LRB Arms M14SA US Rifle;

z.918) ZM Weapons LR300ML;

z.919) ZM Weapons LR300SR;

z.92) Zombie Defense Z-4.

88 L'arme à feu du modèle communément appelé fusil Ruger Mini-14, ainsi que l'arme à feu du même modèle qui comporte des variantes ou qui a subi des modifications, y compris les armes à feu suivantes :

a) Clark Custom Guns Ruger Mini-14;

b) Ruger Mini-14 GB;

c) Ruger Mini-14 Ranch Rifle;

d) Ruger Mini-14 Ranch Rifle Deluxe;

e) Ruger Mini-14 Ranch Rifle LE;

f) Ruger Mini-14 Ranch Rifle LET;

g) Ruger Mini-14 Ranch Rifle NRA Edition;

h) Ruger Mini-14 Ranch Target Rifle;

i) Ruger Mini Thirty.

89 L'arme à feu du modèle communément appelé fusil US Rifle, M14, ainsi que l'arme à feu du même modèle qui comporte des variantes ou qui a subi des modifications, y compris les armes à feu suivantes :

a) American Historical Foundation Federal Ordnance M14 US Rifle Vietnam War Commemorative;

b) Armscorp US Rifle M14;

c) Armscorp US Rifle M14 National Match;

d) AR Sales MARK 4;

e) Bula Defense Systems M14;

f) Dominion Arms Socom 18;

g) Entreprise Arms US Rifle M14A2;

h) Federal Ordnance M14SA US Rifle;

i) Fulton Armory M14;

j) Hesse Arms M14H Brush;

k) Hesse Arms M14H;

l) James River Armory M14;

m) La France Specialties M14K;

(o) LRB Arms M25;

(p) McMillan M1A;

(q) McMillan M3A;

(r) MK Specialties M14A1 Semi-Automatic;

(s) Norinco M14 Semi-Automatic;

(t) Norinco 305;

(u) Norinco CSLR27;

(v) Norinco CSLR28;

(w) Norinco M305;

(x) Norinco 305A;

(y) Norinco M305C;

(z) Norinco M305D;

(z.01) Poly Technologies M14 Semi-Automatic;

(z.02) Poly Technologies M305;

(z.03) Rockola US Rifle M14F;

(z.04) Smith Enterprises US Rifle M14 National Match;

(z.05) Smith Enterprises US Rifle M14;

(z.06) Springfield Armory US Rifle M1A-A1 Bush Rifle;

(z.07) Springfield Armory US Rifle M1A-A1 Scout Rifle;

(z.08) Springfield Armory US Rifle M21;

(z.09) Springfield Armory US Rifle M1A National Match;

(z.1) Springfield Armory US Rifle M1A Super Match;

(z.11) Springfield Armory US Rifle M1A;

(z.12) Springfield Armory US Rifle M25;

(z.13) Springfield Armory US Rifle M1A SOCOM 16;

(z.14) Springfield Armory US Rifle M1A SOCOM 2;

(z.15) Springfield Armory US Rifle M1A NRA Camp Perry National Matches 100th Anniversary;

(z.16) Springfield Armory US Rifle M1A Loaded; and

(z.17) Springfield Armory US Rifle M1A Scout Squad.

n) LRB Arms M14SA US Rifle;

o) LRB Arms M25;

p) McMillan M1A;

q) McMillan M3A;

r) MK Specialties M14A1 Semi-Automatic;

s) Norinco M14 Semi-Automatic;

t) Norinco 305;

u) Norinco CSLR27;

v) Norinco CSLR28;

w) Norinco M305;

x) Norinco 305A;

y) Norinco M305C;

z) Norinco M305D;

z.01) Poly Technologies M14 Semi-Automatic;

z.02) Poly Technologies M305;

z.03) Rockola US Rifle M14F;

z.04) Smith Enterprises US Rifle M14 National Match;

z.05) Smith Enterprises US Rifle M14;

z.06) Springfield Armory US Rifle M1A-A1 Bush Rifle;

z.07) Springfield Armory US Rifle M1A-A1 Scout Rifle;

z.08) Springfield Armory US Rifle M21;

z.09) Springfield Armory US Rifle M1A National Match;

z.1) Springfield Armory US Rifle M1A Super Match;

z.11) Springfield Armory US Rifle M1A;

z.12) Springfield Armory US Rifle M25;

z.13) Springfield Armory US Rifle M1A SOCOM 16;

z.14) Springfield Armory US Rifle M1A SOCOM 2;

z.15) Springfield Armory US Rifle M1A NRA Camp Perry National Matches 100th Anniversary;

z.16) Springfield Armory US Rifle M1A Loaded;

z.17) Springfield Armory US Rifle M1A Scout Squad.

90 The firearm of the design commonly known as the Vz58 rifle, and any variant or modified version of it, including the

(a) Century Arms VZ2008 Sporter;

(b) CZ CZ958 2P;

(c) CZ CZ958 2V;

(d) CZ CZ958 Hunter P;

(e) CZ CZH2003 Sport;

(f) CZ CZ858 Tactical-2 P;

(g) CZ CZ858 Tactical-2 V;

(h) CZ CZ858 Tactical-4 P;

(i) CZ CZ858 Tactical-4 V;

(j) CZ CZ858 Tactical-2 P Spartan Limited Edition;

(k) Czech Small Arms SA VZ58 Canadian Sporter 7.62;

(l) Czech Small Arms SA VZ58 Sporter 5.56;

(m) Czech Small Arms SA VZ58 Sporter 7.62;

(n) Czech Small Arms SA VZ58 Sporter 222 REM;

(o) Czech Small Arms SA VZ58 Sporter 223 REM;

(p) D-Technik SA VZ58 Sporter 7.62;

(q) Gazela Gazela 58;

(r) Grand Power SA VZ58 Sporter 7.62;

(s) Kodiak Defence WR762;

(t) Ohio Ordnance Works VZ2000;

(u) Petr Novohradsky FSN-01;

(v) Petr Novohradsky FSN-01K;

(w) PPK KSK;

(x) PPK KSK Hunter;

(y) Rock Island Armory WR762USA;

(z) West Rifle WR762; and

(z.1) Zelanysport Gazela 58.

90 L'arme à feu du modèle communément appelé fusil Vz58, ainsi que l'arme à feu du même modèle qui comporte des variantes ou qui a subi des modifications, y compris les armes à feu suivantes :

a) Century Arms VZ2008 Sporter;

b) CZ CZ958 2P;

c) CZ CZ958 2V;

d) CZ CZ958 Hunter P;

e) CZ CZH2003 Sport;

f) CZ CZ858 Tactical-2 P;

g) CZ CZ858 Tactical-2 V;

h) CZ CZ858 Tactical-4 P;

i) CZ CZ858 Tactical-4 V;

j) CZ CZ858 Tactical-2 P Spartan Limited Edition;

k) Czech Small Arms SA VZ58 Canadian Sporter 7.62;

l) Czech Small Arms SA VZ58 Sporter 5.56;

m) Czech Small Arms SA VZ58 Sporter 7.62;

n) Czech Small Arms SA VZ58 Sporter 222 REM;

o) Czech Small Arms SA VZ58 Sporter 223 REM;

p) D-Technik SA VZ58 Sporter 7.62;

q) Gazela Gazela 58;

r) Grand Power SA VZ58 Sporter 7.62;

s) Kodiak Defence WR762;

t) Ohio Ordnance Works VZ2000;

u) Petr Novohradsky FSN-01;

v) Petr Novohradsky FSN-01K;

w) PPK KSK;

x) PPK KSK Hunter;

y) Rock Island Armory WR762USA;

z) West Rifle WR762;

z.1) Zelanysport Gazela 58.

91 The firearm of the design commonly known as the Robinson Armament XCR rifle, and any variant or modified version of it, including the Robinson Armament

(a) XCR-L;

(b) XCR-L Micro Pistol;

(c) XCR-M; and

(d) XCR-M Micro Pistol.

92 The firearms of the designs commonly known as the CZ Scorpion EVO 3 carbine and CZ Scorpion EVO 3 pistol, and any variants or modified versions of them, including the CZ

(a) CZ Scorpion EVO 3 S1 Carbine;

(b) CZ Scorpion EVO 3 S1 Pistol; and

(c) CZ Scorpion EVO 3 S2 Pistol Micro.

93 The firearm of the design commonly known as the Beretta Cx4 Storm carbine, and any variant or modified version of it.

94 The firearms of the designs commonly known as the SIG Sauer SIG MCX carbine, SIG Sauer SIG MCX pistol, SIG Sauer SIG MPX carbine and SIG Sauer SIG MPX pistol, and any variants or modified versions of them, including the SIG Sauer

(a) SIG MCX Rattler; and

(b) SIG MCX Rattler Pistol.

95 Any firearm with a bore diameter of 20 mm or greater — other than one designed exclusively for the purpose of neutralizing explosive devices — including the

(a) Aerotek NTW;

(b) Airtronic M203;

(c) Alpimex APK 20;

(d) Amtec Less-Lethal Systems (ALS) 40MM Launcher;

(e) Anzio Ironworks Anzio 20;

(f) Argentine Mortar FMK2 81MM;

(g) Argentine Mortar FMK2 120MM;

91 L'arme à feu du modèle communément appelé fusil Robinson Armament XCR, ainsi que l'arme à feu du même modèle qui comporte des variantes ou qui a subi des modifications, y compris les armes à feu Robinson Armament suivantes :

a) XCR-L;

b) XCR-L Micro Pistol;

c) XCR-M;

d) XCR-M Micro Pistol.

92 Les armes à feu des modèles communément appelés carabine CZ Scorpion EVO 3 et pistolet CZ Scorpion EVO 3, ainsi que les armes à feu des mêmes modèles qui comportent des variantes ou qui ont subi des modifications, y compris les armes à feu CZ suivantes :

a) CZ Scorpion EVO 3 S1 Carbine;

b) CZ Scorpion EVO 3 S1 Pistol;

c) CZ Scorpion EVO 3 S2 Pistol Micro.

93 L'arme à feu du modèle communément appelé carabine Beretta Cx4 Storm, ainsi que l'arme à feu du même modèle qui comporte des variantes ou qui a subi des modifications.

94 Les armes à feu des modèles communément appelés carabine SIG Sauer SIG MCX, pistolet SIG Sauer SIG MCX, carabine SIG Sauer SIG MPX et pistolet SIG Sauer SIG MPX, ainsi que les armes à feu des mêmes modèles qui comportent des variantes ou qui ont subi des modifications, y compris les armes à feu SIG Sauer suivantes :

a) SIG MCX Rattler;

b) SIG MCX Rattler Pistol.

95 Toute arme à feu ayant une âme dont le calibre est de 20 mm ou plus, à l'exception de celle conçue exclusivement pour neutraliser des dispositifs explosifs, mais y compris les armes à feu suivantes :

a) Aerotek NTW;

b) Airtronic M203;

c) Alpimex APK 20;

d) Amtec Less-Lethal Systems (ALS) 40MM Launcher;

e) Anzio Ironworks Anzio 20;

f) Argentine Mortar FMK2 81MM;

g) Argentine Mortar FMK2 120MM;

(h) Argentine Mortar FMK1 60MM;

(i) Argentine Mortar FMK2 60MM;

(j) Argentine Mortar FMK3 60MM;

(k) Armsan BA 40;

(l) Armscor Stopper;

(m) Arsenal UGGL-M1;

(n) Arsenal UBGL;

(o) Arsenal MSGL;

(p) Astra Arms SL203;

(q) Astra Arms GL203;

(r) Austrian Mortar C6 60MM;

(s) Austrian Mortar M6 60MM;

(t) Austrian Mortar M8 81MM;

(u) Austrian Mortar M12 120MM;

(v) Bates & Dittus UBL-37;

(w) Bates & Dittus ExD-37;

(x) Bates & Dittus TBL-37;

(y) Bates & Dittus SML-37 Pistol;

(z) Beretta GLX160;

(z.001) British Mortar ML-3 Inch;

(z.002) British Mortar ML-4.2 Inch;

(z.003) Brugger & Thomet GL06;

(z.004) Bulgarian Mortar M60 60MM;

(z.005) Bulgarian Mortar M81 81MM;

(z.006) Bulgarian Mortar M82 82MM;

(z.007) Chilean Mortar Commando;

(z.008) Chilean Mortar M57 81MM;

(z.009) China Lake EX-41;

(z.01) Chinese Mortar Type 53;

(z.011) Cobray 37MM Launcher;

(z.012) Colt Eagle;

h) Argentine Mortar FMK1 60MM;

i) Argentine Mortar FMK2 60MM;

j) Argentine Mortar FMK3 60MM;

k) Armsan BA 40;

l) Armscor Stopper;

m) Arsenal UGGL-M1;

n) Arsenal UBGL;

o) Arsenal MSGL;

p) Astra Arms SL203;

q) Astra Arms GL203;

r) Austrian Mortar C6 60MM;

s) Austrian Mortar M6 60MM;

t) Austrian Mortar M8 81MM;

u) Austrian Mortar M12 120MM;

v) Bates & Dittus UBL-37;

w) Bates & Dittus ExD-37;

x) Bates & Dittus TBL-37;

y) Bates & Dittus SML-37 Pistol;

z) Beretta GLX160;

z.001) British Mortar ML-3 Inch;

z.002) British Mortar ML-4.2 Inch;

z.003) Brugger & Thomet GL06;

z.004) Bulgarian Mortar M60 60MM;

z.005) Bulgarian Mortar M81 81MM;

z.006) Bulgarian Mortar M82 82MM;

z.007) Chilean Mortar Commando;

z.008) Chilean Mortar M57 81MM;

z.009) China Lake EX-41;

z.01) Chinese Mortar Type 53;

z.011) Cobray 37MM Launcher;

z.012) Colt Eagle;

(z.013) Colt M203;

(z.014) Colt M79;

(z.015) Corner Blast PGL A1;

(z.016) CQ Type CQ 40MM;

(z.017) Croatian Service RT-20;

(z.018) CZ CZ805 G1;

(z.019) Czech Weapons SAG 30;

(z.02) Czech Weapons CZW 40;

(z.021) Czechoslovakian Mortar VZ52;

(z.022) Daewoo K201;

(z.023) Defense Technology L8;

(z.024) Defense Technology 40MM Launcher;

(z.025) Defense Technology 37MM Gas Gun;

(z.026) Defense Technology 37MM Gas Gun Pistol;

(z.027) Defense Technology 1375 Multi-Launcher;

(z.028) Degtyarev ASVK;

(z.029) Denel NTW 20HS;

(z.03) Denel PAW-20;

(z.031) Denel NTW;

(z.032) Dezamet GSBO-40;

(z.033) Dezamet GPBO-40;

(z.034) Diemaco M203A1;

(z.035) Diemaco Eagle;

(z.036) DPMS A-15 37MM Launcher;

(z.037) DSA 40MM Launcher;

(z.038) DSA Incorporated M203;

(z.039) Elite Machining ELM-40;

(z.04) ERE Systems M203 ERE Elite Launcher;

(z.041) Et Cetera 37MM Launcher;

(z.042) Exotic Firearms Nemesis-SL;

(z.043) Federal Laboratories 201Z;

z.013) Colt M203;

z.014) Colt M79;

z.015) Corner Blast PGL A1;

z.016) CQ Type CQ 40MM;

z.017) Croatian Service RT-20;

z.018) CZ CZ805 G1;

z.019) Czech Weapons SAG 30;

z.02) Czech Weapons CZW 40;

z.021) Czechoslovakian Mortar VZ52;

z.022) Daewoo K201;

z.023) Defense Technology L8;

z.024) Defense Technology 40MM Launcher;

z.025) Defense Technology 37MM Gas Gun;

z.026) Defense Technology 37MM Gas Gun Pistol;

z.027) Defense Technology 1375 Multi-Launcher;

z.028) Degtyarev ASVK;

z.029) Denel NTW 20HS;

z.03) Denel PAW-20;

z.031) Denel NTW;

z.032) Dezamet GSBO-40;

z.033) Dezamet GPBO-40;

z.034) Diemaco M203A1;

z.035) Diemaco Eagle;

z.036) DPMS A-15 37MM Launcher;

z.037) DSA 40MM Launcher;

z.038) DSA Incorporated M203;

z.039) Elite Machining ELM-40;

z.04) ERE Systems M203 ERE Elite Launcher;

z.041) Et Cetera 37MM Launcher;

z.042) Exotic Firearms Nemesis-SL;

z.043) Federal Laboratories 201Z;

(z.044) Federal Laboratories 203A;

(z.045) Federal Laboratories Federal Gas Riot Gun;

(z.046) Floro International 40MM Launcher;

(z.047) Floro International M400;

(z.048) Floro International M203;

(z.049) FN EGLM;

(z.05) FN MARK 13 Model 0;

(z.051) FN FN40GL;

(z.052) German Anti-Tank Rifle GrB39;

(z.053) German Anti-Tank Rifle M41;

(z.054) German Anti-Tank Rifle PzB38;

(z.055) German Anti-Tank Rifle PzB39;

(z.056) German Anti-Tank Rifle PzB41;

(z.057) German Mortar 1934 Granatwerfer;

(z.058) German Mortar Kurzer Granatewerfer 42;

(z.059) Greek Mortar C6 60MM;

(z.06) Greek Mortar E44 81MM;

(z.061) Greek Mortar E56 120MM;

(z.062) Heckler & Koch HKMZP1;

(z.063) Heckler & Koch HK69A1 Granatpistole;

(z.064) Heckler & Koch HKAG-G36;

(z.065) Heckler & Koch HKAG-C;

(z.066) Heckler & Koch HKXM320;

(z.067) Heckler & Koch HKAG-HK416;

(z.068) Heckler & Koch HKAG 36;

(z.069) Heckler & Koch HKGLM;

(z.07) Heckler & Koch HKAG-M16A4;

(z.071) Heckler & Koch HKAG-M4;

(z.072) Heckler & Koch HKM320;

(z.073) Heckler & Koch HKM320 A1;

(z.074) Heckler & Koch HK168E1;

z.044) Federal Laboratories 203A;

z.045) Federal Laboratories Federal Gas Riot Gun;

z.046) Floro International 40MM Launcher;

z.047) Floro International M400;

z.048) Floro International M203;

z.049) FN EGLM;

z.05) FN MARK 13 Model 0;

z.051) FN FN40GL;

z.052) German Anti-Tank Rifle GrB39;

z.053) German Anti-Tank Rifle M41;

z.054) German Anti-Tank Rifle PzB38;

z.055) German Anti-Tank Rifle PzB39;

z.056) German Anti-Tank Rifle PzB41;

z.057) German Mortar 1934 Granatwerfer;

z.058) German Mortar Kurzer Granatewerfer 42;

z.059) Greek Mortar C6 60MM;

z.06) Greek Mortar E44 81MM;

z.061) Greek Mortar E56 120MM;

z.062) Heckler & Koch HKMZP1;

z.063) Heckler & Koch HK69A1 Granatpistole;

z.064) Heckler & Koch HKAG-G36;

z.065) Heckler & Koch HKAG-C;

z.066) Heckler & Koch HKXM320;

z.067) Heckler & Koch HKAG-HK416;

z.068) Heckler & Koch HKAG 36;

z.069) Heckler & Koch HKGLM;

z.07) Heckler & Koch HKAG-M16A4;

z.071) Heckler & Koch HKAG-M4;

z.072) Heckler & Koch HKM320;

z.073) Heckler & Koch HKM320 A1;

z.074) Heckler & Koch HK168E1;

(z.075) Heckler & Koch HK79;

(z.076) Heckler & Koch HK269;

(z.077) Heckler & Koch HK169;

(z.078) Helenius RK20;

(z.079) Helenius RK99 MARK 2;

(z.08) Hotchkiss 1934 Canon SAH;

(z.081) IOF Ugra;

(z.082) IOF UBGL;

(z.083) IOF Vidhwansak;

(z.084) Israeli Mortar C03;

(z.085) Italian Mortar Otobreda 81MM;

(z.086) IWI UBGL;

(z.087) Japanese Anti-Tank Rifle Type 97;

(z.088) Knights Armament Company M203;

(z.089) Lahti 39;

(z.09) Lake Erie Chemical Company Tru-Flite;

(z.091) Lamperd L40SL;

(z.092) LEI M203-PR;

(z.093) LMT M203;

(z.094) LMT M2032003 FMT;

(z.095) LMT 37MM Launcher;

(z.096) LMT 40MM Launcher;

(z.097) Luvo M203;

(z.098) Maadi UBGL;

(z.099) Manville Manville Gas Gun;

(z.1) Metallic Limited RBG-1;

(z.101) Metallic Limited RBG-6;

(z.102) Milkor Stopper;

(z.103) Milkor MGL MARK 1;

(z.104) Milkor M79;

(z.105) Milkor MRGL;

z.075) Heckler & Koch HK79;

z.076) Heckler & Koch HK269;

z.077) Heckler & Koch HK169;

z.078) Helenius RK20;

z.079) Helenius RK99 MARK 2;

z.08) Hotchkiss 1934 Canon SAH;

z.081) IOF Ugra;

z.082) IOF UBGL;

z.083) IOF Vidhwansak;

z.084) Israeli Mortar C03;

z.085) Italian Mortar Otobreda 81MM;

z.086) IWI UBGL;

z.087) Japanese Anti-Tank Rifle Type 97;

z.088) Knights Armament Company M203;

z.089) Lahti 39;

z.09) Lake Erie Chemical Company Tru-Flite;

z.091) Lamperd L40SL;

z.092) LEI M203-PR;

z.093) LMT M203;

z.094) LMT M2032003 FMT;

z.095) LMT 37MM Launcher;

z.096) LMT 40MM Launcher;

z.097) Luvo M203;

z.098) Maadi UBGL;

z.099) Manville Manville Gas Gun;

z.1) Metallic Limited RBG-1;

z.101) Metallic Limited RBG-6;

z.102) Milkor Stopper;

z.103) Milkor MGL MARK 1;

z.104) Milkor M79;

z.105) Milkor MRGL;

(z.106) Milkor USA MGL-140 M32;

(z.107) Milkor USA MGL-140;

(z.108) Milkor USA MGL-105;

(z.109) Milkor USA MGL-AV140;

(z.11) Missile Launcher 9K111 Fagot;

(z.111) Missile Launcher 9K310 Igla-1;

(z.112) Missile Launcher 9K32 Strela-2;

(z.113) Missile Launcher 9K34 Strela-3;

(z.114) Missile Launcher 9K38 Igla;

(z.115) Missile Launcher BGM-71 TOW;

(z.116) Missile Launcher Eryx;

(z.117) Missile Launcher FGM-148 Javelin;

(z.118) Missile Launcher FIM-43 Redeye;

(z.119) Missile Launcher FIM-92 Stinger;

(z.12) Missile Launcher HN-5;

(z.121) Missile Launcher Ingwe;

(z.122) Missile Launcher M47 Dragon;

(z.123) Missile Launcher MILAN;

(z.124) Missile Launcher Saegheh;

(z.125) Missile Launcher Starstreak;

(z.126) Missile Launcher Toophan;

(z.127) Missile Launcher Type 79;

(z.128) MKE T40;

(z.129) MKE Grenade Launcher;

(z.13) Oerlikon SSG 32;

(z.131) Oerlikon SSG 36;

(z.132) Ordnance Group TAC79;

(z.133) Ordnance Group TAC-D;

(z.134) Penn Arms L140;

(z.135) Penn Arms H140;

(z.136) Penn Arms P540;

z.106) Milkor USA MGL-140 M32;

z.107) Milkor USA MGL-140;

z.108) Milkor USA MGL-105;

z.109) Milkor USA MGL-AV140;

z.11) Missile Launcher 9K111 Fagot;

z.111) Missile Launcher 9K310 Igla-1;

z.112) Missile Launcher 9K32 Strela-2;

z.113) Missile Launcher 9K34 Strela-3;

z.114) Missile Launcher 9K38 Igla;

z.115) Missile Launcher BGM-71 TOW;

z.116) Missile Launcher Eryx;

z.117) Missile Launcher FGM-148 Javelin;

z.118) Missile Launcher FIM-43 Redeye;

z.119) Missile Launcher FIM-92 Stinger;

z.12) Missile Launcher HN-5;

z.121) Missile Launcher Ingwe;

z.122) Missile Launcher M47 Dragon;

z.123) Missile Launcher MILAN;

z.124) Missile Launcher Saegheh;

z.125) Missile Launcher Starstreak;

z.126) Missile Launcher Toophan;

z.127) Missile Launcher Type 79;

z.128) MKE T40;

z.129) MKE Grenade Launcher;

z.13) Oerlikon SSG 32;

z.131) Oerlikon SSG 36;

z.132) Ordnance Group TAC79;

z.133) Ordnance Group TAC-D;

z.134) Penn Arms L140;

z.135) Penn Arms H140;

z.136) Penn Arms P540;

(z.137) Penn Arms L640;

(z.138) Penn Arms P837;

(z.139) Penn Arms L837;

(z.14) Penn Arms L137;

(z.141) Penn Arms AML1-37;

(z.142) Penn Arms HL;

(z.143) Penn Arms HG;

(z.144) Penn Arms L8;

(z.145) Penn Arms L6;

(z.146) Penn Arms L1;

(z.147) Penn Arms GL1;

(z.148) Penn Arms PGL65;

(z.149) Penn Arms GL6;

(z.15) Penn Arms GL65;

(z.151) Penn Arms PL8;

(z.152) Penn Arms TL1;

(z.153) Penn Arms TL8;

(z.154) Penn Arms TGL1;

(z.155) Penn Arms TGL6;

(z.156) Pindad SPG-1;

(z.157) PMP NTW;

(z.158) Polish Grenade Launcher Wz74;

(z.159) Polish Grenade Launcher Wz83;

(z.16) Portuguese Mortar M965;

(z.161) Portuguese Mortar M937;

(z.162) Recoilless Rifle AT4;

(z.163) Recoilless Rifle B-10;

(z.164) Recoilless Rifle FMK1 105MM;

(z.165) Recoilless Rifle Folgore;

(z.166) Recoilless Rifle M136 AT4;

(z.167) Recoilless Rifle M18A1;

z.137) Penn Arms L640;

z.138) Penn Arms P837;

z.139) Penn Arms L837;

z.14) Penn Arms L137;

z.141) Penn Arms AML1-37;

z.142) Penn Arms HL;

z.143) Penn Arms HG;

z.144) Penn Arms L8;

z.145) Penn Arms L6;

z.146) Penn Arms L1;

z.147) Penn Arms GL1;

z.148) Penn Arms PGL65;

z.149) Penn Arms GL6;

z.15) Penn Arms GL65;

z.151) Penn Arms PL8;

z.152) Penn Arms TL1;

z.153) Penn Arms TL8;

z.154) Penn Arms TGL1;

z.155) Penn Arms TGL6;

z.156) Pindad SPG-1;

z.157) PMP NTW;

z.158) Polish Grenade Launcher Wz74;

z.159) Polish Grenade Launcher Wz83;

z.16) Portuguese Mortar M965;

z.161) Portuguese Mortar M937;

z.162) Recoilless Rifle AT4;

z.163) Recoilless Rifle B-10;

z.164) Recoilless Rifle FMK1 105MM;

z.165) Recoilless Rifle Folgore;

z.166) Recoilless Rifle M136 AT4;

z.167) Recoilless Rifle M18A1;

(z.168) Recoilless Rifle M40A1;

(z.169) Recoilless Rifle M60;

(z.17) Recoilless Rifle M60A;

(z.171) Recoilless Rifle M65;

(z.172) Recoilless Rifle Pansarskott M68 Miniman;

(z.173) Recoilless Rifle RGW 60;

(z.174) Recoilless Rifle RGW 90;

(z.175) Recoilless Rifle SPG-9;

(z.176) Recoilless Rifle Type 36 M18A1 Recoilless Rifle Copy;

(z.177) Recoilless Rifle Type 65;

(z.178) Recoilless Rifle Type 78;

(z.179) Rippel Effect XRGL40;

(z.18) Rippel Effect LL40;

(z.181) RM Equipment M203PI;

(z.182) Rocket Launcher P27;

(z.183) Rocket Launcher RPG-27 Tavolga;

(z.184) Rocket Launcher ALAC;

(z.185) Rocket Launcher MARA;

(z.186) Rocket Launcher Shipon;

(z.187) Rocket Launcher RPG-22 Netto;

(z.188) Rocket Launcher MARK 153 SMAW;

(z.189) Rocket Launcher B-300;

(z.19) Rocket Launcher RPG-26 Aglen;

(z.191) Rocket Launcher RPG-76;

(z.192) Rocket Launcher RPG-7;

(z.193) Rocket Launcher M1;

(z.194) Rocket Launcher M1A1;

(z.195) Rocket Launcher M9;

(z.196) Rocket Launcher RPG-75;

(z.197) Rocket Launcher LRAC89-F1;

(z.198) Rocket Launcher RPG-16 Udar;

z.168) Recoilless Rifle M40A1;

z.169) Recoilless Rifle M60;

z.17) Recoilless Rifle M60A;

z.171) Recoilless Rifle M65;

z.172) Recoilless Rifle Pansarskott M68 Miniman;

z.173) Recoilless Rifle RGW 60;

z.174) Recoilless Rifle RGW 90;

z.175) Recoilless Rifle SPG-9;

z.176) Recoilless Rifle Type 36 M18A1 Recoilless Rifle Copy;

z.177) Recoilless Rifle Type 65;

z.178) Recoilless Rifle Type 78;

z.179) Rippel Effect XRGL40;

z.18) Rippel Effect LL40;

z.181) RM Equipment M203PI;

z.182) Rocket Launcher P27;

z.183) Rocket Launcher RPG-27 Tavolga;

z.184) Rocket Launcher ALAC;

z.185) Rocket Launcher MARA;

z.186) Rocket Launcher Shipon;

z.187) Rocket Launcher RPG-22 Netto;

z.188) Rocket Launcher MARK 153 SMAW;

z.189) Rocket Launcher B-300;

z.19) Rocket Launcher RPG-26 Aglen;

z.191) Rocket Launcher RPG-76;

z.192) Rocket Launcher RPG-7;

z.193) Rocket Launcher M1;

z.194) Rocket Launcher M1A1;

z.195) Rocket Launcher M9;

z.196) Rocket Launcher RPG-75;

z.197) Rocket Launcher LRAC89-F1;

z.198) Rocket Launcher RPG-16 Udar;

(z.199) Rocket Launcher RPG-7B;

(z.2) Rocket Launcher RL100 Blindicide;

(z.201) Rocket Launcher M141 SMAW-D;

(z.202) Rocket Launcher MARK 777 RPG;

(z.203) Rocket Launcher ATGL RPG;

(z.204) Rocket Launcher Type 69 RPG;

(z.205) Rocket Launcher Type 56 RPG;

(z.206) Rocket Launcher RPG-2;

(z.207) Rocket Launcher Cobra RPG;

(z.208) Rocket Launcher Panzerfaust 3;

(z.209) Rocket Launcher APILAS;

(z.21) Rocket Launcher Wasp;

(z.211) Rocket Launcher Bunkerfaust;

(z.212) Rocket Launcher Type 2004 RPG;

(z.213) Rocket Launcher PF98;

(z.214) Rocket Launcher RPG-28 Klyukva;

(z.215) Rocket Launcher RPG-29 Vampir;

(z.216) Rocket Launcher FT5;

(z.217) Rocket Launcher C90;

(z.218) Rocket Launcher M20B1;

(z.219) Rocket Launcher M72;

(z.22) Romarm AG-40;

(z.221) Russian Artillery M1942 Anti-Tank Gun;

(z.222) Russian Mortar M1937;

(z.223) Russian Service DP-64;

(z.224) Sabre Defence Industries XR40;

(z.225) Sabre Defence Industries XR37;

(z.226) Sage ML40 MARK 1;

(z.227) Sage Ace 37MM Launcher;

(z.228) Sage Ace 40MM Launcher;

(z.229) Sage Deuce 37MM Launcher;

z.199) Rocket Launcher RPG-7B;

z.2) Rocket Launcher RL100 Blindicide;

z.201) Rocket Launcher M141 SMAW-D;

z.202) Rocket Launcher MARK 777 RPG;

z.203) Rocket Launcher ATGL RPG;

z.204) Rocket Launcher Type 69 RPG;

z.205) Rocket Launcher Type 56 RPG;

z.206) Rocket Launcher RPG-2;

z.207) Rocket Launcher Cobra RPG;

z.208) Rocket Launcher Panzerfaust 3;

z.209) Rocket Launcher APILAS;

z.21) Rocket Launcher Wasp;

z.211) Rocket Launcher Bunkerfaust;

z.212) Rocket Launcher Type 2004 RPG;

z.213) Rocket Launcher PF98;

z.214) Rocket Launcher RPG-28 Klyukva;

z.215) Rocket Launcher RPG-29 Vampir;

z.216) Rocket Launcher FT5;

z.217) Rocket Launcher C90;

z.218) Rocket Launcher M20B1;

z.219) Rocket Launcher M72;

z.22) Romarm AG-40;

z.221) Russian Artillery M1942 Anti-Tank Gun;

z.222) Russian Mortar M1937;

z.223) Russian Service DP-64;

z.224) Sabre Defence Industries XR40;

z.225) Sabre Defence Industries XR37;

z.226) Sage ML40 MARK 1;

z.227) Sage Ace 37MM Launcher;

z.228) Sage Ace 40MM Launcher;

z.229) Sage Deuce 37MM Launcher;

(z.23) Sage Deuce 40MM Launcher;

(z.231) Schermuly 38MM Multi-Purpose Gun;

(z.232) Singapore Technologies Kinetics 40GL;

(z.233) Smith & Wesson 210/276;

(z.234) Smith & Wesson 276;

(z.235) Solothurn S18-100;

(z.236) Solothurn S18-1000;

(z.237) Spike's Tactical 37MM Launcher STZ Havoc;

(z.238) Swiss Anti Tank Rifle Tankbusche 41;

(z.239) Swiss Arms GL5040;

(z.24) Swiss Arms GL5140;

(z.241) Swiss Arms GLG40;

(z.242) Taiwanese Grenade Launcher T85;

(z.243) Tarnow RGP-40;

(z.244) Tarnow GP40;

(z.245) Tarnow GS40;

(z.246) Truvelo SR20;

(z.247) Truvelo HSR 20;

(z.248) Truvelo CMS 20;

(z.249) US Mortar M2;

(z.25) US Mortar M1;

(z.251) US Mortar XM224E3;

(z.252) US Ordnance M6 37MM Gun;

(z.253) US Recoilless M18; and

(z.254) US Recoilless M20.

96 Any firearm capable of discharging a projectile with a muzzle energy greater than 10,000 joules — other than one referred to in item 12, 13, 14, 20, 22 or 30 of this Part or one designed exclusively for the purpose of neutralizing explosive devices — including the

(a) AAO 2000;

(b) Accuracy International AW50;

(c) Accuracy International AS50;

z.23) Sage Deuce 40MM Launcher;

z.231) Schermuly 38MM Multi-Purpose Gun;

z.232) Singapore Technologies Kinetics 40GL;

z.233) Smith & Wesson 210/276;

z.234) Smith & Wesson 276;

z.235) Solothurn S18-100;

z.236) Solothurn S18-1000;

z.237) Spike's Tactical 37MM Launcher STZ Havoc;

z.238) Swiss Anti Tank Rifle Tankbusche 41;

z.239) Swiss Arms GL5040;

z.24) Swiss Arms GL5140;

z.241) Swiss Arms GLG40;

z.242) Taiwanese Grenade Launcher T85;

z.243) Tarnow RGP-40;

z.244) Tarnow GP40;

z.245) Tarnow GS40;

z.246) Truvelo SR20;

z.247) Truvelo HSR 20;

z.248) Truvelo CMS 20;

z.249) US Mortar M2;

z.25) US Mortar M1;

z.251) US Mortar XM224E3;

z.252) US Ordnance M6 37MM Gun;

z.253) US Recoilless M18;

z.254) US Recoilless M20.

96 Toute arme à feu pouvant tirer un projectile avec une énergie initiale de plus de 10 000 joules, à l'exception de celle visée aux articles 12, 13, 14, 20, 22 ou 30 de la présente partie et de celle conçue exclusivement pour neutraliser des dispositifs explosifs, mais y compris les armes à feu suivantes :

a) AAO 2000;

b) Accuracy International AW50;

c) Accuracy International AS50;

(d) Accuracy International AX;

(e) Accuracy International AX50;

(f) Alberta Tactical Rifle Big Bertha;

(g) Alberta Tactical Rifle ATSHL Prototype;

(h) Alberta Tactical Rifle ATSHL;

(i) Alberta Tactical Rifle AT50;

(j) Allied Armament Browning M2 Heavy Barrel;

(k) Allied Armament Browning M3 Aircraft;

(l) Alpimex APK 12.7;

(m) American Tactical Imports Omni Hybrid;

(n) AMP DSR 50;

(o) AMSD OM 50 Nemesis;

(p) Anzio Ironworks Anzio 50 CM1;

(q) Anzio Ironworks Anzio 50 Lightweight;

(r) Anzio Ironworks Anzio SS;

(s) Anzio Ironworks Anzio 50;

(t) Anzio Ironworks Anzio 14.5;

(u) Armalite AR-50;

(v) Armalite AR-50A1;

(w) Armtech BM50;

(x) Azerbaijani Sniper Rifle Istiglal IST 12.7;

(y) Azerbaijani Sniper Rifle Istiglal IST 14.5;

(z) Ballard SB500;

(z.001) Barnard GP;

(z.002) Barrett Firearms 99;

(z.003) BAT Machine EX;

(z.004) BCM Europearms Extreme;

(z.005) BCM Europearms MAAR Extreme;

(z.006) BCM Europearms STD Extreme;

(z.007) Bluegrass Armory Viper XL;

(z.008) Boys MARK 1*;

d) Accuracy International AX;

e) Accuracy International AX50;

f) Alberta Tactical Rifle Big Bertha;

g) Alberta Tactical Rifle ATSHL Prototype;

h) Alberta Tactical Rifle ATSHL;

i) Alberta Tactical Rifle AT50;

j) Allied Armament Browning M2 Heavy Barrel;

k) Allied Armament Browning M3 Aircraft;

l) Alpimex APK 12.7;

m) American Tactical Imports Omni Hybrid;

n) AMP DSR 50;

o) AMSD OM 50 Nemesis;

p) Anzio Ironworks Anzio 50 CM1;

q) Anzio Ironworks Anzio 50 Lightweight;

r) Anzio Ironworks Anzio SS;

s) Anzio Ironworks Anzio 50;

t) Anzio Ironworks Anzio 14.5;

u) Armalite AR-50;

v) Armalite AR-50A1;

w) Armtech BM50;

x) Azerbaijani Sniper Rifle Istiglal IST 12.7;

y) Azerbaijani Sniper Rifle Istiglal IST 14.5;

z) Ballard SB500;

z.001) Barnard GP;

z.002) Barrett Firearms 99;

z.003) BAT Machine EX;

z.004) BCM Europearms Extreme;

z.005) BCM Europearms MAAR Extreme;

z.006) BCM Europearms STD Extreme;

z.007) Bluegrass Armory Viper XL;

z.008) Boys MARK 1*;

(z.009) Boys MARK 1;

(z.01) Bushmaster BA50;

(z.011) Cadex CDX-50 Tremor;

(z.012) Canstar Arms CS 50;

(z.013) Canstar Arms CS1 Prototype;

(z.014) Canstar Arms CS2 Prototype;

(z.015) Canstar Arms CS 50-2;

(z.016) Caracal CS50;

(z.017) China South Industries Group AMR-2;

(z.018) China South Industries Group LR2A;

(z.019) Christensen Arms Carbon One Ranger;

(z.02) Christensen Arms Carbon One Conquest;

(z.021) Christensen Arms Carbon Ranger;

(z.022) Cobb FA50;

(z.023) Cobb FA50(T);

(z.024) Cobb BA50;

(z.025) Croatian Service MACS M3;

(z.026) Croatian Service MACS M4;

(z.027) Czech Weapons CZW 127;

(z.028) Defence Industries Organization AM-50;

(z.029) Degtyarev ASVK;

(z.03) Denel NTW;

(z.031) Desert Tactical Arms HTI;

(z.032) Desert Tech HTI;

(z.033) DPMS A-15;

(z.034) DPMS A-15 Panther VRS Single Shot;

(z.035) EAA M93 Black Arrow;

(z.036) East Ridge/State Arms Gun Company Big Bertha;

(z.037) EDM Arms XM-107 Windrunner;

(z.038) EDM Arms SA-01 Windrunner;

(z.039) EDM Arms 96 Windrunner;

z.009) Boys MARK 1;

z.01) Bushmaster BA50;

z.011) Cadex CDX-50 Tremor;

z.012) Canstar Arms CS 50;

z.013) Canstar Arms CS1 Prototype;

z.014) Canstar Arms CS2 Prototype;

z.015) Canstar Arms CS 50-2;

z.016) Caracal CS50;

z.017) China South Industries Group AMR-2;

z.018) China South Industries Group LR2A;

z.019) Christensen Arms Carbon One Ranger;

z.02) Christensen Arms Carbon One Conquest;

z.021) Christensen Arms Carbon Ranger;

z.022) Cobb FA50;

z.023) Cobb FA50(T);

z.024) Cobb BA50;

z.025) Croatian Service MACS M3;

z.026) Croatian Service MACS M4;

z.027) Czech Weapons CZW 127;

z.028) Defence Industries Organization AM-50;

z.029) Degtyarev ASVK;

z.03) Denel NTW;

z.031) Desert Tactical Arms HTI;

z.032) Desert Tech HTI;

z.033) DPMS A-15;

z.034) DPMS A-15 Panther VRS Single Shot;

z.035) EAA M93 Black Arrow;

z.036) East Ridge/State Arms Gun Company Big Bertha;

z.037) EDM Arms XM-107 Windrunner;

z.038) EDM Arms SA-01 Windrunner;

z.039) EDM Arms 96 Windrunner;

(z.04) Elite Machining Elite 50;

(z.041) Essential Arms Company J15;

(z.042) Essential Arms Company J15F;

(z.043) Evolution USA Phantom 3;

(z.044) FN Hecate 2;

(z.045) FN Nemesis;

(z.046) Fortmeier, Heinrich 2001;

(z.047) Fortmeier, Heinrich 2002;

(z.048) Gepard GM6 Lynx;

(z.049) German Anti-Tank Rifle PzB42;

(z.05) Gun Room Company Noreen ULR;

(z.051) Hagelberg FH50;

(z.052) Halo Arms HA50 FTR;

(z.053) Halo Arms HA50 LRR;

(z.054) Helenius RK97;

(z.055) Helenius RK99;

(z.056) Helenius RK99 MARK 1;

(z.057) IOF Vidhwansak;

(z.058) Jard J50;

(z.059) Jard J51;

(z.06) JRS 510;

(z.061) Karta Tool Frenchy 1 Prototype;

(z.062) Kovrov SVN-98;

(z.063) LAR Manufacturing Grizzly Big Boar;

(z.064) LAR Manufacturing Grizzly T-50;

(z.065) McBros 50 BMG Benchrest;

(z.066) McBros 50 BMG Sporter;

(z.067) McBros 50 BMG Tactical;

(z.068) McMillan 50 BMG Benchrest;

(z.069) McMillan Brothers 50 BMG Benchrest;

(z.07) McMillan Brothers 50 BMG Sporter;

z.04) Elite Machining Elite 50;

z.041) Essential Arms Company J15;

z.042) Essential Arms Company J15F;

z.043) Evolution USA Phantom 3;

z.044) FN Hecate 2;

z.045) FN Nemesis;

z.046) Fortmeier, Heinrich 2001;

z.047) Fortmeier, Heinrich 2002;

z.048) Gepard GM6 Lynx;

z.049) German Anti-Tank Rifle PzB42;

z.05) Gun Room Company Noreen ULR;

z.051) Hagelberg FH50;

z.052) Halo Arms HA50 FTR;

z.053) Halo Arms HA50 LRR;

z.054) Helenius RK97;

z.055) Helenius RK99;

z.056) Helenius RK99 MARK 1;

z.057) IOF Vidhwansak;

z.058) Jard J50;

z.059) Jard J51;

z.06) JRS 510;

z.061) Karta Tool Frenchy 1 Prototype;

z.062) Kovrov SVN-98;

z.063) LAR Manufacturing Grizzly Big Boar;

z.064) LAR Manufacturing Grizzly T-50;

z.065) McBros 50 BMG Benchrest;

z.066) McBros 50 BMG Sporter;

z.067) McBros 50 BMG Tactical;

z.068) McMillan 50 BMG Benchrest;

z.069) McMillan Brothers 50 BMG Benchrest;

z.07) McMillan Brothers 50 BMG Sporter;

(z.071) McMillan Brothers 50 BMG Tactical;

(z.072) McMillan Brothers TAC-50;

(z.073) McMillan TAC-50;

(z.074) McMillan TAC-416;

(z.075) MG Arms Behemoth;

(z.076) Mitchells Mausers M93 Black Arrow Target;

(z.077) Modulo Masterpiece Wizard Extreme Long Range Match;

(z.078) Noreen Firearms Noreen ULR;

(z.079) Noreen Firearms Noreen ULR Extreme;

(z.08) Norinco JS 05;

(z.081) Norinco CSLR5;

(z.082) Northwest Imports Browning M2 Heavy Barrel;

(z.083) Odessa Patriot 50;

(z.084) Omni Windrunner;

(z.085) PGM Precision Hecate 2;

(z.086) Phase 5 Tactical P5T15;

(z.087) Pietsch P B 50 Canadian;

(z.088) PMP NTW;

(z.089) Poly Technologies M99;

(z.09) Poly Technologies M99B;

(z.091) Prairie Gun Works LRT3REP;

(z.092) Prairie Gun Works LRT3SS;

(z.093) Prairie Gun Works LRT50;

(z.094) RAD M650 SLAMR;

(z.095) RAD M614;

(z.096) Ramo 600;

(z.097) Ramo 650;

(z.098) Rib Mountain Arms 92;

(z.099) Robar RC-50;

(z.1) RPA Quadlock;

z.071) McMillan Brothers 50 BMG Tactical;

z.072) McMillan Brothers TAC-50;

z.073) McMillan TAC-50;

z.074) McMillan TAC-416;

z.075) MG Arms Behemoth;

z.076) Mitchells Mausers M93 Black Arrow Target;

z.077) Modulo Masterpiece Wizard Extreme Long Range Match;

z.078) Noreen Firearms Noreen ULR;

z.079) Noreen Firearms Noreen ULR Extreme;

z.08) Norinco JS 05;

z.081) Norinco CSLR5;

z.082) Northwest Imports Browning M2 Heavy Barrel;

z.083) Odessa Patriot 50;

z.084) Omni Windrunner;

z.085) PGM Precision Hecate 2;

z.086) Phase 5 Tactical P5T15;

z.087) Pietsch P B 50 Canadian;

z.088) PMP NTW;

z.089) Poly Technologies M99;

z.09) Poly Technologies M99B;

z.091) Prairie Gun Works LRT3REP;

z.092) Prairie Gun Works LRT3SS;

z.093) Prairie Gun Works LRT50;

z.094) RAD M650 SLAMR;

z.095) RAD M614;

z.096) Ramo 600;

z.097) Ramo 650;

z.098) Rib Mountain Arms 92;

z.099) Robar RC-50;

z.1) RPA Quadlock;

(z.101) RPA Rangemaster 50;

(z.102) Russian Anti-Tank Rifle PTRS41;

(z.103) Russian Anti-Tank Rifle PTRD41;

(z.104) Russian Anti-Tank Rifle PTRR39;

(z.105) Russian Anti-Tank Rifle PTRSh;

(z.106) Safety Harbor Firearms SHF/R50;

(z.107) Safety Harbor Firearms Ultra Mag 50;

(z.108) Safety Harbor Firearms SHF/S50;

(z.109) Saxonia Big Valve M2;

(z.11) Semtecx Single Shot Pistol;

(z.111) Serbu BFG-50;

(z.112) Serbu BFG-50A;

(z.113) Serbu RN-50;

(z.114) Sero GM6 Lynx;

(z.115) SIG Sauer SIG 50;

(z.116) SMOS Rogue-50;

(z.117) SMOS Rogue-SS;

(z.118) Spider Firearms Ferret 50;

(z.119) St George Arms Leader 50 A1;

(z.12) State Arms Gun Company Rebel;

(z.121) State Arms Gun Company Mosquito;

(z.122) State Arms Gun Company Shorty;

(z.123) State Arms Gun Company Competitor 2000;

(z.124) Steyr-Mannlicher HS50;

(z.125) Steyr-Mannlicher HS50M1;

(z.126) Steyr-Mannlicher HS460;

(z.127) Stoner SR-50;

(z.128) Swiss Arms SAN511;

(z.129) Tactical Machining TM-SS;

(z.13) Tarnow WKW;

(z.131) Tasko 7ET3;

z.101) RPA Rangemaster 50;

z.102) Russian Anti-Tank Rifle PTRS41;

z.103) Russian Anti-Tank Rifle PTRD41;

z.104) Russian Anti-Tank Rifle PTRR39;

z.105) Russian Anti-Tank Rifle PTRSh;

z.106) Safety Harbor Firearms SHF/R50;

z.107) Safety Harbor Firearms Ultra Mag 50;

z.108) Safety Harbor Firearms SHF/S50;

z.109) Saxonia Big Valve M2;

z.11) Semtecx Single Shot Pistol;

z.111) Serbu BFG-50;

z.112) Serbu BFG-50A;

z.113) Serbu RN-50;

z.114) Sero GM6 Lynx;

z.115) SIG Sauer SIG 50;

z.116) SMOS Rogue-50;

z.117) SMOS Rogue-SS;

z.118) Spider Firearms Ferret 50;

z.119) St George Arms Leader 50 A1;

z.12) State Arms Gun Company Rebel;

z.121) State Arms Gun Company Mosquito;

z.122) State Arms Gun Company Shorty;

z.123) State Arms Gun Company Competitor 2000;

z.124) Steyr-Mannlicher HS50;

z.125) Steyr-Mannlicher HS50M1;

z.126) Steyr-Mannlicher HS460;

z.127) Stoner SR-50;

z.128) Swiss Arms SAN511;

z.129) Tactical Machining TM-SS;

z.13) Tarnow WKW;

z.131) Tasko 7ET3;

(z.132) Tech Designs Kodiak;

(z.133) Thompson Machine ARSSL;

(z.134) Thor Global Defense Group M96 Windrunner Series;

(z.135) TNW Browning M2 Heavy Barrel;

(z.136) Triple Action Thunder 50;

(z.137) Truvelo CMS 12.7;

(z.138) Truvelo CMS 14.5;

(z.139) Truvelo SR50;

(z.14) Ursus Firearms Kodiak;

(z.141) Valkyrie Arms Browning M2 Heavy Barrel;

(z.142) VM Hy-Tech VM50;

(z.143) Vulcan Armament V50SS;

(z.144) Watsons Weapons 50;

(z.145) Zastava M93;

(z.146) Zastava Arms M93 Black Arrow;

(z.147) Zastava Europe M93;

(z.148) ZVI OP96; and

(z.149) ZVI OP99.

4 Item 2 of Part 2 of the schedule to the Regulations is repealed.

5 Part 2.1 of the schedule to the Regulations is repealed.

6 Part 4 of the schedule to the Regulations is amended by adding the following after item 3:

Other

4 The upper receiver of any firearm referred to in item 87 of Part 1 of this schedule.

Application Prior to Publication

7 For the purposes of paragraph 11(2)(a) of the *Statutory Instruments Act*, these Regulations apply according to their terms before they are published in the *Canada Gazette*.

z.132) Tech Designs Kodiak;

z.133) Thompson Machine ARSSL;

z.134) Thor Global Defense Group M96 Windrunner Series;

z.135) TNW Browning M2 Heavy Barrel;

z.136) Triple Action Thunder 50;

z.137) Truvelo CMS 12.7;

z.138) Truvelo CMS 14.5;

z.139) Truvelo SR50;

z.14) Ursus Firearms Kodiak;

z.141) Valkyrie Arms Browning M2 Heavy Barrel;

z.142) VM Hy-Tech VM50;

z.143) Vulcan Armament V50SS;

z.144) Watsons Weapons 50;

z.145) Zastava M93;

z.146) Zastava Arms M93 Black Arrow;

z.147) Zastava Europe M93;

z.148) ZVI OP96;

z.149) ZVI OP99.

4 L'article 2 de la partie 2 de l'annexe du même règlement est abrogé.

5 La partie 2.1 de l'annexe du même règlement est abrogée.

6 La partie 4 de l'annexe du même règlement est modifiée par adjonction, après l'article 3, de ce qui suit :

Autres

4 Toute carcasse supérieure d'une arme à feu visée à l'article 87 de la partie 1 de la présente annexe.

Antériorité de la prise d'effet

7 Pour l'application de l'alinéa 11(2)a) de la *Loi sur les textes réglementaires*, le présent règlement prend effet avant sa publication dans la *Gazette du Canada*.

Coming into Force

8 These Regulations come into force on the day on which they are made.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations or the Order.*)

Issues

Canada has experienced mass shootings in rural and urban areas such as in Nova Scotia, city of Québec, Montréal, and Toronto. Whether at home or abroad, the deadliest mass shootings are commonly perpetrated with assault-style firearms. These events, and concerns about the inherent deadliness of assault-style firearms used in them, have led to increasing public demand for measures to address gun violence and mass shootings in Canada.

The *Regulations Amending the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted* (Regulations) amend the Regulations that classify firearms (Classification Regulations) to prescribe certain firearms as prohibited firearms. The Regulations prohibit approximately 1 500 models of assault-style firearms, including current and future variants. The Regulations also prescribe the upper receivers of M16, AR-10, AR-15 and M4 pattern firearms to be prohibited devices.

The Regulations address gun violence and the threat to public safety by assault-style firearms. The Government of Canada recognizes that their inherent deadliness makes them unsuitable for civilian use and a serious threat to public safety given the degree to which they can increase the severity of mass shootings.

The *Order Declaring an Amnesty Period (2020)* (the Amnesty Order) accompanies the Regulations to protect individuals, who were in lawful possession of one or more of the newly prohibited firearms or prohibited devices on the day the Regulations came into force, from criminal liability for unlawful possession for the purpose of allowing individuals to come into compliance with the law.

Entrée en vigueur

8 Le présent règlement entre en vigueur à la date de sa prise.

RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(*Le présent résumé ne fait pas partie du Règlement ni du Décret.*)

Enjeux

Le Canada a connu des fusillades de masse dans les régions rurales et urbaines comme la Nouvelle-Écosse, la ville de Québec, Montréal et Toronto. Que ce soit au Canada ou à l'étranger, les fusillades de masse les plus meurtrières sont souvent perpétrées au moyen d'armes à feu de style arme d'assaut. Ces événements, et les préoccupations au sujet du caractère mortel inhérent des armes à feu de style arme d'assaut alors utilisées, ont amené le public à réclamer de plus en plus de mesures pour lutter contre la violence commise avec des armes à feu et les fusillades de masse au Canada.

Le *Règlement modifiant le Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés ou à autorisation restreinte* (le Règlement) modifie le Règlement sur la classification des armes à feu (Règlement sur la classification) afin de prévoir que certaines armes à feu sont des armes à feu prohibées. Le Règlement interdit approximativement 1 500 modèles d'armes à feu de style d'assaut, y compris des variantes actuelles et futures. Le Règlement prescrit également que les carcasses supérieures des armes à feu de type M16, AR-10, AR-15 et M4 sont des dispositifs prohibés.

Le Règlement vise à lutter contre la violence commise avec des armes à feu et la menace à la sécurité publique que représentent les armes à feu de style arme d'assaut. Le gouvernement du Canada reconnaît que leur caractère mortel inhérent fait que de telles armes ne conviennent pas à une utilisation civile et présentent une grave menace pour la sécurité publique compte tenu du degré auquel de telles armes peuvent accroître la gravité des fusillades de masse.

Le *Décret fixant une période d'amnistie (2020)* (le Décret d'amnistie) accompagne le Règlement et confère aux personnes qui étaient en possession légale d'une ou de plusieurs armes à feu nouvellement prohibées ou dispositifs prohibés au moment de l'entrée en vigueur du Règlement une immunité en matière de droit pénal pour la possession illégale de telles armes en vue de permettre aux particuliers de se conformer avec la loi.

During the amnesty period, the Government intends to implement a buy-back program to compensate affected owners for the value of their firearms after they are delivered to a police officer; however, until a buy-back program is offered, affected owners will not be eligible for compensation. An option to participate in a grandfathering regime would also be made available for affected owners. Further public communications on the buy-back program and the grandfathering regime will follow later.

Pendant la période d'amnistie, le gouvernement a l'intention de mettre en œuvre un programme de rachat pour indemniser les propriétaires touchés pour la valeur de leurs armes à feu qu'ils auront remises à un agent de police; cependant, jusqu'à l'établissement d'un programme de rachat, les propriétaires touchés ne seront pas admissibles à une indemnisation. Une option permettant de participer à un régime de maintien des droits acquis serait aussi offerte aux propriétaires touchés. D'autres communications publiques sur le programme de rachat et le régime de maintien des droits acquis suivront.

The Regulations and the Amnesty Order come into force on the day they are made. The Amnesty Order expires on April 30, 2022.

Le Règlement et le Décret d'amnistie entrent en vigueur le jour où ils seront pris. Le Décret d'amnistie prend fin le 30 avril 2022.

Background

Canada has experienced mass shootings in rural and urban areas such as in Nova Scotia, city of Québec, Montréal and Toronto. Whether at home or abroad, the deadliest mass shootings are commonly perpetrated with assault-style firearms. Given these events, the growing concern for public safety, the increasing public demand for measures to address gun violence and mass shootings and, in particular, the concern resulting from the inherent deadliness of assault-style firearms that are not suitable for civilian use, these firearms must be prohibited in Canada.

Assault-style firearms are not suitable for hunting or sport shooting purposes given the inherent danger that they pose to public safety. The newly prescribed firearms are primarily designed for military or paramilitary purposes with the capability of injuring, immobilizing or killing humans in large numbers within a short period of time given the basic characteristics they possess, such as a tactical or military design and capability of holding a quickly reloadable large-capacity magazine. While some of these newly prohibited firearms were previously used by individuals for hunting or sporting purposes, it is the view of the Government that those firearms are unreasonable and disproportionate for such purposes. The significant risk that these firearms pose to the public's safety outweighs any justification for their continued use and availability within Canada given that numerous types of firearms remain available for lawful ownership for hunting or sport shooting purposes.

Contexte

Le Canada a connu des fusillades de masse dans les régions rurales et urbaines comme la Nouvelle-Écosse, la ville de Québec, Montréal et Toronto. Que ce soit au Canada ou à l'étranger, les fusillades de masse les plus meurtrières sont souvent perpétrées au moyen d'armes à feu de style arme d'assaut. Compte tenu de ces événements, la préoccupation grandissante à l'égard de la sécurité publique et du fait que le public réclame de plus en plus de mesures visant à lutter contre la violence commise avec des armes à feu et les fusillades de masse, et tout particulièrement de la préoccupation liée au caractère mortel inhérent de ces armes à feu de style arme d'assaut qui ne conviennent pas à une utilisation civile, ces armes à feu doivent être classifiées comme des armes à feu prohibées au Canada.

Les armes à feu de style arme d'assaut ne conviennent pas pour la chasse ou le tir sportif compte tenu du danger inhérent qu'elles présentent pour la sécurité du public. Les armes à feu nouvellement prohibées sont principalement conçues à des fins militaires ou paramilitaires et ont la capacité de causer des blessures, d'immobiliser ou de tuer des humains en grand nombre dans un court laps de temps compte tenu des caractéristiques de base qu'elles possèdent, comme une conception tactique ou militaire et la capacité de contenir un chargeur grande capacité rapidement rechargeable. Bien que certaines de ces armes à feu nouvellement prohibées aient déjà été utilisées par des particuliers pour la chasse ou le sport, le gouvernement est d'avis que l'utilisation de ces armes à feu est déraisonnable et disproportionnée à de telles fins. Le risque important que ces armes à feu posent pour la sécurité du public l'emporte sur toute justification relative à leur utilisation et à leur disponibilité continue au Canada étant donné qu'il continue d'être possible d'avoir la possession légale de nombreux types d'armes à feu à des fins de chasse ou de tir sportif.

The Classification Regulations prescribe firearms as prohibited, restricted or nonrestricted, and also include variants and certain modified versions of the listed firearms.

Pursuant to subsections 84(1) and 117.15(1) of the *Criminal Code,* the Governor in Council (GIC) has the authority to prescribe a firearm or a device to be prohibited in accordance with the definitions of "prohibited firearm" and "prohibited device."

Pursuant to section 117.14 of the *Criminal Code*, the GIC is also authorized to declare an amnesty period when a firearm or device is prohibited for the purpose of permitting affected owners to come into compliance with the law.

Objective

The prescribing of firearms as prohibited is intended to limit the access to firearms that are characterized by their design and their capability of inflicting significant harm to Canadians. The Regulations address a growing public concern regarding the safety risk posed by assault-style firearms and their suitability for civilian use. The amendments to the Classification Regulations are intended to reduce the number and availability of assault-style firearms and other firearms that exceed safe civilian use in Canada, and to reduce the possibility of these firearms being diverted to the illegal market. Many of the known variants or modified versions of the approximately 1 500 firearms are also specifically prescribed to be prohibited firearms. The Regulations apply to all variants of the principal model, current or future, whether they are expressly listed or not.

Description

The Regulations have been amended to prescribe as prohibited approximately 1 500 models of firearms. Of those, nine principal models of assault-style firearms are prohibited as they (1) have semi-automatic action with sustained rapid-fire capability (tactical/military design with large magazine capacity), (2) are of modern design, and (3) are present in large volumes in the Canadian market.

The Regulations prescribe the firearms set out below as "prohibited firearms" and also specifically prescribe the known variants of the principal models:

- M16, AR-10, and AR-15 rifles and M4 carbine;
- Ruger Mini-14 rifle;
- US Rifle M14;
- Vz58 rifle;

Le Règlement sur la classification prévoit que les armes à feu sont prohibées, à autorisation restreinte ou sans restriction, et comprend également des variantes et certaines versions modifiées des armes à feu énumérées.

En vertu des paragraphes 84(1) et 117.15(1) du *Code criminel*, le gouverneur en conseil (GC) a le pouvoir de prescrire qu'une arme à feu ou un dispositif est prohibé conformément aux définitions d'« arme à feu prohibée » ou de « dispositif prohibé ».

En vertu de l'article 117.14 du *Code criminel,* le GC est autorisé à fixer une période d'amnistie à l'égard d'une arme à feu ou d'un dispositif prohibés afin de permettre aux propriétaires touchés de se conformer à la loi.

Objectif

La prohibition d'armes à feu vise à limiter l'accès à des armes à feu qui se caractérisent par leur conception et leur capacité à causer d'importants dommages aux Canadiens. Le Règlement répond à une préoccupation croissante du public relativement au risque pour la sécurité que posent les armes à feu de style arme d'assaut et à leur utilisation à des fins civiles. Les modifications du Règlement sur la classification visent à réduire le nombre et la disponibilité des armes à feu de style arme d'assaut et d'autres armes à feu qui ne conviennent pas à une utilisation civile au Canada et à réduire la possibilité de détournement de ces armes à feu vers le marché illicite. Il est aussi expressément prévu que constituent des armes à feu prohibées un grand nombre des variantes connues ou des versions modifiées d'approximativement 1 500 armes à feu. Le Règlement s'applique à toutes les variantes du modèle principal, actuelles ou futures, qu'elles soient expressément énumérées ou non.

Description

Le Règlement a été modifié pour prévoir que sont prohibés approximativement 1 500 modèles d'armes à feu. De ce nombre, neuf modèles principaux d'armes à feu de style arme d'assaut sont prohibés puisqu'ils (1) ont une action semi-automatique avec une capacité de tir rapide soutenu (conception tactique/militaire avec un chargeur grande capacité), (2) sont de conception moderne, et (3) se retrouvent en grand nombre sur le marché canadien.

Le Règlement prévoit que les armes à feu décrites ci-après sont des « armes à feu prohibées », ainsi que les variantes connues des principaux modèles:

- fusils M16, AR-10, AR-15 et carabine M4;
- fusil Ruger Mini-14;
- fusil américain M14;
- fusil Vz58;

- Robinson Armament XCR rifle;
- CZ Scorpion EVO 3 carbines and pistols;
- Beretta Cx4 Storm carbine;
- SIG Sauer SIG MCX and SIG Sauer SIG MPX carbine and pistol; and
- Swiss Arms Classic Green and Four Seasons series (as specified in former Bill C-71: *An Act to amend certain Acts and Regulations in relation to firearms*).

Also included are two new categories of firearms that exceed safe civilian use. These are characterized by the following physical attributes: a 20 mm bore or greater (e.g. grenade launcher) and the capacity to discharge a projectile with a muzzle energy greater than 10 000 joules (e.g. a .50 calibre BMG). These weapons are primarily designed to produce mass human casualties or cause significant property damage at long ranges, and the potential power of these weapons exceeds safe or legitimate civilian use.

Previous classification of the newly prohibited firearm models

	Principal model	Previous classification
1	M16, AR-10, and AR-15 rifles and M4 carbine (which represent one family of firearms commonly known as the AR Platform)	Mostly restricted, some non-restricted
2	Ruger Mini-14 rifle	Mostly non-restricted, some restricted
3	Vz58 rifle	Mostly non-restricted, some restricted
4	US Rifle M14	Non-restricted
5	Beretta Cx4 Storm carbine	Restricted and non-restricted
6	Robinson Armament XCR rifle	Mostly non-restricted, some restricted
7	CZ Scorpion EVO 3 carbine and pistol	Restricted and non-restricted
8	SIG Sauer SIG MCX and SIG Sauer SIG MPX carbines and pistols	Restricted and non-restricted
9	Swiss Arms Classic Green and Four Seasons series rifles	Non-restricted and restricted

- fusil Robinson Armament XCR;
- carabines et pistolets CZ Scorpion EVO 3;
- carabine Beretta Cx4 Storm;
- carabine et pistolet SIG Sauer SIG MCX et SIG Sauer SIG MPX;
- séries Swiss Arms Classic Green et Four Seasons (tel qu'il est précisé dans l'ancien projet de loi C-71, *Loi modifiant certaines lois et un règlement relatifs aux armes* à *feu*).

Sont également incluses deux nouvelles catégories d'armes à feu qui ne conviennent pas à une utilisation civile. Elles ont les caractéristiques suivantes: une âme de 20 mm ou plus (par ex. un lance-grenades) et ayant la capacité de décharger un projectile avec une énergie initiale de plus de 10 000 joules (par ex. un BMG de calibre 0,50). Ces armes à feu sont principalement conçues pour causer des pertes humaines massives ou des dommages matériels importants à grande distance, et la puissance potentielle de ces armes excède celle d'une utilisation civile sécuritaire ou légitime.

Classification antérieure des armes à feu nouvellement prohibées

	Modèle principal	Classement précédent
1	M16, AR-10, et AR-15 fusils et carabine M4 (qui représentent une famille d'armes à feu communément appelée plate-forme AR)	Principalement à autorisation restreinte, certains sans restriction
2	Fusil Mini-14	Principalement sans restriction, certains à autorisation restreinte
3	Fusil Vz58	Principalement sans restriction, certains à autorisation restreinte
4	Fusil américain M14	Sans restriction
5	Carabine Beretta Cx4 Storm	À autorisation restreinte et sans restriction
6	Fusil Robinson Armament XCR	Principalement sans restriction, certains à autorisation restreinte
7	Carabine et pistolet CZ Scorpion EVO 3	À autorisation restreinte et sans restriction
8	Carabines et pistolets SIG Sauer SIG MCX et SIG Sauer SIG MPX	À autorisation restreinte et sans restriction
9	Carabines séries Swiss Arms Classic Green et Four Seasons	À autorisation restreinte et à autorisation restreinte

Previous classification of the newly prohibited firearm categories

	Category	Previous
1	Firearms with 20 mm bore or greater	Non-restricted, a few restricted
2	Firearms capable of discharging a projectile with a muzzle energy greater than 10 000 joules	Non-restricted

Classification précédente des catégories d'armes à feu nouvellement interdites

	Catégorie	Précédent
1	Armes à feu ayant une âme de 20 mm ou plus	À autorisation restreinte et sans restriction, certaines à autorisation restreinte
2	Armes à feu pouvant tirer un projectile avec une énergie initiale de plus de 10 000 joules	Sans restriction

While devices exclusively designed for disrupting explosives (also known as "bomb disruptors") would technically have the attributes of the newly prohibited categories, they have an important function in defusing hazardous explosive devices. Recognizing Canada's international commitment to global peace and security, these devices are excluded from the prescribed list to permit their export under the *Export and Import Permits Act*.

Bien que les dispositifs exclusivement conçus pour désamorcer les explosifs (aussi connus sous le nom de « désamorceurs de bombes ») aient techniquement les caractéristiques des catégories nouvellement interdites, ils ont une fonction importante dans le désamorçage des dispositifs explosifs dangereux. Compte tenu de l'engagement international du Canada envers la paix et la sécurité mondiales, ces dispositifs sont exclus de la liste réglementaire pour en permettre l'exportation en vertu de la *Loi sur les licences d'exportation et d'importation*.

The Regulations also prescribe the upper receivers of M16, AR-10, AR-15 and M4 pattern firearms to be prohibited devices in order to ensure that these firearms cannot easily be used with illicitly manufactured or acquired lower receivers. The M16, AR-10, AR-15 and M4 firearms are modular firearms consisting of the lower receiver assembly, which is the component bearing the serial number and subject to registration that is now prohibited; and the upper receiver assembly, which is the pressure bearing component and has not previously been regulated. An owner could possess two or more upper receiver assemblies which can be mounted and dismounted on a lower receiver assembly according to the needs of the occasion. If upper receivers are not also prohibited, there is a significant public safety risk that the upper receiver assemblies would be mated with an illegal lower receiver (i.e. smuggled, made from a receiver blank, or manufactured by 3D printing to supply the illegal market) thus creating unmarked, untraceable M16, AR-10, AR-15 or M4 firearms, commonly known as "ghost guns." Prohibiting the upper receiver of these rifles will reduce the quantities in circulation and render it much more difficult to illicitly fabricate working firearms.

Le Règlement prévoit aussi que les carcasses supérieures des armes à feu des modèles M16, AR-10, AR-15 et M4 sont des dispositifs prohibés afin de veiller à ce que ces armes à feu ne puissent être facilement utilisées avec des carcasses inférieures fabriquées ou acquises illicitement. Les armes à feu des modèles M16, AR-10, AR-15 et M4 sont des armes à feu modulaires composées de l'assemblage de la carcasse inférieure, qui est la composante portant le numéro de série et faisant l'objet de l'enregistrement, qui sont maintenant prohibées; l'assemblage de la carcasse supérieure, lequel est le composant sous pression, n'avait pas été réglementé auparavant. Un propriétaire peut posséder deux ou plusieurs assemblages de carcasse supérieure qui peuvent être montés et démontés sur un assemblage de carcasse inférieure selon les besoins. Si les carcasses supérieures ne sont pas aussi des dispositifs prohibés, sur le plan de la sécurité publique, il est fort risqué que des assemblages de carcasse supérieure soient couplés à une carcasse inférieure illégale (c.-à-d. passées en contrebande, fabriquées à partir d'une carcasse inachevée, ou fabriquées par impression 3d pour approvisionner le marché illicite), créant ainsi des armes à feu des modèles M16, AR-10, AR-15 ou M4, non marquées et intraçables, communément appelées « armes à feu fantômes ». Le fait de prohiber la carcasse supérieure de ces fusils réduira les quantités en circulation et rendra beaucoup plus difficile la fabrication illicite d'armes à feu qui fonctionnent.

The Amnesty Order has been made to protect affected individuals who (1) were in legal possession of a newly prohibited firearm or prohibited device at the time the Regulations came into force, and, (2) continue to hold a valid licence during the amnesty period, from criminal liability for unlawful possession of a prohibited firearm in order to afford the individuals with time to dispose of the

Le Décret d'amnistie a été pris afin de conférer aux personnes qui (1) étaient en possession légale d'une arme à feu nouvellement prohibée ou d'un dispositif prohibé au moment de l'entrée en vigueur du Règlement, et (2) continuent d'être titulaires d'un permis valide pendant la période d'amnistie, une immunité en matière pénale pour la possession illégale d'armes à feu prohibées afin de

firearms. Disposal can include: having the firearm deactivated by an approved business; delivering the firearm or device to a police officer; legally exporting the firearm; and, if a business, returning the firearm or device to the manufacturer. Other permitted activities during the amnesty period are to transport the firearm for any of the above purposes and to use the newly prohibited firearm, if previously non-restricted, to hunt for the purposes of sustenance or to exercise a right recognized and affirmed by section 35 of the *Constitution Act, 1982* (the Constitution). Individuals are no longer allowed to import the firearms listed in the Regulations. Affected owners will no longer be permitted to sell to individuals within Canada or use the prohibited firearms, and no transportation will be permitted except for the purposes described above. The firearms will have to be kept securely stored in accordance with the legal storage requirements for the classification of the specified firearms prior to their prohibition.

permettre aux particuliers d'en disposer. La disposition peut comprendre la neutralisation de l'arme à feu par une entreprise autorisée, la remise de l'arme à feu ou du dispositif à un agent de police, l'exportation légale de l'arme à feu; et, dans le cas d'une entreprise, le fait de retourner le dispositif ou l'arme à feu au fabricant. Les autres activités autorisées pendant la période d'amnistie sont le transport de l'arme à feu à l'une des fins susmentionnées et l'utilisation de l'arme à feu nouvellement prohibée, s'il s'agissait auparavant d'une arme à feu à autorisation non restreinte, pour chasser à des fins de subsistance ou pour exercer un droit reconnu et confirmé par l'article 35 de la *Loi constitutionnelle canadienne de 1982* (la Constitution). Les particuliers ne sont plus autorisés à importer les armes à feu énumérées dans le Règlement. Les propriétaires touchés ne seront pas autorisés à vendre ces armes à feu à des particuliers au Canada ou à utiliser les armes à feu prohibées, et aucun transport n'en sera permis, sauf aux fins décrites ci-dessus. Les armes à feu devront être entreposées de façon sécuritaire en conformité avec les exigences légales d'entreposage selon la classification des armes à feu en question avant que celles-ci ne deviennent des armes à feu prohibées.

Individuals may transport the firearms one time to return home with the firearm if it was not at the owner's residence at the time the prohibition came into force, or, if not the owner and in possession of the firearm on the day the prohibition came into force, return the firearm to its owner.

Les particuliers peuvent transporter les armes à feu une fois pour rentrer chez eux avec l'arme à feu si celle-ci ne se trouvait pas à la résidence du propriétaire le jour où l'arme à feu est devenue prohibée, ou, lorsque ce n'est pas le propriétaire qui a la possession de l'arme à feu le jour où l'arme à feu devient prohibée, pour la retourner à son propriétaire.

The amnesty period begins on the date of coming into force of the Amnesty Order and expires on April 30, 2022. Upon the expiration of the Amnesty Order, individuals who are in possession of a prohibited firearm or prohibited device could be prosecuted for unlawful possession.

La période d'amnistie commence à la date d'entrée en vigueur du Décret d'amnistie et prend fin le 30 avril 2022. À l'expiration de ce décret, les particuliers qui sont en possession d'une arme à feu prohibée ou d'un dispositif prohibé pourraient faire l'objet d'une poursuite pour possession illégale.

The Government intends to implement a buy-back program, which would allow affected owners to declare their intent to deliver their firearms to a police officer. The buy-back would compensate affected owners for the value of their firearms after they are delivered to a police officer. An option to participate in a grandfathering regime would also be made available for affected owners.

Le gouvernement a l'intention de mettre en œuvre un programme de rachat qui permettrait aux propriétaires touchés de déclarer leur intention de remettre leur arme à feu à un agent de police. Ce programme permettrait d'indemniser les propriétaires touchés pour la valeur de leurs armes à feu une fois que celles-ci auront été remises à un agent de police. Une option de participation à un régime de maintien des droits acquis serait également offerte aux propriétaires touchés.

While an individual may dispose of a firearm by deactivating it, legally exporting it or delivering it to a police officer prior to the implementation of the buy-back program, compensation will not be available until the buy-back program is in effect. An individual should not deliver a firearm to a police station without first making arrangements with a police officer for a safe and scheduled delivery or pick up.

Un particulier peut disposer d'une arme à feu en procédant à une neutralisation de l'arme à feu, en l'exportant légalement, ou en en faisant la remise à un agent de police avant la mise en œuvre du programme de rachat; toutefois, aucune indemnisation ne sera versée jusqu'à la prise d'effet du programme d'achat. Un particulier ne devrait pas remettre une arme à feu à un poste de police sans prendre tout d'abord des dispositions avec un agent de la police pour que la livraison ou la collecte se fasse de façon sécuritaire et au moment convenu.

Regulatory development

Consultation

Extensive public engagement on the issue of banning handguns and assault-style firearms, led by the then Minister of Border Security and Organized Crime Reduction, took place between October 2018 and February 2019 with the provinces and territories, municipalities, Indigenous groups, law enforcement, community organizations, and industry. The intent of this engagement was to hear from a wide range of stakeholders, which included those both in support of and in opposition to limiting access to firearms. The engagement process included a series of eight in-person roundtables, an online questionnaire, a written submission process, and bilateral meetings with a range of stakeholders. The roundtables were held in four cities across the country (Vancouver, Montréal, Toronto, and Moncton), and 77 stakeholders participated in these sessions. In addition, 134 917 online questionnaires were received, as well as 36 written submissions, and 92 stakeholders were consulted in the bilateral meetings.

Many participants expressed their views that a ban on assault-style firearms was needed in order to protect public safety. As a result of the clear need for immediate action to implement the ban on the prescribed prohibited firearms, and to avoid a potential run on the market, no additional consultations with the public, the provinces and territories, or Indigenous groups were contemplated prior to the effective date of the amendment to the Classification Regulations.

Given the possibility of criminal liability associated with possessing a prohibited firearm, the Government has moved to implement the Amnesty Order expeditiously and, as a result, no consultations have been undertaken relative to this Order.

Modern treaty obligations and Indigenous engagement and consultation

The Amnesty Order permits the use of any of the newly prohibited firearms, if previously non-restricted, to hunt for the purposes of sustenance or to exercise a right recognized and affirmed by section 35 of the Constitution. From fall 2018 to spring 2019, the Government held extensive engagement with Indigenous groups, provinces and territories, municipalities, law enforcement agencies, academics, victim groups and other key stakeholders on limiting access to assault-style firearms and handguns. Recognizing that some Indigenous and sustenance hunters could be using previously non-restricted firearms for their hunting and may be unable to replace these firearms immediately,

Élaboration de la réglementation

Consultation

Entre octobre 2018 et février 2019, le ministre de la Sécurité frontalière et de la Réduction du crime organisé de l'époque a mené une vaste consultation publique sur la question de la prohibition des armes de poing et des armes à feu de style arme d'assaut auprès des provinces et territoires, des municipalités, des groupes autochtones, des forces de l'ordre, des organismes communautaires et de l'industrie. Ce processus de consultation visait à connaître les points de vue d'un vaste éventail d'intervenants, autant de ceux qui appuyaient la restriction de l'accès aux armes à feu que de ceux qui s'y opposaient. Dans le cadre de ce processus, il y a eu une série de huit tables rondes en personne, un questionnaire en ligne, présentation de mémoires et tenue de réunions bilatérales avec un éventail d'intervenants. Les tables rondes ont été tenues dans quatre villes à travers le Canada (Vancouver, Montréal, Toronto et Moncton), et 77 intervenants ont participé à ces séances. De plus, 134 917 questionnaires en ligne et 36 mémoires ont été reçus; 92 intervenants ont été consultés dans le cadre de réunions bilatérales.

De nombreux participants étaient d'avis qu'il était nécessaire de prohiber les fusils d'assaut pour protéger la sécurité publique. Compte tenu de la nécessité évidente de prendre des mesures immédiates pour mettre en œuvre la prohibition des armes à feu visées, et pour éviter une possible ruée sur ce marché, aucune autre consultation du public, des provinces, des territoires ou des groupes autochtones n'a été envisagée avant la date d'entrée en vigueur de la modification au Règlement sur la classification.

Compte tenu de la possibilité qu'il y ait une responsabilité associée à la possession d'une arme à feu prohibée, le gouvernement a pris des mesures pour mettre en *œuvre* rapidement le Décret d'amnistie et il n'y a donc pas eu de consultations au sujet de ce décret et de ce fait, aucune consultation n'a été faite au sujet de ce décret.

Obligations relatives aux traités modernes et consultation et mobilisation des Autochtones

Le Décret d'amnistie permet l'utilisation de toute arme à feu nouvellement prohibée, qui était auparavant une arme à feu sans restriction, pour chasser à des fins de subsistance ou pour exercer un droit reconnu et confirmé par l'article 35 de la Constitution. De l'automne 2018 au printemps 2019, le gouvernement a tenu de vastes consultations auprès de groupes autochtones, des provinces et des territoires, des municipalités, d'organismes chargés de l'application de la loi, de théoriciens, de groupes d'aide aux victimes et d'autres intervenants clés relativement à la question de la restriction de l'accès aux armes à feu de style arme d'assaut et aux armes de poing. Cependant,

the Amnesty Order includes provisions for the limited use of these firearms for such purposes. Following the publication of the Regulations, the Government will continue to engage with Indigenous groups to assess whether the prohibition of these firearms has a continued impact on the right to hunt affirmed by section 35 of the Constitution.

afin d'atténuer le risque que certains chasseurs autochtones et chasseurs de subsistance puissent utiliser pour la chasse exclusivement une arme à feu nouvellement prohibée, mais auparavant une arme à feu sans restriction, et au regard du fait qu'il n'y a pas eu d'avis préalable relatif à la prohibition établie, ces chasseurs pourraient ne pas être en mesure de remplacer immédiatement les armes nouvellement prohibées; le Décret d'amnistie prévoit donc l'utilisation limitée de ces armes à feu à ces fins**.** Après la publication du Règlement, le gouvernement continuera de consulter les groupes autochtones en vue d'évaluer si la prohibition relative à ces armes à feu a une incidence continue sur les droits de chasse, tel qu'il est garanti par l'article 35 de la Constitution.

Instrument choice

Given that the Regulations specifically prescribe firearms as prohibited, restricted and non-restricted in Canada, amendments to the Regulations are required to change the current listing of any firearms. The identified firearms will be legally reclassified as prohibited to reduce the number and availability of assault-style firearms and firearms that exceed safe civilian use in Canadian markets and to reduce the possibility of these firearms being diverted to illegal markets. No non-regulatory options were considered.

Choix de l'instrument

Puisque le Règlement prévoit spécifiquement qu'il y a au Canada des armes à feu prohibées, des armes à autorisation restreinte et des armes à feu sans restriction, il faut modifier le règlement pour changer la liste actuelle des armes à feu. Les armes à feu visées seront légalement reclassifiées en tant qu'armes prohibées afin de réduire le nombre et la disponibilité d'armes à feu de style arme d'assaut et des armes à feu qui ne conviennent pas à une utilisation civile sur les marchés canadiens, et de diminuer la possibilité que ces armes à feu soient détournées vers des marchés illicites. Aucune option de nature non réglementaire n'a été examinée.

Regulatory analysis

Analyse de la réglementation

Benefits and costs

The costs associated with implementing a buy-back program and grandfathering regime have not yet been finalized. Figures reflect estimates of the portion of projected costs associated with compensation of owners, and are determined by estimates of the number of firearms implicated. Further, given the uncertain number of impacted non-restricted firearms and the program complexity, there may be additional costs.

There are 2.2 million individual firearms licence holders in Canada. It is unknown how many exactly will be affected by the prohibition; however, there are approximately 90 000 restricted firearms that would be affected; and an unknown number of non-restricted firearms (due to the fact that non-restricted firearms do not need to be registered in accordance with the *Firearms Act*). The implicated firearms represent some of the most prevalent firearms within the Canadian market that are of modern design, have semi-automatic action with sustained rapid-fire capability and which are able to receive a quickly reloadable, large capacity magazine. The majority of affected owners of the currently restricted firearms reside in Alberta, British Columbia or Ontario. The regional

Avantages et coûts

Les coûts associés à la mise en œuvre d'un programme de rachat et à un régime de maintien des droits acquis n'ont pas encore été finalisés. Les chiffres reflètent les estimations de la portion des coûts projetés associés à l'indemnisation des propriétaires et sont déterminés par des estimations du nombre d'armes à feu en cause. Par ailleurs, compte tenu du nombre incertain d'armes à feu sans restriction touchées et de la complexité du programme, il pourrait y avoir des dépassements de coûts.

Il y a 2,2 millions de titulaires de permis d'armes à feu au Canada. On ne sait pas exactement combien de ceux-ci seront touchés par la prohibition; cependant, il y a approximativement entre 90 000 armes à feu à autorisation restreinte qui seraient visées, de même qu'un nombre inconnu d'armes à feu sans restriction qui le seraient également (puisque les armes à feu sans restriction n'ont pas besoin d'être enregistrées en vertu de la *Loi sur les armes à feu*). Les armes à feu visées représentent la majorité des armes à feu sur le marché canadien qui sont de conception moderne, ont une action semi-automatique avec une capacité de tir rapide soutenu et une capacité de contenir un chargeur grande capacité rapidement rechargeable. La majorité des propriétaires d'armes à feu à autorisation

breakdown for affected owners of the currently non-restricted firearms is unknown because these firearms are not registered.

A Conference Board of Canada report on *The Economic Footprint of Angling, Hunting, Trapping and Sport Shooting in Canada* published in September 2019, found that an estimated 1.4 million Canadians participate in legal sport shooting. These sport shooters may find themselves temporarily unable to participate in the sport if their primary means of participating is with a newly prohibited firearm. Sport shooters may already possess or may purchase other firearms suitable for sport shooting, and if they turn in their prohibited firearm during the buy-back program, would receive compensation. Sport shooting contributed an estimated $1.8 billion to Canada's Gross Domestic Product (GDP) in 2018, as well as $868 million in labour income, and supports about 14 555 full-time equivalent jobs. These figures may be affected in the short term by the prohibition on certain firearms, but these impacts may be mitigated by increases in purchases of new firearms that are not being prohibited.

In addition, 1.3 million Canadians participate in legal hunting. These owners may also be affected if they have been using a newly prohibited firearm that was previously nonrestricted. If they have been using such a firearm for sustenance hunting or to exercise a right affirmed in section 35 of the Constitution, they may continue to use their firearm for the same purpose, until the end of the amnesty period. Hunting contributes an estimated $4.1 billion to Canada's GDP as well as $2 billion in labour income, and supports about 33 313 full-time equivalent jobs.

The 2018 Commissioner of Firearms Report states that there are 4 442 licenced firearms businesses, of which 2 004 are for ammunition only, not including carriers and museums. Firearms business licences are issued to businesses, museums or organizations that manufacture, sell, possess, handle, display or store firearms or ammunition. The number of small businesses included in these figures is unknown, but likely comprises a large majority. Some of these businesses may see in the short term a decrease in profits as a result of the prohibition. These impacts may be mitigated by the buy-back program and the ability to return prohibited firearms to their manufacturer, and potentially by purchases of new firearms to replace those being prohibited.

restreinte touchés actuellement réside en Alberta, en Colombie-Britannique ou en Ontario. On ne connaît actuellement pas la ventilation régionale des propriétaires touchés des armes à feu actuellement sans restriction puisque celles-ci ne sont pas enregistrées.

Selon un rapport du Conference Board of Canada intitulé « The Economic Footprint of Angling, Hunting, Trapping and Sport Shooting in Canada, » publié en septembre 2019, il y a approximativement 1,4 million de Canadiens qui font du tir sportif légal. Ces tireurs sportifs pourraient se trouver temporairement dans l'impossibilité de participer au sport s'ils utilisent principalement une arme à feu nouvellement prohibée. Des tireurs sportifs peuvent déjà être en possession d'armes à feu convenant au tir sportif, ou pourraient en acheter, et seront indemnisés s'ils remettent leurs armes à feu prohibées dans le cadre du programme de rachat. Le tir sportif a contribué à hauteur de 1,8 milliard de dollars au produit intérieur brut (PIB) en 2018, de 868 millions de dollars en revenu du travail, et soutient environ 14 555 emplois équivalents temps plein. Ces chiffres risquent d'être touchés à court terme par la prohibition de certaines armes à feu; cependant, ces répercussions pourraient être atténuées par une augmentation de l'achat de nouvelles armes à feu qui ne sont pas prohibées.

Par ailleurs, 1,3 million de Canadiens participent à la chasse légale. Ces propriétaires pourraient également être touchés s'ils utilisent une arme à feu nouvellement prohibée qui, auparavant, était une arme à feu sans restriction. S'ils utilisaient une telle arme à feu pour la chasse de subsistance ou l'exercice d'un droit garanti par l'article 35 de la Constitution, ils pourront continuer d'utiliser leur arme à feu à cette fin, jusqu'à la fin de la période d'amnistie. La chasse contribue à hauteur de 4,1 milliards de dollars au PIB du Canada, et de deux milliards de dollars en revenu du travail, et appuie environ 33 313 emplois équivalents temps plein.

Selon le Rapport du commissaire aux armes à feu de 2018, il y avait 4 442 entreprises d'armes à feu titulaires d'un permis; de ce nombre, 2 004 étaient titulaires d'un permis de vente de munitions seulement, sans compter les transporteurs et les musées. Les permis d'armes à feu pour entreprise sont délivrés aux entreprises, aux musées ou aux organismes qui fabriquent, vendent, possèdent, manient, exposent ou entreposent des armes à feu ou des munitions. Le nombre de petites entreprises inclus dans ces chiffres est inconnu, mais en compose vraisemblablement la grande majorité. Certaines de ces entreprises pourraient connaître à court terme une diminution de profits à la suite de la prohibition. Ces répercussions pourraient être atténuées d'une part, par le programme de rachat qui offre aux propriétaires la possibilité de retourner aux fabricants les armes à feu prohibées, et d'autre part, peut-être aussi par les achats de nouvelles armes à feu en remplacement des armes prohibées.

Small business lens

While small businesses may assume some compliance costs arising from these Regulations, the costs are extremely difficult to assess as the inventory held by private businesses is unknown. Some costs may include lost interest from the inability to sell this inventory for a profit and possible restocking fees if the business chooses to return the affected firearms in their inventory to their foreign supplier for reimbursement. Firearms that cannot be exported may be eligible for the buy-back program.

It is likely that businesses selling newly prohibited firearms would experience a reduction in sales and as a result may reduce staff or cease operations. Some businesses may choose to switch to a new product line to replace those firearms. A Conference Board of Canada study completed in September 2019 determined that sport shooting and hunting contribute $5.9 billion to Canada's GDP, as well as $2.9 billion in labour income. The sport shooting and hunting industries also support approximately 48 000 jobs.

One-for-one rule

The one-for-one rule does not apply to these Regulations as there will be no incremental change in administrative burden to business. The Regulations do not introduce new administrative requirements for businesses.

Regulatory cooperation and alignment

As a member of the World Trade Organization (WTO) Canada must comply with different notification obligations before making regulations that could have an impact on trade. These notifications are in addition to Canada's general obligations not to impose prohibitions on the importation or exportation of goods and not to treat some nations more favourably than others unless justified. Specifically, under the WTO's Technical Barriers to Trade (TBT) Agreement, Canada must give notification of proposed regulations within a reasonable time. A WTO member may not be required to follow the normal notification periods under the TBT Agreement under certain circumstances, including urgent circumstances regarding safety, health, environmental protection or national security. The Government of Canada has taken the position that the prohibition of these firearms is a matter of public safety and security therefore Canada has not given the advance notification as required by the WTO. In addition, Canada has not given advance notice in an effort to avoiding

Lentille des petites entreprises

Les petites entreprises pourraient avoir à assumer certains coûts découlant du Règlement; toutefois, il est extrêmement difficile d'en prévoir les coûts, car on ne connaît pas l'inventaire détenu par des entreprises privées. Certains coûts pourraient inclure des pertes pécuniaires liées aux frais d'intérêt attribuables à l'impossibilité de vendre à profit cet inventaire, ainsi que des frais de réapprovisionnement possibles si l'entreprise choisit de retourner les armes à feu visées dans son inventaire à son fournisseur étranger pour remboursement. Les armes à feu qui ne peuvent être exportées pourraient être admissibles au programme de rachat.

Il est probable que les entreprises qui vendent des armes à feu nouvellement prohibées connaissent une baisse de ventes, et que, de ce fait, puissent réduire leur personnel ou cesser leurs activités. Certaines entreprises pourraient choisir d'adopter une nouvelle gamme de produits en remplacement de ces armes à feu. Selon une étude du Conference Board of Canada, terminée en septembre 2019, le tir sportif et la chasse contribuent à hauteur de 5,9 milliards de dollars au PIB du Canada, et de 2,9 milliards de dollars en revenu du travail. Les industries du tir sportif et de la chasse soutiennent également approximativement 48 000 emplois.

Règle du « un pour un »

La règle du « un pour un » ne s'applique pas à ce Règlement proposé, car il n'y a pas de changement supplémentaire sur le fardeau administratif des entreprises. Le Règlement ne prévoit pas de nouvelles exigences administratives pour les entreprises.

Coopération et harmonisation en matière de réglementation

En tant que membre de l'Organisation mondiale du commerce (OMC), le Canada doit se conformer à différentes obligations de notification avant de prendre des règlements susceptibles d'avoir une incidence sur le commerce. Ces notifications viennent s'ajouter aux obligations générales qu'a le Canada de ne pas imposer de prohibitions relatives à l'importation ou à l'exportation de marchandises, et de ne pas traiter certains pays plus favorablement que d'autres, à moins que de telles mesures soient justifiées. Tout particulièrement, en vertu de l'Accord sur les Obstacles techniques au Commerce (AOTC) de l'OMC, le Canada est tenu de donner notification d'un règlement projeté, dans un délai raisonnable. Un membre de l'OMC n'est pas tenu de respecter les délais normaux de notification en vertu de l'AOTC dans certaines circonstances, notamment si des problèmes urgents de sécurité, de santé, de protection de l'environnement ou de sécurité nationale se posent. Le gouvernement du Canada est d'avis que la prohibition de ces armes à feu est une question de sécurité

creating a potential run on the market before it is frozen by the prohibition.

Strategic environmental assessment

There will be low environmental impacts resulting from the buy-back program and the subsequent disposal/destruction of prohibited firearms.

Gender-based analysis plus (GBA+)

Measures to limit access to firearms are expected to have different impacts on certain populations in Canada, such as males, who are the largest group of firearms owners, and youth, who are overrepresented as perpetrators of firearm-related crime. These measures would benefit both males and females, as about two-thirds of victims of gun violence are male; however, according to Statistics Canada approximately 85% of police-reported victims in 2016 of intimate partner violence incidents involving a firearm were women.

Measures to reduce access to firearms are expected to have a higher impact on western provinces, which experience firearm-related crimes at a higher rate compared to the rest of Canada.

Indigenous persons are victims of homicides involving firearms at a much higher rate than the Canadian population and this figure appears to be increasing. The total number of Indigenous victims of firearms-related homicides rose from 10.4% in 2014 to 13.5% in 2016.

Rationale

The Regulations address gun violence and the threat to public safety by assault-style firearms. The Government of Canada recognizes that their inherent deadliness makes them unsuitable for civilian use and a serious threat to public safety given the degree to which they can increase the severity of mass shootings.

Prescribing these firearms as prohibited supports the Government's objective to ban assault-style firearms and to reduce the risk of diversion to illegal markets for criminal use. The prescribed list represents the most prevalent assault-style firearms in the Canadian market. The list prohibits assault-style firearms within the Canadian market that have semi-automatic action with sustained rapid-fire capability, including the AR-15 and its variants or

et de sûreté publiques, par conséquent, le Canada n'a pas donné la notification préalable requise par l'OMC. De plus, le Canada n'a pas donné de préavis afin d'éviter de créer une fuite potentielle sur le marché avant qu'elle ne soit gelée par la prohibition.

Évaluation environnementale stratégique

Il y aura de faibles impacts environnementaux résultant du programme de rachat et de l'élimination / destruction subséquente des armes à feu prohibées.

Analyse comparative entre les sexes plus (ACS+)

Les mesures visant à réduire l'accès aux armes à feu devraient avoir des répercussions différentes sur certains groupes au Canada, comme les hommes, qui constituent le groupe le plus important de propriétaires d'armes à feu au Canada, et les jeunes, qui sont surreprésentés parmi les auteurs de crimes liés aux armes à feu. Ces mesures profiteraient à la fois aux hommes et aux femmes, car environ les deux tiers des victimes de violence armée sont des hommes; toutefois, selon Statistique Canada, en 2016, approximativement 85 % des victimes de violence entre partenaires intimes, impliquant une arme, étaient des femmes.

Les mesures visant à réduire l'accès aux armes à feu devraient avoir une plus grande incidence dans les provinces de l'ouest, où les crimes liés aux armes à feu sont plus fréquents que dans le reste du Canada.

Les Autochtones sont victimes d'homicides liés aux armes à feu dans une proportion beaucoup plus élevée que la population canadienne, et ce chiffre semble augmenter. Le nombre total de victimes autochtones d'homicides liés aux armes à feu est passé de 10,4 % en 2014 à 13,5 % en 2016.

Justification

Le Règlement vise à lutter contre la violence commise au moyen d'armes à feu et la menace à la sécurité publique que présentent les armes à feu de style arme d'assaut. Le gouvernement du Canada reconnaît que le caractère mortel inhérent de telles armes fait qu'elles ne conviennent pas à une utilisation civile et qu'elles présentent une menace grave pour la sécurité publique compte tenu du degré auquel elles peuvent accroître la gravité des fusillades de masse.

La prohibition de ces armes à feu appuie l'objectif qu'a le gouvernement de prohiber les armes à feu de style arme d'assaut et de réduire le risque de détournement de ces armes vers les marchés illégaux à des fins criminelles. La liste établie représente les armes à feu de style arme d'assaut les plus répandues sur le marché canadien. La liste établit comme armes à feu prohibées les armes à feu de style arme d'assaut sur le marché canadien, qui ont une

modified versions thereof. Any firearm having a 20 mm bore or greater (e.g. grenade launchers) or a capability of discharging a projectile with a muzzle energy above 10 000 joules (e.g. .50 calibre sniper rifles) will also be prohibited.

Prohibiting additional firearms and providing an amnesty for the disposal of prevalent assault-style firearms and other firearms exceeding safe civilian use will respond directly to a key and growing public safety concern that these firearms are not suitable for civilian use as they can and have been used in mass shootings in Canada and internationally. The addition of the newly prohibited firearms to the Classification Regulations aligns with the Government's mandate to ban assault-style firearms and reduce the risk of diversion of firearms to the illegal market.

The prohibited firearms are tactical and/or military-style firearms and are not reasonable for hunting or sport shooting. Individuals may have used some of the listed firearms for hunting purposes on the basis that they were previously classified as non-restricted firearms. In addition, some of the listed firearms may have been used by individuals for sport shooting on the basis that they have been classified as restricted or non-restricted. However, the fact that these firearms are sometimes used for hunting or sport shooting does not supersede the fact that they were built with the intent to be used by the military and are capable of killing a large number of people in a short period of time. Due to the public safety concerns posed by these firearms, they are not reasonable for use in Canada for hunting or sport shooting purposes.

The Regulations also prescribe the upper receivers of M16, AR-10, AR-15 and M4 pattern firearms to be prohibited devices in order to ensure that these firearms cannot easily be used with illicitly manufactured or acquired lower receivers. The M16, AR-10, AR-15 and M4 firearms are modular firearms consisting of the lower receiver assembly, which is the component bearing the serial number and subject to registration and that is now prohibited; and the upper receiver assembly, which is the pressure-bearing component and has not previously been regulated. An owner could possess two or more upper receiver assemblies, which can be mounted and dismounted on a lower receiver assembly according to the needs of the occasion. If upper receivers were not also prohibited, there would be an important public safety risk that the

action semi-automatique avec capacité de tir rapide soutenu, y compris le AR-15 et les armes à feu du même modèle qui comportent des variantes ou qui ont subi des modifications. Seront également prohibées les armes à feu ayant une âme de 20 mm ou plus (par ex. lance-grenades) ou pouvant tirer un projectile avec une énergie initiale de plus de 10 000 joules (par ex. un fusil de tireur d'élite de calibre 0,50).

La prohibition d'armes à feu additionnelles et l'amnistie prévue pour la disposition des armes à feu de style arme d'assaut répandues et autres armes à feu excédant une utilisation civile sécuritaire permettront de répondre directement à une préoccupation importante et grandissante en matière de sécurité publique, à savoir que ces armes à feu ne conviennent pas à une utilisation civile puisqu'elles peuvent être utilisées, et l'ont été, dans des fusillades de masse au Canada et à l'étranger. L'adjonction d'armes à feu nouvelles prohibées au Règlement sur la classification s'inscrit dans la foulée du mandat qu'a le gouvernement de prohiber les armes à feu de style arme d'assaut et de réduire le risque de détournement des armes à feu vers le marché illégal.

Les armes à feu prohibées sont des armes à feu de style tactique et/ou militaire et ne conviennent pas pour la chasse ou le tir sportif. Il se peut que des particuliers aient utilisé certaines des armes énumérées à des fins de chasse puisqu'elles étaient auparavant classées comme armes à feu sans restriction. De plus, certaines des armes à feu énumérées peuvent avoir été utilisées par des particuliers à des fins de tir sportif du fait qu'elles étaient classées comme armes à feu à autorisation restreinte ou armes à feu sans restriction. Toutefois, le fait que ces armes à feu soient parfois utilisées à des fins de chasse ou de tir sportif ne remplace pas celui qu'elles ont été construites dans l'intention d'être utilisées par des militaires, et qu'elles ont la capacité de tuer un grand nombre de personnes en un court laps de temps. En raison des problèmes de sécurité publique que posent ces armes à feu, il ne convient pas de les utiliser au Canada à des fins de chasse ou de tir sportif.

Le Règlement prévoit aussi que les carcasses supérieures des armes à feu des modèles M16, AR-10, AR-15 et M4 sont des dispositifs prohibés afin de veiller à ce que ces armes à feu ne puissent être facilement utilisées avec des carcasses inférieures fabriquées ou acquises illicitement. Les armes à feu des modèles M16, AR-10, AR-15 et M4 sont des armes à feu modulaires composées de l'assemblage de la carcasse inférieure, qui est la composante portant le numéro de série faisant l'objet de l'enregistrement, qui est maintenant prohibée; l'assemblage de la carcasse supérieure, la composante sous pression, n'avait pas été réglementé auparavant. Un propriétaire peut posséder deux ou plusieurs assemblages de carcasse supérieure qui peuvent être montés et démontés sur un assemblage de carcasse inférieure selon les besoins. Si les carcasses supérieures

upper receiver assemblies would be mated with an illegal lower receiver (i.e. smuggled, made from a receiver blank, or manufactured by 3D printing to supply the illegal market) thus creating unmarked untraceable M16, AR-10, AR-15 or M4 firearms, commonly known as "ghost guns." Prohibiting the upper receiver of these rifles will reduce the quantities in circulation and render it much more difficult to illicitly fabricate working firearms.

ne sont pas aussi des dispositifs prohibés, il existerait un important risque pour la sécurité publique du fait que des assemblages de carcasse supérieure seraient couplés à une carcasse inférieure illégale (c.-à-d. passées en contrebande, fabriquées à partir d'une carcasse inachevée, ou fabriquées par impression 3d pour approvisionner le marché illicite), créant ainsi des armes à feu des modèles M16, AR-10, AR-15 ou M4 , non marquées et intraçables, communément appelées « armes fantômes ». Le fait de prévoir que la carcasse supérieure constitue un dispositif prohibé permettra d'en réduire les quantités en circulation et de rendre beaucoup plus difficile la fabrication illicite d'armes à feu qui fonctionnent.

The Amnesty Order encourages compliance with the law and seeks to protect lawful firearms owners who acted in good faith when they acquired the firearms before the coming into force of Regulations and the Amnesty Order. It provides affected owners with a reasonable amount of time to divest themselves of the firearms by any of the means set out in the Amnesty Order. The Government intends to implement a buy-back program which would allow affected owners to declare their intent to participate in the program in order to be eligible for compensation once the owner turns in the firearm. A grandfathering regime would also be made available for owners of the newly prohibited firearms.

Le Décret d'amnistie encourage le respect de la loi et vise à protéger les propriétaires légitimes d'armes à feu qui ont agi de bonne foi lors de l'acquisition des armes à feu avant l'entrée en vigueur du Règlement et du Décret d'amnistie. Il vise à conférer aux propriétaires touchés un délai raisonnable pour se départir de leurs armes à feu par l'un des moyens énumérés dans le Décret. Le gouvernement a l'intention de mettre en œuvre un programme de rachat qui permettrait aux propriétaires touchés de déclarer leur intention de participer au programme afin d'être admissibles à une indemnisation une fois que le propriétaire aura remis l'arme à feu. Un régime de maintien des droits acquis sera également offert aux propriétaires des nouvelles armes à feu nouvellement prohibées.

Implementation, compliance and enforcement, and service standards

Mise en œuvre, conformité et application, et normes de service

The disposal of the prescribed prohibited firearms is dependent on voluntary compliance by affected owners and businesses. Calculation of the compliance rate will be complicated by the lack of information about non-restricted firearms and their owners; the compliance rate for non-restricted firearms will be based on the number of owners who declare themselves to be in possession of one or more affected firearms. The amount of compensation being offered per firearm may also affect the level of compliance. Communications are in place emphasizing the obligation on affected owners to comply with the new prohibitions, and further public communications on the compensation program will follow in the near future.

La disposition des armes à feu prohibées visées dépend de l'observation volontaire par les propriétaires et les entreprises touchés. Le calcul du taux de conformité sera compliqué par le manque d'information sur les armes à feu sans restriction et leurs propriétaires; le taux de conformité pour les armes à feu sans restriction sera fondé sur le nombre de propriétaires qui se déclarent en possession d'une ou de plusieurs des armes à feu visées. Le montant de l'indemnisation offert par arme à feu pourrait aussi avoir une incidence sur le niveau de conformité. Il y a des communications en place qui font ressortir l'obligation que les propriétaires touchés ont de se conformer aux nouvelles prohibitions, et il y aura sous peu d'autres communications publiques sur le programme d'indemnisation.

There is also a risk that affected firearms owners may elect to replace their firearms with models unaffected by the ban, causing a market displacement. This risk may be mitigated by adding additional makes and models to the list of prohibited firearms in the future.

Il existe également un risque que les propriétaires touchés d'armes à feu puissent choisir de remplacer ces armes par des modèles non visés par la prohibition, ce qui pourrait causer une perturbation des échanges commerciaux. Ce risque pourrait être atténué par l'adjonction dans le futur de marques et de modèles additionnels à la liste des armes à feu prohibées.

The amendment to the Classification Regulations and the Amnesty Order come into force on the day on which they are made. The Amnesty Order will expire on April 30, 2022.

La modification du Règlement sur la classification et le Décret d'amnistie entrent en vigueur à la date où ils seront pris. Le Décret d'amnistie prend fin le 30 avril 2022. Ceux

Those who remain in possession of these firearms or devices at the end of the amnesty period could be subject to criminal liability for unlawful possession.

Contact

By mail:

Public Safety Canada
269 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

General enquiries:

Telephone: 1-800-731-4000
Fax: 613-825-0297
Email: ps.firearms-armesafeu.sp@canada.ca

qui restent en possession de ces armes à feu ou dispositifs à la fin de la période d'amnistie pourraient être passibles de poursuites pénales pour possession illégale.

Personne-ressource

Par courrier :

Sécurité publique Canada
269, avenue Laurier Ouest
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Registration
SOR/2020-97 May 1, 2020

CRIMINAL CODE

P.C. 2020-299 May 1, 2020

Her Excellency the Governor General in Council, on the recommendation of the Minister of Justice, pursuant to subsection 117.14(1)[a] of the *Criminal Code*[b], makes the annexed *Order Declaring an Amnesty Period (2020)*.

Order Declaring an Amnesty Period (2020)

Definitions

1 The following definitions apply in this Order.

specified device means a prohibited device referred to in item 4 of Part 4 of the schedule to the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*. (*dispositif visé*)

specified firearm means a prohibited firearm referred to in any of paragraphs 83(a) to (p) or any of items 87 to 96 of Part 1 of the schedule to the *Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited or Restricted*. (*arme à feu visée*)

Amnesty

2 (1) The amnesty period set out in subsection (3) is declared under section 117.14 of the *Criminal Code* for

(a) a person who,

(i) on the day on which this Order comes into force, owns or possesses a specified firearm and holds a licence that was issued under the *Firearms Act*,

(ii) at any time during the amnesty period, is in possession of the specified firearm,

(iii) during the amnesty period, continues to hold the licence while in possession of the specified firearm, and

(iv) if the specified firearm was, on the day before the day on which this Order comes into force, a

[a] S.C. 1995, c. 39, s. 139
[b] R.S., c. C-46

Enregistrement
DORS/2020-97 Le 1er mai 2020

CODE CRIMINEL

C.P. 2020-299 Le 1er mai 2020

Sur recommandation du ministre de la Justice et en vertu du paragraphe 117.14(1)[a] du *Code criminel*[b], Son Excellence la Gouverneure générale en conseil prend le *Décret fixant une période d'amnistie (2020)*, ci-après.

Décret fixant une période d'amnistie (2020)

Définitions

1 Les définitions qui suivent s'appliquent au présent décret.

arme à feu visée Arme à feu prohibée visée par l'un ou l'autre des alinéas 83a) à p) ou l'un ou l'autre des articles 87 à 96 de la partie 1 de l'annexe du *Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés ou à autorisation restreinte*. (*specified firearm*)

dispositif visé Dispositif prohibé visé à l'article 4 de la partie 4 de l'annexe du *Règlement désignant des armes à feu, armes, éléments ou pièces d'armes, accessoires, chargeurs, munitions et projectiles comme étant prohibés ou à autorisation restreinte*. (*specified device*)

Amnistie

2 (1) La période d'amnistie prévue au paragraphe (3) est déclarée en vertu de l'article 117.14 du *Code criminel* en faveur de la personne qui :

a) soit, à la fois :

(i) est, à la date d'entrée en vigueur du présent décret, propriétaire d'une arme à feu visée et titulaire d'un permis délivré en vertu de la *Loi sur les armes à feu* ou en possession d'une arme à feu visée et titulaire d'un tel permis,

(ii) est, au cours de la période d'amnistie, en possession de l'arme à feu visée,

(iii) demeure, au cours de la période d'amnistie, titulaire du permis pendant qu'elle est en possession de l'arme à feu visée,

[a] L.C. 1995, ch. 39, art. 139
[b] L.R., ch. C-46

restricted firearm, held on the day before the day on which this Order comes into force, a registration certificate for the specified firearm that was issued under the *Firearms Act*; or

(b) a person who,

(i) owns or possesses a specified device on the day on which this Order comes into force, and

(ii) at any time during the amnesty period, is in possession of the specified device.

Purpose

(2) The purpose of the amnesty period is to permit the person to

(a) deactivate the specified firearm so that it is no longer a firearm or deactivate the specified device so that it is no longer a prohibited device;

(b) deliver the specified firearm or specified device to a police officer for destruction or other disposal;

(c) if the person is not the owner of the specified firearm or specified device, deliver it to its owner;

(d) export the specified firearm or specified device in accordance with all applicable legal requirements, including the legal requirements of the country to which it is exported;

(e) if the person is a *business*, as defined in subsection 2(1) of the *Firearms Act*, return the specified firearm or specified device to the manufacturer;

(f) transport the specified firearm or specified device by vehicle, for the purpose of doing any of the things described in paragraphs (a) to (e), by a route that, in all the circumstances, is reasonably direct, as long as, during transportation,

(i) in the case of a firearm, it is unloaded and no ammunition is present in the vehicle,

(ii) the firearm or device is in the trunk of the vehicle or, if there is no trunk, the firearm or device is not visible from outside the vehicle, and

(iii) the vehicle is not left unattended;

(g) before doing any of the things described in paragraphs (a) to (f), store the specified firearm in accordance with section 5 or 6 of the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations* according to the classification of the firearm on the day before the day on which it became a prohibited firearm;

(iv) était, le jour précédant la date d'entrée en vigueur du présent décret, titulaire du certificat d'enregistrement, délivré en vertu de la *Loi sur les armes à feu*, de l'arme à feu visée, si celle-ci était, ce jour-là, une arme à feu à autorisation restreinte;

b) soit, à la fois :

(i) est, à la date d'entrée en vigueur du présent décret, propriétaire d'un dispositif visé ou en possession d'un dispositif visé,

(ii) est, au cours de la période d'amnistie, en possession du dispositif visé.

Objectifs

(2) La période d'amnistie est déclarée afin de permettre à la personne :

a) de neutraliser l'arme à feu visée de manière à ce qu'elle ne soit plus une arme à feu ou de neutraliser le dispositif visé de façon à ce qu'il ne soit plus un dispositif prohibé;

b) de remettre à un officier de police l'arme à feu visée ou le dispositif visé pour qu'il en soit disposé par destruction ou autrement;

c) de remettre l'arme à feu visée ou le dispositif visé à son propriétaire, si la personne n'en est pas le propriétaire;

d) d'exporter l'arme à feu visée ou le dispositif visé conformément aux exigences légales applicables, y compris celles du pays d'exportation;

e) si la personne est une *entreprise* au sens du paragraphe 2(1) de la *Loi sur les armes à feu*, de retourner l'arme à feu visée ou le dispositif visé au fabricant;

f) de transporter, afin de faire toute chose visée à l'un des alinéas a) à e), l'arme à feu visée ou le dispositif visé dans un véhicule selon un itinéraire qu'il est raisonnable, dans toutes les circonstances, de considérer comme direct, si les conditions ci-après sont remplies lors du transport :

(i) dans le cas d'une arme à feu, elle n'est pas chargée et il n'y a aucune munition dans le véhicule,

(ii) l'arme à feu ou le dispositif est dans le coffre du véhicule ou, si le véhicule n'est pas muni d'un coffre, l'arme à feu ou le dispositif n'est pas visible de l'extérieur du véhicule,

(iii) le véhicule n'est pas laissé sans surveillance;

g) d'entreposer l'arme à feu visée conformément aux articles 5 ou 6 du *Règlement sur l'entreposage, l'exposition, le transport et le maniement des armes à feu*

(h) transport the specified firearm by vehicle, for the purpose of doing the thing described in paragraph (g), by a route that, in all the circumstances, is reasonably direct, as long as, during transportation,

(i) the firearm is unloaded and no ammunition is present in the vehicle,

(ii) the firearm is in the trunk of the vehicle or, if there is no trunk, the firearm is not visible from outside the vehicle, and

(iii) the vehicle is not left unattended;

(i) if the specified firearm was, on the day before the day on which this Order comes into force, a non-restricted firearm, use it to hunt in the exercise of a right recognized and affirmed by section 35 of the *Constitution Act, 1982* or to sustain the person or their family — until they are able to obtain another firearm for that use — and, for that purpose, transport the firearm in accordance with section 10 of the *Storage, Display, Transportation and Handling of Firearms by Individuals Regulations*; and

(j) possess the specified firearm or specified device before doing any of the things described in paragraphs (a) to (i).

h) de transporter, afin de faire la chose visée à l'alinéa g), l'arme à feu visée dans un véhicule selon un itinéraire qu'il est raisonnable, dans toutes les circonstances, de considérer comme direct, si les conditions ci-après sont remplies lors du transport :

(i) l'arme à feu n'est pas chargée et il n'y a aucune munition dans le véhicule,

(ii) l'arme à feu est dans le coffre du véhicule ou, si le véhicule n'est pas muni d'un coffre, l'arme à feu n'est pas visible de l'extérieur du véhicule,

(iii) le véhicule n'est pas laissé sans surveillance;

i) si l'arme à feu visée était, le jour précédant la date d'entrée en vigueur du présent décret, une arme à feu sans restriction, de l'utiliser pour la chasse dans le cadre de l'exercice de droits reconnus et confirmés par l'article 35 de la *Loi constitutionnelle de 1982* ou pour la chasse afin de subvenir à ses besoins ou à ceux de sa famille, et ce, jusqu'à ce que la personne puisse obtenir une autre arme à feu pour cette utilisation ainsi que, en vue de cette utilisation, de la transporter conformément à l'article 10 du *Règlement sur l'entreposage, l'exposition, le transport et le maniement des armes à feu par des particuliers*;

j) d'être en possession de l'arme à feu visée ou du dispositif visé avant de faire toute chose visée à l'un des alinéas a) à i).

Amnesty period

(3) The amnesty period begins on the day on which this Order comes into force and ends on April 30, 2022.

Coming into force

3 This Order comes into force on the day on which it is made.

N.B. The Regulatory Impact Analysis Statement for this Order appears at page 53, following SOR/2020-96.

Période d'amnistie

(3) La période d'amnistie commence à la date d'entrée en vigueur du présent décret et se termine le 30 avril 2022.

Entrée en vigueur

3 Le présent décret entre en vigueur à la date de sa prise.

N.B. Le résumé de l'étude d'impact de la réglementation de ce décret se trouve à la page 53, à la suite du DORS/2020-96.

first day on which the resolution has been passed by both Houses of Parliament.

Rules

(3) A motion for the adoption of the resolution may be debated in both Houses of Parliament but may not be amended. At the conclusion of the debate, the Speaker of the House of Parliament shall immediately put every question necessary to determine whether or not the motion is concurred in.

Subsequent extensions

(4) The operation of section 83.3 may be further extended in accordance with this section, but

(a) the reference to "at the end of the fifth anniversary of the day on which the *National Security Act, 2017* receives royal assent unless, before the end of that fifth anniversary" in subsection (1) is to be read as a reference to "on the expiry of the most recent extension under this section unless, before that extension expires"; and

(b) the reference to "the fifth anniversary referred to subsection (1)" in subsection (1.2) is to be read as a reference to "the expiry of the most recent extension under this section".

(5) [Repealed, 2019, c. 13, s. 148]

2001, c. 41, s. 4; 2013, c. 9, s. 12; 2019, c. 13, s. 148.

83.33 (1) [Repealed, 2019, c. 13, s. 149]

Transitional provision — section 83.3

(2) In the event that section 83.3 ceases to have effect in accordance with section 83.32, a person detained in custody under section 83.3 shall be released when that section ceases to have effect, except that subsections 83.3(7) to (14) continue to apply to a person who was taken before a judge under subsection 83.3(6) before section 83.3 ceased to have effect.

2001, c. 41, s. 4; 2013, c. 9, s. 13; 2019, c. 13, s. 149.

PART III

Firearms and Other Weapons

Interpretation

Definitions

84 (1) In this Part,

date à laquelle la deuxième chambre a adopté la résolution.

Règles

(3) La motion visant l'adoption de la résolution peut faire l'objet d'un débat dans les deux chambres du Parlement mais ne peut être amendée. Au terme du débat, le président de la chambre du Parlement met immédiatement aux voix toute question nécessaire pour décider de son agrément.

Prorogations subséquentes

(4) L'article 83.3 peut être prorogé par la suite en conformité avec le présent article, auquel cas :

a) la mention « à la fin du cinquième anniversaire de la sanction de la *Loi de 2017 sur la sécurité nationale*, sauf si, avant la fin de ce jour », au paragraphe (1), est remplacée par « à la date d'expiration de la dernière période de prorogation fixée par résolution conformément au présent article, sauf si, à la fin de cette date »;

b) la mention « le cinquième anniversaire visé au paragraphe (1) », au paragraphe (1.2), est remplacée par « l'expiration de la dernière période de prorogation fixée par résolution conformément au présent article ».

(5) [Abrogé, 2019, ch. 13, art. 148]

2001, ch. 41, art. 4; 2013, ch. 9, art. 12; 2019, ch. 13, art. 148.

83.33 (1) [Abrogé, 2019, ch. 13, art. 149]

Disposition transitoire : article 83.3

(2) Dans le cas où, conformément à l'article 83.32, l'article 83.3 cesse d'avoir effet, la personne mise sous garde au titre de cet article est mise en liberté à la date de cessation d'effet de cet article, sauf que les paragraphes 83.3(7) à (14) continuent de s'appliquer à la personne qui a été conduite devant le juge au titre du paragraphe 83.3(6) avant cette date.

2001, ch. 41, art. 4; 2013, ch. 9, art. 13; 2019, ch. 13, art. 149.

PARTIE III

Armes à feu et autres armes

Définitions et interprétation

Définitions

84 (1) Les définitions qui suivent s'appliquent à la présente partie.

ammunition means a cartridge containing a projectile designed to be discharged from a firearm and, without restricting the generality of the foregoing, includes a caseless cartridge and a shot shell; (*munitions*)

antique firearm means

(a) any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or

(b) any firearm that is prescribed to be an antique firearm; (*arme à feu historique*)

authorization means an authorization issued under the *Firearms Act*; (*autorisation*)

automatic firearm means a firearm that is capable of, or assembled or designed and manufactured with the capability of, discharging projectiles in rapid succession during one pressure of the trigger; (*arme automatique*)

cartridge magazine means a device or container from which ammunition may be fed into the firing chamber of a firearm; (*chargeur*)

chief firearms officer means a chief firearms officer as defined in subsection 2(1) of the *Firearms Act*; (*contrôleur des armes à feu*)

Commissioner of Firearms means the Commissioner of Firearms appointed under section 81.1 of the *Firearms Act*; (*commissaire aux armes à feu*)

cross-bow means a device with a bow and a bowstring mounted on a stock that is designed to propel an arrow, a bolt, a quarrel or any similar projectile on a trajectory guided by a barrel or groove and that is capable of causing serious bodily injury or death to a person; (*arbalète*)

export means export from Canada and, for greater certainty, includes the exportation of goods from Canada that are imported into Canada and shipped in transit through Canada; (*exporter*)

firearms officer means a firearms officer as defined in subsection 2(1) of the *Firearms Act*; (*préposé aux armes à feu*)

handgun means a firearm that is designed, altered or intended to be aimed and fired by the action of one hand, whether or not it has been redesigned or subsequently altered to be aimed and fired by the action of both hands; (*arme de poing*)

arbalète Dispositif constitué d'un arc monté sur un fût ou autre monture, conçu pour tirer des flèches, viretons, carreaux ou autres projectiles semblables sur une trajectoire guidée par un barillet ou une rainure et susceptible d'infliger des lésions corporelles graves ou la mort à une personne. (*cross-bow*)

arme à autorisation restreinte Toute arme — qui n'est pas une arme à feu — désignée comme telle par règlement. (*restricted weapon*)

arme à feu à autorisation restreinte

a) Toute arme de poing qui n'est pas une arme à feu prohibée;

b) toute arme à feu — qui n'est pas une arme à feu prohibée — pourvue d'un canon de moins de 470 mm de longueur qui peut tirer des munitions à percussion centrale d'une manière semi-automatique;

c) toute arme à feu conçue ou adaptée pour tirer lorsqu'elle est réduite à une longueur de moins de 660 mm par repliement, emboîtement ou autrement;

d) toute arme à feu désignée comme telle par règlement. (*restricted firearm*)

arme à feu historique Toute arme à feu fabriquée avant 1898 qui n'a pas été conçue ni modifiée pour l'utilisation de munitions à percussion annulaire ou centrale ou toute arme à feu désignée comme telle par règlement. (*antique firearm*)

arme à feu prohibée

a) Arme de poing pourvue d'un canon dont la longueur ne dépasse pas 105 mm ou conçue ou adaptée pour tirer des cartouches de calibre 25 ou 32, sauf celle désignée par règlement pour utilisation dans les compétitions sportives internationales régies par les règles de l'Union internationale de tir;

b) arme à feu sciée, coupée ou modifiée de façon que la longueur du canon soit inférieure à 457 mm ou de façon que la longueur totale de l'arme soit inférieure à 660 mm;

c) arme automatique, qu'elle ait été ou non modifiée pour ne tirer qu'un seul projectile à chaque pression de la détente;

d) arme à feu désignée comme telle par règlement. (*prohibited firearm*)

arme à feu sans restriction Arme à feu qui, selon le cas :

imitation firearm means any thing that imitates a firearm, and includes a replica firearm; (*fausse arme à feu*)

import means import into Canada and, for greater certainty, includes the importation of goods into Canada that are shipped in transit through Canada and exported from Canada; (*importer*)

licence means a licence issued under the *Firearms Act*; (*permis*)

non-restricted firearm means

(a) a firearm that is neither a prohibited firearm nor a restricted firearm, or

(b) a firearm that is prescribed to be a non-restricted firearm; (*arme à feu sans restriction*)

prescribed means prescribed by the regulations; (*Version anglaise seulement*)

prohibited ammunition means ammunition, or a projectile of any kind, that is prescribed to be prohibited ammunition; (*munitions prohibées*)

prohibited device means

(a) any component or part of a weapon, or any accessory for use with a weapon, that is prescribed to be a prohibited device,

(b) a handgun barrel that is equal to or less than 105 mm in length, but does not include any such handgun barrel that is prescribed, where the handgun barrel is for use in international sporting competitions governed by the rules of the International Shooting Union,

(c) a device or contrivance designed or intended to muffle or stop the sound or report of a firearm,

(d) a cartridge magazine that is prescribed to be a prohibited device, or

(e) a replica firearm; (*dispositif prohibé*)

prohibited firearm means

(a) a handgun that

(i) has a barrel equal to or less than 105 mm in length, or

(ii) is designed or adapted to discharge a 25 or 32 calibre cartridge,

(a) n'est ni une arme à feu prohibée ni une arme à feu à autorisation restreinte;

(b) est désignée comme telle par règlement. (*non-restricted firearm*)

arme automatique Arme à feu pouvant tirer rapidement plusieurs projectiles à chaque pression de la détente, ou assemblée ou conçue et fabriquée de façon à pouvoir le faire. (*automatic firearm*)

arme de poing Arme à feu destinée, de par sa construction ou ses modifications, à permettre de viser et tirer à l'aide d'une seule main, qu'elle ait été ou non modifiée subséquemment de façon à requérir l'usage des deux mains. (*handgun*)

arme prohibée

a) Couteau dont la lame s'ouvre automatiquement par gravité ou force centrifuge ou par pression manuelle sur un bouton, un ressort ou autre dispositif incorporé ou attaché au manche;

b) toute arme — qui n'est pas une arme à feu — désignée comme telle par règlement. (*prohibited weapon*)

autorisation Autorisation délivrée en vertu de la *Loi sur les armes à feu*. (*authorization*)

certificat d'enregistrement Certificat d'enregistrement délivré en vertu de la *Loi sur les armes à feu*. (*registration certificate*)

cession Vente, fourniture, échange, don, prêt, envoi, location, transport, expédition, distribution ou livraison. (*transfer*)

chargeur Tout dispositif ou contenant servant à charger la chambre d'une arme à feu. (*cartridge magazine*)

commissaire aux armes à feu Commissaire aux armes à feu nommé en vertu de l'article 81.1 de la *Loi sur les armes à feu*. (*Commissioner of Firearms*)

contrôleur des armes à feu Le contrôleur des armes à feu au sens du paragraphe 2(1) de la *Loi sur les armes à feu*. (*chief firearms officer*)

cour supérieure

a) En Ontario, la Cour supérieure de justice de l'Ontario dans la région, le district ou le comté ou groupe de comtés où le jugement a été prononcé;

b) au Québec, la Cour supérieure;

but does not include any such handgun that is prescribed, where the handgun is for use in international sporting competitions governed by the rules of the International Shooting Union,

(b) a firearm that is adapted from a rifle or shotgun, whether by sawing, cutting or any other alteration, and that, as so adapted,

(i) is less than 660 mm in length, or

(ii) is 660 mm or greater in length and has a barrel less than 457 mm in length,

(c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger, or

(d) any firearm that is prescribed to be a prohibited firearm; (*arme à feu prohibée*)

prohibited weapon means

(a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or

(b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon; (*arme prohibée*)

prohibition order means an order made under this Act or any other Act of Parliament prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things; (*ordonnance d'interdiction*)

Registrar means the Registrar of Firearms appointed under section 82 of the *Firearms Act*; (*directeur*)

registration certificate means a registration certificate issued under the *Firearms Act*; (*certificat d'enregistrement*)

replica firearm means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm; (*réplique*)

restricted firearm means

(a) a handgun that is not a prohibited firearm,

(b) a firearm that

c) au Nouveau-Brunswick, au Manitoba, en Saskatchewan et en Alberta, la Cour du Banc de la Reine;

d) en Nouvelle-Écosse, en Colombie-Britannique, à l'Île-du-Prince-Édouard et dans les territoires, la Cour suprême;

e) à Terre-Neuve-et-Labrador, la Section de première instance de la Cour suprême. (*superior court*)

directeur Le directeur de l'enregistrement des armes à feu nommé en vertu de l'article 82 de la *Loi sur les armes à feu*. (*Registrar*)

dispositif prohibé

a) Élément ou pièce d'une arme, ou accessoire destiné à être utilisé avec une arme, désignés comme tel par règlement;

b) canon d'une arme de poing, qui ne dépasse pas 105 mm de longueur, sauf celui désigné par règlement pour utilisation dans des compétitions sportives internationales régies par les règles de l'Union internationale de tir;

c) appareil ou dispositif propre ou destiné à amortir ou à étouffer le son ou la détonation d'une arme à feu;

d) chargeur désigné comme tel par règlement;

e) réplique. (*prohibited device*)

exporter Exporter hors du Canada, notamment exporter des marchandises importées au Canada et expédiées en transit à travers celui-ci. (*export*)

fausse arme à feu Tout objet ayant l'apparence d'une arme à feu, y compris une réplique. (*imitation firearm*)

importer Importer au Canada, notamment importer des marchandises expédiées en transit à travers le Canada et exportées hors de celui-ci. (*import*)

munitions Cartouches contenant des projectiles destinés à être tirés par des armes à feu, y compris les cartouches sans douille et les cartouches de chasse. (*ammunition*)

munitions prohibées Munitions ou projectiles de toute sorte désignés comme telles par règlement. (*prohibited ammunition*)

ordonnance d'interdiction Toute ordonnance rendue en application de la présente loi ou de toute autre loi fédérale interdisant à une personne d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à

(i) is not a prohibited firearm,

(ii) has a barrel less than 470 mm in length, and

(iii) is capable of discharging centre-fire ammunition in a semi-automatic manner,

(c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or

(d) a firearm of any other kind that is prescribed to be a restricted firearm; (*arme à feu à autorisation restreinte*)

restricted weapon means any weapon, other than a firearm, that is prescribed to be a restricted weapon; (*arme à autorisation restreinte*)

superior court means

(a) in Ontario, the Superior Court of Justice, sitting in the region, district or county or group of counties where the relevant adjudication was made,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(d) in Nova Scotia, British Columbia, Prince Edward Island and a territory, the Supreme Court, and

(e) in Newfoundland and Labrador, the Trial Division of the Supreme Court; (*cour supérieure*)

transfer means sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver. (*cession*)

autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets. (*prohibition order*)

permis Permis délivré en vertu de la *Loi sur les armes à feu*. (*licence*)

préposé aux armes à feu Préposé aux armes à feu au sens du paragraphe 2(1) de la *Loi sur les armes à feu*. (*firearms officer*)

réplique Tout objet, qui n'est pas une arme à feu, conçu de façon à en avoir l'apparence exacte — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence. La présente définition exclut tout objet conçu de façon à avoir l'apparence exacte d'une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou auquel on a voulu donner cette apparence. (*replica firearm*)

Barrel length

(2) For the purposes of this Part, the length of a barrel of a firearm is

(a) in the case of a revolver, the distance from the muzzle of the barrel to the breach end immediately in front of the cylinder, and

(b) in any other case, the distance from the muzzle of the barrel to and including the chamber,

but does not include the length of any component, part or accessory including any component, part or accessory designed or intended to suppress the muzzle flash or reduce recoil.

Longueur du canon

(2) Pour l'application de la présente partie, la longueur du canon se mesure :

a) pour un revolver, par la distance entre la bouche du canon et la tranche de la culasse devant le barillet;

b) pour les autres armes à feu, par la distance entre la bouche du canon et la chambre, y compris celle-ci.

N'est pas comprise la longueur de tout élément, pièce ou accessoire, notamment tout élément, pièce ou accessoire propre ou destiné à étouffer la lueur de départ ou à amortir le recul.

Certain weapons deemed not to be firearms

(3) For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the *Firearms Act*, the following weapons are deemed not to be firearms:

(a) any antique firearm;

(b) any device that is

(i) designed exclusively for signalling, for notifying of distress, for firing blank cartridges or for firing stud cartridges, explosive-driven rivets or other industrial projectiles, and

(ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed;

(c) any shooting device that is

(i) designed exclusively for the slaughtering of domestic animals, the tranquillizing of animals or the discharging of projectiles with lines attached to them, and

(ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed; and

(d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge

(i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules, or

(ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second or an energy exceeding 5.7 Joules.

Armes réputées ne pas être des armes à feu

(3) Pour l'application des articles 91 à 95, 99 à 101, 103 à 107 et 117.03 et des dispositions de la *Loi sur les armes à feu*, sont réputés ne pas être des armes à feu :

a) les armes à feu historiques;

b) tout instrument conçu exclusivement pour envoyer un signal, appeler au secours ou tirer des cartouches à blanc ou pour tirer des cartouches d'ancrage, des rivets explosifs ou autres projectiles industriels, et destiné par son possesseur à servir exclusivement à ces fins;

c) tout instrument de tir conçu exclusivement pour soit abattre des animaux domestiques, soit administrer des tranquillisants à des animaux, soit encore tirer des projectiles auxquels des fils sont attachés, et destiné par son possesseur à servir exclusivement à ces fins;

d) toute autre arme pourvue d'un canon dont il est démontré qu'elle n'est ni conçue ni adaptée pour tirer du plomb, des balles ou tout autre projectile à une vitesse initiale de plus de 152,4 m par seconde ou dont l'énergie initiale est de plus de 5,7 joules ou pour tirer du plomb, des balles ou tout autre projectile conçus ou adaptés pour atteindre une vitesse de plus de 152,4 m par seconde ou une énergie de plus de 5,7 joules.

Exception — antique firearms

(3.1) Notwithstanding subsection (3), an antique firearm is a firearm for the purposes of regulations made under paragraph 117(h) of the *Firearms Act* and subsection 86(2) of this Act.

Exception — arme à feu historique

(3.1) Par dérogation au paragraphe (3), une arme à feu historique est une arme à feu pour l'application des règlements pris en application de l'alinéa 117h) de la *Loi sur les armes à feu* et le paragraphe 86(2) de la présente loi.

Meaning of *holder*

(4) For the purposes of this Part, a person is the holder of

(a) an authorization or a licence if the authorization or licence has been issued to the person and the person continues to hold it; and

Définition de *titulaire*

(4) Pour l'application de la présente partie, est titulaire :

a) d'une autorisation ou d'un permis la personne à qui ce document a été délivré, et ce pendant sa durée de validité;

(b) a registration certificate for a firearm if

(i) the registration certificate has been issued to the person and the person continues to hold it, or

(ii) the person possesses the registration certificate with the permission of its lawful holder.

b) du certificat d'enregistrement d'une arme à feu la personne à qui ce document a été délivré, et ce pendant sa durée de validité, ou quiconque le détient avec la permission de celle-ci pendant cette période.

Subsequent offences

(5) In determining, for the purpose of subsection 85(3), 95(2), 99(2), 100(2) or 103(2), whether a convicted person has committed a second or subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under section 85, 95, 96, 98, 98.1, 99, 100, 102 or 103 or subsection 117.01(1);

(b) an offence under section 244 or 244.2; or

(c) an offence under section 220, 236, 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 if a firearm was used in the commission of the offence.

However, an earlier offence shall not be taken into account if 10 years have elapsed between the day on which the person was convicted of the earlier offence and the day on which the person was convicted of the offence for which sentence is being imposed, not taking into account any time in custody.

Récidive

(5) Lorsqu'il s'agit de décider, pour l'application des paragraphes 85(3), 95(2), 99(2), 100(2) ou 103(2), si la personne déclarée coupable se trouve en état de récidive, il est tenu compte de toute condamnation antérieure à l'égard :

a) d'une infraction prévue aux articles 85, 95, 96, 98, 98.1, 99, 100, 102 ou 103 ou au paragraphe 117.01(1);

b) d'une infraction prévue aux articles 244 ou 244.2;

c) d'une infraction prévue aux articles 220, 236, 239, 272 ou 273, au paragraphe 279(1) ou aux articles 279.1, 344 ou 346, s'il y a usage d'une arme à feu lors de la perpétration.

Toutefois, il n'est pas tenu compte des condamnations précédant de plus de dix ans la condamnation à l'égard de laquelle la peine doit être déterminée, compte non tenu du temps passé sous garde.

Sequence of convictions only

(6) For the purposes of subsection (5), the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences or whether any offence occurred before or after any conviction.

R.S., 1985, c. C-46, s. 84; R.S., 1985, c. 27 (1st Supp.), ss. 185(F), 186; 1991, c. 40, s. 2; 1995, c. 39, s. 139; 1998, c. 30, s. 16; 2003, c. 8, s. 2; 2008, c. 6, s. 2; 2009, c. 22, s. 2; 2015, c. 3, s. 45, c. 27, s. 18.

Précision relative aux condamnations antérieures

(6) Pour l'application du paragraphe (5), il est tenu compte de l'ordre des déclarations de culpabilité et non de l'ordre de perpétration des infractions, ni du fait qu'une infraction a été commise avant ou après une déclaration de culpabilité.

L.R. (1985), ch. C-46, art. 84; L.R. (1985), ch. 27 (1er suppl.), art. 185(F) et 186; 1991, ch. 40, art. 2; 1995, ch. 39, art. 139; 1998, ch. 30, art. 16; 2003, ch. 8, art. 2; 2008, ch. 6, art. 2; 2009, ch. 22, art. 2; 2015, ch. 3, art. 45, ch. 27, art. 18.

Use Offences

Infractions relatives à l'usage

Using firearm in commission of offence

85 (1) Every person commits an offence who uses a firearm, whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm,

(a) while committing an indictable offence, other than an offence under section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (discharging firearm with intent), 244.2 (discharging firearm — recklessness), 272 (sexual

Usage d'une arme à feu lors de la perpétration d'une infraction

85 (1) Commet une infraction quiconque, qu'il cause ou non des lésions corporelles en conséquence ou qu'il ait ou non l'intention d'en causer, utilise une arme à feu :

a) soit lors de la perpétration d'un acte criminel qui ne constitue pas une infraction prévue aux articles 220 (négligence criminelle entraînant la mort), 236 (homicide involontaire coupable), 239 (tentative de meurtre), 244 (décharger une arme à feu avec une intention particulière), 244.2 (décharger une arme à feu

assault with a weapon) or 273 (aggravated sexual assault), subsection 279(1) (kidnapping) or section 279.1 (hostage taking), 344 (robbery) or 346 (extortion);

(b) while attempting to commit an indictable offence; or

(c) during flight after committing or attempting to commit an indictable offence.

Using imitation firearm in commission of offence

(2) Every person commits an offence who uses an imitation firearm

(a) while committing an indictable offence,

(b) while attempting to commit an indictable offence, or

(c) during flight after committing or attempting to commit an indictable offence,

whether or not the person causes or means to cause bodily harm to any person as a result of using the imitation firearm.

Punishment

(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable

(a) in the case of a first offence, except as provided in paragraph (b), to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of one year; and

(b) in the case of a second or subsequent offence, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of three years.

(c) [Repealed, 2008, c. 6, s. 3]

Sentences to be served consecutively

(4) A sentence imposed on a person for an offence under subsection (1) or (2) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2).

R.S., 1985, c. C-46, s. 85; 1995, c. 39, s. 139; 2003, c. 8, s. 3; 2008, c. 6, s. 3; 2009, c. 22, s. 3.

avec insouciance), 272 (agression sexuelle armée) ou 273 (agression sexuelle grave), au paragraphe 279(1) (enlèvement) ou aux articles 279.1 (prise d'otage), 344 (vol qualifié) ou 346 (extorsion);

b) soit lors de la tentative de perpétration d'un acte criminel;

c) soit lors de sa fuite après avoir commis ou tenté de commettre un acte criminel.

Usage d'une fausse arme à feu lors de la perpétration d'une infraction

(2) Commet une infraction quiconque, qu'il cause ou non des lésions corporelles en conséquence ou qu'il ait ou non l'intention d'en causer, utilise une fausse arme à feu :

a) soit lors de la perpétration d'un acte criminel;

b) soit lors de la tentative de perpétration d'un acte criminel;

c) soit lors de sa fuite après avoir commis ou tenté de commettre un acte criminel.

Peine

(3) Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable d'un acte criminel passible :

a) dans le cas d'une première infraction, sauf si l'alinéa b) s'applique, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an;

b) en cas de récidive, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de trois ans.

c) [Abrogé, 2008, ch. 6, art. 3]

Peines consécutives

(4) La peine infligée à une personne pour une infraction prévue aux paragraphes (1) ou (2) est purgée consécutivement à toute autre peine sanctionnant une autre infraction basée sur les mêmes faits et à toute autre peine en cours d'exécution.

L.R. (1985), ch. C-46, art. 85; 1995, ch. 39, art. 139; 2003, ch. 8, art. 3; 2008, ch. 6, art. 3; 2009, ch. 22, art. 3.

Careless use of firearm, etc.

86 (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

Contravention of storage regulations, etc.

(2) Every person commits an offence who contravenes a regulation made under paragraph 117(h) of the *Firearms Act* respecting the storage, handling, transportation, shipping, display, advertising and mail-order sales of firearms and restricted weapons.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment

(i) in the case of a first offence, for a term not exceeding two years, and

(ii) in the case of a second or subsequent offence, for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 86; 1991, c. 40, s. 3; 1995, c. 39, s. 139.

Pointing a firearm

87 (1) Every person commits an offence who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 87; 1995, c. 39, s. 139.

Usage négligent

86 (1) Commet une infraction quiconque, sans excuse légitime, utilise, porte, manipule, expédie, transporte ou entrepose une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées d'une manière négligente ou sans prendre suffisamment de précautions pour la sécurité d'autrui.

Contravention des règlements

(2) Commet une infraction quiconque contrevient à un règlement pris en application de l'alinéa 117h) de la *Loi sur les armes à feu* régissant l'entreposage, la manipulation, le transport, l'expédition, l'exposition, la publicité et la vente postale d'armes à feu et d'armes à autorisation restreinte.

Peine

(3) Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal :

(i) de deux ans, dans le cas d'une première infraction,

(ii) de cinq ans, en cas de récidive;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 86; 1991, ch. 40, art. 3; 1995, ch. 39, art. 139.

Braquer une arme à feu

87 (1) Commet une infraction quiconque braque, sans excuse légitime, une arme à feu, chargée ou non, sur une autre personne.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 87; 1995, ch. 39, art. 139.

Possession Offences

Possession of weapon for dangerous purpose

88 (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 88; 1995, c. 39, s. 139.

Carrying weapon while attending public meeting

89 (1) Every person commits an offence who, without lawful excuse, carries a weapon, a prohibited device or any ammunition or prohibited ammunition while the person is attending or is on the way to attend a public meeting.

Punishment

(2) Every person who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 89; 1995, c. 39, s. 139.

Carrying concealed weapon

90 (1) Every person commits an offence who carries a weapon, a prohibited device or any prohibited ammunition concealed, unless the person is authorized under the *Firearms Act* to carry it concealed.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 90; 1991, c. 28, s. 6, c. 40, ss. 4, 35; 1994, c. 44, s. 6; 1995, c. 39, s. 139.

Unauthorized possession of firearm

91 (1) Subject to subsection (4), every person commits an offence who possesses a prohibited firearm, a

Infractions relatives à la possession

Port d'arme dans un dessein dangereux

88 (1) Commet une infraction quiconque porte ou a en sa possession une arme, une imitation d'arme, un dispositif prohibé, des munitions ou des munitions prohibées dans un dessein dangereux pour la paix publique ou en vue de commettre une infraction.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 88; 1995, ch. 39, art. 139.

Port d'arme à une assemblée publique

89 (1) Commet une infraction quiconque, sans excuse légitime, porte une arme, un dispositif prohibé, des munitions ou des munitions prohibées alors qu'il assiste ou se rend à une assemblée publique.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 89; 1995, ch. 39, art. 139.

Port d'une arme dissimulée

90 (1) Commet une infraction quiconque porte dissimulés une arme, un dispositif prohibé ou des munitions prohibées sans y être autorisé en vertu de la *Loi sur les armes à feu*.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 90; 1991, ch. 28, art. 6, ch. 40, art. 4 et 35; 1994, ch. 44, art. 6; 1995, ch. 39, art. 139.

Possession non autorisée d'une arme à feu

91 (1) Sous réserve du paragraphe (4), commet une infraction quiconque a en sa possession une arme à feu

restricted firearm or a non-restricted firearm without being the holder of

(a) a licence under which the person may possess it; and

(b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

Unauthorized possession of prohibited weapon or restricted weapon

(2) Subject to subsection (4), every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, without being the holder of a licence under which the person may possess it.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Exceptions

(4) Subsections (1) and (2) do not apply to

(a) a person who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or

(b) a person who comes into possession of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,

(i) lawfully disposes of it, or

(ii) obtains a licence under which the person may possess it and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

(5) [Repealed, 2012, c. 6, s. 2]

R.S., 1985, c. C-46, s. 91; 1991, c. 28, s. 7, c. 40, ss. 5, 36; 1995, c. 22, s. 10, c. 39, s. 139; 2008, c. 6, s. 4; 2012, c. 6, s. 2; 2015, c. 27, s. 19.

prohibée, une arme à feu à autorisation restreinte ou une arme à feu sans restriction sans être titulaire :

a) d'une part, d'un permis qui l'y autorise;

b) d'autre part, s'agissant d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de cette arme.

Possession non autorisée d'armes prohibées ou à autorisation restreinte

(2) Sous réserve du paragraphe (4), commet une infraction quiconque a en sa possession une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé — autre qu'une réplique — ou des munitions prohibées sans être titulaire d'un permis qui l'y autorise.

Peine

(3) Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Réserve

(4) Les paragraphes (1) et (2) ne s'appliquent pas :

a) au possesseur d'une arme à feu prohibée, d'une arme à feu à autorisation restreinte, d'une arme à feu sans restriction, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées qui est sous la surveillance directe d'une personne pouvant légalement les avoir en sa possession, et qui s'en sert de la manière dont celle-ci peut légalement s'en servir;

b) à la personne qui entre en possession de tels objets par effet de la loi et qui, dans un délai raisonnable, s'en défait légalement ou obtient un permis qui l'autorise à en avoir la possession, en plus, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de cette arme.

(5) [Abrogé, 2012, ch. 6, art. 2]

L.R. (1985), ch. C-46, art. 91; 1991, ch. 28, art. 7, ch. 40, art. 5 et 36; 1995, ch. 22, art. 10, ch. 39, art. 139; 2008, ch. 6, art. 4; 2012, ch. 6, art. 2; 2015, ch. 27, art. 19.

Possession of firearm knowing its possession is unauthorized

92 (1) Subject to subsection (4), every person commits an offence who possesses a prohibited firearm, a restricted firearm or a non-restricted firearm knowing that the person is not the holder of

(a) a licence under which the person may possess it; and

(b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

Possession of prohibited weapon, device or ammunition knowing its possession is unauthorized

(2) Subject to subsection (4), every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition knowing that the person is not the holder of a licence under which the person may possess it.

Punishment

(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable

(a) in the case of a first offence, to imprisonment for a term not exceeding ten years;

(b) in the case of a second offence, to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; and

(c) in the case of a third or subsequent offence, to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of two years less a day.

Exceptions

(4) Subsections (1) and (2) do not apply to

(a) a person who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or

(b) a person who comes into possession of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a

Possession non autorisée d'une arme à feu : infraction délibérée

92 (1) Sous réserve du paragraphe (4), commet une infraction quiconque a en sa possession une arme à feu prohibée, une arme à feu à autorisation restreinte ou une arme à feu sans restriction sachant qu'il n'est pas titulaire :

a) d'une part, d'un permis qui l'y autorise;

b) d'autre part, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de cette arme.

Possession non autorisée d'autres armes — infraction délibérée

(2) Sous réserve du paragraphe (4), commet une infraction quiconque a en sa possession une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé — autre qu'une réplique — ou des munitions prohibées sachant qu'il n'est pas titulaire d'un permis qui l'y autorise.

Peine

(3) Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable d'un acte criminel passible des peines suivantes :

a) pour une première infraction, un emprisonnement maximal de dix ans;

b) pour la deuxième infraction, un emprisonnement maximal de dix ans, la peine minimale étant de un an;

c) pour chaque récidive subséquente, un emprisonnement maximal de dix ans, la peine minimale étant de deux ans moins un jour.

Réserve

(4) Les paragraphes (1) et (2) ne s'appliquent pas :

a) au possesseur d'une arme à feu prohibée, d'une arme à feu à autorisation restreinte, d'une arme à feu sans restriction, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées qui est sous la surveillance directe d'une personne pouvant légalement les avoir en sa possession, et qui s'en sert de la manière dont celle-ci peut légalement s'en servir;

b) à la personne qui entre en possession de tels objets par effet de la loi et qui, dans un délai raisonnable, s'en défait légalement ou obtient un permis qui

prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,

(i) lawfully disposes of it, or

(ii) obtains a licence under which the person may possess it and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.

(5) and (6) [Repealed, 2012, c. 6, s. 3]

R.S., 1985, c. C-46, s. 92; R.S., 1985, c. 1 (2nd Supp.), s. 213; 1991, c. 40, s. 7; 1995, c. 39, s. 139; 2008, c. 6, s. 5; 2012, c. 6, s. 3; 2015, c. 27, s. 20.

Possession at unauthorized place

93 (1) Subject to subsection (3), every person commits an offence who, being the holder of an authorization or a licence under which the person may possess a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition, possesses them at a place that is

(a) indicated on the authorization or licence as being a place where the person may not possess it;

(b) other than a place indicated on the authorization or licence as being a place where the person may possess it; or

(c) other than a place where it may be possessed under the *Firearms Act*.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(3) Subsection (1) does not apply to a person who possesses a replica firearm.

R.S., 1985, c. C-46, s. 93; 1991, c. 40, s. 8; 1995, c. 39, s. 139; 2008, c. 6, s. 6; 2015, c. 27, s. 21.

Unauthorized possession in motor vehicle

94 (1) Subject to subsections (3) and (4), every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited

l'autorise à en avoir la possession, en plus, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de cette arme.

(5) et (6) [Abrogés, 2012, ch. 6, art. 3]

L.R. (1985), ch. C-46, art. 92; L.R. (1985), ch. 1 (2e suppl.), art. 213; 1991, ch. 40, art. 7; 1995, ch. 39, art. 139; 2008, ch. 6, art. 5; 2012, ch. 6, art. 3; 2015, ch. 27, art. 20.

Possession dans un lieu non autorisé

93 (1) Sous réserve du paragraphe (3), commet une infraction le titulaire d'une autorisation ou d'un permis qui l'autorise à avoir en sa possession une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées, s'il les a en sa possession :

a) soit dans un lieu où cela lui est interdit par l'autorisation ou le permis;

b) soit dans un lieu autre que celui où l'autorisation ou le permis l'y autorise;

c) soit dans un lieu autre que celui où la *Loi sur les armes à feu* l'y autorise.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Réserve

(3) Le paragraphe (1) ne s'applique pas au possesseur d'une réplique.

L.R. (1985), ch. C-46, art. 93; 1991, ch. 40, art. 8; 1995, ch. 39, art. 139; 2008, ch. 6, art. 6; 2015, ch. 27, art. 21.

Possession non autorisée dans un véhicule automobile

94 (1) Sous réserve des paragraphes (3) et (4), commet une infraction quiconque occupe un véhicule automobile où il sait que se trouvent une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation

device, other than a replica firearm, or any prohibited ammunition, unless

(a) in the case of a prohibited firearm, a restricted firearm or a non-restricted firearm,

(i) the person or any other occupant of the motor vehicle is the holder of

(A) a licence under which the person or other occupant may possess the firearm, and

(B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it,

(ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was the holder of

(A) a licence under which that other occupant may possess the firearm, and

(B) in the case of a prohibited firearm or a restricted firearm, an authorization and a registration certificate for it, or

(iii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was a person who could not be convicted of an offence under this Act by reason of sections 117.07 to 117.1 or any other Act of Parliament; and

(b) in the case of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition,

(i) the person or any other occupant of the motor vehicle is the holder of an authorization or a licence under which the person or other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or

(ii) the person had reasonable grounds to believe that any other occupant of the motor vehicle was

(A) the holder of an authorization or a licence under which the other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or

(B) a person who could not be convicted of an offence under this Act by reason of sections 117.07 to 117.1 or any other Act of Parliament.

restreinte, un dispositif prohibé — autre qu'une réplique — ou des munitions prohibées sauf si :

a) dans le cas d'une arme à feu prohibée, d'une arme à feu à autorisation restreinte ou d'une arme à feu sans restriction :

(i) soit celui-ci ou tout autre occupant du véhicule est titulaire d'un permis qui l'autorise à l'avoir en sa possession et, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, est également titulaire de l'autorisation et du certificat d'enregistrement afférents,

(ii) soit celui-ci avait des motifs raisonnables de croire qu'un autre occupant du véhicule était titulaire d'un permis autorisant ce dernier à l'avoir en sa possession et, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, était également titulaire de l'autorisation et du certificat d'enregistrement afférents,

(iii) soit celui-ci avait des motifs raisonnables de croire qu'un autre occupant du véhicule ne pouvait pas être reconnu coupable d'une infraction à la présente loi, en raison des articles 117.07 à 117.1 ou des dispositions de toute autre loi fédérale;

b) dans le cas d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées :

(i) soit celui-ci ou tout autre occupant du véhicule est titulaire d'une autorisation ou d'un permis qui l'autorise à les transporter,

(ii) soit celui-ci avait des motifs raisonnables de croire qu'un autre occupant du véhicule était titulaire d'une autorisation ou d'un permis qui l'autorisait à les transporter ou que ce dernier ne pouvait pas être reconnu coupable d'une infraction à la présente loi, en raison des articles 117.07 à 117.1 ou des dispositions de toute autre loi fédérale.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(3) Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, weapon, device or ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.

Exception

(4) Subsection (1) does not apply to an occupant of a motor vehicle when the occupant or any other occupant of the motor vehicle is a person who came into possession of the firearm, weapon, device or ammunition by the operation of law.

(5) [Repealed, 2012, c. 6, s. 4]

R.S., 1985, c. C-46, s. 94; 1995, c. 39, s. 139; 2008, c. 6, s. 7; 2012, c. 6, s. 4; 2015, c. 27, s. 22.

Possession of prohibited or restricted firearm with ammunition

95 (1) Subject to subsection (3), every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, without being the holder of

(a) an authorization or a licence under which the person may possess the firearm in that place; and

(b) the registration certificate for the firearm.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(i) in the case of a first offence, three years, and

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Réserve

(3) Le paragraphe (1) ne s'applique pas à l'occupant du véhicule automobile qui, se rendant compte de la présence de l'arme, du dispositif ou des munitions, quitte le véhicule ou tente de le faire dès que les circonstances le permettent.

Réserve

(4) Le paragraphe (1) ne s'applique pas à l'occupant du véhicule automobile lorsque lui-même ou un autre occupant du véhicule est entré en possession de l'arme, du dispositif ou des munitions par effet de la loi.

(5) [Abrogé, 2012, ch. 6, art. 4]

L.R. (1985), ch. C-46, art. 94; 1995, ch. 39, art. 139; 2008, ch. 6, art. 7; 2012, ch. 6, art. 4; 2015, ch. 27, art. 22.

Possession d'une arme à feu prohibée ou à autorisation restreinte avec des munitions

95 (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession dans un lieu quelconque soit une arme à feu prohibée ou une arme à feu à autorisation restreinte chargées, soit une telle arme non chargée avec des munitions facilement accessibles qui peuvent être utilisées avec celle-ci, sans être titulaire à la fois :

a) d'une autorisation ou d'un permis qui l'y autorise dans ce lieu;

b) du certificat d'enregistrement de l'arme.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

(i) de trois ans, dans le cas d'une première infraction,

(ii) de cinq ans, en cas de récidive;

(ii) in the case of a second or subsequent offence, five years; or

(b) is guilty of an offence punishable on summary conviction.

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Exception

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

R.S., 1985, c. C-46, s. 95; 1991, c. 28, s. 8, c. 40, ss. 9, 37; 1993, c. 25, s. 93; 1995, c. 39, s. 139; 2008, c. 6, s. 8; 2012, c. 6, s. 5(E); 2019, c. 25, s. 25.

Réserve

(3) Le paragraphe (1) ne s'applique pas à quiconque utilise une arme à feu sous la surveillance directe d'une personne qui en a la possession légale, de la manière dont celle-ci peut légalement s'en servir.

L.R. (1985), ch. C-46, art. 95; 1991, ch. 28, art. 8, ch. 40, art. 9 et 37; 1993, ch. 25, art. 93; 1995, ch. 39, art. 139; 2008, ch. 6, art. 8; 2012, ch. 6, art. 5(A); 2019, ch. 25, art. 25.

Possession of weapon obtained by commission of offence

96 (1) Subject to subsection (3), every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person knows was obtained by the commission in Canada of an offence or by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence.

Possession d'une arme obtenue lors de la perpétration d'une infraction

96 (1) Sous réserve du paragraphe (3), commet une infraction quiconque a en sa possession une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées qu'il sait avoir été obtenus par suite soit de la perpétration d'une infraction au Canada, soit d'une action ou omission qui, au Canada, aurait constitué une infraction.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Exception

(3) Subsection (1) does not apply to a person who comes into possession of anything referred to in that subsection by the operation of law and who lawfully disposes of it within a reasonable period after acquiring possession of it.

R.S., 1985, c. C-46, s. 96; 1995, c. 39, s. 139; 2019, c. 25, s. 26.

Réserve

(3) Le paragraphe (1) ne s'applique pas à la personne qui entre en possession par effet de la loi de tout objet visé à ce paragraphe et qui s'en défait légalement dans un délai raisonnable.

L.R. (1985), ch. C-46, art. 96; 1995, ch. 39, art. 139; 2019, ch. 25, art. 26.

97 [Repealed before coming into force, 2008, c. 20, s. 3]

97 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

Breaking and entering to steal firearm

98 (1) Every person commits an offence who

(a) breaks and enters a place with intent to steal a firearm located in it;

(b) breaks and enters a place and steals a firearm located in it; or

Introduction par effraction pour voler une arme à feu

98 (1) Commet une infraction quiconque, selon le cas :

a) s'introduit en un lieu par effraction avec l'intention d'y voler une arme à feu;

b) s'introduit en un lieu par effraction et y vole une arme à feu;

(c) breaks out of a place after

(i) stealing a firearm located in it, or

(ii) entering the place with intent to steal a firearm located in it.

Definitions of *break* and *place*

(2) In this section, ***break*** has the same meaning as in section 321, and ***place*** means any building or structure — or part of one — and any motor vehicle, vessel, aircraft, railway vehicle, container or trailer.

Entrance

(3) For the purposes of this section,

(a) a person enters as soon as any part of his or her body or any part of an instrument that he or she uses is within any thing that is being entered; and

(b) a person is deemed to have broken and entered if he or she

(i) obtained entrance by a threat or an artifice or by collusion with a person within, or

(ii) entered without lawful justification or excuse by a permanent or temporary opening.

Punishment

(4) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life.

R.S., 1985, c. C-46, s. 98; R.S., 1985, c. 27 (1st Supp.), s. 13; 1991, c. 40, s. 11; 1995, c. 39, s. 139; 2008, c. 6, s. 9.

Robbery to steal firearm

98.1 Every person who commits a robbery within the meaning of section 343 with intent to steal a firearm or in the course of which he or she steals a firearm commits an indictable offence and is liable to imprisonment for life.

2008, c. 6, s. 9.

Trafficking Offences

Weapons trafficking

99 (1) Every person commits an offence who

(a) manufactures or transfers, whether or not for consideration, or

c) sort d'un lieu par effraction après :

(i) soit y avoir volé une arme à feu,

(ii) soit s'y être introduit avec l'intention d'y voler une arme à feu.

Définitions de *effraction* et *lieu*

(2) Pour l'application du présent article, ***effraction*** s'entend au sens de l'article 321 et ***lieu*** s'entend de tout bâtiment ou construction — ou partie de ceux-ci —, véhicule à moteur, navire, aéronef, matériel ferroviaire, contenant ou remorque.

Introduction

(3) Pour l'application du présent article :

a) une personne s'introduit dès qu'une partie de son corps ou une partie d'un instrument qu'elle utilise se trouve à l'intérieur de toute chose qui fait l'objet de l'introduction;

b) une personne est réputée s'être introduite par effraction dans les cas suivants :

(i) elle est parvenue à entrer au moyen d'une menace ou d'un artifice ou par collusion avec une personne se trouvant à l'intérieur,

(ii) elle s'est introduite sans justification ou excuse légitime par une ouverture permanente ou temporaire.

Peine

(4) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible de l'emprisonnement à perpétuité.

L.R. (1985), ch. C-46, art. 98; L.R. (1985), ch. 27 (1er suppl.), art. 13; 1991, ch. 40, art. 11; 1995, ch. 39, art. 139; 2008, ch. 6, art. 9.

Vol qualifié visant une arme à feu

98.1 Quiconque commet un vol qualifié au sens de l'article 343 avec l'intention de voler une arme à feu ou au cours duquel il vole une arme à feu commet un acte criminel passible de l'emprisonnement à perpétuité.

2008, ch. 6, art. 9.

Infractions relatives au trafic

Trafic d'armes

99 (1) Commet une infraction quiconque fabrique ou cède, même sans contrepartie, ou offre de fabriquer ou de céder une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une

(b) offers to do anything referred to in paragraph (a) in respect of

a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition knowing that the person is not authorized to do so under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées sachant qu'il n'y est pas autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements.

Punishment — firearm

(2) Every person who commits an offence under subsection (1) when the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device, any ammunition or any prohibited ammunition is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(a) in the case of a first offence, three years; and

(b) in the case of a second or subsequent offence, five years.

Peine : arme à feu

(2) Dans le cas où l'objet en cause est une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, un dispositif prohibé ou des munitions prohibées ou non, quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

a) de trois ans, dans le cas d'une première infraction;

b) de cinq ans, en cas de récidive.

Punishment — other cases

(3) In any other case, a person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of one year.

R.S., 1985, c. C-46, s. 99; 1995, c. 39, s. 139; 2008, c. 6, s. 10; 2015, c. 27, s. 23.

Peine : autres

(3) Dans tous les autres cas, quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an.

L.R. (1985), ch. C-46, art. 99; 1995, ch. 39, art. 139; 2008, ch. 6, art. 10; 2015, ch. 27, art. 23.

Possession for purpose of weapons trafficking

100 (1) Every person commits an offence who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition for the purpose of

(a) transferring it, whether or not for consideration, or

(b) offering to transfer it,

knowing that the person is not authorized to transfer it under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

Possession en vue de faire le trafic d'armes

100 (1) Commet une infraction quiconque a en sa possession une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées en vue de les céder, même sans contrepartie, ou d'offrir de les céder, sachant qu'il n'y est pas autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements.

Punishment — firearm

(2) Every person who commits an offence under subsection (1) when the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device, any ammunition or any prohibited ammunition is guilty of an indictable offence and liable

Peine : arme à feu

(2) Dans le cas où l'objet en cause est une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, un dispositif prohibé ou des

to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(a) in the case of a first offence, three years; and

(b) in the case of a second or subsequent offence, five years.

Punishment — other cases

(3) In any other case, a person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of one year.

R.S., 1985, c. C-46, s. 100; R.S., 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), ss. 14, 203, c. 27 (2nd Supp.), s. 10, c. 1 (4th Supp.), s. 18(F); 1990, c. 16, s. 2, c. 17, s. 8; 1991, c. 40, s. 12; 1992, c. 51, s. 33; 1995, c. 22, ss. 10, 18(F), c. 39, s. 139; 1996, c. 19, s. 65; 2008, c. 6, s. 11; 2015, c. 27, s. 24.

Transfer without authority

101 (1) Every person commits an offence who transfers a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition to any person otherwise than under the authority of the *Firearms Act* or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 101; 1991, c. 40, s. 13; 1995, c. 39, s. 139; 2015, c. 27, s. 25.

Assembling Offence

Making automatic firearm

102 (1) Every person commits an offence who, without lawful excuse, alters a firearm so that it is capable of, or manufactures or assembles any firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger.

Punishment

(2) Every person who commits an offence under subsection (1)

munitions prohibées ou non, quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

a) de trois ans, dans le cas d'une première infraction;

b) de cinq ans, en cas de récidive.

Peine : autres

(3) Dans tous les autres cas, quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an.

L.R. (1985), ch. C-46, art. 100; L.R. (1985), ch. 11 (1er suppl.), art. 2, ch. 27 (1er suppl.), art. 14 et 203, ch. 27 (2e suppl.), art. 10, ch. 1 (4e suppl.), art. 18(F); 1990, ch. 16, art. 2, ch. 17, art. 8; 1991, ch. 40, art. 12; 1992, ch. 51, art. 33; 1995, ch. 22, art. 10 et 18(F), ch. 39, art. 139; 1996, ch. 19, art. 65; 2008, ch. 6, art. 11; 2015, ch. 27, art. 24.

Cession illégale

101 (1) Commet une infraction quiconque cède une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées à une personne sans y être autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 101; 1991, ch. 40, art. 13; 1995, ch. 39, art. 139; 2015, ch. 27, art. 25.

Infraction relative à l'assemblage

Fabrication d'une arme automatique

102 (1) Commet une infraction quiconque, sans excuse légitime, modifie ou fabrique une arme à feu de façon à ce qu'elle puisse tirer rapidement plusieurs projectiles à chaque pression de la détente ou assemble des pièces d'armes à feu en vue d'obtenir une telle arme.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 102; R.S., 1985, c. 27 (1st Supp.), s. 203; 1991, c. 28, s. 9, c. 40, s. 14; 1995, c. 39, s. 139; 2019, c. 25, s. 27.

Export and Import Offences

Importing or exporting knowing it is unauthorized

103 (1) Every person commits an offence who imports or exports

(a) a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or

(b) any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,

knowing that the person is not authorized to do so under the *Firearms Act* or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment — firearm

(2) Every person who commits an offence under subsection (1) when the object in question is a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited device or any prohibited ammunition is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of

(a) in the case of a first offence, three years; and

(b) in the case of a second or subsequent offence, five years.

Punishment — other cases

(2.1) In any other case, a person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of one year.

(3) [Repealed, 2019, c. 25, s. 28]

R.S., 1985, c. C-46, s. 103; 1991, c. 40, s. 15; 1995, c. 39, s. 139; 2008, c. 6, s. 12; 2015, c. 27, s. 26; 2019, c. 25, s. 28.

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 102; L.R. (1985), ch. 27 (1er suppl.), art. 203; 1991, ch. 28, art. 9, ch. 40, art. 14; 1995, ch. 39, art. 139; 2019, ch. 25, art. 27.

Infractions relatives à l'importation ou l'exportation

Importation ou exportation non autorisées — infraction délibérée

103 (1) Commet une infraction quiconque, sachant qu'il n'y est pas autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements, importe ou exporte :

a) soit une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

b) soit quelque élément ou pièce conçu exclusivement pour être utilisé dans la fabrication ou l'assemblage d'armes automatiques.

Peine : arme à feu

(2) Dans le cas où l'objet en cause est une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, un dispositif prohibé ou des munitions prohibées, quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant :

a) de trois ans, dans le cas d'une première infraction;

b) de cinq ans, en cas de récidive.

Peine : autres

(2.1) Dans tous les autres cas, quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans, la peine minimale étant de un an.

(3) [Abrogé, 2019, ch. 25, art. 28]

L.R. (1985), ch. C-46, art. 103; 1991, ch. 40, art. 15; 1995, ch. 39, art. 139; 2008, ch. 6, art. 12; 2015, ch. 27, art. 26; 2019, ch. 25, art. 28.

Unauthorized importing or exporting

104 (1) Every person commits an offence who imports or exports

(a) a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or

(b) any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,

otherwise than under the authority of the *Firearms Act* or any other Act of Parliament or any regulations made under an Act of Parliament.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

(3) [Repealed, 2019, c. 25, s. 29]

R.S., 1985, c. C-46, s. 104; 1991, c. 40, s. 16; 1995, c. 39, s. 139; 2015, c. 27, s. 27; 2019, c. 25, s. 29.

Offences relating to Lost, Destroyed or Defaced Weapons, etc.

Losing or finding

105 (1) Every person commits an offence who

(a) having lost a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition, an authorization, a licence or a registration certificate, or having had it stolen from the person's possession, does not with reasonable despatch report the loss to a peace officer, to a firearms officer or a chief firearms officer; or

(b) on finding a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person has reasonable grounds to believe has been lost or abandoned, does not with reasonable despatch deliver it to a peace officer, a firearms officer or a chief firearms

Importation ou exportation non autorisées

104 (1) Commet une infraction quiconque, sans y être autorisé en vertu de la *Loi sur les armes à feu*, de toute autre loi fédérale ou de leurs règlements, importe ou exporte :

a) soit une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

b) soit quelque élément ou pièce conçu exclusivement pour être utilisé dans la fabrication ou l'assemblage d'armes automatiques.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

(3) [Abrogé, 2019, ch. 25, art. 29]

L.R. (1985), ch. C-46, art. 104; 1991, ch. 40, art. 16; 1995, ch. 39, art. 139; 2015, ch. 27, art. 27; 2019, ch. 25, art. 29.

Infractions relatives aux armes perdues, volées, trouvées, détruites ou maquillées

Armes perdues, volées ou trouvées

105 (1) Commet une infraction quiconque :

a) ayant perdu ou s'étant fait voler une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions prohibées, une autorisation, un permis ou un certificat d'enregistrement, omet de signaler, avec une diligence raisonnable, la perte ou le vol à un agent de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu;

b) après avoir trouvé une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées, qu'il croit pour des motifs raisonnables avoir été perdus ou abandonnés, omet de les remettre, avec une diligence raisonnable, à un agent

officer or report the finding to a peace officer, a firearms officer or a chief firearms officer.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 105; 1991, c. 28, s. 10, c. 40, ss. 18, 39; 1994, c. 44, s. 7; 1995, c. 39, s. 139; 2015, c. 27, s. 28.

Destroying

106 (1) Every person commits an offence who

(a) after destroying any prohibited firearm, restricted firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or

(b) on becoming aware of the destruction of any prohibited firearm, restricted firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition that was in the person's possession before its destruction,

does not with reasonable despatch report the destruction to a peace officer, firearms officer or chief firearms officer.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

R.S., 1985, c. C-46, s. 106; R.S., 1985, c. 27 (1st Supp.), s. 203; 1991, c. 40, s. 19; 1995, c. 22, s. 10, c. 39, s. 139; 2012, c. 6, s. 6.

False statements

107 (1) Every person commits an offence who knowingly makes, before a peace officer, firearms officer or chief firearms officer, a false report or statement concerning the loss, theft or destruction of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition, an authorization, a licence or a registration certificate.

de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu ou de signaler à une telle personne qu'il les a trouvés.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 105; 1991, ch. 28, art. 10, ch. 40, art. 18 et 39; 1994, ch. 44, art. 7; 1995, ch. 39, art. 139; 2015, ch. 27, art. 28.

Destruction

106 (1) Commet une infraction quiconque, après avoir détruit une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées ou après s'être rendu compte que de tels objets, auparavant en sa possession, ont été détruits, omet de signaler, avec une diligence raisonnable, leur destruction à un agent de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

L.R. (1985), ch. C-46, art. 106; L.R. (1985), ch. 27 (1er suppl.), art. 203; 1991, ch. 40, art. 19; 1995, ch. 22, art. 10, ch. 39, art. 139; 2012, ch. 6, art. 6.

Fausse déclaration

107 (1) Commet une infraction quiconque fait sciemment une fausse déclaration à un agent de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu concernant la perte, le vol ou la destruction d'une arme à feu prohibée, d'une arme à feu à autorisation restreinte, d'une arme à feu sans restriction, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé, de munitions prohibées, d'une autorisation, d'un permis ou d'un certificat d'enregistrement.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Definition of *report* or *statement*

(3) In this section, ***report*** or ***statement*** means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not.

R.S., 1985, c. C-46, s. 107; 1991, c. 40, s. 20; 1995, c. 39, s. 139; 2015, c. 27, s. 29.

Tampering with serial number

108 (1) Every person commits an offence who, without lawful excuse,

(a) alters, defaces or removes a serial number on a firearm; or

(b) possesses a firearm knowing that the serial number on it has been altered, defaced or removed.

Punishment

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(3) No person is guilty of an offence under paragraph (1)(b) by reason only of possessing a prohibited firearm or restricted firearm the serial number on which has been altered, defaced or removed, if that serial number has been replaced and a registration certificate in respect of the firearm has been issued setting out a new serial number for the firearm.

Evidence

(4) In proceedings for an offence under subsection (1), evidence that a person possesses a firearm the serial number on which has been wholly or partially obliterated otherwise than through normal use over time is, in the absence of evidence to the contrary, proof that the person

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Définition de *déclaration*

(3) Au présent article, ***déclaration*** s'entend d'une assertion de fait, d'opinion, de croyance ou de connaissance, qu'elle soit essentielle ou non et qu'elle soit admissible en preuve ou non.

L.R. (1985), ch. C-46, art. 107; 1991, ch. 40, art. 20; 1995, ch. 39, art. 139; 2015, ch. 27, art. 29.

Modification du numéro de série

108 (1) Commet une infraction quiconque, sans excuse légitime :

a) soit modifie, maquille ou efface un numéro de série sur une arme à feu;

b) soit a en sa possession une arme à feu sachant que son numéro de série a été modifié, maquillé ou effacé.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Exception

(3) Nul ne peut être reconnu coupable d'une infraction visée à l'alinéa (1)b) du seul fait de la possession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte dont le numéro de série a été modifié, maquillé ou effacé, si ce numéro a été remplacé et qu'un certificat d'enregistrement mentionnant le nouveau numéro de série a été délivré à l'égard de cette arme.

Preuve

(4) Dans toute poursuite intentée dans le cadre du paragraphe (1), la possession d'une arme à feu dont le numéro de série a été effacé en totalité ou en partie autrement que par l'usure normale fait foi, sauf preuve contraire, de

possesses the firearm knowing that the serial number on it has been altered, defaced or removed.

R.S., 1985, c. C-46, s. 108; 1991, c. 40, s. 20; 1995, c. 39, s. 139; 2012, c. 6, s. 7; 2018, c. 29, s. 6.

Prohibition Orders

Mandatory prohibition order

109 (1) Where a person is convicted, or discharged under section 730, of

(a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

(a.1) an indictable offence in the commission of which violence was used, threatened or attempted against

(i) the person's intimate partner,

(ii) a child or parent of the person or of anyone referred to in subparagraph (i), or

(iii) any person who resides with the person or with anyone referred to in subparagraph (i) or (ii),

(b) an offence under subsection 85(1) (using firearm in commission of offence), subsection 85(2) (using imitation firearm in commission of offence), 95(1) (possession of prohibited or restricted firearm with ammunition), 99(1) (weapons trafficking), 100(1) (possession for purpose of weapons trafficking), 102(1) (making automatic firearm), 103(1) (importing or exporting knowing it is unauthorized) or section 264 (criminal harassment),

(c) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*,

(c.1) an offence relating to the contravention of subsection 9(1) or (2), 10(1) or (2), 11(1) or (2), 12(1), (4), (5), (6) or (7), 13(1) or 14(1) of the *Cannabis Act*, or

(d) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance and, at the time of the offence, the person was prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,

the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for

la connaissance par le possesseur de l'arme du fait que ce numéro a été modifié, maquillé ou effacé.

L.R. (1985), ch. C-46, art. 108; 1991, ch. 40, art. 20; 1995, ch. 39, art. 139; 2012, ch. 6, art. 7; 2018, ch. 29, art. 6.

Ordonnance d'interdiction

Ordonnance d'interdiction obligatoire

109 (1) Le tribunal doit, en plus de toute autre peine qu'il lui inflige ou de toute autre condition qu'il lui impose dans l'ordonnance d'absolution, rendre une ordonnance interdisant au contrevenant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives pour la période fixée en application des paragraphes (2) ou (3), lorsqu'il le déclare coupable ou l'absout en vertu de l'article 730, selon le cas :

a) d'un acte criminel passible d'une peine maximale d'emprisonnement égale ou supérieure à dix ans et perpétré avec usage, tentative ou menace de violence contre autrui;

a.1) d'un acte criminel perpétré avec usage, tentative ou menace de violence contre l'une des personnes suivantes :

(i) son partenaire intime,

(ii) l'enfant, le père ou la mère du contrevenant ou de l'une des personnes mentionnées au sous-alinéa (i),

(iii) toute personne qui réside avec le contrevenant ou l'une des personnes mentionnées aux sous-alinéas (i) ou (ii);

b) d'une infraction visée aux paragraphes 85(1) (usage d'une arme à feu lors de la perpétration d'une infraction), 85(2) (usage d'une fausse arme à feu lors de la perpétration d'une infraction), 95(1) (possession d'une arme à feu prohibée ou à autorisation restreinte avec des munitions), 99(1) (trafic d'armes), 100(1) (possession en vue de faire le trafic d'armes), 102(1) (fabrication d'une arme automatique), 103(1) (importation ou exportation non autorisées — infraction délibérée) ou à l'article 264 (harcèlement criminel);

c) d'une infraction relative à la contravention des paragraphes 5(1) ou (2), 6(1) ou (2) ou 7(1) de la *Loi réglementant certaines drogues et autres substances*;

c.1) d'une infraction relative à la contravention des paragraphes 9(1) ou (2), 10(1) ou (2), 11(1) ou (2),

that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.

Duration of prohibition order — first offence

(2) An order made under subsection (1) shall, in the case of a first conviction for or discharge from the offence to which the order relates, prohibit the person from possessing

(a) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that

(i) begins on the day on which the order is made, and

(ii) ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence; and

(b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

Duration of prohibition order — subsequent offences

(3) An order made under subsection (1) shall, in any case other than a case described in subsection (2), prohibit the person from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for life.

Definition of *release from imprisonment*

(4) In subparagraph (2)(a)(ii), ***release from imprisonment*** means release from confinement by reason of expiration of sentence, commencement of statutory release or grant of parole.

Application of ss. 113 to 117

(5) Sections 113 to 117 apply in respect of every order made under subsection (1).

R.S., 1985, c. C-46, s. 109; R.S., 1985, c. 27 (1st Supp.), s. 185(F); 1991, c. 40, s. 21; 1995, c. 39, ss. 139, 190; 1996, c. 19, s. 65.1; 2003, c. 8, s. 4; 2015, c. 27, s. 30; 2018, c. 16, s. 208; 2019, c. 25, s. 30.

12(1), (4), (5), (6) ou (7), 13(1) ou 14(1) de la *Loi sur le cannabis*;

d) d'une infraction relative à une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives, perpétrée alors que celui-ci était sous le coup d'une ordonnance, rendue en vertu de la présente loi ou de toute autre loi fédérale, lui en interdisant la possession.

Durée de l'ordonnance — première infraction

(2) En cas de condamnation ou d'absolution du contrevenant pour une première infraction, l'ordonnance interdit au contrevenant d'avoir en sa possession :

a) des armes à feu — autres que des armes à feu prohibées ou des armes à feu à autorisation restreinte — , arbalètes, armes à autorisation restreinte, munitions et substances explosives pour une période commençant à la date de l'ordonnance et se terminant au plus tôt dix ans après sa libération ou, s'il n'est pas emprisonné ni passible d'emprisonnement, après sa déclaration de culpabilité ou son absolution;

b) des armes à feu prohibées, armes à feu à autorisation restreinte, armes prohibées, dispositifs prohibés et munitions prohibées, et ce à perpétuité.

Durée de l'ordonnance — récidives

(3) Dans tous les cas autres que ceux visés au paragraphe (2), l'interdiction est perpétuelle.

Définition de *libération*

(4) À l'alinéa (2)a), ***libération*** s'entend de l'élargissement entraîné par l'expiration de la peine ou le début soit de la libération d'office soit d'une libération conditionnelle.

Application des articles 113 à 117

(5) Les articles 113 à 117 s'appliquent à l'ordonnance rendue en application du paragraphe (1).

L.R. (1985), ch. C-46, art. 109; L.R. (1985), ch. 27 (1er suppl.), art. 185(F); 1991, ch. 40, art. 21; 1995, ch. 39, art. 139 et 190; 1996, ch. 19, art. 65.1; 2003, ch. 8, art. 4; 2015, ch. 27, art. 30; 2018, ch. 16, art. 208; 2019, ch. 25, art. 30.

Discretionary prohibition order

110 (1) Where a person is convicted, or discharged under section 730, of

(a) an offence, other than an offence referred to in any of paragraphs 109(1)(a) to (c.1), in the commission of which violence against a person was used, threatened or attempted, or

(b) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance and, at the time of the offence, the person was not prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,

the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, consider whether it is desirable, in the interests of the safety of the person or of any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court decides that it is so desirable, the court shall so order.

Duration of prohibition order

(2) An order made under subsection (1) against a person begins on the day on which the order is made and ends not later than ten years after the person's release from imprisonment after conviction for the offence to which the order relates or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence.

Exception

(2.1) Despite subsection (2), an order made under subsection (1) may be imposed for life or for any shorter duration if, in the commission of the offence, violence was used, threatened or attempted against

(a) the person's intimate partner;

(b) a child or parent of the person or of anyone referred to in paragraph (a); or

(c) any person who resides with the person or with anyone referred to in paragraph (a) or (b).

Ordonnance d'interdiction discrétionnaire

110 (1) Le tribunal doit, s'il en arrive à la conclusion qu'il est souhaitable pour la sécurité du contrevenant ou pour celle d'autrui de le faire, en plus de toute autre peine qu'il lui inflige ou de toute autre condition qu'il lui impose dans l'ordonnance d'absolution, rendre une ordonnance lui interdisant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, lorsqu'il le déclare coupable ou l'absout en vertu de l'article 730 :

a) soit d'une infraction, autre que celle visée à l'un des alinéas 109(1)a) à c.1), perpétrée avec usage, tentative ou menace de violence contre autrui;

b) soit d'une infraction relative à une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives, perpétrée alors que celui-ci n'est pas sous le coup d'une ordonnance, rendue en vertu de la présente loi ou de toute autre loi fédérale, lui en interdisant la possession.

Durée de l'ordonnance

(2) Le cas échéant, la période d'interdiction — commençant sur-le-champ — expire au plus tard dix ans après la libération du contrevenant ou, s'il n'est pas emprisonné ni passible d'emprisonnement, après sa déclaration de culpabilité ou son absolution.

Exception

(2.1) Malgré le paragraphe (2), l'ordonnance d'interdiction peut s'appliquer soit à perpétuité soit pour toute autre période plus courte si l'infraction a été perpétrée avec usage, tentative ou menace de violence contre l'une des personnes suivantes :

a) le partenaire intime du contrevenant;

b) l'enfant, le père ou la mère du contrevenant ou de l'une des personnes mentionnées à l'alinéa a);

c) toute personne qui réside avec le contrevenant ou l'une des personnes mentionnées aux alinéas a) ou b).

Reasons

(3) Where the court does not make an order under subsection (1), or where the court does make such an order but does not prohibit the possession of everything referred to in that subsection, the court shall include in the record a statement of the court's reasons for not doing so.

Definition of *release from imprisonment*

(4) In subsection (2), ***release from imprisonment*** means release from confinement by reason of expiration of sentence, commencement of statutory release or grant of parole.

Application of ss. 113 to 117

(5) Sections 113 to 117 apply in respect of every order made under subsection (1).

R.S., 1985, c. C-46, s. 110; 1991, c. 40, ss. 23, 40; 1995, c. 39, ss. 139, 190; 2015, c. 27, s. 31; 2018, c. 16, s. 209; 2019, c. 25, s. 31.

110.1 [Repealed, 2019, c. 25, s. 32]

Application for prohibition order

111 (1) A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, where the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that it is not desirable in the interests of the safety of the person against whom the order is sought or of any other person that the person against whom the order is sought should possess any such thing.

Date for hearing and notice

(2) On receipt of an application made under subsection (1), the provincial court judge shall fix a date for the hearing of the application and direct that notice of the hearing be given, in such manner as the provincial court judge may specify, to the person against whom the order is sought.

Hearing of application

(3) Subject to subsection (4), at the hearing of an application made under subsection (1), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order is sought.

Where hearing may proceed *ex parte*

(4) A provincial court judge may proceed *ex parte* to hear and determine an application made under subsection (1) in the absence of the person against whom the

Motifs

(3) S'il ne rend pas d'ordonnance ou s'il en rend une dont l'interdiction ne vise pas tous les objets visés au paragraphe (1), le tribunal est tenu de donner ses motifs, qui sont consignés au dossier de l'instance.

Définition de *libération*

(4) Au paragraphe (2), ***libération*** s'entend de l'élargissement entraîné par l'expiration de la peine ou le début soit de la libération d'office soit d'une libération conditionnelle.

Application des articles 113 à 117

(5) Les articles 113 à 117 s'appliquent à l'ordonnance rendue en application du paragraphe (1).

L.R. (1985), ch. C-46, art. 110; 1991, ch. 40, art. 23 et 40; 1995, ch. 39, art. 139 et 190; 2015, ch. 27, art. 31; 2018, ch. 16, art. 209; 2019, ch. 25, art. 31.

110.1 [Abrogé, 2019, ch. 25, art. 32]

Demande d'une ordonnance d'interdiction

111 (1) L'agent de la paix, le préposé aux armes à feu ou le contrôleur des armes à feu peut demander à un juge de la cour provinciale de rendre une ordonnance interdisant à une personne d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, s'il a des motifs raisonnables de croire qu'il ne serait pas souhaitable pour la sécurité de qui que ce soit que celle-ci soit autorisée à les avoir en sa possession.

Date d'audition et avis

(2) Sur réception de la demande, le juge fixe la date à laquelle il l'entendra et ordonne que la personne visée par l'interdiction demandée en soit avisée de la manière qu'il indique.

Audition de la demande

(3) Sous réserve du paragraphe (4), à l'audition, le juge prend connaissance de tout élément de preuve pertinent que présentent l'auteur de la demande et la personne visée par celle-ci, ou leurs procureurs.

Audition *ex parte*

(4) Il peut entendre *ex parte* la demande et la trancher en l'absence de la personne visée par la demande, dans les cas où les cours des poursuites sommaires peuvent,

order is sought in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.

en vertu de la partie XXVII, tenir le procès en l'absence du défendeur.

Prohibition order

(5) Where, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for such period, not exceeding five years, as is specified in the order, beginning on the day on which the order is made.

Ordonnance d'interdiction

(5) Si, au terme de l'audition, il est convaincu de l'existence des motifs visés au paragraphe (1), le juge rend une ordonnance interdisant à la personne visée d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, pour la période prévue dans l'ordonnance, qui est d'au plus cinq ans à compter de la date où elle est rendue.

Reasons

(6) Where a provincial court judge does not make an order under subsection (1), or where a provincial court judge does make such an order but does not prohibit the possession of everything referred to in that subsection, the provincial court judge shall include in the record a statement of the court's reasons.

Motifs

(6) S'il ne rend pas d'ordonnance ou s'il en rend une dont l'interdiction ne vise pas tous les objets prévus au paragraphe (1), le juge est tenu de donner ses motifs, qui sont consignés au dossier de l'instance.

Application of ss. 113 to 117

(7) Sections 113 to 117 apply in respect of every order made under subsection (5).

Application des articles 113 à 117

(7) Les articles 113 à 117 s'appliquent à l'ordonnance rendue en application du paragraphe (5).

Appeal by person or Attorney General

(8) Where a provincial court judge makes an order under subsection (5), the person to whom the order relates, or the Attorney General, may appeal to the superior court against the order.

Appel d'une ordonnance

(8) La personne visée par l'ordonnance d'interdiction et le procureur général peuvent en interjeter appel devant la cour supérieure.

Appeal by Attorney General

(9) Where a provincial court judge does not make an order under subsection (5), the Attorney General may appeal to the superior court against the decision not to make an order.

Appel du refus de rendre une ordonnance

(9) Lorsque le juge de la cour provinciale ne rend pas l'ordonnance d'interdiction, le procureur général peut interjeter appel de cette décision devant la cour supérieure.

Application of Part XXVII to appeals

(10) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (8) or (9), with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

Application de la partie XXVII

(10) La partie XXVII, sauf les articles 785 à 812, 816 à 819 et 829 à 838, s'applique, avec les adaptations nécessaires, aux appels interjetés en application des paragraphes (8) ou (9) et la mention de la cour d'appel dans cette partie vaut celle de la cour supérieure.

Definition of *provincial court judge*

(11) In this section and sections 112, 117.011 and 117.012, ***provincial court judge*** means a provincial court

Définition de *juge de la cour provinciale*

(11) Au présent article et aux articles 112, 117.011 et 117.012, ***juge de la cour provinciale*** s'entend d'un juge

judge having jurisdiction in the territorial division where the person against whom the application for an order was brought resides.

R.S., 1985, c. C-46, s. 111; 1991, c. 40, s. 24; 1995, c. 39, s. 139.

de la cour provinciale compétent dans la circonscription territoriale où réside la personne visée par l'ordonnance demandée.

L.R. (1985), ch. C-46, art. 111; 1991, ch. 40, art. 24; 1995, ch. 39, art. 139.

Revocation of prohibition order under s. 111(5)

112 A provincial court judge may, on application by the person against whom an order is made under subsection 111(5), revoke the order if satisfied that the circumstances for which it was made have ceased to exist.

R.S., 1985, c. C-46, s. 112; R.S., 1985, c. 27 (1st Supp.), s. 203; 1991, c. 40, s. 26; 1995, c. 39, s. 139.

Révocation de l'ordonnance prévue au paragraphe 111(5)

112 Le juge de la cour provinciale peut, sur demande de la personne visée par une ordonnance d'interdiction rendue en application du paragraphe 111(5), révoquer l'ordonnance lorsqu'il est convaincu qu'elle n'est plus justifiée eu égard aux circonstances.

L.R. (1985), ch. C-46, art. 112; L.R. (1985), ch. 27 (1er suppl.), art. 203; 1991, ch. 40, art. 26; 1995, ch. 39, art. 139.

Lifting of prohibition order for sustenance or employment

113 (1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that

(a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or

(b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,

the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.

Levée de l'interdiction

113 (1) La juridiction compétente peut rendre une ordonnance autorisant le contrôleur des armes à feu ou le directeur à délivrer à une personne qui est ou sera visée par une ordonnance d'interdiction, une autorisation, un permis ou un certificat d'enregistrement, selon le cas, aux conditions qu'elle estime indiquées, si cette personne la convainc :

a) soit de la nécessité pour elle de posséder une arme à feu ou une arme à autorisation restreinte pour chasser, notamment à la trappe, afin d'assurer sa subsistance ou celle de sa famille;

b) soit du fait que l'ordonnance d'interdiction équivaudrait à une interdiction de travailler dans son seul domaine possible d'emploi.

Factors

(2) A competent authority may make an order under subsection (1) only after taking the following factors into account:

(a) the criminal record, if any, of the person;

(b) the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and

(c) the safety of the person and of other persons.

Critères

(2) La juridiction compétente peut rendre l'ordonnance après avoir tenu compte :

a) du casier judiciaire de cette personne, s'il y a lieu;

b) le cas échéant, de la nature de l'infraction à l'origine de l'ordonnance d'interdiction et des circonstances dans lesquelles elle a été commise;

c) de la sécurité de toute personne.

Effect of order

(3) Where an order is made under subsection (1),

(a) an authorization, a licence or a registration certificate may not be denied to the person in respect of

Conséquences de l'ordonnance

(3) Une fois l'ordonnance rendue :

a) la personne visée par celle-ci ne peut se voir refuser la délivrance d'une autorisation, d'un permis ou d'un

whom the order was made solely on the basis of a prohibition order against the person or the commission of an offence in respect of which a prohibition order was made against the person; and

(b) an authorization and a licence may, for the duration of the order, be issued to the person in respect of whom the order was made only for sustenance or employment purposes and, where the order sets out terms and conditions, only in accordance with those terms and conditions, but, for greater certainty, the authorization or licence may also be subject to terms and conditions set by the chief firearms officer that are not inconsistent with the purpose for which it is issued and any terms and conditions set out in the order.

certificat d'enregistrement du seul fait qu'elle est sous le coup d'une ordonnance d'interdiction ou a perpétré une infraction à l'origine d'une telle ordonnance;

b) l'autorisation ou le permis ne peut être délivré, pour la durée de l'ordonnance, qu'aux seules fins de subsistance ou d'emploi et, s'il y a lieu, qu'en conformité avec les conditions de l'ordonnance, étant entendu qu'il peut aussi être assorti de toute autre condition fixée par le contrôleur des armes à feu, qui n'est pas incompatible avec ces fins et conditions.

When order can be made

(4) For greater certainty, an order under subsection (1) may be made during proceedings for an order under subsection 109(1), 110(1), 111(5), 117.05(4) or 515(2), paragraph 732.1(3)(d) or subsection 810(3).

Meaning of *competent authority*

(5) In this section, ***competent authority*** means the competent authority that made or has jurisdiction to make the prohibition order.

R.S., 1985, c. C-46, s. 113; 1991, c. 40, s. 27(E); 1995, c. 22, s. 10, c. 39, ss. 139, 190.

Quand l'ordonnance peut être rendue

(4) Il demeure entendu que l'ordonnance peut être rendue lorsque des procédures sont engagées en application des paragraphes 109(1), 110(1), 111(5), 117.05(4) ou 515(2), de l'alinéa 732.1(3)d) ou du paragraphe 810(3).

Sens de *juridiction compétente*

(5) Au présent article, ***juridiction compétente*** s'entend de la juridiction qui a rendu l'ordonnance d'interdiction ou a la compétence pour la rendre.

L.R. (1985), ch. C-46, art. 113; 1991, ch. 40, art. 27(A); 1995, ch. 22, art. 10, ch. 39, art. 139 et 190.

Requirement to surrender

114 A competent authority that makes a prohibition order against a person may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer

(a) any thing the possession of which is prohibited by the order that is in the possession of the person on the commencement of the order, and

(b) every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order,

and where the competent authority does so, it shall specify in the order a reasonable period for surrendering such things and documents and during which section 117.01 does not apply to that person.

R.S., 1985, c. C-46, s. 114; R.S., 1985, c. 27 (1st Supp.), s. 203; 1995, c. 22, s. 10, c. 39, s. 139.

Remise obligatoire

114 La juridiction qui rend une ordonnance d'interdiction peut l'assortir d'une obligation pour la personne visée de remettre à un agent de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu :

a) tout objet visé par l'interdiction en sa possession à la date de l'ordonnance;

b) les autorisations, permis et certificats d'enregistrement — dont elle est titulaire à la date de l'ordonnance — afférents à ces objets.

Le cas échéant, l'ordonnance prévoit un délai raisonnable pour remettre les objets et les documents, durant lequel l'article 117.01 ne s'applique pas à cette personne.

L.R. (1985), ch. C-46, art. 114; L.R. (1985), ch. 27 (1er suppl.), art. 203; 1995, ch. 22, art. 10, ch. 39, art. 139.

Forfeiture

115 (1) Unless a prohibition order against a person specifies otherwise, every thing the possession of which is prohibited by the order is forfeited to Her Majesty if, on the commencement of the order, the thing is in the

Confiscation

115 (1) Sauf indication contraire de l'ordonnance d'interdiction, les objets visés par celle-ci sont confisqués au profit de Sa Majesté si, à la date de l'ordonnance, ils sont

person's possession or has been seized and detained by, or surrendered to, a peace officer.

Exception

(1.1) Subsection (1) does not apply in respect of an order made under section 515.

Disposal

(2) Every thing forfeited to Her Majesty under subsection (1) shall be disposed of or otherwise dealt with as the Attorney General directs.

R.S., 1985, c. C-46, s. 115; 1995, c. 39, s. 139; 2003, c. 8, s. 5; 2019, c. 9, s. 17.

Authorizations revoked or amended

116 (1) Subject to subsection (2), every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by a prohibition order and issued to a person against whom the prohibition order is made is, on the commencement of the prohibition order, revoked, or amended, as the case may be, to the extent of the prohibitions in the order.

Duration of revocation or amendment — orders under section 515

(2) An authorization, a licence and a registration certificate relating to a thing the possession of which is prohibited by an order made under section 515 is revoked, or amended, as the case may be, only in respect of the period during which the order is in force.

R.S., 1985, c. C-46, s. 116; 1991, c. 28, s. 11, c. 40, ss. 28, 41; 1995, c. 39, s. 139; 2003, c. 8, s. 6.

Return to owner

117 Where the competent authority that makes a prohibition order or that would have had jurisdiction to make the order is, on application for an order under this section, satisfied that a person, other than the person against whom a prohibition order was or will be made,

(a) is the owner of any thing that is or may be forfeited to Her Majesty under subsection 115(1) and is lawfully entitled to possess it, and

(b) in the case of a prohibition order under subsection 109(1) or 110(1), had no reasonable grounds to believe that the thing would or might be used in the commission of the offence in respect of which the prohibition order was made,

the competent authority shall order that the thing be returned to the owner or the proceeds of any sale of the thing be paid to that owner or, if the thing was destroyed, that an amount equal to the value of the thing be paid to the owner.

R.S., 1985, c. C-46, s. 117; 1991, c. 40, s. 29; 1995, c. 39, s. 139.

en la possession de l'intéressé ou ils ont été saisis et retenus par un agent de la paix ou remis à un tel agent.

Exception

(1.1) Le paragraphe (1) ne s'applique pas aux ordonnances rendues en vertu de l'article 515.

Disposition

(2) Le cas échéant, il peut en être disposé selon les instructions du procureur général.

L.R. (1985), ch. C-46, art. 115; 1995, ch. 39, art. 139; 2003, ch. 8, art. 5; 2019, ch. 9, art. 17.

Révocation ou modification des autorisations ou autres documents

116 (1) Sous réserve du paragraphe (2), toute ordonnance d'interdiction emporte sans délai la révocation ou la modification — dans la mesure qu'elle précise — des autorisations, permis et certificats d'enregistrement délivrés à la personne visée par celle-ci et afférents aux objets visés par l'interdiction.

Durée de la révocation ou de la modification — ordonnances rendues en vertu de l'art. 515

(2) L'ordonnance rendue en vertu de l'article 515 n'emporte la révocation ou la modification que pour la période de validité de l'ordonnance.

L.R. (1985), ch. C-46, art. 116; 1991, ch. 28, art. 11, ch. 40, art. 28 et 41; 1995, ch. 39, art. 139; 2003, ch. 8, art. 6.

Restitution au propriétaire

117 La juridiction qui a rendu l'ordonnance d'interdiction ou qui aurait eu compétence pour le faire doit ordonner que les objets confisqués en application du paragraphe 115(1) ou susceptibles de l'être soient rendus à un tiers qui lui en fait la demande ou que le produit de leur vente soit versé à ce dernier ou, si les objets ont été détruits, qu'une somme égale à leur valeur lui soit versée, si elle est convaincue :

a) que celui-ci est le propriétaire légitime de ces objets et qu'il peut légalement les avoir en sa possession;

b) dans le cas d'une ordonnance rendue en application des paragraphes 109(1) ou 110(1), que celui-ci n'avait aucun motif raisonnable de croire que ces objets seraient ou pourraient être employés pour la perpétration de l'infraction à l'origine de l'ordonnance d'interdiction.

L.R. (1985), ch. C-46, art. 117; 1991, ch. 40, art. 29; 1995, ch. 39, art. 139.

Possession contrary to order

117.01 (1) Subject to subsection (4), every person commits an offence who possesses a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance while the person is prohibited from doing so by any order made under this Act or any other Act of Parliament.

Failure to surrender authorization, etc.

(2) Every person commits an offence who wilfully fails to surrender to a peace officer, a firearms officer or a chief firearms officer any authorization, licence or registration certificate held by the person when the person is required to do so by any order made under this Act or any other Act of Parliament.

Punishment

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

Exception

(4) Subsection (1) does not apply to a person who possessed a firearm in accordance with an authorization or licence issued to the person as the result of an order made under subsection 113(1).

1995, c. 39, s. 139.

Limitations on Access

Application for order

117.011 (1) A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order under this section where the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that

(a) the person against whom the order is sought cohabits with, or is an associate of, another person who is prohibited by any order made under this Act or any other Act of Parliament from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things; and

Contravention d'une ordonnance d'interdiction

117.01 (1) Sous réserve du paragraphe (4), commet une infraction quiconque a en sa possession une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives pendant que cela lui est interdit par une ordonnance rendue sous le régime de la présente loi ou de toute autre loi fédérale.

Défaut de remettre les autorisations ou autres documents

(2) Commet une infraction quiconque sciemment n'exécute pas l'obligation que lui impose une ordonnance rendue sous le régime de la présente loi ou de toute autre loi fédérale de remettre à un agent de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu une autorisation, un permis ou un certificat d'enregistrement dont il est titulaire.

Peine

(3) Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Réserve

(4) Le paragraphe (1) ne s'applique pas à une personne qui, conformément à une autorisation ou un permis qui lui a été délivré en vertu d'une ordonnance rendue en application du paragraphe 113(1), a en sa possession une arme à feu.

1995, ch. 39, art. 139.

Ordonnance de restriction

Demande d'ordonnance

117.011 (1) L'agent de la paix, le préposé aux armes à feu ou le contrôleur des armes à feu peut demander à un juge de la cour provinciale de rendre une ordonnance en vertu du présent article s'il a des motifs raisonnables de croire que la personne visée par la demande habite ou a des rapports avec un particulier qui est sous le coup d'une ordonnance, rendue en vertu de la présente loi ou de toute autre loi fédérale, lui interdisant d'avoir en sa possession des armes à feu, arbalètes, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, et qui aurait ou pourrait avoir accès à de tels objets que celle-ci a en sa possession.

(b) the other person would or might have access to any such thing that is in the possession of the person against whom the order is sought.

Date for hearing and notice

(2) On receipt of an application made under subsection (1), the provincial court judge shall fix a date for the hearing of the application and direct that notice of the hearing be given, in such manner as the provincial court judge may specify, to the person against whom the order is sought.

Date d'audition et avis

(2) Sur réception de la demande, le juge fixe la date à laquelle il l'entendra et ordonne que la personne visée par la demande en soit avisée de la manière qu'il indique.

Hearing of application

(3) Subject to subsection (4), at the hearing of an application made under subsection (1), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order is sought.

Audition de la demande

(3) Sous réserve du paragraphe (4), le juge prend connaissance, à l'audition, de tout élément de preuve pertinent que présentent l'auteur de la demande et la personne visée par celle-ci, ou leurs procureurs.

Where hearing may proceed *ex parte*

(4) A provincial court judge may proceed *ex parte* to hear and determine an application made under subsection (1) in the absence of the person against whom the order is sought in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.

Audition *ex parte*

(4) Il peut entendre *ex parte* la demande et la trancher en l'absence de la personne visée par la demande dans les cas où les cours des poursuites sommaires peuvent, en vertu de la partie XXVII, tenir le procès en l'absence du défendeur.

Order

(5) Where, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order in respect of the person against whom the order was sought imposing such terms and conditions on the person's use and possession of anything referred to in subsection (1) as the provincial court judge considers appropriate.

Ordonnance

(5) Si, au terme de l'audition, il est convaincu de l'existence des motifs visés au paragraphe (1), le juge rend une ordonnance imposant à la personne visée les conditions qu'il estime indiquées relativement à l'utilisation ou à la possession de tout objet visé à ce paragraphe.

Terms and conditions

(6) In determining terms and conditions under subsection (5), the provincial court judge shall impose terms and conditions that are the least intrusive as possible, bearing in mind the purpose of the order.

Conditions

(6) Toutefois, compte tenu de l'objet de l'ordonnance, le juge impose des conditions aussi libérales que possible.

Appeal by person or Attorney General

(7) Where a provincial court judge makes an order under subsection (5), the person to whom the order relates, or the Attorney General, may appeal to the superior court against the order.

Appel d'une ordonnance

(7) La personne visée par l'ordonnance et le procureur général peuvent en interjeter appel devant la cour supérieure.

Appeal by Attorney General

(8) Where a provincial court judge does not make an order under subsection (5), the Attorney General may appeal to the superior court against the decision not to make an order.

Application of Part XXVII to appeals

(9) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (7) or (8), with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

1995, c. 39, s. 139.

Revocation of order under s. 117.011

117.012 A provincial court judge may, on application by the person against whom an order is made under subsection 117.011(5), revoke the order if satisfied that the circumstances for which it was made have ceased to exist.

1995, c. 39, s. 139.

Search and Seizure

Search and seizure without warrant where offence committed

117.02 (1) Where a peace officer believes on reasonable grounds

(a) that a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or

(b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance,

and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed.

Appel du refus de rendre une ordonnance

(8) Lorsque le juge de la cour provinciale ne rend pas l'ordonnance, le procureur général peut interjeter appel de cette décision devant la cour supérieure.

Application de la partie XXVII

(9) La partie XXVII, sauf les articles 785 à 812, 816 à 819 et 829 à 838, s'applique, avec les adaptations nécessaires, aux appels interjetés en application des paragraphes (7) ou (8) et la mention de la cour d'appel dans cette partie vaut celle de la cour supérieure.

1995, ch. 39, art. 139.

Révocation de l'ordonnance prévue à l'article 117.011

117.012 Le juge de la cour provinciale peut, sur demande de la personne visée par une ordonnance rendue en application du paragraphe 117.011(5), révoquer l'ordonnance lorsqu'il est convaincu qu'elle n'est plus justifiée eu égard aux circonstances.

1995, ch. 39, art. 139.

Perquisition et saisie

Perquisition et saisie sans mandat en cas d'infraction

117.02 (1) Lorsqu'il a des motifs raisonnables de croire à la perpétration d'une infraction avec usage d'une arme, d'une fausse arme à feu, d'un dispositif prohibé, de munitions, de munitions prohibées ou de substances explosives ou d'une infraction à la présente loi relative à une arme à feu, une fausse arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives et de croire qu'une preuve de celle-ci peut être trouvée sur une personne, dans un véhicule ou en tout lieu, sauf une maison d'habitation, l'agent de la paix, lorsque l'urgence de la situation rend difficilement réalisable l'obtention d'un mandat et que les conditions de délivrance de celui-ci sont réunies, peut, sans mandat, fouiller la personne ou le véhicule, perquisitionner dans ce lieu et saisir tout objet au moyen ou au sujet duquel il a des motifs raisonnables de croire que l'infraction est perpétrée ou l'a été.

Disposition of seized things

(2) Any thing seized pursuant to subsection (1) shall be dealt with in accordance with sections 490 and 491.

1995, c. 39, s. 139.

Disposition des objets saisis

(2) Il est disposé conformément aux articles 490 et 491 des objets saisis.

1995, ch. 39, art. 139.

Seizure on failure to produce authorization

117.03 (1) Despite section 117.02, a peace officer who finds

(a) a person in possession of a prohibited firearm, a restricted firearm or a non-restricted firearm who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess the firearm and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it, or

(b) a person in possession of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess it,

may seize the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition unless its possession by the person in the circumstances in which it is found is authorized by any provision of this Part, or the person is under the direct and immediate supervision of another person who may lawfully possess it.

Saisie à défaut de présenter les documents

117.03 (1) Par dérogation à l'article 117.02, lorsqu'il trouve une personne qui a en sa possession une arme à feu prohibée, une arme à feu à autorisation restreinte, une arme à feu sans restriction, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées et qui est incapable de lui présenter sur-le-champ pour examen une autorisation ou un permis qui l'y autorise, en plus, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de l'arme, l'agent de la paix peut saisir ces objets, à moins que, dans les circonstances, la présente partie n'autorise cette personne à les avoir en sa possession ou que celle-ci ne soit sous la surveillance directe d'une personne pouvant légalement les avoir en sa possession.

Return of seized thing on production of authorization

(2) If a person from whom any thing is seized under subsection (1) claims the thing within 14 days after the seizure and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody of it,

(a) a licence under which the person is lawfully entitled to possess it, and

(b) in the case of a prohibited firearm or a restricted firearm, an authorization and registration certificate for it,

the thing shall without delay be returned to that person.

Remise des objets saisis sur présentation des documents

(2) Ces objets doivent être remis sans délai au saisi, s'il les réclame dans les quatorze jours et présente à l'agent de la paix qui les a saisis ou en a la garde le permis qui l'autorise a en avoir la possession légale, en plus, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, de l'autorisation et du certificat d'enregistrement afférents.

Forfeiture of seized thing

(3) Where any thing seized pursuant to subsection (1) is not claimed and returned as and when provided by subsection (2), a peace officer shall forthwith take the thing before a provincial court judge, who may, after affording the person from whom it was seized or its owner, if known, an opportunity to establish that the person is lawfully entitled to possess it, declare it to be forfeited to

Confiscation

(3) L'agent de la paix remet sans délai les objets saisis non restitués à un juge de la cour provinciale qui peut, après avoir donné au saisi — ou au propriétaire, s'il est connu — l'occasion d'établir son droit de les avoir en sa possession, déclarer qu'ils sont confisqués au profit de Sa

Her Majesty, to be disposed of or otherwise dealt with as the Attorney General directs.

1995, c. 39, s. 139; 2012, c. 6, s. 8; 2015, c. 27, s. 33.

Majesté et qu'il en sera disposé conformément aux instructions du procureur général.

1995, ch. 39, art. 139; 2012, ch. 6, art. 8; 2015, ch. 27, art. 33.

Application for warrant to search and seize

117.04 (1) Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied by information on oath that there are reasonable grounds to believe that the person possesses a weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance in a building, receptacle or place and that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess the weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search the building, receptacle or place and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

Demande de mandat de perquisition

117.04 (1) Le juge de paix peut, sur demande de l'agent de la paix, délivrer un mandat autorisant celui-ci à perquisitionner dans tel bâtiment, contenant ou lieu et à saisir les armes, dispositifs prohibés, munitions, munitions prohibées ou substances explosives en la possession de telle personne, de même que les autorisations, permis ou certificats d'enregistrement - dont elle est titulaire ou qui sont en sa possession - afférents à ces objets, s'il est convaincu, sur la foi d'une dénonciation sous serment, qu'il existe des motifs raisonnables de croire que cette personne est en possession de tels objets dans ce bâtiment, contenant ou lieu et que cela n'est pas souhaitable pour sa sécurité ou celle d'autrui.

Search and seizure without warrant

(2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

Saisie sans mandat

(2) Lorsque les conditions pour l'obtention du mandat sont réunies mais que l'urgence de la situation, suscitée par les risques pour la sécurité de cette personne ou pour celle d'autrui, la rend difficilement réalisable, l'agent de la paix peut, sans mandat, perquisitionner et saisir les armes, dispositifs prohibés, munitions, munitions prohibées ou substances explosives dont une personne a la possession, de même que les autorisations, permis ou certificats d'enregistrement — dont la personne est titulaire — afférents à ces objets, lorsqu'il est convaincu qu'il existe des motifs raisonnables de croire qu'il n'est pas souhaitable pour la sécurité de celle-ci, ni pour celle d'autrui, de lui laisser ces objets.

Return to justice

(3) A peace officer who executes a warrant referred to in subsection (1) or who conducts a search without a warrant under subsection (2) shall forthwith make a return to the justice who issued the warrant or, if no warrant was issued, to a justice who might otherwise have issued a warrant, showing

(a) in the case of an execution of a warrant, the things or documents, if any, seized and the date of execution of the warrant; and

(b) in the case of a search conducted without a warrant, the grounds on which it was concluded that the peace officer was entitled to conduct the search, and the things or documents, if any, seized.

Rapport du mandat au juge de paix

(3) L'agent de la paix présente, immédiatement soit après l'exécution du mandat visé au paragraphe (1), soit après la saisie effectuée sans mandat en vertu du paragraphe (2), au juge de paix qui a délivré le mandat ou qui aurait eu compétence pour le faire un rapport précisant, outre les objets ou les documents saisis, le cas échéant, la date d'exécution du mandat ou les motifs ayant justifié la saisie sans mandat, selon le cas.

Authorizations, etc., revoked

(4) Where a peace officer who seizes any thing under subsection (1) or (2) is unable at the time of the seizure to seize an authorization or a licence under which the person from whom the thing was seized may possess the thing and, in the case of a seized firearm, a registration certificate for the firearm, every authorization, licence and registration certificate held by the person is, as at the time of the seizure, revoked.

1995, c. 39, s. 139; 2004, c. 12, s. 3.

Application for disposition

117.05 (1) Where any thing or document has been seized under subsection 117.04(1) or (2), the justice who issued the warrant authorizing the seizure or, if no warrant was issued, a justice who might otherwise have issued a warrant, shall, on application for an order for the disposition of the thing or document so seized made by a peace officer within thirty days after the date of execution of the warrant or of the seizure without a warrant, as the case may be, fix a date for the hearing of the application and direct that notice of the hearing be given to such persons or in such manner as the justice may specify.

***Ex parte* hearing**

(2) A justice may proceed *ex parte* to hear and determine an application made under subsection (1) in the absence of the person from whom the thing or document was seized in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.

Hearing of application

(3) At the hearing of an application made under subsection (1), the justice shall hear all relevant evidence, including evidence respecting the value of the thing in respect of which the application was made.

Forfeiture and prohibition order on finding

(4) Where, following the hearing of an application made under subsection (1), the justice finds that it is not desirable in the interests of the safety of the person from whom the thing was seized or of any other person that the person should possess any weapon, prohibited device, ammunition, prohibited ammunition and explosive substance, or any such thing, the justice shall

(a) order that any thing seized be forfeited to Her Majesty or be otherwise disposed of; and

(b) where the justice is satisfied that the circumstances warrant such an action, order that the possession by that person of any weapon, prohibited device,

Révocation des autorisations, permis et certificats

(4) Les autorisations, permis et certificats d'enregistrement afférents aux objets en cause dont le saisi est titulaire sont révoqués de plein droit lorsque l'agent de la paix n'est pas en mesure de les saisir dans le cadre des paragraphes (1) ou (2).

1995, ch. 39, art. 139; 2004, ch. 12, art. 3.

Demande d'une ordonnance pour disposer des objets saisis

117.05 (1) Lorsque l'agent de la paix sollicite, dans les trente jours suivant la date de l'exécution du mandat ou de la saisie sans mandat, une ordonnance de disposition des objets et des documents saisis en vertu des paragraphes 117.04(1) ou (2), le juge de paix qui l'a délivré, ou celui qui aurait eu compétence pour le faire, peut rendre une telle ordonnance; il fixe la date d'audition de la demande et ordonne que soient avisées les personnes qu'il désigne, de la manière qu'il détermine.

Audition *ex parte*

(2) Le juge peut entendre *ex parte* la demande et la trancher en l'absence de la personne visée par l'ordonnance, dans les cas où les cours des poursuites sommaires peuvent, en vertu de la partie XXVII, tenir le procès en l'absence du défendeur.

Audition de la demande

(3) À l'audition de la demande, il prend connaissance de tous les éléments de preuve pertinents, notamment quant à la valeur des objets saisis.

Conclusion et ordonnance du tribunal

(4) Le juge qui, au terme de l'audition de la demande, conclut qu'il n'est pas souhaitable pour la sécurité du saisi, ni pour celle d'autrui, qu'il ait en sa possession des armes, dispositifs prohibés, munitions, munitions prohibées et substances explosives, ou l'un ou plusieurs de ces objets, doit :

a) ordonner que les objets saisis soient confisqués au profit de Sa Majesté ou qu'il en soit autrement disposé;

b) lorsqu'il est convaincu que les circonstances le justifient, interdire à celui-ci d'avoir en sa possession de

ammunition, prohibited ammunition and explosive substance, or of any such thing, be prohibited during any period, not exceeding five years, that is specified in the order, beginning on the making of the order.

tels objets pour une période d'au plus cinq ans à compter de la date de l'ordonnance.

Reasons

(5) Where a justice does not make an order under subsection (4), or where a justice does make such an order but does not prohibit the possession of all of the things referred to in that subsection, the justice shall include in the record a statement of the justice's reasons.

Motifs

(5) S'il ne rend pas d'ordonnance ou s'il en rend une dont l'interdiction ne vise pas tous les objets visés au paragraphe (4), le juge est tenu de donner ses motifs, qui sont consignés au dossier de l'instance.

Application of ss. 113 to 117

(6) Sections 113 to 117 apply in respect of every order made under subsection (4).

Application des articles 113 à 117

(6) Les articles 113 à 117 s'appliquent à l'ordonnance visée au paragraphe (4).

Appeal by person

(7) Where a justice makes an order under subsection (4) in respect of a person, or in respect of any thing that was seized from a person, the person may appeal to the superior court against the order.

Appel de la personne visée par l'ordonnance

(7) La personne visée par l'ordonnance peut en interjeter appel devant la cour supérieure.

Appeal by Attorney General

(8) Where a justice does not make a finding as described in subsection (4) following the hearing of an application under subsection (1), or makes the finding but does not make an order to the effect described in paragraph (4)(b), the Attorney General may appeal to the superior court against the failure to make the finding or to make an order to the effect so described.

Appel du procureur général

(8) Dans les cas où le juge de paix, après avoir entendu la demande visée au paragraphe (1), ne conclut pas dans le sens indiqué au paragraphe (4) ou, s'il le fait, lorsqu'il ne rend pas l'ordonnance d'interdiction prévue à l'alinéa (4)b), le procureur général peut interjeter appel du défaut devant la cour supérieure.

Application of Part XXVII to appeals

(9) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (7) or (8) with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

1995, c. 39, s. 139.

Application de la partie XXVII

(9) La partie XXVII, sauf les articles 785 à 812, 816 à 819 et 829 à 838, s'applique, avec les adaptations nécessaires, aux appels interjetés en application des paragraphes (7) ou (8) et la mention de la cour d'appel dans cette partie vaut celle de la cour supérieure.

1995, ch. 39, art. 139.

Where no finding or application

117.06 (1) Any thing or document seized pursuant to subsection 117.04(1) or (2) shall be returned to the person from whom it was seized if

(a) no application is made under subsection 117.05(1) within thirty days after the date of execution of the warrant or of the seizure without a warrant, as the case may be; or

(b) an application is made under subsection 117.05(1) within the period referred to in paragraph (a), and the justice does not make a finding as described in subsection 117.05(4).

Absence de demande ou de conclusion

117.06 (1) Les objets ou documents saisis en vertu des paragraphes 117.04(1) ou (2) doivent être remis au saisi dans les cas suivants :

a) aucune demande n'est présentée en vertu du paragraphe 117.05(1) dans les trente jours qui suivent la date d'exécution du mandat ou de la saisie sans mandat, selon le cas;

b) la demande visée au paragraphe 117.05(1) est présentée dans le délai prévu à l'alinéa a), mais le juge de paix ne conclut pas dans le sens indiqué au paragraphe 117.05(4).

Restoration of authorizations

(2) Where, pursuant to subsection (1), any thing is returned to the person from whom it was seized and an authorization, a licence or a registration certificate, as the case may be, is revoked pursuant to subsection 117.04(4), the justice referred to in paragraph (1)(b) may order that the revocation be reversed and that the authorization, licence or registration certificate be restored.

1995, c. 39, s. 139.

Exempted Persons

Public officers

117.07 (1) Notwithstanding any other provision of this Act, but subject to section 117.1, no public officer is guilty of an offence under this Act or the *Firearms Act* by reason only that the public officer

(a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer's duties or employment;

(b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition in the course of the public officer's duties or employment;

(c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of the public officer's duties or employment;

(d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm in the course of the public officer's duties or employment;

(e) in the course of the public officer's duties or employment, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger;

(f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of the public officer's duties or employment or the destruction of any such thing in the course of the public officer's duties or employment; or

Rétablissement des autorisations et autres documents

(2) Le juge de paix visé à l'alinéa (1)b) peut renverser la révocation visée au paragraphe 117.04(4) et rétablir la validité d'une autorisation, d'un permis ou d'un certificat d'enregistrement, selon le cas, lorsque, en vertu du paragraphe (1), les objets ont été remis au saisi.

1995, ch. 39, art. 139.

Dispenses

Fonctionnaires publics

117.07 (1) Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un fonctionnaire public n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, dans le cadre de ses fonctions, il :

a) a en sa possession une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions prohibées ou des substances explosives;

b) fabrique, cède ou offre de fabriquer ou de céder une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées;

c) exporte ou importe une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

d) exporte ou importe quelque élément ou pièce conçu exclusivement pour être utilisé dans la fabrication ou l'assemblage d'armes automatiques;

e) modifie ou fabrique une arme à feu de façon à ce qu'elle puisse tirer rapidement plusieurs projectiles à chaque pression de la détente ou assemble des pièces d'armes à feu en vue d'obtenir une telle arme;

f) omet de signaler la perte, le vol ou la découverte d'une arme à feu, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé, de munitions, de munitions prohibées ou de substances explosives, ou la destruction de tels objets;

g) modifie le numéro de série d'une arme à feu.

(g) alters a serial number on a firearm in the course of the public officer's duties or employment.

Definition of *public officer*

(2) In this section, ***public officer*** means

(a) a peace officer;

(b) a member of the Canadian Forces or of the armed forces of a state other than Canada who is attached or seconded to any of the Canadian Forces;

(c) an operator of a museum established by the Chief of the Defence Staff or a person employed in any such museum;

(d) a member of a cadet organization under the control and supervision of the Canadian Forces;

(e) a person training to become a police officer or a peace officer under the control and supervision of

(i) a police force, or

(ii) a police academy or similar institution designated by the Attorney General of Canada or the lieutenant governor in council of a province;

(f) a member of a visiting force, within the meaning of section 2 of the *Visiting Forces Act*, who is authorized under paragraph 14(a) of that Act to possess and carry explosives, ammunition and firearms;

(g) a person, or member of a class of persons, employed in the federal public administration or by the government of a province or municipality who is prescribed to be a public officer; or

(h) the Commissioner of Firearms, the Registrar, a chief firearms officer, any firearms officer and any person designated under section 100 of the *Firearms Act*.

1995, c. 39, s. 139; 2003, c. 8, s. 7, c. 22, s. 224(E).

Définition de *fonctionnaire public*

(2) Pour l'application du présent article, sont des fonctionnaires publics :

a) les agents de la paix;

b) les membres des Forces canadiennes ou des forces armées d'un État étranger sous les ordres de celles-ci;

c) le conservateur ou les employés d'un musée constitué par le chef d'état-major de la défense nationale;

d) les membres des organisations de cadets sous l'autorité et le commandement des Forces canadiennes;

e) les personnes qui reçoivent la formation pour devenir agents de la paix ou officiers de police sous l'autorité et la surveillance soit d'une force policière soit d'une école de police ou d'une autre institution semblable désignées par le procureur général du Canada ou par le lieutenant-gouverneur en conseil d'une province;

f) les membres des forces étrangères présentes au Canada, au sens de l'article 2 de la *Loi sur les forces étrangères présentes au Canada*, qui sont autorisés, en vertu de l'alinéa 14a) de cette loi, à détenir et à porter des armes à feu, munitions ou explosifs;

g) les personnes ou catégories de personnes désignées par règlement qui sont des employés des administrations publiques fédérale, provinciales ou municipales;

h) le commissaire aux armes à feu, le directeur, les contrôleurs des armes à feu, les préposés aux armes à feu et les personnes désignées en vertu de l'article 100 de la *Loi sur les armes à feu*.

1995, ch. 39, art. 139; 2003, ch. 8, art. 7, ch. 22, art. 224(A).

Preclearance officers

117.071 Despite any other provision of this Act, but subject to section 117.1, no *preclearance officer*, as defined in section 5 of the *Preclearance Act, 2016*, is guilty of an offence under this Act or the *Firearms Act* by reason only that the preclearance officer

(a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of or for the purpose of their duties or employment;

Contrôleurs

117.071 Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un *contrôleur*, au sens de l'article 5 de la *Loi sur le précontrôle (2016)*, n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, dans le cadre de ses fonctions, il :

a) a en sa possession une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

(b) transfers or offers to transfer a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition in the course of their duties or employment;

(c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of their duties or employment; or

(d) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of their duties or employment or the destruction of any such thing in the course of their duties or employment.

2017, c. 27, s. 61.

b) cède ou offre de céder une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées;

c) exporte ou importe une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

d) omet de signaler la perte, le vol ou la découverte d'une arme à feu, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé, de munitions, de munitions prohibées ou de substances explosives, ou la destruction de tels objets.

2017, ch. 27, art. 61.

Individuals acting for police force, Canadian Forces and visiting forces

117.08 Notwithstanding any other provision of this Act, but subject to section 117.1, no individual is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual

(a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance,

(b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition,

(c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition,

(d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,

(e) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger,

(f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or the destruction of any such thing, or

(g) alters a serial number on a firearm,

Particulier agissant pour le compte des forces armées ou policières

117.08 Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un particulier n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, sous les ordres et pour le compte des forces policières, des Forces canadiennes, des forces étrangères présentes au Canada — au sens de l'article 2 de la *Loi sur les forces étrangères présentes au Canada* — ou d'un ministère fédéral ou provincial, il :

a) a en sa possession une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions prohibées ou des substances explosives;

b) fabrique, cède ou offre de fabriquer ou de céder une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées;

c) exporte ou importe une arme à feu, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé ou des munitions prohibées;

d) exporte ou importe quelque élément ou pièce conçu exclusivement pour être utilisé dans la fabrication ou l'assemblage d'armes automatiques;

e) modifie ou fabrique une arme à feu de façon à ce qu'elle puisse tirer rapidement plusieurs projectiles à chaque pression de la détente ou assemble des pièces d'armes à feu en vue d'obtenir une telle arme;

f) omet de signaler la perte, le vol ou la découverte d'une arme à feu, d'une arme prohibée, d'une arme à

if the individual does so on behalf of, and under the authority of, a police force, the Canadian Forces, a visiting force, within the meaning of section 2 of the *Visiting Forces Act*, or a department of the Government of Canada or of a province.

1995, c. 39, s. 139.

autorisation restreinte, d'un dispositif prohibé, de munitions, de munitions prohibées ou de substances explosives, ou la destruction de tels objets;

g) modifie le numéro de série d'une arme à feu.

1995, ch. 39, art. 139.

Employees of business with licence

117.09 (1) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is the holder of a licence to possess and acquire restricted firearms and who is employed by a business as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence that authorizes the business to carry out specified activities in relation to prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual, in the course of the individual's duties or employment in relation to those specified activities,

(a) possesses a prohibited firearm, a prohibited weapon, a prohibited device or any prohibited ammunition;

(b) manufactures or transfers, or offers to manufacture or transfer, a prohibited weapon, a prohibited device or any prohibited ammunition;

(c) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger; or

(d) alters a serial number on a firearm.

Employees of business with licence

(2) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a business as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual, in the course of the individual's duties or employment, possesses, manufactures or transfers, or offers to manufacture or transfer, a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person.

Employees of carriers

(3) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed

Employés des titulaires de permis

117.09 (1) Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un particulier titulaire d'un permis qui l'autorise à acquérir et à avoir en sa possession une arme à feu à autorisation restreinte et dont l'employeur — une entreprise au sens du paragraphe 2(1) de la *Loi sur les armes à feu* — est lui-même titulaire d'un permis l'autorisant à se livrer à des activités particulières relatives aux armes à feu prohibées, armes prohibées, dispositifs prohibés ou munitions prohibées, n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, dans le cadre de ses fonctions en rapport à ces activités, il :

a) a en sa possession une arme à feu prohibée, une arme prohibée, un dispositif prohibé ou des munitions prohibées;

b) fabrique, cède ou offre de fabriquer ou de céder une arme prohibée, un dispositif prohibé ou des munitions prohibées;

c) modifie ou fabrique une arme à feu de façon à ce qu'elle puisse tirer rapidement plusieurs projectiles à chaque pression de la détente ou assemble des pièces d'armes à feu en vue d'obtenir une telle arme;

d) modifie le numéro de série d'une arme à feu.

Employés d'une entreprise titulaire d'un permis

(2) Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un particulier dont l'employeur est une entreprise — au sens du paragraphe 2(1) de la *Loi sur les armes à feu* — titulaire d'un permis n'est pas coupable d'une infraction à la présente loi ou à cette loi du seul fait que, dans le cadre de ses fonctions, il a en sa possession, fabrique ou cède ou offre de fabriquer ou de céder une arme à feu partiellement fabriquée qui, dans son état incomplet, ne constitue pas une arme pourvue d'un canon permettant de tirer du plomb, des balles ou tout autre projectile et n'est pas susceptible d'infliger des lésions corporelles graves ou la mort à une personne.

Employés des transporteurs

(3) Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un particulier

by a carrier, as defined in subsection 2(1) of the *Firearms Act*, is guilty of an offence under this Act or that Act by reason only that the individual, in the course of the individual's duties or employment, possesses any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or prohibited ammunition or transfers, or offers to transfer any such thing.

dont l'employeur est un transporteur au sens du paragraphe 2(1) de la *Loi sur les armes à feu* n'est pas coupable d'une infraction à la présente loi ou à cette loi du seul fait que, dans le cadre de ses fonctions, il a en sa possession une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées, ou il cède ou offre de céder de tels objets.

Employees of museums handling functioning imitation antique firearm

(4) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a museum as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual, in the course of the individual's duties or employment, possesses or transfers a firearm that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm if the individual has been trained to handle and use such a firearm.

Employés de musées — imitation d'armes à feu historiques utilisables

(4) Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un particulier dont l'employeur est un musée — au sens du paragraphe 2(1) de la *Loi sur les armes à feu* — titulaire d'un permis n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, dans le cadre de ses fonctions, il a en sa possession ou cède une arme à feu conçue de façon à avoir l'apparence exacte d'une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou à laquelle on a voulu donner cette apparence, s'il a reçu une formation pour le maniement et l'usage d'une telle arme à feu.

Employees of museums handling firearms generally

(5) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a museum as defined in subsection 2(1) of the *Firearms Act* that itself is the holder of a licence is guilty of an offence under this Act or the *Firearms Act* by reason only that the individual possesses or transfers a firearm in the course of the individual's duties or employment if the individual is designated, by name, by a provincial minister within the meaning of subsection 2(1) of the *Firearms Act*.

Employés de musées — armes à feu

(5) Par dérogation aux autres dispositions de la présente loi, mais sous réserve de l'article 117.1, un particulier dont l'employeur est un musée — au sens du paragraphe 2(1) de la *Loi sur les armes à feu* — titulaire d'un permis n'est pas coupable d'une infraction à la présente loi ou à la *Loi sur les armes à feu* du seul fait que, dans le cadre de ses fonctions, il a en sa possession ou cède une arme à feu, s'il est nominalement désigné par le ministre provincial visé au paragraphe 2(1) de la *Loi sur les armes à feu*.

Public safety

(6) A provincial minister shall not designate an individual for the purpose of subsection (5) where it is not desirable, in the interests of the safety of any person, to designate the individual.

Sécurité publique

(6) Le ministre provincial ne procède pas à la désignation d'un particulier visé au paragraphe (5) lorsqu'elle n'est pas souhaitable pour la sécurité de quiconque.

Conditions

(7) A provincial minister may attach to a designation referred to in subsection (5) any reasonable condition that the provincial minister considers desirable in the particular circumstances and in the interests of the safety of any person.

1995, c. 39, s. 139.

Conditions

(7) Le ministre provincial peut assortir la désignation des conditions raisonnables qu'il estime souhaitables dans les circonstances et en vue de la sécurité de quiconque.

1995, ch. 39, art. 139.

Restriction

117.1 Sections 117.07 to 117.09 do not apply if the public officer or the individual is subject to a prohibition order and acts contrary to that order or to an authorization or a

Réserve

117.1 Les articles 117.07 à 117.09 ne s'appliquent pas aux personnes qui contreviennent à une ordonnance d'interdiction ou aux conditions d'une autorisation ou

licence issued under the authority of an order made under subsection 113(1).

1995, c. 39, s. 139.

General

Onus on the accused

117.11 Where, in any proceedings for an offence under any of sections 89, 90, 91, 93, 97, 101, 104 and 105, any question arises as to whether a person is the holder of an authorization, a licence or a registration certificate, the onus is on the accused to prove that the person is the holder of the authorization, licence or registration certificate.

1995, c. 39, s. 139.

Authorizations, etc., as evidence

117.12 (1) In any proceedings under this Act or any other Act of Parliament, a document purporting to be an authorization, a licence or a registration certificate is evidence of the statements contained therein.

Certified copies

(2) In any proceedings under this Act or any other Act of Parliament, a copy of any authorization, licence or registration certificate is, if certified as a true copy by the Registrar or a chief firearms officer, admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the authorization, licence or registration certificate would have had if it had been proved in the ordinary way.

1995, c. 39, s. 139.

Certificate of analyst

117.13 (1) A certificate purporting to be signed by an analyst stating that the analyst has analyzed any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or any part or component of such a thing, and stating the results of the analysis is evidence in any proceedings in relation to any of those things under this Act or under section 19 of the *Export and Import Permits Act* in relation to subsection 15(2) of that Act without proof of the signature or official character of the person appearing to have signed the certificate.

Attendance of analyst

(2) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

d'un permis délivré en vertu d'une ordonnance rendue en application du paragraphe 113(1).

1995, ch. 39, art. 139.

Dispositions générales

Charge de la preuve

117.11 Dans toute poursuite intentée dans le cadre des articles 89, 90, 91, 93, 97, 101, 104 et 105, c'est au prévenu qu'il incombe éventuellement de prouver qu'une personne est titulaire d'une autorisation, d'un permis ou d'un certificat d'enregistrement.

1995, ch. 39, art. 139.

Authenticité des documents

117.12 (1) Dans toute poursuite intentée en vertu de la présente loi ou de toute autre loi fédérale, un document présenté comme étant une autorisation, un permis ou un certificat d'enregistrement fait foi des déclarations qui y sont contenues.

Copies certifiées conformes

(2) Dans toute poursuite intentée dans le cadre de la présente loi ou de toute autre loi fédérale, toute copie d'une autorisation, d'un permis ou d'un certificat d'enregistrement certifiée conforme à l'original par le directeur ou le contrôleur des armes à feu est admissible en justice et, sauf preuve contraire, a la même force probante que l'original.

1995, ch. 39, art. 139.

Certificat d'analyse

117.13 (1) Dans toute poursuite intentée en vertu de la présente loi ou de l'article 19 de la *Loi sur les licences d'exportation et d'importation* en rapport avec le paragraphe 15(2) de cette dernière et relative à une arme, un dispositif prohibé, des munitions, des munitions prohibées ou des substances explosives, ou quelque élément ou pièce de ceux-ci, le certificat d'un analyste où il est déclaré que celui-ci a effectué l'analyse de ces objets et où sont données ses conclusions fait foi de la nature de celle-ci sans qu'il soit nécessaire de prouver la signature ou la qualité officielle du signataire.

Présence requise

(2) La partie contre laquelle le certificat est produit peut, avec l'autorisation du tribunal, exiger que son auteur comparaisse pour qu'elle puisse le contre-interroger.

Notice of intention to produce certificate

(3) No certificate of an analyst may be admitted in evidence unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.

(4) and (5) [Repealed, 2008, c. 18, s. 2]

1995, c. 39, s. 139; 2008, c. 18, s. 2.

Avis de production

(3) Le certificat ne peut être admis en preuve que si la partie qui entend le produire a donné un avis raisonnable à la partie contre laquelle il doit servir ainsi qu'une copie de celui-ci.

(4) et (5) [Abrogés, 2008, ch. 18, art. 2]

1995, ch. 39, art. 139; 2008, ch. 18, art. 2.

Amnesty period

117.14 (1) The Governor in Council may, by order, declare for any purpose referred to in subsection (2) any period as an amnesty period with respect to any weapon, prohibited device, prohibited ammunition, explosive substance or component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm.

Purposes of amnesty period

(2) An order made under subsection (1) may declare an amnesty period for the purpose of

(a) permitting any person in possession of any thing to which the order relates to do anything provided in the order, including, without restricting the generality of the foregoing, delivering the thing to a peace officer, a firearms officer or a chief firearms officer, registering it, destroying it or otherwise disposing of it; or

(b) permitting alterations to be made to any prohibited firearm, prohibited weapon, prohibited device or prohibited ammunition to which the order relates so that it no longer qualifies as a prohibited firearm, a prohibited weapon, a prohibited device or prohibited ammunition, as the case may be.

Reliance on amnesty period

(3) No person who, during an amnesty period declared by an order made under subsection (1) and for a purpose described in the order, does anything provided for in the order, is, by reason only of the fact that the person did that thing, guilty of an offence under this Part.

Proceedings are a nullity

(4) Any proceedings taken under this Part against any person for anything done by the person in reliance of this section are a nullity.

1995, c. 39, s. 139.

Délai d'amnistie

117.14 (1) Le gouverneur en conseil peut, par décret, fixer aux fins visées au paragraphe (2) un délai établissant une amnistie à l'égard d'une arme, d'un dispositif prohibé, de munitions prohibées ou de substances explosives, ou de quelque élément ou pièce conçu exclusivement pour être utilisé dans la fabrication ou l'assemblage d'armes automatiques.

Objet

(2) Le décret peut déclarer une période d'amnistie pour permettre :

a) soit à une personne en possession de tout objet visé par le décret de faire toute chose qui y est mentionnée, notamment le remettre à un agent de la paix, à un préposé aux armes à feu ou au contrôleur des armes à feu, l'enregistrer ou en disposer par destruction ou autrement;

b) soit que des modifications soient apportées à ces objets, de façon à ce qu'ils ne soient plus des armes à feu prohibées, des armes prohibées, des dispositifs prohibés ou des munitions prohibées, selon le cas.

Acte non répréhensible

(3) La personne qui, au cours de la période d'amnistie, agit conformément au décret ne peut, de ce seul fait, être coupable d'une infraction à la présente partie.

Nullité des poursuites

(4) Il ne peut, sous peine de nullité, être intenté de poursuite dans le cadre de la présente partie contre une personne ayant agi en conformité avec le présent article.

1995, ch. 39, art. 139.

Regulations

117.15 (1) Subject to subsection (2), the Governor in Council may make regulations prescribing anything that by this Part is to be or may be prescribed.

Restriction

(2) In making regulations, the Governor in Council may not prescribe any thing to be a prohibited firearm, a restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition if, in the opinion of the Governor in Council, the thing to be prescribed is reasonable for use in Canada for hunting or sporting purposes.

Non-restricted firearm

(3) Despite the definitions ***prohibited firearm*** and ***restricted firearm*** in subsection 84(1), a firearm that is prescribed to be a non-restricted firearm is deemed not to be a prohibited firearm or a restricted firearm.

Restricted firearm

(4) Despite the definition ***prohibited firearm*** in subsection 84(1), a firearm that is prescribed to be a restricted firearm is deemed not to be a prohibited firearm.

1995, c. 39, s. 139; 2015, c. 27, s. 34.

Règlements

117.15 (1) Sous réserve du paragraphe (2), le gouverneur en conseil peut, par règlement, prendre toute mesure d'ordre réglementaire prévue ou pouvant être prévue par la présente partie.

Restriction

(2) Le gouverneur en conseil ne peut désigner par règlement comme arme à feu prohibée, arme à feu à autorisation restreinte, arme prohibée, arme à autorisation restreinte, dispositif prohibé ou munitions prohibées toute chose qui, à son avis, peut raisonnablement être utilisée au Canada pour la chasse ou le sport.

Arme à feu sans restriction

(3) Malgré les définitions de ***arme à feu prohibée*** et de ***arme à feu à autorisation restreinte*** au paragraphe 84(1), une arme à feu désignée par règlement comme étant une arme à feu sans restriction est réputée ne pas être une arme à feu prohibée ni une arme à feu à autorisation restreinte.

Arme à feu à autorisation restreinte

(4) Malgré la définition de ***arme à feu prohibée*** au paragraphe 84(1), une arme à feu désignée par règlement comme étant une arme à feu à autorisation restreinte est réputée ne pas être une arme à feu prohibée.

1995, ch. 39, art. 139; 2015, ch. 27, art. 34.

PART IV

Offences Against the Administration of Law and Justice

Interpretation

Definitions

118 In this Part,

evidence or ***statement*** means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not; (*témoignage*, *déposition* ou *déclaration*)

government means

(a) the Government of Canada,

(b) the government of a province, or

PARTIE IV

Infractions contre l'application de la loi et l'administration de la justice

Définitions

Définitions

118 Les définitions qui suivent s'appliquent à la présente partie.

charge ou ***emploi*** S'entend notamment :

a) d'une charge ou fonction sous l'autorité du gouvernement;

b) d'une commission civile ou militaire;

c) d'un poste ou emploi dans un ministère public. (*office*)

CANADA

CONSOLIDATION

CODIFICATION

Firearms Act

Loi sur les armes à feu

S.C. 1995, c. 39

L.C. 1995, ch. 39

Current to November 2, 2020

Last amended on June 21, 2019

À jour au 2 novembre 2020

Dernière modification le 21 juin 2019

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 2, 2020. The last amendments came into force on June 21, 2019. Any amendments that were not in force as of November 2, 2020 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 2 novembre 2020. Les dernières modifications sont entrées en vigueur le 21 juin 2019. Toutes modifications qui n'étaient pas en vigueur au 2 novembre 2020 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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An Act respecting firearms and other weapons

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S.C. 1995, c. 39

An Act respecting firearms and other weapons

[*Assented to 5th December 1995*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short Title

Short title

1 This Act may be cited as the *Firearms Act*.

Interpretation

Definitions

2 (1) In this Act,

authorization to carry means an authorization described in section 20; (*autorisation de port*)

authorization to export means an authorization referred to in section 44 and includes a permit to export goods that is issued under the *Export and Import Permits Act* and that is deemed by regulations made under paragraph 117(a.1) to be an authorization to export; (*autorisation d'exportation*)

authorization to import means an authorization referred to in section 46; (*autorisation d'importation*)

authorization to transport means an authorization described in section 19; (*autorisation de transport*)

business means a person who carries on a business that includes

(a) the manufacture, assembly, possession, purchase, sale, importation, exportation, display, repair,

L.C. 1995, ch. 39

Loi concernant les armes à feu et certaines autres armes

[*Sanctionnée le 5 décembre 1995*]

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

Titre abrégé

Titre abrégé

1 *Loi sur les armes à feu*.

Définitions et interprétation

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

agent des douanes S'entend au sens de « agent » ou « agent des douanes » au paragraphe 2(1) de la *Loi sur les douanes*. (*customs officer*)

autorisation de port L'autorisation prévue à l'article 20. (*authorization to carry*)

autorisation de transport Toute autorisation prévue à l'article 19. (*authorization to transport*)

autorisation d'exportation L'autorisation prévue à l'article 44, y compris la licence pour l'exportation de marchandises qui est délivrée en vertu de la *Loi sur les licences d'exportation et d'importation* et qui est réputée être une autorisation d'exportation aux termes des règlements pris en vertu de l'alinéa 117a.1). (*authorization to export*)

autorisation d'importation L'autorisation prévue à l'article 46. (*authorization to import*)

restoration, maintenance, storage, alteration, pawnbroking, transportation, shipping, distribution or delivery of firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition,

(b) the possession, purchase or sale of ammunition, or

(c) the purchase of cross-bows

and includes a museum; (*entreprise*)

carrier means a person who carries on a transportation business that includes the transportation of firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition; (*transporteur*)

chief firearms officer means

(a) in respect of a province, the individual who is designated in writing as the chief firearms officer for the province by the provincial minister of that province,

(b) in respect of a territory, the individual who is designated in writing as the chief firearms officer for the territory by the federal Minister, or

(c) in respect of any matter for which there is no chief firearms officer under paragraph (a) or (b), the individual who is designated in writing as the chief firearms officer for the matter by the federal Minister; (*contrôleur des armes à feu*)

commencement day, in respect of a provision of this Act or the expression "former Act" in a provision of this Act, means the day on which the provision comes into force; (*date de référence*)

Commissioner means the Commissioner of Firearms appointed under section 81.1; (*commissaire*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

customs office has the meaning assigned by subsection 2(1) of the *Customs Act*; (*bureau de douane*)

customs officer has the meaning assigned to the word "officer" by subsection 2(1) of the *Customs Act*; (*agent des douanes*)

federal Minister means the Minister of Public Safety and Emergency Preparedness; (*ministre fédéral*)

firearms officer means

bureau de douane S'entend au sens du paragraphe 2(1) de la *Loi sur les douanes*. (*customs office*)

commissaire Commissaire aux armes à feu nommé en vertu de l'article 81.1. (*Commissioner*)

conjoint de fait La personne qui vit avec une autre dans une relation conjugale depuis au moins un an. (*common-law partner*)

contrôleur des armes à feu

a) Particulier qu'un ministre provincial désigne par écrit pour agir en cette qualité dans la province;

b) particulier que le ministre fédéral désigne par écrit pour agir en cette qualité dans un territoire;

c) particulier que le ministre fédéral désigne par écrit pour agir en cette qualité dans une situation particulière, en l'absence du contrôleur des armes à feu prévu aux alinéas a) ou b). (*chief firearms officer*)

date de référence En ce qui concerne une disposition de la présente loi ou le terme « loi antérieure » dans une telle disposition, la date d'entrée en vigueur de la disposition. (*commencement day*)

entreprise Personne qui exploite une entreprise se livrant à des activités, notamment :

a) de fabrication, d'assemblage, de possession, d'achat, de vente, d'importation, d'exportation, d'exposition, de réparation, de restauration, d'entretien, d'entreposage, de modification, de prêt sur gages, de transport, d'expédition, de distribution ou de livraison d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées;

b) de possession, d'achat ou de vente de munitions;

c) d'achat d'arbalètes.

Sont visés par la présente définition les musées. (*business*)

loi antérieure La partie III du *Code criminel* dans sa version antérieure à la date de référence. (*former Act*)

ministre fédéral Le ministre de la Sécurité publique et de la Protection civile. (*federal Minister*)

ministre provincial

(a) in respect of a province, an individual who is designated in writing as a firearms officer for the province by the provincial minister of that province,

(b) in respect of a territory, an individual who is designated in writing as a firearms officer for the territory by the federal Minister, or

(c) in respect of any matter for which there is no firearms officer under paragraph (a) or (b), an individual who is designated in writing as a firearms officer for the matter by the federal Minister; (*préposé aux armes à feu*)

former Act means Part III of the *Criminal Code*, as it read from time to time before the commencement day; (*loi antérieure*)

museum means a person who operates a museum

(a) in which firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition are possessed, bought, displayed, repaired, restored, maintained, stored or altered, or

(b) in which ammunition is possessed or bought; (*musée*)

non-resident means an individual who ordinarily resides outside Canada; (*non-résident*)

prescribed means

(a) in the case of a form or the information to be included on a form, prescribed by the federal Minister, and

(b) in any other case, prescribed by the regulations; (*réglementaire*)

provincial minister means

(a) in respect of a province, the member of the executive council of the province who is designated by the lieutenant governor in council of the province as the provincial minister,

(b) in respect of a territory, the federal Minister, or

(c) in respect of any matter for which there is no provincial minister under paragraph (a) or (b), the federal Minister; (*ministre provincial*)

regulations means regulations made by the Governor in Council under section 117. (*règlements*)

a) Membre du conseil exécutif d'une province désigné par le lieutenant gouverneur en conseil de la province en cette qualité;

b) le ministre fédéral en ce qui concerne les territoires;

c) le ministre fédéral dans une situation particulière où le ministre provincial ne peut agir. (*provincial minister*)

musée Personne qui exploite un musée se livrant soit à des activités de possession, d'achat, d'exposition, de réparation, de restauration, d'entretien, d'entreposage ou de modification d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées, soit à des activités de possession ou d'achat de munitions. (*museum*)

non-résident Particulier qui réside habituellement à l'étranger. (*non-resident*)

préposé aux armes à feu

a) Particulier qu'un ministre provincial désigne par écrit pour agir en cette qualité dans la province;

b) particulier que le ministre fédéral désigne par écrit pour agir en cette qualité dans un territoire;

c) particulier que le ministre fédéral désigne par écrit pour agir en cette qualité dans une situation particulière, en l'absence du préposé aux armes à feu prévu aux alinéas a) ou b). (*firearms officer*)

réglementaire Prescrit par le ministre fédéral, pour les formulaires ou l'information à y faire figurer, ou par les règlements, dans tous les autres cas. (*prescribed*)

règlements Les règlements pris en application de l'article 117 par le gouverneur en conseil. (*regulations*)

transporteur Personne qui exploite une entreprise de transport se livrant notamment à des activités de transport d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées. (*carrier*)

To be interpreted with *Criminal Code*

(2) Unless otherwise provided, words and expressions used in this Act have the meanings assigned to them by section 2 or 84 of the *Criminal Code*. Subsections 117.15(3) and (4) of that Act apply to those words and expressions.

Deemed references to Registrar

(2.1) Sections 5, 9, 54 to 58, 67, 68 and 70 to 72 apply in respect of a carrier as if each reference in those sections to a chief firearms officer were a reference to the Registrar and for the purposes of applying section 6 in respect of a carrier, paragraph 113(3)(b) of the *Criminal Code* applies as if the reference in that section to a chief firearms officer were a reference to the Registrar.

Aboriginal and treaty rights

(3) For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*.

1995, c. 39, s. 2; 2000, c. 12, s. 116; 2001, c. 4, s. 85; 2003, c. 8, s. 9; 2005, c. 10, s. 29; 2015, c. 27, s. 2.

Her Majesty

Binding on Her Majesty

3 (1) This Act is binding on Her Majesty in right of Canada or a province.

Canadian Forces

(2) Notwithstanding subsection (1), this Act does not apply in respect of the Canadian Forces.

Purpose

Purpose

4 The purpose of this Act is

(a) to provide, notably by sections 5 to 16 and 54 to 73, for the issuance of

(i) licences for firearms and authorizations and registration certificates for prohibited firearms or restricted firearms, under which persons may possess firearms in circumstances that would otherwise constitute an offence under subsection 91(1), 92(1), 93(1) or 95(1) of the *Criminal Code*,

(ii) licences and authorizations under which persons may possess prohibited weapons, restricted weapons, prohibited devices and prohibited ammunition in circumstances that would otherwise

Code criminel

(2) Sauf disposition contraire, les termes employés dans la présente loi s'entendent au sens des articles 2 ou 84 du *Code criminel*. Les paragraphes 117.15(3) et (4) de cette loi s'appliquent à ces termes.

Mention du directeur

(2.1) Les articles 5, 9, 54 à 58, 67, 68 et 70 à 72 s'appliquent aux transporteurs et, à cette fin, la mention du contrôleur des armes à feu vaut mention du directeur; pour que l'article 6 s'applique également aux transporteurs, la mention du contrôleur des armes à feu à l'alinéa 113(3)b) du *Code criminel* vaut mention du directeur.

Droits des autochtones

(3) Il est entendu que la présente loi ne porte pas atteinte aux droits — ancestraux ou issus de traités — des peuples autochtones du Canada visés à l'article 35 de la *Loi constitutionnelle de 1982*.

1995, ch. 39, art. 2; 2000, ch. 12, art. 116; 2001, ch. 4, art. 85; 2003, ch. 8, art. 9; 2005, ch. 10, art. 29; 2015, ch. 27, art. 2.

Sa Majesté

Obligation de Sa Majesté

3 (1) La présente loi lie Sa Majesté du chef du Canada ou d'une province.

Forces canadiennes

(2) Par dérogation au paragraphe (1), la présente loi ne s'applique pas aux Forces canadiennes.

Objet

Objet

4 La présente loi a pour objet :

a) de prévoir, notamment aux articles 5 à 16 et 54 à 73, la délivrance :

(i) de permis à l'égard des armes à feu, ainsi que d'autorisations et de certificats d'enregistrement à l'égard des armes à feu prohibées et des armes à feu à autorisation restreinte, permettant la possession d'armes à feu en des circonstances qui ne donnent pas lieu à une infraction visée aux paragraphes 91(1), 92(1), 93(1) ou 95(1) du *Code criminel*,

(ii) de permis et d'autorisations permettant la possession d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés et de munitions

constitute an offence under subsection 91(2), 92(2) or 93(1) of the *Criminal Code*, and

(iii) licences under which persons may sell, barter or give cross-bows in circumstances that would otherwise constitute an offence under subsection 97(1) of the *Criminal Code*;

(b) to authorize,

(i) notably by sections 5 to 12 and 54 to 73, the manufacture of or offer to manufacture, and

(ii) notably by sections 21 to 34 and 54 to 73, the transfer of or offer to transfer,

firearms, prohibited weapons, restricted weapons, prohibited devices, ammunition and prohibited ammunition in circumstances that would otherwise constitute an offence under subsection 99(1), 100(1) or 101(1) of the *Criminal Code*; and

(c) to authorize, notably by sections 35 to 73, the importation or exportation of firearms, prohibited weapons, restricted weapons, prohibited devices, ammunition, prohibited ammunition and components and parts designed exclusively for use in the manufacture of or assembly into automatic firearms in circumstances that would otherwise constitute an offence under subsection 103(1) or 104(1) of the *Criminal Code*.

1995, c. 39, s. 4; 2012, c. 6, s. 9.

prohibées en des circonstances qui ne donnent pas lieu à une infraction aux paragraphes 91(2), 92(2) ou 93(1) du *Code criminel*,

(iii) de permis autorisant la vente, l'échange ou le don d'arbalètes en des circonstances qui ne donnent pas lieu à une infraction au paragraphe 97(1) du *Code criminel*;

b) de permettre, notamment aux articles 5 à 12 et 54 à 73, la fabrication ou la proposition de fabrication, et aux articles 21 à 34 et 54 à 73, la cession ou la proposition de cession, d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés, de munitions et de munitions prohibées, en des circonstances qui ne donnent pas lieu à une infraction aux paragraphes 99(1), 100(1) ou 101(1) du *Code criminel*;

c) de permettre, notamment aux articles 35 à 73, l'importation et l'exportation d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés, de munitions ou de munitions prohibées et d'éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l'assemblage d'armes automatiques, sans enfreindre les paragraphes 103(1) ou 104(1) du *Code criminel*.

1995, ch. 39, art. 4; 2012, ch. 6, art. 9.

Authorized Possession

Eligibility to Hold Licences

General Rules

Public safety

5 (1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

Criteria

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

Possession

Admissibilité

Règles générales

Sécurité publique

5 (1) Le permis ne peut être délivré lorsqu'il est souhaitable, pour sa sécurité ou celle d'autrui, que le demandeur n'ait pas en sa possession une arme à feu, une arbalète, une arme prohibée, une arme à autorisation restreinte, un dispositif prohibé, des munitions ou des munitions prohibées.

Critères d'admissibilité

(2) Pour l'application du paragraphe (1), le contrôleur des armes à feu ou, dans le cas d'un renvoi prévu à l'article 74, le juge de la cour provinciale tient compte, pour les cinq ans précédant la date de la demande, des éléments suivants :

(a) has been convicted or discharged under section 730 of the *Criminal Code* of

(i) an offence in the commission of which violence against another person was used, threatened or attempted,

(ii) an offence under this Act or Part III of the *Criminal Code*,

(iii) an offence under section 264 of the *Criminal Code* (criminal harassment),

(iv) an offence relating to the contravention of subsection 5(1) or (2), 6(1) or (2) or 7(1) of the *Controlled Drugs and Substances Act*, or

(v) an offence relating to the contravention of subsection 9(1) or (2), 10(1) or (2), 11(1) or (2), 12(1), (4), (5), (6) or (7), 13(1) or 14(1) of the *Cannabis Act*;

(b) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

(c) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

Exception

(3) Despite subsection (2), in determining whether a non-resident who is 18 years old or older and by or on behalf of whom an application is made for a 60-day licence authorizing the non-resident to possess non-restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

1995, c. 39, ss. 5, 137; 1996, c. 19, s. 76.1; 2003, c. 8, s. 10; 2015, c. 27, s. 3; 2018, c. 16, s. 182.

Court orders

6 (1) A person is eligible to hold a licence only if the person is not prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition.

a) le demandeur a été déclaré coupable ou absous en application de l'article 730 du *Code criminel* d'une des infractions suivantes :

(i) une infraction commise avec usage, tentative ou menace de violence contre autrui,

(ii) une infraction à la présente loi ou à la partie III du *Code criminel*,

(iii) une infraction à l'article 264 du *Code criminel* (harcèlement criminel),

(iv) une infraction relative à la contravention des paragraphes 5(1) ou (2), 6(1) ou (2) ou 7(1) de la *Loi réglementant certaines drogues et autres substances*,

v) une infraction relative à la contravention au paragraphe 9(1) ou (2), 10(1) ou (2), 11(1) ou (2), 12(1), (4), (5), (6) ou (7), 13(1) ou 14(1) de la *Loi sur le cannabis*;

b) qu'il ait été interné ou non, il a été traité, notamment dans un hôpital, un institut pour malades mentaux ou une clinique psychiatrique, pour une maladie mentale caractérisée par la menace, la tentative ou l'usage de violence contre lui-même ou autrui;

c) l'historique de son comportement atteste la menace, la tentative ou l'usage de violence contre lui-même ou autrui.

Exception

(3) Malgré le paragraphe (2), pour l'application du paragraphe (1) au non-résident âgé d'au moins dix-huit ans ayant déposé — ou fait déposer — une demande de permis de possession, pour une période de soixante jours, d'une arme à feu sans restriction, le contrôleur des armes à feu ou, dans le cas d'un renvoi prévu à l'article 74, le juge de la cour provinciale peut tenir compte des critères prévus au paragraphe (2), sans toutefois y être obligé.

1995, ch. 39, art. 5 et 137; 1996, ch. 19, art. 76.1; 2003, ch. 8, art. 10; 2015, ch. 27, art. 3; 2018, ch. 16, art. 182.

Ordonnances d'interdiction

6 (1) Le permis ne peut être délivré lorsqu'une ordonnance d'interdiction interdit au demandeur la possession d'une arme à feu, d'une arbalète, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées.

Exception

(2) Subsection (1) is subject to any order made under section 113 of the *Criminal Code* (lifting of prohibition order for sustenance or employment).

Successful completion of safety course

7 (1) An individual is eligible to hold a licence only if the individual

(a) successfully completes the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(b) passed, before the commencement day, the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(c) successfully completed, before January 1, 1995, a course that the attorney general of the province in which the course was given had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act;

(d) passed, before January 1, 1995, a test that the attorney general of the province in which the test was administered had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act; or

(e) on the commencement day, was an individual referred to in paragraph 7(4)(c) as it read immediately before that day and held a licence.

Restricted firearms safety course

(2) An individual is eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms only if the individual

(a) successfully completes a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and passes any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course;

(b) passed, before the commencement day, a restricted firearms safety test, as administered by an instructor who is designated by a chief firearms officer, that is approved by the federal Minister; or

Exception

(2) Le paragraphe (1) s'applique compte tenu des ordonnances rendues sous le régime de l'article 113 du *Code criminel* (levée de l'interdiction).

Cours sur la sécurité des armes à feu

7 (1) La délivrance d'un permis à un particulier est subordonnée à l'une des conditions suivantes :

a) la réussite du Cours canadien de sécurité dans le maniement des armes à feu, contrôlé par l'examen y afférent, dont est chargé un instructeur désigné par le contrôleur des armes à feu;

b) la réussite, avant la date de référence, de l'examen de contrôle de ce cours que lui fait passer un instructeur désigné par le contrôleur des armes à feu;

c) avant le 1er janvier 1995, la réussite d'un cours agréé — au cours de la période commençant le 1er janvier 1993 et se terminant le 31 décembre 1994 — par le procureur général de la province où il a eu lieu pour l'application de l'article 106 de la loi antérieure;

d) avant le 1er janvier 1995, la réussite d'un examen agréé — au cours de la période commençant le 1er janvier 1993 et se terminant le 31 décembre 1994 — par le procureur général de la province où il a eu lieu pour l'application de l'article 106 de la loi antérieure;

e) à la date de référence, le particulier était visé à l'alinéa 7(4)c) dans sa version antérieure à cette date et était titulaire d'un permis.

Cours sur la sécurité des armes à feu à autorisation restreinte

(2) La délivrance d'un permis de possession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte à un particulier est subordonnée à l'une des conditions suivantes :

a) la réussite d'un cours sur la sécurité des armes à feu à autorisation restreinte, agréé par le ministre fédéral et contrôlé par un examen, dont est chargé un instructeur désigné par le contrôleur des armes à feu;

b) la réussite, avant la date de référence, d'un examen sur la sécurité des armes à feu à autorisation restreinte, agréé par le ministre fédéral, que lui fait passer un instructeur désigné par le contrôleur des armes à feu;

(c) on the commencement day, was an individual referred to in paragraph 7(4)(c) as it read immediately before that day and held a licence authorizing the individual to possess prohibited firearms or restricted firearms.

(c) à la date de référence, le particulier était visé à l'alinéa 7(4)c) dans sa version antérieure à cette date et était titulaire d'un permis de possession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte.

After expiration of prohibition order

(3) An individual against whom a prohibition order was made

(a) is eligible to hold a licence only if the individual has, after the expiration of the prohibition order,

(i) successfully completed the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course; and

(b) is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual has, after the expiration of the prohibition order,

(i) successfully completed a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course.

Ordonnances d'interdiction

(3) Le particulier qui est sous le coup d'une ordonnance d'interdiction peut devenir titulaire :

a) d'un permis, s'il réussit, après l'expiration de celle-ci :

(i) le Cours canadien de sécurité dans le maniement des armes à feu donné par un instructeur désigné par le contrôleur des armes à feu,

(ii) les examens de contrôle de ce cours que lui fait passer un instructeur désigné par le contrôleur des armes à feu;

b) d'un permis de possession d'une arme à feu à autorisation restreinte, s'il réussit, après l'expiration de celle-ci :

(i) un cours sur la sécurité des armes à feu à autorisation restreinte, agréé par le ministre fédéral, donné par un instructeur désigné par le contrôleur des armes à feu,

(ii) tout examen de contrôle de ce cours que lui fait passer un instructeur désigné par le contrôleur des armes à feu.

Exceptions

(4) Subsections (1) and (2) do not apply to an individual who

(a) in the prescribed circumstances, has been certified by a chief firearms officer as meeting the prescribed criteria relating to the safe handling and use of firearms and the laws relating to firearms;

(b) is less than eighteen years old and requires a firearm to hunt or trap in order to sustain himself or herself or his or her family;

(c) [Repealed, 2015, c. 27, s. 4]

(d) requires a licence merely to acquire cross-bows; or

(e) is a non-resident who is 18 years old or older and by or on behalf of whom an application is made for a 60-day licence authorizing the non-resident to possess non-restricted firearms.

Exceptions

(4) Les paragraphes (1) et (2) ne s'appliquent pas, selon le cas, au particulier :

a) dont la compétence en matière de législation sur les armes à feu et de règles de sécurité relatives à leur maniement et à leur usage a été certifiée conforme aux exigences réglementaires par le contrôleur des armes à feu dans les cas prévus par règlement;

b) qui, âgé de moins de dix-huit ans, a besoin d'une arme à feu pour chasser, notamment à la trappe, afin de subvenir à ses besoins ou à ceux de sa famille;

c) [Abrogé, 2015, ch. 27, art. 4]

d) qui n'a besoin d'un permis que pour acquérir une arbalète;

e) qui est un non-résident âgé d'au moins dix-huit ans qui a déposé — ou fait déposer — une demande de permis l'autorisant à posséder, pour une période de soixante jours, une arme à feu sans restriction.

Further exception

(5) Subsection (3) does not apply to an individual in respect of whom an order is made under section 113 of the *Criminal Code* (lifting of prohibition order for sustenance or employment) and who is exempted by a chief firearms officer from the application of that subsection.

1995, c. 39, s. 7; 2003, c. 8, s. 11; 2015, c. 27, s. 4.

Autre exception

(5) Le paragraphe (3) ne s'applique pas au particulier qui est sous le coup d'une ordonnance rendue sous le régime de l'article 113 du *Code criminel* (levée de l'interdiction) et qui est exempté de l'application de ce paragraphe par le contrôleur des armes à feu.

1995, ch. 39, art. 7; 2003, ch. 8, art. 11; 2015, ch. 27, art. 4.

Special Cases — Persons

Minors

8 (1) An individual who is less than eighteen years old and who is otherwise eligible to hold a licence is not eligible to hold a licence except as provided in this section.

Minors hunting as a way of life

(2) An individual who is less than eighteen years old and who hunts or traps as a way of life is eligible to hold a licence if the individual needs to hunt or trap in order to sustain himself or herself or his or her family.

Hunting, etc.

(3) An individual who is twelve years old or older but less than eighteen years old is eligible to hold a licence authorizing the individual to possess, in accordance with the conditions attached to the licence, a firearm for the purpose of target practice, hunting or instruction in the use of firearms or for the purpose of taking part in an organized competition.

No prohibited or restricted firearms

(4) An individual who is less than eighteen years old is not eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms or to acquire firearms or cross-bows.

Consent of parent or guardian

(5) An individual who is less than eighteen years old is eligible to hold a licence only if a parent or person who has custody of the individual has consented, in writing or in any other manner that is satisfactory to the chief firearms officer, to the issuance of the licence.

Businesses

9 (1) A business is eligible to hold a licence authorizing a particular activity only if every person who stands in a prescribed relationship to the business is eligible under

Cas particuliers : personnes

Mineurs

8 (1) Le permis ne peut être délivré au particulier âgé de moins de dix-huit ans qui répond par ailleurs aux critères d'admissibilité que dans les cas prévus au présent article.

Chasse de subsistance

(2) Le permis peut lui être délivré, quand la chasse, notamment à la trappe, constitue son mode de vie, s'il a besoin de chasser ainsi pour subvenir à ses besoins ou à ceux de sa famille.

Tir à la cible, chasse, entraînement

(3) Peut lui être également délivré, s'il a au moins douze ans, le permis de possession d'une arme à feu, conformément aux conditions précisées, pour se livrer au tir à la cible ou à la chasse, pour s'entraîner au maniement des armes à feu ou pour participer à une compétition de tir organisée.

Exclusion des armes à feu prohibées et à autorisation restreinte

(4) Ne peut lui être délivré en aucun cas un permis l'autorisant soit à posséder une arme à feu prohibée ou une arme à feu à autorisation restreinte, soit à acquérir une arbalète ou des armes à feu.

Consentement des parents ou du gardien

(5) Dans tous les cas, le permis ne peut lui être délivré qu'avec le consentement — exprimé par écrit ou de toute autre manière que le contrôleur des armes à feu juge satisfaisante — de ses père ou mère ou de la personne qui en a la garde.

Entreprises

9 (1) Pour qu'un permis autorisant une activité en particulier puisse être délivré à une entreprise, il faut que toutes les personnes liées à l'entreprise de manière

sections 5 and 6 to hold a licence authorizing that activity or the acquisition of restricted firearms.

réglementaire répondent aux critères d'admissibilité prévus par les articles 5 et 6 relativement à l'activité ou à l'acquisition d'armes à feu à autorisation restreinte.

Safety courses

(2) A business other than a carrier is eligible to hold a licence only if

(a) a chief firearms officer determines that no individual who stands in a prescribed relationship to the business need be eligible to hold a licence under section 7; or

(b) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 are eligible to hold a licence under that section.

Cours sur la sécurité

(2) Le permis peut être délivré à l'entreprise qui n'est pas un transporteur lorsque le contrôleur des armes à feu décide qu'il n'est pas nécessaire pour les particuliers liés à l'entreprise de manière réglementaire, ou pour ceux de ces particuliers qu'il désigne, de répondre aux exigences prévues à l'article 7.

Employees — firearms

(3) Subject to subsection (3.1), a business other than a carrier is eligible to hold a licence that authorizes the possession of firearms only if every employee of the business who, in the course of duties of employment, handles or would handle firearms is the holder of a licence authorizing the holder to acquire non-restricted firearms.

Employés : armes à feu

(3) Sous réserve du paragraphe (3.1), pour qu'un permis autorisant la possession d'armes à feu soit délivré à une entreprise — qui n'est pas un transporteur —, il faut que chaque employé de celle-ci qui manie ou est susceptible de manier des armes à feu dans le cadre de ses fonctions soit titulaire d'un permis l'autorisant à acquérir des armes à feu sans restriction.

Employees — prohibited firearms or restricted firearms

(3.1) A business other than a carrier is eligible to hold a licence that authorizes the possession of prohibited firearms or restricted firearms only if every employee of the business who, in the course of duties of employment, handles or would handle firearms is the holder of a licence authorizing the holder to acquire restricted firearms.

Employés : armes à feu prohibées ou armes à feu à autorisation restreinte

(3.1) Pour qu'un permis autorisant la possession d'armes à feu prohibées ou d'armes à feu à autorisation restreinte soit délivré à une telle entreprise, il faut que chaque employé de celle-ci qui manie ou est susceptible de manier de telles armes dans le cadre de ses fonctions soit titulaire d'un permis l'autorisant à acquérir des armes à feu à autorisation restreinte.

Employees — prohibited weapons, restricted weapons, etc.

(3.2) A business other than a carrier is eligible to hold a licence that authorizes the possession of prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition only if every employee of the business who, in the course of duties of employment, handles or would handle any of those things is eligible under sections 5 and 6 to hold a licence.

Employés : armes prohibées, armes à autorisation restreinte, etc.

(3.2) Pour qu'un permis autorisant la possession d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées soit délivré à une entreprise — qui n'est pas un transporteur —, il faut que chaque employé de celle-ci qui en manie ou est susceptible d'en manier dans le cadre de ses fonctions réponde aux critères d'admissibilité prévus par les articles 5 et 6.

Exception

(4) In subsection (3), "firearm" does not include a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon

Exception

(4) Pour l'application du paragraphe (3), « arme à feu » exclut une arme partiellement fabriquée pourvue d'un canon qui, dans son état incomplet, n'est pas une arme pourvue d'un canon susceptible de tirer du plomb, des

(a) from which any shot, bullet or other projectile can be discharged; and

(b) that is capable of causing serious bodily injury or death to a person.

Exception

(5) Subsection (1) does not apply in respect of a person who stands in a prescribed relationship to a business where a chief firearms officer determines that, in all the circumstances, the business should not be ineligible to hold a licence merely because of that person's ineligibility.

Exception for museums

(6) Subsection (3) does not apply in respect of an employee of a museum

(a) who, in the course of duties of employment, handles or would handle only firearms that are designed or intended to exactly resemble, or to resemble with near precision, antique firearms, and who has been trained to handle or use such a firearm; or

(b) who is designated, by name, by a provincial minister.

1995, c. 39, s. 9; 2003, c. 8, s. 12; 2015, c. 27, s. 5.

balles ou tout autre projectile et n'est pas capable d'infliger des lésions corporelles graves ou la mort à une personne.

Exception

(5) Le paragraphe (1) ne s'applique pas aux personnes liées à une entreprise de manière réglementaire lorsque le contrôleur des armes à feu décide qu'en tout état de cause l'entreprise peut être titulaire du permis même si l'une d'entre elles ne peut l'être.

Exception pour les musées

(6) Le paragraphe (3) ne s'applique pas aux employés d'un musée dans chacun des cas suivants :

a) ils manient ou sont susceptibles de manier, dans le cadre de leurs fonctions, seulement des armes à feu conçues de façon à avoir l'apparence exacte d'une arme à feu historique — ou à la reproduire le plus fidèlement possible — ou auxquelles on a voulu donner cette apparence et ont reçu la formation pour le maniement et l'usage de telles armes;

b) ils sont nominalement désignés par le ministre provincial.

1995, ch. 39, art. 9; 2003, ch. 8, art. 12; 2015, ch. 27, art. 5.

10 [Repealed, 2003, c. 8, s. 13]

10 [Abrogé, 2003, ch. 8, art. 13]

Special Cases — Prohibited Firearms, Weapons, Devices and Ammunition

Prohibited firearms, weapons, devices and ammunition — businesses

11 (1) A business that is otherwise eligible to hold a licence is not eligible to hold a licence authorizing the business to possess prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition except as provided in this section.

Prescribed purposes

(2) A business other than a carrier is eligible to hold a licence authorizing the business to possess prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition if the business needs to possess them for a prescribed purpose.

Cas particuliers : armes à feu, armes, dispositifs et munitions prohibés

Armes à feu, armes, dispositifs et munitions prohibés : entreprises

11 (1) L'entreprise admissible au permis ne peut devenir titulaire d'un permis de possession d'armes à feu prohibées, d'armes prohibées, de dispositifs prohibés ou de munitions prohibées qu'aux conditions énoncées au présent article.

Fins réglementaires

(2) Un tel permis peut être délivré à l'entreprise — autre qu'un transporteur — qui en a besoin aux fins réglementaires.

Carriers

(3) A carrier is eligible to hold a licence authorizing the carrier to possess prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition.

Prohibited firearms — individuals

12 (1) An individual who is otherwise eligible to hold a licence is not eligible to hold a licence authorizing the individual to possess prohibited firearms except as provided in this section.

Grandfathered individuals — pre-January 1, 1978 automatic firearms

(2) An individual is eligible to hold a licence authorizing the individual to possess automatic firearms that, on the commencement day, were registered as restricted weapons under the former Act if the individual

(a) on January 1, 1978 possessed one or more automatic firearms;

(b) on the commencement day held a registration certificate under the former Act for one or more automatic firearms; and

(c) beginning on the commencement day was continuously the holder of a registration certificate for one or more automatic firearms.

Grandfathered individuals — pre-August 1, 1992 converted automatic firearms

(3) An individual is eligible to hold a licence authorizing the individual to possess automatic firearms that have been altered to discharge only one projectile during one pressure of the trigger and that, on the commencement day, were registered as restricted weapons under the former Act if the individual

(a) on August 1, 1992 possessed one or more automatic firearms

(i) that had been so altered, and

(ii) for which on October 1, 1992 a registration certificate under the former Act had been issued or applied for;

(b) on the commencement day held a registration certificate under the former Act for one or more automatic firearms that had been so altered; and

(c) beginning on the commencement day was continuously the holder of a registration certificate for one or more automatic firearms that have been so altered.

Transporteurs

(3) Les transporteurs peuvent être titulaires d'un permis de possession d'armes à feu prohibées, d'armes prohibées, de dispositifs prohibés ou de munitions prohibées.

Armes à feu prohibées : particuliers

12 (1) Le particulier admissible au permis ne peut devenir titulaire d'un permis de possession d'armes à feu prohibées qu'aux conditions énoncées au présent article.

Particuliers avec droits acquis : armes automatiques (1er janvier 1978)

(2) Est admissible au permis autorisant la possession des armes automatiques qui étaient, à la date de référence, enregistrées comme armes à autorisation restreinte sous le régime de la loi antérieure le particulier qui :

a) le 1er janvier 1978, en possédait une ou plusieurs;

b) était, à la date de référence, titulaire d'un certificat d'enregistrement prévu par la loi antérieure pour de telles armes;

c) à compter de la date de référence, a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes.

Particuliers avec droits acquis : armes automatiques modifiées (1er août 1992)

(3) Est admissible au permis autorisant la possession des armes automatiques — modifiées pour ne tirer qu'un seul projectile à chaque pression de la détente qui étaient, à la date de référence, enregistrées comme des armes à autorisation restreinte sous le régime de la loi antérieure — le particulier qui :

a) le 1er août 1992, en possédait une ou plusieurs pour lesquelles il était, au 1er octobre 1992, titulaire ou demandeur d'un certificat d'enregistrement prévu par la loi antérieure;

b) était, à la date de référence, titulaire d'un certificat d'enregistrement prévu par la loi antérieure pour de telles armes;

c) à compter de la date de référence, a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes.

Grandfathered individuals — *Prohibited Weapons Order, No. 12*

(4) An individual is eligible to hold a licence authorizing the individual to possess firearms that were declared to be prohibited weapons under the former Act by the *Prohibited Weapons Order, No. 12*, made by Order in Council P.C. 1992-1690 of July 23, 1992 and registered as SOR/92-471 and that, on October 1, 1992, either were registered as restricted weapons under the former Act or were the subject of an application for a registration certificate under the former Act if the individual

(a) before July 27, 1992 possessed one or more firearms that were so declared;

(b) on the commencement day held a registration certificate under the former Act for one or more firearms that were so declared; and

(c) beginning on the commencement day was continuously the holder of a registration certificate for one or more firearms that were so declared.

Particuliers avec droits acquis : *Décret nº 12 sur les armes prohibées*

(4) Est admissible au permis autorisant la possession d'armes à feu — déclarées armes prohibées sous le régime de la loi antérieure par le *Décret nº 12 sur les armes prohibées*, pris par le décret C.P. 1992-1690 du 23 juillet 1992 portant le numéro d'enregistrement DORS/92-471 — le particulier qui :

a) avant le 27 juillet 1992, en possédait une ou plusieurs qui, au 1er octobre 1992, étaient enregistrées comme des armes à autorisation restreinte sous le régime de la loi antérieure ou faisaient l'objet d'une demande de certificat d'enregistrement sous le régime de cette loi;

b) était, à la date de référence, titulaire d'un certificat d'enregistrement prévu par la loi antérieure pour de telles armes;

c) à compter de la date de référence, a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes.

Grandfathered individuals — *Prohibited Weapons Order, No. 13*

(5) An individual is eligible to hold a licence authorizing the individual to possess firearms that were declared to be prohibited weapons under the former Act by the *Prohibited Weapons Order, No. 13*, made by Order in Council P.C. 1994-1974 of November 29, 1994 and registered as SOR/94-741 and that, on January 1, 1995, either were registered as restricted weapons under the former Act or were the subject of an application for a registration certificate under the former Act if the individual

(a) before January 1, 1995 possessed one or more firearms that were so declared;

(b) on the commencement day held a registration certificate under the former Act for one or more firearms that were so declared; and

(c) beginning on the commencement day was continuously the holder of a registration certificate for one or more firearms that were so declared.

Particuliers avec droits acquis : *Décret sur les armes prohibées (nº 13)*

(5) Est admissible au permis autorisant la possession d'armes à feu — déclarées armes prohibées sous le régime de la loi antérieure par le *Décret sur les armes prohibées (nº 13)*, pris par le décret C.P. 1994-1974 du 29 novembre 1994 portant le numéro d'enregistrement DORS/94-741 — le particulier qui :

a) avant le 1er janvier 1995, en possédait une ou plusieurs qui, au 1er janvier 1995, étaient enregistrées comme des armes à autorisation restreinte sous le régime de la loi antérieure ou faisaient l'objet d'une demande de certificat d'enregistrement sous le régime de cette loi;

b) était, à la date de référence, titulaire d'un certificat d'enregistrement prévu par la loi antérieure pour de telles armes;

c) à compter de la date de référence, a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes.

Grandfathered individuals — pre-December 1, 1998 handguns

(6) A particular individual is eligible to hold a licence authorizing that particular individual to possess a handgun referred to in subsection (6.1) if

(a) on December 1, 1998 the particular individual

Particuliers avec droits acquis : armes de poing, 1er décembre 1998

(6) Est admissible au permis autorisant la possession d'une arme de poing visée au paragraphe (6.1), le particulier qui :

a) le 1er décembre 1998, était :

(i) held a registration certificate under the former Act for that kind of handgun, or

(ii) had applied for a registration certificate that was subsequently issued for that kind of handgun; and

(b) beginning on December 1, 1998 the particular individual was continuously the holder of a registration certificate for that kind of handgun.

(i) soit titulaire d'un certificat d'enregistrement — prévu par la loi antérieure — pour une telle arme,

(ii) soit demandeur d'un certificat d'enregistrement, qui a été délivré par la suite, pour une telle arme;

b) à compter de cette date, a été sans interruption titulaire d'un certificat d'enregistrement pour une telle arme.

Grandfathered handguns — pre-December 1, 1998 handguns

(6.1) Subsection (6) applies in respect of a handgun

(a) that has a barrel equal to or less than 105 mm in length or that is designed or adapted to discharge a 25 or 32 calibre cartridge; and

(b) in respect of which

(i) on December 1, 1998 a registration certificate had been issued to an individual under the former Act,

(ii) on December 1, 1998 a registration certificate had been applied for by an individual under the former Act, if the certificate was subsequently issued to the individual, or

(iii) a record was sent before December 1, 1998 to the Commissioner of the Royal Canadian Mounted Police and received by that officer before, on or after that date.

Droits acquis : armes de poing, 1er décembre 1998

(6.1) Le paragraphe (6) s'applique à toute arme de poing :

a) qui est pourvue d'un canon dont la longueur ne dépasse pas 105 mm, ou conçue ou adaptée pour tirer des cartouches de calibre 25 ou 32;

b) pour laquelle par ailleurs, selon le cas :

(i) le 1er décembre 1998, un certificat d'enregistrement avait été délivré à un particulier en vertu de la loi antérieure,

(ii) le 1er décembre 1998, une demande de certificat d'enregistrement avait été présentée, en vertu de la loi antérieure, par un particulier et un certificat lui avait été délivré par la suite,

(iii) une copie d'un registre a été envoyée, avant le 1er décembre 1998, au commissaire de la Gendarmerie royale du Canada et reçue par lui avant, après ou à cette date.

Next of kin of grandfathered individuals

(7) A particular individual is eligible to hold a licence authorizing the particular individual to possess a particular handgun referred to in subsection (6.1) that was manufactured before 1946 if the particular individual is the spouse or common-law partner or a brother, sister, child or grandchild of an individual who was eligible under this subsection or subsection (6) to hold a licence authorizing the individual to possess the particular handgun.

Proches parents de particuliers avec droits acquis

(7) Est admissible au permis autorisant la possession d'une arme de poing visée au paragraphe (6.1) et fabriquée avant 1946, le particulier qui est l'époux ou le conjoint de fait, le frère, la sœur, l'enfant ou le petit-enfant d'un particulier qui était admissible en vertu du présent paragraphe ou du paragraphe (6) au permis autorisant la possession de l'arme de poing en question.

Grandfathered individuals — regulations re prohibited firearms

(8) An individual is, in the prescribed circumstances, eligible to hold a licence authorizing the individual to possess firearms prescribed by a provision of regulations made by the Governor in Council under section 117.15 of the *Criminal Code* to be prohibited firearms if the individual

Particuliers avec droits acquis : armes à feu prohibées visées par les règlements

(8) Est admissible au permis autorisant la possession d'armes à feu, dans les situations prévues par règlement, qui sont déclarées prohibées en vertu d'une disposition des règlements d'application de l'article 117.15 du *Code criminel*, le particulier qui :

a) en possédait une ou plusieurs à l'entrée en vigueur de la disposition;

(a) on the day on which the provision comes into force possesses one or more of those firearms; and

(b) beginning on

(i) the day on which that provision comes into force, or

(ii) in the case of an individual who on that day did not hold but had applied for a registration certificate for one or more of those firearms, the day on which the registration certificate was issued

was continuously the holder of a registration certificate for one or more of those firearms.

b) à compter de l'entrée en vigueur de la disposition, a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes ou, dans le cas où il était demandeur d'un certificat d'enregistrement d'une telle arme à cette date, à compter de la date de délivrance du certificat.

Grandfathered individuals — regulations

(9) An individual is eligible to hold a licence authorizing the individual to possess prohibited firearms of a prescribed class if the individual

(a) possesses one or more firearms of that class on a day that is prescribed with respect to that class;

(b) holds a registration certificate for one or more firearms of that class in the circumstances prescribed with respect to that class; and

(c) was continuously the holder of a registration certificate for one or more firearms of that class beginning on the day that is prescribed — or that is determined under the regulations — with respect to that class.

1995, c. 39, s. 12; 2000, c. 12, s. 117; 2003, c. 8, s. 14; 2019, c. 9, s. 3.

Particuliers avec droits acquis : règlements

(9) Est admissible au permis autorisant la possession d'armes à feu prohibées d'une catégorie réglementaire le particulier qui remplit les conditions suivantes :

a) il en possédait une ou plusieurs à la date réglementaire prévue relativement à cette catégorie;

b) il est titulaire d'un certificat d'enregistrement pour de telles armes dans les situations prévues par règlement relativement à cette catégorie;

c) il a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes à compter de la date réglementaire — ou de celle déterminée conformément aux règlements — à l'égard de cette catégorie.

1995, ch. 39, art. 12; 2000, ch. 12, art. 117; 2003, ch. 8, art. 14; 2019, ch. 9, art. 3.

Registration Certificates

Registration certificate

12.1 A registration certificate may only be issued for a prohibited firearm or a restricted firearm.

2012, c. 6, s. 10.

Registration certificate

13 A person is not eligible to hold a registration certificate for a firearm unless the person holds a licence authorizing the person to possess that kind of firearm.

Serial number

14 A registration certificate may be issued only for a firearm

(a) that bears a serial number sufficient to distinguish it from other firearms; or

Certificats d'enregistrement

Certificat d'enregistrement

12.1 Le certificat d'enregistrement ne peut être délivré qu'à l'égard d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte.

2012, ch. 6, art. 10.

Admissibilité

13 Le certificat d'enregistrement d'une arme à feu ne peut être délivré qu'au titulaire du permis autorisant la possession d'une telle arme à feu.

Numéro de série

14 Le certificat d'enregistrement ne peut être délivré que pour une arme à feu qui :

a) soit porte un numéro de série qui permet de la distinguer des autres armes à feu;

(b) that is described in the prescribed manner.

b) soit encore est décrite de manière réglementaire.

Exempted firearms

15 A registration certificate may not be issued for a firearm that is owned by Her Majesty in right of Canada or a province or by a police force.

Sa Majesté et les forces policières

15 Il n'est pas délivré de certificat d'enregistrement pour les armes à feu qui appartiennent à Sa Majesté du chef du Canada ou d'une province ou aux forces policières.

Only one person per registration certificate

16 (1) A registration certificate for a firearm may be issued to only one person.

Une seule personne par certificat d'enregistrement

16 (1) Le certificat d'enregistrement ne peut être délivré qu'à une seule personne.

Exception

(2) Subsection (1) does not apply in the case of a firearm for which a registration certificate referred to in section 127 was issued to more than one person.

Exception

(2) Le paragraphe (1) ne s'applique pas à l'arme à feu pour laquelle le certificat d'enregistrement visé à l'article 127 a été délivré à plus d'une personne.

Authorized Transportation of Firearms

Transport d'armes à feu

Places where prohibited and restricted firearms may be possessed

17 Subject to sections 19 and 20, a prohibited firearm or restricted firearm, the holder of the registration certificate for which is an individual, may be possessed only at the dwelling-house of the individual, as recorded in the Canadian Firearms Registry, or at a place authorized by a chief firearms officer.

1995, c. 39, s. 17; 2003, c. 8, s. 15.

Lieu de possession

17 Sous réserve des articles 19 et 20, une arme à feu prohibée ou une arme à feu à autorisation restreinte enregistrée au nom d'un particulier ne peut être gardée que dans la maison d'habitation notée au Registre canadien des armes à feu ou en tout lieu autorisé par le contrôleur des armes à feu.

1995, ch. 39, art. 17; 2003, ch. 8, art. 15.

18 [Repealed, 2003, c. 8, s. 15]

18 [Abrogé, 2003, ch. 8, art. 15]

Transporting and using prohibited firearms or restricted firearms

19 (1) An individual who holds a licence authorizing the individual to possess prohibited firearms or restricted firearms may be authorized to transport a particular prohibited firearm or restricted firearm between two or more specified places for any good and sufficient reason, including, without restricting the generality of the foregoing,

(a) for use in target practice, or a target shooting competition, under specified conditions or under the auspices of a shooting club or shooting range that is approved under section 29;

(a.1) to provide instructions in the use of firearms as part of a restricted firearms safety course that is approved by the federal Minister; or

(b) if the individual

(i) changes residence,

Transport et usage d'armes à feu prohibées ou d'armes à feu à autorisation restreinte

19 (1) Le particulier titulaire d'un permis de possession d'armes à feu prohibées ou d'armes à feu à autorisation restreinte peut être autorisé à en transporter une en particulier entre des lieux précis pour toute raison valable, notamment :

a) pour le tir à la cible, la participation à une compétition de tir ou l'usage à des conditions précisées ou sous les auspices d'un club de tir ou d'un champ de tir agréé conformément à l'article 29;

a.1) pour offrir un entraînement au maniement des armes à feu dans le cadre d'un cours sur la sécurité des armes à feu à autorisation restreinte agréé par le ministre fédéral;

b) s'il :

(i) change de résidence,

(ii) wishes to transport the firearm to a peace officer, firearms officer or chief firearms officer for registration or disposal in accordance with this Act or Part III of the *Criminal Code*,

(iii) wishes to transport the firearm for repair, storage, sale, exportation or appraisal, or

(iv) wishes to transport the firearm to a gun show.

(ii) désire la présenter à l'agent de la paix, au préposé aux armes à feu ou au contrôleur des armes à feu pour enregistrement ou disposition en conformité avec la présente loi ou la partie III du *Code criminel*,

(iii) désire la transporter aux fins de réparation, d'entreposage, de vente, d'exportation ou d'évaluation,

(iv) désire l'apporter à une exposition d'armes à feu.

Target practice or competition

(1.1) In the case of an authorization to transport issued for a reason referred to in paragraph (1)(a) within the province where the holder of the authorization resides, the specified places must — except in the case of an authorization that is issued for a prohibited firearm referred to in subsection 12(9) — include all shooting clubs and shooting ranges that are approved under section 29 and that are located in that province.

Tir à la cible ou compétition de tir

(1.1) Dans le cas d'une autorisation de transport délivrée pour l'une des raisons mentionnées à l'alinéa (1)a) pour la province de résidence du titulaire de l'autorisation, les lieux qui y sont précisés comprennent tous les clubs de tir et tous les champs de tir de cette province agréés conformément à l'article 29, sauf s'il s'agit d'une autorisation de transport délivrée pour une arme à feu prohibée visée au paragraphe 12(9).

Exception for prohibited firearms other than prohibited handguns

(2) Despite subsection (1), an individual must not be authorized to transport a prohibited firearm — other than a handgun referred to in subsection 12(6.1) or a prohibited firearm referred to in subsection 12(9) — between specified places except for the purposes referred to in paragraph (1)(b).

Exception : armes à feu prohibées autres que les armes de poing prohibées

(2) Malgré le paragraphe (1), le particulier ne peut être autorisé à transporter une arme à feu prohibée — autre qu'une arme de poing visée au paragraphe 12(6.1) ou une arme à feu prohibée visée au paragraphe 12(9) — entre des lieux précis que pour les raisons visées à l'alinéa (1)b).

Automatic authorization to transport — licence renewal

(2.1) Subject to subsection (2.3), an individual who holds a licence authorizing the individual to possess prohibited firearms or restricted firearms must, if the licence is renewed, be authorized to transport them within the individual's province of residence

(a) to and from all shooting clubs and shooting ranges that are approved under section 29;

(b) to and from any place a peace officer, firearms officer or chief firearms officer is located, for verification, registration or disposal in accordance with this Act or Part III of the *Criminal Code*;

(c) to and from a business that holds a licence authorizing it to repair or appraise prohibited firearms or restricted firearms;

(d) to and from a gun show; and

(e) to a port of exit in order to take them outside Canada, and from a port of entry.

Autorisation de transport automatique : renouvellement

(2.1) Sous réserve du paragraphe (2.3), le particulier titulaire d'un permis de possession d'armes à feu prohibées ou d'armes à feu à autorisation restreinte doit, si son permis est renouvelé, être autorisé, dans sa province de résidence, à les transporter :

a) vers tout club de tir et tout champ de tir agréés conformément à l'article 29, et à partir de ceux-ci;

b) vers tout lieu où se trouve un agent de la paix, un préposé aux armes à feu ou un contrôleur des armes à feu pour enregistrement, vérification ou disposition en conformité avec la présente loi ou la partie III du *Code criminel*, et à partir de celui-ci;

c) vers une entreprise titulaire d'un permis l'autorisant à réparer et à évaluer les armes à feu prohibées ou les armes à feu à autorisation restreinte, et à partir de celle-ci;

d) vers une exposition d'armes à feu, et à partir de celle-ci;

e) to a port of exit from which they are to be exported, and from a port of entry.

Automatic authorization to transport — transfer

(2.2) Subject to subsection (2.3), if a chief firearms officer has authorized the transfer of a prohibited firearm or a restricted firearm to an individual who holds a licence authorizing the individual to possess prohibited firearms or restricted firearms, the individual must be authorized

(a) to transport the firearm within the individual's province of residence from the place where the individual acquires it to the place where they may possess it under section 17; and

(b) to transport their prohibited firearms and restricted firearms within the individual's province of residence to and from the places referred to in any of paragraphs (2.1)(a) to (e).

Exceptions

(2.3) An individual must not be authorized under subsection (2.1) or (2.2) to transport the following firearms to or from the places referred to in paragraph (2.1)(a):

(a) a prohibited firearm, other than a handgun referred to in subsection 12(6.1); and

(b) a restricted firearm or a handgun referred to in subsection 12(6.1) whose transfer was approved, in accordance with subparagraph 28(b)(ii), for the purpose of forming part of a gun collection.

Non-residents

(3) A non-resident may be authorized to transport a particular restricted firearm between specified places in accordance with sections 35 and 35.1.

1995, c. 39, s. 19; 2003, c. 8, s. 16; 2015, c. 27, s. 6; 2019, c. 9, s. 4.

Carrying restricted firearms and pre-February 14, 1995 handguns

20 An individual who holds a licence authorizing the individual to possess restricted firearms or handguns referred to in subsection 12(6.1) (pre-December 1, 1998 handguns) may be authorized to possess a particular restricted firearm or handgun at a place other than the place at which it is authorized to be possessed if the individual needs the particular restricted firearm or handgun

(a) to protect the life of that individual or of other individuals; or

e) vers un port de sortie afin de les emporter à l'extérieur du Canada, et à partir d'un port d'entrée.

Autorisation de transport automatique : cession

(2.2) Sous réserve du paragraphe (2.3), si un contrôleur des armes à feu autorise la cession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte à un particulier titulaire d'un permis de possession d'armes à feu prohibées ou d'armes à feu à autorisation restreinte, le particulier doit, dans sa province de résidence, être autorisé à transporter :

a) cette arme à feu du lieu de son acquisition au lieu où elle peut être gardée en vertu de l'article 17;

b) toutes ses armes à feu prohibées et ses armes à feu à autorisation restreinte vers les lieux visés aux alinéas (2.1)a) à e), et à partir de ceux-ci.

Exceptions

(2.3) Le particulier ne doit pas être autorisé en vertu des paragraphes (2.1) ou (2.2) à transporter, vers les lieux visés à l'alinéa (2.1)a) ou à partir de ceux-ci, les armes à feu suivantes :

a) une arme à feu prohibée, autre qu'une arme de poing visée au paragraphe 12(6.1);

b) une arme à feu à autorisation restreinte ou une arme de poing visée au paragraphe 12(6.1) dont la cession a été autorisée, en application du sous-alinéa 28b)(ii), à des fins de collection.

Importation par un non-résident

(3) Un non-résident peut être autorisé à transporter, en conformité avec les dispositions des articles 35 et 35.1, une arme à feu à autorisation restreinte entre des lieux précisés.

1995, ch. 39, art. 19; 2003, ch. 8, art. 16; 2015, ch. 27, art. 6; 2019, ch. 9, art. 4.

Port d'armes à feu à autorisation restreinte et d'armes de poing

20 Le particulier titulaire d'un permis de possession d'armes à feu à autorisation restreinte ou d'armes de poing visées au paragraphe 12(6.1) (armes de poing : 1er décembre 1998) peut être autorisé à en posséder une en particulier en un lieu autre que celui où il est permis de la posséder, s'il en a besoin pour protéger sa vie ou celle d'autrui ou pour usage dans le cadre de son activité professionnelle légale.

1995, ch. 39, art. 20; 2003, ch. 8, art. 56.

(b) for use in connection with his or her lawful profession or occupation.

1995, c. 39, s. 20; 2003, c. 8, s. 56.

Authorized Transfers and Lending

General Provisions

Definition of "transfer"

21 For the purposes of sections 22 to 32, ***transfer*** means sell, barter or give.

Mental disorder, etc.

22 A person may transfer or lend a firearm to an individual only if the person has no reason to believe that the individual

(a) has a mental illness that makes it desirable, in the interests of the safety of that individual or any other person, that the individual not possess a firearm; or

(b) is impaired by alcohol or a drug.

Authorized Transfers

Authorization to transfer non-restricted firearms

23 A person may transfer a non-restricted firearm if, at the time of the transfer,

(a) the transferee holds a licence authorizing the transferee to acquire and possess that kind of firearm; and

(b) the transferor has no reason to believe that the transferee is not authorized to acquire and possess that kind of firearm.

1995, c. 39, s. 23; 2003, c. 8, s. 17; 2012, c. 6, s. 11; 2015, c. 27, s. 7.

Voluntary request to Registrar

23.1 (1) A transferor referred to in section 23 may request that the Registrar inform the transferor as to whether the transferee, at the time of the transfer, holds and is still eligible to hold the licence referred to in paragraph 23(a), and if such a request is made, the Registrar or his or her delegate, or any other person that the federal Minister may designate, shall so inform the transferor.

No record of request

(2) Despite sections 12 and 13 of the *Library and Archives of Canada Act* and subsections 6(1) and (3) of the *Privacy Act*, neither the Registrar or his or her

Cession et prêt

Dispositions générales

Définition de « cession »

21 Pour l'application des articles 22 à 32, ***cession*** s'entend de la vente, de l'échange ou du don.

État de santé mentale, alcool et drogue

22 Il ne peut être cédé ou prêté d'arme à feu à un particulier si le cédant ou le prêteur a un motif de croire que soit la possession d'une arme à feu par celui-ci constituerait, vu son état de santé mentale, un danger pour lui-même ou pour autrui, soit les facultés du particulier sont affaiblies par l'alcool ou la drogue.

Cession

Cession d'armes à feu sans restriction

23 La cession d'une arme à feu sans restriction est permise si, au moment où elle s'opère :

a) le cessionnaire est effectivement titulaire d'un permis l'autorisant à acquérir et à posséder une telle arme à feu;

b) le cédant n'a aucun motif de croire que le cessionnaire n'est pas autorisé à acquérir et à posséder une telle arme à feu.

1995, ch. 39, art. 23; 2003, ch. 8, art. 17; 2012, ch. 6, art. 11; 2015, ch. 27, art. 7.

Demande au directeur

23.1 (1) Le cédant visé à l'article 23 peut demander au directeur qu'il lui indique si, au moment de la cession, le cessionnaire est titulaire du permis mentionné à l'alinéa 23a) et y est toujours admissible; le cas échéant, le directeur, son délégué ou toute autre personne que le ministre fédéral peut désigner lui fournit les renseignements demandés.

Aucun fichier ou registre

(2) Malgré les articles 12 et 13 de la *Loi sur la Bibliothèque et les Archives du Canada* et les paragraphes 6(1) et (3) de la *Loi sur la protection des renseignements*

delegate nor a designated person shall retain any record of a request made under subsection (1).

2012, c. 6, s. 11.

personnels, le directeur, son délégué ou la personne désignée, selon le cas, ne conserve aucun registre ou fichier au sujet d'une telle demande.

2012, ch. 6, art. 11.

Authorization to transfer prohibited or restricted firearms

23.2 (1) A person may transfer a prohibited firearm or a restricted firearm if, at the time of the transfer,

(a) the transferee holds a licence authorizing the transferee to acquire and possess that kind of firearm;

(b) the transferor has no reason to believe that the transferee is not authorized to acquire and possess that kind of firearm;

(c) the transferor informs the Registrar of the transfer;

(d) if the transferee is an individual, the transferor informs a chief firearms officer of the transfer and obtains the authorization of the chief firearms officer for the transfer;

(e) a new registration certificate for the firearm is issued in accordance with this Act; and

(f) the prescribed conditions are met.

Notice

(2) If, after being informed of a proposed transfer of a firearm, the Registrar decides to refuse to issue a registration certificate for the firearm, the Registrar shall inform a chief firearms officer of that decision.

2012, c. 6, s. 11.

Cession d'armes à feu prohibées ou à autorisation restreinte

23.2 (1) La cession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte est permise si, au moment où elle s'opère :

a) le cessionnaire est effectivement titulaire d'un permis l'autorisant à acquérir et à posséder une telle arme à feu;

b) le cédant n'a aucun motif de croire que le cessionnaire n'est pas autorisé à acquérir et à posséder une telle arme à feu;

c) le cédant en informe le directeur;

d) le cédant en informe le contrôleur des armes à feu et obtient l'autorisation correspondante, si le cessionnaire est un particulier;

e) un nouveau certificat d'enregistrement de l'arme à feu est délivré conformément à la présente loi;

f) les conditions réglementaires sont remplies.

Notification

(2) Si, après avoir été informé d'un projet de cession d'une arme à feu, il refuse de délivrer un certificat d'enregistrement de l'arme à feu, le directeur notifie sa décision de refus au contrôleur des armes à feu.

2012, ch. 6, art. 11.

Authorization to transfer prohibited weapons, devices and ammunition

24 (1) Subject to section 26, a person may transfer a prohibited weapon, prohibited device or prohibited ammunition only to a business.

Conditions

(2) A person may transfer a prohibited weapon, prohibited device, ammunition or prohibited ammunition to a business only if

(a) the business holds a licence authorizing the business to acquire and possess prohibited weapons, prohibited devices, ammunition or prohibited ammunition, as the case may be; and

(b) [Repealed, 2003, c. 8, s. 18]

Cession d'armes prohibées, de dispositifs prohibés et de munitions

24 (1) Sous réserve de l'article 26, les armes prohibées, les dispositifs prohibés ou les munitions prohibées ne peuvent être cédés qu'à une entreprise.

Conditions

(2) La cession d'un tel objet et de munitions n'est permise que si, au moment où elle s'opère :

a) l'entreprise est titulaire d'un permis l'autorisant à acquérir et à posséder l'objet en cause;

b) [Abrogé, 2003, ch. 8, art. 18]

c) le cédant n'a aucun motif de croire que l'entreprise n'est pas autorisée à acquérir et à posséder l'objet en cause.

(c) the person has no reason to believe that the business is not authorized to acquire and possess prohibited weapons, prohibited devices, ammunition or prohibited ammunition, as the case may be.

(d) [Repealed before coming into force, 2008, c. 20, s. 3]

1995, c. 39, s. 24; 2003, c. 8, s. 18; 2008, c. 20, s. 3.

(d) [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

1995, ch. 39, art. 24; 2003, ch. 8, art. 18; 2008, ch. 20, art. 3.

Authorization to transfer ammunition to individuals

25 A person may transfer ammunition that is not prohibited ammunition to an individual only if the individual

(a) until January 1, 2001, holds a licence authorizing him or her to possess firearms or a prescribed document; or

(b) after January 1, 2001, holds a licence authorizing him or her to possess firearms.

Cession de munitions non prohibées aux particuliers

25 La cession de munitions non prohibées à un particulier n'est permise :

a) jusqu'au 1er janvier 2001, que s'il est titulaire d'un permis l'autorisant à posséder une arme à feu ou d'un document réglementaire;

b) après le 1er janvier 2001, que s'il est titulaire d'un permis l'autorisant à posséder une arme à feu.

Authorization to transfer prohibited or restricted firearms to Crown, etc.

26 (1) A person may transfer a prohibited firearm or a restricted firearm to Her Majesty in right of Canada or a province, to a police force or to a municipality if the person informs the Registrar of the transfer and complies with the prescribed conditions.

Cession d'armes à feu prohibées ou d'armes à feu à autorisation restreinte à Sa Majesté

26 (1) La cession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte à Sa Majesté du chef du Canada et des provinces, à une force policière ou à une municipalité est permise si le cédant en informe le directeur et remplit les conditions réglementaires.

Authorization to transfer prohibited weapons, etc., to the Crown, etc.

(2) A person may transfer a prohibited weapon, restricted weapon, prohibited device, ammunition or prohibited ammunition to Her Majesty in right of Canada or a province, to a police force or to a municipality if the person informs a chief firearms officer of the transfer and complies with the prescribed conditions.

1995, c. 39, s. 26; 2003, c. 8, s. 19; 2012, c. 6, s. 12.

Cession d'armes prohibées, d'armes à autorisation restreinte, etc.

(2) La cession d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés, de munitions ou de munitions prohibées à Sa Majesté du chef du Canada ou d'une province, à une force policière ou à une municipalité est permise si le cédant en informe le contrôleur des armes à feu et remplit les conditions réglementaires.

1995, ch. 39, art. 26; 2003, ch. 8, art. 19; 2012, ch. 6, art. 12.

Chief firearms officer

27 On being informed of a proposed transfer of a prohibited firearm or restricted firearm under section 23.2, a chief firearms officer shall

(a) verify

(i) whether the transferee or individual holds a licence,

(ii) whether the transferee or individual is still eligible to hold that licence, and

(iii) whether the licence authorizes the transferee or individual to acquire that kind of firearm or to acquire prohibited weapons, prohibited devices,

Contrôleur des armes à feu

27 Dès qu'il est informé d'un projet de cession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte en application de l'article 23.2, le contrôleur des armes à feu :

a) vérifie, à l'égard du cessionnaire ou du particulier :

(i) s'il est titulaire d'un permis,

(ii) s'il y est toujours admissible,

(iii) si le permis autorise l'acquisition de l'objet en cause;

b) en cas de cession d'une arme à feu à autorisation restreinte ou d'une arme de poing visée au paragraphe

ammunition or prohibited ammunition, as the case may be;

(b) in the case of a proposed transfer of a restricted firearm or a handgun referred to in subsection 12(6.1) (pre-December 1, 1998 handguns), verify the purpose for which the transferee or individual wishes to acquire the restricted firearm or handgun and determine whether the particular restricted firearm or handgun is appropriate for that purpose;

(c) decide whether to approve the transfer and inform the Registrar of that decision; and

(d) take the prescribed measures.

1995, c. 39, s. 27; 2003, c. 8, s. 20; 2012, c. 6, s. 13.

12(6.1) (armes de poing : 1er décembre 1998), vérifie la finalité de l'acquisition par le cessionnaire ou le particulier et détermine si l'arme est appropriée;

c) autorise ou refuse la cession et avise le directeur de sa décision;

d) prend les mesures réglementaires.

1995, ch. 39, art. 27; 2003, ch. 8, art. 20; 2012, ch. 6, art. 13.

Permitted purposes

28 A chief firearms officer may approve the transfer to an individual of a restricted firearm or a handgun referred to in subsection 12(6.1) (pre-December 1, 1998 handguns) only if the chief firearms officer is satisfied

(a) that the individual needs the restricted firearm or handgun

(i) to protect the life of that individual or of other individuals, or

(ii) for use in connection with his or her lawful profession or occupation; or

(b) that the purpose for which the individual wishes to acquire the restricted firearm or handgun is

(i) for use in target practice, or a target shooting competition, under conditions specified in an authorization to transport or under the auspices of a shooting club or shooting range that is approved under section 29, or

(ii) to form part of a gun collection of the individual, in the case of an individual who satisfies the criteria described in section 30.

1995, c. 39, s. 28; 2003, c. 8, s. 21.

Finalité de l'acquisition

28 Le contrôleur des armes à feu ne peut autoriser la cession à un particulier d'une arme à feu à autorisation restreinte ou d'une arme de poing visée au paragraphe 12(6.1) (armes de poing : 1er décembre 1998) que s'il est convaincu que :

a) celui-ci en a besoin pour :

(i) protéger sa vie ou celle d'autrui,

(ii) usage dans le cadre de son activité professionnelle légale;

b) celui-ci désire l'acquérir pour l'une ou l'autre des fins suivantes :

(i) tir à la cible, participation à une compétition de tir ou usage conforme à une autorisation de transport ou sous les auspices d'un club de tir ou d'un champ de tir agréé conformément à l'article 29,

(ii) collection d'armes à feu par le particulier, lorsque les conditions énoncées à l'article 30 sont remplies.

1995, ch. 39, art. 28; 2003, ch. 8, art. 21.

Shooting clubs and shooting ranges

29 (1) No person shall operate a shooting club or shooting range except under an approval of the provincial minister for the province in which the premises of the shooting club or shooting range are located.

Approval

(2) A provincial minister may approve a shooting club or shooting range for the purposes of this Act if

Clubs de tir et champs de tir

29 (1) Nul ne peut, sauf avec l'agrément du ministre provincial, exploiter un club de tir ou un champ de tir situés dans sa province.

Agrément

(2) Le ministre provincial peut conférer l'agrément aux clubs de tir ou aux champs de tir, situés dans sa province,

(a) the shooting club or shooting range complies with the regulations made under paragraph 117(e); and

(b) the premises of the shooting club or shooting range are located in that province.

qui se conforment aux règlements d'application de l'alinéa 117e).

Revocation

(3) A provincial minister who approves a shooting club or shooting range for the purposes of this Act may revoke the approval for any good and sufficient reason including, without limiting the generality of the foregoing, where the shooting club or shooting range contravenes a regulation made under paragraph 117(e).

Révocation de l'agrément

(3) L'agrément peut être révoqué pour toute raison valable, notamment dans le cas où le club de tir ou le champ de tir contrevient aux règlements d'application de l'alinéa 117e).

Delegation

(4) A chief firearms officer who is authorized in writing by a provincial minister may perform such duties and functions of the provincial minister under this section as are specified in the authorization.

Délégation

(4) Le contrôleur des armes à feu, s'il est le délégué du ministre provincial pour l'application des paragraphes (2) et (3), exerce les attributions précisées dans l'acte de délégation.

Notice of refusal to approve or revocation

(5) Where a provincial minister decides to refuse to approve or to revoke an approval of a shooting club or shooting range for the purposes of this Act, the provincial minister shall give notice of the decision to the shooting club or shooting range.

Notification du refus ou de la révocation de l'agrément

(5) Le ministre provincial est tenu de notifier au club de tir ou au champ de tir intéressé sa décision de refuser ou de révoquer l'agrément nécessaire pour l'application de la présente loi.

Material to accompany notice

(6) A notice given under subsection (5) must include reasons for the decision disclosing the nature of the information relied on for the decision and must be accompanied by a copy of sections 74 to 81.

Contenu

(6) La notification visée au paragraphe (5) comporte les motifs de la décision faisant état de la nature des renseignements sur lesquels il s'est fondé pour la prendre ainsi que le texte des articles 74 à 81.

Non-disclosure of information

(7) A provincial minister need not disclose any information the disclosure of which could, in the opinion of the provincial minister, endanger the safety of any person.

1995, c. 39, s. 29; 2003, c. 8, s. 22(F).

Non-communication des renseignements

(7) Le ministre provincial n'est pas tenu de communiquer des renseignements qui, à son avis, pourraient menacer la sécurité d'une personne.

1995, ch. 39, art. 29; 2003, ch. 8, art. 22(F).

Gun collectors

30 The criteria referred to in subparagraph 28(b)(ii) are that the individual

(a) has knowledge of the historical, technological or scientific characteristics that relate or distinguish the restricted firearms or handguns that he or she possesses;

(b) has consented to the periodic inspection, conducted in a reasonable manner, of the premises in which the restricted firearms or handguns are to be kept; and

Collectionneurs d'armes à feu

30 Pour l'application du sous-alinéa 28b)(ii), les particuliers collectionneurs doivent :

a) connaître les caractéristiques historiques, techniques ou scientifiques relatives ou particulières à leurs armes à feu à autorisation restreinte ou à leurs armes de poing;

b) consentir à une forme raisonnable de visite périodique des lieux où doivent être gardées ces armes à feu;

(c) has complied with such other requirements as are prescribed respecting knowledge, secure storage and the keeping of records in respect of restricted firearms or handguns.

(c) se conformer aux autres exigences réglementaires portant sur la connaissance et la sûreté de l'entreposage de ces armes à feu ainsi que sur la tenue de fichiers à leur égard.

Registrar

31 (1) On being informed of a proposed transfer of a firearm, the Registrar may

(a) issue a new registration certificate for the firearm in accordance with this Act; and

(b) revoke any registration certificate for the firearm held by the transferor.

Directeur

31 (1) Dès qu'il est informé d'un projet de cession d'une arme à feu, le directeur peut délivrer un nouveau certificat d'enregistrement de celle-ci conformément à la présente loi; le cas échéant, il révoque celui dont le cédant est titulaire.

Transfers of firearms to the Crown, etc.

(2) On being informed of a transfer of a firearm to Her Majesty in right of Canada or a province, to a police force or to a municipality, the Registrar shall revoke any registration certificate for the firearm.

1995, c. 39, s. 31; 2003, c. 8, s. 23.

Cession d'arme à feu à Sa Majesté, à une force policière ou à une municipalité

(2) Dès qu'il est informé de la cession d'une arme à feu à Sa Majesté du chef du Canada ou d'une province, à une force policière ou à une municipalité, le directeur révoque le certificat d'enregistrement y afférent.

1995, ch. 39, art. 31; 2003, ch. 8, art. 23.

Mail-order transfers of firearms

32 A person may transfer a firearm by mail only if

(a) the verifications, notifications, issuances and authorizations referred to in sections 21 to 28, 30, 31, 40 to 43 and 46 to 52 take place within a reasonable period before the transfer in the prescribed manner; and

(b) [Repealed, 2003, c. 8, s. 24]

(c) the prescribed conditions are complied with.

1995, c. 39, s. 32; 2003, c. 8, s. 24.

Cession par la poste

32 La cession d'une arme à feu par la poste est permise lorsque :

a) les vérifications, notifications, délivrances et autorisations prévues aux articles 21 à 28, 30, 31, 40 à 43 et 46 à 52 sont effectuées auparavant dans un délai raisonnable, selon les modalités réglementaires;

b) [Abrogé, 2003, ch. 8, art. 24]

c) les conditions réglementaires sont remplies.

1995, ch. 39, art. 32; 2003, ch. 8, art. 24.

Authorized Lending

Authorization to lend

33 Subject to section 34, a person may lend a firearm only if

(a) the person

(i) has reasonable grounds to believe that the borrower holds a licence authorizing the borrower to possess that kind of firearm, and

(ii) in the case of a prohibited firearm or a restricted firearm, lends the registration certificate for it to the borrower; or

Prêt

Autorisation de prêt

33 Sous réserve de l'article 34, le prêt d'une arme à feu n'est permis que dans l'un ou l'autre des cas suivants :

a) le prêteur :

(i) croit, pour des motifs raisonnables, que l'emprunteur est titulaire d'un permis l'autorisant à posséder une telle arme à feu,

(ii) s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, la livre à celui-ci accompagnée du certificat d'enregistrement afférent;

(b) the borrower uses the firearm under the direct and immediate supervision of the person in the same manner in which the person may lawfully use it.

1995, c. 39, s. 33; 2012, c. 6, s. 14.

(b) l'emprunteur l'utilise sous la surveillance directe du prêteur de la même manière légale que celui-ci.

1995, ch. 39, art. 33; 2012, ch. 6, art. 14.

Authorization to lend firearms, etc., to the Crown, etc.

34 A person may lend a firearm, prohibited weapon, restricted weapon, prohibited device, ammunition or prohibited ammunition to Her Majesty in right of Canada or a province, to a police force or to a municipality if

(a) in the case of a prohibited firearm or a restricted firearm, the transferor lends the registration certificate for it to the borrower; and

(b) the prescribed conditions are complied with.

1995, c. 39, s. 34; 2003, c. 8, s. 25; 2012, c. 6, s. 15.

Prêt à Sa Majesté, à une force policière ou à une municipalité

34 Le prêt d'armes à feu, d'armes prohibées, de dispositifs prohibés, d'armes à autorisation restreinte, de munitions et de munitions prohibées à Sa Majesté du chef du Canada ou d'une province, à une force policière ou à une municipalité est permis si :

a) dans le cas d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, le prêteur la livre accompagnée du certificat d'enregistrement afférent;

b) les conditions réglementaires sont remplies.

1995, ch. 39, art. 34; 2003, ch. 8, art. 25; 2012, ch. 6, art. 15.

Authorized Exportation and Importation

Individuals

Authorization for non-residents who do not hold a licence to import firearms that are not prohibited firearms

35 (1) A non-resident who does not hold a licence may import a firearm that is not a prohibited firearm if, at the time of the importation,

(a) the non-resident

(i) is eighteen years old or older,

(ii) declares the firearm to a customs officer in the prescribed manner and, in the case of a declaration in writing, completes the prescribed form containing the prescribed information, and

(iii) in the case of a restricted firearm, produces an authorization to transport the restricted firearm; and

(b) a customs officer confirms in the prescribed manner the declaration referred to in subparagraph (a)(ii) and the authorization to transport referred to in subparagraph (a)(iii).

Non-compliance

(2) Where a firearm is declared at a customs office to a customs officer but the requirements of subparagraphs (1)(a)(ii) and (iii) are not complied with, the customs

Exportation et importation

Particuliers

Importation : non-résidents

35 (1) Le non-résident qui n'est pas titulaire d'un permis peut importer une arme à feu non prohibée si, au moment de l'importation :

a) il est âgé d'au moins dix-huit ans;

b) il la déclare à l'agent des douanes selon les modalités réglementaires et, dans le cas d'une déclaration écrite, remplit le formulaire réglementaire et fournit les renseignements réglementaires;

c) il produit, s'il s'agit d'une arme à feu à autorisation restreinte, l'autorisation de transport y afférente;

d) l'agent des douanes atteste, selon les modalités réglementaires, la déclaration prévue à l'alinéa b) et, le cas échéant, l'autorisation prévue à l'alinéa c).

Non-respect des conditions

(2) Dans le cas où l'arme à feu a été déclarée sans que les conditions des alinéas (1)b) ou c) soient remplies, l'agent des douanes peut en autoriser l'exportation à partir du

officer may authorize the firearm to be exported from that customs office or may detain the firearm and give the non-resident a reasonable time to comply with those requirements.

Disposal of firearm

(3) Where those requirements are not complied with within a reasonable time and the firearm is not exported, the firearm shall be disposed of in the prescribed manner.

Non-compliance

(4) If a non-restricted firearm is declared at a customs office to a customs officer and

(a) the non-resident has not truthfully completed the prescribed form, or

(b) the customs officer has reasonable grounds to believe that it is desirable, in the interests of the safety of the non-resident or any other person, that the declaration not be confirmed,

the customs officer may refuse to confirm the declaration and may authorize the firearm to be exported from that customs office.

1995, c. 39, s. 35; 2015, c. 27, s. 8.

Temporary licence and registration certificate

36 (1) A declaration that is confirmed under paragraph 35(1)(b) has the same effect after the importation of the firearm as a licence authorizing the non-resident to possess only that firearm and, in the case of a restricted firearm, as a registration certificate for the firearm until

(a) the expiry of 60 days after the importation, in the case of a non-restricted firearm; or

(b) the earlier of the expiry of 60 days after the importation and the expiry of the authorization to transport, in the case of a restricted firearm.

Renewal

(2) A chief firearms officer may renew the confirmation of a declaration for one or more periods of sixty days.

Electronic or other means

(3) For greater certainty, an application for a renewal of the confirmation of a declaration may be made by telephone or other electronic means or by mail and a chief

bureau de douane de la déclaration, ou la retenir et accorder au non-résident un délai raisonnable pour lui permettre de remplir ces conditions.

Sort de l'arme à feu

(3) Après l'expiration du délai, il est disposé, de la manière réglementaire, de l'arme à feu retenue et non exportée si les conditions ne sont toujours pas remplies.

Non-conformité

(4) Dans le cas où une arme à feu sans restriction a été déclarée au bureau de douane et que le non-résident n'a pas rempli véridiquement le formulaire réglementaire ou que l'agent des douanes a des motifs raisonnables de croire qu'il est souhaitable, pour la sécurité du non-résident ou pour celle d'autrui, que la déclaration ne soit pas attestée, celui-ci peut refuser de l'attester et autoriser l'exportation de l'arme à feu à partir du bureau de douane.

1995, ch. 39, art. 35; 2015, ch. 27, art. 8.

Permis et certificat temporaires

36 (1) Une fois attestée conformément à l'alinéa 35(1)d), la déclaration a valeur de permis de possession — valide à l'égard de l'arme à feu importée seulement — ainsi que, dans le cas d'une arme à feu à autorisation restreinte, de certificat d'enregistrement, pour :

a) une période de soixante jours à compter de l'importation, s'il s'agit d'une arme à feu sans restriction;

b) soit une période de soixante jours à compter de l'importation, soit la période de validité de l'autorisation de transport afférente si elle est inférieure à soixante jours, s'il s'agit d'une arme à feu à autorisation restreinte.

Prorogation

(2) Cette période de soixante jours peut être prorogée à une ou plusieurs reprises par le contrôleur des armes à feu.

Moyens électroniques ou autres

(3) Il est entendu que la demande de prorogation peut être faite soit par téléphone ou par tout autre moyen électronique soit par courrier et que le contrôleur des armes à feu peut y faire droit par les mêmes moyens.

1995, ch. 39, art. 36; 2012, ch. 6, art. 16; 2015, ch. 27, art. 9.

firearms officer may renew that confirmation by electronic means or by mail.

1995, c. 39, s. 36; 2012, c. 6, s. 16; 2015, c. 27, s. 9.

37 [Repealed before coming into force, 2008, c. 20, s. 3]

38 [Repealed before coming into force, 2008, c. 20, s. 3]

39 [Repealed before coming into force, 2008, c. 20, s. 3]

40 [Repealed before coming into force, 2008, c. 20, s. 3]

41 [Repealed before coming into force, 2008, c. 20, s. 3]

42 [Repealed before coming into force, 2008, c. 20, s. 3]

Businesses

43 [Repealed before coming into force, 2008, c. 20, s. 3]

44 [Repealed before coming into force, 2008, c. 20, s. 3]

45 [Repealed before coming into force, 2008, c. 20, s. 3]

46 [Repealed before coming into force, 2008, c. 20, s. 3]

47 [Repealed before coming into force, 2008, c. 20, s. 3]

48 [Repealed before coming into force, 2008, c. 20, s. 3]

49 [Repealed before coming into force, 2008, c. 20, s. 3]

50 [Repealed before coming into force, 2008, c. 20, s. 3]

51 [Repealed before coming into force, 2008, c. 20, s. 3]

52 [Repealed before coming into force, 2008, c. 20, s. 3]

53 [Repealed before coming into force, 2008, c. 20, s. 3]

Licences, Registration Certificates and Authorizations

Applications

Applications

54 (1) A licence, registration certificate or authorization, other than an authorization referred to in subsection 19(2.1) or (2.2), may be issued only on application made in the prescribed form — which form may be in writing or electronic — or in the prescribed manner. The application must set out the prescribed information and be accompanied by payment of the prescribed fees.

37 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

38 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

39 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

40 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

41 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

42 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

Entreprises

43 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

44 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

45 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

46 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

47 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

48 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

49 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

50 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

51 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

52 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

53 [Abrogé avant d'entrer en vigueur, 2008, ch. 20, art. 3]

Permis, autorisations et certificats d'enregistrement

Demandes

Dépôt d'une demande

54 (1) La délivrance des permis, des autorisations — autre que celles visées aux paragraphes 19(2.1) ou (2.2) — et des certificats d'enregistrement est subordonnée au dépôt d'une demande présentée en la forme réglementaire — écrite ou électronique — ou selon les modalités réglementaires et accompagnée des renseignements réglementaires, et à l'acquittement des droits réglementaires.

To whom made

(2) An application for a licence, registration certificate or authorization must be made to

(a) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or

(b) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

Pre-commencement restricted firearms and handguns

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6.1) (pre-December 1, 1998 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

(a) except in the case of a firearm described in paragraph (b), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

(b) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

1995, c. 39, s. 54; 2003, c. 8, ss. 36, 56; 2015, c. 27, s. 11.

Further information

55 (1) A chief firearms officer or the Registrar may require an applicant for a licence or authorization to submit such information, in addition to that included in the application, as may reasonably be regarded as relevant for the purpose of determining whether the applicant is eligible to hold the licence or authorization.

Investigation

(2) Without restricting the scope of the inquiries that may be made with respect to an application for a licence, a chief firearms officer may conduct an investigation of the applicant, which may consist of interviews with neighbours, community workers, social workers, individuals who work or live with the applicant, spouse or common-law partner, former spouse or former common-law partner, dependants or whomever in the opinion of the chief firearms officer may provide information pertaining to whether the applicant is eligible under section 5 to hold a licence.

1995, c. 39, s. 55; 2000, c. 12, s. 118.

Destinataire de la demande

(2) La demande est adressée :

a) au contrôleur des armes à feu, dans le cas des permis et des autorisations de port et de transport;

b) au directeur, dans le cas des certificats d'enregistrement et des autorisations d'exportation ou d'importation.

Armes à feu à autorisation restreinte et armes de poing antérieures

(3) Le particulier qui possède une ou plusieurs armes à feu à autorisation restreinte ou armes de poing visées au paragraphe 12(6.1) (armes de poing : 1er décembre 1998) à la date de référence est tenu de préciser dans toute demande de permis correspondante :

a) sauf s'il s'agit d'une arme à feu visée à l'alinéa b), pour laquelle des fins, prévues à l'article 28, il désire continuer cette possession;

b) pour lesquelles de ces armes à feu a été délivré le certificat d'enregistrement prévu par la loi antérieure parce qu'elles sont des antiquités ou avaient une valeur de curiosité, de rareté, de commémoration ou de simple souvenir.

1995, ch. 39, art. 54; 2003, ch. 8, art. 36 et 56; 2015, ch. 27, art. 11.

Renseignements supplémentaires

55 (1) Le contrôleur des armes à feu ou le directeur peut exiger du demandeur d'un permis ou d'une autorisation tout renseignement supplémentaire normalement utile pour lui permettre de déterminer si celui-ci répond aux critères d'admissibilité au permis ou à l'autorisation.

Enquête

(2) Sans que le présent paragraphe ait pour effet de restreindre le champ des vérifications pouvant être menées sur une demande de permis, le contrôleur des armes à feu peut procéder à une enquête pour déterminer si le demandeur peut être titulaire du permis prévu à l'article 5 et, à cette fin, interroger des voisins de celui-ci, des travailleurs communautaires, des travailleurs sociaux, toute personne qui travaille ou habite avec lui, son époux ou conjoint de fait ou son ex-époux ou ancien conjoint de fait, des membres de sa famille ou toute personne qu'il juge susceptible de lui communiquer des renseignements pertinents.

1995, ch. 39, art. 55; 2000, ch. 12, art. 118.

Issuance

Licences

56 (1) A chief firearms officer is responsible for issuing licences.

Only one licence per individual

(2) Only one licence may be issued to any one individual.

Separate licence for each location

(3) A business other than a carrier requires a separate licence for each place where the business is carried on.

Authorizations to carry or transport

57 A chief firearms officer is responsible for issuing authorizations to carry and authorizations to transport.

Conditions

58 (1) A chief firearms officer who issues a licence, an authorization to carry or an authorization to transport may attach any reasonable condition to it that the chief firearms officer considers desirable in the particular circumstances and in the interests of the safety of the holder or any other person.

Exception — licence or authorization

(1.1) However, a chief firearms officer's power to attach a condition to a licence, an authorization to carry or an authorization to transport is subject to the regulations.

Minors

(2) Before attaching a condition to a licence that is to be issued to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer must consult with a parent or person who has custody of the individual.

Minors

(3) Before issuing a licence to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer shall have a parent or person who has custody of the individual sign the licence, including any conditions attached to it.

1995, c. 39, s. 58; 2015, c. 27, s. 12.

Different registered owner

59 An individual who holds an authorization to carry or authorization to transport need not be the person to

Délivrance

Permis

56 (1) Les permis sont délivrés par le contrôleur des armes à feu.

Un seul permis par particulier

(2) Il ne peut être délivré qu'un seul permis à un particulier.

Permis pour chaque établissement

(3) Un permis est délivré pour chaque établissement où l'entreprise — qui n'est pas un transporteur — exerce ses activités.

Autorisations de port et de transport

57 Les autorisations de port et de transport sont délivrées par le contrôleur des armes à feu.

Conditions : permis et autorisations

58 (1) Le contrôleur des armes à feu peut assortir les permis et les autorisations de port et de transport des conditions qu'il estime souhaitables dans les circonstances et en vue de la sécurité de leur titulaire ou d'autrui.

Exception : permis ou autorisation

(1.1) Toutefois, le pouvoir du contrôleur des armes à feu d'assortir de conditions les permis et les autorisations de port et de transport est assujetti aux règlements.

Mineurs : consultation

(2) Dans le cas d'un particulier âgé de moins de dix-huit ans qui n'est pas admissible au permis prévu au paragraphe 8(2) (chasse de subsistance par les mineurs), le contrôleur des armes à feu consulte le père ou la mère du particulier ou la personne qui en a la garde avant d'assortir le permis d'une condition.

Mineurs : information des parents ou gardiens

(3) Avant de délivrer un permis au particulier visé au paragraphe (2), le contrôleur des armes à feu veille à ce que le père ou la mère ou la personne qui en a la garde ait connaissance des conditions dont est assorti le permis en exigeant leur signature sur celui-ci.

1995, ch. 39, art. 58; 2015, ch. 27, art. 12.

Propriétaire et possesseur

59 Il n'est pas nécessaire que le titulaire d'une autorisation de port ou de transport d'une arme à feu prohibée ou

whom the registration certificate for the particular prohibited firearm or restricted firearm was issued.

Registration certificates and authorizations to export or import

60 The Registrar is responsible for issuing registration certificates for prohibited firearms and restricted firearms and assigning firearms identification numbers to them and for issuing authorizations to export and authorizations to import.

1995, c. 39, s. 60; 2012, c. 6, s. 19.

Form

61 (1) A licence or registration certificate must be issued in the prescribed form — which form may be in writing or electronic — or in the prescribed manner, and include the prescribed information, including any conditions attached to it.

Form of authorizations

(2) An authorization to carry, authorization to transport, authorization to export or authorization to import may be issued in the prescribed form — which form may be in writing or electronic — or in the prescribed manner, and include the prescribed information, including any conditions attached to it.

Condition attached to licence

(3) An authorization to carry or authorization to transport may take the form of a condition attached to a licence.

Automatic authorization to transport

(3.1) An authorization to transport referred to in subsection 19(1.1), (2.1) or (2.2) must take the form of a condition attached to a licence.

Businesses

(4) A licence that is issued to a business must specify each particular activity that the licence authorizes in relation to firearms, cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or prohibited ammunition.

1995, c. 39, s. 61; 2003, c. 8, s. 38; 2015, c. 27, s. 13.

Not transferable

62 Licences, registration certificates, authorizations to carry, authorizations to transport, authorizations to export and authorizations to import are not transferable.

d'une arme à feu à autorisation restreinte soit le titulaire du certificat d'enregistrement y afférent.

Délivrance : certificats et numéros d'enregistrement

60 Les certificats d'enregistrement des armes à feu prohibées et des armes à feu à autorisation restreinte et les numéros d'enregistrement qui leur sont attribués, de même que les autorisations d'exportation et d'importation, sont délivrés par le directeur.

1995, ch. 39, art. 60; 2012, ch. 6, art. 19.

Forme : permis et certificats d'enregistrement

61 (1) Les permis et les certificats d'enregistrement sont délivrés en la forme réglementaire — écrite ou électronique — ou selon les modalités réglementaires et énoncent les renseignements réglementaires, notamment les conditions dont ils sont assortis.

Forme : autorisations

(2) Les autorisations de port, de transport, d'exportation ou d'importation peuvent être délivrées en la forme réglementaire — écrite ou électronique — ou selon les modalités réglementaires et énoncer les renseignements réglementaires, notamment les conditions dont elles sont assorties.

Condition d'un permis

(3) Les autorisations de port ou de transport peuvent aussi prendre la forme d'une condition d'un permis.

Autorisation de transport automatique

(3.1) Les autorisations de transport visées aux paragraphes 19(1.1), (2.1) ou (2.2) prennent la forme d'une condition d'un permis.

Précisions pour les entreprises

(4) Les permis délivrés aux entreprises précisent toutes les activités particulières autorisées touchant aux armes à feu, aux arbalètes, aux armes prohibées, aux armes à autorisation restreinte, aux dispositifs prohibés, aux munitions ou aux munitions prohibées.

1995, ch. 39, art. 61; 2003, ch. 8, art. 38; 2015, ch. 27, art. 13.

Incessibilité

62 Les permis, les certificats d'enregistrement, les autorisations de port, de transport, d'exportation ou d'importation sont incessibles.

Geographical extent

63 (1) Licences, registration certificates, authorizations to transport, authorizations to export and authorizations to import are valid throughout Canada.

(2) [Repealed, 2003, c. 8, s. 39]

Authorizations to carry

(3) Authorizations to carry are not valid outside the province in which they are issued.

1995, c. 39, s. 63; 2003, c. 8, s. 39.

Term

Term of licences

64 (1) A licence that is issued to an individual who is eighteen years old or older expires on the earlier of

(a) five years after the birthday of the holder next following the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

Extension period

(1.1) Despite subsection (1), if a licence for firearms is not renewed before it expires, the licence is extended for a period of six months beginning on the day on which it would have expired under that subsection.

No use or acquisition

(1.2) The holder of a licence that is extended under subsection (1.1) must not, until the renewal of their licence, use their firearms or acquire any firearms or ammunition.

Authorizations — no extension

(1.3) The extension of a licence under subsection (1.1) does not result in the extension of any authorization to carry or authorization to transport beyond the day on which the licence would have expired under subsection (1).

Authorizations — issuance

(1.4) During the extension period, the following authorizations must not be issued to the holder of the licence:

(a) an authorization to carry; and

(b) an authorization to transport, unless it is issued

(i) for a reason referred to in subparagraph 19(1)(b)(i) or (ii), or

Portée territoriale

63 (1) Les permis, les certificats d'enregistrement et les autorisations de transport, d'exportation ou d'importation sont valides partout au Canada.

(2) [Abrogé, 2003, ch. 8, art. 39]

Exceptions : autorisation de port

(3) Les autorisations de port ne sont pas valides à l'extérieur de la province de délivrance.

1995, ch. 39, art. 63; 2003, ch. 8, art. 39.

Durée de validité

Permis

64 (1) Les permis délivrés aux particuliers âgés d'au moins dix-huit ans sont valides pour la période mentionnée, qui ne peut dépasser cinq ans après le premier anniversaire de naissance du titulaire suivant la date de délivrance.

Prolongation de la période de validité

(1.1) Malgré le paragraphe (1), la période de validité d'un permis relatif à une arme à feu est prolongée de six mois dans le cas où il n'a pas été renouvelé avant sa date d'expiration.

Interdiction d'utilisation ou d'acquisition

(1.2) Le titulaire du permis dont la validité est prolongée au titre du paragraphe (1.1) ne peut, avant le renouvellement du permis, utiliser ses armes à feu ou acquérir des armes à feu ou des munitions.

Autorisations : aucune prolongation

(1.3) Le paragraphe (1.1) n'a pas pour effet de prolonger la validité d'une autorisation de port ou de transport au-delà de la date d'expiration du permis prévue au paragraphe (1).

Autorisations : délivrance

(1.4) Pendant la période de prolongation, les autorisations ci-après ne peuvent être délivrées au titulaire du permis :

a) une autorisation de port;

b) une autorisation de transport, sauf si elle est délivrée pour l'une des raisons suivantes :

(ii) because the holder wishes to transport a firearm for disposal through sale or exportation.

(i) une raison mentionnée aux sous-alinéas 19(1)b)(i) ou (ii),

(ii) le titulaire désire transporter une arme à feu afin d'en disposer en la vendant ou en l'exportant.

Minors

(2) A licence that is issued to an individual who is less than eighteen years old expires on the earlier of

(a) the day on which the holder attains the age of eighteen years, and

(b) the expiration of the period for which it is expressed to be issued.

Mineurs

(2) Les permis délivrés aux particuliers âgés de moins de dix-huit ans sont valides pour la période mentionnée, qui ne peut dépasser la date où le titulaire atteint l'âge de dix-huit ans.

Businesses

(3) A licence that is issued to a business other than a business referred to in subsection (4) expires on the earlier of

(a) three years after the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

Entreprises

(3) Les permis délivrés aux entreprises — autres que celles visées au paragraphe (4) — sont valides pour la période mentionnée, qui ne peut dépasser trois ans.

Businesses that sell only ammunition

(4) A licence that is issued to a business that sells ammunition but is not authorized to possess firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition expires on the earlier of

(a) five years after the day on which it is issued, and

(b) the expiration of the period for which it is expressed to be issued.

Entreprises qui ne vendent que des munitions

(4) Les permis délivrés aux entreprises qui vendent des munitions, mais qui ne sont pas autorisées à posséder des armes à feu, des armes prohibées, des armes à autorisation restreinte, des dispositifs prohibés ou des munitions prohibées sont valides pour la période mentionnée, qui ne peut dépasser cinq ans suivant la date de délivrance.

(5) and (6) [Repealed before coming into force, 2008, c. 20, s. 3]

(5) à (6) [Abrogés avant d'entrer en vigueur, 2008, ch. 20, art. 3]

Notice to holder

(7) The chief firearms officer shall give notice of every extension under this section to the holder of the licence.

1995, c. 39, s. 64; 2003, c. 8, s. 40; 2008, c. 20, s. 3; 2015, c. 27, s. 14.

Notification

(7) Le cas échéant, le contrôleur des armes à feu notifie la prolongation aux titulaires des permis.

1995, ch. 39, art. 64; 2003, ch. 8, art. 40; 2008, ch. 20, art. 3; 2015, ch. 27, art. 14.

Term of authorizations

65 (1) Subject to subsections (2) to (4), an authorization expires on the expiration of the period for which it is expressed to be issued.

Autorisations

65 (1) Sous réserve des paragraphes (2) à (4), les autorisations sont valides pour la période mentionnée.

Authorizations to transport

(2) Subject to subsection (3), an authorization to transport that takes the form of a condition attached to a licence expires on the earlier of

Autorisations de transport : permis

(2) Sous réserve du paragraphe (3), l'autorisation de transport exprimée sous forme de condition d'un permis est valide pour la période mentionnée, qui ne peut dépasser la date d'expiration du permis.

(a) the expiration of the period for which the condition is expressed to be attached, and

(b) the expiration of the licence.

Authorizations to transport

(3) An authorization to transport a prohibited firearm, except for an automatic firearm, or a restricted firearm for use in target practice, or a target shooting competition, under specified conditions or under the auspices of a shooting club or shooting range that is approved under section 29, whether or not the authorization takes the form of a condition attached to the licence of the holder of the authorization, expires on the earlier of

(a) the expiration of the period for which the authorization is expressed to be issued, which period may be no more than five years, and

(b) the expiration of the licence.

Authorizations to carry

(4) An authorization to carry expires

(a) in the case of an authorization to carry that takes the form of a condition attached to a licence, on the earlier of

(i) the expiration of the period for which the condition is expressed to be attached, which period may not be more than two years, and

(ii) the expiration of the licence; and

(b) in the case of an authorization to carry that does not take the form of a condition attached to a licence, on the expiration of the period for which the authorization is expressed to be issued, which period may not be more than two years.

1995, c. 39, s. 65; 2003, c. 8, s. 41.

Term of registration certificates

66 A registration certificate for a prohibited firearm or a restricted firearm expires when

(a) the holder of the registration certificate ceases to be the owner of the firearm; or

(b) the firearm ceases to be a firearm.

1995, c. 39, s. 66; 2012, c. 6, s. 20.

Renewal

67 (1) A chief firearms officer may renew a licence, authorization to carry or authorization to transport in the prescribed manner.

Autorisations de transport

(3) L'autorisation de transport d'une arme à feu prohibée — à l'exception d'une arme automatique — ou d'une arme à feu à autorisation restreinte pour le tir à la cible, la participation à une compétition de tir ou un usage conforme à des conditions précisées ou sous les auspices d'un club de tir ou d'un champ de tir agréé conformément à l'article 29 est valide, qu'elle soit ou non exprimée sous forme de condition du permis de son titulaire, pour la période mentionnée — d'au plus cinq ans — , qui ne peut dépasser la date d'expiration du permis.

Autorisations de port

(4) L'autorisation de port :

a) exprimée sous forme de condition d'un permis est valide pour la période mentionnée — d'au plus deux ans — , qui ne peut dépasser la date d'expiration du permis;

b) non exprimée sous forme de condition d'un permis est valide pour la période mentionnée, qui ne peut dépasser deux ans.

1995, ch. 39, art. 65; 2003, ch. 8, art. 41.

Certificat d'enregistrement

66 Le certificat d'enregistrement est valide tant que son titulaire demeure propriétaire de l'arme à feu à laquelle il se rapporte ou que celle-ci demeure une arme à feu.

1995, ch. 39, art. 66; 2012, ch. 6, art. 20.

Prorogation

67 (1) Le contrôleur des armes à feu peut renouveler les permis et les autorisations de port et de transport selon les modalités réglementaires.

Restricted firearms and pre-December 1, 1998 handguns

(2) On renewing a licence authorizing an individual to possess restricted firearms or handguns referred to in subsection 12(6.1) (pre-December 1, 1998 handguns), a chief firearms officer shall decide whether any of those firearms or handguns that the individual possesses are being used for a purpose described in section 28.

Armes de poing et armes à feu à autorisation restreinte

(2) En cas de renouvellement du permis de possession par un particulier d'une arme à feu à autorisation restreinte ou d'une arme de poing visée au paragraphe 12(6.1) (armes de poing : 1er décembre 1998), il détermine si celle-ci est utilisée aux fins prévues à l'article 28.

Registrar

(3) A chief firearms officer who decides that any restricted firearms or any handguns referred to in subsection 12(6.1) (pre-December 1, 1998 handguns) that are possessed by an individual are not being used for that purpose shall

(a) give notice of that decision in the prescribed form to the individual; and

(b) inform the Registrar of that decision.

Notification au directeur

(3) S'il détermine qu'une arme à feu à autorisation restreinte ou une arme de poing visée au paragraphe 12(6.1) (armes de poing : 1er décembre 1998) en la possession d'un particulier n'est pas utilisée aux fins indiquées, il notifie sa décision à celui-ci en la forme réglementaire et en informe le directeur.

Relics

(4) Subsections (2) and (3) do not apply to a firearm

(a) that is a relic, is of value as a curiosity or rarity or is valued as a memento, remembrance or souvenir;

(b) that was specified in the licence application as being a firearm for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir;

(c) for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir; and

(d) in respect of which an individual, on the commencement day, held a registration certificate under the former Act.

Antiquités

(4) Les paragraphes (2) et (3) ne s'appliquent pas à une arme à feu :

a) ayant une valeur de curiosité, de rareté, de commémoration ou de simple souvenir;

b) pour laquelle il est précisé dans la demande de permis que le certificat d'enregistrement prévu par la loi antérieure a été délivré parce qu'elle avait une telle valeur;

c) pour laquelle a été délivré le certificat d'enregistrement prévu par la loi antérieure parce qu'elle avait une telle valeur;

d) pour laquelle un particulier était titulaire, à la date de référence, d'un certificat d'enregistrement délivré en application de la loi antérieure.

Material to accompany notice

(5) A notice given under paragraph (3)(a) must include the reasons for the decision and be accompanied by a copy of sections 74 to 81.

1995, c. 39, s. 67; 2003, c. 8, ss. 42, 56.

Contenu de la notification

(5) La notification prévue au paragraphe (3) comporte les motifs de la décision ainsi que le texte des articles 74 à 81.

1995, ch. 39, art. 67; 2003, ch. 8, art. 42 et 56.

Refusal to Issue and Revocation

Licences and authorizations

68 A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to carry or authorization to transport for any good and sufficient reason.

Registration certificates

69 The Registrar may refuse to issue a registration certificate, authorization to export or authorization to import for any good and sufficient reason including, in the case of an application for a registration certificate, where the applicant is not eligible to hold a registration certificate.

Revocation of licence or authorization

70 (1) A chief firearms officer may revoke a licence, an authorization to carry or an authorization to transport for any good and sufficient reason including, without limiting the generality of the foregoing,

(a) where the holder of the licence or authorization

(i) is no longer or never was eligible to hold the licence or authorization,

(ii) contravenes any condition attached to the licence or authorization, or

(iii) has been convicted or discharged under section 730 of the *Criminal Code* of an offence referred to in paragraph 5(2)(a); or

(b) where, in the case of a business, a person who stands in a prescribed relationship to the business has been convicted or discharged under section 730 of the *Criminal Code* of any such offence.

Registrar

(2) The Registrar may revoke an authorization to export or authorization to import for any good and sufficient reason.

1995, c. 39, ss. 70, 137; 2003, c. 8, s. 43(E).

Revocation of registration certificate

71 (1) The Registrar

(a) may revoke a registration certificate for a prohibited firearm or a restricted firearm for any good and sufficient reason; and

(b) shall revoke a registration certificate for a firearm held by an individual where the Registrar is informed

Non-délivrance et révocation

Non-délivrance : contrôleur des armes à feu

68 Le contrôleur des armes à feu ne délivre pas de permis au demandeur qui ne répond pas aux critères d'admissibilité et peut refuser la délivrance des autorisations de port ou de transport pour toute raison valable.

Non-délivrance : directeur

69 Le directeur peut refuser la délivrance du certificat d'enregistrement et des autorisations d'exportation ou d'importation pour toute raison valable, notamment, dans le cas du certificat d'enregistrement, lorsque le demandeur n'y est pas admissible.

Révocation : permis et autorisations

70 (1) Le contrôleur des armes à feu peut révoquer un permis ou une autorisation de port ou de transport pour toute raison valable, notamment parce que :

a) le titulaire soit ne peut plus ou n'a jamais pu être titulaire du permis ou de l'autorisation, soit enfreint une condition du permis ou de l'autorisation, soit encore a été déclaré coupable ou absous en application de l'article 730 du *Code criminel* d'une infraction visée à l'alinéa 5(2)a);

b) dans le cas d'une entreprise, une personne liée de manière réglementaire à celle-ci a été déclarée coupable ou absoute en application de l'article 730 du *Code criminel* d'une telle infraction.

Directeur

(2) Le directeur peut révoquer les autorisations d'exportation ou d'importation pour toute raison valable.

1995, ch. 39, art. 70 et 137; 2003, ch. 8, art. 43(A).

Révocation : certificats d'enregistrement

71 (1) Le directeur peut révoquer le certificat d'enregistrement d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte pour toute raison valable; il est tenu de le faire pour toute arme à feu en la possession d'un particulier dans le cas où le contrôleur des armes à feu l'informe, en application de l'article 67, que celle-ci n'est pas utilisée aux fins prévues à l'article 28.

by a chief firearms officer under section 67 that the firearm is not being used for a purpose described in section 28.

Automatic revocation of registration certificate

(2) A registration certificate for a prohibited firearm referred to in subsection 12(3) (pre-August 1, 1992 converted automatic firearms) is automatically revoked on the change of any alteration in the prohibited firearm that was described in the application for the registration certificate.

1995, c. 39, s. 71; 2003, c. 8, s. 44; 2012, c. 6, s. 21.

Notice of refusal to issue or revocation

72 (1) Subject to subsection (1.1), if a chief firearms officer decides to refuse to issue or to revoke a licence or authorization to transport or the Registrar decides to refuse to issue or to revoke a registration certificate, authorization to export or authorization to import, the chief firearms officer or Registrar shall give notice of the decision in the prescribed form to the applicant for or holder of the licence, registration certificate or authorization.

When notice not required

(1.1) Notice under subsection (1) need not be given in any of the following circumstances:

(a) if the holder has requested that the licence, registration certificate or authorization be revoked; or

(b) if the revocation is incidental to the issuance of a new licence, registration certificate or authorization.

Material to accompany notice

(2) A notice given under subsection (1) must include reasons for the decision disclosing the nature of the information relied on for the decision and must be accompanied by a copy of sections 74 to 81.

Non-disclosure of information

(3) A chief firearms officer or the Registrar need not disclose any information the disclosure of which could, in the opinion of the chief firearms officer or the Registrar, endanger the safety of any person.

Disposal of firearms

(4) A notice given under subsection (1) in respect of a licence must specify a reasonable period during which the applicant for or holder of the licence may deliver to a peace officer or a firearms officer or a chief firearms officer or otherwise lawfully dispose of any firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition that the applicant for or holder of

Révocation automatique du certificat d'enregistrement

(2) Tout changement aux modifications décrites sur la demande de certificat d'enregistrement d'une arme à feu prohibée visée au paragraphe 12(3) (armes automatiques modifiées : 1er août 1992) entraîne la révocation de plein droit du certificat.

1995, ch. 39, art. 71; 2003, ch. 8, art. 44; 2012, ch. 6, art. 21.

Notification de la non-délivrance ou de la révocation

72 (1) Sous réserve du paragraphe (1.1), le contrôleur des armes à feu, dans le cas d'un permis ou d'une autorisation de transport, ou le directeur, dans le cas d'un certificat d'enregistrement ou d'une autorisation d'exportation ou d'importation, notifie à l'intéressé, en la forme réglementaire, sa décision de refus ou de révocation.

Cas d'exception

(1.1) La notification n'est pas requise dans les cas suivants :

a) le titulaire a demandé la révocation;

b) la révocation est liée à la délivrance d'un autre permis ou certificat ou d'une autre autorisation.

Contenu

(2) La notification comporte les motifs de la décision faisant état de la nature des renseignements sur lesquels elle est fondée ainsi que le texte des articles 74 à 81.

Non-communication des renseignements

(3) Le contrôleur des armes à feu ou le directeur n'est pas tenu de communiquer des renseignements qui, à son avis, pourraient menacer la sécurité d'une personne.

Disposition des armes à feu — permis

(4) La notification accorde un délai raisonnable pendant lequel le demandeur ou le titulaire du permis peut se départir légalement des armes à feu, armes prohibées, dispositifs prohibés ou munitions prohibées en sa possession, notamment en les remettant à un agent de la paix, au préposé aux armes à feu ou au contrôleur des armes à

the licence possesses and during which sections 91, 92 and 94 of the *Criminal Code* do not apply to the applicant or holder.

Disposal of firearms — registration certificate

(5) A notice given under subsection (1) in respect of a registration certificate for a prohibited firearm or a restricted firearm must specify a reasonable period during which the applicant for or holder of the registration certificate may deliver to a peace officer or a firearms officer or a chief firearms officer or otherwise lawfully dispose of the firearm to which the registration certificate relates and during which sections 91, 92 and 94 of the *Criminal Code* do not apply to the applicant or holder.

Reference

(6) If the applicant for or holder of the licence or registration certificate refers the refusal to issue it or revocation of it to a provincial court judge under section 74, the reasonable period of time does not begin until after the reference is finally disposed of.

1995, c. 39, s. 72; 2003, c. 8, s. 45; 2012, c. 6, s. 22.

73 [Repealed, 2003, c. 8, s. 46]

References to Provincial Court Judge

Reference to judge of refusal to issue or revocation, etc.

74 (1) Subject to subsection (2), where

(a) a chief firearms officer or the Registrar refuses to issue or revokes a licence, registration certificate, authorization to transport, authorization to export or authorization to import,

(b) a chief firearms officer decides under section 67 that a firearm possessed by an individual who holds a licence is not being used for a purpose described in section 28, or

(c) a provincial minister refuses to approve or revokes the approval of a shooting club or shooting range for the purposes of this Act,

the applicant for or holder of the licence, registration certificate, authorization or approval may refer the matter to a provincial court judge in the territorial division in which the applicant or holder resides.

Limitation period

(2) An applicant or holder may only refer a matter to a provincial court judge under subsection (1) within thirty days after receiving notice of the decision of the chief

feu, sans qu'une poursuite puisse être intentée contre lui en vertu des articles 91, 92 ou 94 du *Code criminel*.

Disposition des armes à feu — certificat d'enregistrement

(5) La notification accorde un délai raisonnable pendant lequel le demandeur ou le titulaire d'un certificat d'enregistrement d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte peut se départir légalement de celle-ci, notamment en la remettant à un agent de la paix, au préposé aux armes à feu ou au contrôleur des armes à feu, aucune poursuite ne pouvant être intentée contre lui en vertu des articles 91, 92 ou 94 du *Code criminel* pendant ce délai.

Renvoi

(6) Lorsque le demandeur ou le titulaire du permis ou du certificat d'enregistrement soumet la non-délivrance ou la révocation du document en cause à un juge de la cour provinciale en vertu de l'article 74, le délai ne commence à courir qu'après la décision finale du juge.

1995, ch. 39, art. 72; 2003, ch. 8, art. 45; 2012, ch. 6, art. 22.

73 [Abrogé, 2003, ch. 8, art. 46]

Renvoi à un juge de la cour provinciale

Renvoi

74 (1) Le demandeur ou le titulaire d'un permis, d'un certificat d'enregistrement, d'une autorisation de transport, d'exportation ou d'importation ou d'un agrément peut soumettre à un juge de la cour provinciale de la circonscription territoriale de sa résidence les cas suivants :

a) la non-délivrance ou révocation, par le contrôleur des armes à feu ou le directeur, du document en cause;

b) la décision du contrôleur des armes à feu, prise aux termes de l'article 67, selon laquelle l'arme à feu d'un particulier n'est pas utilisée aux fins prévues à l'article 28;

c) le refus ou la révocation de l'agrément d'un club de tir ou de champs de tir par le ministre provincial.

Délai

(2) La saisine est à effectuer par le requérant dans les trente jours suivant la réception de la notification de la décision faite par le contrôleur des armes à feu, le

firearms officer, Registrar or provincial minister under section 29, 67 or 72 or within such further time as is allowed by a provincial court judge, whether before or after the expiration of those thirty days.

1995, c. 39, s. 74; 2003, c. 8, s. 47.

directeur ou le ministre provincial en vertu des articles 29, 67 ou 72 ou dans le délai supplémentaire que le juge peut lui accorder avant ou après l'expiration des trente jours.

1995, ch. 39, art. 74; 2003, ch. 8, art. 47.

Hearing of reference

75 (1) On receipt of a reference under section 74, the provincial court judge shall fix a date for the hearing of the reference and direct that notice of the hearing be given to the chief firearms officer, Registrar or provincial minister and to the applicant for or holder of the licence, registration certificate, authorization or approval, in such manner as the provincial court judge may specify.

Audition et notification

75 (1) Le juge de la cour provinciale fixe la date d'audition du cas et ordonne que notification en soit faite, de la manière qu'il précise, au requérant ainsi qu'au contrôleur des armes à feu, au directeur ou au ministre provincial.

Evidence

(2) At the hearing of the reference, the provincial court judge shall hear all relevant evidence presented by or on behalf of the chief firearms officer, Registrar or provincial minister and the applicant or holder.

Éléments de preuve

(2) Lors de l'audition, il est saisi des éléments de preuve pertinents déposés par le contrôleur des armes à feu, le directeur ou le ministre provincial ou par le requérant, ou pour leur compte.

Burden of proof

(3) At the hearing of the reference, the burden of proof is on the applicant or holder to satisfy the provincial court judge that the refusal to issue or revocation of the licence, registration certificate or authorization, the decision or the refusal to approve or revocation of the approval was not justified.

Charge de la preuve

(3) Il appartient au requérant de convaincre le juge que la non-délivrance, la révocation, le refus ou la décision n'était pas justifié.

Where hearing may proceed *ex parte*

(4) A provincial court judge may proceed *ex parte* to hear and determine a reference in the absence of the applicant or holder in the same circumstances as those in which a summary conviction court may, under Part XXVII of the *Criminal Code*, proceed with a trial in the absence of the defendant.

Audition *ex parte*

(4) Le juge peut entendre *ex parte* le cas et le trancher en l'absence du requérant dans les cas où les cours de poursuites sommaires peuvent, en vertu de la partie XXVII du *Code criminel*, tenir le procès en l'absence du défendeur.

Decision by provincial court judge

76 On the hearing of a reference, the provincial court judge may, by order,

(a) confirm the decision of the chief firearms officer, Registrar or provincial minister;

(b) direct the chief firearms officer or Registrar to issue a licence, registration certificate or authorization or direct the provincial minister to approve a shooting club or shooting range; or

(c) cancel the revocation of the licence, registration certificate, authorization or approval or the decision of the chief firearms officer under section 67.

Décision

76 Au terme de l'audition du cas, le juge peut, par ordonnance :

a) confirmer la décision du contrôleur des armes à feu, du directeur ou du ministre provincial;

b) enjoindre au contrôleur des armes à feu ou au directeur de délivrer le permis, le certificat d'enregistrement ou l'autorisation ou enjoindre au ministre provincial de conférer l'agrément au club de tir ou au champ de tir;

c) annuler la révocation du permis, du certificat d'enregistrement, de l'autorisation, de l'agrément ou la décision du contrôleur des armes à feu prise aux termes de l'article 67.

Appeals to Superior Court and Court of Appeal

Nunavut

76.1 With respect to Nunavut, the following definitions apply for the purposes of sections 77 to 81.

provincial court judge means a judge of the Nunavut Court of Justice. (*juge*)

superior court means a judge of the Court of Appeal of Nunavut. (*cour supérieure*)

1999, c. 3, s. 64.

Appeal to superior court

77 (1) Subject to section 78, where a provincial court judge makes an order under paragraph 76(a), the applicant for or holder of the licence, registration certificate, authorization or approval, as the case may be, may appeal to the superior court against the order.

Appeal by Attorney General

(2) Subject to section 78, where a provincial court judge makes an order under paragraph 76(b) or (c),

(a) the Attorney General of Canada may appeal to the superior court against the order, if the order is directed to a chief firearms officer who was designated by the federal Minister, to the Registrar or to the federal Minister; or

(b) the attorney general of the province may appeal to the superior court against the order, in the case of any other order made under paragraph 76(b) or (c).

Notice of appeal

78 (1) An appellant who proposes to appeal an order made under section 76 to the superior court must give notice of appeal not later than thirty days after the order is made.

Extension of time

(2) The superior court may, either before or after the expiration of those thirty days, extend the time within which notice of appeal may be given.

Contents of notice

(3) A notice of appeal must set out the grounds of appeal, together with such further material as the superior court may require.

Appels à la cour supérieure et à la cour d'appel

Définitions

76.1 S'agissant du Nunavut, les définitions qui suivent s'appliquent aux articles 77 à 81.

cour supérieure Un juge de la Cour d'appel du Nunavut. (*superior court*)

juge Juge de la Cour de justice du Nunavut. (*provincial court judge*)

1999, ch. 3, art. 64.

Cour supérieure

77 (1) Sous réserve de l'article 78, dans le cas où le juge rend la décision prévue à l'alinéa 76a), le demandeur ou le titulaire du permis, du certificat d'enregistrement, de l'agrément ou de l'autorisation peut appeler de l'ordonnance devant la cour supérieure.

Appel par le procureur général

(2) Sous réserve de l'article 78, dans le cas où le juge rend la décision prévue aux alinéas 76b) ou c), le procureur général du Canada ou celui de la province peuvent respectivement appeler de l'ordonnance devant la cour supérieure, selon que celle-ci :

a) soit vise le directeur, le ministre fédéral ou le contrôleur des armes à feu désigné à ce titre par le ministre fédéral;

b) soit porte sur toute autre ordonnance rendue aux termes des alinéas 76b) ou c).

Avis d'appel

78 (1) L'appel est formé par le dépôt d'un avis dans les trente jours suivant l'ordonnance contestée.

Prorogation du délai

(2) La cour supérieure peut, avant ou après l'expiration du délai de trente jours, proroger le délai de dépôt de l'avis.

Teneur de l'avis

(3) L'avis doit préciser les motifs de l'appel et comporter tout autre élément exigé par la cour supérieure.

Service of notice

(4) A copy of any notice of appeal filed with the superior court under subsection (1) and of any further material required to be filed with it shall be served within fourteen days after the filing of the notice, unless before or after the expiration of those fourteen days further time is allowed by the superior court, on

(a) the Attorney General of Canada, in the case of an appeal of an order made under paragraph 76(a) confirming a decision of a chief firearms officer who was designated by the federal Minister, of the Registrar or of the federal Minister;

(b) the attorney general of the province, in the case of an appeal against any other order made under paragraph 76(a);

(c) the applicant for or holder of the licence, registration certificate, authorization or approval, in the case of an appeal against an order made under paragraph 76(b) or (c); and

(d) any other person specified by the superior court.

Disposition of appeal

79 (1) On the hearing of an appeal, the superior court may

(a) dismiss the appeal; or

(b) allow the appeal and, in the case of an appeal against an order made under paragraph 76(a),

(i) direct the chief firearms officer or Registrar to issue a licence, registration certificate or authorization or direct the provincial minister to approve a shooting club or shooting range, or

(ii) cancel the revocation of the licence, registration certificate, authorization or approval or the decision of the chief firearms officer under section 67.

Burden on applicant

(2) A superior court shall dispose of an appeal against an order made under paragraph 76(a) by dismissing it, unless the appellant establishes to the satisfaction of the court that a disposition referred to in paragraph (1)(b) is justified.

Appeal to court of appeal

80 An appeal to the court of appeal may, with leave of that court or of a judge of that court, be taken against a decision of a superior court under section 79 on any ground that involves a question of law alone.

Signification de l'avis

(4) Une copie de l'avis, ainsi que de tout autre élément dont la production avec celui-ci est exigée, est signifiée dans les quatorze jours suivant son dépôt, ou dans le délai prorogé par la cour supérieure avant ou après l'expiration des quatorze jours :

a) au procureur général du Canada, lorsque l'appel porte sur l'ordonnance prévue à l'alinéa 76a) confirmant la décision du contrôleur des armes à feu désigné à ce titre par le ministre fédéral, du directeur ou du ministre fédéral;

b) au procureur général de la province, lorsque l'appel porte sur toute autre ordonnance rendue aux termes de l'alinéa 76a);

c) au requérant lorsque l'appel porte sur l'ordonnance prévue aux alinéas 76b) ou c);

d) à toute autre personne précisée par la cour supérieure.

Décision

79 (1) Au terme de l'audition de l'appel, la cour supérieure peut :

a) le rejeter;

b) l'accueillir et, dans les cas où il porte sur l'ordonnance prévue à l'alinéa 76a), soit annuler la révocation ou la décision prise par le contrôleur des armes à feu aux termes de l'article 67, soit ordonner à celui-ci ou au directeur de délivrer un permis, un certificat d'enregistrement ou une autorisation ou enjoindre au ministre provincial de conférer l'agrément au club de tir ou au champ de tir.

Charge de la preuve

(2) Lors de l'audition d'un appel portant sur l'ordonnance prévue à l'alinéa 76a), il appartient à l'appelant de convaincre la cour supérieure qu'elle doit rendre la décision visée à l'alinéa (1)b).

Cour d'appel

80 Un appel à la cour d'appel portant sur la décision visée à l'article 79 peut, avec l'autorisation de celle-ci ou d'un de ses juges, être interjeté pour tout motif qui comporte une question de droit seulement.

Application of Part XXVII of the *Criminal Code*

81 Part XXVII of the *Criminal Code*, except sections 785 to 812, 816 to 819 and 829 to 838, applies in respect of an appeal under this Act, with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

Commissioner of Firearms

Appointment

81.1 The Governor in Council may appoint a person to be known as the Commissioner of Firearms to hold office during pleasure. The Commissioner shall be paid such remuneration as the Governor in Council may fix.

2003, c. 8, s. 48.

Duties, functions and powers

81.2 Subject to any direction that the federal Minister may give, the Commissioner may exercise the powers and shall perform the duties and functions relating to the administration of this Act that are delegated to the Commissioner by the federal Minister.

2003, c. 8, s. 48.

Delegation — federal Minister

81.3 The federal Minister may delegate to the Commissioner any duty, function or power conferred on the federal Minister under this Act, except the power to delegate under this section and the power under subsections 97(2) and (3).

2003, c. 8, s. 48.

Incapacity or vacancy

81.4 In the event of the absence or incapacity of, or vacancy in the office of, the Commissioner, the federal Minister may appoint a person to perform the duties and functions and exercise the powers of the Commissioner, but no person may be so appointed for a term of more than 60 days without the approval of the Governor in Council.

2003, c. 8, s. 48.

Superannuation and compensation

81.5 The Commissioner shall be deemed to be a person employed in the Public Service for the purposes of the *Public Service Superannuation Act* and to be employed in the public service of Canada for the purposes of the *Government Employees Compensation Act* and any regulations made pursuant to section 9 of the *Aeronautics Act*.

2003, c. 8, s. 48.

Partie XXVII du *Code criminel*

81 La partie XXVII du *Code criminel*, sauf les articles 785 à 812, 816 à 819 et 829 à 838, s'applique, avec les adaptations nécessaires, aux appels interjetés aux termes de la présente loi et la mention de la cour d'appel dans cette partie vaut celle de la cour supérieure.

Commissaire aux armes à feu

Nomination

81.1 Le gouverneur en conseil peut nommer une personne à titre de commissaire aux armes à feu. Celui-ci occupe sa charge à titre amovible et reçoit la rémunération fixée par le gouverneur en conseil.

2003, ch. 8, art. 48.

Attributions

81.2 Sous réserve des instructions que peut donner le ministre fédéral, le commissaire peut exercer les attributions liées à l'application de la présente loi qui lui sont déléguées par le ministre.

2003, ch. 8, art. 48.

Délégation

81.3 Le ministre fédéral peut déléguer au commissaire les attributions que la présente loi lui confère, sauf le pouvoir de déléguer prévu au présent article et les pouvoirs prévus aux paragraphes 97(2) et (3).

2003, ch. 8, art. 48.

Absence ou empêchement

81.4 En cas d'absence ou d'empêchement du commissaire ou de vacance de son poste, le ministre fédéral peut confier à quiconque les attributions du commissaire; cependant, l'intérim ne peut dépasser soixante jours sans l'approbation du gouverneur en conseil.

2003, ch. 8, art. 48.

Application de certains textes

81.5 Le commissaire est réputé appartenir à la fonction publique pour l'application de la *Loi sur la pension de la fonction publique*, être un agent de l'État pour l'application de la *Loi sur l'indemnisation des agents de l'État* et appartenir à l'administration publique fédérale pour l'application des règlements pris en vertu de l'article 9 de la *Loi sur l'aéronautique*.

2003, ch. 8, art. 48.

Canadian Firearms Registration System

Registrar of Firearms

Registrar of Firearms

82 An individual to be known as the Registrar of Firearms shall be appointed or deployed in accordance with the *Public Service Employment Act*.

1995, c. 39, s. 82; 2003, c. 8, s. 49.

Incapacity or vacancy

82.1 In the event of the absence or incapacity of, or vacancy in the position of, the Registrar, the Commissioner may perform the duties and functions and exercise the powers of the Registrar.

2003, c. 8, s. 49.

Records of the Registrar

Canadian Firearms Registry

83 (1) The Registrar shall establish and maintain a registry, to be known as the Canadian Firearms Registry, in which shall be kept a record of

(a) every licence, every registration certificate for a prohibited firearm or a restricted firearm and every authorization that is issued or revoked by the Registrar;

(b) every application for a licence, a registration certificate for a prohibited firearm or a restricted firearm or an authorization that is refused by the Registrar;

(c) every transfer of a firearm of which the Registrar is informed under section 26 or 27;

(d) every exportation from or importation into Canada of a firearm of which the Registrar is informed under section 42 or 50;

(e) every loss, finding, theft or destruction of a firearm of which the Registrar is informed under section 88; and

(f) such other matters as may be prescribed.

Operation

(2) The Registrar is responsible for the day-to-day operation of the Canadian Firearms Registry.

1995, c. 39, s. 83; 2012, c. 6, s. 23.

Système canadien d'enregistrement des armes à feu

Directeur

Directeur de l'enregistrement des armes à feu

82 Le poste de directeur de l'enregistrement des armes à feu est pourvu par nomination ou mutation conformément à la *Loi sur l'emploi dans la fonction publique*.

1995, ch. 39, art. 82; 2003, ch. 8, art. 49.

Absence ou empêchement

82.1 En cas d'absence ou d'empêchement du directeur ou de vacance de son poste, le commissaire peut exercer les attributions du directeur.

2003, ch. 8, art. 49.

Registre

Registre canadien des armes à feu

83 (1) Le directeur constitue et tient un registre, dénommé le Registre canadien des armes à feu, où sont notés :

a) les permis, les certificats d'enregistrement d'armes à feu prohibées ou d'armes à feu à autorisation restreinte ou les autorisations qu'il délivre ou révoque;

b) les demandes de permis, les demandes de certificat d'enregistrement d'armes à feu prohibées ou d'armes à feu à autorisation restreinte ou les demandes d'autorisation qu'il refuse;

c) les cessions d'armes à feu qui lui sont notifiées en vertu des articles 26 ou 27;

d) les exportations et les importations d'armes à feu qui lui sont notifiées en vertu des articles 42 ou 50;

e) les pertes, vols ou destructions d'armes à feu, de même que les armes à feu trouvées, dont il est informé en application de l'article 88;

f) tout autre renseignement réglementaire.

Fonctionnement

(2) Le directeur est chargé du fonctionnement du Registre canadien des armes à feu.

1995, ch. 39, art. 83; 2012, ch. 6, art. 23.

Destruction of records

84 The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

Other records of Registrar

85 (1) The Registrar shall establish and maintain a record of

(a) firearms acquired or possessed by the following persons and used by them in the course of their duties or for the purposes of their employment, namely,

(i) peace officers,

(ii) persons training to become police officers or peace officers under the control and supervision of

(A) a police force, or

(B) a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a province,

(iii) persons or members of a class of persons employed in the federal public administration or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the *Criminal Code* to be public officers, and

(iv) chief firearms officers and firearms officers; and

(b) firearms acquired or possessed by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province.

Reporting of acquisitions and transfers

(2) A person referred to in subsection (1) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

Destruction of records

(3) The Registrar may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

1995, c. 39, s. 85; 2003, c. 22, s. 224(E).

Records to be transferred

86 The records kept in the registry maintained pursuant to section 114 of the former Act that relate to registration certificates shall be transferred to the Registrar.

Destruction des fichiers

84 Le directeur peut détruire les fichiers versés au Registre canadien des armes à feu selon les modalités de temps et dans les situations prévues par règlement.

Autres registres du directeur

85 (1) Le directeur établit un registre des armes à feu :

a) acquises ou détenues par les personnes précisées ci-après et utilisées par celles-ci dans le cadre de leurs fonctions :

(i) les agents de la paix,

(ii) les personnes qui reçoivent la formation pour devenir agents de la paix ou officiers de police sous l'autorité et la surveillance :

(A) soit d'une force policière,

(B) soit d'une école de police ou d'une autre institution semblable désignées par le ministre fédéral ou le lieutenant-gouverneur en conseil d'une province,

(iii) les personnes ou catégories de personnes qui sont des employés des administrations publiques fédérales, provinciales ou municipales et qui sont désignées comme fonctionnaires publics par les règlements d'application de la partie III du *Code criminel* pris par le gouverneur en conseil,

(iv) les contrôleurs des armes à feu et les préposés aux armes à feu;

b) acquises ou détenues par des particuliers sous les ordres et pour le compte des forces policières ou d'un ministère fédéral ou provincial.

Signalement des acquisitions ou cessions

(2) Toute personne visée au paragraphe (1) notifie au directeur toute acquisition ou tout transfert d'armes à feu qu'elle effectue.

Destruction des fichiers

(3) Le directeur peut détruire les fichiers du registre selon les modalités de temps et dans les situations prévues par règlement.

1995, ch. 39, art. 85; 2003, ch. 22, art. 224(A).

Transfert des fichiers

86 Les fichiers figurant dans le registre tenu en application de l'article 114 de la loi antérieure en ce qui concerne les certificats d'enregistrement sont transférés au directeur.

Records of Chief Firearms Officers

Records of chief firearms officers

87 (1) A chief firearms officer shall keep a record of

(a) every licence and authorization that is issued or revoked by the chief firearms officer;

(b) every application for a licence or authorization that is refused by the chief firearms officer;

(c) every prohibition order of which the chief firearms officer is informed under section 89; and

(d) such other matters as may be prescribed.

Destruction of records

(2) A chief firearms officer may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

Reporting of loss, finding, theft and destruction

88 A chief firearms officer to whom the loss, finding, theft or destruction of a prohibited firearm or a restricted firearm is reported shall have the Registrar informed without delay of the loss, finding, theft or destruction.

1995, c. 39, s. 88; 2012, c. 6, s. 24.

Reporting of Prohibition Orders

Reporting of prohibition orders

89 Every court, judge or justice that makes, varies or revokes a prohibition order shall have a chief firearms officer informed without delay of the prohibition order or its variation or revocation.

Access to Records

Right of access

90 The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

Registre des contrôleurs des armes à feu

Registre des contrôleurs des armes à feu

87 (1) Le contrôleur des armes à feu tient un registre où sont notés :

a) les permis et autorisations qu'il délivre ou révoque;

b) les permis et les autorisations qu'il refuse de délivrer;

c) les ordonnances d'interdiction dont il est informé aux termes de l'article 89;

d) tout autre renseignement réglementaire.

Destruction des fichiers

(2) Le contrôleur des armes à feu peut détruire les fichiers selon les modalités de temps et dans les situations prévues par règlement.

Notification au directeur

88 Le contrôleur des armes à feu qui est informé de la perte, du vol ou de la destruction d'armes à feu prohibées ou d'armes à feu à autorisation restreinte en informe sans délai à son tour le directeur. Il fait de même relativement à celles qui sont trouvées.

1995, ch. 39, art. 88; 2012, ch. 6, art. 24.

Notification des ordonnances d'interdiction

Notification au directeur

89 Tout tribunal, juge ou juge de paix qui rend, modifie ou révoque une ordonnance d'interdiction avise sans délai le contrôleur des armes à feu de ce fait.

Accès au registre

Droit d'accès

90 Le directeur et le contrôleur des armes à feu ont réciproquement accès aux registres qu'ils tiennent respectivement aux termes de l'article 87 et aux termes des articles 83 ou 85; le contrôleur des armes à feu a également accès aux registres tenus par les autres contrôleurs des armes à feu aux termes de l'article 87.

Right of access — subsection 23.1(1)

90.1 For the purpose of subsection 23.1(1), the person responding to a request made under that subsection has a right of access to records kept by a chief firearms officer under section 87.

2012, c. 6, s. 25.

Droit d'accès — paragraphe 23.1(1)

90.1 Pour l'application du paragraphe 23.1(1), la personne qui donne suite à la demande a accès aux registres tenus par le contrôleur des armes à feu aux termes de l'article 87.

2012, ch. 6, art. 25.

Electronic Filing

Electronic filing

91 (1) Subject to the regulations, notices and documents that are sent to or issued by the Registrar pursuant to this or any other Act of Parliament may be sent or issued in electronic or other form in any manner specified by the Registrar.

Time of receipt

(2) For the purposes of this Act and Part III of the *Criminal Code*, a notice or document that is sent or issued in accordance with subsection (1) is deemed to have been received at the time and date provided by the regulations.

Records of Registrar

92 (1) Records required by section 83 or 85 to be kept by the Registrar may

(a) be in bound or loose-leaf form or in photographic film form; or

(b) be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written or printed form within a reasonable time.

Storage of documents or information in electronic or other form

(2) Subject to the regulations, a document or information received by the Registrar under this Act in electronic or other form may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing stored documents or information in intelligible written or printed form within a reasonable time.

Probative value

(3) Where the Registrar maintains a record of a document otherwise than in written or printed form, an extract from that record that is certified by the Registrar has the same probative value as the document would have had if it had been proved in the ordinary way.

Transmission électronique

Transmission électronique

91 (1) Sous réserve des règlements, les avis ou documents que le directeur envoie ou reçoit aux termes de la présente loi ou de toute autre loi fédérale peuvent être transmis sur support électronique ou autre de la manière précisée par lui.

Date de réception

(2) Pour l'application de la présente loi et de la partie III du *Code criminel*, les avis et documents ainsi transmis sont réputés avoir été reçus à la date et à l'heure réglementaires.

Forme des registres

92 (1) Les registres tenus par le directeur aux termes des articles 83 ou 85 peuvent être reliés, ou conservés soit sous forme de feuilles mobiles ou de films, soit à l'aide de tout procédé mécanique ou électronique de traitement des données ou de mise en mémoire de l'information capable de restituer en clair, dans un délai raisonnable, les renseignements demandés.

Mise en mémoire

(2) Sous réserve des règlements, les documents ou renseignements reçus par le directeur en application de la présente loi sur support électronique ou autre peuvent être mis en mémoire par tout procédé, notamment mécanographique ou informatique, capable de les restituer en clair dans un délai raisonnable.

Force probante

(3) En cas de conservation de documents par le directeur sous une forme non écrite, les extraits qui en sont certifiés conformes par celui-ci ont, sauf preuve contraire, la même force probante que des originaux écrits.

Reports

Report to federal Minister

93 (1) The Commissioner shall, as soon as possible after the end of each calendar year and at any other times that the federal Minister may in writing request, submit to the federal Minister a report, in the form and including the information that the federal Minister may direct, with regard to the administration of this Act.

Report to be laid before Parliament

(2) The federal Minister shall have each report laid before each House of Parliament on any of the first 15 days on which that House is sitting after the federal Minister receives it.

1995, c. 39, s. 93; 2003, c. 8, s. 50.

Information to be submitted to Commissioner

94 A chief firearms officer shall submit to the Commissioner the prescribed information with regard to the administration of this Act at the prescribed time and in the prescribed form for the purpose of enabling the Commissioner to compile the reports referred to in section 93.

1995, c. 39, s. 94; 2003, c. 8, s. 50.

General

Agreements with Provinces

Agreements with provinces

95 The federal Minister may, with the approval of the Governor in Council, enter into agreements with the governments of the provinces

(a) providing for payment of compensation by Canada to the provinces in respect of administrative costs actually incurred by the provinces in relation to processing licences, registration certificates and authorizations and applications for licences, registration certificates and authorizations and the operation of the Canadian Firearms Registration System; and

(b) notwithstanding subsections 17(1) and (4) of the *Financial Administration Act*, authorizing the governments of the provinces to withhold those costs, in accordance with the terms and conditions of the agreement, from fees under paragraph 117(p) collected or received by the governments of the provinces.

Rapports

Rapport au ministre fédéral

93 (1) Le commissaire, dès que possible au début de chaque année civile et chaque fois que le ministre fédéral lui en fait la demande par écrit, transmet à celui-ci un rapport sur l'application de la présente loi rédigé en la forme et contenant les renseignements qu'il exige.

Rapport au Parlement

(2) Le ministre fédéral fait déposer le rapport devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant sa réception.

1995, ch. 39, art. 93; 2003, ch. 8, art. 50.

Communication de renseignements au commissaire

94 Le contrôleur des armes à feu communique au commissaire les renseignements réglementaires sur l'application de la présente loi selon les modalités de temps et de forme réglementaires afin de permettre au commissaire d'établir le rapport visé à l'article 93.

1995, ch. 39, art. 94; 2003, ch. 8, art. 50.

Dispositions générales

Accords avec les provinces

Conclusion des accords

95 Le ministre fédéral peut, avec l'agrément du gouverneur en conseil, conclure des accords avec les gouvernements provinciaux :

a) prévoyant le paiement de compensation par le Canada des frais administratifs effectivement exposés par les provinces en ce qui concerne le traitement des permis, des certificats d'enregistrement et des autorisations, des demandes y afférentes ainsi que le fonctionnement du système canadien d'enregistrement des armes à feu;

b) autorisant, par dérogation aux paragraphes 17(1) et (4) de la *Loi sur la gestion des finances publiques*, ces gouvernements à prélever, conformément aux modalités des accords, le montant de ces frais sur les sommes perçues ou reçues en application de l'alinéa 117p).

Other Matters

Other obligations not affected

96 The issuance of a licence, registration certificate or authorization under this Act does not affect the obligation of any person to comply with any other Act of Parliament or any regulation made under an Act of Parliament respecting firearms or other weapons.

Exemptions — Governor in Council

97 (1) Subject to subsection (4), the Governor in Council may exempt any class of non-residents from the application of any provision of this Act or the regulations, or from the application of any of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of the *Criminal Code*, for any period specified by the Governor in Council.

Exemptions — federal Minister

(2) Subject to subsection (4), the federal Minister may exempt any non-resident from the application of any provision of this Act or the regulations, or from the application of any of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of the *Criminal Code*, for any period not exceeding one year.

Exemptions — provincial minister

(3) Subject to subsection (4), a provincial minister may exempt from the application in that province of any provision of this Act or the regulations or Part III of the *Criminal Code*, for any period not exceeding one year, the employees, in respect of any thing done by them in the course of or for the purpose of their duties or employment, of any business that holds a licence authorizing the business to acquire prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition.

Public safety

(4) Subsections (1) to (3) do not apply if it is not desirable, in the interests of the safety of any person, that the exemption be granted.

Conditions

(5) The authority granting an exemption may attach to it any reasonable condition that the authority considers desirable in the particular circumstances and in the interests of the safety of any person.

1995, c. 39, s. 97; 2001, c. 41, s. 96.

Autres questions

Autres obligations

96 La délivrance d'un permis, d'un certificat d'enregistrement ou d'une autorisation en vertu de la présente loi ne porte pas atteinte à l'obligation de quiconque de se conformer à toute autre loi fédérale ou à ses règlements concernant les armes à feu et d'autres armes.

Dispenses — gouverneur en conseil

97 (1) Sous réserve du paragraphe (4), le gouverneur en conseil peut dispenser toute catégorie de non-résidents de l'application de toute autre disposition de la présente loi, de ses règlements ou des articles 91 à 95, 99 à 101, 103 à 107 et 117.03 du *Code criminel* pour la période qu'il spécifie.

Dispenses — ministre fédéral

(2) Sous réserve du paragraphe (4), le ministre fédéral peut dispenser tout non-résident de l'application de toute autre disposition de la présente loi, de ses règlements ou des articles 91 à 95, 99 à 101, 103 à 107 et 117.03 du *Code criminel* pour une période maximale d'un an.

Dispenses — ministre provincial

(3) Sous réserve du paragraphe (4), le ministre provincial peut dispenser les employés d'une entreprise titulaire d'un permis l'autorisant à acquérir des armes à feu prohibées, des armes prohibées, des dispositifs prohibés ou des munitions prohibées, agissant dans le cadre de leurs fonctions, de l'application dans sa province de toute autre disposition de la présente loi, de ses règlements ou de la partie III du *Code criminel* pour une période maximale d'un an.

Sécurité publique

(4) Les paragraphes (1) à (3) ne s'appliquent pas lorsque la dispense n'est pas souhaitable pour la sécurité de quiconque.

Conditions

(5) L'autorité accordant la dispense peut l'assortir des conditions raisonnables qu'elle estime souhaitables dans les circonstances et en vue de la sécurité de quiconque.

1995, ch. 39, art. 97; 2001, ch. 41, art. 96.

Delegation

Authorized chief firearms officer may perform functions of provincial minister

98 A chief firearms officer of a province who is authorized in writing by a provincial minister may perform the function of the provincial minister of designating firearms officers for the province.

Designated officers may perform functions of chief firearms officers

99 A firearms officer who is designated in writing by a chief firearms officer may perform any of the duties and functions of the chief firearms officer under this Act or Part III of the *Criminal Code* that are specified in the designation.

1995, c. 39, s. 99; 2003, c. 8, s. 52.

Designated officers may perform functions of Registrar

100 A person who is designated in writing by the Registrar for the purpose of this section may perform such duties and functions of the Registrar under this Act or Part III of the *Criminal Code* as are specified in the designation.

Inspection

Definition of "inspector"

101 In sections 102 to 105, ***inspector*** means a firearms officer and includes, in respect of a province, a member of a class of individuals designated by the provincial minister.

Inspection

102 (1) Subject to section 104, for the purpose of ensuring compliance with this Act and the regulations, an inspector may at any reasonable time enter and inspect any place where the inspector believes on reasonable grounds a business is being carried on or there is a record of a business, any place in which the inspector believes on reasonable grounds there is a gun collection or a record in relation to a gun collection or any place in which the inspector believes on reasonable grounds there is a prohibited firearm or there are more than 10 firearms and may

(a) open any container that the inspector believes on reasonable grounds contains a firearm or other thing in respect of which this Act or the regulations apply;

(b) examine any firearm and examine any other thing that the inspector finds and take samples of it;

Délégation

Attributions du ministre provincial

98 Le contrôleur des armes à feu d'une province peut, s'il en est chargé par le ministre provincial, désigner les préposés aux armes à feu pour la province.

Attributions du contrôleur des armes à feu

99 Le préposé aux armes à feu désigné par écrit par le contrôleur des armes à feu peut exercer les attributions, précisées dans la désignation, que la présente loi et la partie III du *Code criminel* confèrent à ce dernier.

1995, ch. 39, art. 99; 2003, ch. 8, art. 52.

Attributions du directeur

100 La personne désignée par écrit par le directeur pour l'application du présent article peut exercer les attributions de celui-ci, précisées dans l'acte de délégation, que lui confèrent la présente loi et la partie III du *Code criminel*.

Visite

Définition de « inspecteur »

101 Pour l'application des articles 102 à 105, ***inspecteur*** s'entend d'un préposé aux armes à feu. Y est assimilé, pour une province, tout membre d'une catégorie de particuliers désignée par le ministre provincial.

Visite

102 (1) Sous réserve de l'article 104, pour l'application de la présente loi et de ses règlements, l'inspecteur peut, à toute heure convenable, procéder à la visite de tous lieux et y effectuer des inspections, s'il a des motifs raisonnables de croire que s'y déroulent les activités d'une entreprise ou que s'y trouvent soit des registres d'entreprises soit une collection d'armes à feu ou des registres y afférents, soit des armes à feu prohibées ou plus de dix armes à feu; il est aussi autorisé à :

a) ouvrir tout contenant dans lequel, à son avis, se trouvent des armes à feu ou des objets assujettis à l'application de la présente loi ou de ses règlements;

b) examiner les armes à feu ou tout objet qu'il y trouve et en prendre des échantillons;

c) effectuer des essais, des analyses et des mesures;

(c) conduct any tests or analyses or take any measurements; and

(d) require any person to produce for examination or copying any records, books of account or other documents that the inspector believes on reasonable grounds contain information that is relevant to the enforcement of this Act or the regulations.

Operation of data processing systems and copying equipment

(2) In carrying out an inspection of a place under subsection (1), an inspector may

(a) use or cause to be used any data processing system at the place to examine any data contained in or available to the system;

(b) reproduce any record or cause it to be reproduced from the data in the form of a print-out or other intelligible output and remove the print-out or other output for examination or copying; and

(c) use or cause to be used any copying equipment at the place to make copies of any record, book of account or other document.

Use of force

(3) In carrying out an inspection of a place under subsection (1), an inspector may not use force.

Receipt for things taken

(4) An inspector who takes any thing while carrying out an inspection of a place under subsection (1) must give to the owner or occupant of the place at the time that the thing is taken a receipt for the thing that describes the thing with reasonable precision, including, in the case of a firearm, the serial number if available of the firearm.

Definition of "business"

(5) For greater certainty, in this section, ***business*** has the meaning assigned by subsection 2(1).

Duty to assist inspectors

103 The owner or person in charge of a place that is inspected by an inspector under section 102 and every person found in the place shall

(a) give the inspector all reasonable assistance to enable him or her to carry out the inspection and exercise any power conferred by section 102; and

(b) provide the inspector with any information relevant to the enforcement of this Act or the regulations that he or she may reasonably require.

d) exiger de toute personne qu'elle lui fournisse pour examen ou copie les registres, documents comptables ou autres documents qui à son avis contiennent des renseignements utiles à l'application de la présente loi ou de ses règlements.

Dans tous les cas, l'avis de l'inspecteur doit être fondé sur des motifs raisonnables.

Usage d'ordinateurs et de photocopieuses

(2) Dans le cadre de sa visite, l'inspecteur peut :

a) utiliser ou faire utiliser les systèmes informatiques se trouvant sur place afin de prendre connaissance des données qui y sont contenues ou auxquelles ces systèmes donnent accès;

b) à partir de ces données, reproduire ou faire reproduire le document sous forme d'imprimé ou toute autre forme intelligible, qu'il peut emporter pour examen ou reproduction;

c) utiliser ou faire utiliser les appareils de reprographie se trouvant sur place pour faire des copies de tout registre, document comptable ou autre document.

Usage de la force

(3) Dans le cadre de la visite prévue au paragraphe (1), l'inspecteur ne peut faire usage de la force.

Récépissé des objets saisis

(4) L'inspecteur est tenu de remettre au propriétaire ou à l'occupant des lieux, au moment où il en prend possession, un récépissé qui décrit avec suffisamment de précision les objets pris dans le cadre de sa visite, notamment, s'il s'agit d'une arme à feu, par la mention du numéro de série, si celui-ci est disponible.

Précision interprétative

(5) Il est entendu qu'au présent article, « entreprise » s'entend au sens prévu au paragraphe 2(1).

Obligation d'assistance

103 Le propriétaire ou le responsable du lieu qui fait l'objet de la visite, ainsi que toute personne qui s'y trouve, sont tenus d'accorder à l'inspecteur sur demande, toute l'assistance possible dans l'exercice de ses fonctions et de lui donner les renseignements qu'il peut valablement exiger dans le cadre de l'application de la présente loi ou de ses règlements.

Inspection of dwelling-house

104 (1) An inspector may not enter a dwelling-house under section 102 except

(a) on reasonable notice to the owner or occupant, except where a business is being carried on in the dwelling-house; and

(b) with the consent of the occupant or under a warrant.

Authority to issue warrant

(2) A justice who on *ex parte* application is satisfied by information on oath

(a) that the conditions for entry described in section 102 exist in relation to a dwelling-house,

(b) that entry to the dwelling-house is necessary for any purpose relating to the enforcement of this Act or the regulations, and

(c) that entry to the dwelling-house has been refused or that there are reasonable grounds for believing that entry will be refused

may issue a warrant authorizing the inspector named in it to enter that dwelling-house subject to any conditions that may be specified in the warrant.

Areas that may be inspected

(3) For greater certainty, an inspector who is carrying out an inspection of a dwelling-house may enter and inspect only

(a) that part of a room of the dwelling-house in which the inspector believes on reasonable grounds there is a firearm, prohibited weapon, restricted weapon, prohibited device, prohibited ammunition, a record in relation to a gun collection or all or part of a device or other thing required by a regulation made under paragraph 117(h) respecting the storage of firearms and restricted weapons; and

(b) in addition, in the case of a dwelling-house where the inspector believes on reasonable grounds a business is being carried on, that part of a room in which the inspector believes on reasonable grounds there is ammunition or a record of the business.

1995, c. 39, s. 104; 2003, c. 8, s. 53(F).

Demand to produce firearm

105 An inspector who believes on reasonable grounds that a person possesses a firearm may, by demand made to that person, require that person, within a reasonable time after the demand is made, to produce the firearm in

Mandat — maison d'habitation

104 (1) Dans le cas d'une maison d'habitation, l'inspecteur ne peut toutefois procéder à la visite :

a) sans préavis raisonnable donné au propriétaire ou à l'occupant, à moins que s'y déroulent les activités d'une entreprise;

b) sans l'autorisation de l'occupant que s'il est muni d'un mandat.

Délivrance du mandat

(2) Sur demande *ex parte*, le juge de paix peut signer un mandat autorisant, sous réserve des conditions éventuellement fixées, l'inspecteur qui y est nommé à procéder à la visite d'une maison d'habitation s'il est convaincu, sur la foi d'une dénonciation sous serment, que sont réunis les éléments suivants :

a) les circonstances prévues à l'article 102 existent;

b) la visite est nécessaire pour l'application de la présente loi ou de ses règlements;

c) un refus a été opposé à la visite ou il y a des motifs raisonnables de croire que tel sera le cas.

Parties visées par l'inspection

(3) Il est entendu, que lors de l'inspection d'une maison d'habitation, l'inspecteur ne peut visiter et inspecter que les parties d'une pièce où, à son avis :

a) se trouvent soit des armes à feu, armes prohibées, armes à autorisation restreinte, dispositifs prohibés, munitions prohibées ou des registres relatifs à une collection d'armes à feu soit tout ou partie d'un dispositif ou d'un autre objet exigé, par règlement pris en vertu de l'alinéa 117h), pour l'entreposage des armes à feu et des armes à autorisation restreinte;

b) dans le cas où il a des motifs raisonnables de croire que s'y déroulent les activités d'une entreprise, se trouvent des munitions ou des registres d'entreprise.

Dans tous les cas, l'avis de l'inspecteur doit être fondé sur des motifs raisonnables.

1995, ch. 39, art. 104; 2003, ch. 8, art. 53(F).

Contrôle

105 S'il a des motifs raisonnables de croire qu'une personne possède une arme à feu, l'inspecteur peut lui ordonner de présenter, dans un délai raisonnable suivant la demande et de la manière indiquée par l'inspecteur, cette

the manner specified by the inspector for the purpose of verifying the serial number or other identifying features of the firearm and of ensuring that, in the case of a prohibited firearm or a restricted firearm, the person is the holder of the registration certificate for it.

1995, c. 39, s. 105; 2012, c. 6, s. 26.

arme en vue d'en vérifier le numéro de série ou d'autres caractéristiques et, s'agissant d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, de s'assurer que cette personne est titulaire du certificat d'enregistrement afférent.

1995, ch. 39, art. 105; 2012, ch. 6, art. 26.

Offences

False statements to procure licences, etc.

106 (1) Every person commits an offence who, for the purpose of procuring a licence, registration certificate or authorization for that person or any other person, knowingly makes a statement orally or in writing that is false or misleading or knowingly fails to disclose any information that is relevant to the application for the licence, registration certificate or authorization.

False statements to procure customs confirmations

(2) Every person commits an offence who, for the purpose of procuring the confirmation by a customs officer of a document under this Act for that person or any other person, knowingly makes a statement orally or in writing that is false or misleading or knowingly fails to disclose any information that is relevant to the document.

Definition of "statement"

(3) In this section, ***statement*** means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not.

Tampering with licences, etc.

107 Every person commits an offence who, without lawful excuse the proof of which lies on the person, alters, defaces or falsifies

(a) a licence, registration certificate or authorization; or

(b) a confirmation by a customs officer of a document under this Act.

Unauthorized possession of ammunition

108 Every business commits an offence that possesses ammunition, unless the business holds a licence under which it may possess ammunition.

Punishment

109 Every person who commits an offence under section 106, 107 or 108, who contravenes subsection 29(1) or who contravenes a regulation made under paragraph 117(d),

Infractions

Fausse déclaration

106 (1) Commet une infraction quiconque, afin d'obtenir, ou de faire obtenir à une autre personne, un permis, un certificat d'enregistrement ou une autorisation, fait sciemment, oralement ou par écrit, une déclaration fausse ou trompeuse ou, en toute connaissance de cause, s'abstient de communiquer un renseignement utile à cet égard.

Fausse déclaration : attestation douanière

(2) Commet une infraction quiconque, afin d'obtenir, ou de faire obtenir à une autre personne, l'attestation d'un document par l'agent des douanes en application de la présente loi, fait sciemment, oralement ou par écrit, une déclaration fausse ou trompeuse ou, en toute connaissance de cause, s'abstient de communiquer un renseignement utile à cet égard.

Définition de « déclaration »

(3) Au présent article, ***déclaration*** s'entend d'une assertion de fait, d'opinion, de croyance ou de connaissance, qu'elle soit essentielle ou non et qu'elle soit admissible ou non en preuve.

Falsification

107 Commet une infraction quiconque, sans excuse légitime — dont la preuve lui incombe — , modifie, maquille ou falsifie un permis, un certificat d'enregistrement, une autorisation ou l'attestation d'un document faite par un agent des douanes en application de la présente loi.

Possession non autorisée de munitions

108 Commet une infraction toute entreprise qui a en sa possession des munitions sans être titulaire d'un permis qui l'y autorise.

Peine

109 Quiconque contrevient aux articles 106, 107 ou 108 ou au paragraphe 29(1) ou à un règlement d'application des alinéas 117d), e), f), g), i), j), k.2), l), m) ou n) dont la

(e), (f), (g), (i), (j), (k.2), (l), (m) or (n) the contravention of which has been made an offence under paragraph 117(o)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

1995, c. 39, s. 109; 2019, c. 9, s. 12.

Contravention of conditions of licences, etc.

110 Every person commits an offence who, without lawful excuse, contravenes a condition of a licence, registration certificate or authorization held by the person.

Punishment

111 Every person who commits an offence under section 110 or who does not comply with section 103

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

112 [Repealed, 2012, c. 6, s. 27]

Non-compliance with demand to produce firearm

113 Every person commits an offence who, without reasonable excuse, does not comply with a demand made to the person by an inspector under section 105.

Failure to deliver up revoked licence, etc.

114 Every person commits an offence who, being the holder of a licence, a registration certificate for a prohibited firearm or a restricted firearm or an authorization that is revoked, does not deliver it up to a peace officer or firearms officer without delay after the revocation.

1995, c. 39, s. 114; 2012, c. 6, s. 28.

Punishment

115 Every person who commits an offence under section 113 or 114 is guilty of an offence punishable on summary conviction.

1995, c. 39, s. 115; 2012, c. 6, s. 28.

Attorney General of Canada may act

116 Any proceedings in respect of an offence under this Act may be commenced at the instance of the Government of Canada and conducted by or on behalf of that government.

contravention est devenue une infraction aux termes de l'alinéa 117o) est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans;

b) soit d'une infraction punissable par procédure sommaire.

1995, ch. 39, art. 109; 2019, ch. 9, art. 12.

Inobservation des conditions

110 Commet une infraction quiconque, sans excuse légitime, enfreint les conditions du permis, du certificat d'enregistrement ou de l'autorisation dont il est titulaire.

Peine

111 Quiconque contrevient à l'article 110 ou omet de se conformer à l'article 103 est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;

b) soit d'une infraction punissable par procédure sommaire.

112 [Abrogé, 2012, ch. 6, art. 27]

Défaut d'obtempérer à un ordre de l'inspecteur

113 Commet une infraction quiconque, sans excuse légitime, n'obtempère pas à un ordre que lui donne l'inspecteur en vertu de l'article 105.

Non-restitution

114 Commet une infraction le titulaire d'un permis, d'un certificat d'enregistrement d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte ou d'une autorisation qui ne restitue pas le document sans délai après sa révocation à l'agent de la paix ou au préposé aux armes à feu.

1995, ch. 39, art. 114; 2012, ch. 6, art. 28.

Peine

115 Les infractions visées aux articles 113 ou 114 sont punissables par procédure sommaire.

1995, ch. 39, art. 115; 2012, ch. 6, art. 28.

Intervention du procureur général du Canada

116 Le gouvernement du Canada, ou un agent agissant en son nom, peut intenter des poursuites à l'égard de toute infraction à la présente loi.

Regulations

Regulations

117 The Governor in Council may make regulations

(a) regulating the issuance of licences, registration certificates and authorizations, including regulations respecting the purposes for which they may be issued under any provision of this Act and prescribing the circumstances in which persons are or are not eligible to hold licences;

(a.1) deeming permits to export goods, or classes of permits to export goods, that are issued under the *Export and Import Permits Act* to be authorizations to export for the purposes of this Act;

(b) regulating the revocation of licences, registration certificates and authorizations;

(c) prescribing the circumstances in which an individual does or does not need firearms

(i) to protect the life of that individual or of other individuals, or

(ii) for use in connection with his or her lawful profession or occupation;

(d) regulating the use of firearms in target practice or target shooting competitions;

(e) regulating

(i) the establishment and operation of shooting clubs and shooting ranges,

(ii) the activities that may be carried on at shooting clubs and shooting ranges,

(iii) the possession and use of firearms at shooting clubs and shooting ranges, and

(iv) the keeping and destruction of records in relation to shooting clubs and shooting ranges and members of those clubs and ranges;

(f) regulating the establishment and maintenance of gun collections and the acquisition and disposal or disposition of firearms that form part or are to form part of a gun collection;

(g) regulating the operation of gun shows, the activities that may be carried on at gun shows and the possession and use of firearms at gun shows;

Règlements

Règlements

117 Le gouverneur en conseil peut, par règlement :

a) régir la délivrance des permis, des certificats d'enregistrement et des autorisations, y compris les fins auxquelles ils peuvent être délivrés aux termes de la présente loi et préciser les cas d'admissibilité ou d'inadmissibilité aux permis;

a.1) déclarer que les licences pour l'exportation de marchandises — ou catégories de telles licences — qui sont délivrées en vertu de la *Loi sur les licences d'exportation et d'importation* sont réputées être des autorisations d'exportation pour l'application de la présente loi;

b) régir la révocation des permis, des certificats d'enregistrement et des autorisations;

c) préciser les cas dans lesquels un particulier peut avoir ou non besoin d'une arme à feu pour protéger sa vie ou celle d'autrui, ou pour usage dans le cadre d'une activité professionnelle légale;

d) régir l'usage d'armes à feu pour le tir à la cible ou la participation à une compétition de tir;

e) régir :

(i) la constitution et l'exploitation de clubs de tir et de champs de tir,

(ii) les activités qui peuvent y être exercées,

(iii) la possession et l'usage d'armes à feu dans leurs locaux,

(iv) la tenue et la destruction de fichiers sur ces clubs et champs de tir ainsi que sur leurs membres;

f) régir la constitution et la conservation de collections d'armes à feu ainsi que l'acquisition et l'aliénation ou la disposition d'armes à feu en faisant partie;

g) régir les expositions d'armes à feu, les activités qui peuvent s'y dérouler et la possession et l'usage d'armes à feu dans leur cadre;

h) régir l'entreposage, le maniement, le transport, l'expédition, l'exposition, la publicité et la vente postale des armes à feu et des armes à autorisation restreinte et la définition du terme « vente postale » pour l'application de la présente loi;

(h) regulating the storage, handling, transportation, shipping, display, advertising and mail-order sale of firearms and restricted weapons and defining the expression "mail-order sale" for the purposes of this Act;

(i) regulating the storage, handling, transportation, shipping, possession for a prescribed purpose, transfer, exportation or importation of

(i) prohibited firearms, prohibited weapons, restricted weapons, prohibited devices and prohibited ammunition, or

(ii) components or parts of prohibited firearms, prohibited weapons, restricted weapons, prohibited devices and prohibited ammunition;

(j) regulating the possession and use of restricted weapons;

(j.1) respecting the possession and transportation of firearms during the extension period referred to in subsection 64(1.1);

(k) for authorizing

(i) the possession at any place, or

(ii) the manufacture or transfer, whether or not for consideration, or offer to manufacture or transfer, whether or not for consideration,

of firearms, prohibited weapons, restricted weapons, prohibited devices, ammunition, prohibited ammunition and components and parts designed exclusively for use in the manufacture of or assembly into firearms;

(k.1) respecting the importation or exportation of firearms, prohibited weapons, restricted weapons, prohibited devices, ammunition, prohibited ammunition and components and parts designed exclusively for use in the manufacture of or assembly into firearms;

(k.2) respecting the marking of firearms manufactured in Canada or imported into Canada and the removal, alteration, obliteration and defacing of those markings;

(k.3) respecting the confirmation of declarations and authorizations to transport for the purposes of paragraph 35(1)(d), the confirmation of declarations for the purposes of paragraph 35.1(2)(d) and the confirmation of authorizations to import for the purposes of paragraph 40(2)(e);

i) régir l'entreposage, le maniement, le transport, l'expédition, la possession à des fins réglementaires, la cession, l'exportation et l'importation :

(i) d'armes à feu prohibées, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées,

(ii) d'éléments ou pièces d'armes à feu prohibées, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés ou de munitions prohibées;

j) régir la possession et l'usage d'armes à autorisation restreinte;

j.1) régir la possession et le transport d'armes à feu durant la période de prolongation visée au paragraphe 64(1.1);

k) prévoir l'autorisation, en ce qui concerne des armes à feu, des armes prohibées, des armes à autorisation restreinte, des dispositifs prohibés, des munitions, des munitions prohibées et des éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l'assemblage d'armes à feu :

(i) de la possession en tout lieu,

(ii) de la fabrication ou la cession, la proposition de fabrication ou de cession, avec ou sans contrepartie;

k.1) régir l'importation ou l'exportation d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés, de munitions, de munitions prohibées et des éléments ou pièces conçus exclusivement pour être utilisés dans la fabrication ou l'assemblage d'armes à feu;

k.2) régir le marquage des armes à feu fabriquées ou importées au Canada et l'enlèvement, la modification, l'oblitération et le maquillage des marques;

k.3) régir l'attestation des déclarations et des autorisations de transport pour l'application de l'alinéa 35(1)d), l'attestation des déclarations pour l'application de l'alinéa 35.1(2)d) et l'attestation des autorisations d'importation pour l'application de l'alinéa 40(2);

l) régir l'entreposage, le maniement, le transport, l'expédition, l'acquisition, la possession, la cession, l'exportation, l'importation, l'usage et l'aliénation ou la disposition d'armes à feu, d'armes prohibées, d'armes à autorisation restreinte, de dispositifs prohibés, de munitions prohibées et de substances explosives :

(l) regulating the storage, handling, transportation, shipping, acquisition, possession, transfer, exportation, importation, use and disposal or disposition of firearms, prohibited weapons, restricted weapons, prohibited devices, prohibited ammunition and explosive substances

(i) by the following persons in the course of their duties or for the purposes of their employment, namely,

(A) peace officers,

(B) persons training to become police officers or peace officers under the control and supervision of a police force or a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a province,

(C) persons or members of a class of persons employed in the federal public administration or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the *Criminal Code* to be public officers, and

(D) chief firearms officers and firearms officers, and

(ii) by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province;

(m) regulating the keeping, transmission and destruction of records in relation to firearms, prohibited weapons, restricted weapons, prohibited devices and prohibited ammunition;

(n) regulating the keeping and destruction of records by businesses in relation to ammunition;

(o) creating offences consisting of contraventions of the regulations made under paragraph (d), (e), (f), (g), (i), (j), (k.1), (k.2), (l), (m) or (n);

(p) prescribing the fees that are to be paid to Her Majesty in right of Canada for licences, registration certificates, authorizations, approvals of transfers and importations of firearms and confirmations by customs officers of documents under this Act;

(q) waiving or reducing the fees payable under paragraph (p) in such circumstances as may be specified in the regulations;

(r) prescribing the charges that are to be paid to Her Majesty in right of Canada in respect of costs incurred

(i) par les personnes précisées ci-après et utilisées par celles-ci dans le cadre de leurs fonctions :

(A) les agents de la paix,

(B) les personnes qui reçoivent la formation pour devenir agents de la paix ou officiers de police sous l'autorité et la surveillance soit d'une force policière, soit d'une école de police ou d'une autre institution semblable désignées par le ministre fédéral ou le lieutenant-gouverneur en conseil d'une province,

(C) les personnes ou les membres d'une catégorie de personnes qui sont des employés des administrations publiques fédérales, provinciales ou municipales et qui sont désignées comme fonctionnaires publics par les règlements d'application de la partie III du *Code criminel* pris par le gouverneur en conseil,

(D) les contrôleurs des armes à feu et les préposés aux armes à feu,

(ii) par des particuliers sous les ordres et pour le compte des forces policières ou d'un ministère fédéral ou provincial;

m) régir la tenue, la transmission et la destruction de registres ou fichiers sur les armes à feu, les armes prohibées, les armes à autorisation restreinte, les dispositifs prohibés et les munitions prohibées;

n) régir la tenue et la destruction de registres ou fichiers par les entreprises en ce qui concerne les munitions;

o) créer des infractions pour contravention des règlements pris en vertu des alinéas d), e), f), g), i), j), k.1), k.2), l), m) ou n);

p) fixer les droits à payer à Sa Majesté du chef du Canada pour la délivrance des permis, des certificats d'enregistrement, des autorisations, des agréments de cession et d'importation d'armes à feu et des attestations par l'agent des douanes des documents prévus par la présente loi;

q) fixer les cas et les modalités de dispense ou de réduction des droits à payer en application de l'alinéa p);

r) fixer les droits à payer à Sa Majesté du chef du Canada pour les frais engagés par elle pour l'entreposage de marchandises retenues par des agents de douane ou pour leur disposition;

by Her Majesty in right of Canada in storing goods that are detained by customs officers or in disposing of goods;

(s) respecting the operation of the Canadian Firearms Registry;

(t) regulating the sending or issuance of notices and documents in electronic or other form, including

(i) the notices and documents that may be sent or issued in electronic or other form,

(ii) the persons or classes of persons by whom they may be sent or issued,

(iii) their signature in electronic or other form or their execution, adoption or authorization in a manner that pursuant to the regulations is to have the same effect for the purposes of this Act as their signature, and

(iv) the time and date when they are deemed to be received;

(u) respecting the manner in which any provision of this Act or the regulations applies to any of the aboriginal peoples of Canada, and adapting any such provision for the purposes of that application;

(v) repealing

(i) section 4 of the *Cartridge Magazine Control Regulations*, made by Order in Council P.C. 1992-1660 of July 16, 1992 and registered as SOR/92-460, and the heading before it,

(ii) the *Designated Areas Firearms Order*, C.R.C., chapter 430,

(iii) section 4 of the *Firearms Acquisition Certificate Regulations*, made by Order in Council P.C. 1992-1663 of July 16, 1992 and registered as SOR/92-461, and the heading before it,

(iv) section 7 of the *Genuine Gun Collector Regulations*, made by Order in Council P.C. 1992-1661 of July 16, 1992 and registered as SOR/92-435, and the heading before it,

(v) sections 8 and 13 of the *Prohibited Weapons Control Regulations*, made by Order in Council P.C. 1991-1925 of October 3, 1991 and registered as SOR/91-572, and the headings before them,

(vi) the *Restricted Weapon Registration Certificate for Classes of Persons other than Individuals*

s) régir le fonctionnement du Registre canadien des armes à feu;

t) régir la transmission des avis et documents sur support électronique ou autre, notamment quant à leurs destinataires, aux personnes ou catégories de personnes qui peuvent l'effectuer et aux modalités de signature — ou de ce qui peut en tenir lieu — sur support électronique ou autre de ces avis ou documents, ainsi que la date et l'heure réputées de leur réception;

u) prévoir selon quelles modalités et dans quelle mesure telles dispositions de la présente loi ou de ses règlements s'appliquent à tout peuple autochtone du Canada et adapter ces dispositions à cette application;

v) abroger :

(i) l'article 4 — et l'intertitre le précédant — du *Règlement sur le contrôle des chargeurs grande capacité*, pris par le décret C.P. 1992-1660 du 16 juillet 1992 portant le numéro d'enregistrement DORS/92-460,

(ii) le *Décret sur les régions désignées pour la possession d'armes à feu*, C.R.C., chapitre 430,

(iii) l'article 4 — et l'intertitre le précédant — du *Règlement sur les autorisations d'acquisition d'armes à feu*, pris par le décret C.P. 1992-1663 du 16 juillet 1992 portant le numéro d'enregistrement DORS/92-461,

(iv) l'article 7 — et l'intertitre le précédant — du *Règlement sur les véritables collectionneurs d'armes à feu*, pris par le décret C.P. 1992-1661 du 16 juillet 1992 portant le numéro d'enregistrement DORS/92-435,

(v) les articles 8 et 13 — et les intertitres les précédant — du *Règlement sur le contrôle des armes prohibées*, pris par le décret C.P. 1991-1925 du 3 octobre 1991 portant le numéro d'enregistrement DORS/91-572,

(vi) le *Règlement sur les catégories de personnes morales admissibles à un certificat d'enregistrement d'armes à autorisation restreinte*, pris par le décret C.P. 1993-766 du 20 avril 1993 portant le numéro d'enregistrement DORS/93-200,

(vii) les articles 7, 15 et 17 — et les intertitres les précédant — du *Règlement sur le contrôle des armes à autorisation restreinte et sur les armes à feu*, pris par le décret C.P. 1978-2572 du 16 août 1978 portant le numéro d'enregistrement DORS/78-670;

Regulations, made by Order in Council P.C. 1993-766 of April 20, 1993 and registered as SOR/93-200, and

(vii) sections 7, 15 and 17 of the *Restricted Weapons and Firearms Control Regulations*, made by Order in Council P.C. 1978-2572 of August 16, 1978 and registered as SOR/78-670, and the headings before them; and

(w) prescribing anything that by any provision of this Act is to be prescribed by regulation.

1995, c. 39, s. 117; 2003, c. 8, s. 54, c. 22, s. 224(E); 2015, c. 27, s. 16; 2019, c. 9, s. 13.

w) prendre toute mesure réglementaire prévue par la présente loi.

1995, ch. 39, art. 117; 2003, ch. 8, art. 54, ch. 22, art. 224(A); 2015, ch. 27, art. 16; 2019, ch. 9, art. 13.

Laying of proposed regulations

118 (1) Subject to subsection (2), the federal Minister shall have each proposed regulation laid before each House of Parliament.

Idem

(2) Where a proposed regulation is laid pursuant to subsection (1), it shall be laid before each House of Parliament on the same day.

Report by committee

(3) Each proposed regulation that is laid before a House of Parliament shall, on the day it is laid, be referred by that House to an appropriate committee of that House, as determined by the rules of that House, and the committee may conduct inquiries or public hearings with respect to the proposed regulation and report its findings to that House.

Making of regulations

(4) A proposed regulation that has been laid pursuant to subsection (1) may be made

(a) on the expiration of thirty sitting days after it was laid; or

(b) where, with respect to each House of Parliament,

(i) the committee reports to the House, or

(ii) the committee decides not to conduct inquiries or public hearings.

Definition of "sitting day"

(5) For the purpose of this section, ***sitting day*** means a day on which either House of Parliament sits.

Dépôt des projets de règlement

118 (1) Sous réserve du paragraphe (3), le ministre fédéral fait déposer tout projet de règlement devant chaque chambre du Parlement.

Idem

(2) Lorsqu'il fait déposer un projet de règlement en vertu du paragraphe (1), le ministre fédéral le fait déposer devant les deux chambres du Parlement le même jour.

Étude en comité et rapport

(3) Tout comité compétent, d'après le règlement de chacune des chambres du Parlement, est automatiquement saisi du projet de règlement et peut effectuer une enquête ou tenir des audiences publiques à cet égard et faire rapport de ses conclusions à la chambre en cause.

Prise des règlements

(4) Le règlement peut être pris :

a) soit dans un délai de trente jours de séance suivant le dépôt;

b) soit au moment, pour chaque chambre du Parlement, où, selon le cas :

(i) le comité fait rapport,

(ii) il décide de ne pas effectuer d'enquête ou de ne pas tenir d'audiences publiques.

Définition de « jour de séance »

(5) Pour l'application du présent article, ***jour de séance*** s'entend d'un jour où l'une ou l'autre chambre siège.

Exception

119 (1) No proposed regulation that has been laid pursuant to section 118 need again be laid under that section, whether or not it has been altered.

Exception — minor changes

(2) A regulation made under section 117 may be made without being laid before either House of Parliament if the federal Minister is of the opinion that the changes made by the regulation to an existing regulation are so immaterial or insubstantial that section 118 should not be applicable in the circumstances.

Exception — urgency

(3) A regulation made under paragraph 117(i), (l), (m), (n), (o), (q), (s) or (t) may be made without being laid before either House of Parliament if the federal Minister is of the opinion that the making of the regulation is so urgent that section 118 should not be applicable in the circumstances.

Notice of opinion

(4) Where the federal Minister forms the opinion described in subsection (2) or (3), he or she shall have a statement of the reasons why he or she formed that opinion laid before each House of Parliament.

Exception — prescribed dates

(5) A regulation may be made under paragraph 117(w) prescribing a date for the purposes of the application of any provision of this Act without being laid before either House of Parliament.

Part III of the *Criminal Code*

(6) For greater certainty, a regulation may be made under Part III of the *Criminal Code* without being laid before either House of Parliament.

Modification du projet de règlement

119 (1) Il n'est pas nécessaire de déposer de nouveau le projet de règlement devant le Parlement même s'il a subi des modifications.

Exception : modifications mineures

(2) L'obligation de dépôt prévue à l'article 118 ne s'applique pas aux projets de règlements d'application de l'article 117, si le ministre fédéral estime que ceux-ci n'apportent pas de modification de fond notable à des règlements existants.

Exception : cas d'urgence

(3) Les règlements d'application des alinéas 117i), l), m), n), o), q), s) ou t) peuvent être pris sans avoir auparavant été déposés devant l'une ou l'autre chambre du Parlement, si le ministre fédéral estime que l'urgence de la situation justifie une dérogation à l'article 118.

Notification au Parlement

(4) Le ministre fédéral fait déposer devant chaque chambre du Parlement une déclaration énonçant les justificatifs sur lesquels il fonde, en application des paragraphes (2) ou (3), sa dérogation à l'article 118.

Exception : date réglementaire

(5) Tout règlement fixant, aux termes de l'alinéa 117w), une date pour l'application d'une disposition de la présente loi peut être pris sans avoir été déposé devant l'une ou l'autre chambre du Parlement.

Partie III du *Code criminel*

(6) Il est entendu que le dépôt n'est pas obligatoire pour les règlements d'application de la partie III du *Code criminel*.

Transitional Provisions

Licences

Firearms acquisition certificates

120 (1) A firearms acquisition certificate is deemed to be a licence if it

(a) was issued under section 106 or 107 of the former Act;

(b) had not been revoked before the commencement day; and

Dispositions transitoires

Permis

Autorisations d'acquisition d'armes à feu

120 (1) Est réputée un permis l'autorisation d'acquisition d'armes à feu qui :

a) a été délivrée en vertu des articles 106 ou 107 de la loi antérieure;

b) n'a pas été révoquée avant la date de référence;

(c) was valid pursuant to subsection 106(11) of the former Act, or pursuant to that subsection as applied by subsection 107(1) of the former Act, on the commencement day.

c) est valide à la date de référence conformément au paragraphe 106(11) de la loi antérieure ou à ce paragraphe par application du paragraphe 107(1) de celle-ci.

Authorizations

(2) A firearms acquisition certificate that is deemed to be a licence authorizes the holder

(a) to acquire and possess any firearms other than prohibited firearms that are acquired by the holder on or after the commencement day and before the expiration or revocation of the firearms acquisition certificate;

(b) in the case of an individual referred to in subsection 12(2), (3), (4), (5), (6) or (8), to acquire and possess any prohibited firearms referred to in that subsection that are acquired by the holder on or after the commencement day; and

(c) in the case of a particular individual who is eligible under subsection 12(7) to hold a licence authorizing the particular individual to possess a handgun referred to in subsection 12(6.1) (pre-December 1, 1998 handguns) in the circumstances described in subsection 12(7), to acquire and possess such a handgun in those circumstances, if the particular handgun is acquired by the particular individual on or after the commencement day.

Autorisations

(2) Le titulaire d'une telle autorisation est habilité :

a) à acquérir et à posséder toute arme à feu non prohibée acquise par lui à compter de la date de référence et avant l'expiration ou la révocation de l'autorisation d'acquisition de l'arme à feu;

b) s'il s'agit d'un particulier visé aux paragraphes 12(2), (3), (4), (5), (6) ou (8), à acquérir et à posséder toute arme à feu visée à ces paragraphes acquise par lui à compter de la date de référence;

c) s'il s'agit d'un particulier admissible, en vertu du paragraphe 12(7), au permis l'autorisant à posséder une arme de poing visée au paragraphe 12(6.1) (armes de poing : 1er décembre 1998) dans les circonstances prévues au paragraphe 12(7), à acquérir et posséder dans ces circonstances une telle arme de poing acquise par lui à compter de la date de référence.

Expiration

(3) A firearms acquisition certificate that is deemed to be a licence expires on the earlier of

(a) five years after the day on which it was issued, and

(b) the issuance of a licence to the holder of the firearms acquisition certificate.

Durée de validité

(3) Une telle autorisation est valide jusqu'à la délivrance d'un permis à son titulaire ou pour une période maximale de cinq ans à compter de sa délivrance.

Lost, stolen and destroyed firearms acquisition certificates

(4) Where a firearms acquisition certificate that is deemed to be a licence is lost, stolen or destroyed before its expiration under subsection (3), a person who has authority under this Act to issue a licence may issue a replacement firearms acquisition certificate that has the same effect as the one that was lost, stolen or destroyed.

1995, c. 39, s. 120; 2003, c. 8, s. 56.

Autorisations d'acquisition perdues, volées ou détruites

(4) La personne habilitée par la présente loi à délivrer un permis peut remplacer l'autorisation perdue, volée ou détruite avant son expiration par une autorisation correspondante.

1995, ch. 39, art. 120; 2003, ch. 8, art. 56.

Minors' permits

121 (1) A permit is deemed to be a licence if it

Mineurs

121 (1) Est réputé un permis délivré en vertu de l'article 56 le permis qui :

(a) was issued under subsection 110(6) or (7) of the former Act to a person who was under the age of eighteen years;

(b) had not been revoked before the commencement day; and

(c) remained in force pursuant to subsection 110(8) of the former Act on the commencement day.

(a) a été délivré en vertu des paragraphes 110(6) ou (7) de la loi antérieure à une personne âgée de moins de dix-huit ans;

b) n'a pas été révoqué avant la date de référence;

c) était valide à la date de référence conformément au paragraphe 110(8) de la loi antérieure.

Authorizations

(2) A permit that is deemed to be a licence authorizes the holder to possess non-restricted firearms.

Autorisation

(2) Un tel permis autorise son titulaire à posséder une arme à feu sans restriction.

Geographical extent

(3) A permit that is deemed to be a licence is valid only in the province in which it was issued, unless the permit was endorsed pursuant to subsection 110(10) of the former Act as being valid within the provinces indicated in the permit, in which case it remains valid within those provinces.

Territoire de validité

(3) Il est valide dans la province de sa délivrance seulement, sauf s'il a été visé en application du paragraphe 110(10) de la loi antérieure pour les provinces mentionnées, auquel cas il le demeure dans celles-ci.

Expiration

(4) A permit that is deemed to be a licence expires on the earliest of

(a) the expiration of the period for which it was expressed to be issued,

(b) the day on which the person to whom it was issued attains the age of eighteen years, and

(c) five years after the birthday of the person next following the day on which it was issued, if that fifth anniversary occurs on or after the commencement day.

1995, c. 39, s. 121; 2015, c. 27, s. 17.

Durée de validité

(4) Il est valide pour la période mentionnée ou une période maximale de cinq ans après le premier anniversaire de naissance du titulaire suivant la date de délivrance, dans le cas où ce cinquième anniversaire survient à compter de la date de référence, sans toutefois que cette période puisse se terminer après la date où le titulaire atteint l'âge de dix-huit ans.

1995, ch. 39, art. 121; 2015, ch. 27, art. 17.

Museum approvals

122 (1) An approval of a museum, other than a museum established by the Chief of the Defence Staff, is deemed to be a licence if the approval

(a) was granted under subsection 105(1) of the former Act; and

(b) had not been revoked before the commencement day.

Agrément des musées

122 (1) Est réputé un permis délivré en vertu de l'article 56, dans le cas d'un musée qui n'est pas établi par le chef de l'état-major de la défense, tout agrément accordé en application du paragraphe 105(1) de la loi antérieure et non révoqué avant la date de référence.

Expiration

(2) An approval of a museum that is deemed to be a licence expires on the earlier of

(a) the expiration of the period for which the approval was expressed to be granted, and

Durée de validité

(2) Il est valide pour la période pour laquelle l'agrément a été accordé, qui ne peut toutefois dépasser trois ans suivant la date de référence.

(b) three years after the commencement day.

Permits to carry on business

123 (1) A permit to carry on a business described in paragraph 105(1)(a) or (b) or subparagraph 105(2)(b)(i) of the former Act is deemed to be a licence if it

(a) was

(i) issued under subsection 110(5) of the former Act, or

(ii) continued under subsection 6(2) of the *Criminal Law Amendment Act, 1968-69*, chapter 38 of the Statutes of Canada, 1968-69, or subsection 48(1) of the *Criminal Law Amendment Act, 1977*, chapter 53 of the Statutes of Canada, 1976-77;

(b) had not been revoked before the commencement day;

(c) had not ceased to be in force or have any effect on October 30, 1992 under section 34 of *An Act to amend the Criminal Code and the Customs Tariff in consequence thereof*, chapter 40 of the Statutes of Canada, 1991; and

(d) remained in force pursuant to subsection 110(5) of the former Act on the commencement day.

Expiration

(2) A permit that is deemed to be a licence expires on the earlier of

(a) the expiration of the period for which the permit was expressed to be issued, and

(b) one year after the commencement day.

Geographical extent

124 A permit or an approval of a museum that is deemed to be a licence under section 122 or 123 is valid only for the location of the business or museum for which it was issued.

Industrial purpose designations

125 (1) A designation of a person is deemed to be a licence if it

(a) was made under subsection 90(3.1) or paragraph 95(3)(b) of the former Act; and

(b) had not been revoked before the commencement day.

Permis d'exploitation d'une entreprise

123 (1) Est réputé un permis délivré en vertu de l'article 56 le permis d'exploitation d'une entreprise visé aux alinéas 105(1)a) ou b) ou au sous-alinéa 105(2)b)(i) de la loi antérieure qui :

a) a été :

(i) délivré en application du paragraphe 110(5) de la loi antérieure,

(ii) prorogé par les paragraphes 6(2) de la *Loi de 1968-69 modifiant le droit pénal*, chapitre 38 des Statuts du Canada de 1968-1969, ou 48(1) de la *Loi de 1977 modifiant le droit pénal*, chapitre 53 des Statuts du Canada de 1976-1977;

b) n'a pas été révoqué avant la date de référence;

c) n'a pas cessé d'être en vigueur le 30 octobre 1992 en application de l'article 34 de la *Loi modifiant le Code criminel et le Tarif des douanes en conséquence*, chapitre 40 des Lois du Canada (1991);

d) était valide à la date de référence conformément au paragraphe 110(5) de la loi antérieure.

Durée de validité

(2) Il est valide pour la période mentionnée, qui ne peut dépasser un an suivant la date de référence.

Emplacement

124 Le permis ou l'agrément d'un musée réputé un permis délivré en vertu de l'article 56 en application des articles 122 ou 123 est valide seulement pour l'établissement de l'entreprise ou du musée pour lequel il a été délivré.

Désignations industrielles

125 (1) Est réputée un permis la désignation d'une personne :

a) effectuée en vertu du paragraphe 90(3.1) ou de l'alinéa 95(3)b) de la loi antérieure;

b) non révoquée avant la date de référence.

Geographical extent

(2) A designation of a person that is deemed to be a licence is valid only in the province in which it was made.

Expiration

(3) A designation of a person that is deemed to be a licence expires on the earliest of

(a) the expiration of the period for which it was expressed to be made,

(b) one year after the commencement day, and

(c) in the case of a designation of a person who holds a permit that is deemed to be a licence under section 123, the expiration of the permit.

Pending applications

126 Every application that was pending on the commencement day for a document that would be a document referred to in any of sections 120 to 125 had it been issued before the commencement day shall be dealt with and disposed of under and in accordance with the former Act, except that

(a) a licence shall be issued instead of issuing a firearms acquisition certificate or a permit or making an approval or designation; and

(b) only a person who has authority under this Act to issue a licence may finally dispose of the application.

Registration Certificates

Registration certificates

127 (1) A registration certificate is deemed to be a registration certificate issued under section 60 if it

(a) was

(i) issued under subsection 109(7) of the former Act, or

(ii) continued under subsection 6(2) of the *Criminal Law Amendment Act, 1968-69*, chapter 38 of the Statutes of Canada, 1968-69, or subsection 48(2) of the *Criminal Law Amendment Act, 1977*, chapter 53 of the Statutes of Canada, 1976-77; and

(b) had not been revoked before the commencement day.

Territoire de validité

(2) Une telle désignation est valide seulement dans la province où elle a été effectuée.

Durée de validité

(3) Sa durée de validité est la période mentionnée ou, dans le cas de la désignation du titulaire d'un permis réputé, en application de l'article 123, un permis délivré en vertu de l'article 56, celle du permis visé à l'article 123, qui ne peut excéder d'un an la date de référence.

Demandes en cours

126 Les demandes de délivrance des documents — qui seraient visés aux articles 120 à 125 s'ils avaient été délivrés avant la date de référence — en cours à la date de référence sont traitées conformément à la loi antérieure, à la différence près que :

a) un permis remplace les anciens permis, agréments, désignations ou autorisations d'acquisition;

b) seule une personne habilitée par la présente loi à délivrer un permis peut statuer à leur égard.

Certificats d'enregistrement

Certificats d'enregistrement

127 (1) Est réputé un certificat d'enregistrement délivré en application de l'article 60 le certificat d'enregistrement qui :

a) a été :

(i) soit délivré en vertu du paragraphe 109(7) de la loi antérieure,

(ii) soit prorogé par les paragraphes 6(2) de la *Loi de 1968-69 modifiant le droit pénal*, chapitre 38 des Statuts du Canada de 1968-1969, ou 48(1) de la *Loi de 1977 modifiant le droit pénal*, chapitre 53 des Statuts du Canada de 1976-1977;

b) n'a pas été révoqué avant la date de référence.

Expiration

(2) A registration certificate that is deemed to be a registration certificate issued under section 60 expires on the earlier of

(a) its expiration under section 66, and

(b) December 31, 2002, or such other date as is prescribed.

Durée de validité

(2) Un tel certificat d'enregistrement — qui n'a pas expiré en application de l'article 66 — est valide pour la période se terminant le 31 décembre 2002 ou à la date prévue par règlement, si celle-ci est antérieure.

Pending applications

128 Every application for a registration certificate that was pending on the commencement day shall be dealt with and disposed of under and in accordance with the former Act, except that only a person who has authority under this Act to issue a registration certificate may finally dispose of the application.

Demandes en cours

128 Les demandes de certificat d'enregistrement en cours à la date de référence sont traitées conformément à la loi antérieure, à la différence près que seule une personne habilitée par la présente loi à délivrer les certificats d'enregistrement peut statuer à leur égard.

Authorized Transportation of Firearms

Transport d'armes à feu

Permit to carry

129 (1) A permit authorizing a person to possess a particular prohibited firearm or restricted firearm is deemed to be an authorization to carry or authorization to transport if it

(a) was

(i) issued under subsection 110(1) of the former Act, or

(ii) continued under subsection 6(2) of the *Criminal Law Amendment Act, 1968-69*, chapter 38 of the Statutes of Canada, 1968-69, or subsection 48(1) of the *Criminal Law Amendment Act, 1977*, chapter 53 of the Statutes of Canada, 1976-77;

(b) had not been revoked before the commencement day; and

(c) remained in force pursuant to subsection 110(1) of the former Act on the commencement day.

Permis de port

129 (1) Le permis autorisant une personne à posséder une arme à feu prohibée ou une arme à feu à autorisation restreinte en particulier est réputé une autorisation de port ou de transport s'il :

a) a été :

(i) soit délivré en application du paragraphe 110(1) de la loi antérieure,

(ii) soit prorogé par les paragraphes 6(2) de la *Loi de 1968-69 modifiant le droit pénal*, chapitre 38 des Statuts du Canada de 1968-1969, ou 48(1) de la *Loi de 1977 modifiant le droit pénal*, chapitre 53 des Statuts du Canada de 1976-1977;

b) n'a pas été révoqué avant la date de référence;

c) était valide à la date de référence conformément au paragraphe 110(1) de la loi antérieure.

Geographical extent

(2) A permit that is deemed to be an authorization to carry or authorization to transport is valid only in the province in which the permit was issued, unless it was endorsed pursuant to subsection 110(10) of the former Act as being valid within the provinces indicated in the permit, in which case it remains valid within those provinces.

Territoire de validité

(2) Un tel permis est valide dans la province de sa délivrance seulement, sauf s'il a été visé en application du paragraphe 110(10) de la loi antérieure pour les provinces mentionnées, auquel cas il le demeure dans celles-ci.

Expiration

(3) A permit that is deemed to be an authorization to carry or authorization to transport expires on the earlier of

(a) the expiration of the period for which it was expressed to be issued, and

(b) two years after the commencement day.

Durée de validité

(3) Il est valide pour la période mentionnée, qui ne peut excéder de plus de deux ans la date de référence.

Temporary permit to carry

130 A permit authorizing a person who does not reside in Canada to possess and carry a particular prohibited firearm or restricted firearm is deemed to be an authorization to transport if it

(a) was issued under subsection 110(2.1) of the former Act;

(b) had not been revoked before the commencement day; and

(c) remained in force pursuant to that subsection on the commencement day.

Permis temporaire de port d'armes

130 Est réputé une autorisation de transport tout permis autorisant un non-résident à transporter et à porter au Canada une arme à feu prohibée ou une arme à feu à autorisation restreinte en particulier, s'il :

a) a été délivré en vertu du paragraphe 110(2.1) de la loi antérieure;

b) n'a pas été révoqué avant la date de référence;

c) était valide à la date de référence conformément à ce paragraphe.

Permit to transport or convey

131 A permit authorizing a person to transport or to convey to a local registrar of firearms a particular prohibited firearm or restricted firearm is deemed to be an authorization to transport if it

(a) was

(i) issued under subsection 110(3) or (4) of the former Act, or

(ii) continued under subsection 6(2) of the *Criminal Law Amendment Act, 1968-69*, chapter 38 of the Statutes of Canada, 1968-69, or subsection 48(1) of the *Criminal Law Amendment Act, 1977*, chapter 53 of the Statutes of Canada, 1976-77;

(b) had not been revoked before the commencement day; and

(c) remained in force pursuant to subsection 110(3) or (4) of the former Act on the commencement day.

Permis de transport

131 Est réputé une autorisation de transport tout permis autorisant une personne à présenter au directeur local de l'enregistrement des armes à feu une arme à feu prohibée ou une arme à feu à autorisation restreinte en particulier, s'il :

a) a été :

(i) soit délivré en vertu des paragraphes 110(3) ou (4) de la loi antérieure,

(ii) soit prorogé par les paragraphes 6(2) de la *Loi de 1968-69 modifiant le droit pénal*, chapitre 38 des Statuts du Canada de 1968-1969, ou 48(1) de la *Loi de 1977 modifiant le droit pénal*, chapitre 53 des Statuts du Canada de 1976-1977;

b) n'a pas été révoqué avant la date de référence;

c) était valide à la date de référence conformément aux paragraphes 110(3) ou (4) de la loi antérieure.

Expiration

132 A permit that is deemed to be an authorization to transport under section 130 or 131 expires on the expiration of the period for which the permit was expressed to be issued.

Durée de validité

132 Le permis réputé une autorisation de transport en application des articles 130 ou 131 est valide pour la période mentionnée.

Pending applications

133 Every application that was pending on the commencement day for a document that would be a document referred to in any of sections 129 to 131 had it been issued before the commencement day shall be dealt with and disposed of under and in accordance with the former Act, except that

(a) an authorization to carry or authorization to transport shall be issued or a condition shall be attached to a licence instead of issuing a permit; and

(b) only a person who has authority under this Act to issue an authorization to carry or authorization to transport may finally dispose of the application.

Demandes en cours

133 Les demandes de délivrance des documents — qui seraient prévus aux articles 129 à 131 s'ils avaient été délivrés avant la date de référence — en cours à la date de référence sont traitées conformément à la loi antérieure, à différence près que :

a) le permis qui aurait été délivré devient une autorisation de port ou de transport ou une condition d'un permis;

b) seule une personne habilitée par la présente loi à délivrer l'autorisation de port et de transport peut statuer à leur égard.

Shooting club approvals

134 (1) An approval of a shooting club is deemed to be an approval granted under this Act if the approval

(a) was granted under subparagraph 109(3)(c)(iii) or paragraph 110(2)(c) of the former Act; and

(b) had not been revoked before the commencement day.

Approbations des clubs de tir

134 (1) Est réputée l'agrément prévu par la présente loi toute approbation d'un club de tir accordée en application du sous-alinéa 109(3)c)(iii) ou de l'alinéa 110(2)c) de la loi antérieure et non révoquée avant la date de référence.

Expiration

(2) An approval of a shooting club that is deemed to be an approval granted under this Act expires on the earlier of

(a) the expiration of the period for which it was expressed to be granted, and

(b) one year after the commencement day.

Durée de validité

(2) Une telle approbation est valide pour la période mentionnée, sans que celle-ci puisse excéder d'un an la date de référence.

Temporary storage permit

135 Every permit authorizing a person to temporarily store a particular prohibited firearm or restricted firearm

(a) that was issued under subsection 110(3.1) of the former Act,

(b) that had not been revoked before the commencement day, and

(c) that remained in force pursuant to subsection 110(3.3) of the former Act on the commencement day

continues in force until the expiration of the period for which it was expressed to be issued, unless the permit is revoked by a chief firearms officer for any good and sufficient reason.

Permis d'entreposage temporaire

135 Est valide pour la période mentionnée, sauf révocation par le contrôleur des armes à feu pour une raison valable, tout permis autorisant l'entreposage temporaire d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte en particulier, s'il :

a) a été délivré en vertu du paragraphe 110(3.1) de la loi antérieure;

b) n'a pas été révoqué avant la date de référence;

c) était valide à la date de référence conformément au paragraphe 110(3.3) de la loi antérieure.

Conditional Amendments to this Act

136 and 137 [Amendments]

Amendments to the Criminal Code

138 and 139 [Amendments]

Related and Consequential Amendments to the Criminal Code

140 to 157 [Amendments]

Related and Consequential Amendments to Other Acts

158 to 168 [Amendments]

169 [Repealed, 2003, c. 8, s. 55]

170 to 187 [Amendments]

Conditional Amendments

188 to 192 [Amendments]

Coming into Force

Coming into force

***193 (1) Subject to subsection (2), this Act or any of its provisions or any provision of any other Act enacted or amended by this Act, other than sections 136, 137 and 174, shall come into force on a day or days to be fixed by order of the Governor in Council.**

Coming into force if no order made

(2) If no order bringing this Act or any of its provisions or any provision of any other Act enacted or amended by this Act is made before January 1, 2003, this Act, other than sections 136, 137 and 174, comes into force on that date.

* **[Note: Section 85, as enacted by section 139, and sections 141 to 150 in force January 1, 1996, *see* SI/96-2; sections 118 and 119 in force April 30, 1996, *see* SI/96-39; section 95 in force December 18, 1997, *see* SI/98-2; sections 1, 2 and 117 in force**

Modifications conditionnelles

136 et 137 [Modifications]

Modifications du Code criminel

138 et 139 [Modifications]

Modifications corrélatives : Code criminel

140 à 157 [Modifications]

Modifications corrélatives : autres lois

158 à 168 [Modifications]

169 [Abrogé, 2003, ch. 8, art. 55]

170 à 187 [Modifications]

Modifications conditionnelles

188 à 192 [Modifications]

Entrée en vigueur

Entrée en vigueur

***193 (1) Sous réserve du paragraphe (2), la présente loi ou telle de ses dispositions, ou toute disposition édictée ou modifiée par la présente loi, à l'exception des articles 136, 137 et 174, entre en vigueur à la date ou aux dates fixées par décret.**

Entrée en vigueur

(2) Dans l'éventualité où aucun décret n'est pris en application du paragraphe (1) avant le 1er janvier 2003, la présente loi, à l'exception des articles 136, 137 et 174, entre en vigueur à cette date.

* **[Note : Article 85, édicté par l'article 139, et articles 141 à 150 en vigueur le 1er janvier 1996, *voir* TR/96-2; articles 118 et 119 en vigueur le 30 avril 1996, *voir* TR/96-39; article 95 en vigueur le 18 décembre 1997, *voir* TR/98-2; articles 1, 2 et 117 en vigueur le 25 février 1998, *voir* TR/98-35; articles 3 et 4, paragraphes 5(1) et**

February 25, 1998, *see* SI/98-35; sections 3 and 4, subsections 5(1) and (2), section 6, subsections 7(1) to (3), paragraphs 7(4)(a) to (d), subsection 7(5), sections 8 to 23, subsection 24(1), paragraphs 24(2)(a) and (b), sections 25 to 28, subsections 29(2) to (7), sections 30 and 31, paragraphs 32(a) and (c), sections 33 and 34, subsection 35(1) before paragraph (a), paragraph 35(1)(a) of the English version before subparagraph (i), subparagraphs 35(1)(a)(i) and (iii) of the English version, paragraphs 35(1)(a) and (c) of the French version, sections 54 to 94, 96, 98 to 116, 120 to 135 and 138, sections 84, 86 to 96 and 98 to 117.15, as enacted by section 139, and sections 140, 151 to 168, 170 to 173 and 175 to 193 in force December 1, 1998, *see* SI/98-93, 95; section 97 in force December 3, 1998, *see* SI/98-129; subsection 5(3), paragraph 7(4)(e), those portions of subsection 35(1) that are not yet in force, subsections 35(2) to (4) and section 36 in force January 1, 2001, *see* SI/2001-4; subsection 29(1) in force January 1, 2003, *see* SI/2002-161; paragraph 24(2)(c), as enacted by 2003, c.8, s.18, in force April 10, 2005, *see* SI/2005-27; section 97, as enacted by section 139, repealed before coming into force, *see* 2008, c. 20, s. 3; paragraph 24(2)(d) repealed before coming into force, *see* 2008, c. 20, s. 3; sections 37 to 53 repealed before coming into force, *see* 2008, c. 20, s. 3.]

(2), article 6, paragraphes 7(1) à (3), alinéas 7(4)a) à d), paragraphe 7(5), articles 8 à 23, paragraphe 24(1), alinéas 24(2)a) et b), articles 25 à 28, paragraphes 29(2) à (7), articles 30 et 31, alinéas 32a) et c), articles 33 et 34, paragraphe 35(1) précédant l'alinéa a), alinéa 35(1)a) de la version anglaise précédant le sous-alinéa (i), sous-alinéas 35(1)a)(i) et (iii) de la version anglaise, alinéas 35(1)a) et c) de la version française, articles 54 à 94, 96, 98 à 116, 120 à 135 et 138, articles 84, 86 à 96 et 98 à 117.15, édictés par l'article 139, et articles 140, 151 à 168, 170 à 173 et 175 à 193 en vigueur le 1er décembre 1998, *voir* TR/98-93 et 95; article 97 en vigueur le 3 décembre 1998, *voir* TR/98-129; paragraphe 5(3), alinéa 7(4)e), les passages du paragraphe 35(1) qui ne sont pas encore en vigueur, paragraphes 35(2) à (4) et article 36 en vigueur le 1er janvier 2001, *voir* TR/2001-4; paragraphe 29(1) en vigueur le 1er janvier 2003, *voir* TR/2002-161; alinéa 24(2)c), édicté par 2003, ch. 8, art. 18, en vigueur le 10 avril 2005, *voir* TR/2005-27; article 97, édicté par l'article 139, abrogé avant d'entrer en vigueur, *voir* 2008, ch. 20, art. 3; alinéa 24(2)d) abrogé avant d'entrer en vigueur, *voir* 2008, ch. 20, art. 3; articles 37 à 53 abrogés avant d'entrer en vigueur, *voir* 2008, ch. 20, art. 3.]

RELATED PROVISIONS

— 2003, c. 8, s. 49(2)

Transitional

49 (2) The person occupying the position of Registrar of Firearms on the day on which section 82 of the Act, as enacted by subsection (1) of this Act, comes into force is deemed, as of that day, to be appointed as Registrar of Firearms under the *Public Service Employment Act* and continues to occupy that position until another person is appointed or deployed as the Registrar of Firearms under that Act.

— 2012, c. 6, s. 29, as amended by 2019, c. 9, s. 23

Destruction of information — Commissioner

29 (1) The Commissioner of Firearms shall ensure the destruction as soon as feasible of all records in the Canadian Firearms Registry related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under the Commissioner's control.

Destruction of information — chief firearms officers

(2) Each chief firearms officer shall ensure the destruction as soon as feasible of all records under their control related to the registration of firearms that are neither prohibited firearms nor restricted firearms and all copies of those records under their control.

Non-application

(3) Sections 12 and 13 of the *Library and Archives of Canada Act* and subsections 6(1) and (3) of the *Privacy Act* do not apply with respect to the destruction of the records and copies referred to in subsections (1) and (2).

— 2015, c. 27, s. 37

Conversion of possession only licence

37 A licence that is issued under the *Firearms Act* and that is held by an individual referred to in paragraph 7(4)(c) of that Act, as it read immediately before the day on which this section comes into force, authorizes the holder to acquire any firearms that they are authorized to possess under the licence and that are acquired by the holder on or after that day and before the expiration or revocation of the licence.

DISPOSITIONS CONNEXES

— 2003, ch. 8, par. 49(2)

Disposition transitoire

49 (2) La personne qui occupe le poste de directeur de l'enregistrement des armes à feu, à la date d'entrée en vigueur de l'article 82 de la même loi dans sa version édictée par le paragraphe (1) de la présente loi, est réputée, à compter de cette date, avoir été nommée au poste aux termes de la *Loi sur l'emploi dans la fonction publique*, et est maintenue dans le poste jusqu'à ce qu'une personne y soit nommée ou mutée aux termes de cette loi.

— 2012, ch. 6, art. 29, modifié par 2019, ch. 9, art. 23

Destruction des renseignements — commissaire

29 (1) Le commissaire aux armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui se trouvent dans le Registre canadien des armes à feu, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.

Destruction des renseignements — contrôleurs des armes à feu

(2) Chaque contrôleur des armes à feu veille à ce que, dès que possible, tous les registres et fichiers relatifs à l'enregistrement des armes à feu autres que les armes à feu prohibées ou les armes à feu à autorisation restreinte qui relèvent de lui, ainsi que toute copie de ceux-ci qui relève de lui soient détruits.

Non-application

(3) Les articles 12 et 13 de la *Loi sur la Bibliothèque et les Archives du Canada* et les paragraphes 6(1) et (3) de la *Loi sur la protection des renseignements personnels* ne s'appliquent pas relativement à la destruction des registres, fichiers et copies mentionnés aux paragraphes (1) et (2).

— 2015, ch. 27, art. 37

Permis de possession seulement : conversion

37 Le particulier visé à l'alinéa 7(4)c) de la *Loi sur les armes à feu*, dans sa version antérieure à la date d'entrée en vigueur du présent article, qui détient un permis délivré sous le régime de cette loi est, à compter de cette date et avant l'expiration ou la révocation du permis, autorisé à acquérir toute arme à feu qu'il est autorisé à posséder en vertu de ce permis.

— 2019, c. 9, s. 25

Definitions

25 The following definitions apply in this section and in sections 26 to 28.

commencement day means the day on which this Act receives royal assent. (*date d'entrée en vigueur*)

copy means a copy referred to in subsection 29(1) or (2) of the *Ending the Long-gun Registry Act*. (*copie*)

personal information means any *personal information*, as defined in section 3 of the *Privacy Act*, that is contained in a record or copy. (*renseignements personnels*)

record means, other than in section 28, a record referred to in subsection 29(1) or (2) of the *Ending the Long-gun Registry Act*. (*registres*)

specified proceeding means any request, complaint, investigation, application, judicial review, appeal or other proceeding under the *Access to Information Act* or the *Privacy Act* that is with respect to a record or copy or to personal information and that

(a) was made or initiated on or before June 22, 2015 and was not concluded, or in respect of which no decision was made, on or before that day; or

(b) was made or initiated after June 22, 2015 but before the commencement day. (*procédure désignée*)

— 2019, c. 9, s. 26

Non-application — *Access to Information Act*

26 (1) Subject to section 27, the *Access to Information Act* does not apply as of the commencement day with respect to records and copies.

Non-application — *Privacy Act*

(2) Subject to section 27, the *Privacy Act*, other than its subsections 6(1) and (3), does not apply as of the commencement day with respect to personal information.

Non-application — subsections 6(1) and (3) of the *Privacy Act*

(3) For greater certainty, by reason of subsection 29(3) of the *Ending the Long-gun Registry Act*, subsections 6(1)

— 2019, ch. 9, art. 25

Définitions

25 Les définitions qui suivent s'appliquent au présent article et aux articles 26 à 28.

copie Copie visée aux paragraphes 29(1) ou (2) de la *Loi sur l'abolition du registre des armes d'épaule*. (*copy*)

date d'entrée en vigueur La date de sanction de la présente loi. (*commencement day*)

procédure désignée Toute procédure — notamment les demandes, plaintes, enquêtes, recours en révision, révisions judiciaires ou appels — qui est engagée sous le régime de la *Loi sur l'accès à l'information* ou de la *Loi sur la protection des renseignements personnels*, qui est relative aux registres, copies ou renseignements personnels et qui, selon le cas :

a) a été introduite ou a débuté au plus tard le 22 juin 2015 et n'a pas été conclue ou à l'égard de laquelle aucune décision n'a encore été prise à cette date;

b) a été introduite ou a débuté après le 22 juin 2015 mais avant la date d'entrée en vigueur. (*specified proceeding*)

registres Registres et fichiers visés aux paragraphes 29(1) ou (2) de la *Loi sur l'abolition du registre des armes d'épaule*. (*record*)

renseignements personnels Les *renseignements personnels*, au sens de l'article 3 de la *Loi sur la protection des renseignements personnels*, versés dans les registres et copies. (*personal information*)

— 2019, ch. 9, art. 26

Non-application — *Loi sur l'accès à l'information*

26 (1) Sous réserve de l'article 27, la *Loi sur l'accès à l'information* ne s'applique pas, à compter de la date d'entrée en vigueur, relativement aux registres et copies.

Non-application — *Loi sur la protection des renseignements personnels*

(2) Sous réserve de l'article 27, la *Loi sur la protection des renseignements personnels*, à l'exception de ses paragraphes 6(1) et (3), ne s'applique pas, à compter de la date d'entrée en vigueur, relativement aux renseignements personnels.

Non-application — paragraphes 6(1) et (3) de la *Loi sur la protection des renseignements personnels*

(3) Il est entendu qu'en application du paragraphe 29(3) de la *Loi sur l'abolition du registre des armes d'épaule*, les paragraphes 6(1) et (3) de la *Loi sur la protection des*

and (3) of the *Privacy Act* do not apply as of April 5, 2012 with respect to personal information.

— 2019, c. 9, s. 28

Permission to view records

28 The Commissioner of Firearms shall permit the Information Commissioner to view — for the purpose of settling the Federal Court proceeding *Information Commissioner of Canada v. Minister of Public Safety and Emergency Preparedness*, bearing court file number T-785-15 — any record that was in the Canadian Firearms Registry on April 3, 2015.

— 2019, c. 9, s. 29

Copy to Government of Quebec

29 (1) The Commissioner of Firearms shall — for the purpose of the administration and enforcement of the *Firearms Registration Act*, chapter 15 of the Statutes of Quebec, 2016 — provide the Quebec Minister with a copy of all records that were in the Canadian Firearms Registry on April 3, 2015 and that relate to firearms registered, as at that day, as non-restricted firearms, if the Quebec Minister provides the Commissioner with a written request to that effect before the end of the 120th day after the day on which the Commissioner sends written notice under subsection (2).

Notice

(2) If no request is provided under subsection (1) before the Commissioner is in a position to proceed with ensuring the destruction of the records referred to in that subsection, the Commissioner shall, as soon as he or she is in that position, send written notice to the Quebec Minister of that fact.

Destruction of records

(3) Despite subsection 29(1) of the *Ending the Long-gun Registry Act*, the Commissioner shall proceed with ensuring the destruction of the records referred to in subsection (1) only after

(a) he or she provides the Quebec Minister with a copy of the records, in the case where that Minister provides a written request in accordance with subsection (1); or

(b) the end of the 120th day after the day on which the Commissioner sends written notice under subsection (2), in any other case.

Definition of *Quebec Minister*

(4) In this section, ***Quebec Minister*** means the minister of the Government of Quebec responsible for public security.

renseignements personnels ne s'appliquent pas, à compter du 5 avril 2012, relativement aux renseignements personnels.

— 2019, ch. 9, art. 28

Permission de voir des documents

28 Le commissaire aux armes à feu permet au Commissaire à l'information de voir — en vue du règlement de l'affaire *Commissaire à l'information du Canada* c. *Ministre de la Sécurité publique et de la Protection civile*, dont le numéro de dossier à la Cour fédérale est T-785-15 — tout document qui se trouvait dans le Registre canadien des armes à feu le 3 avril 2015.

— 2019, ch. 9, art. 29

Copie au gouvernement du Québec

29 (1) Le commissaire aux armes à feu fournit au ministre du Québec, aux fins de l'exécution et du contrôle d'application de la *Loi sur l'immatriculation des armes à feu*, chapitre 15 des Lois du Québec (2016), une copie des registres et fichiers qui se trouvaient dans le Registre canadien des armes à feu le 3 avril 2015 et qui concernent les armes à feu qui, à cette date, étaient enregistrées en tant qu'arme à feu sans restriction, si le ministre du Québec en fait la demande par écrit au commissaire au plus tard le cent vingtième jour suivant la date de l'envoi de l'avis écrit au titre du paragraphe (2).

Avis

(2) Si la demande visée au paragraphe (1) n'est pas faite avant que le commissaire soit en mesure de veiller à la destruction des registres et fichiers visés à ce paragraphe, ce dernier envoie un avis écrit au ministre du Québec dès qu'il est prêt à veiller à la destruction des registres et fichiers visés.

Destruction des registres et fichiers

(3) Malgré le paragraphe 29(1) de la *Loi sur l'abolition du registre des armes d'épaule*, le commissaire aux armes à feu ne veille à la destruction des registres et fichiers visés au paragraphe (1) qu'après :

a) avoir fourni une copie des registres et fichiers au ministre du Québec, dans le cas où ce ministre en fait la demande écrite conformément à ce paragraphe;

b) le cent vingtième jour suivant la date de l'envoi de l'avis écrit au titre du paragraphe (2), dans tout autre cas.

Définition de *ministre du Québec*

(4) Au présent article, ***ministre du Québec*** s'entend du ministre du gouvernement du Québec responsable de la sécurité publique.

— 2019, c. 9, s. 30

Extension

30 The Minister of Public Safety and Emergency Preparedness may, during the 120-day period referred to in subsection 29(1), make an order extending that period for another 120 days, and in that case the references in subsections 29(1) and (3) to "the 120th day" are to be read as references to "the 240th day".

— 2019, ch. 9, art. 30

Prolongation

30 Le ministre de la Sécurité publique et de la Protection civile peut, par arrêté, pendant la période de cent vingt jours visée au paragraphe 29(1), prolonger celle-ci d'une période additionnelle de cent vingt jours. Le cas échéant, la mention « cent vingtième jour » aux paragraphes 29(1) et (3) vaut mention de « deux cent quarantième jour ».

AMENDMENTS NOT IN FORCE

— 2015, c. 27, s. 10

10 The Act is amended by adding the following in numerical order:

Obligation to provide information

42.2 (1) A business may import a prohibited firearm or a restricted firearm only if the business completes the prescribed form containing the prescribed information and provides it by electronic or other means to the Registrar before the importation and to a customs officer before or at the time of the importation.

Information sharing

(2) The Registrar and a customs officer may provide each other with any form or information that they receive under subsection (1).

— 2015, c. 27, s. 15

15 Subsection 83(1) of the Act is amended by adding the following after paragraph (d):

(d.1) all information provided to the Registrar under section 42.2;

— 2019, c. 9, s. 1

2015, c. 27, s. 2(2).

1 (1) Subsection 2(2) of the *Firearms Act* is replaced by the following:

Criminal Code

(2) Unless otherwise provided, words and expressions used in this Act have the meanings assigned to them by section 2 or 84 of the *Criminal Code*.

(2) Section 2 of the Act is amended by adding the following after subsection (3):

For greater certainty

(4) For greater certainty, nothing in this Act shall be construed so as to permit or require the registration of non-restricted firearms.

— 2019, c. 9, s. 2

2 (1) The portion of subsection 5(2) of the Act before paragraph (a) is replaced by the following:

MODIFICATIONS NON EN VIGUEUR

— 2015, ch. 27, art. 10

10 La même loi est modifiée par adjonction, selon l'ordre numérique, de ce qui suit :

Obligation de fournir des renseignements

42.2 (1) Pour importer des armes à feu prohibées ou des armes à feu à autorisation restreinte, l'entreprise remplit le formulaire réglementaire comprenant les renseignements réglementaires et le transmet, électroniquement ou par tout autre moyen, au directeur avant l'importation et à un agent des douanes avant l'importation ou au moment de celle-ci.

Partage de renseignements

(2) Le directeur et l'agent des douanes peuvent échanger tout formulaire ou renseignement reçus en application du paragraphe (1).

— 2015, ch. 27, art. 15

15 Le paragraphe 83(1) de la même loi est modifié par adjonction, après l'alinéa d), de ce qui suit :

d.1) les renseignements qui lui sont communiqués en application de l'article 42.2;

— 2019, ch. 9, art. 1

2015, ch. 27, par. 2(2).

1 (1) Le paragraphe 2(2) de la *Loi sur les armes à feu* est remplacé par ce qui suit :

Code criminel

(2) Sauf disposition contraire, les termes employés dans la présente loi s'entendent au sens des articles 2 ou 84 du *Code criminel*.

(2) L'article 2 de la même loi est modifié par adjonction, après le paragraphe (3), de ce qui suit :

Précision

(4) Il est entendu que la présente loi ne permet ni n'exige l'enregistrement des armes à feu sans restriction.

— 2019, ch. 9, art. 2

2 (1) Le passage du paragraphe 5(2) de la même loi précédant l'alinéa a) est remplacé par ce qui suit :

Criteria

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person

(2) Subsection 5(2) of the Act is amended by striking out "or" at the end of paragraph (b) and by replacing paragraph (c) with the following:

(c) has a history of behaviour that includes violence or threatened or attempted violence or threatening conduct on the part of the person against any person;

(d) is or was previously prohibited by an order — made in the interests of the safety and security of any person — from communicating with an identified person or from being at a specified place or within a specified distance of that place, and presently poses a threat or risk to the safety and security of any person;

(e) in respect of an offence in the commission of which violence was used, threatened or attempted against the person's intimate partner or former intimate partner, was previously prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition; or

(f) for any other reason, poses a risk of harm to any person.

(3) Section 5 of the Act is amended by adding the following after subsection (2):

For greater certainty

(2.1) For greater certainty, for the purposes of paragraph (2)(c), threatened violence and threatening conduct include threats or conduct communicated by the person to a person by means of the Internet or other digital network.

— 2019, c. 9, s. 3(2)

3 (2) Section 12 of the Act is amended by adding the following after subsection (9):

Grandfathered individuals — CZ rifle

(10) An individual is eligible to hold a licence authorizing the individual to possess one or more firearms referred to in subsection (11) if

(a) the individual possessed one or more such firearms on June 30, 2018;

(b) the individual

Critères d'admissibilité

(2) Pour l'application du paragraphe (1), le contrôleur des armes à feu ou, dans le cas d'un renvoi prévu à l'article 74, le juge de la cour provinciale tient compte des éléments suivants :

(2) L'alinéa 5(2)c) de la même loi est remplacé par ce qui suit :

c) l'historique de son comportement atteste la menace, la tentative ou l'usage de violence ou le comportement menaçant contre lui-même ou autrui;

d) il lui est ou lui a été interdit, au titre d'une ordonnance rendue pour la sécurité de toute personne, de communiquer avec une personne donnée ou de se trouver dans un lieu donné ou à une distance donnée de ce lieu, et il représente présentement une menace ou un risque pour la sécurité de toute personne;

e) au titre d'une ordonnance d'interdiction rendue relativement à une infraction commise avec usage, tentative ou menace de violence contre son partenaire intime ou un ancien partenaire intime, il lui a déjà été interdit la possession d'une arme à feu, d'une arbalète, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées;

f) pour toute autre raison, il pourrait causer un dommage à lui-même ou à autrui.

(3) L'article 5 de la même loi est remplacé par adjonction, après le paragraphe (2), de ce qui suit :

Précision

(2.1) Il est entendu que, pour l'application de l'alinéa (2)c), la menace de violence et le comportement menaçant s'entendent notamment de la menace ou du comportement communiqués par la personne envers autrui par Internet ou un autre réseau numérique.

— 2019, ch. 9, par. 3(2)

3 (2) L'article 12 de la même loi est modifié par adjonction, après le paragraphe (9), de ce qui suit :

Particuliers avec droits acquis : fusils CZ

(10) Est admissible au permis autorisant la possession d'armes à feu visées au paragraphe (11) le particulier qui remplit les conditions suivantes :

a) il en possédait une ou plusieurs le 30 juin 2018;

b) selon le cas :

(i) held on that day a registration certificate for one or more such firearms, in the case where at least one of those firearms was on that day a restricted firearm, or

(ii) applies, before the first anniversary of the commencement day, for a registration certificate that is subsequently issued for a firearm referred to in subsection (11), in any other case; and

(c) the individual was continuously the holder of a registration certificate for one or more such firearms beginning on

(i) June 30, 2018, in the case where at least one of those firearms was on that day a restricted firearm, or

(ii) the day on which a registration certificate referred to in subparagraph (b)(ii) is issued to the individual, in any other case.

(i) à cette date, il était titulaire d'un certificat d'enregistrement pour une ou plusieurs de ces armes, dans le cas où au moins une de ces armes était, à cette date, une arme à feu à autorisation restreinte,

(ii) il a présenté, avant le premier anniversaire de la date de référence, une demande de certificat d'enregistrement, qui a été délivré par la suite, pour une arme à feu visée au paragraphe (11), dans tout autre cas;

c) il a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes à compter :

(i) du 30 juin 2018, dans le cas où au moins une des armes à feu était, à cette date, une arme à feu à autorisation restreinte,

(ii) de la date où le certificat d'enregistrement visé au sous-alinéa b)(ii) lui a été délivré, dans tout autre cas.

Grandfathered firearms — CZ rifle

(11) Subsection (10) applies in respect of a firearm that

(a) is a

(i) Ceská Zbrojovka (CZ) Model CZ858 Tactical-2P rifle,

(ii) Ceská Zbrojovka (CZ) Model CZ858 Tactical-2V rifle,

(iii) Ceská Zbrojovka (CZ) Model CZ858 Tactical-4P rifle, or

(iv) Ceská Zbrojovka (CZ) Model CZ858 Tactical-4V rifle; and

(b) was registered as a restricted firearm on June 30, 2018 or, in the case of a firearm that was not a restricted firearm on that day, is the subject of an application made before the first anniversary of the commencement day for a registration certificate that is subsequently issued.

Droits acquis : fusils CZ

(11) Le paragraphe (10) s'applique à l'égard d'une arme à feu qui, à la fois :

a) est l'une ou l'autre des armes à feu suivantes :

(i) un fusil Ceská Zbrojovka (CZ), modèle CZ858 Tactical-2P,

(ii) un fusil Ceská Zbrojovka (CZ), modèle CZ858 Tactical-2V,

(iii) un fusil Ceská Zbrojovka (CZ), modèle CZ858 Tactical-4P,

(iv) un fusil Ceská Zbrojovka (CZ), modèle CZ858 Tactical-4V;

b) était enregistrée comme arme à feu à autorisation restreinte le 30 juin 2018 ou, dans le cas d'une arme à feu qui, à cette date, n'était pas une arme à feu à autorisation restreinte, fait l'objet d'une demande de certificat d'enregistrement qui a été présentée avant le premier anniversaire de la date de référence, et le certificat a été délivré par la suite.

For greater certainty

(12) For greater certainty, the firearms referred to in subparagraphs (11)(a)(i) to (iv) include only firearms that are prohibited firearms on the commencement day.

Précision

(12) Il est entendu que les armes à feu visées aux sous-alinéas (11)a)(i) à (iv) ne comprennent que les armes à feu qui sont prohibées à la date de référence.

Grandfathered individuals — SAN Swiss Arms

(13) An individual is eligible to hold a licence authorizing the individual to possess one or more firearms referred to in subsection (14) if

Particuliers avec droits acquis : armes SAN Swiss Arms

(13) Est admissible au permis autorisant la possession d'armes à feu visées au paragraphe (14) le particulier qui remplit les conditions suivantes :

(a) the individual possessed one or more such firearms on June 30, 2018;

(b) the individual

(i) held on that day a registration certificate for one or more such firearms, in the case where at least one of those firearms was on that day a restricted firearm, or

(ii) applies, before the first anniversary of the commencement day, for a registration certificate that was subsequently issued for a firearm referred to in subsection (14), in any other case; and

(c) the individual was continuously the holder of a registration certificate for one or more such firearms beginning on

(i) June 30, 2018, in the case where at least one of the firearms was on that day a restricted firearm, or

(ii) the day on which a registration certificate referred to in subparagraph (b)(ii) is issued to the individual, in any other case.

Grandfathered firearms — SAN Swiss Arms

(14) Subsection (13) applies in respect of a firearm that

(a) is a

(i) SAN Swiss Arms Model Classic Green rifle,

(ii) SAN Swiss Arms Model Classic Green carbine,

(iii) SAN Swiss Arms Model Classic Green CQB rifle,

(iv) SAN Swiss Arms Model Black Special rifle,

(v) SAN Swiss Arms Model Black Special carbine,

(vi) SAN Swiss Arms Model Black Special CQB rifle,

(vii) SAN Swiss Arms Model Black Special Target rifle,

(viii) SAN Swiss Arms Model Blue Star rifle,

(ix) SAN Swiss Arms Model Heavy Metal rifle,

(x) SAN Swiss Arms Model Red Devil rifle,

(xi) SAN Swiss Arms Model Swiss Arms Edition rifle,

(xii) SAN Swiss Arms Model Classic Green Sniper rifle,

a) il en possédait une ou plusieurs le 30 juin 2018;

b) selon le cas :

(i) à cette date, il était titulaire d'un certificat d'enregistrement pour une ou plusieurs de ces armes, dans le cas où au moins une de ces armes était, à cette date, une arme à feu à autorisation restreinte,

(ii) il a présenté, avant le premier anniversaire de la date de référence, une demande de certificat d'enregistrement, qui a été délivré par la suite, pour une arme à feu visée au paragraphe (14), dans tout autre cas;

c) il a été sans interruption titulaire d'un certificat d'enregistrement pour de telles armes à compter :

(i) du 30 juin 2018, dans le cas où au moins une des armes à feu était, à cette date, une arme à feu à autorisation restreinte,

(ii) de la date où le certificat d'enregistrement visé au sous-alinéa b)(ii) lui a été délivré, dans tout autre cas.

Droits acquis : armes SAN Swiss Arms

(14) Le paragraphe (13) s'applique à l'égard d'une arme à feu qui :

a) d'une part, est l'une ou l'autre des armes à feu suivantes :

(i) un fusil SAN Swiss Arms, modèle Classic Green,

(ii) une carabine SAN Swiss Arms, modèle Classic Green,

(iii) un fusil SAN Swiss Arms, modèle Classic Green CQB,

(iv) un fusil SAN Swiss Arms, modèle Black Special,

(v) une carabine SAN Swiss Arms, modèle Black Special,

(vi) un fusil SAN Swiss Arms, modèle Black Special CQB,

(vii) un fusil SAN Swiss Arms, modèle Black Special Target,

(viii) un fusil SAN Swiss Arms, modèle Blue Star,

(ix) un fusil SAN Swiss Arms, modèle Heavy Metal,

(x) un fusil SAN Swiss Arms, modèle Red Devil,

(xiii) SAN Swiss Arms Model Ver rifle,

(xiv) SAN Swiss Arms Model Aestas rifle,

(xv) SAN Swiss Arms Model Autumnus rifle, or

(xvi) SAN Swiss Arms Model Hiemis rifle; and

(b) was registered as a restricted firearm on June 30, 2018 or, in the case of a firearm that was not a restricted firearm on that day, is the subject of an application made before the first anniversary of the commencement day for a registration certificate that is subsequently issued.

(xi) un fusil SAN Swiss Arms, modèle Swiss Arms Edition,

(xii) un fusil SAN Swiss Arms, modèle Classic Green Sniper,

(xiii) un fusil SAN Swiss Arms, modèle Ver,

(xiv) un fusil SAN Swiss Arms, modèle Aestas,

(xv) un fusil SAN Swiss Arms, modèle Autumnus,

(xvi) un fusil SAN Swiss Arms, modèle Hiemis;

b) d'autre part, était enregistrée comme arme à feu à autorisation restreinte le 30 juin 2018 ou, dans le cas d'une arme à feu qui, à cette date, n'était pas une arme à feu à autorisation restreinte, fait l'objet d'une demande de certificat d'enregistrement qui a été présentée avant le premier anniversaire de la date de référence, et le certificat a été délivré par la suite.

— 2019, c. 9, ss. 4(2), (3)

— 2019, ch. 9, par. 4(2) et (3)

2015, c. 27, s. 6.

4 (2) Subsections 19(1.1) and (2) of the Act are replaced by the following:

Target practice or competition

(1.1) In the case of an authorization to transport issued for a reason referred to in paragraph (1)(a) within the province where the holder of the authorization resides, the specified places must — except in the case of an authorization that is issued for a prohibited firearm referred to in subsection 12(9), (11) or (14) — include all shooting clubs and shooting ranges that are approved under section 29 and that are located in that province.

Exception for prohibited firearms other than prohibited handguns

(2) Despite subsection (1), an individual must not be authorized to transport a prohibited firearm — other than a handgun referred to in subsection 12(6.1) or a prohibited firearm referred to in subsection 12(9), (11) or (14) — between specified places except for the purposes referred to in paragraph (1)(b).

2015, ch. 27, art. 6.

4 (2) Les paragraphes 19(1.1) et (2) de la même loi sont remplacés par ce qui suit :

Tir à la cible ou compétition de tir

(1.1) Dans le cas d'une autorisation de transport délivrée pour l'une des raisons mentionnées à l'alinéa (1)a) pour la province de résidence du titulaire de l'autorisation, les lieux qui y sont précisés comprennent tous les clubs de tir et tous les champs de tir de cette province agréés conformément à l'article 29, sauf s'il s'agit d'une autorisation de transport délivrée pour une arme à feu prohibée visée aux paragraphes 12(9), (11) ou (14).

Exception : armes à feu prohibées autres que les armes de poing prohibées

(2) Malgré le paragraphe (1), le particulier ne peut être autorisé à transporter une arme à feu prohibée — autre qu'une arme de poing visée au paragraphe 12(6.1) ou qu'une arme à feu prohibée visée aux paragraphes 12(9), (11) ou (14) — entre des lieux précis que pour les raisons visées à l'alinéa (1)b).

2015, c. 27, s. 6.

(3) Subsections 19(2.1) to (2.3) of the Act are replaced by the following:

Automatic authorization to transport — licence renewal

(2.1) An individual who holds a licence authorizing the individual to possess restricted firearms or handguns referred to in subsection 12(6.1) must, if the licence is renewed, be authorized to transport them within the individual's province of residence to and from all shooting

2015, ch. 27, art. 6.

(3) Les paragraphes 19(2.1) à (2.3) de la même loi sont remplacés par ce qui suit :

Autorisation automatique de transport : renouvellement

(2.1) Le particulier titulaire d'un permis de possession d'armes à feu à autorisation restreinte ou d'armes de poing visées au paragraphe 12(6.1) doit, si son permis est renouvelé, être autorisé à les transporter, dans sa province de résidence, vers tout club de tir et tout champ de

clubs and shooting ranges that are approved under section 29. However, the authorization does not apply to a restricted firearm or a handgun referred to in subsection 12(6.1) whose transfer to the individual was approved, in accordance with subparagraph 28(b)(ii), for the purpose of having it form part of a gun collection.

Automatic authorization to transport — transfer

(2.2) If a chief firearms officer has authorized the transfer of a prohibited firearm or a restricted firearm to an individual who holds a licence authorizing the individual to possess prohibited firearms or restricted firearms, the individual must be authorized to transport the firearm within the individual's province of residence from the place where they acquire it to the place where they may possess it under section 17.

Automatic authorization to transport — transfer

(2.3) If a chief firearms officer has authorized the transfer of a restricted firearm or a handgun referred to in subsection 12(6.1) to an individual who holds a licence authorizing the individual to possess a restricted firearm or such a handgun, the individual must be authorized to transport their restricted firearm or handgun within the individual's province of residence to and from all shooting clubs and shooting ranges that are approved under section 29, unless the transfer of the restricted firearm or handgun was approved, in accordance with subparagraph 28(b)(ii), for the purpose of having it form part of a gun collection.

— 2019, c. 9, s. 5

tir agréés conformément à l'article 29, et à partir de celui-ci. Toutefois, l'autorisation ne s'applique pas à l'arme à feu à autorisation restreinte ou à l'arme de poing dont la cession au particulier a été autorisée, en application du sous-alinéa 28b)(ii), à des fins de collection.

Autorisation automatique de transport : cession

(2.2) Si un contrôleur des armes à feu autorise la cession d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte à un particulier titulaire d'un permis de possession d'armes à feu prohibées ou d'armes à feu à autorisation restreinte, le particulier doit, dans sa province de résidence, être autorisé à transporter cette arme à feu du lieu de son acquisition au lieu où elle peut être gardée en vertu de l'article 17.

Autorisation automatique de transport : cession

(2.3) Si un contrôleur des armes à feu autorise la cession d'une arme à feu à autorisation restreinte ou d'une arme de poing visées au paragraphe 12(6.1) à un particulier titulaire d'un permis de possession d'armes à feu à autorisation restreinte ou d'une telle arme de poing, le particulier doit, dans sa province de résidence, être autorisé à transporter cette arme à feu vers tout club de tir et tout champ de tir agréés conformément à l'article 29, et à partir de ceux-ci, sauf si la cession de l'arme à feu à autorisation restreinte ou de l'arme de poing a été autorisée, en application du sous-alinéa 28b)(ii), à des fins de collection.

— 2019, ch. 9, art. 5

2012, c. 6, s. 11; 2015, c. 27, s. 7.

5 Sections 23 and 23.1 of the Act are replaced by the following:

Authorization to transfer non-restricted firearms

23 (1) A person may transfer one or more non-restricted firearms if, at the time of the transfer,

(a) the transferee holds a licence authorizing the transferee to acquire and possess a non-restricted firearm;

(b) the Registrar has, at the transferor's request, issued a reference number for the transfer and provided it to the transferor; and

(c) the reference number is still valid.

Information — transferee's licence

(2) The transferee shall provide to the transferor the prescribed information that relates to the transferee's licence, for the purpose of enabling the transferor to request that the Registrar issue a reference number for the transfer.

2012, ch. 6, art. 11; 2015, ch. 27, art. 7.

5 Les articles 23 et 23.1 de la même loi sont remplacés par ce qui suit :

Cession d'armes à feu sans restriction

23 (1) La cession d'une ou de plusieurs armes à feu sans restriction est permise si, au moment où elle s'opère :

a) le cessionnaire est effectivement titulaire d'un permis l'autorisant à acquérir et à posséder une arme à feu sans restriction;

b) sur demande du cédant, le directeur a attribué un numéro de référence à la cession et a informé le cédant de ce numéro;

c) le numéro de référence est toujours valide.

Renseignements liés au permis du cessionnaire

(2) Le cessionnaire fournit au cédant les renseignements réglementaires liés à son permis afin que ce dernier puisse demander au directeur d'attribuer un numéro de référence à la cession.

Reference number

(3) The Registrar shall issue a reference number if he or she is satisfied that the transferee holds and is still eligible to hold a licence authorizing them to acquire and possess a non-restricted firearm.

Period of validity

(4) A reference number is valid for the prescribed period.

Registrar not satisfied

(5) If the Registrar is not satisfied as set out in subsection (3), he or she may so inform the transferor.

— 2019, c. 9, s. 6

2015, c. 27, s. 11.

6 Subsection 54(1) of the Act is replaced by the following:

Applications

54 (1) A licence, registration certificate or authorization, other than an authorization referred to in subsection 19(2.1), (2.2) or (2.3), may be issued only on application made in the prescribed form — which form may be in writing or electronic — or in the prescribed manner. The application must set out the prescribed information and be accompanied by payment of the prescribed fees.

— 2019, c. 9, s. 7

7 The Act is amended by adding the following after section 58:

Conditions — licence issued to business

58.1 (1) A chief firearms officer who issues a licence to a business must attach the following conditions to the licence:

(a) the business must record and, for the prescribed period, keep the prescribed information that relates to the business' possession and disposal of non-restricted firearms;

(b) the business must record and — for a period of 20 years from the day on which the business transfers a non-restricted firearm, or for a longer period that may be prescribed — keep the following information in respect of the transfer:

(i) the reference number issued by the Registrar,

(ii) the day on which the reference number was issued,

(iii) the transferee's licence number, and

Numéro de référence

(3) Le directeur attribue un numéro de référence s'il est convaincu que le cessionnaire est titulaire d'un permis l'autorisant à acquérir et à posséder une arme à feu sans restriction et y est toujours admissible.

Période de validité

(4) Le numéro de référence est valide pour la période réglementaire.

Directeur pas convaincu

(5) Si le directeur n'est pas convaincu de ce qui est prévu au paragraphe (3), il peut en informer le cédant.

— 2019, ch. 9, art. 6

2015, ch. 27, art. 11.

6 Le paragraphe 54(1) de la même loi est remplacé par ce qui suit :

Dépôt d'une demande

54 (1) La délivrance des permis, des autorisations — autres que celles visées aux paragraphes 19(2.1), (2.2) ou (2.3) — et des certificats d'enregistrement est subordonnée au dépôt d'une demande présentée en la forme réglementaire — écrite ou électronique — ou selon les modalités réglementaires et accompagnée des renseignements réglementaires, et à l'acquittement des droits réglementaires.

— 2019, ch. 9, art. 7

7 La même loi est modifiée par adjonction, après l'article 58, de ce qui suit :

Conditions : permis délivré à une entreprise

58.1 (1) Le contrôleur des armes à feu qui délivre un permis à une entreprise assortit ce permis des conditions suivantes :

a) l'entreprise est tenue de noter et de conserver, pendant la période réglementaire, les renseignements réglementaires liés à la possession d'armes à feu sans restriction et à leur disposition;

b) l'entreprise est tenue de noter et de conserver, pendant vingt ans ou pour une période supérieure prévue par règlement à compter de la date de la cession d'une arme à feu sans restriction, les renseignements suivants :

(i) le numéro de référence attribué par le directeur,

(ii) la date à laquelle le numéro de référence a été attribué,

(iii) le numéro de permis du cessionnaire,

(iv) the firearm's make, model and type and, if any, its serial number; and

(c) the business must, unless otherwise directed by a chief firearms officer, transmit any records containing the information referred to in paragraph (a) or (b) to a prescribed official if it is determined that the business will cease to be a business.

(iv) la marque, le modèle et le type de l'arme à feu et, s'il y a lieu, son numéro de série;

c) l'entreprise est tenue de transmettre, à moins d'instructions contraires du contrôleur des armes à feu, tout registre ou fichier contenant les renseignements visés aux alinéas a) ou b) à la personne désignée par règlement s'il est déterminé que l'entreprise cessera d'en être une.

Destruction of records

(2) The prescribed official may destroy the records transmitted to them under paragraph (1)(c) at the times and in the circumstances that may be prescribed.

Destruction des registres et fichiers

(2) La personne désignée par règlement peut détruire les registres et fichiers qui lui sont transmis au titre de l'alinéa (1)c) selon les modalités de temps et dans les situations prévues par règlement.

— 2019, c. 9, s. 8

— 2019, ch. 9, art. 8

2015, c. 27, s. 13(1).

8 Subsection 61(3.1) of the Act is replaced by the following:

2015, ch. 27, par. 13(1).

8 Le paragraphe 61(3.1) de la même loi est remplacé par ce qui suit :

Automatic authorization to transport

(3.1) An authorization to transport referred to in subsection 19(1.1), (2.1), (2.2) or (2.3) must take the form of a condition attached to a licence.

Autorisation automatique de transport

(3.1) Les autorisations de transport visées aux paragraphes 19(1.1), (2.1), (2.2) ou (2.3) prennent la forme d'une condition d'un permis.

— 2019, c. 9, s. 9

— 2019, ch. 9, art. 9

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1995, ch. 39, al. 137b).

9 Paragraph 70(1)(a) of the Act is amended by adding the following after subparagraph (i):

(i.1) transfers, as defined in section 21, a non-restricted firearm other than in accordance with section 23,

9 L'alinéa 70(1)a) de la même loi est remplacé par ce qui suit :

a) le titulaire soit ne peut plus ou n'a jamais pu être titulaire du permis ou de l'autorisation, soit cède, au sens de l'article 21, une arme à feu sans restriction autrement que conformément à l'article 23, soit enfreint une condition du permis ou de l'autorisation, soit encore a été déclaré coupable ou absous en application de l'article 730 du *Code criminel* d'une infraction visée à l'alinéa 5(2)a);

— 2019, c. 9, s. 10

— 2019, ch. 9, art. 10

10 (1) The portion of subsection 85(1) of the French version of the Act before subparagraph (a)(i) is replaced by the following:

Autres registres du directeur

85 (1) Le directeur établit un registre :

a) des armes à feu acquises ou détenues par les personnes précisées ci-après et utilisées par celles-ci dans le cadre de leurs fonctions :

10 (1) Le passage du paragraphe 85(1) de la version française de la même loi précédant le sous-alinéa a)(i) est remplacé par ce qui suit :

Autres registres du directeur

85 (1) Le directeur établit un registre :

a) des armes à feu acquises ou détenues par les personnes précisées ci-après et utilisées par celles-ci dans le cadre de leurs fonctions :

(2) Paragraph 85(1)(b) of the French version of the Act is replaced by the following:

(2) L'alinéa 85(1)b) de la version française de la même loi est remplacé par ce qui suit :

b) des armes à feu acquises ou détenues par des particuliers sous les ordres et pour le compte des forces policières ou d'un ministère fédéral ou provincial;

(3) Subsection 85(1) of the Act is amended by striking out "and" at the end of paragraph (a) and by adding the following after paragraph (b):

(c) every request for a reference number made to the Registrar under section 23 and, if the request is refused, the reasons for refusing the request; and

(d) every reference number that is issued by the Registrar under subsection 23(3) and, with respect to each reference number, the day on which it was issued and the licence numbers of the transferor and transferee.

(4) Subsection 85(2) of the Act is replaced by the following:

Reporting of acquisitions and transfers

(2) A person referred to in paragraph (1)(a) or (b) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

— 2019, c. 9, s. 11

2012, c. 6, s. 25.

11 Section 90.1 of the Act is repealed.

— 2019, c. 9, s. 13

13 (1) Section 117 of the Act is amended by adding the following after paragraph (c):

(c.1) regulating, for the purpose of issuing a reference number under section 23, the provision of information by a transferor, a transferee and the Registrar;

(2) [In force]

(3) Section 117 of the Act is amended by adding the following after paragraph (n):

(n.1) regulating the transmission of records under paragraph 58.1(1)(c) by a business to a prescribed official;

— 2019, c. 9, s. 14

14 The Act is amended by adding the following after section 126:

Licence of business — deemed conditions

126.1 Every licence of a business that is valid on the commencement day is deemed to include the conditions set out in paragraphs 58.1(1)(a) to (c).

b) des armes à feu acquises ou détenues par des particuliers sous les ordres et pour le compte des forces policières ou d'un ministère fédéral ou provincial;

(3) Le paragraphe 85(1) de la même loi est modifié par adjonction, après l'alinéa b), de ce qui suit :

c) des demandes d'attribution de numéro de référence que reçoit le directeur au titre de l'article 23 et, si la demande est refusée, les raisons du refus;

d) des numéros de référence attribués par le directeur au titre du paragraphe 23(3) et, à l'égard de chaque numéro de référence attribué, la date à laquelle le numéro de référence a été attribué et les numéros de permis du cédant et du cessionnaire.

(4) Le paragraphe 85(2) de la même loi est remplacé par ce qui suit :

Signalement des acquisitions ou cessions

(2) Toute personne visée aux alinéas (1)a) ou b) fait notifier au directeur toute acquisition ou tout transfert d'armes à feu qu'elle effectue.

— 2019, ch. 9, art. 11

2012, ch. 6, art. 25.

11 L'article 90.1 de la même loi est abrogé.

— 2019, ch. 9, par. 13(1) et (3)

13 (1) L'article 117 de la même loi est modifié par adjonction, après l'alinéa c), de ce qui suit :

c.1) régir, aux fins de l'attribution d'un numéro de référence au titre de l'article 23, la fourniture des renseignements par le cédant, le cessionnaire et le directeur;

(2) [En vigueur]

(3) L'article 117 de la même loi est modifié par adjonction, après l'alinéa n), de ce qui suit :

n.1) régir la transmission de registres ou fichiers visés à l'alinéa 58.1(1)c) par une entreprise à une personne désignée par règlement;

— 2019, ch. 9, art. 14

14 La même loi est modifiée par adjonction, après l'article 126, de ce qui suit :

Permis délivrés aux entreprises : conditions réputées

126.1 Les permis délivrés aux entreprises qui sont valides à la date de référence sont réputés être assortis des conditions visées aux alinéas 58.1(1)a) à c).

— 2019, c. 9, s. 15

15 The Act is amended by adding the following after section 135:

Revocation of authorization to transport

135.1 All of the following authorizations to transport a prohibited firearm or a restricted firearm are revoked:

(a) authorizations issued under any of paragraphs 19(2.1)(b) to (e), as those paragraphs read immediately before the commencement day; and

(b) authorizations issued under paragraph 19(2.2)(b), as that paragraph read immediately before the commencement day, in respect of transportation to and from the places referred to in any of the paragraphs that are set out in paragraph (a).

— 2019, ch. 9, art. 15

15 La même loi est modifiée par adjonction, après l'article 135, de ce qui suit :

Révocation de l'autorisation de transport

135.1 Toute autorisation de transport d'armes à feu prohibées ou d'armes à feu à autorisation restreinte est révoquée dans les cas suivants :

a) elle a été délivrée en application de l'un ou l'autre des alinéas 19(2.1)b) à e), dans leur version antérieure à la date de référence;

b) elle a été délivrée en application de l'alinéa 19(2.2)b), dans sa version antérieure à la date de référence, à l'égard du transport vers les lieux visés à l'un ou l'autre des alinéas visés à l'alinéa a) et à partir de ceux-ci.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Éditions Québec Amérique inc. c. Druide informatique inc. | 2017 QCCS 4092, 2017 CarswellQue 8069, EYB 2017-284413, 284 A.C.W.S. (3d) 609 | (C.S. Qué., Sep 14, 2017)

2015 SCC 23, 2015 CSC 23
Supreme Court of Canada

White Burgess Langille Inman v. Abbott and Haliburton Co.

2015 CarswellNS 313, 2015 CarswellNS 314, 2015 SCC 23, 2015 CSC 23, [2015] 2 S.C.R. 182, [2015] S.C.J. No. 23, 1135 A.P.R. 1, 18 C.R. (7th) 308, 251 A.C.W.S. (3d) 610, 360 N.S.R. (2d) 1, 383 D.L.R. (4th) 429, 470 N.R. 324, 67 C.P.C. (7th) 73, J.E. 2015-767

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess (Appellants) and Abbott and Haliburton Company Limited, A.W. Allen & Son Limited, Berwick Building Supplies Limited, Bishop's Falls Building Supplies Limited, Arthur Boudreau & Fils Ltée, Brennan Contractors & Supplies Ltd., F. J. Brideau & Fils Limitée, Cabot Building Supplies Company (1988) Limited, Robert Churchill Building Supplies Limited, CDL Holdings Limited, formerly Chester Dawe Limited, Fraser Supplies (1980) Ltd., R. D. Gillis Building Supplies Limited, Yvon Godin Ltd., Truro Wood Industries Limited/Home Care Properties Limited, Hann's Hardware and Sporting Goods Limited, Harbour Breton Building Supplies Limited, Hillier's Trades Limited, Hubcraft Building Supplies Limited, Lumbermart Limited, Maple Leaf Farm Supplies Limited, S.W. Mifflin Ltd., Nauss Brothers Limited, O'Leary Farmers' Co-operative Ass'n. Ltd., Pellerin Building Supplies Inc., Pleasant Supplies Incorporated, J. I. Pritchett & Sons Limited, Centre Multi-Décor de Richibucto Ltée, U. J. Robichaud & Sons Woodworkers Limited, Quincaillerie Saint-Louis Ltée, R & J Swinamer's Supplies Limited, 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies, Taylor Lumber and Building Supplies Limited, Two by Four Lumber Sales Ltd., Walbourne Enterprises Ltd., Western Bay Hardware Limited, White's Construction Limited, D. J. Williams and Sons Limited and Woodland Building Supplies Limited (Respondents) and Attorney General of Canada and Criminal Lawyers' Association (Ontario) (Interveners)

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Wagner, Gascon JJ.

Heard: October 7, 2014
Judgment: April 30, 2015
Docket: 35492

Proceedings: affirming *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 330 N.S.R. (2d) 301, 1046 A.P.R. 301, 361 D.L.R. (4th) 659, 2013 CarswellNS 360, [2013] N.S.J. No. 259, 2013 NSCA 66, 36 C.P.C. (7th) 22, Beveridge J.A., MacDonald C.J.N.S., Oland J.A. (N.S. C.A.); reversing in part *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2012), 26 C.P.C. (7th) 280, (sub nom. *Abbott & Haliburton Co. Ltd. v. WBLI Chartered Accountants)* 317 N.S.R. (2d) 283, 1003 A.P.R. 283, 2012 CarswellNS 376, 2012 NSSC 210, Arthur W.D. Pickup J. (N.S. S.C.)

Counsel: Alan D'Silva, James Wilson, Aaron Kreaden, for Appellants

Jon Laxer, Brian F. P. Murphy, for Respondents
Michael H. Morris, for Intervener, Attorney General of Canada
Matthew Gourlay, for Intervener, Criminal Lawyers' Association

Subject: Civil Practice and Procedure; Evidence; Public; Torts

Headnote

Evidence --- Opinion — Experts — Expert reports — Admissibility

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Expert's lack of independence and impartiality goes to admissibility of evidence in addition to being considered in relation to weight to be given to evidence if admitted — Duty owed by expert witness is that expert must be fair, objective and non-partisan — Absent challenge to expert's independence and impartiality, expert's attestation or testimony recognizing and accepting duty will generally be sufficient to establish that threshold is met — Burden is then on party opposing admission of evidence to show that there is realistic concern that expert's evidence should not be received because expert is unable and/or unwilling to comply with that duty — If opponent does so, burden to establish on balance of probabilities this aspect of admissibility threshold remains on party proposing to call evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application.

Evidence --- Opinion — Experts — Qualification of expert — Miscellaneous

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Concerns related to expert's duty to court and willingness and capacity to comply with it are best addressed initially in "qualified expert" element of framework from case law — Proposed expert witness who is unable or unwilling to fulfill this duty to court is not properly qualified to perform role of expert — Situating this concern in "properly qualified expert" ensures courts will focus expressly on important risks associated with biased experts — If expert evidence is found to meet basic threshold, judge must still take concerns about expert's independence and impartiality into account in weighing evidence at gatekeeping stage — Relevance, necessity, reliability and absence of bias can helpfully be seen as part of sliding scale where basic level must first be achieved in order to meet admissibility threshold and thereafter continue to play role in weighing overall competing considerations in admitting evidence — Potential helpfulness of evidence must not be outweighed by risk of dangers materializing that are associated with expert evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application.

Civil practice and procedure --- Summary judgment — Evidence on application — Affidavit evidence — Based on information and belief

Shareholders brought professional negligence action against former auditors — Shareholders had retained different accounting firm which they claimed revealed problems with auditors' work — Auditors brought motion for summary judgment to have action dismissed — Shareholders retained forensic accounting partner from accounting firm to prepare report — Her affidavit set out opinion that auditors did not comply with professional obligations — Auditors applied successfully to strike out affidavit on grounds that affiant was not impartial witness — Majority of Court of Appeal concluded that motions judge erred in excluding affidavit — Auditors appealed — Appeal dismissed — Motions judge hearing summary judgment application under Nova Scotia rules must be satisfied that proposed expert evidence meets threshold requirements for admissibility at first step of analysis, but generally should not engage in second step cost-benefit analysis — That cost-benefit analysis, in anything other than most obvious cases of inadmissibility, inevitably involves assigning weight or potential weight to evidence — Record in this case amply sustained result reached by majority of Court of Appeal that affiant's evidence was admissible on summary judgment application — There was no finding by motions judge that affiant was in fact biased or not impartial or that she was acting as

advocate — To the extent motion judge was concerned about "appearance" of impartiality, this factor played no part in test for admissibility — There was agreement with majority of Court of Appeal that motions judge committed palpable and overriding error in determining that affiant was in conflict of interest that prevented her from giving impartial and objective evidence.

Preuve --- Opinion — Experts — Rapports d'expert — Recevabilité

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — Manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du témoignage, s'il est admis — Obligation du témoin expert est d'être juste, objectif et impartial — En l'absence d'une contestation concernant l'indépendance et l'impartialité de l'expert, le critère est généralement satisfait dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte — Il incombe alors à la partie qui s'oppose à l'admission du témoignage de l'expert de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation — Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire.

Preuve --- Opinion — Experts — Compétence de l'expert — Divers

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — C'est sous le volet « qualification suffisante de l'expert » du cadre établi par la jurisprudence qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter — Témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle — En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris — Si le témoignage de l'expert satisfait aux critères, le juge doit malgré tout tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien — Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité — Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire.

Procédure civile --- Jugement sommaire — Preuve en instance — Preuve par affidavit — Fondé sur des renseignements et sur une opinion

Actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie — Actionnaires avaient engagé un autre cabinet comptable qui, selon eux, a révélé des erreurs par les vérificateurs précédents — Vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action — Actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle rédige un rapport — Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles — Vérificateurs ont présenté avec succès une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial — Juges majoritaires de

la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit — Vérificateurs ont formé un pourvoi — Pourvoi rejeté — Juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices — Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur, ou, à tout le moins, d'une valeur possible, à la preuve — Dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire — Juge des requêtes n'a pas conclu que le témoin avait un parti pris, qu'il n'était pas impartial ou qu'il se faisait le défenseur des actionnaires — Même si, selon le juge des requêtes, il fallait une « apparence » d'impartialité, ce facteur ne constituait pas un critère d'admissibilité — On s'entendait avec les juges majoritaires de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en concluant que le témoin était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Shareholders brought a professional negligence action against the former auditors of their company. The shareholders started the action after retaining a different accounting firm to perform various accounting tasks and which they claimed revealed problems with the auditors' work. The auditors brought a motion for summary judgment to have the action dismissed. The shareholders retained a forensic accounting partner from the accounting firm to review materials and to prepare a report. Her affidavit set out her opinion that the auditors had not complied with their professional obligations. The auditors applied to strike out her affidavit on the grounds that she was not an impartial witness. The motions judge essentially agreed and struck out the affidavit. The majority of the Court of Appeal concluded that the motions judge erred in excluding the affidavit. The auditors appealed.

Held: The appeal was dismissed.

Per Cromwell J. (McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring): Following the dominant view of Canadian cases, an expert's lack of independence and impartiality goes to the admissibility of evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. Such an approach is more in line with the basic structure of the law relating to expert evidence and with the importance jurisprudence has attached to the gatekeeping role of trial judges.

The duty owed by an expert witness is that the expert must be fair, objective and non-partisan. The appropriate threshold flows from this duty. Absent challenge to the expert's independence and impartiality, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that the threshold is met. The burden is then on the party opposing the admission of the evidence to show that there is realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. Exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide fair, objective and non-partisan evidence. Anything less should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence. The concept of apparent bias is not relevant to the question of whether an expert witness will be unable or unwilling to fulfill its primary duty to the court.

Concerns related to the expert's duty to the court and willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the framework from case law. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of expert. Situating this concern in the "properly qualified expert" ensures courts will focus expressly on the important risks associated with biased experts. If the expert evidence is found to meet the basic threshold, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. Relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play role in weighing the overall competing considerations in admitting the evidence. The potential helpfulness of the evidence must not be outweighed by the risk of the dangers materializing that are associated with expert evidence.

A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but generally should not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight or potential weight to the evidence.

The record amply sustained the result reached by the majority of the Court of Appeal that the affiant's evidence was admissible on the summary judgment application. There was no finding by the motions judge that the affiant was in fact biased or not impartial or that she was acting as an advocate. The motions judge recognized that the affiant was aware of the standards and requirements that experts be independent. The affiant testified that she owed an ultimate duty to the court in testifying as an expert witness. To the extent the motions judge was concerned about the "appearance" of impartiality, this factor played no part in the test for admissibility. The fact that one professional firm discovered what it thought was or may be professional negligence did not disqualify it from offering that opinion as an expert witness. There was no more than a speculative possibility of the accounting firm incurring liability if its opinion was not ultimately accepted by the court. An expert does not lack the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professions in reaching his or her own opinion. There was agreement with the majority of the Court of Appeal that the motions judge committed a palpable and overriding error in determining that the affiant was in a conflict of interest that prevented her from giving impartial and objective evidence.

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie. Les actionnaires ont intenté l'action après avoir engagé un autre cabinet comptable pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. Les actionnaires ont fait appel à une associée en juricomptabilité du cabinet pour qu'elle examine tous les documents pertinents et rédige un rapport. Son affidavit exposait ses constatations que les vérificateurs ne se sont pas acquittés de leurs obligations professionnelles. Les vérificateurs ont présenté une requête en radiation de l'affidavit au motif que l'associée en question n'était pas un témoin expert impartial. Le juge des requêtes s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié l'affidavit. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit et ont accueilli l'appel. Les vérificateurs ont formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Cromwell, J. (McLachlin, J.C.C., Abella, Rothstein, Moldaver, Wagner, Gascon, JJ., souscrivant à son opinion) : Conformément au courant prédominant dans la jurisprudence canadienne, le manque d'indépendance et d'impartialité d'un expert joue au regard tant de l'admissibilité de son témoignage que de la valeur du témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale du droit en ce qui concerne les témoignages d'experts et l'importance que la jurisprudence accorde au rôle de gardien exercé par les juges de première instance.

L'obligation du témoin expert est d'être juste, objectif et impartial. Le critère d'admissibilité découle de cette obligation. En l'absence d'une contestation concernant l'indépendance et l'impartialité de l'expert, le critère est généralement satisfait dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Il incombe alors à la partie qui s'oppose à l'admission du témoignage de l'expert de démontrer un motif réaliste de le juger inadmissible au motif que l'expert ne peut ou ne veut s'acquitter de son obligation. Si elle réussit, la charge de démontrer, selon la prépondérance des probabilités, qu'il a été satisfait à ce critère d'admissibilité incombe toujours à la partie qui entend présenter le témoignage. La décision d'exclure le témoignage à la première étape de l'analyse pour non-conformité aux critères d'admissibilité ne devrait être prise que dans les cas manifestes où l'expert proposé ne peut ou ne veut fournir une preuve juste, objective et impartiale. Dans les autres cas, le témoignage ne devrait pas être exclu d'office, et son admissibilité devrait être déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission. La notion d'apparence de parti pris n'est pas pertinente lorsqu'il s'agit de déterminer si le témoin expert pourra ou voudra s'acquitter de sa principale obligation envers le tribunal.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par la jurisprudence qu'il convient d'abord d'examiner les préoccupations concernant l'obligation de l'expert envers le tribunal et s'il peut ou veut s'en acquitter. Le témoin expert proposé qui ne peut ou ne veut s'acquitter de cette obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. En abordant cette préoccupation sous le volet de la « qualification suffisante de l'expert », les tribunaux pourront s'attacher à évaluer les risques importants que présentent les experts qui ont un parti pris. Si le témoignage de l'expert satisfait aux critères, le juge doit malgré tout tenir compte des réserves émises quant à l'indépendance et à l'impartialité de l'expert lorsqu'il évalue la preuve à l'étape où il exerce son rôle de gardien. Il peut être utile de concevoir la pertinence, la nécessité, la fiabilité et l'absence de parti pris comme autant d'éléments d'un examen en deux temps, qui entrent en ligne de compte à la première étape, celle qui sert à déterminer s'il est satisfait aux critères d'admissibilité, et jouent également un rôle à la deuxième, dans la pondération des considérations concurrentes globales relatives à l'admissibilité. Au bout du compte, le juge doit être convaincu que les risques liés au témoignage de l'expert ne l'emportent pas sur l'utilité possible de celui-ci.

Le juge saisi d'une requête en jugement sommaire en vertu des règles de procédure de la Nouvelle-Écosse doit être convaincu que le témoignage de l'expert proposé satisfait aux critères d'admissibilité à la première étape de l'analyse; en règle générale, il doit toutefois se garder de passer à la seconde étape, celle de l'analyse coût-bénéfices. Cette analyse, sauf dans les cas d'inadmissibilité les plus manifestes, appelle inévitablement l'attribution d'une valeur, ou, à tout le moins, d'une valeur possible, à la preuve.
Le dossier en l'espèce appuyait largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage contenu dans l'affidavit était admissible pour l'instruction de la requête en jugement sommaire. Le juge des requêtes n'a pas conclu que le témoin avait un parti pris, qu'il n'était pas impartial ou qu'il se faisait le défenseur des actionnaires. Le juge des requêtes a reconnu que le témoin connaissait les normes et exigences voulant que l'expert soit indépendant. Le témoin était conscient à titre de témoin expert de sa principale obligation envers le tribunal. Même si, selon le juge des requêtes, il fallait une « apparence » d'impartialité, ce facteur ne constituait pas un critère d'admissibilité. Le cabinet professionnel qui découvre ce qu'il estime être une négligence professionnelle ou ce qui pourrait l'être n'est pas d'emblée interdit de donner son opinion en tant que témoin expert. Il n'y avait rien de plus qu'une hypothétique possibilité que le cabinet soit tenu responsable si, en fin de compte, le tribunal n'avait pas retenu son opinion. Un expert ne satisfait pas au critère de la qualification suffisante, dans la mesure où il est question de son obligation de rendre un témoignage juste, objectif et impartial, simplement parce qu'il se fonde sur le travail d'autres professionnels pour se faire une opinion. On s'entendait avec les juges majoritaires de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en concluant que le témoin était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

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Words and phrases considered:

impartiality

Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance.

. . . . .

Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638- 39.

Termes et locutions cités:

impartialité

Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale.

(....)

Trois concepts apparentés sont à la base des diverses définitions de l'obligation de l'expert, à savoir l'impartialité, l'indépendance et l'absence de parti pris. L'opinion de l'expert doit être impartiale, en ce sens qu'elle découle d'un examen objectif des questions à trancher. Elle doit être indépendante, c'est-à-dire qu'elle doit être le fruit du jugement indépendant de l'expert, non influencée par la partie pour qui il témoigne ou l'issue du litige. Elle doit être exempte de parti pris, en ce sens qu'elle ne doit pas favoriser injustement la position d'une partie au détriment de celle de l'autre. Le critère décisif est que l'opinion de l'expert ne changerait pas, peu importe la partie qui aurait retenu ses services (P. Michell et R. Mandhane, « The Uncertain Duty of the Expert Witness » (2005) 42 *Alta. L. Rev.* 635, p. 638-639).

APPEAL by auditors from judgment reported at *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), 2013 NSCA 66, 2013 CarswellNS 360, 36 C.P.C. (7th) 22, 1046 A.P.R. 301, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, [2013] N.S.J. No. 259 (N.S. C.A.), allowing appeal, as to exclusion of certain affidavit evidence, from judgment striking out affidavit.

POURVOI formé par des vérificateurs à l'encontre d'un jugement publié à *Abbott and Haliburton Co. v. White Burgess Langille Inman* (2013), 2013 NSCA 66, 2013 CarswellNS 360, 36 C.P.C. (7th) 22, 1046 A.P.R. 301, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, [2013] N.S.J. No. 259 (N.S. C.A.), ayant accueilli un appel concernant l'exclusion en preuve d'un affidavit interjeté à l'encontre d'un jugement ayant radié l'affidavit.

Comment

White Burgess Langille Inman v. Abbott and Haliburton Co. comprehensively restates the law on admissibility of expert evidence in civil and criminal cases. A unanimous Supreme Court adopts the key feature of the judgment of Doherty J. in *R. v. Abbey*, 2009 ONCA 624, 68 C.R. (6th) 201 (Ont. C.A.) by holding that the admissibility analysis has two stages — a set of threshold preconditions to admissibility and a discretionary gatekeeper stage (see para. 22, adopting *Abbey*). The Court also resolves a longstanding question in the Canadian case law by holding that defects in an expert witness's independence and impartiality can go to admissibility and not only to weight (para. 45). In fact, on examination, the Court's analysis indicates that problems of independence and impartiality may properly be considered at three separate stages in the analysis of expert evidence. First, the question whether proposed expert witnesses are able and willing to comply with their duties to the court can be addressed at the threshold stage of the admissibility analysis under the "qualified expert" requirement (para. 53). Second, even when the expert is qualified, questions about independence and impartiality can be taken into account at the gatekeeper stage (para. 54). But this too is a question of admissibility to be considered by the trier of law. What may be obscured by the Court's emphasis on admissibility is the third stage when these concerns enter the analysis: independence and impartiality can also be considered by the trier of fact where the evidence is admitted (para. 45).

Given that *White Burgess Langille Inman* will become the starting point for argument on the admissibility of expert evidence, it is somewhat disappointing that the Court did not provide an easily accessible summary of the admissibility analysis. Instead, one must carefully read through the judgment to piece together the features of the admissibility framework. One might attempt to summarize that framework as follows:

Expert evidence is admissible when

1) it meets the threshold requirements of admissibility, which are that

a. the evidence must be logically relevant;

b. the evidence must be necessary to assist the trier of fact;

c. there must be no other exclusionary rule;

d. the expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the duty to the court to provide evidence that is

i. impartial,

ii. independent and

iii. unbiased; and

e. for opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose;

and

2) it passes scrutiny at the gatekeeper stage, and the trial judge determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as

a. relevance,

b. necessity,

c. reliability, and

d. absence of bias (see para. 54).

Certain features of this framework will require clarification and amplification in the future. For example, the Court's reference to reliability as a threshold requirement "in the case of an opinion based on novel or contested science or science used for a novel purpose" (para. 23) leaves open the status of the reliability tests for non-scientific evidence that were extensively discussed in *Abbey*. While some questions remain, the framework outlined in *White Burgess Langille Inman* renews and clarifies the structure of the admissibility analysis for expert evidence.

Lisa Dufraimont

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Cromwell J. **(McLachlin C.J.C. and Abella, Rothstein, Moldaver, Wagner and Gascon JJ. concurring):**

I. Introduction and Issues

1 Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role. These developments seek to ensure that expert opinion evidence meets certain basic standards before it is admitted. The question on this appeal is whether one of these basic standards for admissibility should relate to the proposed expert's independence and impartiality. In my view, it should.

2 Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert's independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.

3 Applying these principles, I agree with the conclusion reached by the majority of the Nova Scotia Court of Appeal and would therefore dismiss this appeal with costs.

II. Overview of the Facts and Judicial History

A. Facts and Proceedings

4 The appeal arises out of a professional negligence action by the respondents (who I will call the shareholders) against the appellants, the former auditors of their company (I will refer to them as the auditors). The shareholders started the action after they had retained a different accounting firm, the Kentville office of Grant Thornton LLP, to perform various accounting tasks and which in their view revealed problems with the auditors' previous work. The central allegation in the action is that the auditors' failure to apply generally accepted auditing and accounting standards while carrying out their functions caused financial loss to the shareholders. The main question in the action boils down to whether the auditors were negligent in the performance of their professional duties.

5 The auditors brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton, to review all the relevant materials, including the documents filed in the action and to prepare a report of her findings. Her affidavit set out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders. The auditors applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They argued that the action comes down to a battle of opinion between two accounting firms — the auditors' and the expert witness's. Ms. MacMillan's firm could be exposed to liability if its approach was not accepted by the court and, as a partner, Ms. MacMillan could be personally liable. Her potential liability if her opinion were not accepted gives her a personal financial interest in the outcome of the litigations and this, in the auditors' submission, ought to disqualify her from testifying.

6 The proceedings since have been neither summary nor resulted in a judgment. Instead, the litigation has been focused on the expert evidence issue; the summary judgment application has not yet been heard on its merits.

B. Judgments Below

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (N.S. S.C.) (Pickup J.)

7 Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: at para. 106. He found that, in order to be admissible, an expert's evidence "must be, and be seen to be, independent and impartial": para. 99. Applying that test, he concluded that this was one of those "clearest of cases where the reliability of the expert ... does not meet the threshold requirements for admissibility": para. 101.

(2) Nova Scotia Court of Appeal: 2013 NSCA 66, 330 N.S.R. (2d) 301 (N.S. C.A.) (Beveridge J.A., Oland J.A. Concurring; MacDonald C.J.N.S., Dissenting)

8 The majority of the Court of Appeal concluded that the motions judge erred in excluding Ms. MacMillan's affidavit. Beveridge J.A. wrote that while the court has a discretion to exclude expert evidence due to actual bias or partiality, the test adopted by the motions judge — that an expert "must be, and be seen to be, independent and impartial" — was wrong in law. He ought not to have ruled her evidence inadmissible and struck out her affidavit.

9 MacDonald C.J.N.S., dissenting, would have upheld the motions judge's decision because he had properly articulated and applied the relevant legal principles.

III. Analysis

A. Overview

10 In my view, expert witnesses have a duty to the court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty and able and willing to carry it out. If they do not meet this threshold requirement, their evidence should not be admitted. Once this threshold is met, however, concerns about an expert witness's independence or impartiality should

be considered as part of the overall weighing of the costs and benefits of admitting the evidence. This common law approach is, of course, subject to statutory and related provisions which may establish different rules of admissibility.

B. Expert Witness Independence and Impartiality

11 There have been long-standing concerns about whether expert witnesses hired by the parties are impartial in the sense that they are expressing their own unbiased professional opinion and whether they are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgment: see, e.g., G. R. Anderson, *Expert Evidence* (3rd ed. 2014), at p. 509; S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (4th ed. 2014), at p. 783. As Sir George Jessel, M.R., put it in the 1870s, "[u]ndoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them": *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358 at 373 (Eng. Rolls Ct.), at p. 374.

12 Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice": para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report* (1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).

13 To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework.

C. The Legal Framework

(1) The Exclusionary Rule for Opinion Evidence

14 To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences — that is, the opinions — that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are not helpful to the trier of fact and might even be misleading: see, e.g., *R. v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.), at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

15 Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Professor Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24 (S.C.C.), at p. 42.

(2) The Current Legal Framework for Expert Opinion Evidence

16 Since at least the mid-1990s, the Court has responded to a number of concerns about the impact on the litigation process of expert evidence of dubious value. The jurisprudence has clarified and tightened the threshold requirements for admissibility, added new requirements in order to assure reliability, particularly of novel scientific evidence, and emphasized the important role that judges should play as "gatekeepers" to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission.

17 We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). That case described the potential dangers of expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. As Sopinka J. observed in *Mohan*:

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]

(See also *D.D.*, at para. 53; *R. c. J. (J.-L.)*, 2000 SCC 51, [2000] 2 S.C.R. 600 (S.C.C.), at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272 (S.C.C.), at para. 46.)

18 The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at para. 90, leave to appeal refused, [2010] 2 S.C.R. v (note) (S.C.C.). The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J. (J.-L.)*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D. (D.)*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D. (D.)*, at para. 55); the risk of admitting "junk science" (*J. (J.-L.)*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), at para. 76.

19 To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility of expert opinion evidence. That structure has two main components. First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert (*Mohan*, at pp. 20-25; see also *Sekhon*, at para. 43). *Mohan* also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value was overborne by its prejudicial effect — a residual discretion to exclude evidence based on a cost-benefit analysis: p. 21. This is the second component, which the subsequent jurisprudence has further emphasized: Lederman, Bryant and Fuerst, at pp. 789-90; *J. (J.-L.)*, at para. 28.

20 *Mohan* and the jurisprudence since, however, have not explicitly addressed how this "cost-benefit" component fits into the overall analysis. The reasons in *Mohan* engaged in a cost-benefit analysis with respect to particular elements of the four threshold requirements, but they also noted that the cost-benefit analysis could be an aspect of exercising the overall discretion to exclude evidence whose probative value does not justify its admission in light of its potentially prejudicial effects: p. 21. The jurisprudence since *Mohan* has also focused on particular aspects of expert opinion evidence, but again without always being explicit about where additional concerns fit into the analysis. The unmistakable overall trend of the jurisprudence, however, has been to tighten the admissibility requirements and to enhance the judge's gatekeeping role.

21 So, for example, the necessity threshold criterion was emphasized in cases such as *D. (D.)*. The majority underlined that the necessity requirement exists "to ensure that the dangers associated with expert evidence are not lightly tolerated" and that

"[m]ere relevance or 'helpfulness' is not enough": para. 46. Other cases have addressed the reliability of the science underlying an opinion and indeed technical evidence in general: *J. (J.-L.)*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239 (S.C.C.). The question remains, however, as to where the cost-benefit analysis and concerns such as those about reliability fit into the overall analysis.

22 *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.

23 At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: *J. (J.-L.)*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J. (J.-L.)*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D. (D.)*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290 (Ont. C.A.), at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396 (Ont. C.A.), at para. 72.

24 At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J. (J.-L.)*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

25 With this delineation of the analytical framework, we can turn to the nature of an expert's duty to the court and where it fits into that framework.

D. The Expert's Duty to the Court or Tribunal

26 There is little controversy about the broad outlines of the expert witness's duty to the court. As Anderson writes, "[t]he duty to provide independent assistance to the Court by way of objective unbiased opinion has been stated many times by common law courts around the world": p. 227. I would add that a similar duty exists in the civil law of Quebec: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at para. 468; D. Béchard with the collaboration of J. Béchard, *L'expert* (2011) ch. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, *art. 22* (not yet in force); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), at pp. 14 and 121.

27 One influential statement of the elements of this duty are found in the English case *National Justice Compania Naviera SA v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Eng. Comm. Ct.). Following an 87-day trial, Cresswell J. believed that a misunderstanding of the duties and responsibilities of expert witnesses contributed to the length of the trial. He listed in *obiter dictum* duties and responsibilities of experts, the first two of which have particularly influenced the development of Canadian law:

> 1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ....
>
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his [or her] expertise .... An expert witness in the High Court should never assume the role of an advocate.
>
> [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [*"Ikarian Reefer" (The), Re*] [1995] 1 Lloyd's Rep. 455 (Eng. C.A.), at p. 496.)

28 Many provinces and territories have provided explicit guidance related to the duty of expert witnesses. In Nova Scotia, for example, the *Civil Procedure Rules* require that an expert's report be signed by the expert who must make (among others) the following representations to the court: that the expert is providing an objective opinion for the assistance of the court; that the expert is prepared to apply independent judgment when assisting the court; and that the report includes everything the expert regards as relevant to the expressed opinion and draws attention to anything that could reasonably lead to a different conclusion (r. 55.04(1)(a), (b) and (c)). While these requirements do not affect the rules of evidence by which expert opinion is determined to be admissible or inadmissible, they provide a convenient summary of a fairly broadly shared sense of the duties of an expert witness to the court.

29 There are similar descriptions of the expert's duty in the civil procedure rules in other Canadian jurisdictions: Anderson, at p. 227; *The Queen's Bench Rules (Saskatchewan)*, r. 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 11-2(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 4.1.01(1); *Rules of Court*, Y.O.I.C. 2009/65, r. 34(23); *An Act to establish the new Code of Civil Procedure*, art. 22. Moreover, the rules in Saskatchewan, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Quebec and the Federal Courts require experts to certify that they are aware of and will comply with their duty to the court: Anderson, at p. 228; Saskatchewan *Queen's Bench Rules*, r. 5-37(3); British Columbia *Supreme Court Civil Rules*, r. 11-2(2); Ontario *Rules of Civil Procedure*, r. 53.03(2.1); Nova Scotia *Civil Procedure Rules*, r. 55.04(1)(a); Prince Edward Island *Rules of Civil Procedure*, r. 53.03(3)(g); *An Act to establish the new Code of Civil Procedure*, art. 235 (not yet in force); *Federal Courts Rules*, SOR/98-106, r. 52.2(1)(c).

30 The formulation in the *Ontario Rules of Civil Procedure* is perhaps the most succinct and complete statement of the expert's duty to the court: to provide opinion evidence that is fair, objective and non-partisan: r. 4.1.01(1)(a). The Rules are also explicit that this duty to the court prevails over any obligation owed by the expert to a party: r. 4.1.01(2). Likewise, the newly adopted *Act to establish the new Code of Civil Procedure of Quebec* explicitly provides, as a guiding principle, that the expert's duty to the court overrides the parties' interests, and that the expert must fulfill his or her primary duty to the court "objectively, impartially and thoroughly": art. 22; Chamberland, at pp. 14 and 121.

31 Many of the relevant rules of court simply reflect the duty that an expert witness owes to the court at common law: Anderson, at p. 227. In my opinion, this is true of the Nova Scotia rules that apply in this case. Of course, it is always open to each jurisdiction to impose different rules of admissibility, but in the absence of a clear indication to that effect, the common law rules apply in common law cases. I note that in *Nova Scotia, the Civil Procedure Rules* explicitly provide that they do not change the rules of evidence by which the admissibility of expert opinion evidence is determined: r. 55.01(2).

32 Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

E. The Expert's Duties and Admissibility

33 As we have seen, there is a broad consensus about the nature of an expert's duty to the court. There is no such consensus, however, about how that duty relates to the admissibility of an expert's evidence. There are two main questions: Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality?

34 In this section, I will explain my view that the answer to both questions is yes: a proposed expert's independence and impartiality goes to admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.

(1) Admissibility or Only Weight?

(a) The Canadian Law

35 The weight of authority strongly supports the conclusion that at a certain point, expert evidence should be ruled inadmissible due to the expert's lack of impartiality and/or independence.

36 Our Court has confirmed this position in a recent decision that was not available to the courts below:

> It is well established that an expert's opinion must be independent, impartial and objective, and given with a view to providing assistance to the decision maker (J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at No. 468; D. Béchard, with J. Béchard, *L'Expert* (2011), chap. 9; *An Act to establish the new Code of Civil Procedure*, S.Q. 2014, c. 1, s. 22 (not yet in force)). However, these factors generally have an impact on the probative value of the expert's opinion and are not always insurmountable barriers to the admissibility of his or her testimony. Nor do they necessarily "disqualify" the expert (L. Ducharme and C.- M. Panaccio, *L'administration de la preuve* (4th ed. 2010), at Nos. 590-91 and 605). For expert testimony to be inadmissible, more than a simple appearance of bias is necessary. The question is not whether a reasonable person would consider that the expert is not independent. Rather, what must be determined is whether the expert's lack of independence renders him or her incapable of giving an impartial opinion in the specific circumstances of the case (D. M. Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565, at pp. 598-99).
>
> (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at para. 106)

37 I will refer to a number of other cases that support this view. I do so by way of illustration and without commenting on the outcome of particular cases. An expert's interest in the litigation or relationship to the parties has led to exclusion in a number of cases: see, e.g., *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Ont. Gen. Div.) (proposed expert was the defendant's lawyer in related matters and had investigated from the outset of his retainer the matter of a potential negligence claim against the plaintiff); *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman* (2000), 49 O.R. (3d) 187 (Ont. S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (Ont. S.C.J.) (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (N.S. S.C.) (expert was also a party to the litigation); *Handley v. Punnett*, 2003 BCSC 294 (B.C. S.C.) (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (Ont. S.C.J. [Commercial List]) (expert was effectively a "co-venturer" in the case due in part to the fact that 40 percent of his remuneration was contingent upon success at trial: para. 7); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (Ont. Master) (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (B.C. S.C.) (expert stood to incur liability depending on the result of the trial). In other cases, the expert's stance or behaviour as an advocate has justified exclusion: see, e.g., *Carmen Alfano Family Trust v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62 (Ont. C.A.); *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617 (B.C. S.C.); *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19 (Ont. S.C.J.).

38 Many other cases have accepted, in principle, that lack of independence or impartiality can lead to exclusion, but have ruled that the expert evidence did not warrant rejection on the particular facts: see, e.g., *United City Properties Ltd. v. Tong*, 2010 BCSC 111 (B.C. S.C.); *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (Ont. S.C.J.). This was the position of the Court of Appeal in this case: para. 109; see also para. 121.

39 Some Canadian courts, however, have treated these matters as going exclusively to weight rather than to admissibility. The most often cited cases for this proposition are probably *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115 (Man. Q.B.),

and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77 (N.L. C.A.). *Klassen* holds as admissible any expert evidence meeting the criteria from *Mohan*, with bias only becoming a factor as to the weight to be given to the evidence: see also *R. v. Violette*, 2008 BCSC 920 (B.C. S.C.). Similarly, the court in *Gallant* determined that a challenge to expert evidence that is based on the expert having a connection to a party or an issue in the case or a possible predetermined position on the case cannot take place at the admissibility stage: para. 89.

40 I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.

(b) Other Jurisdictions

41 Outside Canada, the concerns related to independence and impartiality have been addressed in a number of ways. Some are similar to the approach in Canadian law.

42 For example, summarizing the applicable principles in British law, Nelson J. in *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367 (Eng. & Wales H.C. [T. & C.C.]), underlined that when an expert has an interest or connection with the litigation or a party thereto, exclusion will be warranted if it is determined that the expert is unwilling or unable to carry out his or her primary duty to the court: see also H. M. Malek et al., eds., *Phipson on Evidence* (18th ed. 2013), at pp. 1158-59. The mere fact of an interest or connection will not disqualify, but it nonetheless may do so in light of the nature and extent of the interest or connection in particular circumstances. As Lord Phillips of Worth Matravers, M.R., put it in a leading case, "[i]t is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence": *Factortame Ltd. v. Secretary of State for the Environment, Transport & the Regions (Costs) (No.2)* (2002), [2002] EWCA Civ 932, [2003] Q.B. 381 (Eng. C.A.), at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Eng. Comm. Ct.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Eng. Ch. Div.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Eng. Ch. Div.), at paras. 312-17.

43 In Australia, the expert's objectivity and impartiality will generally go to weight, not to admissibility: I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (5th ed. 2013), at p. 35. As the Court of Appeal of the state of Victoria put it: "... to the extent that it is desirable that expert witnesses should be under a duty to assist the Court, that has not been held and should not be held as disqualifying, in itself, an 'interested' witness from being competent to give expert evidence" (*FGT Custodians Pty Ltd. v. Fagenblat*, [2003] VSCA 33 (Australia Vic. Sup. Ct.), at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson Ltd. v. Clayton*, [2002] NSWSC 366 (New South Wales S.C.); *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485 (New South Wales S.C.); *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 200 (Australia Fed. Ct.)).

44 In the United States, at the federal level, the independence of the expert is a consideration that goes to the weight of the evidence, and a party may testify as an expert in his own case: *Rodriguez v. Pacificare of Texas Inc.* (1993), 980 F.2d 1014 (U.S. C.A. 5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University* (1988), 861 F.2d 1040 (U.S. C.A. 7th Cir. 1988); *Apple Inc. v. Motorola, Inc.* (2014), 757 F.3d 1286 (U.S. C.A. Fed. Cir.), at p. 1321. This also seems to be a fair characterization of the situation in the states: *Corpus Juris Secundum*, vol. 32 (2008), at p. 325 ("The bias or interest of the witness does not affect his or her qualification, but only the weight to be given the testimony.").

(c) Conclusion

45 Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed

up the Canadian approach well in *J. (J.-L.)*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

(2) The Appropriate Threshold

46 I have already described the duty owed by an expert witness to the court: the expert must be fair, objective and non-partisan. As I see it, the appropriate threshold for admissibility flows from this duty. I agree with Prof. (now Justice of the Ontario Court of Justice) Paciocco that "the common law has come to accept ... that expert witnesses have a duty to assist the court that overrides their obligation to the party calling them. If a witness is unable or unwilling to fulfill that duty, they do not qualify to perform the role of an expert and should be excluded": "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L. R.* 135, at p. 152 (footnote omitted). The expert witnesses must, therefore, be aware of this primary duty to the court and able and willing to carry it out.

47 Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565 ("Jukebox"), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.

48 Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. This approach conforms to the general rule under the *Mohan* framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

49 This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.

50 As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

51 Having established the analytical framework, described the expert's duty and determined that compliance with this duty goes to admissibility and not simply to weight, I turn now to where this duty fits into the analytical framework for admission of expert opinion evidence.

F. Situating the Analysis in the Mohan Framework

(1) The Threshold Inquiry

52 Courts have addressed independence and impartiality at various points of the admissibility test. Almost every branch of the *Mohan* framework has been adapted to incorporate bias concerns one way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166 (Ont. S.C.J.); *R. v. Demetrius* [2009 CarswellOnt 2548 (Ont. S.C.J.)], 2009 CanLII 22797; the necessity component (see, e.g., *Docherty; Alfano*); and during the discretionary cost-benefit analysis (see, e.g., *United City Properties*; *Abbey* (ONCA)). On other occasions, courts have found it to be a stand-alone requirement: see, e.g., *Docherty*; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011 (B.C. S.C.); *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J. [Commercial List]); *Prairie Well Servicing Ltd. v. Tundra Oil & Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284 (Man. Q.B.). Some clarification of this point will therefore be useful.

53 In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), vol. 2, at s. 12:30.20.50; see also *Deemar v. College of Veterinarians (Ontario)*, 2008 ONCA 600, 92 O.R. (3d) 97 (Ont. C.A.), at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at § 469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at s. 12:30.20.50; Paciocco, "Jukebox", at p. 595.

(2) The Gatekeeping Exclusionary Discretion

54 Finding that expert evidence meets the basic threshold does not end the inquiry. Consistent with the structure of the analysis developed following *Mohan* which I have discussed earlier, the judge must still take concerns about the expert's independence and impartiality into account in weighing the evidence at the gatekeeping stage. At this point, relevance, necessity, reliability and absence of bias can helpfully be seen as part of a sliding scale where a basic level must first be achieved in order to meet the admissibility threshold and thereafter continue to play a role in weighing the overall competing considerations in admitting the evidence. At the end of the day, the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence.

G. Expert Evidence and Summary Judgment

55 I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh the evidence, draw reasonable inferences from evidence or settle matters of credibility: *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348 (N.S. C.A.), at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385 (N.S. C.A.), at paras. 6 and 12. Taking these two principles together, the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight — or at least potential weight — to the evidence.

H. Application

56 I turn to the application of these principles to the facts of the case. In my respectful view, the record amply sustains the result reached by the majority of the Court of Appeal that Ms. MacMillan's evidence was admissible on the summary judgment application. Of course, the framework which I have set out in these reasons was not available to either the motions judge or to the Court of Appeal.

57 There was no finding by the motions judge that Ms. MacMillan was in fact biased or not impartial or that she was acting as an advocate for the shareholders: C.A. reasons, at para. 122. On the contrary, she specifically recognized that she was aware of the standards and requirements that experts be independent. She was aware of the precise guidelines in the accounting industry concerning accountants acting as expert witnesses. She testified that she owed an ultimate duty to the court in testifying as an expert witness: A.R., vol. III, at pp. 75-76; C.A. reasons, at para. 134. To the extent that the motions judge was concerned about the "appearance" of impartiality, this factor plays no part in the test for admissibility, as I have explained earlier.

58 The auditors' claim that Ms. MacMillan lacks objectivity rests on two main points which I will address in turn.

59 First, the auditors say that the earlier work done for the shareholders by the Kentville office of Grant Thornton "served as a catalyst and foundation for the claim of negligence" against the auditors and that this "precluded [Grant Thornton] from acting as 'independent' experts in this case": A.F., at paras. 17 and 19. Ms. MacMilllan, the auditors submit, was in an "irreconcilable conflict of interest, in that she would inevitably have to opine on, and choose between, the actions taken and standard of care exercised by her own partners at Grant Thornton" and those of the auditors: A.F., at para. 21. This first submission, however, must be rejected.

60 The fact that one professional firm discovers what it thinks is or may be professional negligence does not, on its own, disqualify it from offering that opinion as an expert witness. Provided that the initial work is done independently and impartially and the person put forward as an expert understands and is able to comply with the duty to provide fair, objective and non-partisan assistance to the court, the expert meets the threshold qualification in that regard. There is no suggestion here that Grant Thornton was hired to take a position dictated to it by the shareholders or that there was anything more than a speculative possibility of Grant Thornton incurring liability to them if the firm's opinion was not ultimately accepted by the court. There was no finding that Ms. MacMillan was, in fact, biased or not impartial, or that she was acting as an advocate for the shareholders. The auditors' submission that she somehow "admitted" on her cross-examination that she was in an "irreconcilable conflict" is not borne out by a fair reading of her evidence in context: A.R., vol. III, at pp. 139-45. On the contrary, her evidence was clear that she understood her role as an expert and her duty to the court: *ibid.*, at pp. 75-76.

61 The auditors' second main point was that Ms. MacMillan was not independent because she had "incorporated" some of the work done by the Kentville office of her firm. This contention is also ill founded. To begin, I do not accept that an expert lacks the threshold qualification in relation to the duty to give fair, objective and non-partisan evidence simply because the expert relies on the work of other professionals in reaching his or her own opinion. Moreover, as Beveridge J.A. concluded, what was "incorporated" was essentially an exercise in arithmetic that had nothing to do with any accounting opinion expressed by the Kentville office: C.A. reasons, at paras. 146-49.

62 There was no basis disclosed in this record to find that Ms. MacMillan's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. I agree with the majority of the Court of Appeal who concluded that the motions judge committed a palpable and overriding error in determining that Ms. MacMillan was in a conflict of interest that prevented her from giving impartial and objective evidence: paras. 136-50.

IV. Disposition

63 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

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2019 ONSC 4804
Ontario Superior Court of Justice

Pentalift Equipment Corporation v. 1371787 Ontario Inc.

2019 CarswellOnt 13142, 2019 ONSC 4804, 310 A.C.W.S. (3d) 431

Pentalift Equipment Corporation (Plaintiff) and 1371787 Ontario Inc. o/a Pro-Door & Docksystems (Defendant)

Tzimas J.

Heard: May 14, 2019; May 15, 2019; May 16, 2019; May 17, 2019; May 21, 2019
Judgment: August 16, 2019
Docket: CV-16-3291-SR

Counsel: Anna M. Esposito, Neeta Sandhu, for Plaintiff
Brandon O'Riordan, for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Torts

Headnote

Commercial law --- Sale of goods — Buyer's remedies — Damages — Breach of warranty

Purchaser bought loading dock equipment and accessories from vendor for third company, including vehicle restraint safety systems (VRSS) — Purchaser had issues with VRSS — Vendor brought action against purchaser for unpaid invoices; purchasers brought counterclaim against vendor for damages for breach of warranty, negligence and negligent misrepresentation — Action allowed; counterclaim dismissed — Vendor was entitled to payment of $67,884.59 for outstanding invoices, plus interest — Vendor did not provide defective product and did not breach its warranty — Purchaser selected, ordered and received total of 33 VRSS, three of which exhibited gouging and another three of which had significant wear and tear — Apart from evidence of expert which was rejected as biased and unreliable, there was no evidence to explain how gouging occurred — Choice of carbon content did not amount to defect — Having found VRSS were not defective, there was no basis for finding that vendor breached its warranty obligations — Purchaser could not satisfy requirements to establish breach pursuant to Sale of Goods Act — Manager may not have chosen best product for company's needs but that could not amount to breach of implied warranty under Act.

Torts --- Negligence — Causation — Miscellaneous

Purchaser bought loading dock equipment and accessories from vendor for third company, including vehicle restraint safety systems (VRSS) — Purchaser had issues with VRSS — Vendor brought action against purchaser for unpaid invoices; purchasers brought counterclaim against vendor for damages for breach of warranty, negligence and negligent misrepresentation — Action allowed; counterclaim dismissed — Vendor was entitled to payment of $67,884.59 for outstanding invoices, plus interest — There was no basis for finding that vendor was negligent towards purchaser — Purchaser failed to meet burden of demonstrating that but for vendor's negligence, purchaser would not have suffered damages it alleges — There was no evidence that vendor was negligent in its design or manufacturing of VRSS — Vendor was only manufacturer of restraint systems and had no contact with any end-users — How bid and contract between company and purchaser would extent to or engage vendor's duty of care was mystery.

Torts --- Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Detrimental reliance

Purchaser bought loading dock equipment and accessories from vendor for third company, including vehicle restraint safety systems (VRSS) — Purchaser had issues with VRSS — Vendor brought action against purchaser for unpaid invoices; purchasers brought counterclaim against vendor for damages for breach of warranty, negligence and negligent misrepresentation — Action allowed; counterclaim dismissed — Vendor was entitled to payment of $67,884.59 for outstanding invoices, plus interest — Vendor was not liable to purchaser for negligent misrepresentation — There were no representations from vendor specific to purchaser's or company's needs — Purchaser selected VRSS for company without vendor's involvement — Even if vendor's

sales person said anything about VRSS being compatible for company's needs, evidence was insufficient to ground finding that this amounted to representation on which purchaser relied to make selection — Manager was never sure that VRSS were suitable for company's needs, he knowingly took risk with VRSS in hope that they would meet his customer's needs — Purchaser was familiar with VRSS and had purchased it for other customers on previous occasions.

Equity --- Equitable doctrines — Equitable set-off

Purchaser bought loading dock equipment and accessories from vendor for third company, including vehicle restraint safety systems (VRSS) — Purchaser had issues with VRSS — Vendor brought action against purchaser for unpaid invoices; purchasers brought counterclaim against vendor for damages for breach of warranty, negligence and negligent misrepresentation — Action allowed; counterclaim dismissed — Vendor was entitled to payment of $67,884.59 for outstanding invoices, plus interest — There was no basis for claim for equitable set off — Nobody disputed that purchaser owed vendor money — Purchaser got into trouble with selection and installation of VRSS of its own accord — Party could not come to court with unclean hands and expect court's equity — It was manager who managed relationships in such way that undermined actual identification of response to gouging — Purchaser would have been in far better position to be transparent with vendor about company's directive to replace VRSS altogether.

Evidence --- Opinion — Experts — Weight of evidence

Purchaser bought loading dock equipment and accessories from vendor for third company, including vehicle restraint safety systems (VRSS) — Purchaser had issues with VRSS — Vendor brought action against purchaser for unpaid invoices; purchasers brought counterclaim against vendor for damages for breach of warranty, negligence and negligent misrepresentation — Action allowed; counterclaim dismissed — Vendor was entitled to payment of $67,884.59 for outstanding invoices, plus interest — Defendant retained expert to provide opinion on reason for failure of restraints — Expert was qualified as expert in materials failure and metallurgy — Defendant's expert's evidence, while admissible, was only of minimal value and could not be given any weight because of its fundamental flaws and unreliability — Expert proved to be biased and either unable or unwilling to appreciate nature of his duties to court — Expert did not follow or apply standard methodology, he took number of shortcuts to meet his client's deadline — It was especially troubling that expert did not question information he received form defendant.

Table of Authorities

Cases considered by *Tzimas J.*:

Bruff-Murphy v. Gunawardena (2017), 2017 ONCA 502, 2017 CarswellOnt 9169, 7 C.P.C. (8th) 1, 14 M.V.R. (7th) 173, 414 D.L.R. (4th) 65, 138 O.R. (3d) 584 (Ont. C.A.) — considered

Buctouche First Nation v. New Brunswick (2014), 2014 CarswellNB 484, 2014 CarswellNB 485, (sub nom. *Simon v. New Brunswick)* 1110 A.P.R. 304, (sub nom. *Simon v. New Brunswick)* 426 N.B.R. (2d) 304 (N.B. C.A.) — considered

Frazer v. Haukioja (2008), 2008 CarswellOnt 4948, 58 C.C.L.T. (3d) 259 (Ont. S.C.J.) — considered

Marks v. Ottawa (City) (2011), 2011 ONCA 248, 2011 CarswellOnt 2165, 81 M.P.L.R. (4th) 161, 280 O.A.C. 251 (Ont. C.A.) — referred to

Queen v. Cognos Inc. (1993), 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169, 1993 CarswellOnt 801, 1993 CarswellOnt 972, D.T.E. 93T-198 (S.C.C.) — referred to

R. v. Abbey (2009), 2009 ONCA 624, 2009 CarswellOnt 5008, 246 C.C.C. (3d) 301, 68 C.R. (6th) 201, 97 O.R. (3d) 330, 254 O.A.C. 9 (Ont. C.A.) — considered

R. v. Mohan (1994), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 18 O.R. (3d) 160 (note), 1994 CarswellOnt 66, 1994 CarswellOnt 1155 (S.C.C.) — considered

Ryan v. Victoria (City) (1999), 1999 CarswellBC 79, 1999 CarswellBC 80, 50 M.P.L.R. (2d) 1, 234 N.R. 201, 168 D.L.R. (4th) 513, 117 B.C.A.C. 103, 191 W.A.C. 103, 40 M.V.R. (3d) 1, 44 C.C.L.T. (2d) 1, 59 B.C.L.R. (3d) 81, [1999] 6 W.W.R. 61, [1999] 1 S.C.R. 201, 4 C.C.L.T. (2d) 1 (S.C.C.) — considered

Southcott Estates Inc. v. Toronto Catholic District School Board (2009), 2009 CarswellOnt 494, 78 R.P.R. (4th) 285 (Ont. S.C.J.) — referred to

Southcott Estates Inc. v. Toronto Catholic District School Board (2010), 2010 ONCA 310, 2010 CarswellOnt 2602, 319 D.L.R. (4th) 349, 261 O.A.C. 108, 93 R.P.R. (4th) 159, 71 B.L.R. (4th) 196, 104 O.R. (3d) 784 (Ont. C.A.) — referred to

Southcott Estates Inc. v. Toronto Catholic District School Board (2012), 2012 SCC 51, 2012 CarswellOnt 12505, 2012 CarswellOnt 12506, 351 D.L.R. (4th) 476, 3 B.L.R. (5th) 1, 24 R.P.R. (5th) 1, 435 N.R. 41, 296 O.A.C. 41, [2012] 2 S.C.R. 675 (S.C.C.) — referred to

Telford v. Holt (1987), 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, (sub nom. *Holt v. Telford)* [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234, 1987 CarswellAlta 188, 1987 CarswellAlta 583 (S.C.C.) — considered

Venus Electric Ltd. v. Brevel Products Ltd. (1978), 19 O.R. (2d) 417, 85 D.L.R. (3d) 282, 1978 CarswellOnt 727 (Ont. C.A.) — considered

White Burgess Langille Inman v. Abbott and Haliburton Co. (2015), 2015 SCC 23, 2015 CSC 23, 2015 CarswellNS 313, 2015 CarswellNS 314, 383 D.L.R. (4th) 429, 18 C.R. (7th) 308, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 470 N.R. 324, 67 C.P.C. (7th) 73, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 1135 A.P.R. 1, (sub nom. *Abbott and Haliburton Co. v. WBLI Chartered Accountants)* 360 N.S.R. (2d) 1, [2015] 2 S.C.R. 182 (S.C.C.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

Sale of Goods Act, R.S.O. 1990, c. S.1

Generally — referred to

s. 15 — considered

s. 15 ¶ 1 — considered

s. 15 ¶ 2 — considered

s. 15 ¶ 3 — considered

s. 15 ¶ 4 — considered

s. 51 — considered

ACTION by vendor for amount of unpaid invoices; COUNTERCLAIM by purchaser for damages for beach of warranty, negligence and negligent misrepresentation.

***Tzimas J.*:**

1 The plaintiff, Pentalift Equipment Corporation, (Pentalift), commenced an action against the defendant 1371787 Inc. o/a Pro-Door & Dock System, (Pro-Door), to collect the sum of $67,884.50, plus interest and costs for unpaid invoices for the supply of loading dock equipment and accessories, including the supply of 33 model RVR32 Vehicle Restraint Safety Systems (RVR32s).

2 Pro-Door did not dispute that it owed money to Pentalift but defended the action on the basis that the RVR32s that were supplied were defective. Pro-Door brought a counterclaim against Pentalift for damages for breach of warranty, negligence, and negligent misrepresentations in the sum of $299,000, plus interest and costs. It asked that any amounts that are found to be payable by Pro-Door to Pentalift be set off against any damage award it receives.

3 For the reasons that follow I have come to the conclusion that the RVR32s supplied by Pentalift were not defective and that Pentalift did not breach its warranty or act negligently in any way. Pentalift is entitled to judgment and Pro-Door's counterclaim is dismissed.

BACKGROUND FACTS

4 The following facts are not materially in dispute:

a) Pentalift is a manufacturer of loading dock equipment, including vehicle restraint systems.

b) Pro-Door is a dealer of dock equipment. It was hired by Hopewell Logistics Inc., (Hopewell), to supply and install 20 vehicle restraint systems at Hopewell's Distribution Centre. Pro-Door also managed the operations of Hopewell's Distribution Centre.

c) Hopewell is a third party logistics provider for Mondelez Food Products Canada ("Mondelez"). Mondolez has a relationship with among other food suppliers, Kraft Foods Ltd. and Cadbury. Hopewell's Distribution Centre operates 62 dock doors on a 24 / 7 basis and receives everything from every day trucks to cargo containers for ships and trains.

d) Corlan Electric Inc., (Corlan), was the general contractor hired by Mondelez to support its capital financing. Corlan qualified Pro-Door to be Hopewell's supplier. At all material times, Pro-Door received its instructions from Hopewell.

e) Restraint systems are used at loading docks to secure vehicles that are there to load or unload product. They are either mounted on the dock wall or they are secured to the ground. Either way, they are essential to the safety of the dock workers and the truck drivers, as they are used to prevent a truck from rolling away from the dock as the loading and unloading occurs.

f) The RVR32 is a vehicle restraint system that is mounted on the wall and that secures a truck by hooking into the truck's rear impact guard. It has two components: i) the vehicle restraint; and ii) the communications system and control panel. The system is mounted on the wall of the dock and essentially hooks in the truck that is there to load or unload. More particularly, the system operates in the following way:

i. As a truck reverses into the loading dock, the truck's rear impact guard, also known as the ICC bar, (the "ICC Bar") impacts directly on the RVR32. The impact causes the restraint to adjust to the truck's height. Sensors in the system are activated as well to permit the height adjustments to take place.

ii. A dock worker then activates the RVR32's hook by pushing a button on the control panel inside the dock. The hook rotates upwards to capture and secure the ICC bar.

iii. Once the hook secures the ICC Bar, inside the Dock, the LEX deluxe light changes from red to green. This tells the dockworker that the truck is secure and that the forklift can proceed to load or unload as the case may be.

iv. Outside of the dock, the truck driver sees a red light and warning sign indicating not to move the trailer because of the loading / unloading underway.

v. Once the task is completed, the dock worker pushes a button on the control panel inside the dock to lower the hook and effectively to disengage it from the ICC Bar. The lights both in and out of the dock change as well signalling to both the dock worker that the truck driver that the truck trailer is free to go and that is no longer hooked to the dock.

g) In 2015, Hopewell decided that 50 of its ageing restraint systems had to be replaced. The project was divided into phases. The first phase would see the replacement of twenty systems, with the balance to follow in a subsequent phase or phases.

h) Following a bidding process, Hopewell, with Corlan's approval, selected Pro-Door to supply the new restraints. Pro-Door turned to Pentalift for the purchase of the restraints.

i) Pentalift and Pro-Door had an existing relationship. In 2009, Pro-Door submitted a Credit Application to Pentalift which was accepted and contained the following terms:

i. payment of each invoice due by the 30th day following the date of each invoice, (the "Due Date");

ii. an interest rate of 24% per annum to accrue on unpaid invoice balances after the Due Date; and

iii. no warranties, expressed or implied, including any implied warranty of merchantability or any implied warranty of fitness for a particular purpose, exist on any order.

j) In keeping with the Agreement, Pro-Door made a number of purchases for dock equipment from Pentalift for use at various locations. The parties agreed that none of the locations where the equipment was installed was nearly as busy as Hopewell's Distribution Centre.

k) On or about September 17, 2015, Pro-Door submitted a 'Pentalift RVR32Vehicle Restraint System Site Information Sheet' to Pentalift for a quotation for the purchase of 33 RVR32 Systems. Twenty of them were for Hopewell, 8 were for another project and 5 were overstock for Pro-Door's purposes.

l) On or about September 23, 2015, Pentalift issued the quotation for the supply of 33 RVR32 Systems. Pro-Door accepted the quotation the following day and submitted Purchase Order No. PO22122 to Pentalift for the purchase of the 33 RVR32 systems for a total price of $106,462.95, inclusive of HST.

m) On December 11, 2015, Pro-Door sent a courier to Pentalift's facility to pick up 15 of the RVR32 systems and Pentalift issued the corresponding invoice. That invoice is not in contention.

n) On December 15, 2015 Pro-Door picked up the remaining 18 systems and Pentalift issued its invoice.

o) The 33 RVR32 systems that Pentalift delivered to Pro-Door were in accordance with Pentalift's standard features, operating range and properties. The RVR32s were not altered in any way from Pentalift's usual course of manufacturing the particular model. Nor were they made to measure for Hopewell's particular needs.

p) Pro-Door made various other equipment orders from Pentalift in the months of January, February, and March. These orders were not for Hopewell and the quality for the product provided is not in dispute.

q) The outstanding balance to Pentalift, which as admitted by Pro-Door is as follows:

Invoice No.	Invoice Date	Invoice Amount	Description
156116	Dec. 15, 2015	$58,066.63	18 x RVR32 Systems
157330	Feb. 17, 2016	$2,354.36	4 x 2 DIA (1/4 Wall) Cylinder and freight
157668	March 3, 2016	$2,097.14	25 x brake band assembly, band, brake
157867	March 14, 2016	$4,263.08	1 x 72" W x 16"L x 1/2" bare lip
157868	March 14, 2016	$309.62	1 x dock leveller 6' wide x 8' long
157958	March 17, 2016	$793.67	4 x lifting arm weldment
Outstanding Balance		$67,884.50	

r) The parties agreed that Pentalift's RVR32s came with a standard manufacturer's warranty that product would be free from defects in material and workmanship under normal use for a period of one year from the date of shipment of the equipment. In the event that the product proved to be defective in material or workmanship, Pentalift would, at its option, either replace the product or the defective portion without charge to the purchaser, or alter or repair the product, on site or elsewhere, without charge to the purchaser. The Warranty also:

i. Specifies that a fully completed Product Registration Card is required by Pentalift prior to the review of processing of any warranty requests or claims;

ii. Specifically does not cover "parts requiring replacement due to damage resulting from abuse, improper operations, improper or insufficient lubrications, lack of proper protection or vehicle impact;

iii. Specifically does not cover any failure caused by improper installation, misapplication, overloading, abuse, negligence or failure to lubricate and adjust or maintain the equipment properly and regularly; and

iv. Expressly states that: "THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE HEREOF, AND THERE IS NO WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE".

s) The RVR32s were installed by Pro-Door at Hopewell's Distribution Centre over 10 days between January 13, 2016 and February 18, 2016.

t) The parties' evidence diverges on the nature of the complaints that followed, their respective responses, and the ultimate outcomes.

EVIDENCE and POSITION OF THE PARTIES

a) Pentalift's Evidence and Position

5 Pentalift submitted that the RVR32s that were delivered to Pro-Door for their use at Hopewell's Distribution Centre were free from any defect. All 33 RVR32s were manufactured according to the same standard specifications, using the same steel, with the same carbon content and in accordance with industry standards and requirements.

6 Pro-Door selected the particular model for Hopewell of its own accord and without any consultation with Pentalift. Pro-Door had purchased the particular model on numerous previous occasions and was familiar with its features. Moreover, at no time in the past had it encountered any difficulties or made any complaints with the RVR32s.

7 Pentalift called evidence from Ms. Rachel Verkerke, an Inside Sales Representative at Pentalift who handled Pro-Door's order, Rick Rowan, an Engineering Manager at Pentalift and previously a Designer for Pentalift, and Mr. Clint Glass, the Vice-President of Pentalift.

8 Pentalift also relied on the evidence of Mr. DeGasperis, the Owner and Operations Manager of Pro-Door and of Jeremy Olsen, the Safety Supervisor of Hopewell, to round out and corroborate its position and claim for judgment.

9 Pentalift asked the Court to dismiss Dr. Mehdi Taheri's expert evidence, which was called by ProDoor, as either inadmissible or unreliable, biased and seriously flawed, such that it should be given no weight whatsoever.

10 Ms. Verveke, confirmed that Pro-Door selected the RVR32s model of its own accord. Ms. Verkerke was the main point of contact for Mr. DeGasperis when he placed orders with Pentalift for equipment and she confirmed that Pro-Door was Pentalift's client since 2009 when Pro-Door submitted a credit application.

11 She explained that typically, Mr. DeGasperis would either phone or e-mail Ms. Verkerke for a quote for a specific piece of equipment and she would prepare a formal quotation for his review and approval. There was nothing remarkably different with this order. Mr. DeGasperis followed the same process. He accepted Pentalift's quotation and proceeded with the submission of a Purchase Order. The order stipulated that the buyer is to make sure that they have reviewed all the specifications and information provided for the order and that the order reflects what the buyer requires.

12 In accordance with the Pro-Door's Purchase Order, Pentalift proceeded to manufacture the RVR32s. Ms. Verkerke could not recall Mr. DeGasperis raising any issues with her about any other RVR32s previously purchased by Pro-Door.

13 Mr. Rowan testified extensively with respect to the design of the RVR32 System. He explained that there are various types of restraints in the market and that the materials that are used must be strong enough to hold a truck back from moving away. He also described the requirements of the Canadian Standards Association and identified the required properties for the steel that is used to make the restraints. He said that the RVR32s met those requirements.

14 Mr. Rowan testified that he was the one who was responsible for the design of the RVR32s. He explained that the mechanical features were standard and could not be customized to the needs of a particular client. The only aspect that a client

could customize was the electrical device to meet the particular voltage demands. Finally, he described the yield strength and the strength in the steel materials used to manufacture the particular model.

15 Specifically with respect to the 33 RVR32s that were delivered to Pro-Door, Mr. Rowan explained that they would have been tested before they were delivered to Pro-Door.

16 On the subject of the gouging, Mr. Rowan could not explain the cause. He said that Pentalift had made upwards of 600 hundred restraints and had not encountered any gouging problems. He explained that the factors that could explain the gouging included the strength of materials used and their resistance to deformation, the installation method, the particular use and the frequency of that use, the sharpness of the ICC device on trucks, and the speed with which trucks backed into the restraint. He further suggested that if the rear guard to a truck hit the restraint at the same point all the time, eventually the system would be weakened.

17 In cross-examination, Mr. Rowan admitted that over the years there were several a changes to the RVR32s. He described the changes as evolutionary that touched on everything from the switch-brand, the switch mechanism, the design of the hook, and the grade of the steel. In response to questions about the carbon content, he explained that the carbon content in the steel could vary from shipment to shipment. Considerations that went into the selection of the steel and its carbon content included the availability of a particular grade, the weldability of the steel and its brittleness. Upgrades to a model would occur in reaction to various considerations, including the supplier's availability of materials, the cost of materials, and innovations in a particular design.

18 Mr. Rowan agreed that the RVR32s manufactured by Pentalift after 2016 and following Pro-Door's order were made with new and enhanced materials. He explained that the stronger steel used since 2016 was not readily available prior to that time.

19 Finally, with respect to the defence's theory concerning the inadequacy of the strength and hardness of the RVR32s, Mr. Rowan agreed that the RVR32s that were delivered to Pro-Door were not as strong as what Pentalift produces today but that at the time, what Pro-Door received was equipment with standard features. Moreover, at no point did Pro-Door advise Pentalift of the specific application of the RVR32s. Nor did it make any inquiries as to whether the RVR32s had adequate capacity to meet Hopewell's specific needs.

20 The next person to testify was Mr. Glass. He explained that he had worked closely on various orders for Pro-Door and that Pro-Door was a decent customer. At the height of Pentalift's relationship with Pro-Door, Mr. Glass thought that they processed 30 orders a year.

21 Mr. Glass reviewed the purchase orders pertaining to Pro-Door and confirmed the outstanding sum of $67,884. He further confirmed that not all of the invoices related to the 33 RVR32s.

22 With respect to the selection of restraint equipment, Mr. Glass explained that typically, dealers, such as Pro-Door will receive directions from the end user concerning the particular needs. Restraint systems may be manual or they may be automated. As well, the restraint may operate with either an impact or a non-impact mechanism. Manual systems are the cheapest on the market.

23 A dealer, such as Pro-Door could ask a manufacturer such as Pentalift about various model options and it could go as far as seeking a recommendation for the purchase of a particular piece of equipment. However, such consultations are typically very rare. Mr. Glass went on to explain that Pentalift ships locally and internationally and does not know who the end-user is; that is the dealer's responsibility.

24 Mr. Glass also explained that it is for the dealer to consider the height of the docks, the mounting surface for the restraints, whether a wall can withstand the restraint, the types of trucks that will be backing up into the restraint system, the effect of tailgates on trucks for the restraint sensors, and last but not least, budgetary constraints. Specifically in relation to cost, Mr. Glass referred to equipment from Rite Hite and Metro but said that their equipment had different specific features and were far more expensive than Pentalift's RVR32s.

25 With respect to Pro-Door's purchase order that is the subject of this claim, Mr. Glass testified that at no point did Pro-Door provide Pentalift with any specifications. He explained that the RVR32s had standard features that came with certain accessories but that they were manufactured in the same manner at all times. He further explained that Pro-Door would have been aware of the RVR32's standard features because they had purchased them in the past.

26 Turning to the specific restraints that were delivered to Pro-Door, Mr. Glass confirmed that there were some initial difficulties when the systems were installed that related to the hooking ranges and the electrical connections. The gouging complaint surfaced with respect to three of the systems. Another three may have had some accelerated wear and tear but it was not until June 2016 when Mr. DeGasperis complained about all twenty systems. Of the twenty systems at Hopewell, 14 did not exhibit any gouging. There were also no complaints for the eight systems that were installed at one of Pro-Door's other customers or the five that Pro-Door ordered for additional stock.

27 Mr. Glass explained that Pro-Door was responsible for the installation. On the electrical issue, that was a problem for Pro-Door to resolve. For the hooking, once Pentalift understood the nature of the problem it adjusted the sensor range for the operation of the hook. As far as Pentalift knew, that adjustment took care of the problem.

28 On the subject of the gouging, Mr. Glass said that initially they were advised of the problem for one of the twenty systems that were installed at Hopewell. He believed that the complaint was brought to his attention in April of 2016. Mr. Glass took the court through multiple e-mail exchanges with Mr. DeGasperis about this specific problem. He highlighted Pentalift's willingness to develop a kit that would address the particular concern. The kit involved the welding of extra steel onto the restraints to provide more surface space for the ICC bars to contact.

29 Leading up to the kit proposal, Mr. Glass said that in his four years with Pentalift this was the first time he had heard of such a problem and he considered it to be an isolated incident. He also believed that there would be an easy remedy to the situation.

30 In an e-mail communication dated May 27, 2016, Mr. Glass proposed that the kit be applied immediately to the three docks that had problems, that Pro-Door have seven days to pay its outstanding account, that Pentalift would take back from ProDoor the five unused systems and would waive the 25% restocking fee, and that Pentalift would reinstate ProDoor's 30 day credit terms once the account was completely cleared of the past due invoices. Pentalift refused to agree to credit Pro-Door $5,000 on account of the additional labour costs that Pro-Door said it incurred to fix the electrical and the hooking range issues.

31 In the communications that followed, Mr. DeGasperis asked that the proposed kit be applied to all twenty systems and he refused to make any payment until the installation of the kit was completed. As these negotiations were underway, Mr. Glass learned to his dismay that Mr. DeGasperis had written to Hopewell to advise that Pentalift was refusing to fix the restraints, that he did not know how the gouging would be fixed, and that if necessary, Pro-Door would either come up with its own solution or remove the systems and replace them with knew ones. Mr. Glass could not understand why Pro-Door would "throw us under the bus" in its communications with Hopewell.

32 Eventually, Pentalift indicated that it would be willing to undertake the kit installation at its own material and labour costs for all twenty systems. Mr. Glass estimated that the total cost to Pentalift would be approximately $2,000 and that it would take about a week to install the kits to the 20 systems. Mr. Glass was puzzled by the request since there were no complaints for the remaining 17 systems. The pre-requisite for the fix however was Pro-Door's confirmation that it pay the outstanding invoices.

33 In the course of these exchanges, Mr. Glass explained that he was led to believe that Hopewell had not yet paid Pro-Door for the 20 systems. Mr. DeGasperis told Mr. Glass repeatedly that Pentalift would get paid when Pro-Door got paid. In fact, Mr. DeGasperis' representations on this were misleading because Hopewell, through Corlan Electric had gone ahead and paid Pro-Door for the 20 systems. Mr. Glass learned of this at the discoveries for examination.

34 Mr. Glass made it abundantly clear that in Pentalift's view there was no defect in the systems and that the proposed offer was intended as a goodwill gesture and in recognition of the longstanding relationship between the two companies. Mr. Glass made that position clear as early as April 20, 2016, when he advised Pro-Door that the gouging of the steel was not a product

defect or a warranty issue covered by Pentalift's Warranty. Mr. Glass advised Pro-Door that in his view the gouging had to be the result of an irregular impact guard or ICC bar.

35 Mr. Glass concluded his testimony with the explanation that his last exchange with Mr. DeGasperis occurred on or about July 5, 2016, when Mr. DeGasperis cancelled a meeting intended to come to a resolution of the dispute. It was not until late 2016 or early 2017 that Pentalift learned that ProDoor had removed all of the systems from Hopewell's facilities and replaced them with ground-mounted restraint systems from Metro Dock.

36 In addition to the evidence led by the plaintiff's various witnesses, Pentalift highlighted the following admissions from Mr. DeGasperis' and Mr. Olsen's testimony that they concluded supported their position:

a. Pro-Door submitted a bid to Hopewell for Phase I in June, 2015, specifically for the supply and installation of 20 RVR32 Systems and well before it had any communications with Pentalift about the needs of Hopewell's Distribution Centre;

b. Hopewell relied on Pro-Door's expertise for the selection of an appropriate restraint system and on that basis Pro-Door and Mondelez entered in an agreement for the Phase I installation of the restraints; it had no contact whatsoever with Pentalift;

c. Mr. DeGasperis was not certain if the RVR32 Systems could meet the needs at the Distribution Centre but he alone decided to take the risk; and

d. Mr. DeGasperis admitted that he reviewed the Owner's Manual which stipulated Pentalift's recommendation that users of the restraint device review the means of attachment to a transport vehicle, which included the ICC bar.

37 Pentalift also asked the court to draw a negative inference from the fact that although Mr. DeGasperis gave an undertaking to produce a copy of the Bid and the Phase I Agreement with Mondelez he failed to do so. Pentalift's inability to review those documents was to its detriment as it was deprived of the opportunity to understand the precise details of Pro-Door's commitment and undertaking with respect to the restraints and its specific selection of the RVR32s.

b) Pro-Door's Position

38 Pro-Door claimed that the problems with the RVR32s surfaced almost immediately following their installation. Although Mr. DeGasperis admitted to taking a risk with the use of the RVR32s for Hopewell's needs, he blamed the ultimate breakdown of the relationship between Pentalift and Pro-Door on Pentalift's refusal to remedy the gouging problem and on its insistence that it be paid.

39 Mr. DeGasperis said repeatedly that Pentalift only cared for the money and was not interested to find a solution to the gouging problem. Eventually, Hopewell lost its patience with what it perceived to be Pro-Door's inability to resolve the gouging problem and rejected the RVR32s altogether. Pro-Door had to replace the RVR32s at its own cost or face litigation.

40 In Pro-Door's view, Pentalift breached its warranty because the RVR32 Systems were defective. Pro-Door relied on the evidence led by Dr. Tahir for that conclusion. Moreover, Pro-Door submitted that Pentalift was made aware of Hopewell's specific needs and that if it were not happy with the outcome Hopewell would demand the repair or replacement of the systems. As a result, Pro-Door claimed that it was entitled to damages, not only for costs incurred to replace the RVR32 Systems with a ground mounted product from Metro Hook Restraints, but also for the lost opportunity to be awarded the subsequent phases of Hopewell's restraint replacement project.

41 Specifically with respect to the evidence underpinning Pro-Door's position, as already mentioned, the Court heard from Mr. Olsen, the Safety Supervisor for Hopewell, the expert, Dr. Tahir and Mr. DeGasperis.

42 Mr. Olsen explained the bid process and the Hopewell's needs. He went on to explain that within a few days of the installation of the restraint systems, they encountered problems with the operations. Alarms were going off indicating that the restraints were not attaching properly. He also received reports of the restraints releasing prematurely and in some instances the

restraints would not adjust for the height of the incoming trailer. The alarm issues surfaced within a couple days. The release problem surfaced within a week.

43 Mr. Olsen said that he brought up the problems with Pro-Door immediately. He expressed frustration with these difficulties because a malfunctioning restraint system meant that the dock where that restraint system was located could not be used. Given the volume of traffic at the Distribution Centre, this was a real problem.

44 Mr. Olsen believed that Pentalift came out to Hopewell's Distribution Centre in the middle of March. He thought that they provided some suggestions on what was causing the issues and that they tried to repair the problems. He acknowledged that Pentalift made various adjustments to the sensors. They also installed spacers to prevent the trucks from coming too close to the building. In his view, none of these "fixes" resolved the problems.

45 Mr. Olsen said that they continued to experience issues with the restraints and were prepared to work with anyone who could help them. He was under the impression that the funds for the RVR32s were withheld and would be withheld until the restraints were in good working condition. Mr. Olsen was not aware that Corlan Electric had gone ahead and paid Pro-Door for the Pentalift systems and he thought that might have an error. He was also not aware that Pro-Door was telling Pentalift that it could not pay Pentalift until it received payment from Hopewell or Mondelez.

46 Mr. Olsen also said that around the same time as the difficulties with Pentalift's systems, he began to consider his options for the remaining phases of the restraint replacements.

47 In light of the continued difficulties with the RVR32s, Mr. Olsen said that they decided to try out a Metro Dock restraint for one of the docks. This was installed on June 7, 2016. That product performed as expected, with minimal issues. In the meantime, the problems with the Pentalift Restraints continued through the summer of 2016. He said that they "struggled through the summer", using rubber wheel chalks to prevent trailers from sliding away. By October 2016 they started replacing the RVR32s with the Metro Dock restraints. He thought that the decision to replace the RVR32s was made in late May or early June of 2016.

48 Mr. Olsen could not explain the reason for the alarms going off or for the hooking problem. He also agreed that eventually the "hooking issues" were cleared but he also thought that they reappeared. As far as the gouging was concerned, in his view, the restraints were damaged by the trucks that were jamming into them. He confirmed that Hopewell did not have any protocol on how the trucks should back into the docks. He thought it was possible that some trucks might be backing in too quickly. He also agreed that some trucks might have damaged ICC bars. Finally, he agreed that nobody inspected the trucks as they came into the Distribution Centre.

49 Mr. Olsen said that he could not recall if he was advised of Pentalift's proposed remedies. He also could not recall if he was ever aware that Pentalift never refused to address the issues though he agreed that he was never given the opportunity to consider Pentalift's proposed kit. Instead he explained that by April 26, they had already started shopping around for another option. Mr. Olsen ultimately confirmed that he was not aware that Pro-Door was continuing discussions with Pentalift to work out a solution for the gouging.

50 When Mr. Olsen was asked if the reason he started to look for other options was because of the information that Pentalift was refusing to fix the systems, he said: "I suppose it seems that way".

51 For the subsequent phases, Mr. Olsen confirmed that Pro-Door did not get the contract. Nor was ProDoor asked to provide a quote. Mr. Olsen did say that at the beginning of the original bidding, the expectation had been that as the successful bidder on Phase I, Pro-Door would undertake the subsequent phases, even though those would be subject to an independent bidding process. But he also agreed that the model they selected for the subsequent phases was not one that Pro-Door could supply.

52 Going back Pro-Door's successful bid, Mr. Olsen explained that they were attracted to that bid because Pro-Door proposed a wall-mounted restraint system. Pro-Door also identified the specific manufacturer of the restraint system. The competing bid proposed a ground-mounted restraint system, something that they did not want because they wanted to avoid the problems associated with snow and ice build-up at the foot of the mounts during the winter months.

53 Mr. Olsen also confirmed that he relied on Pro-Door's judgment on the selection of the RVR32s; he had no experience whatsoever with them. Mr. Olsen did not know if Pro-Door followed Pentalift's recommendation that it consider Hopewell's facility design, the nature of the truck fleets and their designs arriving at Hopewell's Distribution Centre, and the ICC bars in use, before selecting a restraint system.

54 Mr. Olsen also confirmed that unlike the advanced testing of the Metro Dock system, there was no advanced testing of the RVR32. Mr. Olsen also would not confirm whether Mondelez had a budget limit in mind for Phase I. He merely indicated that Modelez and Hopewell accepted Pro-Door's bid.

55 Mr. Olsen was asked about his knowledge of an alternative restrain system produced by Rite Hite. Although he said he was not familiar with all of the Rite Hite models he did indicate that Hopewell did not ask Rite Hite to bid on the replacement project because the Rite Hite restraints were significantly more expensive. He agreed that Pentalift's system, installed, had an approximate price of $6,000 while Rite Hite's system, installed, had an approximate cost of $10,000. He said that he never saw the price for the Metro Dock system. When shown an invoice from Metro dated September 20, 2016, Mr. Olsen agreed that the unit cost was $4,750.

56 Finally with respect to the Metro Dock option, Mr. Olsen explained that although that system was ground mounted, they added a heating pad at the base to eliminate the problem with the snow and ice accumulation. He also agreed that they invited Rite Hite to bid for Phase II.

57 The next person to testify was Dr. Mehdi Tahir, who was qualified as an expert in "materials failure and metallurgy". He provided the court with his curriculum vitae, he said he understood his duty as an expert to be objective and he submitted an executed copy of hit his Acknowledgment of Expert's Duty. He advised the court that this was the first time that he was testifying as an expert.

58 Dr. Tahir prepared an expert report wherein he concluded that the gouging in the RVR32s was the result of a design defect and specifically in relation to the steel that was used to manufacture the RVR32 System. He explained that the steel material that was used for the carriage assembly did not have sufficient hardness to prevent the gouging.

59 Dr. Tahir outlined his methodology. He said that when he carries out an independent investigation he performs a mechanical systems test and a materials systems test so that he might determine impartially the causation of either a materials or a mechanical failure. The mechanical testing system involves testing and analyzing the load applied to material to determine if the system in question is being misused. Typically, as part of that testing, Dr. Tahir will examine loss locations and review the components involved.

60 Dr. Tahir also explained that when he conduct is analysis and investigation he would ask the client for documentation and important information; conduct witness interviews; attend at the incident loss location and document it; examine the component that failed at the loss location; examine exemplar components at the incident loss location; and if necessary, determine whether material testing needs to be carried out to determine if loading was excessive for a particular application.

61 Having explained his usual methodology, Dr. Tahir then confirmed that he did not follow it in the development of his opinion for this matter. Specifically, he agreed that:

a) He did not carry out an independent investigation or onsite visit of the Distribution Centre;

b) He asked Pro-Door for "documentation and important information" but he did not verify if what he received was true. Nor did he undertake any independent review of any of the relevant documentation because Pro-Door did not provide him with anything;

c) He said that Pro-Door gave very little time to produce an opinion. He said that although he would have reviewed the relevant documentation had it been provided, he also acknowledged that he would not have had the time to produce his opinion in a timely manner;

d) He carried out a visual inspection of six RVR32 Systems at Pro-Door's Facility on June 1, 2018;

e) He did not compare the RVR32s that were gouged to any of the 13 or 14 that were not;

f) His exemplar was a Rite Hite system that Pro-Door provided him; it was not even from one of the Rite Hite systems at Hopewell;

g) He retained Acumen to conduct a metallurgical analysis of a cut piece of 1 RVR32 System and a cut piece from Rite Hite;

h) He was not aware that Pro-Door installed the RVR32 systems at Hopewell in 2016. He said he was told that the systems were installed in 2017;

i) He believed that there were approximately eight systems that had gouging. He did not know the complaint related to only three systems;

j) He thought that the RVR32s were a new restraint system by Pentalift. He did not know that Pentalift manufactured over 600 RVR32s;

k) He was led to believe by Pro-Door that the Pentalift restraints installed at other facilities exhibited similar damage to the incident restraints installed at Hopewell's Distribution Centre;

l) He did not carry out independent witness interviews;

m) He did not investigate the application of the RVR32s at the Distribution Centre;

n) He concluded that the installation and application of the RVR32s were likely not factors in the causation of the problem but he never was in a position to evaluate the installation;

o) He was unable to explain, even with respect to the 6 RVR32s that he did examine why only three had gouging while the other three had only wear and tear issues;

p) He drew conclusions about Pentalift's consideration of ICC bars without the benefit of any independent information. He concluded in particular that Pentalift must have failed to take into account the various hardness of the ICC bars, without any evidence to support what Pentalifit did or did not consider when it designed the RVR32s;

q) He did not undertake any independent inquiry to determine how the RVR32s were removed from the Distribution Centre to Pro-Door, or how they were stored in the period between the fall of 2016 and his examination in June 2018. He agreed that the systems he saw might have been damaged when they were ripped out of the Distribution Centre;

r) He was not aware of the actual service loads that were applied to the RVR32s at the Distribution Centre;

s) He did not consider the types of trucks that came to the Distribution Centre or the types of ICC bars on those trucks. He did agree that a damaged ICC Bar would cause it to have a harder surface than an ICC bar that is not damaged and that accordingly, a damaged ICC bar would affect the restraint system on impact;

t) Finally, he failed to consider, much less, rule out other probable causes.

62 Having regard for the metallurgical analysis of the steel used in the RVR32s, Dr. Tahir hypothesized that since the wear and tear was clustered on the sloped surface of the restraint, the gouging was caused by a sharp ICC Bar that hit the slope of the carriage.

63 Dr. Tahir conceded that an "apples to apples" analysis would have required a comparison between the RVR32s that had gouging in them and the RVR32s that did not have any gouging. He was reluctant to agree that the comparison between an RVR32 and the Rite Hite model amounted to an "apples and oranges" analysis.

64 As between the carbon content in the RVR32s and the Rite Hite Exemplar, Dr. Tahir reported a 19% difference, with the RVRs having a low carbon content and the Rite Hite having a medium carbon content. He did not however know that the RVR32s met the industry mandates and requirements. Nor did he seem familiar with the existence of any standards.

65 Mr. DeGasperis was the last witness to testify. He confirmed that he took a risk with the Pentalift restraints and remarkably, he said that on more than one occasion during his testimony. He said that Pentalift gave him a good price, he had a good rapport with Pentalift, and although he had reservations because the RVRs were a new product, he went ahead with the order. He said that he did not consider other manufacturers.

66 Mr. DeGasperis said that he spoke to Scott McCorquodale, who he thought was a sales guy at Pentalift in the late summer, early fall of 2015, to obtain reassurances that he would not have any problems with the RVR32s and he obtained those reassurances. He asked Mr. McCorquodale if he was comfortable supplying so many units and he said that he did not see any problem. He believed that he and Mr. McCorquodale met at the Distribution Centre to fill out the Site Information Sheet and to get the order going. Mr. DeGasperis admitted that he had used the RVR32s at other locations, though he conceded that those other locations had smaller operations. He specifically said that the Hopewell Distribution Centre was a very busy place and that the order "was a guinea pig job to see if we would expand to other places".

67 Mr. DeGasperis described the problems he had with this project as ten times greater than anything else that he had encountered. He explained that there were complaints right away. At first, Pro-Door tried to make adjustments on their own. When they realized that the problems were more serious, they called Pentalift.

68 Mr. DeGasperis explained that the light switches were not working and that the hooks were not picking up the ICC Bars properly. He said that all of the twenty systems had this problem. He said that Pentalift was throwing ideas at them but they could not fix the problem for over a month. He went on to explain that some of Pentalift's "fixes" worked for a while but then the problems re-emerged.

69 Mr. DeGasperis said that the gouging started to appear in February / March of 2016. He described the problem as progressively getting worse. He admitted that Pentalift was only advised of this problem two months into its first discovery. At a later point in the testimony Mr. DeGasperis thought that Pentalift was advised of the gouging as soon as it was discovered.

70 Mr. DeGasperis testified that he was under extreme pressure from Hopewell and Mondelez. At the same time, while Mr. DeGasperis was trying to fix the restraints or obtain replacements, in his view, Pentalift only cared about getting paid. Mr. DeGasperis expressed the concern that if he paid Pentalift, they would walk away and not attend to the repairs. He took Mr. Glass's responses to mean that the problems they were encountering were Pro-Door's and that they had nothing to do with Pentalift.

71 On the subject of the kit, he said he never saw it and Pentalift told him nothing about the kit. He admitted that there was a lot of yelling and many heated conversations. It came to the point where he was no longer interested in any repairs or restorations. When Mr. DeGasperis was asked about what he understood Pentalift's repair proposal to be, he responded that Pentalift wanted to see the money and he wanted to see the restraints operating properly. He also admitted that by late April he had started discussions with Metro Dock for the replacement of the systems.

72 Mr. DeGasperis agreed that he did not discuss Pentalift's proposed kit repair with Hopewell and with Mr. Olsen in particular. He did not see the point because Hopewell was very unhappy and they were done with Pentalift. In cross-examination he described Pentalift's proposal as a crazy idea that he was not going to discuss with Mr. Olsen. He also indicated that Mr. Olsen considered him to be a pain in the neck.

73 Mr. DeGasperis also said that for every e-mail exchange, Mr. DeGasperis thought there were ten conversations back and forth, Ultimately, Mr. DeGasperis explained his proposal to Pentalift that would have had Pentalift fix the systems at three docks, Pro-Door would then pay a substantial sum owing but hold back $10,000, the Pentalift would fix the remaining systems, and finally Pro-Door would release the remaining sum of $10,000. Eventually, Mr. DeGasperis said that they just came to an impasse.

74 With respect to the payment from Corlan Electric, Mr. DeGasperis admitted that he was surprised they were paid but he chose not to say anything to Pentalift; if he did, he thought that Pentalift would disappear from the scene. Instead, Mr. DeGasperis decided that he would hold back that money to pay for the replacement systems that he had already decided to purchase.

75 Mr. DeGasperis provided evidence on the cost of the Metro Dock restraints and his labour costs associated with the removal and replacement of the restraints. The total cost for the Metro Dock restraints came to $95,000. The labour costs were about $25,121. He also said that the RVR32s were brought back to Pro-Door's facilities and remain stored in their shelves. He had no explanation for why Hopewell would agree to testing a Metro Dock restraint system but would not agree to having Pentalift try out the kit and the repair it was proposing. At one point in his testimony, Mr. DeGasperis suggested that there was nothing preventing Pentalift from showing up at the Distribution Centre to apply the kits.

76 Finally, Mr. DeGasperis estimated the subsequent phases of Hopewell's replacement project to have a value of $180,000 or so. He did not provide any supporting evidence for that estimate.

77 On the subject of what information Mr. DeGasperis provided Dr. Tahir, he was less than forthcoming. He said that all 20 of the restraints were on the Pro-Door shelves but he could not recall what information he gave Dr. Tahir. He thought that he gave him an overview of the progression of the damages. He could not recall if he told Dr. Tahir that the RVR32s at other locations exhibited similar types of damages.

ANALYSIS

78 The telltale to this dispute rests with Mr. DeGasperis' admission that he took a risk when he selected the RVR32s for his client. Mr.DeGasperis chose to experiment with Pentalift's RVR32w for Hopewell, where the demands and the high volume traffic likely exceeded the capacity that RVR32s could handle. Price and budgetary considerations must have played a significant role in Hopewell's preferences and Pro-Door was looking to expand its business from smaller operations to higher volume customers like Hopewell. Mr. DeGasperis was candid about his concerns about the RVR32s' capacity. He described Pro-Door's purchase order to Pentalift as "a guinea pig job to see if we could expand in other places".

79 While in my review of the evidence I found myself somewhat sympathetic with Pro-Door's predicament, the uncontested evidence was that Mr. DeGasperis knowingly took a risk with the RVR32s, in the hope that they would meet his customer's needs. Unfortunately for Pro-Door the experiment faltered. When it came to finding a "fix" to the gouging, Mr. DeGasperis made matters worse by pursuing competing and contrary narratives as Pro-Door and Pentalift and Pro-Door and Hopewell. To Pentalift he said that Hopewell was applying tremendous pressure and was not paying for the product. To Hopewell he was saying that Pentalift was not interested in a solution. This did Mr. DeGasperis no favours. Ultimately, his relationship imploded with both Pentalift and Hopewell, resulting in losses for Pro-Door. That said, those losses were Pro-Door's doing and I see no basis for visiting them or allowing for any kind of set-off against Pentalift's claim.

80 My findings and conclusions are based on my consideration and analysis of the following legal issues:

a) Did Pentalift provide a defective product and did it breach its warranty?

b) Was Pentalift negligent towards Pro-Door?

c) Is Pentalift liable to Pro-Door for Negligent Misrepresentation?

d) Did Pro-Door suffer damages?

e) Is Pro-Door entitled to an equitable set-off for the damages it says it suffered?

81 Before I turn to consider these issues, the admissibility of Dr. Tahir's evidence is a preliminary and pivotal issue to determine as it has a bearing on the totality of the evidence available for my consideration.

82 Pro-Door retained Dr. Tahir to provide an expert opinion on the reason for the failure of the restraints, and more specifically the cause for the gouging. He concluded that: "The gouging failure of the incident Pentalift restraints was due to a design defect." He went on to elaborate that:

> "[t]he yield strength and hardness of the incident carriage material were inadequate for the intended service loads. As such, the contact loads applied by ICC bar of trailers resulted in severe plastic deformation and wear damage of carriage plates and led to gouging failure of the incident Pentalift restraints. As such, the carriage steel material was inadequate for its intended service loads."

83 Following an expert qualification *voir dire*, Dr. Tahir was qualified by this court as an expert in "materials failure and metallurgy". He purported to understand his obligations to be independent and comply with his duties to the court.

84 During the *voir dire*, Pentalift did not take serious issue with Dr. Tahir's qualifications or with the methodology he said he followed to reach his conclusions. Even though Pentalift had reviewed Dr. Tahir's report in advance of the trial, it did not raise any concerns with any bias or reliability.

85 By the time of Pentalift's closing submissions, Pentalift asked this court to deny the admissibility of Dr. Tahir's evidence or alternatively, to give it minimal to no weight because of the serious flaws with bias and with the methodology that was actually followed. In support of its position, Pentalift drew the court's attention to the directions in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), *R. v. Abbey*, 2009 ONCA 624 (Ont. C.A.), *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 (S.C.C.), *Buctouche First Nation v. New Brunswick*, [2014] N.B.J. No. 266 (N.B. C.A.), *Frazer v. Haukioja*, [2008] W.D.F.L. 4459 (Ont. S.C.J.), and *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2009 CarswellOnt 494 (Ont. S.C.J.), rev'd on other grounds 2010 ONCA 310, 104 O.R. (3d) 784 (Ont. C.A.), appeal dismissed, 2012 SCC 51, [2012] 2 S.C.R. 675 (S.C.C.).

86 Pro-Door disputed Pentalift's request to have Dr. Tahir's evidence excluded. It urged the court to admit Dr. Tahir's evidence, to find it reliable, and ultimately to accept his conclusion that the RVR32s were defective.

87 Having regard for the role of experts, the criteria for the admissibility of expert evidence, and the court's ongoing obligation to be a gatekeeper of the evidentiary process and exclude prejudicial evidence throughout the trial, I have come to the conclusion that Dr. Tahir's evidence, while admissible, is only of minimal value and cannot be given any weight because of its fundamental flaws and unreliability. Since I heard his testimony, I see no prejudice to the trial to admit the evidence, particularly since I do not intend to give it much weight, if any. That said, had I appreciated the magnitude of the flaws in Dr. Tahir's opinion at the *voir dire* stage, I would have very likely declined to hear from him.

88 More to the point, Dr. Tahir proved to be biased and either unable or unwilling to appreciate the nature of his duties to the court. When pushed on some of the more difficult questions, he said that he followed his client's instructions. Substantively, although he purported to follow an objective methodology, he disregarded his own methodology, he accepted the limitations that were imposed on his work by Pro-Door and he did not question any of the information that was provided to him.

89 Admittedly, given the lack of any substantial resistance by the plaintiff to Dr. Tahir's evidence during the *voir dire*, the flaws with Dr. Tahir's overall approach were not immediately evident as he purported to understand his obligations. The methodology that he said he generally followed also seemed to be promising. The problem with Dr. Tahir was that he actually did not follow or apply the standard methodology; charitably, he took a number of shortcuts so that he could meet his client's deadline. Whether deliberately or because of inexperience, Dr. Tahir's lost his objectivity almost from the get go.

90 Regrettably, it was not until his cross-examination that the magnitude of the deficiencies became obvious. I will not repeat the admissions Dr. Tahir made about what he did not do or how he undermined his own methodology. Those were listed above in the summary of his testimony. I will however note my dismay at his defensiveness as he was confronted with each of his failures in his analysis.

91 The progression from a *voir dire*, where Dr. Tahir came across as objective and committed to his duty to be impartial to somebody who became defensive and lost all perspective on his role as an expert, reminded me of the direction in *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502 (Ont. C.A.) that a trial judge's gatekeeper role is ongoing and that even after allowing an expert to testify, a trial judge must continuously assess whether the expert's testimony risks trial fairness as it unfolds. If it does, the judge must take action:

> [16] [T]he court's residual discretion to exclude prejudicial evidence is an *ongoing* one that *continues throughout trial.* It may be involved if prejudice manifests after initially admitting the evidence. Thus, . . . the court has residual discretion [under this ongoing gatekeeper function] to *exclude expert evidence even after admitting it*, if late in the trial prejudice emerges that was not apparent at the time of admission." [Emphasis added].

92 Of all of Dr. Tahir's omissions, I found it especially troubling that he would not question the information he received from Pro-Door, that he did not conduct any interviews whatsoever to gain an understanding of the problem at hand, that he did not seek to meet with Pentalift to gain even an elementary understanding of the RVR32 and how they were intended to operate, that he would make unsupported assumptions about Pentalift's manufacturing decisions and designs, that he would not seek out locations where the RVR32s were operating without any difficulty to compare and contrast his investigations, that he was unaware that the RVR32s met the industry mandates and requirements, and that he failed to visit Hopewell or to interview anyone at Hopewell to gain an understanding of that operation.

93 Had Dr. Tahir undertaken these essential steps, which even he said would ordinarily be part of his methodology, he might have learned that Pro-Door's complete order was for 33 systems and not 20, that the steel that Pentalift used for the manufacture of the RVR32 met the industry standards, that there were 14 systems that Pro-Door installed at Hopewell that did not exhibit any gouging, that Pentalift had manufactured and sold over 600 RVR32s and had never heard of any gouging problem, and he may have discovered that there were no reported problems with the eight systems that Pro-Door installed at another location contemporaneously with the 20 that were installed at Hopewell's Distribution Centre. He may have even learned of Mr. DeGasperis' reluctance to use the RVR32s for Hopewell and may have gained some insight as to why Mr. DeGasperis considered the order from Pentalift a bit of a "guinea pig".

94 Most significantly, on the totalilty of these discoveries, Dr. Tahir would have realized that an essential component of his analysis would have been to undertake a comparison between the 14 systems that worked, the three that had only wear and tear signs, and the three that exhibited gouging to explain what was really going on and whether there was a defect in the three systems or whether the failure might be explained by some other reason. He admitted as much when he agreed that an "apples to apples" comparison would have been one that compared the RVR32s with the gouging to the 14 RVR32s without the gouging.

95 Instead, Dr. Tahir became increasingly defensive in his answers, he justified the limitations in his analysis by indicating that Pro-Door did not give him enough time to complete his opinion, and that he did not see a reason to disbelieve what Pro-Door told him. As other possible explanations for the gouging were put to him for his consideration, Dr. Tahir argued forcefully for his particular conclusion and demonstrated an inability to engage with other probable or contributing causes for the gouging. The more he spoke, the more he was unable to provide a balanced discussion of the issues that could be relevant to causation. He clearly failed to appreciate that he was there to assist the court and not to be one more advocate for Pro-Door.

96 Having regard for the magnitude of these difficulties I am obliged to echo the trial judge's *obiter* by in *Southcott Estates Inc.*:

> [110] . . . Qualified expert witnesses are granted a right not available to lay witnesses; to give express opinions for the assistance of the court. But with this right comes the crucially important responsibility or maintaining an attitude of strict independence, and impartiality. This requires the expert's evidence to be uninfluenced as to form and content by the

> exigencies of the litigation. Simply put, this means that the expert's opinion should not be influenced by the interests of the party calling him or her. Judges must be vigilant to ensure that these responsibilities are scrupulously fulfilled and when they are not, to apply appropriate sanctions.

97 Having regard for this direction and given Dr. Tahir's admission that this was the first time that he appeared before the court as an expert, I feel compelled to remind counsel of their obligations to ensure that the expert is not humiliated in the process of a cross-examination. There will always be a first time for an expert witness; that is not an impediment to testifying. But counsel have an obligation to ensure that an expert understands his or her unique role in a trial and that they are there to assist the court and to prepare that witness for testimony. This, of course, is to be distinguished from any interference with the substance of the expert's opinion, which must be his or her independent analysis and conclusion.

98 I rely on Justice Paciocco's article, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009) 34 Queen's L.J. 565 at 600-608 to remind counsel that they must guard against: (i) selection bias (why the expert is chosen); ii. Association bias (whether the expert might demonstrate a desire to do something serviceable for his or her customer / employer); (iii) professional bias (whether an expert might be defending his or her research or own credibility); (iv) noble cause distortion (whether the expert might demonstrate a willingness to distort evidence, believing that he or she is on the side of good), and (v) dogmatism and rigidity. Any one or more of these flaws will render that expert's views unreliable and useless. When counsel fail to guard against these risks, they run the risk of bringing the administration of justice into disrepute.

99 I find it especially necessary to underscore this caution in light of Dr. Tahir's admission that he deliberately modified, and thereby compromised his standard methodology because ostensibly he was given very little time to investigate and reach his conclusions. Counsel should have been vigilant over such limitations; it was incumbent on him to scrutinize the expert's efforts and ensure that his opinion was not compromised.

100 Having taken the time to review and understand Dr. Tahir's efforts, it gives me no pleasure whatsoever to have to reject his evidence, almost in its entirety and to have to underscore the various material weaknesses. I would like to believe that Dr. Tahir set out to study the issue in a *bona fides* manner. Clearly he did not understand that his obligations were not to Pro-Door but to the court. I am even more troubled by the time and expense that was undertaken to produce an opinion that was so fundamentally flawed and ultimately of little assistance to the court.

101 In that regard, the responsibility that Justice Paciocco speaks of in his article, extends to counsel for all parties and is engaged as early as when it is clear that a party will be seeking to lead expert evidence. Counsel should not be hesitating to raise their concerns and to engage in a comprehensive and vigorous *voir dire* at the outset, to prevent the risk of any trial prejudice. More to the point, they should not be calling an expert who is either biased or who is rendered useless by the excessive limitations of what he may or may not consider, as Dr. Tahir suggested occurred.

102 I turn to my consideration of the remaining issues in this trial.

a) Did Pentalift provide a defective product and did it breach its warranty?

103 My short answer to this question is "no". Pro-Door selected, ordered and received a total of 33 RVR32s. Of that order, three systems exhibited gouging. Another three were said to have significant wear and tear. The rest were fine.

104 Pro-Door had the onus to satisfy this court on a balance of probabilities that the RVR32s were defective. Apart from the evidence of Dr. Tahir, which I have rejected as biased and unreliable, there was no evidence to explain how the gouging occurred. Nobody who testified witnessed the gouging as it occurred. Mr. DeGasperis talked about trucks jamming into the restraints but he did not actually witness anything. The photos that were produced illustrated the gouging. In that sense, the court could see the outcome of something going wrong but it could not draw any conclusions on why the gouging occurred.

105 Leaving aside Dr. Tahir's conclusion about the strength of the steel and the low carbon content, much was made of Pentalift's choice of steel for the RVR32s. Mr. Rowan admitted that the strength of the steel was upgraded sometime after 2016. But he also testified that Pentalift made a number of other developmental changes to the RVR32 model.

106 On the limited evidence before me, I am not persuaded that the choice of carbon content amounted to a defect. There might have been something to that hypothesis had the gouging manifested itself across most if not all of the 20 systems that were installed at the Hopewell facility. The intensity of use of the restraint systems at Hopewell, as compared to other facilities might also offer some insight into the cause for the gouging. I cannot preclude the possibility that the RVR32s may not have been most suitable or the best choice for Hopewell. Mr. DeGasperis was certainly not sure. But failure in choice is very different from failure in a product.

107 However, having regard for the fact that there was no reported gouging on 17 of the 20 systems at Hopewell, and no problems with the eight systems at Pro-Door's other customer, if the cause for the failure were the carbon content, then all of the RVR32s at Hopewell should have exhibited some gouging, even if in variable degrees.

108 Similarly, if the explanation for the gouging lay with the intensity of use at Hopewell, as compared to other locations, then the gouging should have manifested itself uniformly across the twenty systems because the intensity of use was uniform across Hopewell's 62 loading docks. But that was not the case. Mr. DeGasperis worried that the gouging would eventually show up in the remaining 14 systems but there was no evidence that it actually occurred to any systems other than the three in question.

109 In the same vein, even if Dr. Tahir's evidence on the difference in carbon content between the RVR32s and the Rite Hite model were to be accepted as the cause for the gouging, that distinction could not explain why at least 14, if not 17 of the systems at Hopewell were gouge-free and why only three exhibited the gouging. Moreover, there was no evidence that systems such as the Rite Hite exemplar would have withstood the intensity of use at Hopewell. Although the court heard that Hopewell had some Rite Hite restraints at its Distribution Centre there was no evidence concerning their performance. And in any event, that product was disqualified as an option because of its price.

110 My concern and rejection of the carbon content as an explanation for the failure of the three out of the thirty-three RVR32s is further supported by Mr. Rowan's evidence that all 33 of the RVR32s were manufactured from the same material and the same standardized specifications and that the steel that was used met the applicable CSA standards. It stands to reason that if all 33 RVR32s were made of the same steel and that three could not withstand the pressure and exhibited the gouging but the 30 could, it could not be the steel that was defective or that was the cause for the gouging. There must be some other explanation for the problem. Pro-Door failed to advance any other probable causes.

111 Certainly, in the absence of credible and reliable evidence, it is not for the court to diagnose the problem or provide an alternate explanation for the cause for the gouging. What did become obvious from the evidence was that there could be any number of explanations for the gouging that could lie with the proper / improper installation of the systems, the accurate operation of the sensors for the particular systems, and the possible problems with damaged ICC bars. But most, if not all of these possible explanations had everything to do with the proper installation of the systems and their use, and nothing to do with Pentalift's product design. Pentalift was only the manufacturer. It did not install anything, it did not select anything, and it had no involvement whatsoever with the end-user. I therefore find it rich for Pro-Door to be putting the blame on Pentalift without any consideration for other possible causes for the problem.

112 To the extent that Mr. DeGasperis pointed to the accelerated wear and tear of the RVR32s as an additional defect or as a manifestation generally of a defect in the RVR32s, that only goes as far as to suggest to me that the RVR32s may not have been well-suited to Hopewell's needs and that perhaps Pro-Door should have selected a different product. But even on that point, there was no evidence to make such a conclusive finding.

113 As for the complaints concerning the alarms and the hooking were concerned, on the totality of the evidence, I find that those problems were addressed and were not the result of any defect. I accept Mr. Rowan's and Mr. Glass' extensive explanation

regarding the adjustments that had to be made to expand the range for the hook. I also accept their evidence that by April those issues were resolved.

114 I rely on the e-mail exchanges between April and July of 2016 between Mr. Glass and Mr. DeGasperis to support that finding. Even though Mr. DeGasperis suggested that the problems resurfaced, there were no communications by Mr. DeGasperis to suggest that this allegation had any truth to it.

115 I also rely on the communications concerning the kit proposed by Mr. Glass, which was intended to address the gouging and nothing else, to conclude that by the time of those discussions, there were no other problems to address. Moreover, at least until the June 2016 communications, the complaints were focused on fixing three systems and not twenty. Accordingly, there was no evidence to support Pro-Door's claim that the RVR32s had several defects in addition to the gouging.

116 With respect to Pentalift's efforts to address Pro-Door's complaints and the difficulties they encountered at Hopewell, I found Mr. Glass' explanation that they undertook those efforts as a matter of goodwill and in recognition of Pentalift's longstanding relationship with Pro-Door entirely credible. I am unable to say the same thing for Mr. DeGasperis.

117 In contrast to Mr. Glass, although Mr. DeGasperis came across as a likable individual, I was disappointed that he was not forthright in his answers and that he let his emotions get ahead of him. Most troubling was the recognition that he did not come to court with clean hands. This came through in the competing narratives to which he admitted as he explained and compared his communications between himself and Mr. Glass on the one hand, and himself and Mr. Olsen on the other hand.

118 The communications between Mr. Glass and Mr. DeGasperis implied that Mr. DeGasperis wanted very sincerely to find a solution to the gouging. And yet, his communications with Mr. Olsen revealed a very different story, especially when he said that Pentalift was not interested in a solution. It is no wonder that Hopewell came to the point where they wanted nothing to do with Pentalift's RVR32s. I can only conclude that in an effort to mask Pro-Door's risk-taking and choice of the RVR32s, Mr. DeGasperis tried to shift the blame on others.

119 Apart from the blaming of Pentalift and Hopewell respectively and the distortion of what was really going on, Mr. DeGasperis was also untruthful with Mr. Glass and Mr. Olsen in a number of other ways. If, as he told the court he was so disappointed with his choice of the RVR32s and if he also thought that Mr. Glass' kit idea was crazy, it made no sense that he would continue the exchanges with Pentalift. I would have expected him to tell Mr. Glass that the RVR32s were not suitable or to be insisting that Pentalift replace the systems. But he did not say anything like that. His deception went further in that all the while that he was negotiating with Mr. Glass for a solution, Mr. DeGasperis was searching for another system and by the end of April there were no bona fides intentions to keep the RVR32s. That explains why Mr. Glass was so surprised to hear that the RVR32s were ripped out and replaced.

120 Similarly in his communications with Mr. Olsen, Mr. DeGasperis engaged in nothing but posturing. He tried to project Pro-Door as the hero who would either find its own solution or replace the systems altogether, when in reality Pentalift was the one that was willing to work out a solution. I believed Mr. Olsen when he said that he had no idea of Pentalift's repeated efforts to address Pro-Door's particular complaints.

121 Looking back at how Pro-Door went about selecting the RVR32s, it is very likely that Mr. DeGasperis' selection was either ill-considered or driven by budget limitations imposed by Hopewell and that this selection was the first domino to fall in a series of other poor decisions that followed.

122 But to be clear, there was no evidence to support the contention that Pentalift imposed that choice or made any kind of a recommendation. Mr. DeGasperis readily admitted that the choice was his, even if he tried to draw in one of Pentalift's employees. Having run into difficulties with his choice, rather than admit to the difficulty and address it head-on, possibly with both Pentalift and Hopewell, Mr. DeGasperis chose to tell Mr. Glass that Hopewell was refusing to pay Pro-Door and he chose to tell Hopewell that Pentalift was not interested in a solution. On that strategy, it was only a matter of time before both narratives would implode.

123 All that to say that nothing in the evidence permits me to find that the RVR32s were defective. It follows that I can also see no basis for concluding that Pentalift breached either its own warranty or the protections extended by the *Sale of Goods Act*, R.S.O. 1990, Chapter.S.1, S.5. (SGA).

124 Insofar as both the plaintiff and the defendant made submissions regarding the SGA, and specifically, sections 15 and 51, I make the following findings. Pentalift's own warranty was clear in its terms. If a product proved to be defective and the problems were not caused by misuse, improper installation or any other third-party causes, Pentalift reserved the right to repair or replace the equipment at issue. Having found that the RVR32s were not defective, I see no basis for a finding that Pentalift breached its warranty obligations. As I already noted, I accepted Pentalift's evidence that its efforts to assist Pro-Door were intended as a goodwill gesture and were not intended as a response to any legal obligation. There was no defect in Pentalift's product to engage Pentalift's warranty.

125 A similar analysis underlies my consideration of the protections offered by the *Sale of Goods Act.* Section 15 addresses the application of implied warranties. For ease of reference, I have reproduced it as follows:

> ***Implied conditions as to quality or fitness***
>
> 15 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:
>
> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is no implied condition as regards defects that such examination ought to have revealed.
>
> 3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
>
> 4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. R.S.O. 1990, c. S.1, s. 15.

126 For Pro-Door to establish a breach by Pentalift pursuant to the *Sale of Goods Act*, Pro-Door would have to satisfy one of the four conditions. Beginning with section 15(1), Pro-Door would have to satisfy the court that the RVR32s were part of Pentalift's business, that Pentalift was made aware of the particular use of the RVR32s and that Pro-Door relied on Pentalift's skill and knowledge.

127 None of the evidence before the court allows Pro-Door to satisfy these requirements. Pentalift certainly manufactured the RVR32s but Pentalift had nothing to do with the Pro-Door's bid to Hopewell and Pro-Door's selection of the RVR32s. Pro-Door put in a bid for the Hopewell project and expressly selected the RVR32s months before it ever spoke to Pentalift about the order. Mr. DeGasperis talked about Scott McCorquodale's attendance at Hopewell in September and attempted to rely on that interaction to anchor the argument that Pro-Door relied on Pentalift for its expertise. However on a close read of even Mr. DeGasperis' recounting of that exchange, the questions seemed to focus more on whether Pentalift could produce so many systems. Mr. McCorquodale may have assisted with the dock measurements, but Pentalift did not assume that responsibility. Moreover, Pentalift made it clear that all such measurements were the responsibility of the dealer purchasing equipment, be that Pro-Door or any other purchaser.

128 Although Pentalift did not challenge the evidence concerning Mr. McCorquodale, even if I were to accept Mr. DeGasperis' representations, I cannot ignore the fact that the alleged interaction occurred well after Pro-Door had committed to using the RVR32s for Hopewell and well after Hopewell awarded Pro-Door the contract for Phase I. Whatever advice Mr. McCorquodale might have provided, I do not see how anything he said had any impact on Pro-Door's choice and decision to order the RVR32s for Hopewell's Distribution Centre. I also note that Ms. Ververke said nothing about such an interaction. She described this order as nothing out of the ordinary and similar to the way Pro-Door submitted other purchase orders.

129 As well, nothing in what Mr. DeGasperis said about his selection of the RVR32s actually revealed any reliance by Pro-Door on Pentalift. He said that he knew the company well, he had ordered the RVR32s for other customers, Pentalift offered good prices, and he had not encountered any difficulties. He went further to indicated that he knew he was taking a risk and that the treated this order as a "guinea pig". Mr. DeGasperis, might have been able to rely on section 15(1) had he contacted Pentalift in advance of his choice to discuss what he said was the risk he was thinking of taking, and to inquire about other options, but there was no evidence of such an action.

130 Finally, it may be useful to recall the Ontario Court of Appeal's observation in *Venus Electric Ltd. v. Brevel Products Ltd.*, 1978 CarswellOnt 727 (Ont. C.A.), at paragraph 39, that a warranty requires that goods be reasonably suited or fitted to the purpose for which it is sold but that it need not be perfect or even the best of its kind. A warranty also does not constitute an agreement that the goods are perfectly adapted to the intended use. Mr. De Gasperis may not have chosen the best product for Hopewell's needs but that cannot amount to a breach of any implied warranty provided by the *Sale of Goods Act*.

131 To bring itself within the requirements of section 15(2) of the same *Act*, Pro-Door would have to satisfy the court, on a balance of probabilities that the RVR32s that Pentalift delivered were defective. For the reasons already discussed, Pro-Door was unable to satisfy that onus and I am unable to find on a balance of probabilities that the RVR32s that Pentalift supplied to Pro-Door had ay defect at the time of their delivery.

132 Section 15(3), which speaks of the annexation of an implied condition or condition being annexed by the usage of trade has no application to this case.

133 Section 15(4) is also of no assistance to Pro-Door. Pentalift's Agreement explicitly and unambiguously excluded the application of sections 15(1) and (2) of the *Sale of Goods Act*, to the Agreement as both the Warranty and page 3, provision 6 of the Quotation expressly and unambiguously excluded any express or implied warranty of merchantability or fitness for a particular purpose. There is nothing in Pentalift's Agreement with Pro-Door to suggest otherwise.

134 Without a breach of section 15 of the *Sale of Goods Act*, Pro-Door cannot access the remedies anticipated by section 51 of the same act and I see no point in engaging in such an analysis.

b) Was Pentalift negligent towards Pro-Door?

135 On the totality of the evidence I see no basis for such a finding. Liability for negligence requires a breach of duty of care arising from a reasonably foreseeable risk of harm to one person created by the act or omission of another. This is often referred to as the "but for" test. A party asserting negligence bears the burden of showing that "but for" the negligent act or omission, the injury would have occurred.

136 Pro-Door pleaded that Pentalift owed it a duty of care in the provision of the RVR32s and repairs to same and that Pentalift breached its duty of care to Pro-Door, causing Pro-Door to suffer damages as a result. Pro-Door bears the burden of demonstrating that "but for" Pentalift's negligence, Pro-Door would not have suffered losses.

137 Pentalift relied on the following useful paragraph from *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) at paragraph 28 to respond to Pro-Door's claim:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise a standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The

measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice and statutory or regulatory standards.

138 In my review of the evidence, Pro-Door failed to meet the burden of demonstrating that "but for" Pentalift's negligence, Pro-Door would not have suffered the damages it alleges. On the evidence before me, the more probable answer is that "but for" Mr. DeGasperis' decision to take a risk and to treat the RVR32s as a "guinea pig", Pro-Door would not have compromised its relationship with Hopewell. Also, but for Mr. DeGasperis' two competing and contradictory narratives to Mr. Glass and Mr. Olsen respectively, he might have had a better outcome in the resolution of the gouging and any other difficulties. Mr. Glass was willing to co-operate and Mr. Olsen would have welcomed, at the very least, the consideration of Pentalift's proposed kits. Those communications were not explored because Mr. DeGasperis chose two very different approaches and strategies.

139 There was also no evidence that the Pentalift was negligent in its design or its manufacturing of the RVR32s. The particular restraints passed the internal inspection and quality control process and the materials used were all the correct composition as confirmed by the mill certificates.

140 Insofar as Pro-Door submitted that the cost of the replacement of the restraints and the labour charges for the performance of the replacements would have been within Pentalift's contemplation, there was simply no evidence to support such a contention. There was also no evidence to support the contention that Pentalift would have known that Hopewell would have been entitled to reject the RVR32s and seek replacements. Both submissions were entirely inconsistent with the reality that Pentalift was only a manufacturer of the restraint systems and had no contact with any end-users. Pro-Door selected the RVR32s for Hopewell, independent of any involvement by Pentalift. On the evidence before me, how a bid and a contract between Hopewell (Mondelez) and Pro-Door would extend to or engage Pentalift's duty of care is a mystery.

c) Is Pentalift liable to Pro-Door for Negligent Misrepresentation?

141 Here too, the short answer is "no" and here is why. For such a claim to succeed the aggrieved party must establish that:

1. There was a duty of care based on a special relationship;

2. The representation in question must be untrue, inaccurate or misleading;

3. The party making the representation must have acted negligently when he or she made the representation;

4. The party receiving the representation must have relied, in a reasonable manner, on the said negligent misrepresentation; and

5. The reliance must have been detrimental to the party that relied on the representation in that damages resulted.

See *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at para. 37 and *Marks v. Ottawa (City)*, 2011 ONCA 248 (Ont. C.A.) at para. 21.

142 Pro-Door selected the RVR32s for Hopewell without Pentalift's involvement. Even if Mr. McCorquodale said anything about the RVR32s being compatible for Hopewell's needs, the evidence before the court was insufficient to ground a finding that this communication amounted to a representation on which Pro-Door relied on to make the selection. In any event, any and all communications with Pentalift regarding this specific order post-dated Pro-Door's bidding and agreement with Hopewell and Mondelez.

143 Moreover, at the risk of being repetitive, Mr. DeGasperis was never sure that the RVR32s were suitable for Hopewell's needs. He said he took a risk. Had he consulted Pentalift prior to the bid and prior to his selection of the RVR32s and had Pentalift reassured and encouraged him to go ahead with that selection, the analysis may have been different. But such a consultation did not occur.

144 Underscoring all of this was Pentalift's evidence that for all orders, Pentalift cautions its buyers to be certain of their selection. It is the buyer who is responsible to determine and take into consideration the present requirements and future plans or adverse environments for the equipment, the type of facility, the trailer design, including the trailer bed heights, ICC Bars, air ride suspension, trailer inside width and height and trailer tailgates, and the truck fleet. Pentalift was clear in its evidence that the RVR32s are not made to measure but have a standard specifications design. Moreover, it does not consider any of the noted factors and does not have any responsibility for doing so when it processes an order. Nor would it represent to any customer that it would take such features into account.

145 Specifically with respect to Pro-Door, nobody disputed Pentalift's evidence that Pro-Door was familiar with the RVR32s and had purchased it for other customers on previous occasions.

146 All of this evidence supports the conclusion that there were no representations by Pentalift specific to Pro-Door's or Hopewell's needs, much less that the representations were negligent.

d) Did Pro-Door suffer damages

147 There was no reason to dispute the costs that Pro-Door incurred to replace the RVR32s with the Metro Dock restraints. There was some disagreement over the actual labour costs. There was also substantial disagreement regarding Pro-Door's loss of the opportunity to bid on the future phases of Hopewell's replacement phases and by extension, a loss of profit.

148 That said, I do not intend to reconcile the different estimates that Pro-Door put forward on its total damages because I see no basis for holding Pentalift accountable or liable for them. Nobody really disputed that Pro-Door ran into difficulties with Hopewell over this contract. I also find it probable that Hopewell's experience with Phase I caused it to rethink its replacement strategy including its use of Pro-Door.

149 Given Hopewell's decision to go back to ground-mounted restraints and not wall mounted restraints, I am left wondering whether they too may have had doubts about the wall mounts and after trying them out in Phase I, causing them to reverted to the ground mounts for the subsequent phases. I also cannot ignore Hopewell's refusal to reveal anything about its actual budget, the significant cost differential between the RVR32s and the Rite Hite models and Mr. Olsen's express awareness of that difference, even if he did not know much about the Rite Hite option, and Mr. DeGasperis' failure to produce the bid documents. The absence of evidence on these issues raises more questions than they answer. This evidentiary void would have been problematic if I had to determine Pro-Door's loss or profit and opportunity. But in the absence of such a requirement, to make any finding would be to engage in unnecessary speculation.

150 That said, for the reasons I already discussed, I see no fault on Pentalift's part that would allow Pro-Door to claim damages from Pentalift for its losses from Hopewell.

e) Is Pro-Door entitled to an equitable set-off for the damages it says it suffered?

151 There is absolutely no basis for such a claim. The essence of Pro-Door's claim for equitable set-off is that it would be manifestly unjust for Pentalift to enforce payment for the restraints without taking into account Pro0Door's counterclaim as both claims originate from the same contract and the same products.

152 There are four criteria for equitable set-off, as outlined in *Telford v. Holt* [1987 CarswellAlta 188 (S.C.C.)], 1987 CanLII 18:

1. the party relying on a set-off must show some equitable ground for being protected against his adversary's demands

2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed;

3. A crossclaim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the crossclaim;

4. The plaintiff's claim and the crossclaim need not arise out of the same contract;

5. Unliquidated claims are on the same foot as liquidated claims.

153 Nobody disputed that Pro-Door owed Pentalift money. The dispute was over Pro-Door's counterclaim. Given my preceding findings, I am unable to identify any equitable grounds for any set-off, as claimed by Pro-Door.

154 As I already concluded, Pro-Door got into trouble with the selection and installation of the RVR32s of its own accord. Mr. DeGasperis chose a strategy of two different narratives in his communications with Mr. Glass and Mr. Olsen. To Mr. Glass, Hopewell was applying extreme pressure and giving him a very hard time. They would not even pay him for the RVR32s; in fact, whether by design or by error, Pro-Door received payment for the systems but deliberately withheld that information from Mr. Glass. To Mr. Olsen, Pentalift was the bad actor. Pentalift was the one to refuse any cooperation and refuse to propose any fix. Mr. Olsen knew nothing about Pentalift's proposed kit.

155 A party cannot come to court with unclean hands and expect the court's equity. It is of course unfortunate that Pro-Door ripped out the RVR32s and had to pay for the Metro Dock replacements. But here too, it was Mr. DeGasperis who managed the relationships in such a way that undermined the actual identification of a response to the gouging. He accused Pentalift of being greedy and money-hungry, but who was really the greedy one? Pro-Door would have been in a far better position had it allowed the kits to be installed. Had they worked, the solution would have cost everyone no more than $2,000. Had they not worked, Pro-Door may then have had a better foundation for an equitable set-off.

156 Similarly, Pro-Door would have been in a far better position to be transparent with Pentalift about Hopewell's actual directive to replace the RVR32s altogether. It would have also been a far better position if at least it would agree to return the unused systems.

157 Instead, on the facts of this case and from the time of the bid until the litigation, Pro-Door took very specific and deliberate actions. Against that reality I find it very difficult to understand why Pentalift demanding payment, without a set-off would be unjust.

CONCLUSION

158 In light of my findings and conclusions, Pro-Door's counterclaim is dismissed in its entirely. Pentalift is entitled to judgment on the following terms:

a) Payment of the sum of $67,884.59 by Pro-Door to Pentalift for the outstanding invoices;

b) Payment of pre-judgment interest from Pro-Door on each outstanding invoice from the 30 th day of the month following the date of each invoice at the rate of 24% per year; and

c) Post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

159 On the subject of costs, having received the parties' respective bills of costs and having regard for the plaintiff's success, I fix costs at $38,000, inclusive of disbursements and applicable taxes and payable within 30 days from the date of this judgment.

160 I have reduced the plaintiff's partial indemnity claim by approximately $7,500 in recognition of the proportionality between the amount claimed and the fees incurred as well as the number of people who worked on the file. I find some duplication of effort all along. While the counterclaim was certainly significant the issues were straightforward and should not have required nearly the number of hours for the tasks at hand.

161 Judgment in favour of Pentalift is to issue accordingly.

Action allowed; counterclaim dismissed.

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Most Negative Treatment: Not followed
Most Recent Not followed: Leger v. Canadian National Railway | 1999 CarswellNat 3824, 1999 CarswellNat 3825, [1999] C.H.R.D. No. 6, [1999] D.C.D.P. No. 6 | (Can. Human Rights Trib., Nov 26, 1999)

1994 SCC 117
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, 1994 SCC 117, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

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Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Subject: Constitutional; Intellectual Property; Civil Practice and Procedure; Public; Property
Headnote
Injunctions --- Injunctions involving Crown — Miscellaneous injunctions
Injunctions --- Availability of injunctions — Public interest
Injunctions --- Availability of injunctions — Need to show irreparable injury
Injunctions --- Availability of injunctions — Interim, interlocutory and permanent injunctions — Balance of convenience — Restraint of governmental acts
Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Stay pending appeal
Jurisdiction of Supreme Court of Canada to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can R. 27.

Applicants challenged the constitutional validity of the Tobacco Products Control Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to R. 27. A preliminary issue of jurisdiction was raised. Held, the Court had jurisdiction to grant such relief but the applications for stays were dismissed. The phrase "other relief" in R. 27 was broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered, and could apply even though leave to appeal was not yet granted. S. 65.1 was to be interpreted as conferring the same broad powers as R. 27. The Court had to be able to intervene not only against the direct dictates of a judgment, but also against its effects. Even if the relief requested by applicants was for the suspension of the regulation rather than for an exemption from it, jurisdiction to grant such relief existed, as a distinction between such cases was only to be made after jurisdiction was otherwise established.
Application for stay of compliance with new tobacco packaging regulations — Tobacco Products Control Act, S.C. 1988, c. 20.
Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law and the expenditures which the new regulations required would impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. Public interest had to be taken into account. Public interest consideration carried less weight in exemption cases than in suspension cases, the present case being of the latter type. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
Applicants challenged the constitutional validity of the Act, which regulated the advertisement of tobacco products and health warnings on those products. The Court of Appeal found the legislation to be constitutional. Before a decision on applicants' leave applications in the main action was made, applicants applied to the Supreme Court of Canada for a stay from compliance with the new packaging requirements. Held, the applications for stays were dismissed. The same test was to be applied to applications for interlocutory injunctions and stays in both private law and Charter cases. The case clearly raised serious questions of law. Where the government was the unsuccessful party in a constitutional claim, a plaintiff faced a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations required would therefore impose irreparable harm on applicants if the stay were denied and the main action were successful. However, in determining the balance of convenience, any economic hardship suffered by applicants could be avoided by passing it on to tobacco purchasers. The only possible public interest in continuing current packaging requirements was that the price of cigarettes for smokers would not increase. This increase would be slight and would carry little weight when balanced against the undeniable public interest in health protection from medical problems attributable to smoking.
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Jurisdiction to stay implementation of regulations pending appeal — Distinction between suspension of and exemption from regulations irrelevant — Tobacco Products Control Act, S.C. 1988, c. 20 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 65.1 — Can. R. 27.

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The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment* , SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act* , R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act* , particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449 , finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter* . The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act* . However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid.

On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment* , SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotogravе cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act* , R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada* , SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act* .

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

15

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

16

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

18 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

19 Chabot J. found that, with respect to s. 2(*b*) of the *Charter* , the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

20 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

21 In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a *valid* act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or

> delay the implementation or enforcement of *valid* legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> . . . . .
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 , 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

22 LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

23 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 , and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

25 Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

26 However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

27 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

28 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter* . Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

29 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

30 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada* .

Supreme Court Act

31

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

32

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

33 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada* , 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

> *97.* ...
>
> > (*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to

facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135 . The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.) . Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

34 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

35 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

36 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594 . The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. *Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court.* I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

37 While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act* , S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms* .

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.

(ii) Compliance with the new regulations will cause irreparable harm.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* , at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores* , Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

53 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* , at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

54 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra* , at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 , at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

57 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.) , the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried *in the sense of a case with enough legal merit* to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

58 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 , the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores* , at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms* , could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 , at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) , at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863 , at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 , at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter* . In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to

assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores* , at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 , at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores* . The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

71 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

72 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.) , per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants* , which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

74 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791 , which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act* , R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304 .

75 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158 , who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub lic interest is equally well served, in the same sense, by any appeal....

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores* , it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is

suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

79 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.) , the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

80 In the course of discussing the balance of convenience in *American Cyanamid* , Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

81 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

82 As indicated in *Metropolitan Stores* , the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

84 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the

interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter* . The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103 , to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

88 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

90 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

91 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

92 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act* . On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores* . However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify

these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

93 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores* :

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo cratically-elected legislatures and are generally passed for the common good, for instance: ... *the protection of public health* .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

94 The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

95 The Regulatory Impact Analysis Statement, in the *Canada Gazette* , Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

96 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

97 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

98 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is

balanced against the undeniable importance of the public interest in health and in the pre vention of the widespread and serious medical problems directly attributable to smoking.

99 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors of record:
Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais* , Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault* , Montreal.
Solicitors for the respondent: *Côté & Ouellet* , Montreal.
Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault* , Toronto.

2000 SCC 57
Supreme Court of Canada

Harper v. Canada (Attorney General)

2000 CarswellAlta 1158, 2000 CarswellAlta 1159, 2000 SCC 57, [2000] 2 S.C.R. 764, [2000] S.C.J. No. 58, [2001] 9 W.W.R. 201, [2001] A.W.L.D. 147, 193 D.L.R. (4th) 38, 234 W.A.C. 201, 271 A.R. 201, 92 Alta. L.R. (3d) 1, J.E. 2000-2262, REJB 2000-20913

Attorney General of Canada v. Stephen Joseph Harper

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Judgment: November 10, 2000 *
Docket: 28210

Counsel: Written submissions by *Graham Garton, Q.C.*, and *Thomas W. Wakeling*, for Applicant.
Written submissions by *Alan D. Hunter, Q.C.*, and *Eric Groody*, for Respondent.

***McLachlin C.J.C, L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.*:**

1 On May 31, 2000, Parliament passed the *Canada Elections Act*, S.C. 2000, c. 9 ("the Act"), imposing limits on third-party spending on advertising in the course of a federal election campaign. The law came into force on September 1, 2000. Our reasons in this application relate solely to the issue of whether an injunction which suspended the enforcement of certain provisions pertaining to third-party spending limits should be stayed. They do not deal with the granting of leave to appeal the injunction order nor any ensuing appeal. They also do not deal with the question of whether the Act is unconstitutional.

2 The respondent Stephen Joseph Harper commenced an action on June 7, 2000 before the Alberta Court of Queen's Bench, seeking a declaration that the spending limits are unconstitutional because they unjustifiably limit the right of free expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The trial commenced on October 2 and adjourned on October 13, after nine days of evidence.

3 On October 22, an election writ was issued, with a polling date of November 27, 2000. Mr. Harper applied to the same trial judge (Cairns J.), who heard the action seeking a declaration that the spending limits are unconstitutional, for an interlocutory injunction restraining the Chief Electoral Officer of Canada and the Commissioner of Canada Elections from enforcing the third-party spending limits, pending the decision in the action. The trial judge granted the injunction ((October 23, 2000), Doc. 0001-09477 (Alta. Q.B.)), and the Alberta Court of Appeal upheld it (2000 ABCA 288 (Alta. C.A.)). The Attorney General of Canada now applies to this Court, seeking leave to appeal from the interlocutory injunction and, in the interim, a stay of the injunction. The application for leave to appeal is granted, by separate order, released concurrently. This leaves the question of whether the injunction restraining the enforcement of the law imposing spending limits should be stayed.

4 In considering whether an injunction should be granted, and by extension whether an injunction should be stayed pending appeal, the Court considers: (i) whether there is a serious issue to be tried; (ii) whether absent an injunction there will be irreparable harm to the individual seeking the injunction; and (iii) the balance of (in)convenience. Without prejudging the appeal, we are satisfied there is a serious issue to be tried. The issue is no less than the constitutionality of provisions of the electoral law passed by the Parliament of Canada which no court has held to be invalid. This is a serious issue not only because the constitutionality of the provisions is challenged, but because it is common ground that the determination of the constitutionality will turn on the application of s. 1 of the *Charter*, which is always a complex factual and legal analysis. We also assume that the provisions in issue may occasion "irreparable harm" to the capacity of third parties to participate as they wish in the election

campaign to the extent of the spending limits on advertising imposed on them. This leaves the third ground, the balance of convenience.

5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose leaf ed.), at para. 3.1220.

6 The trial judge found that the freedom of speech interest raised by the applicant Harper to be of great importance. On the other side of the balance, he found that the Attorney General of Canada had called no evidence on the harm that would result from suspending the operation of the law. In the absence of evidence, he characterized this harm as "notional and unproven unfairness" (para. 35). Accordingly, he found that the balance of convenience favoured the grant of an injunction.

7 We cannot, with respect, agree. This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes: *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124 (S.C.C.); see also *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), *per* Beetz J. at p. 144; *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.). In this case, allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.

8 It may also be noted that, in *Thomson Newspapers Co. v. Canada (Attorney General)*, S.C.C., No. 25593, May 7, 1997 (published in the *Bulletin of Proceedings of the Supreme Court of Canada*, 1997, at p. 882), this Court refused to grant a stay suspending the enforcement of the provisions mandating publication bans on opinion polls set forth in the *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 322.1. In so doing, the Court relied on its previous decision in *Gould*, *supra*. The Court refused the stay even though the ultimate decision found the poll prohibition to be unconstitutional.

9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law — in this case the spending limits imposed by s. 350 of the Act — is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(*b*) right of freedom of expression; indeed, the violation at issue in *RJR-MacDonald Inc.* was of s. 2(*b*). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

10 Again, the trial judge appears not to have applied this principle in weighing the benefits of the law against its impact on free expression. Instead of assuming that the legislation has the effect of promoting the public interest as *RJR-MacDonald Inc.* directs, the trial judge based his conclusion on the fact that the Government " has not adduced any evidence to illustrate unfairness in any of these elections in Canada caused by third-party spending limits" (para. 33). He went on to repeat that the "Government simply asserts that third-party spending limits, if not controlled, may (and that is notional only) impact adversely on the fairness of elections" (para. 34), and moved directly from this to the conclusion that leaving the spending limits in place " would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government" (para. 35). Moreover, the trial judge made no mention of the fact that the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly.

11 Applying the principles enunciated in previous decisions of this Court, and without prejudging the outcome of any appeal from the injunction, we are satisfied that the public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits. To leave the injunction in place is to grant substantial success to the applicant Harper even though the trial has not been completed. Moreover, applying *RJR-MacDonald Inc.*, we must take as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose. Weighing these factors against the partial limitation on freedom of expression imposed by the restrictions, we conclude that the balance of convenience favours staying the injunction granted by the trial judge.

Conclusion

12 We therefore conclude that a stay of the order enjoining the enforcement of s. 350(1), (2), (3) and (4) of the *Canada Elections Act* should be granted.

***Major J.* (dissenting):**

13 The facts that accompany this application by the Attorney General of Canada for a stay of the injunction obtained in Alberta are not in dispute. The chambers judge, relying on the pleadings and the evidence at the trial, faced the concession that the plaintiff Mr. Harper's freedom of expression was restricted by the legislation. Weighed against this was the inability of the Attorney General to demonstrate that the injunction would cause any inconvenience (see (October 23, 2000), Doc. 0001-09477 (Alta. Q.B.), at paras. 34-35 *per* Cairns J.):

> The Government simply asserts that third-party spending limits, if not controlled, may (and this is notional only) impact adversely on the fairness of elections. Yet, it can point to no evidence to illustrate unfairness in the Canadian elections caused by third-party spending.
>
> In my judgment, the spending limits having the deleterious effect of fettering the core freedom of expression and speech as enshrined in the Charter, as they do and as admitted by the Attorney General of Canada, would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government.

14 As described in the reasons of the majority, an injunction should be granted where: (1) there is a serious question to be tried, (2) there is irreparable harm to the person seeking the injunction if no injunction is issued, and (3) the balance of convenience favours an injunction.

15 It is on the determination of the balance of convenience that I disagree with the majority. The chambers judge, who was also the trial judge in the recently concluded trial, was in a unique position to weigh the balance of convenience.

16 The trial judge did not, nor do I, intend the interim injunction to reflect on the validity of the new elections legislation. The question of whether the limits on election spending are constitutional will only be decided once there is a determination on the merits.

17 It is inescapable to me that the balance of convenience tips sharply in favour of the plaintiff. The proposition advanced to counter the obvious inconvenience to Mr. Harper is that legislation generally identified as serving a public interest carries

a *prima facie* assumption of validity. But that presumption should not be conclusive where, as here, it competes against the acknowledged impediment to the plaintiff's free speech unless there is some evidence demonstrating an impediment of a public interest. Here there is none.

18 The chambers judge was careful to note that the interim injunction was just that. He stated that his ultimate disposition may be that the legislation is constitutional. But he could not ignore the evidence produced during the two-week trial to the extent it bore on granting an interim injunction.

19 The interim injunction would safeguard important constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms* and protect the freedom of political speech during a federal election. The law is clear that — in the absence of an error in principle — the trial judge has the discretion, and is entitled to appellate deference.

20 In this application, we are dealing with one of the most valuable forms of speech: political speech. Canadians cherish the unimpeded diffusion of political ideas and opinions, and this Court has long recognized that freedom of expression is "essential to the working of a parliamentary democracy such as ours" (*Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.), *per* Abbott J., at p. 326). Hence we must tread carefully in limiting political speech. It is speech that we recognize as invaluable, given its significance in our democratic process. We should be loathe to interfere with it, especially in the midst of a federal election.

21 I am of the view that the trial judge did not err in applying the three-part test for an injunction in a constitutional context, as set out in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), both cases that the trial judge referred to and relied upon. As stated, I agree with the majority that the first two requirements are met.

22 The third requirement is that the balance of convenience favours granting the injunction. This requirement subsumes the question of what irreparable harm the *defendant* faces. After nine days of trial, there was no evidence before the Alberta Court of Queen's Bench that the injunction would cause any " inconvenience" or "irreparable harm". Nor has the Attorney General in this application referred this Court to any evidence showing what harm would result from the injunction. Instead, the Attorney General states as a conclusion that suspending the spending limits would result in unfairness, and so the legislation must be applied "in the interests of fairness for all".

23 The Attorney General admitted that there was a violation of s. 2(*b*), and offered not a scintilla of evidence showing that the injunction would cause some harm. In this light, the trial judge concluded that the balance of convenience favoured injunctive relief. Given the restriction upon a cherished constitutional freedom and the absence of anything tilting the other way, Cairns J. was entitled to reach this conclusion.

24 I acknowledge that in the majority of cases, it may be acceptable to assume that there is irreparable harm to the public interest when an injunction stops an authority from protecting the public good: *RJR-MacDonald Inc.*, *supra*, at p. 346. But that is an assumption only (as Sopinka and Cory JJ. suggest at p. 349), and it can be overcome when an applicant demonstrates that the injunction itself serves the public interest. In this case, the injunction furthers the *Charter*'s guarantee of freedom of expression, and Mr. Harper has displaced the assumption that the government suffers a greater harm than he does.

25 I find that the suggestion of "irreparable harm" to the government or the public interest is strained and unpersuasive. To date, Canadian federal elections have not been governed by limits on third-party spending. It is difficult to see how the consequences of undergoing one more election without these limits would somehow cause "irreparable harm" to our democratic institutions, particularly since no such harm occurred in past elections. In my view, the public interest favours granting, rather than refusing, the injunction. Dean Cassels is right to suggest that the "public interest" does not belong exclusively to the Attorney General, and I agree with his rejection of the "assumption that only one party speaks for the public interest" (J. Cassels, "An Inconvenient Balance: The Injunction as Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* (1991), at pp. 303-5). The question is: will the injunction serve the public good by protecting constitutional rights? Given the need to protect free speech, particularly during an election, it seems reasonable to require the Attorney General to provide something more than a *pro forma* statement about unfairness. In the absence of anything beyond speculation, and in the face of a serious

denial of *Charter*-protected freedoms, the balance of convenience clearly favours the injunction. I would add that while the Attorney General argues that the public interest is served by seeing the legislation enforced, that argument is countered by the compelling public interest in seeing fundamental *Charter-protected freedoms* upheld: J. Berryman, *The Law of Equitable Remedies* (2000), at p. 51.

26 "Because the granting of an interlocutory injunction is a discretionary matter appellate courts have limited the role of review": Berryman, *The Law of Equitable Remedies, supra*, at p. 37. This Court endorsed the deferential approach in *Metropolitan Stores (MTS) Ltd.*, *supra*, at pp. 154-56. The standard is high; the reviewing court "must not interfere with [the trial judge's exercise of discretion] merely on the ground that the members of the appellate court would have exercised the discretion differently": *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.), *per* Lord Diplock, at p. 1046. To interfere, there must be a clear mistake on the law or the evidence, or some other glaring error. There is no such mistake here.

27 Cairns J. is entitled to appellate deference. He was, in fact, unusually well-placed to grant the injunction. The typical judge faced with this sort of injunction would not have the benefit of having presided over the trial on the merits of the constitutional challenge.

28 It is true, as the majority suggests, that in all but exceptional cases, the effect of democratically enacted legislation should not be suspended before a finding of unconstitutionality or invalidity. *Gould v. Canada (Attorney General)*, [1984] 1 F.C. 1133 (Fed. C.A.), aff'd [1984] 2 S.C.R. 124 (S.C.C.). But this case falls in the narrow category of exceptions. I reach that conclusion for three reasons.

29 First, there is the timing of the challenge. The new *Canada Elections Act*, S.C. 2000, c. 9, was given royal assent on May 31, 2000. The plaintiff's statement of claim was issued within seven days. The legislation would ordinarily have come into force after the November 27 general election, but it was activated, so to speak, by publication of notice in the *Canada Gazette* on September 1, 2000. The Attorney General of Canada introduced this legislation in a manner that virtually sealed it from meaningful constitutional scrutiny before the election. These circumstances demand scrutiny. The prospect arises that governments could pass unconstitutional laws immediately prior to an election and leave affected citizens with no remedy. The state could effectively place its election legislation beyond constitutional scrutiny by virtue of *when* that legislation is enacted. I note that the situation here is unlike that in *Gould*, *supra*, where the impugned provision had been in force for years but was challenged only on the eve of an election.

30 Another compelling factor is that the judge who handled the application for an interlocutory injunction knew the case; he had recently presided over a two-week trial in which the constitutionality of the legislation was debated in great detail. That fact distinguishes this case from *Gould*, *supra*, where the judge who granted the injunction had not heard arguments on the constitutionality of the provisions governing prisoners' voting rights. The fact that the same judge heard both the trial and the application for an injunction here argues in favour of considerable deference to his decision.

31 Finally, there is the nature of the constitutional challenge at issue. The speech that is limited here is political expression. It is the epitome of speech that furthers the aspirations of a democratic society. That expression would be limited at its most important moment, during an election, while the Attorney General offers no evidence that the injunction would cause harm.

32 The majority, at para. 7, accepts the Attorney General's submission that an injunction "effectively grants [Mr. Harper] the final relief that he seeks in the trial still under way." I do not, because the "final" question is the constitutionality of the legislation, and that question cannot be answered in these interlocutory proceedings. In any event, it could equally be said that staying the injunction gives the *government* the final relief it is most concerned about. That argument cuts both ways and does not get us far.

33 This Court, as Professor Roach points out in *Constitutional Remedies in Canada* (loose-leaf ed.), at p. 7 7, has "clearly rejected reliance on a presumption that legislation is constitutional in deciding interlocutory applications". In *Metropolitan Stores (MTS) Ltd.*, *supra*, at p. 124, Beetz J. held that "the presumption of constitutional validity ... is not compatible with the innovative and evolutive character of [the *Charter*]". It could be said that the majority improperly veers toward an automatic presumption of constitutionality.

34 In *RJR-MacDonald Inc.*, at pp. 333-34, Sopinka and Cory JJ. considered the factors that must govern the balancing process:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

I find those words apt. I would deny the application for a stay.

Application granted.

Requête accordée.

Footnotes

* Changes in a corrigendum issued by the court on November 11, 2000 have been incorporated herein.

2013 CAF 126, 2013 FCA 126
Federal Court of Appeal

Gateway City Church v. Minister of National Revenue

2013 CarswellNat 1314, 2013 CarswellNat 3097, 2013 CAF 126, 2013 FCA 126,
[2013] F.C.J. No. 514, 2013 D.T.C. 5100 (Eng.), 228 A.C.W.S. (3d) 285, 445 N.R. 360

Gateway City Church, Applicant and The Minister of National Revenue, Respondent

David Stratas J.A.

Heard: May 07, 2013
Judgment: May 7, 2013
Docket: A-151-13

Counsel: Osborne G. Barnwell, for Applicant
Joanna Hill, for Respondent

***David Stratas J.A.*:**

1 The Gateway City Church applies for an order that, if granted, will prevent the Minister from revoking its charitable status under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). For the reasons set out below, I dismiss the application, with costs.

A. Background

2 The Gateway City Church is registered as a charity under the Act.

3 Recently, the Minister has given notice of her intention to revoke the Church's registration as a charity: Act, subsection 168(1). The Church loses its registration as a charity when the Minister's notice is published in the *Canada Gazette*.

4 In her notice, the Minister alleges that the Church has failed to comply with the Act in several respects:

- Failure to maintain adequate books and records: Act, subsection 149.1(2), paragraph 168(1)(*e*) and section 230;

- Failure to devote all of its resources to its own charitable activities: Act, subsections 149.1(1) and 149.1(2) and paragraph 168(1)(*b*);

- Provision of personal benefits to a proprietor, member, shareholder, trustee or settlor: Act, subsections 149.1(1) and 149.1(2) and paragraph 168(1)(*b*).

5 Where, as here, the charity has not requested the revocation, the publication of the Minister's notice is deferred for 30 days in order to allow the charity to challenge it: Act, paragraph 168(2)(*b*). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172. The Church has filed an objection.

6 The 30 day period can be extended: Act, paragraph 168(2)(*b*).

7 By application brought under Rule 300(*b*) of the *Federal Courts Rules*, the Church seeks an extension until the Minister decides upon the Church's objection, or until this Court determines the appeal from the Minister's decision, whichever is later. In effect, the Church wishes to maintain its charitable status under the Act until the merits of its objection have been determined.

B. A preliminary issue

8 The parties agree that the proper respondent is the Minister of National Revenue, not Her Majesty the Queen in Right of Canada. Therefore, to reflect this, the style of cause shall be amended.

C. The legal test to be applied in this application

9 The parties agree that the Church's application can be granted only if the Church meets the test for the granting of stays and injunctions: *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 114 (F.C.A.) at paragraph 5. The Church must show:

- it has an arguable case against the revocation;
- it will suffer irreparable harm if the revocation is allowed to happen; and
- the balance of convenience lies in its favour.

(*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).)

D. Applying the legal test

(1) Arguable case

10 On the first branch of the threefold test, the Church must establish that its objection raises a serious question to be tried.

11 The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc. c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.) at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). The Church need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR Macdonald*, *supra* at page 337.

12 Given the lowness of this threshold, the Minister does not contest that the Church has met this branch of the threefold test.

(2) Irreparable harm

13 If the Church's registration as a charity is revoked, it will not be able to issue receipts for donations. Future donors will not be able to claim deductions for their donations. The Church says donations will fall off, preventing it from doing essential work for its congregation and the wider community.

14 Such a general assertion is insufficient to establish irreparable harm: *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 (F.C.A.) at paragraph 22. That sort of general assertion can be made in every case. Accepting it as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.

15 General assertions cannot establish irreparable harm. They essentially prove nothing:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert — not demonstrate to the Court's satisfaction — that the harm is irreparable.

(*Stoney First Nation v. Shotclose*, 2011 FCA 232 (F.C.A.) at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 (F.C.A.) at paragraph 31.

16 Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Glooscap*, *supra* at paragraph 31. See also *Dywidag Systems International Canada Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 (F.C.A.) at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (Fed. C.A.) at paragraph 12; *Canada (Superintendent of Bankruptcy) v. MacLeod*, 2010 FCA 84 (F.C.A.) at paragraph 17.

17 In this case, the evidence tendered by the Church falls short in a number of respects:

- The evidence shows that the Church's members seem loyal and have donated much in past years. Much is said about the Church's importance and value to its congregation and the community. Will donors suddenly reduce their donations to zero because they cannot obtain a charitable receipt?

- There is no evidence from donors in the record. It is speculative to conclude that donations will fall off to such an extent that the Church's existence is imperilled.

- Even if donations fall off to some extent, there is no evidence showing how this will affect the Church's overall budgetary position. What is the Church's budgetary position? What assets does it have? What liabilities does it have? Between now and the ultimate determination of the Church's objection or later appeal, what financial events will take place? The record is silent.

- The Church asserts that it will no longer be able to rent facilities for its services and Bible classes. It adds that benevolence assistance to local food banks and singleparent households in need will stop. It says that other beneficial payments it makes will stop. But without information about the financial circumstances of the Church and the size of these expenditures, these assertions cannot qualify as irreparable harm.

18 Irreparable harm must be demonstrated, not just asserted. Demonstration is achieved by supplying particular information that empowers the Court to find the existence of harm that cannot be repaired later. In the record before this Court, there is only assertion, not demonstration.

19 Counsel for the Church fairly conceded that particularity was missing from the evidence the Church tendered. However, he urged the Court to view this in the context of this application — a proceeding brought urgently, with little time to prepare.

20 I accept there was urgency in bringing this application. However, to some extent, the urgency was created by the Church's delay in retaining and instructing counsel.

21 In her notice of intention, the Minister told the Church it had thirty days to apply to this Court for relief. Thirty days was more than enough time for the Church to retain counsel and file evidence disclosing the particular information known to it and readily at hand.

(3) The balance of convenience

22 It is not necessary to consider this branch of the threefold test.

E. Disposition

23 The Church has failed to demonstrate irreparable harm. For this reason, its application must be dismissed, with costs.

Application dismissed.

Most Negative Treatment: Distinguished
Most Recent Distinguished: R. v. Cairenius | 2008 CarswellOnt 3468, 232 C.C.C. (3d) 13, [2008] O.J. No. 2323, 77 W.C.B. (2d) 746 | (Ont. S.C.J., May 30, 2008)

1999 CarswellNB 305
Supreme Court of Canada

New Brunswick (Minister of Health & Community Services) v. G. (J.)

1999 CarswellNB 305, 1999 CarswellNB 306, [1999] 3 S.C.R. 46, [1999] A.C.S. No. 47, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 216 N.B.R. (2d) 25, 244 N.R. 276, 26 C.R. (5th) 203, 50 R.F.L. (4th) 63, 552 A.P.R. 25, 66 C.R.R. (2d) 267, 7 B.H.R.C. 615, 90 A.C.W.S. (3d) 698, J.E. 99-1756, REJB 1999-14250

J.G., Appellant v. The Minister of Health and Community Services, the Law Society of New Brunswick, Legal Aid New Brunswick, the Attorney General for New Brunswick and the Minister of Justice, Respondents and The Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Alberta, the Canadian Bar Association, the Charter Committee on Poverty Issues, the Women's Legal Education and Action Fund, the National Association of Women and the Law, the Disabled Women's Network Canada, the Watch Tower Bible and Tract Society of Canada, Intervenors

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Major, Binnie JJ.

Heard: November 9, 1998
Judgment: September 10, 1999
Docket: 26005

Proceedings: reversing (1997), 145 D.L.R. (4th) 349 (N.B. C.A.); affirming (1995), 131 D.L.R. (4th) 273 (N.B. Q.B.)

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Barry L. Gorlick, Q.C. and *Greg Delbigio* , for Intervenor, Canadian Bar Association.
Arne Peltz and *Martha Jackman* , for Intervenor, Charter Committee on Poverty Issues.
Carole Curtis and *Anne Dugas-Horsman* , for Intervenors, Women's Legal Education and Action Fund, National Association of Women and the Law, and Disabled Women's Network Canada.
W. Glenn How, Q.C. and *André Carbonneau* , for Intervenor, Watch Tower Bible and Tract Society of Canada.

Subject: Family; Constitutional; Civil Practice and Procedure; Human Rights

Headnote

Family law --- Constitutional issues — Constitutional jurisdiction in particular matters — Children in need of protection
Mother's three children were in Minister's custody — Minister applied for extended custody — Mother did not have counsel and was not entitled under existing legal aid program — Mother brought motion for provision of funds or counsel and declaration that legal aid program violated ss. 7 and 15(1) of Charter — Motion was dismissed and mother appealed — Appeal was dismissed and mother appealed again — Appeal allowed — Right to security of person protects both physical and psychological

integrity — State removal of child from parental custody constitutes serious interference with psychological integrity of parent — Effective parental participation at hearing essential for determining best interests of the child — Necessity of representation for parent directly proportional to seriousness and complexity of proceedings and inversely proportional to capacities of parent — Parent's right to fair hearing outweighs relatively modest sums saved by state in limiting legal aid — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 28 — Family Services Act, S.N.B. 1980, c. F-2.2.

Family law --- Children in need of protection — Practice and procedure in custody hearings — General

Mother's three children were in Minister's custody — Minister applied for extended custody — Mother did not have counsel and was not entitled under existing legal aid program — Mother brought motion for provision of funds or counsel and declaration that legal aid program violated ss. 7 and 15(1) of Charter — Motion was dismissed and mother appealed — Appeal was dismissed and mother appealed again — Appeal allowed — Right to security of person protects both physical and psychological integrity — State removal of child from parental custody constitutes serious interference with psychological integrity of parent — Effective parental participation at hearing essential for determining best interests of the child — Necessity of representation for parent directly proportional to seriousness and complexity of proceedings and inversely proportional to capacities of parent — Parent's right to fair hearing outweighs relatively modest sums saved by state in limiting legal aid — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 28 — Family Services Act, S.N.B. 1980, c. F-2.2.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — General

Mother's three children were in Minister's custody — Minister applied for extended custody — Mother did not have counsel and was not entitled under existing legal aid program — Mother brought motion for provision of funds or counsel and declaration that legal aid program violated ss. 7 and 15(1) of Charter — Motion was dismissed and mother appealed — Appeal was dismissed and mother appealed again — Appeal allowed — Right to security of person protects both physical and psychological integrity — State removal of child from parental custody constitutes serious interference with psychological integrity of parent — Effective parental participation at hearing essential for determining best interests of the child — Necessity of representation for parent directly proportional to seriousness and complexity of proceedings and inversely proportional to capacities of parent — Parent's right to fair hearing outweighs relatively modest sums saved by state in limiting legal aid — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 28 — Family Services Act, S.N.B. 1980, c. F-2.2.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — General

Mother's three children were in Minister's custody — Minister applied for extended custody — Mother did not have counsel and was not entitled under existing legal aid program — Mother brought motion for provision of funds or counsel and declaration that legal aid program violated ss. 7 and 15(1) of Charter — Motion was dismissed and mother appealed — Appeal was dismissed and mother appealed again — Appeal allowed — Minority of court found gender equality issues necessarily raised as women and especially single mothers are disproportionately and particularly affected by child protection proceedings — Principles of equality are significant influence on interpreting scope of protection offered by s. 7 — Patterns of relationships within marriage disproportionately lead to women taking responsibility for child care, foregoing economic opportunities and suffering economic deprivation — Issues involving poor parents necessarily affect women disproportionately — Important to ensure principles and purposes of equality guarantee in promoting equal benefit of law taken into account in analysis — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 28 — Family Services Act, S.N.B. 1980, c. F-2.2.

Barristers and solicitors --- Legal aid — Right to legal aid

Mother's three children were in Minister's custody — Minister applied for extended custody — Mother did not have counsel and was not entitled under existing legal aid program — Mother brought motion for provision of funds or counsel and declaration that legal aid program violated ss. 7 and 15(1) of Charter — Motion was dismissed and mother appealed — Appeal was dismissed and mother appealed again — Appeal allowed — Right to security of person protects both physical and psychological integrity — State removal of child from parental custody constitutes serious interference with psychological integrity of parent — Effective parental participation at hearing essential for determining best interests of the child — Necessity of representation for parent directly proportional to seriousness and complexity of proceedings and inversely proportional to capacities of parent — Parent's right to fair hearing outweighs relatively modest sums saved by state in limiting legal aid — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 28 — Family Services Act, S.N.B. 1980, c. F-2.2.

Judges and courts --- Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court — Where issue becoming academic

Mother's three children were in Minister's custody — Minister applied for extended custody — Mother did not have counsel and was not entitled under existing legal aid program — Mother brought motion for provision of funds or counsel and declaration that legal aid program violated ss. 7 and 15(1) of Charter — Motion was dismissed one year after custody hearing was decided — Mother's appeal was dismissed — Mother appealed again — Appeal allowed — Issue was moot — Question of whether parent has right to state-funded legal representation at custody hearing undoubtedly of national importance and evasive of review — Court's discretion exercised to decide case and address legal issues notwithstanding mootness — Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 28 — Family Services Act, S.N.B. 1980, c. F-2.2.

Droit de la famille --- Questions constitutionnelles — Compétence constitutionnelle en certaines matières — Enfants ayant besoin de protection

Ministère ayant la garde des trois enfants de la mère — Ministère a demandé la prorogation de la garde — Mère n'était pas représentée par un avocat et les lignes directrices de l'aide juridique ne lui permettaient pas d'y recourir — Mère a présenté une requête en provision pour frais ou pour obtenir qu'on lui fournisse un avocat et elle a demandé qu'il soit déclaré que le programme d'aide juridique violait les art. 7 et 15(1) de la Charte — Requête a été rejetée et la mère en a appelé — Pourvoi a été rejeté et la mère a formé un nouveau pourvoi — Pourvoi a été accueilli — Droit à la sécurité de la personne protège tant l'intégrité physique que psychologique — Retrait de la garde des enfants par l'État porte gravement atteinte à l'intégrité psychologique du parent — Participation efficace du parent à l'audience est essentielle pour déterminer le meilleur intérêt de l'enfant — Nécessité d'être représenté pour un parent est directement proportionnelle à la gravité et à la complexité des procédures et inversement proportionnelle aux capacités du parent — Droit du parent à une audience juste l'emporte sur les sommes relativement modestes que l'État épargnerait en limitant l'aide juridique — Charte canadienne des droits et libertés, art. 7, 15(1), 28 — Loi sur les services à la famille, L.N.-B. 1980, c. F-2.2.

Droit de la famille --- Enfants ayant besoin de protection — Pratique et procédure dans le cadre d'une audience sur la garde — En général

Ministère ayant la garde des trois enfants de la mère — Ministère a demandé la prorogation de la garde — Mère n'était pas représentée par un avocat et les lignes directrices de l'aide juridique ne lui permettaient pas d'y recourir — Mère a présenté une requête en provision pour frais ou pour obtenir qu'on lui fournisse un avocat et elle a demandé qu'il soit déclaré que le programme d'aide juridique violait les art. 7 et 15(1) de la Charte — Requête a été rejetée et la mère en a appelé — Pourvoi a été rejeté et la mère a formé un nouveau pourvoi — Pourvoi a été accueilli — Droit à la sécurité de la personne protège tant l'intégrité physique que psychologique — Retrait de la garde des enfants par l'État porte gravement atteinte à l'intégrité psychologique du parent — Participation efficace du parent à l'audience est essentielle pour déterminer le meilleur intérêt de l'enfant — Nécessité d'être représenté pour un parent est directement proportionnelle à la gravité et à la complexité des procédures et inversement proportionnelle aux capacités du parent — Droit du parent à une audience juste l'emporte sur les sommes relativement modestes que l'État épargnerait en limitant l'aide juridique — Charte canadienne des droits et libertés, art. 7, 15(1), 28 — Loi sur les services à la famille, L.N.-B. 1980, c. F-2.2.

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Vie, liberté et sécurité — En général

Ministère ayant la garde des trois enfants de la mère — Ministère a demandé la prorogation de la garde — Mère n'était pas représentée par un avocat et les lignes directrices de l'aide juridique ne lui permettaient pas d'y recourir — Mère a présenté une requête en provision pour frais ou pour obtenir qu'on lui fournisse un avocat et elle a demandé qu'il soit déclaré que le programme d'aide juridique violait les art. 7 et 15(1) de la Charte — Requête a été rejetée et la mère en a appelé — Pourvoi a été rejeté et la mère a formé un nouveau pourvoi — Pourvoi a été accueilli — Droit à la sécurité de la personne protège tant l'intégrité physique que psychologique — Retrait de la garde des enfants par l'État porte gravement atteinte à l'intégrité psychologique du parent — Participation efficace du parent à l'audience est essentielle pour déterminer le meilleur intérêt de l'enfant — Nécessité d'être représenté pour un parent est directement proportionnelle à la gravité et à la complexité des procédures et inversement proportionnelle aux capacités du parent — Droit du parent à une audience juste l'emporte sur les sommes relativement modestes que l'État épargnerait en limitant l'aide juridique — Charte canadienne des droits et libertés, art. 7, 15(1), 28 — Loi sur les services à la famille, L.N.-B. 1980, c. F-2.2.

Droit constitutionnel --- Charte des droits et libertés — Nature des droits et libertés — Droit à l'égalité — En général

Ministère ayant la garde des trois enfants de la mère — Ministère a demandé la prorogation de la garde — Mère n'était pas représentée par un avocat et les lignes directrices de l'aide juridique ne lui permettaient pas d'y recourir — Mère a présenté une requête en provision pour frais ou pour obtenir qu'on lui fournisse un avocat et elle a demandé qu'il soit déclaré que le programme

d'aide juridique violait les art. 7 et 15(1) de la Charte — Requête a été rejetée et la mère en a appelé — Pourvoi a été rejeté et la mère a formé un nouveau pourvoi — Pourvoi a été accueilli — Droit à la sécurité de la personne protège tant l'intégrité physique que psychologique — Retrait de la garde des enfants par l'État porte gravement atteinte à l'intégrité psychologique du parent — Participation efficace du parent à l'audience est essentielle pour déterminer le meilleur intérêt de l'enfant — Nécessité d'être représenté pour un parent est directement proportionnelle à la gravité et à la complexité des procédures et inversement proportionnelle aux capacités du parent — Droit du parent à une audience juste l'emporte sur les sommes relativement modestes que l'État épargnerait en limitant l'aide juridique — Charte canadienne des droits et libertés, art. 7, 15(1), 28 — Loi sur les services à la famille, L.N.-B. 1980, c. F-2.2.

Avocats et conseillers juridiques --- Aide juridique — Droit à l'aide juridique

Ministère ayant la garde des trois enfants de la mère — Ministère a demandé la prorogation de la garde — Mère n'était pas représentée par un avocat et les lignes directrices de l'aide juridique ne lui permettaient pas d'y recourir — Mère a présenté une requête en provision pour frais ou pour obtenir qu'on lui fournisse un avocat et elle a demandé qu'il soit déclaré que le programme d'aide juridique violait les art. 7 et 15(1) de la Charte — Requête a été rejetée et la mère en a appelé — Pourvoi a été rejeté et la mère a formé un nouveau pourvoi — Pourvoi a été accueilli — Droit à la sécurité de la personne protège tant l'intégrité physique que psychologique — Retrait de la garde des enfants par l'État porte gravement atteinte à l'intégrité psychologique du parent — Participation efficace du parent à l'audience est essentielle pour déterminer le meilleur intérêt de l'enfant — Nécessité d'être représenté pour un parent est directement proportionnelle à la gravité et à la complexité des procédures et inversement proportionnelle aux capacités du parent — Droit du parent à une audience juste l'emporte sur les sommes relativement modestes que l'État épargnerait en limitant l'aide juridique — Charte canadienne des droits et libertés, art. 7, 15(1), 28 — Loi sur les services à la famille, L.N.-B. 1980, c. F-2.2.

Juges et tribunaux --- Compétence — Compétence des tribunaux supérieurs — Compétence des tribunaux d'appel — Lorsque la question est devenue théorique

Ministère ayant la garde des trois enfants de la mère — Ministère a demandé la prorogation de la garde — Mère n'était pas représentée par un avocat et les lignes directrices de l'aide juridique ne lui permettaient pas d'y recourir — Mère a présenté une requête en provision pour frais ou pour obtenir qu'on lui fournisse un avocat et elle a demandé qu'il soit déclaré que le programme d'aide juridique violait les art. 7 et 15(1) de la Charte — Requête a été rejetée un an après que la décision quant à la garde avait été rendue — Pourvoi de la mère a été rejeté — Mère a formé un nouveau pourvoi — Pourvoi a été accueilli — Débat était contradictoire — Question de savoir si un parent a droit à une représentation juridique défrayée par l'État lors d'une audience en matière de garde est sans aucun doute d'importance nationale et échappant à l'examen des tribunaux — Pouvoir discrétionnaire de la Cour est exercé pour juger de l'espèce et répondre aux questions juridiques malgré leur caractère théorique — Charte canadienne des droits et libertés, art. 7, 15(1), 28 — Loi sur les services à la famille, L.N.-B. 1980, c. F-2.2.

The Minister of Health and Community services was granted custody of the mother's three children for six months and brought an application to extend the custody order for a further six months. The mother was indigent and receiving social assistance. The mother's application for legal aid was denied. The legal aid programs in place in New Brunswick at the time provided funding for permanent guardianship application but not for temporary custody applications or extensions of existing orders. The mother brought a motion for an order directing provision of sufficient funds to cover reasonable fees and disbursements for counsel or for the provision of counsel. She was also seeking a declaration that the rules and policies governing the distribution of domestic legal aid were contrary to s. 15(1) and violated s. 7 of the *Canadian Charter of Rights and Freedoms* . The custody application was heard prior to the determination of the right to paid counsel. The mother was represented in the custody hearing by duty counsel on a pro bono basis. At the custody hearing, the Minister called testimony and presented affidavit evidence from 15 witnesses, including expert psychological reports. The Minister was granted the extension.

The mother's motion was dismissed almost a year later. The motions judge concluded that the failure to provide the mother with legal aid did not violate s. 7 or s. 15(1). The provision of counsel to represent the mother was not found to be essential to a fair trial and the mother's liberty interest would not be violated by the lack of state-funded legal representation. The mother's appeal was dismissed. The majority of the Court of Appeal found that there could be no s. 7 violation if the mother was unrepresented as parental liberty did not fall within the ambit of s. 7 of the *Charter* . The provisions of the *Family Services Act* were found to ensure reasonable compliance with constitutional standards if complied with. The majority found that the court would be exercising a legislative function if it allowed the appeal as it would be involving the courts in the task of both defining the scope of legal aid and the administering of legal aid. The mother appealed.

Held: The appeal was allowed.

Per Lamer C.J.C. (Gonthier, Cory, McLachlin, Major and Binnie JJ. concurring): The mother was represented by counsel at the custody hearing and the custody order has expired. The mother regained custody. The issue has become academic. However, the discretion of the court should be exercised to decide the case and the legal issues which arose in this case should be addressed notwithstanding their mootness. There was an appropriate adversarial context and the appeal was vigorously and fully argued on both sides. The question of whether a parent has a right to state-funded legal representation at a custody hearing is undoubtedly of national importance and one which is evasive of review. The Court is not overstepping its institutional role in deciding this appeal. The analysis of the appeal must proceed on the assumption that the custody hearing had not yet taken place and that the mother would not have been represented by counsel at the hearing. The approach must be prospective, not retrospective.

The Minister's extension application threatened to restrict the mother's right to security of the person guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* . The right to security of the person protects both the physical and psychological integrity of the individual. For a restriction of security of the person to be made out, the impugned action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensitivity. This does not need to rise to the level of nervous shock or psychiatric illness but must be greater than ordinary stress or anxiety. The state removal of a child from parental custody constitutes a serious interference with the psychological integrity of the parent. Profound effects would be felt by both parent and child if separated. Direct state interference into the parent-child relationship through a procedure in which the relationship is subject to state inspection and review is a gross intrusion into a private and intimate sphere. The stigma and distress resulting from a loss of parental status is a particularly serious consequence.

The potential restriction to the mother's right to security of the person would not have been in accordance with the principles of fundamental justice had the custody hearing proceeded with the mother unrepresented by counsel. Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. The parent must have an opportunity to present his or her case effectively for a hearing to be fair. Effective parental participation at the hearing is essential in circumstances where the parent seeks to maintain custody of the child as the judge may be unable to make an accurate determination of the child's best interest if the parent is denied the opportunity to participate effectively. In the circumstances of this case, the mother's right to a fair hearing required that she be represented by counsel. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent. Child custody proceedings are adversarial and the parties are responsible for planning and presenting their cases. Difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in a foreign environment while under significant emotional strain. In proceedings as serious and complex as these, the unrepresented parent would need to possess superior intelligence or education, communication skills and a familiarity with the legal system in order to effectively present his or her case. No evidence suggested that the mother possessed such capacities. The potential s. 7 violation would have been the result of the failure of the government to provide the mother with state-funded counsel under its domestic legal aid program after initiating proceedings.

The *Charter* infringement was not caused by the legislation itself. The legislation clearly indicates that state-funded legal counsel may be provided. The infringement was caused by a decision by the delegated decision-maker not to cover these types of hearings. The additional cost of providing state-funded counsel is insufficient to constitute justification for the restriction and infringement within the meaning of s. 1 of the *Charter* . A parent's right to a fair hearing when the state seeks to suspend such parent's custody of his or her child outweighs the relatively modest sums saved by the state. Leaving the policy intact subject to a discretion vested in the trial judge to order state-funded counsel on a case-by-case basis when necessary to ensure the fairness of the custody hearing would be the least intrusive remedy. The procedure for coming to the determination of necessity would give consideration to the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the parent.

Per L'Heureux-Dubé J. (Gonthier and McLachlin JJ. concurring): Issues of gender equality are necessarily raised in this matter as women and especially single mothers are disproportionately and particularly affected by child protection proceedings. The patterns of relationships within marriage disproportionately lead to women taking responsibility for child care, foregoing economic opportunities in the workforce and suffering economic deprivation as a result. Issues involving poor parents necessarily disproportionately affect women. Principles of equality, guaranteed by both ss. 15 and 28 of the *Charter* , are a significant influence on interpreting the scope of protection offered by s. 7. In considering the s. 7 rights at issue and the principles of fundamental justice that apply to the situation, it is important to ensure that the analysis takes into account the

principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15.

Parental decision-making and other attributes of custody are protected under the liberty interest in s. 7 of the *Charter* . A parent's security of the person will be violated, due to the importance of one's identity as a parent and the serious stigma and psychological stress caused by the removal of a child from the home, if a child is removed from the home because the parent's power to care for him or her is removed. The trial judge did not adequately consider the values of meaningful participation in the hearing affecting the rights of the child or the complexity of this case and the difficulty the mother would face in presenting her case. A trial judge must consider the seriousness of the interests, the complexity of the proceedings and the characteristics of the parent affected in determining whether a parent will be able to participate effectively in the hearing. Trial judges should be attentive to the fact that temporary applications are often part of a process that leads to permanent ones, and it is necessary to consider the seriousness of the proceeding in relation to both the short-term and long-term interests of the parents affected. The length of proceedings, the type of evidence presented, the number of witnesses and complexity and technicality of the proceedings must be important considerations in evaluating the overall complexity of the proceedings. The courts must be particularly careful to avoid including factors in the test relating to the capacity of the parents which may make it more difficult for the parent when presenting her case on the merits. The focus should be on the parent's education level, linguistic abilities, facility in communicating, age and similar indicators.

Le ministre de la Santé et des Services communautaires a obtenu la garde des trois enfants de la mère pour une période de six mois et a demandé une prorogation de l'ordonnance de garde pour une autre période de six mois. La mère était pauvre et recevait de l'aide sociale. Sa demande d'aide juridique a été refusée. Les programmes d'aide juridique qui étaient en vigueur au Nouveau-Brunswick au moment de la demande ne permettaient l'octroi d'une aide financière qu'à l'égard des demandes de garde permanente, et non pour les demandes de garde temporaire ou les demandes de prorogation d'ordonnances de garde déjà rendues. La mère a déposé une requête pour obtenir un jugement ordonnant au ministre de lui accorder les fonds nécessaires pour couvrir les honoraires et débours raisonnables d'un avocat. Elle a en outre sollicité un jugement déclarant que la réglementation et les politiques régissant l'octroi d'une assistance juridique en matière de droit de la famille contrevenaient à l'art. 15(1) de la *Charte canadienne des droits et libertés* et enfreignait l'art. 7 de la Charte. L'audience de la requête relative à la garde a eu lieu avant celle concernant la détermination du droit aux services d'un avocat rémunéré par l'État. Lors de l'audition de la requête concernant la garde, la mère était représentée par un avocat de service qui agissait bénévolement. Lors de l'audition de la requête concernant la garde, le ministère a présenté, sous forme de dépositions orales ou de déclarations assermentées, 15 témoignages, comprenant des rapports psychologiques. La demande de prorogation du ministre a été accordée.

La requête de la mère a été rejetée presque un an plus tard. Le juge saisi de la requête a conclu que le défaut d'avoir octroyer l'aide juridique à la mère ne violait ni l'art. 7 ni l'art. 15(1). Il a estimé qu'il n'était pas essentiel que l'appelante soit représentée par avocat pour que l'audience soit équitable et que l'absence de services d'avocats rémunérés par l'État ne portait pas atteinte au droit à la liberté de la mère. L'appel formé par la mère a été rejeté. La Cour d'appel a conclu, à la majorité, que le fait que la mère ne soit pas représentée par avocat n'enfreignait pas l'art. 7 puisque la liberté parentale n'était pas protégée par l'art. 7 de la Charte. Elle a estimé que les dispositions de la *Loi sur les services à la famille* , dans la mesure où elles étaient appliquées, étaient raisonnablement conformes aux normes constitutionnelles. Les juges majoritaires ont par ailleurs estimé qu'en accueillant l'appel la cour aurait exercé une fonction législative, ce qui aurait constitué une ingérence des tribunaux dans la définition de la portée du régime d'aide juridique et son application. La mère a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Le juge en chef Lamer (les juges Gonthier, Cory, McLachlin, Major et Binnie y souscrivant) : La mère était représentée par avocat lors de l'audition de la requête relative à la garde, l'ordonnance de garde avait pris fin et la mère avait recouvré la garde de ses enfants. La question en litige était devenue purement théorique. La Cour a toutefois jugé qu'elle se devait d'exercer son pouvoir discrétionnaire afin de statuer sur l'affaire et d'examiner les questions juridiques posées même si le pourvoi était devenu théorique. Il s'agissait d'un débat contradictoire, et l'appel a été débattu à fond et avec vigueur par les deux parties. La question de savoir si un père ou une mère a le droit d'être représenté par un avocat aux frais de l'État lors de l'audition d'un litige portant sur la garde d'enfants constituait sans conteste une question d'importance nationale et qui était susceptible d'échapper à l'examen des tribunaux. La Cour n'outrepassait pas son rôle institutionnel en entendant le pourvoi. Il fallait procéder à l'analyse des questions en appel comme si l'audience relative à la garde n'avait pas encore eu lieu et que la mère n'y avait pas été représentée par avocat. L'analyse des questions en litige devait être fait de façon prospective et non rétrospective.

La requête pour prorogation présentée par le ministre menaçait de restreindre le droit de la mère à la sécurité de sa personne garanti par l'art. 7 de la *Charte canadienne des droits et libertés* . Le droit à la sécurité de la personne protège « à la fois l'intégrité physique et psychologique de la personne ». Pour qu'une restriction de la sécurité de la personne soit établie, il faut que l'acte contesté ait des répercussions graves et profondes sur l'intégrité psychologique d'une personne. Il convient de procéder à une évaluation objective des répercussions de l'ingérence de l'État, en particulier de son incidence sur l'intégrité psychologique d'une personne ayant une sensibilité raisonnable. Il n'est pas nécessaire qu'une telle ingérence ait entraîné un choc nerveux ou un trouble psychiatrique, mais ses répercussions doivent être plus importantes qu'une simple tension ou une angoisse ordinaire. Le fait pour l'État de retirer aux parents la garde des enfants constitue une grave ingérence qui porte atteinte à l'intégrité psychologique du père et de la mère. La séparation d'un parent de son enfant aurait des répercussions profondes tant sur l'enfant que sur le parent. L'ingérence directe de l'État dans le lien parent-enfant, par le biais d'une procédure dans laquelle le lien est examiné et contrôlé par l'État, constitue une intrusion flagrante dans un domaine privé et intime. La honte et l'affliction qui résultent de la perte de la qualité de parent constituent une conséquence particulièrement grave.

La restriction potentielle du droit de la mère à la sécurité de sa personne aurait été contraire aux principes de justice fondamentale si elle n'avait pas été représentée par un avocat à l'audience relative à la garde. L'article 7 garantit à chacun des parents le droit à une audience équitable lorsque l'État cherche à obtenir la garde de leurs enfants. Pour qu'une audience soit équitable, le père ou la mère doivent avoir l'occasion de soumettre efficacement leurs prétentions. La participation efficace du parent à l'audience est nécessaire dans le cas où le parent cherche à conserver la garde de son enfant. Si le parent se voit refuser l'occasion de participer efficacement à l'audience, le juge peut se trouver dans l'impossibilité de déterminer avec précision l'intérêt supérieur de l'enfant. Dans les circonstances de la présente affaire, le droit de la mère à une audience équitable exigeait qu'elle soit représentée par un avocat. La nécessité qu'un parent soit représenté par avocat est directement proportionnelle à l'importance et à la complexité de l'instance et inversement proportionnelle aux capacités du parent. Une instance relative à la garde des enfants est une instance contradictoire et les parties sont responsables de la préparation et de la présentation de leur cause. Des questions de preuve compliquées sont souvent soulevées. Le parent doit soumettre des éléments de preuve, procéder au contre-interrogatoire des témoins, formuler des objections et présenter des moyens de défense prévus par la loi dans un contexte qui lui est inconnu, alors qu'il est en proie à une importante tension émotionnelle. Dans des instances aussi importantes et complexes que celle-ci, le parent qui n'est pas représenté par un avocat devrait être doté d'une intelligence ou d'une éducation supérieures, de talents de communicateur et connaître le système juridique pour être en mesure de présenter efficacement sa cause. Aucun élément de preuve n'a été soumis pour démontrer que la mère possédait de tels attributs. La violation possible de l'art. 7 aurait résulté du défaut du gouvernement de fournir à la mère un avocat rémunéré par l'État dans le cadre de son programme d'aide juridique après avoir entamé les procédures.

La contravention à la Charte ne résultait pas de la loi elle-même. Celle-ci prévoit clairement la fourniture des services d'un avocat payé par l'État. La contravention résultait plutôt de la décision prise par un décideur à qui on avait délégué l'application de la loi de ne pas couvrir ce type de procédure. Les coûts supplémentaires qu'engendrerait la prestation de tels services ne sont pas suffisants pour constituer une justification à la restriction et à la contravention au sens de l'art. 1 de la Charte. Le droit d'un parent à une audience équitable dans les cas où l'État cherche à lui retirer la garde de ses enfants l'emporte sur les modestes économies réalisées par l'État. La réparation qui empiéterait le moins serait de ne pas apporter de modification à la ligne de conduite adoptée, sous réserve du pouvoir discrétionnaire dévolu au juge de première instance d'ordonner de façon ponctuelle la fourniture des services d'un avocat rémunéré par l'État lorsqu'une telle mesure est nécessaire pour assurer l'équité d'une audience relative à la garde d'enfants. La procédure visant à déterminer la nécessité tiendrait compte de la gravité des intérêts en jeu, de la complexité de l'instance et des capacités du parent.

Le juge L'Heureux-Dubé (les juges Gonthier et McLachlin y souscrivant) : La présente affaire soulève indubitablement la question de l'égalité des sexes puisque les femmes, et surtout les mères célibataires, sont touchées de façon disproportionnée et particulière par les procédures relatives à la protection des enfants. La tendance des relations vécues dans le cadre du mariage fait en sorte que les femmes assument, de façon disproportionnée, le soin des enfants, qu'elles renoncent à des possibilités d'avancement, sur le plan financier, dans le marché du travail et qu'elles souffrent de dénuement économique, par voie de conséquence. Les questions qui concernent les parents pauvres touchent nécessairement les femmes de façon disproportionnée. Les principes d'égalité garantis par l'art. 15 de même que par l'art. 28 de la Charte ont une grande influence sur l'interprétation de la portée de la protection offerte par l'art. 7. Dans le cadre de l'examen des droits accordés par l'art. 7 qui sont en cause et des principes de justice fondamentale qui s'appliquent à ce cas, il est primordial de s'assurer que l'analyse tienne compte des

principes et des objectifs de la garantie du droit à l'équité en favorisant le bénéfice égal de la protection de la loi et en s'assurant que la loi réponde aux besoins des personnes et des groupes défavorisés que vise à protéger l'art. 15.
Le processus de prise de décisions des parents de même que les autres attributs de la garde sont protégés au nom du droit à la liberté prévu à l'art. 7 de la Charte. Compte tenu de l'importance de son identité en tant que parent, du grave traumatisme et du stress psychologique qui sont causés par le retrait d'un enfant de son foyer, le droit d'un parent à la sécurité de sa personne est enfreint si son enfant est retiré du foyer familial en raison de la suppression du pouvoir du parent d'en prendre soin. Le juge de première instance n'a pas tenu suffisamment compte des valeurs relatives à la participation valable à l'audience touchant les droits de l'enfant ni de la complexité de la présente affaire et des problèmes que rencontrerait la mère dans la présentation de sa cause. Un juge de première instance doit tenir compte de la gravité des intérêts en jeu, de la complexité des procédures et des caractéristiques du parent touché pour déterminer si le parent est apte à participer de façon efficace à l'audience.Les juges devraient tenir compte du fait que les demandes d'ordonnances temporaires font souvent partie d'un processus qui mène à des ordonnances permanentes et qu'ils doivent nécessairement soupeser la gravité des procédures eu égard aux intérêts à court terme et à long terme des parents touchés. La longueur des procédures, le genre d'éléments de preuve soumis, le nombre de témoins, de même que la complexité et le caractère technique des procédures doivent constituer des considérations importantes dans le cadre de l'évaluation de la complexité globale des procédures. Les tribunaux doivent tout particulièrement prendre soin d'éviter d'inclure dans le test des facteurs susceptibles de rendre plus difficile la tâche du parent de présenter sa cause au fond. L'accent devrait être mis sur le niveau d'instruction du parent, ses aptitudes linguistiques, sa facilité de communication, son âge et autres indicateurs du même genre.

Annotation

We have to thank pig-headed, penny-pinching provincial governments like New Brunswick for creating "good" test cases like *New Brunswick (Minister of Health & Community Services) v. G. (J.)* . But it took eleven years for a test case to get to the Supreme Court of Canada. It was April 1988 when the McKenna Liberal government abolished civil legal aid in New Brunswick. Even today, as the court makes clear (at paras. 18 to 23), the New Brunswick legal aid plan is shockingly inadequate. Hundreds of parents have been denied represention over the past decade.

This policy and these facts moved the Supreme Court to hold that the New Brunswick government was under a constitutional obligation to provide state-funded counsel in child protection proceedings, to ensure a fair hearing consistent with s. 7 of the *Charter* . Whether counsel will be required depends upon the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. If counsel is not provided, then a trial judge has the power to order the government to provide state-funded counsel under s. 24(1) of the *Charter* .

Beneath the cautious language can be found two major developments in s. 7 law. First, the court has unanimously extended s. 7 protection into the civil setting, beyond criminal law and beyond "physical liberty". Second, the court has ordered the state to act, to spend money, to provide funding for counsel for a parent before the courts. I want to explore the doctrinal and practical implications of this decision. Whole new issues and arguments have now opened up, in child protection and other fields of civil and family law.

Section 7 Doctrine

For the majority, Chief Justice Lamer uses "security of the person" as the foundation for a parent's claim to protection under s. 7 of the Charter. "State removal of a child from parental custody" has "a serious and profound effect on a person's psychological integrity": the loss of companionship of the child, the "gross intrusion into a private and intimate sphere", the stigmatization as an "unfit" parent, the impact of the loss of parental status upon personal identity. In this holding, the court has extended and reaffirmed much of what was said by La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, 176 N.R. 161, 78 O.A.C. 1 .

But Justice La Forest relied upon "liberty" as the foundation for his s. 7 analysis. Those reasons attracted the support of three Justices in *B. (R.)* : L'Heureux-Dubé, Gonthier and McLachlin JJ. The same trio continue to adhere to those strong views of "liberty", as is made clear in Justice L'Heureux-Dubé's separate concurring judgment. And I would note that, as the author of the dissenting opinion in the New Brunswick Court of Appeal, Justice Bastarache also relied upon the parent's "liberty" interest.

What is clear is that six members of the seven-judge panel were prepared to unite under the "security of the person" heading, to find a potential infringement of s. 7. Left for another day is the scope of "liberty". Lamer C.J.C. makes clear that "s. 7 is not limited solely to purely criminal or penal matters" (para. 65), an important clarification that was not apparent from his narrow opinion in *B. (R.)* .

In future, those using s. 7 for a *Charter* challenge in protection proceedings should now found their arguments upon "security of the person". The same "liberty" points made by La Forest J. in *B. (R.)* can be used as "security" arguments.

Under the heading of "principles of fundamental justice" (in para. 70), Chief Justice Lamer provides a short and telling statement of the law, that is sure to be quoted often:

Thus, the principles of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.

In this case, procedural arguments were made, but there is also substantive content to the principles of fundamental justice, a reminder for counsel looking to challenge protection laws. There is a healthy amount of "substantive" commentary in both judgments in *G. (J.)* that should not be overlooked, especially when read together with *B. (R.)* .

On the procedural point, note that Lamer C.J.C. emphasises not just "fairness" to the parent, but also the greater accuracy in fact-finding and decision-making that comes from effective parental participation in the hearing (at para. 73). For those arguing for fair procedures under s. 7, it is useful to hitch one's arguments to this broader, less self-interested purpose.

Practical implications for legal aid in protection cases

Every legal aid plan in Canada gives top priority on the civil side to representation of parents in protection proceedings. Outside of New Brunswick, the immediate effects of *G. (J.)* will be modest. All plans should review their child protection coverage, though, to make sure they comply with the directives of the Supreme Court. Further, the decision here will serve as a significant bulwark for protection cases against any future cuts to legal aid funding and services.

New Brunswick provided coverage only for "guardianship" hearings, the equivalent of Ontario's Crown wardship or Nova Scotia's permanent care and custody. Mind you, the certificate maximum (inclusive of disbursements) was a paltry $1,000. Coverage was not provided for any other hearing, including any extensions of "custody" orders as in J.G.'s case, what Ontario would call society wardship or Nova Scotia would call temporary care and custody. Chief Justice Lamer sets out three factors to guide the need for counsel: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent. What becomes apparent from his analysis of these "factors" is that counsel will almost always be required in every protection hearing, a view supported by the helpful detailed suggestions of L'Heureux-Dubé J. As her concurring opinion states (at para. 125), in those understated double negatives favoured by judges, "it is likely that the situations in which counsel will be required will not necessarily be rare".

The third factor really foreordains the result in most protection cases. States Lamer C.J.C. (at para. 80):

In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case.

Most parents in protection cases are profoundly disadvantaged - poor, uneducated, often illiterate, and often suffering from disabilities like mental illness, addictions, etc. Essentially, this means that most judges should start from the assumption that all but the most rare parents will require counsel.

The second factor looks to the complexity of the hearing. Lamer C.J.C. recognises that these cases are "effectively adversarial proceedings", but suggests that there may be "simple" cases that don't require counsel. A quick look at modern Canadian protection statutes will demonstrate just how complex these cases are, and just how few hearings are "very short, involve

relatively simple questions of fact and credibility, and have no expert reports" (para. 88). Only in this latter setting might counsel be unnecessary, assuming "superior" parental abilities.

The first factor looks to the seriousness of the interests at stake. The Chief Justice looks to the length of the proposed future separation, considered in light of any period of past separation (para. 77). Here a six-month temporary "custody" order, after a year of separation, was "a significant period of time" for J.G.'s young children. An important point is made by L'Heureux-Dubé J., namely, that temporary orders begin the slow march to permanent wardship (para. 121). I would add here that counsel is also critical at the very first hearing or appearance after an apprehension, where the separation process begins and the tone is set for the rest of the proceeding.

Practically, it will be very rare that a parent can appear without counsel under this three-factor test. A parent would have to be possessed of "superior" skills, the facts would have to be simple with no experts, and the state would have to be asking for only a supervision order. In my years of experience in this field, I can count the number of these cases on one hand, with fingers to spare.

For most legal aid plans, it will be simplest to provide counsel in *all* protection cases for *all* hearings, as is the general practice today. It is not worth the time, cost and delay of legal assessment or court assessment to ferret out the few cases that would not require counsel. Although the Supreme Court has framed the test in neutral terms, to be met by the parent seeking counsel, it is clear that the test leans heavily towards providing counsel in every case. Trial judges will be content to direct the provision of counsel, to assist them in hearing and deciding these difficult cases, and their right-to-counsel decisions will be treated deferentially by appeal courts.

Implications for other civil and family matters

Lamer C.J.C. makes clear that his comments and the remedy of state-funded counsel are limited to child protection proceedings (para. 104). In these proceedings, the state moves directly and as a party to intervene in the parent-child relationship. Obviously, *G. (J.)* should be read closely by legal aid plan administrators, judges and defence counsel for its criminal implications. Here I want to look to the "civil" implications, first for child protection cases, for other family law matters, and then for other civil matters.

The Supreme Court has reaffirmed that "the principles of fundamental justice in child protection proceedings are both substantive and procedural". Elsewhere I and others have canvassed the constitutional issues that can arise in protection proceedings: Thompson, "A Family Law Hitchhiker's Guide to the Charter Galaxy" (1988), 3 C.F.L.Q. 315 at 367-382; "Why Hasn't the Charter Mattered in Child Protection?" (1989), 8 Can.J.Fam.L. 133; "Revenge of the Charter: 'Public' and 'Private' in Family Law" in *1996 National Family Law Program* (Ottawa, 1996); Zylberberg, "Minimum Constitutional Guarantees in Child Protection Cases" (1992), 10 Can.J.Fam.L. 257; Bala and Redfearn, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983), 15 Ottawa L.Rev. 274. Included would be: warrantless apprehension; post-apprehension interim procedures; illegally obtained evidence; maximum time limits on temporary orders; trial within a reasonable time; the breadth and vagueness of the definition of "child in need of protection"; the constitutional limits of any test for permanent wardship; rights of foster parents; rights of children in care; freedom of association as a separate source of constitutional rights.

The Supreme Court will soon hear a case raising constitutional issues surrounding warrantless apprehension, in a case granted leave in October of 1998: *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, 231 N.R. 393 (note), 138 Man. R. (2d) 70 (note), 202 W.A.C. 70 (note) (S.C.C.) , [1998] S.C.C.A. No. 361, respecting the appeal decision reported at (1998), 41 R.F.L. (4th) 291, 167 W.A.C. 315, 126 Man. R. (2d) 315 (C.A.) .

What of conventional "family law" proceedings?

Imprisonment for non-payment of support clearly implicates s. 7's protection of "physical liberty", as I have pointed out previously: Thompson, "Charter Galaxy", above, 383-4; *Wright v. Wright* (October 11, 1990), Doc. Richmond 00388 (B.C. Prov. Ct.) , [1990] W.D.F.L. 1293 , [1990] B.C.J. 2290.

The references to "custody" in *G. (J.)* must be read in the context of child protection "custody" orders under the New Brunswick *Family Services Act* , and not "private" custody. What's distinctive about protection proceedings is the direct involvement of the state as a party. It may be possible to argue for state-funded counsel in "private" custody matters where the state plays a more direct role, e.g. defending Hague Convention applications (where the state has conduct of the proceedings), and some adoption proceedings. See Thompson, "Charter Galaxy", above, 355, for some exceptional U.S. and European cases on right to counsel in such matters.

If the termination of the parent-child relationship implicates s. 7's security of the person, what of the establishment of the parent-child relationship, as in paternity cases? In the United States, paternity cases have attracted much constitutional "liberty" litigation over fair procedures: Thompson, "Charter Galaxy", above, 348-50.

Outside of the family law setting, there are some civil spheres opened up for protection by s. 7 and possible right to state-funded counsel after this decision. Chief Justice Lamer kindly identifies one such case: where the government "can deprive a person of their s. 7 rights to liberty and security of the person, i.e. civil committal to a mental institution" (para. 65). Most legal aid plans do not provide counsel for civil commitment hearings, but that will have to change in light of *G. (J.)* .

More broadly, I believe *G. (J.)* opens up to constitutional litigation the non-provision of a wide range of government benefits and services. In these cases, the denial is by the state, directly, and can have "a serious and profound effect on a person's psychological integrity": the denial or termination of social assistance to someone in need; eviction from public housing; disconnection of monopoly electric or gas service; refusal of necessary medical or hospital services; and, yes, even the denial of legal aid services. Where benefits or services are denied to parents with children and persons with disabilities, a large chunk of the poor population, the s. 7 arguments will be just as powerful as in the child protection field. For poverty lawyers, *G. (J.)* is now the starting point for arguments about procedural — and substantive — "fundamental justice".

Nous devons remercier les gouvernements bornés et radins tel celui du Nouveau-Brunswick, pour avoir présenté un « bon » cas ayant fait jurisprudence, *Nouveau Brunswick (Ministre de la santé & des services communautaires) c. G. (J.)* . Mais il a fallu onze ans avant qu'un tel cas ne se rende jusqu'à la Cour suprême du Canada. C'est en avril 1988 que le gouvernement libéral de McKenna a aboli l'aide juridique en matière civile au Nouveau-Brunswick. Même aujourd'hui, comme la Cour l'affirme clairement (aux par. 18 à 23), le régime d'aide juridique du Nouveau-Brunswick est manifestement inadéquat. Des centaines de parents n'ont pas obtenu d'être représentés au cours de la dernière décennie.

Ce régime et ces faits ont incité la Cour suprême à déclarer que le gouvernement du Nouveau-Brunswick avait l'obligation constitutionnelle de fournir à ses frais un conseiller juridique dans le cadre d'instances en matière de protection de la jeunesse, de manière à assurer une audience juste et conforme à l'art. 7 de la *Charte* . La question de savoir si les services d'un avocat seront requis dépend des intérêts en jeu, de la complexité des procédures et de la capacité des parents. En cas de refus, le juge du procès a le pouvoir d'ordonner au gouvernement de fournir un avocat rémunéré par l'État en vertu du par. 24(1) de la *Charte* .

Sous le langage prudent se trouvent deux développements majeurs relativement à l'état du droit sur l'art. 7. D'abord, la Cour a, unanimement, étendu la protection de l'art. 7 au cadre civil, au-delà du droit criminel et de la « liberté physique ». Deuxièmement, la Cour a ordonné à l'État d'agir, de dépenser des sommes, dans le but de libérer des fonds pour fournir un conseiller aux parents devant les tribunaux. Je désire approfondir les implications doctrinales et pratiques de cet arrêt. Des questions et des arguments nouveaux se posent désormais en matière de protection de la jeunesse ainsi que dans d'autres domaines du droit civil et familial.

La doctrine relative à l'article 7

Rédigeant l'opinion majoritaire, le juge en chef Lamer fonde la réclamation du droit d'un parent à la protection en vertu de l'art. 7 sur la « sécurité de la personne ». « Le retrait de la garde d'un enfant par l'État ... porte gravement atteinte à l'intégrité psychologique du parent »: la perte de la compagnie de l'enfant, « l'intrusion flagrante dans un domaine privé et intime », la stigmatisation des parents comme étant « inaptes », l'impact de la perte du statut parental, lequel est souvent fondamental à l'identité personnelle. Par sa position, la Cour a étendu et confirmé la plupart de ce qu'a écrit le juge La Forest dans l'arrêt *B.*

(R.) c. Children's Aid Society of Metropolitan Toronto (1994), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 R.C.S. 315, 26 C.R.R. (2d) 202, 176 N.R. 161, 78 O.A.C. 1 .

Mais le juge La Forest a fondé son analyse de l'art. 7 sur la « liberté ». Ses motifs ont recueilli l'assentiment de trois juges dans *B. (R.)* : les juges L'Heureux-Dubé, Gonthier et McLachlin. Ces derniers continuent à adhérer à cette vision ferme de la « liberté », tel qu'il ressort clairement de l'opinion rendue séparément par la juge L'Heureux-Dubé. Et j'ajouterais qu'en tant qu'auteur de l'opinion dissidente de la Cour d'appel du Nouveau Brunswick, le juge Bastarache se fonde également sur le droit à la « liberté » des parents.

Ce qui est clair c'est que six des sept juges formant le banc étaient prêts à s'unir sous la bannière de la « sécurité de la personne », pour conclure à une atteinte potentielle à l'art. 7. On a remis l'analyse de la portée de la « liberté » à un autre jour. Le juge en chef Lamer énonce clairement que « l'art. 7 n'est pas limité aux affaires purement criminelles ou pénales » (par. 65), une clarification importante qui n'était pas apparente à la lecture de son opinion, plutôt étroite, dans *B. (R.)* .

À l'avenir, ceux qui utiliseront l'art. 7 dans le cadre d'une contestation en vertu de la *Charte* , lors de procédures en matière de protection, devraient dorénavant fonder leurs arguments sur la « sécurité de la personne ». Les points soulevés par le juge La Forest dans *B. (R.)* relativement à la « liberté » peuvent servir à l'argumentation concernant la « sécurité ».

Sous le titre de « principes de justice fondamentale » (au par. 70), le juge en chef Lamer fournit un court et instructif état du droit, lequel fera très certainement l'objet de nombreuses citations:

En conséquence, les principes de justice fondamentale dans les instances concernant la protection des enfants intéressent autant le fond que la procédure. L'État ne peut retirer au parent la garde de son enfant que si cela s'avère nécessaire pour protéger l'intérêt supérieur de l'enfant, pourvu que cette décision soit prise selon une procédure équitable.

Dans cette affaire, des arguments de nature procédurale ont été soulevés, mais on a également fait face à la substance des principes de justice fondamentale, dont les avocats doivent tenir compte au moment de chercher à contester une loi en matière de protection. Il existe une quantité saine de commentaires substantifs dans les deux jugement *G. (J.)* qui mérite attention, particulièrement lorsque lus en parallèle avec *B. (R.)*).

Relativement à l'aspect procédural, il faut observer que le juge en chef Lamer met l'accent non seulement sur l'« équité » à l'égard du parent, mais aussi sur la précision que l'on gagne au niveau de la recherche factuelle ainsi qu'au niveau de la prise de décision, au moyen de la participation efficace des parents au cours de l'audience (au par. 73). Il peut être utile à ceux qui argumenteront en faveur de procédures équitables en vertu de l'art. 7 de lier une de ses prétentions à cet objet plus large et moins intéressé.

Implications pratiques de l'aide juridique dans le cadre d'affaires en matière de protection

Tous les régimes d'aide juridique au Canada ont comme priorité, dans le domaine civil, d'assurer la représentation des parents dans le cadre de procédures en protection. À l'extérieur du Nouveau-Brunswick, l'effet immédiat de *G. (J.)* sera modeste. Cependant, tous les régimes devront réviser la couverture offerte en matière de protection de l'enfant de manière à s'assurer de satisfaire aux directives de la Cour suprême. En outre, cet arrêt servira, à l'égard des affaires de protection, de rempart contre de futures compressions dans le financement et la prestation de services du régime d'aide juridique.

Au Nouveau-Brunswick, la couverture ne s'appliquait qu'aux audiences portant sur la garde, soit l'équivalent de la tutelle de la Couronne en Ontario, ou de la garde permanente en Nouvelle-Écosse. Par ailleurs, le montant maximum du certificat, incluant les déboursés, atteignait un maigre 1 000 $. La couverture n'était fournie pour aucun autre type d'audiences, même celles découlant d'un prolongement d'une ordonnance de garde, comme c'était le cas dans l'affaire J.G., ce qu'on nommerait en Ontario une « society wardship », ou ce qui constituerait une garde temporaire en Nouvelle-Écosse. Le juge en chef Lamer énonce trois critères destinés à servir de guide au moment de décider de la nécessité de fournir un conseiller: l'importance des droits en cause, la complexité des procédures, et la capacité du parent. Ce qui se révèle apparent à l'analyse de ces critères, c'est que l'assistance d'un conseiller s'avérera presque toujours requise dans chaque audience en matière de protection, point de vue appuyé par les suggestions détaillées et utiles fournies par la juge L'Heureux-Dubé. Tel que cité dans son opinion (au par. 125),

dans une formule utilisant la double négation tant prisée par les magistrats, « il est probable que les cas où la présence d'un avocat sera requise ne seront pas nécessairement rares ».

Le troisième critère aura un effet prédestiné sur le résultat de la plupart des affaires de protection. Le juge en chef Lamer déclare (au par. 80):

Dans des instances aussi importantes et complexes, le parent non représenté devra, en général, être très intelligent ou très instruit, posséder d'excellentes capacités de communication ainsi que beaucoup de sang-froid et bien connaître le système judiciaire pour pouvoir présenter efficacement sa cause.

La majorité des parents dans les affaires de protection sont profondément désavantagés; ils sont souvent pauvres, illettrés, et fréquemment atteint de maladie mentale, toxicomanie, etc. Cela signifie essentiellement que les juges devraient présumer au départ que l'ensemble des parents, à de rares exceptions près, auront besoin d'un avocat.

Le second critère touche la complexité de l'audience. Le juge en chef Lamer reconnaît que ces causes constituent « réellement des instances contradictoires », mais il suggère qu'il peut y avoir des cas simples qui ne requièrent pas d'avocat. Un survol des lois canadiennes en matière de protection démontrera la complexité de ces causes et le fait que très peu de celles-ci peuvent être « très courtes, soulever des questions de fait ou de crédibilité relativement simples et ne pas comporter de rapports d'experts » (par. 88). C'est seulement dans ces derniers cas que le recours à un avocat pourra ne pas s'avérer nécessaire, en assumant que les parents ont des habilités supérieures.

Le premier facteur concerne la gravité des intérêts en jeu. Le Juge en chef étudie la durée de la séparation proposée à la lumière des périodes antérieures de séparation (par. 77). En l'espèce, une ordonnance temporaire de garde de six (6) mois après un an de séparation fut considérée « comme étant d'une durée significative » pour les jeunes enfants de J.G. Un point important établi par la Juge L'Heureux-Dubé est à l'effet que les ordonnances temporaires sont le début d'une longue marche vers la tutelle permanente (par. 121). J'ajouterai que le recours à l'avocat est critique au tout début de l'audience ou de la comparution, après une crainte de partialité, ou au début de la procédure de séparation où est établie l'atmosphère pour le reste de l'audience.

En pratique, il sera très rare qu'un parent puisse se présenter sans avocat en respectant les trois critères du test. Un parent devra posséder des habilités supérieures, le cas devra être simple et ne pas comporter d'expertise, et l'État ne devra demander qu'une ordonnance de supervision. De toutes mes années d'expérience dans ce domaine, je peux compter de tels cas sur les doigts d'une main, avec des doigts en trop.

Pour la plupart des régimes d'aide juridique, il serait plus simple de fournir un avocat dans tous les cas de protection pour toutes les audiences comme le veut la pratique actuelle. Il ne vaut la peine, le coût et le délai de la détermination juridique ou judiciaire de dénicher les quelques cas qui ne nécessiteraient pas l'assistance d'un avocat. Même si la Cour suprême a encadré le test en utilisant des termes neutres, auxquels doivent satisfaire les parents recherchant les conseils d'un avocat, il est clair que le test penche grandement pour la représentation par avocat dans tous les cas. Les juges de procès se contenteront de suggérer la présence d'un avocat pour les aider durant l'audience et pour trancher ces cas difficiles. Leurs décisions concernant l'assistance d'un avocat seront traitées avec déférence par les Cours d'appel.

Implication sur les autres aspects du droit familial et civil

Le Juge en chef Lamer tient des propos clairs et l'utilisation d'avocats financés par l'État est limitée aux cas de protection des enfants (par. 104). Dans ces procédures, l'État devient directement une partie qui intervient dans la relation parent-enfant. Évidemment, *G. (J.)* devrait être lu attentivement par les administrateurs des régimes d'aide juridique, les juges et les avocats de la défense pour ses implications en droit criminel. En l'espèce, je veux analyser les implications en droit civil, premièrement pour les cas de protection de l'enfant, pour les autres cas en droit familial et ensuite pour les autres affaires de droit civil.

La Cour suprême a réaffirmé que « les principes de justice fondamentale dans les cas de protection de l'enfant relèvent à la fois du droit substantif et procédural ». Ailleurs, j'ai analysé avec d'autres les aspects constitutionnels qui peuvent émaner des cas de protection: « A Family Law Hitchhiker's Guide to the Charter Galaxy », (1988), 3 C.F.L.Q. 315 at 367-382; «

Why Hasn't the Charter Mattered in Child Protection? » (1989), 8 Can.J.Fam.L. 133; « Revenge of the Charter: "Public" and "Private" in Family Law » dans *1996 National Family Law Program* (Ottawa, 1996); Zylberberg, « Minimum Constitutional Guarantees in Child Protection Cases » (1992), 10 Can. J. Fam. L. 257; Bala et Redfearn, « Family Law and the "Liberty Interest": Section 7 of the Canadian Charter of Rights » (1983), 15 Ottawa L.Rev. 274. Incluse serait la crainte de partialité injustifiée; la crainte de partialité postérieure aux procédures intérimaires; la preuve obtenue illégalement; les limites de temps maximums des ordonnances temporaires; le procès à l'intérieur d'un délai raisonnable; la portée et l'imprécision des définitions de « l'enfant qui a besoin de protection »; les limites constitutionnelles de tout test pour la garde permanente; le droit des parents adoptifs; le droit des enfants sous soins; la liberté d'association en tant que source séparée des droits constitutionnels.

La Cour suprême entendra bientôt un cas soulevant les questions constitutionnelles entourant la crainte de partialité injustifiée, dans la cause dont l'autorisation de pourvoi a été accordée au mois d'octobre dernier: *Winnipeg Child & Family Services (Central Area) c. W. (K.L.)*, 231 N.R. 393 (note), 138 Man. R. (2d) 70 (note), 202 W.A.C. 70 (note) (C.S.C.) , (1998) S.C.C.A. no 361, concernant l'appel d'une décision publiée à (1998), 41 R.F.L. (4e) 291, 167 W.A.C. 315, 126 Man. R. (2d) 315 (C.A.) .

Qu'en est-il des procédures conventionnelles en « droit de la famille »? L'emprisonnement pour le défaut de payer la pension alimentaire implique la notion énoncée à l'art. 7 concernant la protection de « la liberté physique », tel que mentionné précédemment: « Charter Galaxy », supra, à 383-4; *Wright c. Wright* (11 octobre 1990), no Richmond 00388 (C. prov. C.B.), [1990] W.D.F.L. 1293 , [1990] B.C.J. 2290.

Les références à la « garde » dans *G. (J.)* doivent être lues dans le contexte de la protection de l'enfant dans les ordonnances de garde sous la *Loi sur les services familiaux* du Nouveau-Brunswick et non ceux de la garde « privée », ce qui est particulier des procédures de protection est l'implication directe de l'État en tant que partie. Il peut être possible de plaider en faveur d'un avocat rémunéré par l'État dans les cas de garde « privée » lorsque l'État joue un rôle plus direct, i.e.: l'application de la convention de la Haye (où l'État a la conduite des procédures) et quelques procédures d'adoption. Voir Thompson, « Charter Galaxy », supra, 355, pour des cas exceptionnels américains et européens au droit à l'avocat lors de telles causes.

Lorsque la fin de la relation parent-enfant implique les notions de sécurité de la personne et de l'art. 7, qu'en est-il de l'établissement de la relation parent-enfant telle que dans les affaires de paternité? Aux États-Unis, les cas de paternité ont attiré plusieurs litiges concernant la « liberté » constitutionnelle relativement aux procédures équitables: Thompson, « Charter Galaxy », supra, 348-50.

Hors les domaines du droit de la famille, il y a quelques sphères du droit civil où le droit à la protection édicté à l'art. 7 pourrait permettre, depuis cette décision, d'obtenir un avocat rémunéré par l'État. Le Juge en chef Lamer identifie avec égard un tel cas: lorsque « l'État peut priver un individu du droit à la liberté et à la sécurité de la personne garanti à l'article 7, par exemple l'internement dans un établissement psychiatrique » (par. 65). La plupart des programmes d'aide juridique ne prévoient pas le droit à l'avocat pour les cas de procédures relatives aux incarcérations civiles, mais cela devra être modifié à la lumière de la décision *G. (J.)* .

De façon générale, je crois que *G. (J.)* ouvre la porte à la contestation constitutionnelle du refus de fournir un grand nombre de services et prestations gouvernementales. Dans ces cas, le refus émane directement de l'État et peut avoir « un impact sérieux et profond sur l'intégrité psychologique d'une personne »: le refus ou l'arrêt de l'assistance sociale à quelqu'un dans le besoin; l'éviction d'un logement public, la coupure des services de monopole de gaz et d'électricité, le refus d'offrir les soins hospitaliers et médicaux nécessaires; et, bien sûr, même le refus du service d'aide juridique. Lorsque les bénéfices ou les services sont refusés aux parents et aux individus ayant des incapacités, lesquels représentent une partie importante de la population défavorisée, les arguments relatifs à l'art. 7 seront tout aussi puissants que dans les domaines de protection de l'enfant. Pour les avocats traitant de cas de pauvreté, *G. (J.)* constitue le point de départ d'arguments concernant la procédure et la substance de la « justice fondamentale ».

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s. 1 — considered

s. 2 — considered

s. 2(b) — considered

s. 7 — considered

s. 10 — considered

s. 10(b) — referred to

s. 11(b) — referred to

s. 11(d) — referred to

s. 15 — considered

s. 15(1) — considered

s. 24(1) — considered

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s. 1 "best interests of the child"/"intérêt supérieur de l'enfant" — considered

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s. 53(2) — considered

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s. 12(14) — considered

s. 24 — considered

s. 24(1) — considered

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s. 15 — considered

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Legal Aid Regulation — Legal Aid Act, N.B. Reg. N.B. 84-112

Generally

APPEAL by mother from judgment reported at (1997), 145 D.L.R. (4th) 349, 187 N.B.R. (2d) 81, 478 A.P.R. 81 (N.B. C.A.) dismissing mother's appeal from decision reported at (1995), 131 D.L.R. (4th) 273, 171 N.B.R. (2d) 185, 437 A.P.R. 185 (N.B. Q.B.) dismissing mother's motion regarding right to state-funded legal counsel.

POURVOI formé par la mère à l'encontre de l'arrêt publié à (1997), 145 D.L.R. (4th) 34, 187 N.B.R. (2d) 81, 478 A.P.R. 81 (C.A. N.-B.) rejetant le pourvoi de la mère à l'encontre de la décision publiée à (1995), 131 D.L.R. (4th) 273 (B.R. N.-B.) rejetant la requête de la mère pour obtenir le droit à des services d'avocats rémunérés par l'État.

***Lamer C.J.C.* (*Gonthier, Cory, McLachlin, Major* and *Binnie JJ.* concurring):**

1 This case raises for the first time the issue of whether indigent parents have a constitutional right to be provided with state-funded counsel when a government seeks a judicial order suspending such parents' custody of their children. It comes before the Court as a result of Legal Aid New Brunswick's decision not to provide legal aid to the appellant after the Minister of Health and Community Services of New Brunswick sought to extend an order granting the Minister custody of the appellant's three children for an additional six months. The decision not to provide the appellant with legal aid was made pursuant to a policy in force at the time of her application which stipulated that no legal aid certificates would be issued to respondents in custody applications made by the Minister of Health and Community Services.

2 I have concluded that the government of New Brunswick was under a constitutional obligation to provide the appellant with state-funded counsel in the particular circumstances of this case. When government action triggers a hearing in which the interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. Where the government fails to discharge its constitutional obligation, a judge has the power to order the government to provide a parent with state-funded counsel under s. 24(1) of the *Charter* through whatever means the government wishes, be it through the Attorney General's budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place.

I - Factual Background

3 The appellant's three young children were placed in the care of the Minister of Health and Community Services of New Brunswick on November 12, 1993. On April 28, 1994 the Minister obtained an order under Part IV of the *Family Services Act* , S.N.B. 1980, c. F-2.2, granting him custody of the children for a period of up to six months. The appellant was not represented by counsel at the hearing, although she did have the assistance of a friend who did not have any legal training.

4 By notice of application served on the appellant on October 24, 1994, the Minister sought an extension of the order for a further period of up to six months. On October 27, 1994, at the initial appearance of the appellant, duty counsel appointed by the Minister of Justice to act on her behalf advised the court that the appellant intended to challenge the temporary custody application and therefore required a full hearing of the matter.

5 The appellant, who was indigent and receiving social assistance at the time, applied to Legal Aid New Brunswick for legal aid on November 1, 1994 and was advised the next day that her application was denied on the grounds that the proceeding involved a *custody application* , as opposed to a *guardianship application* by the Minister. At that time, custody applications were not covered under the legal aid guidelines; legal aid certificates were available only for guardianship applications.

6 On November 2, 1994, the appellant brought a motion for an order directing the Minister to provide her with sufficient funds to cover reasonable fees and disbursements of counsel for the purposes of preparing for and representing her in the custody proceedings or in the alternative, that either Legal Aid New Brunswick or the Attorney General of New Brunswick provide her with counsel. She also sought a declaration that the rules and policies governing the distribution of Domestic Legal Aid, as they differentiated between applications for guardianship and applications for custody orders (or their extension), were contrary to s. 15(1) of the *Charter* . Subsequently, the motion was amended to include relief for a violation of s. 7 of the *Charter* .

7 November 3, 1994 was set aside to hear the motion. At the request of the Attorney General, an adjournment was granted until December 12, 1994. The motions judge, Athey J., also requested that the parties present their arguments by way of written brief.

8 In the week preceding the new hearing date, Athey J. advised counsel that she would be unable to determine the issue of the right to paid counsel prior to the date set for the custody application. It was agreed by counsel that the best interests of the children would be served by proceeding with the custody hearing on the originally scheduled date. Mr. Christie, who had been appointed duty counsel for the appellant and relieved of his role on November 8, 1994, agreed to represent the appellant at the

custody hearing *pro bono* , in accordance with the highest standards of the profession. The parties also agreed that the motion would not be considered moot by virtue of Mr. Christie's representation of the appellant at the hearing.

9 The custody hearing was held December 19, 20 and 21, 1994. Athey J. granted an extension of the custody order on January 3, 1995. At the hearing, the Minister of Health and Community Services called testimony and presented affidavit evidence from 15 witnesses, including expert psychological reports. The Minister of Justice provided counsel for the Minister of Health and Community Services and, at the request of the court pursuant to s. 7(*b*) of the *Family Services Act* , the Attorney General provided counsel for the appellant's children. Mr. Danny Vezina, the father of one of the children, hired counsel to represent him.

10 In June of 1995, the children were returned to the care of the appellant. On December 15, 1995, over a year after the appellant's motion was brought, it was dismissed by Athey J. The appellant was granted leave to appeal. Her appeal was dismissed by the New Brunswick Court of Appeal on March 14, 1997.

II - The Legislative Scheme

11 The relevant sections of the *Family Services Act* are as follows:

> **1.** ...
>
> "best interests of the child" means the best interests of the child under the circumstances taking into consideration
>
> (*a*) the mental, emotional and physical health of the child and his need for appropriate care or treatment, or both;
>
> (*b*) the views and preferences of the child, where such views and preferences can be reasonably ascertained;
>
> (*c*) the effect upon the child of any disruption of the child's sense of continuity;
>
> (*d*) the love, affection and ties that exist between the child and each person to whom the child's custody is entrusted, each person to whom access to the child is granted and, where appropriate, each sibling of the child;
>
> (*e*) the merits of any plan proposed by the Minister under which he would be caring for the child, in comparison with the merits of the child returning to or remaining with his parents;
>
> (*f*) the need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity; and
>
> (*g*) the child's cultural and religious heritage;
>
> 53**(2)** When disposing of an application under this Part the court shall at all times place above all other considerations the best interests of the child.

12 The relevant sections of the *Legal Aid Act* , R.S.N.B. 1973, c. L-2, are as follows:

> **12** (1) Subject to the directions of the Provincial Director and policies established by the Law Society, an area director may issue legal aid certificates authorizing legal aid for proceedings and matters preliminary to anticipated proceedings
>
> (*a*) in respect of an offence under an Act of the Parliament of Canada or in respect of the *Extradition Act* , chapter E-21 of the Revised Statutes of Canada, 1970 or the *Fugitive Offenders Act* chapter F-32 of the Revised Statutes of Canada, 1970,
>
> (*b*) in respect of an offence under an Act of the Legislature,
>
> (*c*) before an administrative tribunal established by an Act of the Legislature or of the Parliament of Canada,
>
> (*d*) in bankruptcy,

(*e*) under the *Divorce Act* , chapter D-8 of the Revised Statutes of Canada 1970, or the *Divorce Act, 1985* , chapter 4 of the Statutes of Canada, 1986,

(*f*) other than those covered in paragraphs (a) to (e), in The Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Provincial Court, The Probate Court of New Brunswick, the Supreme Court of Canada or the Federal Court of Canada, and

(*g*) of an appellate nature in respect of matters and proceedings described in such of paragraphs (a) to (f) as are in force.

12 (14) Where the Law Society is of the opinion that the Legal Aid Fund is in danger of being depleted, it may, with the approval of the Minister, issue directions to the Provincial Director limiting the providing of legal aid in matters included in paragraphs (1)(c) to (g) and subsection (2).

24 (1) Notwithstanding any other provision of this Act or the regulations, the Minister may establish and administer a program to provide legal aid for persons for proceedings and matters preliminary to anticipated proceedings

(*a*) under the *Divorce Act* , (Canada)

(*b*) other than those covered in paragraphs 12(1)(a) to 12(1)(e) in The Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Supreme Court of Canada or the Federal Court of Canada, and

(*c*) of an appellate nature in respect of matters and proceedings described in paragraphs (a) and (b).

13 The relevant sections of the *Charter* are as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter* , have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

14 To better understand both the factual context and the issues raised in this appeal, it may prove helpful to briefly review the Domestic Legal Aid program in New Brunswick. The statutory scheme and development of domestic legal aid in New Brunswick was ably described by both Athey J. in her reasons and by the parties, and I borrow from their accounts in what follows.

A. The Statutory Scheme

15 Under the *Legal Aid Act* , the Law Society is authorized to establish a plan known as Legal Aid New Brunswick, funded by both the government and the Law Foundation of New Brunswick. This plan is administered by the Law Society through the Provincial Director, who is appointed by the Law Society and is subject to its directions in all matters of policy and administration. The Law Society is responsible for establishing policies and regulations governing the administration of the plan. The Provincial Director in turn administers the plan in accordance with the regulations and policies established by the Law Society and directs the Area Directors concerning the performance of their duties.

16 Section 12(1) of the *Legal Aid Act* sets out the various judicial and administrative proceedings, both civil and criminal, which are eligible to receive legal aid certificates issued under the Act, subject to policies established by the Law Society and the directions of the Provincial Director. Pursuant to s. 12(14), where the Law Society is of the opinion that the Legal Aid Fund is in danger of being depleted, it may, with the approval of the Minister of Justice, issue directions to the Provincial Director

limiting the provision of legal aid in certain matters. Among the matters in respect of which the Law Society is authorized to limit the provision of services are custody applications.

17 In 1993, the *Legal Aid Act* was amended to allow the Minister of Justice to establish and administer a program to provide domestic legal aid through the addition of Part II of the Act. Prior to that time, the Law Society and Legal Aid New Brunswick had exclusive jurisdiction over the provision of domestic legal aid and provided a limited service pursuant to the authority conferred by s. 12. Under s. 24(1) the Minister of Justice was granted the authority to establish a legal aid program notwithstanding any other provision of the Act or regulations, although the scope of this program is limited to civil matters. The result is a situation in which there is concurrent jurisdiction under the *Legal Aid Act* over the provision of domestic legal aid. As a matter of practice, however, domestic legal aid is provided almost exclusively by the Minister of Justice. One notable exception is guardianship applications, which are only covered by Legal Aid New Brunswick. Unlike Legal Aid New Brunswick, which uses a certificate system, the Minister of Justice operates a "staff model" of delivery whereby the Minister directly employs or enters into contracts with persons for the provision of legal aid.

B. The Development of the Domestic Legal Aid Program

18 In June 1988, the New Brunswick Law Foundation provided a grant to the Law Society to implement a domestic legal aid scheme and offer limited duty counsel service in Family Court. Certificates were only to be issued to applicants in cases where there were allegations against the applicant's spouse of spousal abuse, sexual abuse of the applicant's children, or "snatching" of children from the custodial parent. No certificates were to be issued to respondents to defend such allegations.

19 In December 1988, the Law Foundation agreed with the Law Society's request to expand the program to include parents subject to guardianship applications, but not custody applications by the Minister of Health and Community Services. In April 1989, the program was further expanded when the province of New Brunswick agreed to match the Law Foundation grant and double the budget of the Domestic Legal Aid program to $500,000.

20 Budgetary restraints necessitated a reduction in Domestic Legal Aid services in December 1991. On December 9, 1991, the Council of the Law Society, after having been made aware of the financial state of the program, decided that as of December 16, 1991 and until further notice certificates would only be issued for family violence and guardianship applications. In adopting this policy, the Law Society purported to act under the authority of s. 12(14).

21 In April 1993, the Domestic Legal Aid program underwent a major overhaul which significantly reduced the Law Society's involvement in the provision of domestic legal aid. With the addition of Part II of the Act, the bulk of domestic legal aid came under the direction of the Minister of Justice, which expanded the Unified Family Court program to provide more comprehensive socio-legal services.

22 Under the program offered by the Minister of Justice, everyone who needs counsel for the purposes of support orders is provided with the services of the Family Solicitor, who is paid by the Minister of Justice to provide legal services offered by the program. If there are allegations of abuse, a party will be able to use the services of the Family Solicitor for all legal matters that may arise between the parties, including custody, support, and divorce proceedings. The Minister also provides a limited duty counsel service, available to respondents on the day of their first appearance in Family Court proceedings initiated by the Crown. Mr. Christie was appointed duty counsel for the appellant pursuant to this aspect of the plan.

23 The Minister of Justice's program does not cover either guardianship or custody applications initiated by the Minister of Health and Community Services. This decision was made in order to avoid any potential conflicts of interest for Family Solicitors, who would be forced to act against the government while being paid by the Minister of Justice. In circumstances where the Minister of Health and Community Services applies for a permanent order of guardianship the provision of legal assistance is shifted to Legal Aid New Brunswick, which provides a legal aid certificate covering representation up to a limit of $1,000 to a qualified applicant. Prior to September 22, 1997 and at the time this case was initially heard, no legal aid was provided by either Legal Aid New Brunswick or the Minister of Justice to respondents in custody applications, except for the advice of duty counsel on the day of the first appearance. Since that time Legal Aid New Brunswick has adopted a new policy

under which a legal aid certificate will be provided for the first custody hearing. Subsequent hearings for the extension of the original custody order, such as the one which is the subject of the present appeal, are still not eligible for a certificate, nor are they covered by the Minister of Justice's program.

III - Judgments Below

A. New Brunswick Court of Queen's Bench (1995), 171 N.B.R. (2d) 185 (N.B. Q.B.)

24 Although the Minister's application had been heard and a determination made, counsel had agreed prior to the custody application that the appellant's motion to obtain state-funded counsel would not be considered moot if Athey J. was unable to decide the issue prior to the date set for the custody application. She therefore exercised her discretion to decide the motion.

25 Athey J. dismissed the appellant's s. 15 claim. Although she found that the legal aid system in New Brunswick did not provide respondents to ministerial applications for custody orders or extensions of those orders the same benefits granted to respondents to applications for guardianship orders, she concluded that the distinction between these two groups of respondents was not based on irrelevant personal characteristics enumerated in s. 15 or on any analogous grounds.

26 Turning to s. 7, Athey J. found that the appellant's liberty interest was engaged by the state when it removed her children from her care. She based her conclusion on La Forest J.'s decision in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.) , where, in writing for three other justices, he held at para. 83 that "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent".

27 Athey J. then considered whether the appellant would have been deprived of her right to liberty in accordance with the principles of fundamental justice were she unrepresented at the custody hearing. She referred again to La Forest J.'s reasons in *B. (R)* . where he held at para. 88 that

> [t]he protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure.

She also cited Wilson J.'s judgment in *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 (S.C.C.) , for the proposition that fundamental justice includes the notion of procedural fairness articulated by Fauteux C.J. in *R. v. Duke*, [1972] S.C.R. 917 (S.C.C.) .

28 Applying these principles to the facts of this case, Athey J. concluded that there was no general right to paid counsel in a custody hearing because, in her opinion, it could not be said that parents can never adequately state their case in the absence of counsel, that any presumption to that effect should exist, or that the representation of parents by counsel is always essential to a fair trial. With respect to the appellant's case in particular, Athey J. held that there had been no suggestion that the appellant lacked the capacity to understand the allegations made by the Minister or to communicate her position to the Court. She found that provision of counsel to represent the appellant was not essential to a fair trial. Therefore, she concluded that the appellant's liberty interest would not be violated by the lack of state-funded legal representation.

B. Court of Appeal (1997), 187 N.B.R. (2d) 81 (N.B. C.A.)

(1) Hoyt C.J.N.B., Ayles and Turnbull JJ.A. for the majority

29 The majority of the Court of Appeal began by noting that the case was moot because the custody application had been determined. Nevertheless, following *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.) , they exercised their discretion to hear the case, given the importance of the issue.

30 The majority found that there could be no s. 7 violation in this case if the appellant were unrepresented at the custody hearing because parental liberty does not fall within the ambit of s. 7 of the *Charter* . In reaching this conclusion, the majority

relied on my reasons in *B. (R.)* where I held at para. 22 that "s. 7 was not designed to protect even fundamental individual freedoms if those freedoms have no connection with the physical dimension of the concept of 'liberty'". Acknowledging the differing views in the Supreme Court in that case over the extent of the liberty interest protected by s. 7, they noted that only four members of the Court found a parental liberty interest, and that my reasons should be followed, at least until a majority of this Court rules to the contrary.

31 The majority also noted that the *Family Services Act* does not prohibit parents from retaining and instructing legal counsel. Parents are entitled to (1) be present at and participate in the hearing, with or without counsel, (2) hear all the evidence and cross-examine witnesses and, (3), present evidence and make other representations to the court. The majority found that the provisions of the Act, if complied with, ensure reasonable compliance with constitutional standards.

32 Finally, the majority held that the court would be exercising a legislative function if it allowed the appeal because it would be involving the courts in the task of both defining the scope of legal aid and administering it on an *ad hoc* basis. They found that the courts have heretofore refused to recognize an entitlement to state-funded counsel, citing in particular this Court's decision in *R. v. Prosper*, [1994] 3 S.C.R. 236 (S.C.C.) .

33 The majority concurred with Bastarache J.A.'s (as he then was) reasons for finding that there was no s. 15 violation in this case.

(2) Bastarache J.A. in dissent (Ryan J.A. concurring)

34 Bastarache J.A. rejected the appellant's s. 15 argument. He held that it was clear that the distinction drawn between indigent persons facing custody applications and indigent persons facing guardianship applications was not based on any particular personal characteristics. Consequently, no discrimination contrary to s. 15 had been established.

35 With respect to s. 7, Bastarache J.A. noted that there was no clear majority opinion of the Supreme Court as to whether the right to liberty in s. 7 includes parental rights. Nevertheless, he agreed with La Forest J.'s reasons in *B. (R.)* that the historical and social context applicable to constitutional interpretation reinforces the recognition of a parental liberty interest.

36 In reviewing the case law on the requirements of fundamental justice, Bastarache J.A. found that the right to funded counsel had not been considered outside the larger question of the right to a fair trial in the criminal law context. After considering a number of cases, including *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) , he concluded that s. 7 does not guarantee a general right to funded counsel, but requires the provision of paid counsel in order to guarantee a fair trial in serious and complex cases where the accused is impecunious and has been refused assistance by Legal Aid.

37 Outside the area of criminal law, Bastarache J.A. considered *Howard v. Stony Mountain Institution, Presiding Officer of Inmate Disciplinary Court*, [1984] 2 F.C. 642 (Fed. C.A.) , a parole board case, which he relied upon for the proposition that the matter of providing counsel is not discretionary, but a matter of right where the circumstances are such that a fair trial cannot be held without legal representation. He then considered *Children's Aid Society of Ottawa-Carleton v. T. (M.)* (December 8, 1995), Doc. Ottawa 21446/93 (Ont. Gen. Div.) , a child custody case, in which Desmarais J. applied *Howard* and concluded that an absence of counsel had rendered the trial ineffectual because a parent had difficulty presenting her case, did not understand the rules of evidence and had offered self-incriminating evidence.

38 In light of his review of the case law, Bastarache J.A. concluded that "the trial judge erred in finding that Ms. G could assume her own defence in the given proceedings without sacrificing her right to a fair trial" (p. 139). In reaching this conclusion, he noted that the proceedings were adversarial in nature, that the appellant's conduct was being examined and the findings of the court would create a stigma similar to that of a finding of guilt in some criminal prosecutions. The appellant was destitute, receiving welfare, and "not seen to be very rational" (p. 139). All other parties were represented by counsel. The proceedings were long and complex, and the matter was very emotional. Moreover, it was important that the appellant's views and explanations be well understood by the court in order to determine the best interests of the children.

39 Bastarache J.A. held that the failure to provide the appellant with legal aid could not be saved by s. 1. He would have allowed the appeal and awarded the appellant her fees and disbursements, determined by the Registrar of the court according to the Legal Aid Tariff, and payable by the Minister of Justice.

IV - Issues

40 On April 9, 1998 the following constitutional questions were stated:

> Question 1: In the circumstances of this case, did the failure of the *Legal Aid Act* , R.S.N.B. 1973, c. L-2, or the government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act* , S.N.B. 1980, c. F-2.2, constitute an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms* ?
>
> Question 2: If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms* ?

V - Analysis

A. Mootness

41 As a preliminary matter, I will address the issue of mootness. A moot case is one in which a decision of the court "will not have the effect of resolving some controversy which affects or may affect the rights of the parties": see *Borowski* , *supra* , at p. 353. As a general rule, the Court will not decide moot cases. However, the Court may exercise its discretion to decide a moot case in certain circumstances. In *Borowski* , Sopinka J. set out the following test at p. 353:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case.

42 There can be little doubt that the present appeal is moot, and that the response to the first question is affirmative. At issue is whether the government of New Brunswick was under an obligation to provide state-funded counsel to the appellant in the circumstances of this case. The appellant, though, was in fact represented by counsel at the custody hearing, the custody order has expired, and she has since regained custody of her children. Consequently, there is no "live controversy" in this appeal. T he tangible and concrete dispute has disappeared, and the issue has become academic.

43 Nevertheless, the Court has decided to exercise its discretion to decide this case. In *Borowski* , Sopinka J. identified three criteria relevant to the Court's exercise of discretion: the presence of an adversarial context, the concern for judicial economy, and the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

44 Applying these criteria to this appeal, I am satisfied that there was an appropriate adversarial context. The appeal was vigorously and fully argued on both sides by the parties and the interveners.

45 Turning to the second factor, this Court has held on a number of occasions that an expenditure of judicial resources is warranted in cases which raise important issues but are evasive of review: see *Borowski* , *supra* , at p. 360; *Winnipeg Builders' Exchange v. I.B.E.W., Local 2085*, [1967] S.C.R. 628 (S.C.C.) ; *Québec (Procureur général) v. Canada (Procureur général)*, [1982] 2 S.C.R. 793 (S.C.C.) at p. 806.

46 The present appeal is a case in point. The question of whether a parent has a right to state-funded counsel at a custody hearing is undoubtedly of national importance. Similar cases may arise in the future, and the Court has an opportunity to clarify the law and provide guidance to the courts below. This is a particularly important factor, as evidenced by the facts of this case. Although the appellant's motion to be provided with state-funded counsel was brought well over a month before the custody hearing, Athey J. did not have the opportunity to determine the issue prior to the date set for the application, given the difficult

constitutional questions raised and the need to quickly decide the custody hearing concerning the best interests of the children. A pre-hearing resolution of this issue is essential, for if no determination can be made prior to the hearing, the moving party is no better off than he or she would have been had the motion not been brought to begin with -he or she will almost invariably have to proceed without the assistance of counsel.

47 While similar cases may arise in the future, they are by nature evasive of review. This is so for two reasons. First, the custody order will ordinarily have expired by the time the matter comes to this Court, rendering the controversy moot. The Court will therefore likely have to decide a moot case if it ever wants to address this issue. An analogy can be drawn to the situation in *I.B.E.W., Local 2085* , *supra* , where the issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court, the strike had been settled. Second, it is unlikely that appellants will be able to retain counsel for an appeal if they were unable to retain counsel at the initial hearing. As a result, few cases will ever be appealed to this Court, since the assistance of counsel is almost invariably required in negotiating the appeal process.

48 Finally, the Court is not overstepping its institutional role in deciding this case. Unlike *Borowski* , the appellant is not requesting a legal opinion on the interpretation of the *Charter* in the absence of legislation or other governmental action which would otherwise bring the *Charter* into play. While the issue in this case is moot, it is not abstract: see *Borowski* , *supra* , at p. 365.

49 In light of my conclusion that the Court should address the legal issues that arise in this case notwithstanding its mootness, I will proceed with my analysis on the assumption that the custody hearing had not yet taken place and that the appellant would not have been represented by counsel at the hearing. This is the same approach taken by both the motions judge and the Court of Appeal. I am proceeding in this fashion in order to review the lower court decisions and to determine whether the appellant had a right to state-funded counsel in the circumstances of this case.

50 In her motion, the appellant sought relief for a prospective s. 7 violation. She argued that the custody hearing would have been unfair were she not represented by counsel, infringing s. 7. She therefore requested that the court order the government to provide her with state-funded counsel pursuant to s. 24(1) of the *Charter* .

51 This Court has held on a number of occasions that remedies can be ordered in anticipation of future *Charter* violations, notwithstanding the retrospective language of s. 24(1): *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) ; *R. v. Vermette*, [1988] 1 S.C.R. 985 (S.C.C.) ; *R. v. Harrer*, [1995] 3 S.C.R. 562 (S.C.C.) . In *Harrer* , McLachlin J., concurring in the result, held at para. 42 that "[s]ection 24(1) applies to prospective breaches, although its wording refers to 'infringe' and 'deny' in the past tense". In *Operation Dismantle* , Dickson J. (as he then was) held at p. 450 that an applicant requesting a remedy for a prospective breach "must at least be able to establish a threat of violation, if not an actual violation, of their rights under the *Charter* ". He also found at p. 458 that courts require proof of "probable future harm" before ordering such a remedy.

52 In disposing of this appeal, the Court must determine whether s. 7 would likely have been infringed had the custody hearing proceeded with the appellant unrepresented and, if so, what the appropriate remedy should have been. Given the approach I will be taking, the constitutional questions must be slightly modified. As they are currently stated, the constitutional questions are retrospective rather than prospective in nature. The first question asks whether, in the circumstances of this case, the failure to provide the appellant with legal aid *constituted* an infringement of s. 7. Assuming the answer to the first question is yes, the second question asks if the infringement can be saved by s. 1.

53 Since the appellant is arguing that s. 7 *would have been* violated, not that it had been violated, the constitutional questions should be reformulated as follows:

> Question 1: In the circumstances of this case, would the failure of the *Legal Aid Act* , R.S.N.B. 1973, c. L-2, or the government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the*Family Services Act* , S.N.B. 1980, c. F-2.2, have constituted an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms* if the appellant had not been represented by counsel at the custody hearing?

Question 2: If the answer to question 1 is yes, would the infringement have been demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms* ?

54 This Court has recently held in *Corbiere v. Canada (Minister of Indian & Northern Affairs)* (1999), 239 N.R. 1 (S.C.C.) at para. 50, that constitutional questions can be restated provided that there is no "substantive prejudice ... caused to attorneys general or anyone else by the wording of the question, or that they would reasonably have made a different decision about exercising their right to intervene". In my opinion, none of the parties are prejudiced by the reformulation of the question, nor would any potential interveners have made a different decision about exercising their right to intervene. As I have already mentioned, both the motions judge and the Court of Appeal approached this case as though a prospective breach of s. 7 was at issue. Consequently, the parties' written and oral arguments in this appeal are equally applicable to the restated constitutional questions as they are to the original questions.

55 Having explained the approach I will be taking in this appeal, I will state my conclusions at the outset. The Minister's application to extend the original custody order pursuant to Part IV of the *Family Services Act* threatened to restrict the appellant's right to security of the person. This restriction would not have been in accordance with the principles of fundamental justice were the appellant unrepresented by counsel at the custody hearing. Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. In certain circumstances, which obtain in this case, the parent's right to a fair hearing requires the government to provide the parent with state-funded counsel. To avoid a prospective breach of s. 7, the motions judge, who was under a duty to ensure the fairness of the hearing, should have ordered the government to provide the appellant with state-funded counsel under s. 24(1). I will not be addressing s. 15 of the *Charter* , as it was not argued by either the appellant or the respondents in this Court.

B. Security of the Person

56 The appellant argued that the Minister of Health and Community Services' application to extend the order granting the Minister custody of her three children threatened to deprive her of both her s. 7 rights to liberty and security of the person. I believe it is possible to dispose of this appeal by focussing on the appellant's right to security of the person. Since the appeal can be disposed of on this basis and there have been differing views expressed about the scope of the right to liberty in the Court's previous judgments, I will not address the issue of whether the appellant's right to liberty was also engaged in this case.

57 Were the Minister successful in his application, the appellant would have been separated from her children for up to an additional six months. There would also be no guarantee that she would regain custody of her children at the expiry of the order. The separation of parent and child contemplated by the Minister's application would unquestionably have profound effects on both parent and child. For the purposes of this appeal, however, what must be determined is whether relieving a parent of custody of his or her child restricts a parent's right to security of the person.

58 This Court has held on a number of occasions that the right to security of the person protects "both the physical and psychological integrity of the individual": see *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) at p. 173 (*per* Wilson J.); *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) at p. 1177; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.) at pp. 587-88. Although these cases considered the right to security of the person in a criminal law context, I believe that the protection accorded by this right extends beyond the criminal law and can be engaged in child protection proceedings. Before addressing this issue, I will first make some general comments about the nature of the protection of "psychological integrity" included in the right to security of the person.

59 Delineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science. Dickson C.J. in *Morgentaler* , *supra* , at p. 56 suggested that security of the person would be restricted through "*serious* state-imposed psychological stress" (emphasis added). Dickson C.J. was trying to convey something qualitative about the type of state interference that would rise to the level of an infringement of this right. It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could

be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. N or will every violation of a fundamental freedom guaranteed in s. 2 of the *Charter* amount to a restriction of security of the person. I do not believe it can be seriously argued that a law prohibiting certain kinds of commercial expression in violation of s. 2(*b*), for example, will necessarily result in a violation of the psychological integrity of the person. This is not to say, though, that there will never be cases where a violation of s. 2 will also deprive an individual of security of the person.

60 For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

61 I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)* , *supra* , at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

62 In *R. v. Mills*, [1986] 1 S.C.R. 863 (S.C.C.) at pp. 919-20, a case dealing with the s. 11(*b*) right to be tried within a reasonable time, I found that the combination of stigmatization, loss of privacy, and disruption of family life were sufficient to constitute a restriction of security of the person:

> ... security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to the vexations and vicissitudes of a pending criminal accusation"... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction.

As I have noted, these are precisely the same consequences arising from the state's conduct in this case.

63 Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer: see *Augustus v. Gosset*, [1996] 3 S.C.R. 268 (S.C.C.) .

64 While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent *qua* parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged.

65 I now turn to the question of whether the right to security of the person extends beyond the criminal law context. In both *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)* and *B. (R.)* , *supra* , I held that the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration. In other words, the subject matter of s. 7 is the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person. I hastened to add, however, that s. 7 is not limited solely to purely criminal or penal matters. There are other ways

in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.)* , *supra* , at para. 22.

66 A child custody application is an example of state action which directly engages the justice system and its administration. The *Family Services Act* provides that a judicial hearing must be held in order to determine whether a parent should be relieved of custody of his or her child.

67 I therefore conclude that the Minister of Health and Community Services' application to extend the original custody order threatened to restrict the appellant's right to security of the person. I note that this conclusion is not inconsistent with the position I adopted in *B. (R.)* , where I limited my comments to the issue of the scope of the right to liberty under s. 7 and in particular, whether the right to liberty includes the right of parents to choose medical treatment for their child.

C. Principles of Fundamental Justice

68 I now turn to consider whether the potential restriction of the appellant's right to security of the person would have been in accordance with the principles of fundamental justice were she not represented by counsel at the custody hearing.

69 While relieving a parent of custody of his or her child restricts the parent's right to security of the person, this restriction may nevertheless be in accordance with the principles of fundamental justice. The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.) at p. 503. It is a time-honoured principle that the state may relieve a parent of custody when necessary to protect a child's health and safety. Rand J.'s judgment in *Hepton v. Maat*, [1957] S.C.R. 606 (S.C.C.) , is the classic statement of this principle in Canadian law. At pp. 607-8, he wrote:

> It is, I think, of the utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that fundamental natural relation be severed. ...
>
> The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.
>
> This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody.

70 More recently, La Forest J., writing for three others in *B. (R.)* held at para. 88 that

> the common law has long recognized the power of the state to intervene to protect children whose lives are in jeopardy and to promote their well-being, basing such intervention on its *parens patriae* jurisdiction; see for example *Hepton v. Maat* , *supra* ; *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 . The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure.

Thus, the principles of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.

71 The appellant did not contest the legitimacy of the principle that the state may relieve a parent of custody to protect the child's health and safety. Rather, she took issue with the fairness of the procedure in this case.

72 A fair procedure for determining whether a custody order should be extended requires a fair hearing before a neutral and impartial arbiter. The paramount consideration at the hearing should be the child's best interests. This is recognized in s. 53(2) of the *Family Services Act* , which provides:

> When disposing of an application under this Part the court shall at all times place above all other considerations the best interests of the child.

73 For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child's home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child's best interests. There is a risk that the parent will lose custody of the child when in actual fact it might have been in the child's best interests to remain in his or her care.

74 The *Family Services Act* allows parents to be present at and participate in the hearing, with or without counsel, hear all the evidence and cross-examine witnesses, and present evidence and make other representations to the court. However, it does not provide for the payment of legal fees incurred by parents with respect to an application by the Minister. Indigent parents must resort to the legal aid scheme, if there is one, as is the case in New Brunswick. If no legal aid is available, as in this case, the parent is forced to participate in the proceedings without the benefit of counsel. The majority of the Court of Appeal nevertheless held that the procedural rights provided by the *Family Services Act* , if complied with, would have been sufficient to "ensure reasonable compliance with constitutional standards".

75 I respectfully disagree. *In the circumstances of this case* , the appellant's right to a fair hearing required that she be represented by counsel. I have reached this conclusion through a consideration of the following factors: the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant. I will consider each in turn.

76 The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

77 Of particular importance is the fact that the state was seeking to extend a previous custody order by six months. A six-month separation of a parent from three young children is a significant period of time. It is even more significant when considered in light of the fact that the appellant had already been separated from her children for over a year and that generally speaking, the longer the separation of parent from child, the less likely it is that the parent will ever regain custody.

78 There is some debate between the parties as to whether child custody proceedings under the *Family Services Act* are more properly classified as adversarial or administrative in nature. In my view, a formalistic classification of the nature of the proceedings is not helpful in resolving the issue at hand. Child protection proceedings do not admit of easy classification. As Professor Thompson argues, the "unique amalgam of elements — criminal, civil, family, administrative — makes child protection proceedings so hard to characterize": D. A. Rollie Thompson, "Taking Children *and* Facts Seriously: Evidence Law in Child Protection Proceedings - Part I" (1988), 7 *Can. J. Fam. L.* 11, at p. 12.

79 At issue in this appeal is whether the custody hearing would have been sufficiently complex, in light of the other two factors, that the assistance of a lawyer would have been necessary to ensure the appellant her right to a fair hearing. I believe that it would have been. Although perhaps more administrative in nature than criminal proceedings, child custody proceedings are effectively adversarial proceedings which occur in a court of law. The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent

must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel. The hearing was scheduled to last three days, and counsel for the Minister planned to present 15 affidavits, including two expert reports.

80 In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case. There is no evidence in Athey J.'s decision or the record to suggest that the appellant possessed such capacities.

81 In light of these factors, I find that the appellant needed to be represented by counsel for there to have been a fair determination of the children's best interests. Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person. I say this despite the motions judge's finding to the contrary.

82 Athey J., in concluding that representation of the appellant by counsel was not essential to a fair hearing, said at p. 205:

> There has been no suggestion that J. G. lacks the capacity to understand the allegations made by the Minister or that she is unable to communicate her position to the court. In these circumstances I am not convinced that she is not able to adequately state her case or that provision of counsel to represent her is essential to a fair trial.

When a trial judge decides that an indigent parent does not need legal representation for there to be a fair custody hearing, the judge's finding should ordinarily be accorded deference by a reviewing court if the reviewing court becomes seized of the matter prior to the commencement of the hearing pursuant to an interlocutory appeal. This is because whether counsel for the parent is necessary to ensure the fairness of the hearing depends on a consideration of the factors I outlined above, and a trial judge is generally better positioned than a reviewing court to make this determination. He or she is better situated to make an accurate assessment of the complexity of the proceedings and, in particular, the parent's capacities. Moreover, the trial judge is under a duty to ensure a fair hearing, and has the ability to assist the parent in the proceedings, within the limits of his or her judicial role. Even if the parent is in need of some assistance, the judge may feel that he or she can intervene sufficiently to ensure the fairness of the hearing. Therefore, an appellate court should be wary of overturning a trial judge's decision, assuming that the appropriate factors are considered.

83 *In the unusual circumstances of this case* , however, I find that little deference should be accorded to the motions judge's conclusion that the appellant was capable of adequately representing herself. First, Athey J., who did not have the benefit of these reasons, referred to the appellant's "capacity to understand the allegations" and ability to "communicate her position to the court" (p. 205). This creates the impression that Athey J. may have assessed whether counsel was necessary for a fair hearing according to the same standard used to determine competence to stand trial on criminal charges. Competence is a necessary but not sufficient condition for determining whether an unrepresented parent will receive a fair custody hearing. Although competent, the parent must be able to participate meaningfully at the hearing, which goes beyond mere ability to understand the case and communicate.

84 Second, even assuming that Athey J. applied the correct test and considered the appropriate factors, she decided the motion on the appellant's right to counsel nearly a full year after the custody hearing. More importantly, the appellant was in fact represented by counsel at the hearing. Ordinarily a judge would determine whether representation by counsel is essential for a fair hearing *prior to* the commencement of the hearing. The fact that the motions judge made her determination *after* a hearing in which the appellant's case was presented through the assistance of counsel may have had an unduly influential effect on her conclusion. For example, the smoothness with which the proceeding was conducted may well have caused the motions judge to discount its complexity, as well as any limitations in the appellant's ability to communicate effectively in a court of law.

85 Therefore, attempting to put myself in the position of the motions judge prior to the hearing, when considering the seriousness and complexity of the proceedings and the capacities of the appellant, I disagree with her finding that the appellant

could communicate effectively enough without the assistance of counsel to ensure a fair hearing. I believe this Court may justifiably overturn her decision.

86 I would like to make it clear that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.

87 Although all custody hearings engage serious interests, the seriousness of the interests at stake varies according to the length of the proposed separation of parent from child. For instance, permanent guardianship applications are more serious than temporary custody applications. Therefore, counsel will more likely be necessary in guardianship applications than custody applications. The difference in seriousness between these two types of applications is currently recognized by Legal Aid New Brunswick, which provides legal aid certificates to financially eligible applicants in all guardianship applications but not in all custody applications. There is also a difference in the seriousness of the interests at stake in custody hearings depending on the length of any previous separation.

88 The complexity of the hearing can vary dramatically from case to case. Some hearings may be very short, involve relatively simple questions of fact and credibility, and have no expert reports. Others might take days and involve complicated evidentiary questions, troublesome points of law, and multiple experts. In the former cases, the assistance of counsel will make little difference to the parent's ability to present his or her view of the child's best interests, whereas in the latter cases, the representation of counsel may be essential to ensure a fair hearing.

89 The parent's capacities are also variable. Some parents may be well educated, familiar with the legal system, and possess above-average communication skills and the composure to advocate effectively in an emotional setting. At the other extreme, some parents may have little education and difficulty communicating, particularly in a court of law. It is unfortunately the case that this is true of a disproportionate number of parents involved in child custody proceedings, who often are members of the least advantaged groups in society. The more serious and complex the proceedings, the more likely it will be that the parent will need to possess exceptional capacities for there to be a fair hearing if the parent is unrepresented.

90 Without commenting on their correctness, I note that there are a number of appellate court cases in Canada which have found that legal representation of an accused may be necessary to ensure a fair trial, pursuant to ss. 7 and 11(*d*) of the *Charter* . These cases are noteworthy because the criteria employed by the courts to determine whether counsel was warranted included the seriousness of the interests at stake and the complexity of the proceedings: see *Rowbotham* , *supra* ; *R. v. Robinson* (1989), 63 D.L.R. (4th) 289 (Alta. C.A.) ; *R. v. Rain* (1998), 130 C.C.C. (3d) 167 (Alta. C.A.) .

91 I therefore conclude that the potential restriction of the appellant's right to security of the person would not have been in accordance with the principles of fundamental justice had the custody hearing proceeded with the appellant unrepresented by counsel. The potential s. 7 violation in this case would have been the result of the failure of the government of New Brunswick to provide the appellant with state-funded counsel under its Domestic Legal Aid program after initiating proceedings under Part IV of the *Family Services Act* .

92 In attributing the failure to provide state-funded counsel to the government's administration of the Domestic Legal Aid program, I do not mean to suggest that the Domestic Legal Aid program as it stands is the only way the government could have fulfilled its constitutional obligation in this case. The government has wide latitude in discharging its constitutional duty to provide state-funded counsel in proceedings where that duty arises. It could have done so in any number of ways — under the *Legal Aid Act* , the *Family Services Act* , or a myriad of other legislation or programs. This Court need not and should not tell the government of New Brunswick what specific delivery system should have been employed.

93 Nevertheless, notwithstanding the variety of potential delivery options, the government chose to enact a general legal aid scheme with a scope of application encompassing the proceeding at issue in this appeal. It also adopted a specific policy of not

providing legal aid to respondents in custody applications. Most importantly, the Attorney General and Ministers of Justice and Health and Community Services' s. 1 arguments seeking to justify the infringement (if one were to be found) of the appellant's s. 7 rights attribute it to the administration of the legal aid scheme. Therefore, it is not unreasonable to find the Domestic Legal Aid program to be the locus of the constitutional violation in this case.

D. Section 1

94 Although this case involves a prospective violation of s. 7, it is still necessary to engage in a s. 1 analysis. For if the prospective s. 7 violation would otherwise have been saved by s. 1, then there would be no need to order a remedy.

95 Section 1 of the *Charter* provides:

> **1.** *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.) , this Court set out the analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right. Iacobucci J. summarized this framework in *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.) at para. 605:

> A limitation to a constitutional guarantee will be sustained once two conditions are met. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right.

96 The appellant quite rightly is not directly challenging the *Legal Aid Act* , but rather administrative decisions made pursuant to it. The *Legal Aid Act* does not expressly or by necessary implication deny state-funded counsel to respondents in custody applications. On the contrary, both Legal Aid New Brunswick, pursuant to s. 12 of the Act, and the Minister of Justice, pursuant to s. 24 *may* provide state-funded counsel in these circumstances.

97 Despite the fact that state-funded legal assistance could have been provided in cases of custody applications pursuant to ss. 12 and 24, it was not. The Minister of Justice's program did not cover either guardianship or custody applications initiated by the Minister of Health and Community Services. This decision was made in order to avoid any potential conflicts of interest for Family Solicitors, who would be forced to act against the government while being paid by the Minister of Justice. As a result, Legal Aid New Brunswick agreed to continue providing legal aid certificates in cases of guardianship applications, but expressly refused to do so for custody applications. This had been Legal Aid New Brunswick's policy prior to 1993, when the Minister of Justice's program was first introduced. In December of 1991, the Council of the Law Society adopted a policy of limiting the provision of legal aid certificates to victims of family violence involved in private family litigation and to respondents to guardianship applications by the Minister of Health and Community Services. This policy was adopted pursuant to s. 12(14) of the Act, which provides that the Law Society *may* limit the provision of legal aid in certain matters when the Legal Aid Fund is in danger of being depleted. Consequently, the *Charter* infringement in this case is not caused "by the legislation itself, but by the actions of a delegated decision-maker in applying it": see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.) at para. 20. See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.) at p. 1078.

98 Assuming without deciding that the policy of not providing state-funded counsel to respondents in custody applications was a limit prescribed by law, that the objective of this policy — controlling legal aid expenditures — is pressing and substantial, that the policy is rationally connected to that objective, and that it constitutes a minimal impairment of s. 7, I find that the deleterious effects of the policy far outweigh the salutary effects of any potential budgetary savings.

99 Section 7 violations are not easily saved by s. 1. In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), supra* , at p. 518, I said:

Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.

100 In the circumstances of this case, the government of New Brunswick argues that the objective of limiting legal aid expenditures is of sufficient importance to deny the appellant a fair hearing. The proposed budgetary savings, however, are minimal. In their factum, Legal Aid New Brunswick and the Law Society of New Brunswick report that the projected annual cost of their new policy, effective September 22, 1997, of issuing legal aid certificates to respondents in custody applications for their first hearing would be under $100,000. Although the present appeal concerns the right to state-funded counsel at a hearing to extend an original custody order, the additional cost of providing state-funded counsel in these circumstances is insufficient to constitute a justification within the meaning of s. 1. Moreover, the government is not under an obligation to provide legal aid to every parent who cannot afford a lawyer. Rather, the obligation only arises in circumstances where the representation of the parent is essential to ensure a fair hearing where the parent's life, liberty, or security is at stake. In my view, a parent's right to a fair hearing when the state seeks to suspend such parent's custody of his or her child outweighs the relatively modest sums, when considered in light of the government's entire budget, at issue in this appeal.

E. Remedy

101 There are only two possible remedies a judge can order under s. 24(1) to avoid a prospective s. 7 breach in circumstances where the absence of counsel for one of the parties would result in an unfair hearing: an order that the government provide the unrepresented party with state-funded counsel, or a stay of proceedings. A stay of proceedings is clearly inappropriate in this case, as it would result in the return of the children to the appellant's custody. Children should not be returned to their parent's care when there is reason to suspect that they are in need of protection. Indeed, this would run contrary to the purposes of Part IV of the *Family Services Act* . The government must, therefore, provide the appellant with state-funded counsel.

102 It is unnecessary, however, to direct the government of New Brunswick to rectify the policy's constitutional infirmities through the adoption of a new policy. Directing the government to design a new policy would run contrary to Sopinka J.'s admonition in *Osborne v. Canada (Treasury Board)*), [1991] 2 S.C.R. 69 (S.C.C.) at p. 104, to "refrain from intruding into the legislative sphere beyond what is necessary" in fashioning remedies for *Charter* violations. It is not clear how often the operation of the policy will lead to an unconstitutional hearing. It may be only in rare cases. Accordingly, the least intrusive remedy would be to leave the policy intact, subject to a discretion vested in the trial judge to order state-funded counsel on a case-by-case basis when necessary to ensure the fairness of the custody hearing. That having been said, there is nothing preventing the government from amending the policy - for example reading in a discretion - or providing respondents to custody applications with state-funded counsel through means other than the Domestic Legal Aid program.

103 As similar cases may arise in the future, I will briefly outline the procedure that should be followed when an unrepresented parent in a custody application seeks state-funded counsel. The judge at the hearing should first inquire as to whether the parent applied for legal aid or any other form of state-funded legal assistance offered by the province. If the parent has not exhausted all possible avenues for obtaining state-funded legal assistance, the proceedings should be adjourned to give the parent a reasonable time to make the appropriate applications, provided the best interests of the children are not compromised. It goes without saying that if the parent, whether or not he or she is able to pay for a lawyer, chooses not to have one that there will be no entitlement to state-funded legal assistance: see *Rowbotham* , *supra* , at p. 64. This is because the parent voluntarily assumes the risk of ineffective representation, for which the government cannot be held responsible.

104 If the parent wants a lawyer but is unable to afford one, the judge should next consider whether the parent can receive a fair hearing through a consideration of the following criteria: the seriousness of the interests at stake, the complexity of the

proceedings, and the capacities of the parent. The judge should also bear in mind his or her ability to assist the parent within the limits of the judicial role. If, after considering these criteria, the judge is not satisfied that the parent can receive a fair hearing and there is no other way to provide the parent with a lawyer (i.e., pursuant to a statutory power to appoint counsel), the judge should order the government to provide the parent with state-funded counsel under s. 24(1) of the *Charter* . I hasten to add that I am limiting my comments here to child protection proceedings, and need not and should not comment as to other kinds of proceedings.

105 Having now decided that the government was under a constitutional obligation to provide state-funded counsel to the appellant to ensure the fairness of the custody hearing in this case, I turn to consider a passage from my judgment in *Prosper* , *supra* , which may appear to be in tension with this conclusion.

106 At issue in *Prosper* was whether s. 10(*b*) of the *Charter* imposed a substantive constitutional obligation on governments to ensure that duty counsel is available upon arrest or detention to provide free and immediate preliminary legal advice upon request. The Court was unanimous in concluding that it did not. In my reasons, I held at pp. 266-67 that:

> [T]here is evidence which shows that the framers of the *Charter* consciously chose not to constitutionalize a right to state-funded counsel under s. 10 of the *Charter*: *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (January 27, 1981). Specifically, a proposed amendment, which would have added the following clause to what is now s. 10 of the *Charter* was considered and rejected (p. 46:127):
>
> > (d) if without sufficient means to pay for counsel and if the interests of justice so require, to be provided with counsel;
>
> ... In my opinion, it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted. In light of the language of s. 10 of the *Charter* , which on its face does not guarantee any substantive right to legal advice, and the legislative history of s. 10, which reveals that the framers of the *Charter* decided not to incorporate into s. 10 even a relatively limited substantive right to legal assistance (i.e., for those "without sufficient means" and "if the interests of justice so require"), it would be a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of a service is, I might add, a further consideration which weighs against this interpretation. [Emphasis in original.]

107 The omission of a positive right to state-funded counsel in s. 10, which, as I said in *Prosper* , should be accorded some significance, does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing. To hold otherwise would be to suggest that the principles of fundamental justice do not guarantee the right to a fair hearing or, alternatively, that under no circumstances would the requirements of a fair hearing obligate governments to pay for an individual to be represented by counsel. Both of these positions are untenable. In my view, the significance of the omission of a positive right to state-funded counsel under s. 10 is that s. 7 should not be interpreted as providing an *absolute* right to state-funded counsel at all hearings where an individual's life, liberty, and security is at stake and the individual cannot afford a lawyer. Accordingly, while a blanket right to state-funded counsel does not exist under s. 10, a limited right to state-funded counsel arises under s. 7 to ensure a fair hearing in the circumstances I have outlined above.

108 With respect to the concern in *Prosper* that a positive constitutional obligation to provide state-funded counsel would interfere with governments' allocation of limited resources, I note that these fiscal concerns have been addressed under s. 1.

VI. Disposition

109 The appeal is allowed. The government of New Brunswick shall pay the appellant her solicitor-client costs, both in this Court and in the courts below, to be determined by the Registrar according to the Legal Aid Tariff in New Brunswick or the tariff applicable to non-governmental lawyers hired by the government of New Brunswick to handle certain matters in the manner of these proceedings.

110 I would answer the restated constitutional questions as follows:

> Question 1: In the circumstances of this case, would the failure of the *Legal Aid Act* , R.S.N.B. 1973, c. L-2, or the government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act* , S.N.B. 1980, c. F-2.2, have constituted an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms* if the appellant had not been represented by counsel at the custody hearing?
>
> Answer: Yes, in the circumstances of this case.
>
> Question 2: If the answer to question 1 is yes, would the infringement have been demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms* ?
>
> Answer: No.

***L'Heureux-Dubé J.* (concurring):**

111 The appellant is the mother of three children. At the time of the hearing that is the subject of this appeal, the Minister of Health and Community Services had been granted custody of the children for six months, and was seeking to extend the custody order for a further six months. The legal aid programmes in place in the province of New Brunswick at the time did not provide funding for temporary custody applications or extensions of existing orders, but only for permanent guardianship applications. Ms. G. was therefore not able to receive funded counsel at the hearing where the Minister sought the extension of the custody order, and was unable to afford to hire her own counsel. The hearing took place over three days, and the Minister, along with all other interested parties, was represented by counsel. Fifteen witnesses were called, including expert witnesses, and several expert reports were presented. Although Ms. G. received the voluntary assistance of counsel, this appeal requires the Court to decide whether the appellant's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were engaged, and, if so, whether the procedures adopted would have complied with the principles of fundamental justice had she not received counsel. I have read the reasons of the Chief Justice and I agree with him that this child protection hearing implicated the appellant's right to security of the person, and that in this case the procedure that threatened to deprive her of that right would not have been in accordance with the principles of fundamental justice because of the lack of funded counsel. However, I wish to set out my own views on the constitutional rights implicated and the appropriate test for determining when the failure to accord counsel to a parent would result in a procedure that is not in accordance with fundamental justice.

I. The Charter Rights Implicated

A. Equality

112 Before turning to the analysis of the s. 7 rights implicated and the principles of fundamental justice, I would emphasize that this case also implicates issues of equality, guaranteed by s. 15 of the *Charter* . These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s. 7. This Court has recognized the important influence of the equality guarantee on the other rights in the *Charter* . As McIntyre J. wrote in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.) at p. 185:

> The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter* .

All *Charter* rights strengthen and support each other (see, for example, *R. v. L. (T.P.)*, [1987] 2 S.C.R. 309 (S.C.C.) at p. 326; *R. v. Tran*, [1994] 2 S.C.R. 951 (S.C.C.) at p. 976) and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.

113 This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings: see, for example, M. Callahan, "Feminist Approaches: Women Recreate Child Welfare", in B. Wharf, ed., *Rethinking Child Welfare in Canada* (1992), 172. The fact that this appeal relates to legal representation in the family context for those whose economic circumstances are such that they are unable to afford such representation is significant. As I wrote in *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.) at p. 853, "In Canada, the feminization of poverty is an entrenched social phenomenon." The patterns of relationships within marriage disproportionately lead to women taking responsibility for child care, foregoing economic opportunities in the workforce, and suffering economic deprivation as a result: *Moge* , *supra* , at p. 861. Issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives.

114 As well as affecting women in particular, issues of fairness in child protection hearings also have particular importance for the interests of women and men who are members of other disadvantaged and vulnerable groups, particularly visible minorities, Aboriginal people, and the disabled. As noted by the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (U.S. N.Y., 1982) at p. 763:

> Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups ... such proceedings are often vulnerable to judgments based on cultural or class bias.

Similarly, Professors Cossman and Rogerson note that "The parents in child protection cases are typically the most disadvantaged and vulnerable within the family law system...": "Case Study in the Provision of Legal Aid: Family Law", in *Report of the Ontario Legal Aid Review: A Blueprint of Publicly Funded Legal Services* (1997), 773, at p. 787.

115 Thus, in considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

B. Security of the Person

116 Turning to the s. 7 rights engaged, I agree with the Chief Justice, for the reasons that he states, that the appellant's security of the person was implicated when the government instituted proceedings to extend the existing custody order. As he discusses, the importance of one's identity as a parent, and the serious stigma and psychological stress that will occur if the child is removed from the home because of the removal of the parent's power to care for him or her mean that the parent's security of the person will be violated if the child is removed from the home.

C. Liberty

117 I also agree with Bastarache J.A. (as he then was), who dissented in the Court of Appeal, that the right to liberty within s. 7 is triggered. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.) , La Forest J., writing on behalf of four members of the Court, held that the liberty interest must be interpreted broadly, in accordance with the principles and values of the *Charter* as a whole. He wrote, at para. 80:

> On the one hand, liberty does not mean unconstrained freedom. ... Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance . [Emphasis added.]

Similar principles were articulated in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) at p. 166, *per* Wilson J.; and *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.) at para. 66, *per* La Forest J. I continue to agree with these statements, and I note that they were not rejected by a majority of the Court in either of the above cases.

118 Applying these principles to the context of the family in *B.(R.)* , La Forest J. held that parental decision-making and other attributes of custody are protected under the liberty interest. He wrote, at paras. 83 and 85:

> ... I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent.
>
> [The parental] role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the *Charter* . [Emphasis added.]

Wardship proceedings, in my view, implicate these fundamental liberty interests of parents. The result of the proceeding may be that the parent is deprived of the right to make decisions on behalf of children and guide their upbringing, which is protected by s. 7. Though the state may intervene when necessary, liberty interests are engaged of which the parent can only be deprived in accordance with the principles of fundamental justice. Interpreting the interests here as protected under s. 7 also reflects the equality values set out above.

II. The Principles of Fundamental Justice

119 I agree with the Chief Justice, for the reasons he sets out, that the principles of fundamental justice require that a parent be able to participate in the hearing adequately and effectively, and that it is the obligation of the trial judge to exercise his or her discretion in determining when a lack of counsel will interfere with the ability of the parent to present his or her case. I also agree with him that this discretion was not properly exercised here. The trial judge was in error in not adequately considering the values of *meaningful* participation in the hearing affecting the rights of the child or the complexity of this case and the difficulty the appellant would face in presenting her case.

120 As to the criteria for determining when the provision of counsel will be necessary to ensure a fair hearing if the parent cannot otherwise afford a lawyer, first, I agree with the Chief Justice that a trial judge, in determining whether a parent will be able to participate effectively in the hearing, must consider the seriousness of the interests, the complexity of the proceedings, and the characteristics of the parent affected. I would view these interests broadly, and would therefore find that the right to funded counsel in child protection hearings, when a parent cannot afford a lawyer and the parent is not covered by the legal aid scheme, will not infrequently be invoked.

121 On the issue of the seriousness of the interests at stake, I agree with my colleague that child protection hearings will have varying degrees of seriousness. Under the legislation of different provinces, varying types of orders may be made, including orders that the child be placed with the parent subject to supervision, or temporary or permanent orders depriving the parent of custody. The seriousness of the order requested will play a role in the balancing of interests that takes place when determining whether counsel is necessary to ensure effective participation in the proceedings. However, in my view, whether the application is temporary or permanent should not have a significant effect on whether the parent will be granted a right to counsel. When considering this factor, trial judges should be attentive to the fact that temporary applications are often part of a process that leads to permanent ones, and it is necessary to consider the seriousness of the proceeding in relation to both the short-term and long-term interests of the parents affected. As noted by George Thomson (then a judge of the Ontario Provincial Court (Family Division)):

> Yet [the judge] must deal with the realization that a temporary order is often the first step in a fairly inexorable march to permanent wardship , and that there is a fairly unequal relationship between the protection agency and those parents with whom it works. [Emphasis added.]
>
> (G. M. Thomson, "Judging Judiciously in Child Protection Cases", in R.S. Abella and C. L'Heureux-Dubé, eds., *Family Law: Dimensions of Justice* (1983), 213, at p. 233.)

Judges must be cognizant of this reality when evaluating this factor in the circumstances of each particular case. Determining the seriousness of the matter must take into account the overall context and the serious effects of losing the ability to care for and guide the development of one's children.

122 Second, as my colleague points out, the complexity of the proceedings is also an important factor in evaluating whether a hearing without counsel proceeded in accordance with the principles of fundamental justice. The more complex the proceedings are, the more difficult it will be for the parent to participate effectively without assistance. As eloquently noted by Bastarache J.A., the complexity of the proceedings in the present case placed the appellant at a significant disadvantage:

> All other parties are represented. Ms. G. must be able to adduce evidence and cross-examine witnesses. There were 15 witnesses. Proceedings consumed three days. The interpretation of the legislation and of the powers of the Minister were at issue. The rules of evidence were at play. ((1997), 187 N.B.R. (2d) 81 , at p. 111)

The length of the proceedings, the type of evidence that is presented, the number of witnesses and the complexity and technicality of the proceedings must be important considerations in evaluating this factor.

123 As regards the third factor discussed by the Chief Justice, in articulating and interpreting this criterion, courts must be particularly careful to avoid including factors in the test for funded counsel that may make it more difficult for the parent when presenting her case on the merits: see P. Hughes, "New Brunswick's Domestic Legal Aid System: *New Brunswick (Minister of Health and Community Services) v. G. (J.)* " (1998), 16 *Windsor Y.B. Access Just.* 240, at p. 250. The parent should not be placed in the Catch-22 situation of having to present himself or herself, in order to be granted the right to funded counsel, in a manner that makes it more likely that decisions will be made against him or her at the hearing itself. Nor should the parent face the disadvantage of the trial judge having already made findings of fact, at the right to counsel stage, that will be adverse to her or his interests at the stage of determining the best interests of the child. I agree with the Chief Justice that: "In proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case" (para. 80).

124 In considering this factor, the focus should be on the parent's education level, linguistic abilities, facility in communicating, age, and similar indicators. These characteristics will vary among those whose liberty and security interests are affected by child protection proceedings, but none of them will have considerable effects on the determination of the ultimate result of the Minister's application.

125 Taking into account all these factors, it is likely that the situations in which counsel will be required will not necessarily be rare. Proceedings will in many cases be complex, and the consequences, when the child may be removed from the home, are generally serious. Funded counsel must be ordered whenever a fair hearing will not take place without representation. The determination of this question must take into account the important value of meaningful participation in the hearing, taking into account the rights affected, and the powerlessness that a reasonable person in the position of the claimant may legitimately feel when faced with the formal procedures and practices of the justice system. The trial judge's duty to ensure a fair trial may therefore, when necessary, involve an order that the parent be provided with legal counsel, and trial judges should not, in my view, consider the issue from the starting point that counsel will be necessary to ensure a fair hearing only in rare cases.

126 In the result, I would dispose of the appeal as proposed by the Chief Justice.

Appeal allowed.

Pourvoi accueilli.

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2019 ONCA 876
Ontario Court of Appeal

Ontario (Attorney General) v. Bogaerts

2019 CarswellOnt 18624, 2019 ONCA 876, 160 W.C.B. (2d) 24, 389 C.C.C. (3d) 227, 448 C.R.R. (2d) 1

The Attorney General of Ontario (Respondent / Appellant in appeal) and Jeffrey Bogaerts (Applicant / Respondent in appeal)

Robert J. Sharpe, C.W. Hourigan, L.B. Roberts JJ.A.

Heard: October 1, 2019
Judgment: November 14, 2019
Docket: CA C66542

Proceedings: reversing *Bogaerts v. Attorney General of Ontario* (2019), 426 C.R.R. (2d) 303, 2019 CarswellOnt 7, 2019 ONSC 41, 52 C.R. (7th) 201, Timothy Minnema J. (Ont. S.C.J.)

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Stephen McCammon, for Intervener, the Information and Privacy Commissioner of Ontario
Andrew Faith, Brookelyn Kirkham, for Intervener, Railway Association of Canada
Graeme A. Hamilton, Alannah Fotheringham, for Intervener, Canadian Civil Liberties Association

Subject: Constitutional; Criminal; Human Rights

Headnote

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Miscellaneous

Applicant was paralegal with law firm that handled animal welfare law — Ontario Society for Prevention of Cruelty Animals was founded as independent charitable organization that had been given certain statutory powers relating to animal welfare — Ontario Society for the Prevention of Cruelty to Animals Act was enacted to protect animals — For purposes of enforcement, Act provided that any inspector or agent of society had and may exercise any powers of police officer — Applicant's application to challenge provisions of Act on basis that they violated ss. 7 and 8 of Canadian Charter of Rights and Freedoms was granted — Trial judge found it was unconstitutional under s. 7 of Charter to assign police and investigative powers per ss. 11, 12 and 12.1 of Act and sections were declared of no force and effect — Trial judge found impugned search and seizure powers required warrants under Act and clearly engaged security of person but applicant failed to establish that impugned sections were arbitrary in that they had no connection to purposes of Act itself — Trial judge found applicant's recognition of novel principle of fundamental justice that law enforcement bodies must be subject to reasonable standards of transparency and accountability was available and appropriate — Trial judge found society's investigators and agents while having police powers, were not subject to Police Services Act, which had comprehensive system for oversight and accountability for police — Trial judge found society had policy manual that it had created related to entering homes and seizures of property and that manual was not public document and unlike virtually every public body in Ontario, society was not subject to Freedom of Information and Protection of Privacy Act — Trial judge found although charged with law enforcement responsibilities, society was opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians could not be confident that laws it enforced would be fairly and impartially administered — Attorney General appealed, applicant cross-appealed — Appeal allowed, cross-appeal dismissed — Trial judge erred by finding that liberty interests under s. 7 of Charter were engaged, and by accepting novel principle of fundamental justice that law enforcement bodies must be subject to reasonable standards of

transparency and accountability — Possibility of eventual imprisonment as consequence would make every s. 8 challenge into s. 7 challenge as well — Security of person was not engaged and warrantless searches of dwellings were not authorized by provisions at issue.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Unreasonable search or seizure

Applicant was paralegal with law firm that handled animal welfare law — Ontario Society for Prevention of Cruelty Animals was founded as independent charitable organization that had been given certain statutory powers relating to animal welfare — Ontario Society for the Prevention of Cruelty to Animals Act was enacted to protect animals — For purposes of enforcement, Act provided that any inspector or agent of society had and may exercise any powers of police officer — Applicant's application to challenge provisions of Act on basis that they violated ss. 7 and 8 of Canadian Charter of Rights and Freedoms was granted — Trial judge found applicant had not established reasonable expectation of privacy for type of searches permitted by these sections and had therefore failed to establish that they were unconstitutional — Trial judge found while expectation of privacy was high when state was investigating criminal offence, there was very low expectation of privacy for regulation of business and social activity and these particular searches applied only to those who have chosen to engage in regulated activity — Trial judge found it was difficult to see how there could be reasonable expectation of privacy when seizure was for express purpose of providing animal with needed food, care or treatment to ameliorate its suffering — Attorney General appealed, applicant cross-appealed — Appeal allowed, cross-appeal dismissed — Individuals enjoy expectation of privacy in their dwellings, however, lower standard of reasonableness existed regarding powers at issue — Matter was regulatory as opposed to criminal, and dealt with prevention of harm as opposed to gathering evidence — Requirement for reasonable belief was sufficient safeguard against unreasonable search and seizure.

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Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General) (2012), 2012 SCC 45, 2012 CarswellBC 2818, 2012 CarswellBC 2819, 34 B.C.L.R. (5th) 1, [2012] 10 W.W.R. 423, 95 C.R. (6th) 1, 23 C.P.C. (7th) 217, 352 D.L.R. (4th) 587, 290 C.C.C. (3d) 1, 325 B.C.A.C. 1, 553 W.A.C. 1, (sub nom. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society)* [2012] 2 S.C.R. 524, (sub nom. *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society)* 266 C.R.R. (2d) 1 (S.C.C.) — considered

Federation of Law Societies of Canada v. Canada (Attorney General) (2015), 2015 SCC 7, 2015 CSC 7, 2015 CarswellBC 295, 2015 CarswellBC 296, 78 Admin. L.R. (5th) 1, 67 B.C.L.R. (5th) 1, [2015] 3 W.W.R. 637, 17 C.R. (7th) 57, 467 N.R. 243, 365 B.C.A.C. 3, 627 W.A.C. 3, (sub nom. *Canada (Attorney General) v. Federation of Law Societies of Canada)* [2015] 1 S.C.R. 401, 322 C.C.C. (3d) 1, 385 D.L.R. (4th) 67, (sub nom. *Canada (Attorney General) v. Federation of Law Societies of Canada)* 327 C.R.R. (2d) 284 (S.C.C.) — referred to

Incredible Electronics Inc. v. Canada (Attorney General) (2006), 2006 CarswellOnt 3291, 80 O.R. (3d) 723, 147 C.R.R. (2d) 79 (Ont. S.C.J.) — referred to

London (City) v. Polewsky (2005), 2005 CarswellOnt 5145, 23 M.V.R. (5th) 63, 202 C.C.C. (3d) 257, 138 C.R.R. (2d) 208 (Ont. C.A.) — referred to

London (City) v. Polewsky (2006), 2006 CarswellOnt 3307, 2006 CarswellOnt 3308, 138 C.R.R. (2d) 376 (note), 356 N.R. 397 (note), 224 O.A.C. 400 (note), [2006] 1 S.C.R. xiii (note) (S.C.C.) — referred to

R. c. Pearson (1992), 17 C.R. (4th) 1, 12 C.R.R. (2d) 1, [1992] 3 S.C.R. 665, 52 Q.A.C. 1, 144 N.R. 243, 77 C.C.C. (3d) 124, 1992 CarswellQue 17, 1992 CarswellQue 120 (S.C.C.) — referred to

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — considered

R. v. Godoy (1998), 1998 CarswellOnt 5223, 131 C.C.C. (3d) 129, 168 D.L.R. (4th) 257, 235 N.R. 134, 21 C.R. (5th) 205, 117 O.A.C. 127, [1999] 1 S.C.R. 311, 1998 CarswellOnt 5224 (S.C.C.) — referred to

R. v. Généreux (1992), 133 N.R. 241, [1992] 1 S.C.R. 259, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, 1992 CarswellNat 668, 1992 CarswellNat 668F (S.C.C.) — referred to

R. v. Knight (2008), 2008 NLCA 67, 2008 CarswellNfld 342, 281 Nfld. & P.E.I.R. 269, 863 A.P.R. 269, 62 C.R. (6th) 328, 241 C.C.C. (3d) 353 (N.L. C.A.) — referred to

R. v. Malmo-Levine (2003), 2003 SCC 74, 2003 CarswellBC 3133, 2003 CarswellBC 3134, 16 C.R. (6th) 1, 179 C.C.C. (3d) 417, 233 D.L.R. (4th) 415, 314 N.R. 1, 23 B.C.L.R. (4th) 1, 191 B.C.A.C. 1, 314 W.A.C. 1, [2004] 4 W.W.R. 407, [2003] 3 S.C.R. 571, 114 C.R.R. (2d) 189 (S.C.C.) — considered

R. v. Mills (1999), 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1, [1999] 3 S.C.R. 668 (S.C.C.) — referred to

R. v. Rodgers (2006), 2006 SCC 15, 2006 CarswellOnt 2498, 2006 CarswellOnt 2499, 37 C.R. (6th) 1, (sub nom. *R. v. Jackpine)* 207 C.C.C. (3d) 225, [2006] 1 S.C.R. 554, (sub nom. *R. v. Jackpine)* 266 D.L.R. (4th) 101, (sub nom. *R. v. Jackpine)* 347 N.R. 201, (sub nom. *R. v. Jackpine)* 210 O.A.C. 200, 140 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Schmidt (2014), 2014 ONCA 188, 2014 CarswellOnt 2796, 119 O.R. (3d) 145, 318 O.A.C. 53, 304 C.R.R. (2d) 126 (Ont. C.A.) — referred to

R. v. Stinchcombe (1991), [1992] 1 W.W.R. 97, [1991] 3 S.C.R. 326, 130 N.R. 277, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 8 C.R. (4th) 277, 68 C.C.C. (3d) 1, 8 W.A.C. 161, 18 C.R.R. (2d) 210, 1991 CarswellAlta 192, 1991 CarswellAlta 559 (S.C.C.) — considered

Reference re s. 94(2) of Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — considered

Rodriguez v. British Columbia (Attorney General) (1993), 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, [1993] 3 S.C.R. 519, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641, 1993 CarswellBC 228, 1993 CarswellBC 1267 (S.C.C.) — considered

Thompson v. Ontario (Attorney General) (2013), 2013 ONSC 6357, 2013 CarswellOnt 15275, 118 O.R. (3d) 34, 369 D.L.R. (4th) 515 (Ont. S.C.J.) — referred to

Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission) (1990), 76 C.R. (3d) 129, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161, 106 N.R. 161, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 47 C.R.R. 1, 72 O.R. (2d) 415 (note), 1990 CarswellOnt 991, 1990 CarswellOnt 92 (S.C.C.) — referred to

United States of America v. Wakeling (2014), 2014 SCC 72, 2014 CSC 72, 2014 CarswellBC 3341, 2014 CarswellBC 3342, 15 C.R. (7th) 1, 465 N.R. 1, (sub nom. *Wakeling v. United States of America)* [2014] 3 S.C.R. 549, 318 C.C.C. (3d) 134, 363 B.C.A.C. 1, 624 W.A.C. 1, 383 D.L.R. (4th) 221, (sub nom. *Wakeling v. United States of America)* 324 C.R.R. (2d) 337 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 8 — considered

ss. 8-14 — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 92 ¶ 13 — considered

Criminal Code, R.S.C. 1985, c. C-46

s. 25(4) — considered

s. 27 — considered

s. 30 — considered

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Ombudsman Act, R.S.O. 1990, c. O.6

Generally — referred to

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36

Generally — referred to

s. 1(1) "distress" — considered

s. 3 — considered

s. 6.1(1) [en. 2008, c. 16, s. 5] — considered

s. 6.1(2) [en. 2008, c. 16, s. 5] — considered

s. 7 — considered

s. 7(3) — considered

s. 8 — considered

s. 11 — considered

s. 11(1) — considered

s. 11.2(1) [en. 2008, c. 16, s. 8] — considered

s. 11.2(2) [en. 2008, c. 16, s. 8] — considered

s. 11.4 [en. 2008, c. 16, s. 8] — considered

s. 11.4(1) [en. 2008, c. 16, s. 8] — considered

s. 11.4(2) [en. 2008, c. 16, s. 8] — considered

s. 11.4.1(1) [en. 2015, c. 10, s. 5] — considered

s. 12 — considered

s. 12(1) — considered

s. 12(6) — considered

s. 12(8) "immediate distress" — referred to

s. 12.1 [en. 2008, c. 16, s. 9] — considered

s. 13 — considered

s. 13(1) — considered

s. 13(6) — considered

s. 14(1) — considered

s. 14(1)(b) — considered

s. 14(1)(c) — considered

s. 22(2)(a) — considered

Police Services Act, R.S.O. 1990, c. P.15

Generally — referred to

Protecting What Matters Most Act (Budget Measures), 2019, S.O. 2019, c. 7

Generally — referred to

Regulations considered:

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c. O.36

General, O. Reg. 59/09

s. 1 — considered

s. 1(1) — considered

APPEAL by Attorney General and CROSS-APPEAL by applicant from judgment reported at *Bogaerts v. Attorney General of Ontario* (2019), 2019 ONSC 41, 2019 CarswellOnt 7, 52 C.R. (7th) 201, 426 C.R.R. (2d) 303 (Ont. S.C.J.), finding certain provisions of Ontario Society for the Prevention of Cruelty to Animals Act unconstitutional.

***Robert J. Sharpe J.A.*:**

1 This appeal considers the constitutionality of the statutory authority conferred upon inspectors and agents designated by the Ontario Society for the Prevention of Cruelty to Animals (the "OSPCA") to exercise the powers of a peace officer in the enforcement of laws pertaining to the welfare and prevention of cruelty to animals.

2 The respondent is a paralegal who was given public interest standing to challenge certain provisions of the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36 (the "Act").

3 The application judge dismissed the respondent's argument that provisions in the Act creating offences were matters of criminal law and therefore beyond the legislative authority of the province. The application judge also dismissed the respondent's contention that certain provisions in the Act infringed s. 8 of *Charter of Rights and Freedoms* guaranteeing the right to be secure against unreasonable search and seizure. However, the application judge accepted the submission that some of the Act's search and seizure provisions violated the s. 7 right not to be denied liberty and security of the person except in accordance with the principles of fundamental justice. He found that those search and seizure powers engaged the liberty and security of the person interests and he recognized a novel principle of fundamental justice, namely, that "law enforcement bodies must be subject to reasonable standards of transparency and accountability". The application judge struck down the sections of the Act conferring the powers of a peace officer on OSPCA officers and agents as well as two sections authorizing search and seizure.

4 The appellant, the Attorney General of Ontario, appeals the order granting the respondent public interest standing and the s. 7 order striking down three sections of the Act. The respondent cross-appeals the dismissal of the s. 8 argument and seeks to add that "law enforcement bodies must be funded in such manner to avoid actual or perceived conflicts of interest or apprehension of bias" as an additional principle of fundamental justice.

5 For the following reasons, I would allow the appeal and dismiss the cross-appeal. In my view, the application judge erred in finding that the liberty and security of the person interests protected by s. 7 were engaged. It is also my view that he further erred in accepting that "law enforcement bodies must be subject to reasonable standards of transparency and accountability" as a novel principle of fundamental justice. However, he did not err in dismissing the s. 8 claim.

OVERVIEW OF THE ACT

6 The relevant statutory provisions are set out in the Appendix to these reasons and may be summarized as follows.

7 The object of the Act "is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom" (s. 3). The Act constitutes the OSPCA and provides for its governance by a board of directors. While the OSPCA essentially functions as a private organization, the Lieutenant Governor in Council has the power to annul any by-law it enacts (s. 7(3)). The Act provides that the OSPCA shall appoint a Chief Inspector (s. 6.1(1)) who has the authority to establish qualifications, requirements and standards for inspectors and agents and to appoint, supervise and remove them (s. 6.1(2)).

8 The provision central to this challenge is s. 11(1) which confers the powers of a police officer on OSPCA inspectors and agents for the purpose of enforcing the Act and any other law pertaining to animal safety and the prevention of cruelty to animals.

9 The Act establishes obligations and prohibitions regarding the care of and harm to animals.

10 The respondent challenged two provisions, ss. 11.2(1) and 11.2(2), making it an offence to cause or permit an animal to be "in distress", defined as "the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect" (s. 1). The application judge rejected the contention that those provisions were *ultra vires* the province on the ground that they were, in pith and substance, criminal law. No appeal is taken from that aspect of the application judge's order.

11 The Act contains several provisions authorizing search and seizure. The respondent's challenge to the following provisions was dismissed by the application judge:

• Section 11.4 allows entry (without warrant into any place other than a dwelling, and into a dwelling with a warrant) where animals are kept for commercial purposes (exhibition, entertainment, boarding, hire or sale) to determine whether applicable standards are being met, provided that entry into a dwelling is not permitted without the consent of the occupier (s. 11.4(2));

• Section 11.4.1(1) gives inspectors and agents the power to demand production of records in relation to the same class of animals;

• Section 12(1) allows inspectors and agents with a warrant to search a building or place to determine if an animal is in distress;

• Section 12(6) allows for entry without a warrant into any building or place other than a dwelling if the inspector or agent has reasonable grounds to believe that there is an animal in immediate distress, defined as "distress that requires immediate intervention in order to alleviate suffering or to preserve life" (s. 12(8));

• Section 12.1 allows inspectors, agents and veterinarians who are lawfully in a place to take a carcass or sample of a carcass;

• Section 13(1) allows an inspector or agent who has reasonable grounds to believe that an animal is in distress to order any person present or found promptly to take action to relieve the distress or to have the animal treated or examined by a veterinarian at the owner or custodian's expense;

• Section 13(6) allows for entry without a warrant if an order made under s. 13(1) remains in force to determine if the order has been complied with;

• Section 14(1) allows an inspector or agent to remove an animal for the purpose of providing it with care upon reasonable grounds to believe that an animal is in distress and the owner or custodian cannot be found or if a s. 13 order has been made and not complied with.

12 The Act constitutes the Animal Care Review Board and gives it the authority to entertain appeals from compliance orders made under s. 13(1) and from animal removals pursuant to s. 14(1).

13 Section 22(2)(a) gives the Minister responsible for the administration of the Act the authority to make regulations prescribing the powers and duties of the OSPCA's Chief Inspector, including the power to appoint, oversee and establish qualifications, requirements and standards for OSPCA inspectors and agents. Pursuant to that provision, the Minister enacted O Reg 59/09, s. 1(1), requiring the Chief Inspector to establish such standards and to oversee inspectors and agents in the performance of their duties.

DECISION OF THE MOTION JUDGE ON STANDING

14 The respondent is a paralegal who works in the animal care area and owns animals. The Attorney General challenged his standing to bring this application. The motion judge ruled that the respondent lacked sufficient interest to satisfy the test for private interest standing but accepted that he should be given public interest standing.

15 The motion judge concluded that the respondent satisfied the test for public interest standing set out in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.), at para. 37: "(1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts". There was a justiciable issue, the respondent had a genuine interest as a paralegal who works in the area of animal welfare, and the proposed application was a reasonable and effective way to bring the issue before the courts.

16 Having granted public interest standing, the motion judge accepted the Attorney General's argument that he should strike from the record affidavit evidence alleging specific complaints that inspectors, agents and members of the Animal Care

Review Board had engaged in conduct that infringes or denies the *Charter* rights of non-parties. He did so on the basis that the public interest standing challenge was to the constitutionality of the Act, not to the specific exercise of discretion to which the affidavits were directed.

DECISION OF THE APPLICATION JUDGE

Federalism

17 The application judge rejected the respondent's contention that ss. 11.2(1) and 11.2(2) were, in pith and substance, criminal law and therefore beyond the legislative competence of the province. He concluded that the "matter" of the OSPCA is animal protection and prevention of cruelty to animals and that it fell within s. 92(13) of the *Constitution Act, 1867*, conferring upon the province the authority to make laws in relation to "Property and Civil Rights in the Province". No appeal is taken from that aspect of the application judge's decision.

Charter s. 8: Unreasonable Search and Seizure

18 The application judge dismissed the respondent's contention that ss. 11.4, 12(6), 13(1) and (6), and 14(1)(b) and (c) breached s. 8 of the *Charter*.

19 He found that the purpose of s. 11.4 is to deal with commercial activity and that it is essentially regulatory in nature. He concluded that the respondent had failed to show a reasonable expectation of privacy when this provision was used for the purpose for which the section was intended, namely protection of vulnerable animals.

20 The application judge found that as s. 12(6) dealt with exigent circumstances and did not authorize warrantless searches of dwellings, it did not infringe s. 8 of the *Charter*, and he rejected the respondent's argument that the legislature should have included certain safeguards.

21 With respect to ss. 13(1) and (6), the application judge found that as s. 13(6) simply allowed an inspector to follow up on a s. 13(1) order in relation to an animal in distress, no reasonable expectation of privacy was established.

22 Finally, the application judge found that the exercise of the powers conferred by s. 14(1)(b) and (c) to remove an animal in distress in order to provide it with the care required to relieve the distress did not give rise to a reasonable expectation of privacy.

Charter s. 7: Liberty, Security of the Person and the Principles of Fundamental Justice

23 The principal focus of the application was the argument that the delegation of police and other investigative powers in ss. 11, 12 and 12.1 to the OSPCA, a private organization, violates s. 7 of the *Charter*. The application judge properly analyzed this issue in two stages: first, do the impugned provisions engage life, liberty or security of the person; and if the answer is yes, second, is the denial of life, liberty or security of the person in accordance with the principles of fundamental justice.

24 The application judge accepted the submission that ss. 11, 12 and 12.1 deprive someone subjected to those powers of liberty and security of the person. He rejected the appellant's contention that as a deprivation of liberty would only arise after prosecution, conviction and sentencing, the search powers were too remote to trigger a s. 7 claim. The application judge also found that the impugned provisions engaged the security of the person interest and he rejected the appellant's submission that the challenge to the impugned provisions should proceed under the more specific guarantee of s. 8.

25 The application judge then turned to the issue of whether the interference with liberty and security of the person was in accordance with the principles of fundamental justice. He rejected the argument that the impugned provisions ran afoul of the principle of non-arbitrariness, the only accepted principle of fundamental justice raised by the respondent. However, he accepted as a novel principle of fundamental justice that "law enforcement bodies must be subject to reasonable standards of transparency and accountability", while rejecting the inclusion of "integrity" as being too vague. He found, at para. 25, that while the respondent had "made a good case that the institutional integrity of the OSPCA may be lacking in the way it has

been funded and structured", integrity was "essentially a synonym for morality" and a "vague concept" that did not amount to "a legal principle".

26 The application judge found that this formulation met the three-part test set out by the Supreme Court of Canada in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (S.C.C.), at paras. 112-13 and *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 (S.C.C.), at para. 8. It must be (1) "a legal principle" (2) that is "vital or fundamental to our societal notion of justice" and (3) "capable of being identified with precision and applied to situations in a manner that yields predictable results."

27 The application judge found that accountability and transparency were basic tenets of our legal system. It was, he ruled, vital for the public to have confidence in the enforcement of laws, and that "a reasonable level of transparency and accountability is the cornerstone for that confidence." He was satisfied that the proposed principle was capable of being identified with precision and applied in a manner that would yield predictable results.

28 The application judge concluded that the impugned provisions contravened this novel principle of fundamental justice. As a private organization, the OSPCA lacked the required degree of transparency and accountability. OSPCA investigators and agents are not subject to the *Police Services Act*, R.S.O. 1990, c. P.15, which provides a comprehensive system of oversight and accountability. He noted that while the OSPCA does have a policy manual relating to search and entry, it is not a public document and that complaints and discipline issues are dealt with by the OSPCA internally. Nor is the OSPCA subject to the *Ombudsman Act*, R.S.O. 1990, c. O.6, or the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F31. He agreed with the intervener's submission that "although charged with law enforcement responsibilities, the OSPCA is opaque, insular, unaccountable, and potentially subject to external influence, and as such Ontarians cannot be confident that the laws it enforces will be fairly and impartially administered."

29 The application judge declared ss. 11, 12 and 12.1 of no force and effect on the ground that they violated s. 7 of the *Charter*. He suspended his declaration of invalidity for one year to give the legislature the opportunity to consider alternative arrangements.

INTERIM LEGISLATION

30 We were advised during oral argument that there has been a change in the legislation since the decision of the application judge. The OSPCA has withdrawn from enforcement of the Act. Interim legislation, the *Ontario Society for the Prevention of Cruelty to Animals Amendment Act (Interim Period)*, 2019, S.O. 2019, c. 11, allows for the appointment of a Chief Inspector who has the power to appoint any person as an inspector under the Act. The legislature has yet to enact any other legislation to deal with the suspended declaration of invalidity.

ISSUES

31 The following issues arise on the appeal and cross-appeal.

1. Did the motion judge err by granting the respondent public interest standing?

2. Did the application judge err by rejecting the s. 8 challenge to ss. 13(6), 14(1)(b) and 14(1)(c)?

3. Did the application judge err by finding that ss. 11, 12 and 12.1 engage the liberty and security of the person interests under s. 7?

4. Did the application judge err in recognizing a novel principle of fundamental justice?

ANALYSIS

(1) Did the motion judge err by granting the respondent public interest standing?

32 The Attorney General appeals the order of the motion judge granting the respondent public interest standing. However, the Attorney General rested on his factum and made no oral submissions on this point. As it is my view that this court should decide the appeal and cross-appeal in any event in order to clarify the law in relation to s. 7, I do not propose to deal with this ground of appeal in any detail.

33 I would, however, point out that the combined effect of the order granting the respondent public interest standing and striking out the affidavits providing specific instances of the infringement of *Charter* rights resulted in this court having a less than satisfactory record. In *Downtown Eastside Sex Workers*, the case recognizing generous scope for public interest standing, the Supreme Court noted, at para. 74, that there was a substantial record of affidavit evidence as to the operation and impact of the challenged legislation, to "provide a concrete factual background" for the challenge. By contrast, on this application and appeal, the constitutional arguments were advanced in the abstract without a proper factual foundation. In my view, it would have been preferable had this challenge come before the court either on the application of an individual who had been subjected to the challenged statutory powers, or upon some other proper record, to provide a concrete factual context for the consideration of the constitutional issues raised.

(2) Did the application judge err by rejecting the s. 8 challenge to ss. 13(6), 14(1)(b) and 14(1)(c)?

34 As I have indicated, the respondent's cross-appeal of the application judge's dismissal of the s. 8 challenge is restricted to three provisions.

35 Section 13(6) allows for entry without a warrant if a s. 13(1) order remains in force. A s. 13(1) order can require an owner or custodian to take action to relieve the distress or to have an animal treated or examined by a veterinarian at the owner's or custodian's expense, where there are reasonable grounds to believe that an animal is in distress and the owner or custodian is present or may be found promptly.

36 Section 14(1)(b) allows an inspector or agent to remove an animal for the purpose of providing it with care where the inspector or agent has examined the animal and has reasonable grounds to believe that an animal is in distress and the owner or custodian is not present and cannot be found promptly.

37 Section 14(1)(c) allows for the removal of an animal where a s. 13(1) order has been made and not complied with.

38 The principal focus of the respondent's cross-appeal is that all three provisions allow for warrantless searches of and seizures from dwellings.

39 It is worth noting that the OSPCA's internal policy requires inspectors and agents to obtain a warrant before searching a dwelling. Because of the public interest standing ruling, the case was argued in the abstract without a factual foundation. As a result, we do not have before us a warrantless search of a dwelling and, if the OSPCA follows its policy, none may exist. Courts should not be asked to decide hypothetical cases of this nature. However, for the sake of completeness, I will express my view on the challenge to these provisions.

40 The application judge rejected the s. 8 challenge on the ground that a person subject to a search or seizure under the challenged provisions would not have a reasonable expectation of privacy, in part at least because of their non-criminal nature. I agree with the respondent that the application judge's analysis is unpersuasive. There can be no doubt that individuals enjoy an expectation of privacy in their dwellings.

41 However, as I will explain, the search and seizure powers at issue all favour a lower standard of reasonableness. Considering certain specific features of the impugned provisions that I outline below, I am satisfied that they do not violate s. 8 of the *Charter*.

42 The powers conferred by ss. 13(6) and 14(1)(c) depend upon a s. 13(1) order having been made. To make a s. 13(1) order, an inspector or agent must have reasonable grounds to believe that an animal is in distress, that is, "being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect" (s. 1(1)). A s. 13(1) order must be in writing. Upon being notified of the order, the owner of custodian is

given the opportunity to challenge the order before the Animal Care Review Board. This means that entry into a dwelling can only take place after an inspector or agent has reasonable grounds to believe an animal is in distress, a written order has been given to the owner or custodian, and the owner or custodian has not complied with or challenged the order. While this falls short of the protection afforded by prior authorization obtained through a judicially approved search warrant, in my view, it is a sufficient safeguard against unreasonable search and seizure in the context of animal protection.

43 First, as the application judge observed, we are dealing with a regulatory rather than a criminal matter where a "less strenuous and more flexible standard of reasonableness" applies: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425 (S.C.C.), at p. 506.

44 Second, these provisions deal less with gathering evidence and more with the prevention and alleviation of harm. We are dealing with exigent circumstances where the expectation of privacy yields to prevention of imminent harm: *R. v. Godoy* (1998), [1999] 1 S.C.R. 311 (S.C.C.), at para. 21. An animal in distress is unable to draw attention to its plight. More serious harm or even death may result if prompt action is not taken to relieve the animal's distress. Entry under ss. 13(6) and 14(1)(c) is only permitted where the owner or custodian has already been ordered to act to relieve animal distress. Seizure under s. 14(1)(b) is only permitted where an animal is in distress and the owner or custodian is not present and cannot be found promptly.

45 Given the nature of the search powers at issue, I would dismiss the cross-appeal with respect to ss. 13(6), 14(1)(b) and 14(1)(c).

(3) Did the application judge err by finding that ss. 11, 12 and 12.1 engage the liberty and security of the person interests under s. 7?

46 It is well-established that the analysis under s. 7 proceeds in two stages. The first question is whether the impugned law infringes life, liberty or security of the person. If the answer to that question is yes, the second question is whether the infringement is in accordance with the principles of fundamental justice. I turn first to whether ss. 11, 12 and 12.1 infringe the liberty or security of the person interest of those subjected to the powers conferred by those provisions.

Liberty

47 The application judge concluded that because the exercise of the powers conferred by ss. 11, 12 and 12.1 could lead to prosecution, conviction and imprisonment under the offence provisions of the Act, the liberty interest was engaged. In my respectful view, this amounted to an error of law for two reasons.

48 First, we are not dealing with an appeal from conviction. I agree with the appellant that viewed on their own, the powers conferred by those provisions are too remote from the possibility of conviction and imprisonment to engage the liberty interest. As the appellant points out, several steps would have to occur after the search before an individual would be deprived of liberty:

- The criteria prescribed in those provisions search would have to be satisfied to authorize the search;
- The search would have to yield evidence that could be used in a prosecution;
- The person would have to be charged with an offence;
- The person would have to be tried, convicted and sentenced to imprisonment for the offence.

49 We were given no authority for the proposition that a power of search and seizure, without more, engages the liberty interest. The case law suggests the contrary. Two decisions of this court hold that the risk of imprisonment for non-payment of a fine imposed for a provincial offence is too remote to permit a challenge to the provincial offence itself on the ground that it infringes the liberty interest protected by s. 7: *London (City) v. Polewsky* (2005), 202 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 37 (S.C.C.) (speeding); and *R. v. Schmidt*, 2014 ONCA 188, 119 O.R. (3d) 145 (Ont. C.A.) (selling unpasteurized milk). While the prospect of imprisonment was arguably more remote in those cases, they do stand for

the proposition that where there are intermediate steps between the operation of a provision and deprivation of liberty, the court will not engage in speculation as to the possible eventual outcome to bring the case within s. 7.

50 Second, holding that the risk of imprisonment is possible as an eventual consequence of a search would turn virtually every s. 8 challenge into a s. 7 challenge as well. In my view, that would be wrong and contrary to established authority. As I will explain in more detail below with respect to security of the person, this would run counter to the principle that where a specific section of the *Charter* such as s. 8 is engaged, *Charter* scrutiny should be conducted under that specific provision and not under the more general guarantee of s. 7.

Security of the person

51 In my respectful view, the application judge also erred in concluding that the impugned provisions engaged the security of the person interest protected by s. 7.

52 To demonstrate an interference with security of the person, an applicant must show either (1) interference with bodily integrity and autonomy, including deprivation of control over one's body: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.), at paras. 66-67, or (2) serious state-imposed psychological stress: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.), at paras. 81-86; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2019), at pp. 95-106.

53 The impugned powers plainly do not interfere with bodily integrity or control over one's body. No doubt it would be unsettling to have one's premises or dwelling subjected to a search under the impugned powers. However, as the application judge found, there is nothing in the record to suggest that a search of that nature would impose the level of state-imposed stress contemplated by the case law. In *Blencoe*, the Supreme Court warned, at para. 86, against "stretch[ing] the meaning of this right" by accepting lesser levels of stress as engaging the security of the person interest. It rejected the contention that a lengthy delay in dealing with a human rights complaint against the applicant, that had led to him suffering depression, humiliation and lack of employment, amounted a denial of security of the person.

54 Even in the case of a search that does involve an intrusion into bodily integrity (taking bodily samples), the Supreme Court of Canada held in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 (S.C.C.), at para. 23, that "because s. 8 provides a more specific and complete illustration of the s. 7 right" any s. 7 analysis is "redundant." This follows the more general principle that where a *Charter* claim falls within one of the provisions of ss. 8 to 14, the challenge should be considered under that specific provision rather than under the more general guarantee found in s. 7: *R. c. Pearson*, [1992] 3 S.C.R. 665 (S.C.C.), at p. 688; *R. v. Généreux*, [1992] 1 S.C.R. 259 (S.C.C.), at p. 310; *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at paras. 87-88; *R. v. Knight*, 2008 NLCA 67, 241 C.C.C. (3d) 353 (N.L. C.A.), at para. 48. In *United States of America v. Wakeling*, 2014 SCC 72, [2014] 3 S.C.R. 549 (S.C.C.), the applicant challenged a wiretap under s. 7. He argued that transparency and accountability were principles of fundamental justice. As I explain below, that argument was rejected at first instance. The Supreme Court of Canada did not find in necessary to deal with the issue of whether transparency and accountability were principles of fundamental justice, but ruled, at para. 52, that "the accountability concerns . . . are best dealt with under s. 8."

55 The failure of the respondent to show either interference with bodily integrity or serious state-imposed psychological stress should have ended the security of the person inquiry. The application judge held, however, that as ss. 8 to 14 of the *Charter* are specific illustrations of the s. 7 right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice, the constitutionality of the impugned search and seizure powers could be considered under s. 7.

56 This produced an unusual result. The application judge dismissed the respondent's s. 8 challenge to some of the Act's search provisions under the *Charter's* specific guarantee against unreasonable search and seizure. The s. 7 challenge involved ss. 12 and 12.1, provisions that were not challenged under s. 8. However, in view of the application judge's reasons on the s. 8 challenge, it is difficult to see any reason why the application judge would have not ruled the same way with respect to ss. 12 and 12.1. Yet he allowed the challenge to ss. 12 and 12.1 under the more general constitutional standard found in s. 7 on the ground that s. 7 embraced the right conferred by s. 8.

57 In my view, the application judge should have confined his analysis of any challenged search and seizure provision to the specific s. 8 guarantee. I do not agree with the application judge's determination that a s. 7 analysis was appropriate in the "particular context" of this case to address the respondent's issues. There was a proper way to deal with the questions posed by the respondent. The issue should have been framed in terms of the reasonableness of the powers of search and seizure. To succeed, the respondent should have been required to show that conducting a search or seizure without reasonable standards to ensure transparency, accountability and adequate funding is unreasonable under s. 8.

58 The respondent submits that if we accept that the analysis should proceed under s. 8, we should still strike down ss. 11, 12 and 12.1 on the grounds that the absence of transparency, accountability and adequate funding renders searches conducted under these provisions unreasonable.

59 I disagree. I explain below why I reject the proposition that "law enforcement bodies must be subject to reasonable standards of transparency, adequate funding, and accountability" is a principle of fundamental justice. In my view, the proposed principle fares no better when framed in terms of the reasonableness of the impugned powers of search and seizure. The proposed principle deals with general issues of governance and institutional design, not with the reasonableness, scope or exercise of powers of search and seizure. The alleged shortcomings in the legislation are too remote from the definition of the challenged statutory powers and the manner in which those powers are carried out. To succeed on this ground, the respondent would have to show that the lack of measures to ensure transparency, accountability and adequate funding realistically had or risked having an actual impact on the exercise of the challenged statutory powers. There is no such evidence in this case. The respondent's complaint is with the general governance of the OSPCA, not with the definition of its statutory powers or the manner in which they are exercised.

60 The fact that the respondent had been given public interest standing to challenge the Act did not relieve him of the obligation to establish a *Charter* infringement.

61 I turn finally to the specific provisions challenged as being unreasonable. It will be recalled that the provisions at issue are ss. 12 and 12.1. Section 12(1) allows inspectors and agents with a warrant to search a building or place to determine if an animal is in distress while s. 12(6) allows for entry without a warrant upon reasonable grounds to believe that an animal is in immediate distress. Section 12.1 allows inspectors, agents and veterinarians who are lawfully in a place to take a carcass or sample of a carcass.

62 Neither provision authorizes the warrantless search of a dwelling. Section 12, dealing with exigent circumstances and the seizure of a carcass or part of a carcass, represents a minimal interference with the owner's or custodian's rights. They are arguably less intrusive of an owner's or custodian's privacy interest than the other provisions with which I have already dealt. For the reasons I gave with respect to the other provisions challenged under s. 8, I reject the challenge to ss. 12 and 12.1.

(4) Did the application judge err in recognizing a novel principle of fundamental justice?

63 The appellant submits that the application judge erred by recognizing "law enforcement bodies must be subject to reasonable standards of transparency and accountability" as a novel principle of fundamental justice. The respondent cross-appeals, asking that we recognize as a principle of fundamental justice that law enforcement be properly funded, amplified in his factum as the principle that "law enforcement bodies must be funded in such manner to avoid actual or perceived conflicts of interest or apprehension of bias." This is a re-formulation of the integrity argument the respondent made before the application judge.

64 I have no doubt that it would be a good idea and sound public policy to make all law enforcement bodies subject to reasonable standards of transparency, accountability and adequate funding and that they be properly funded. But not all good ideas and sound public policies are constitutionally protected or mandated. Our task is not to decide what would be sound policy. We are charged with the more specific task of deciding what the Constitution requires: see *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at p. 590: "Principles of fundamental justice must not . . . be so broad as to be no more than vague generalizations about what society considers to be ethical or moral."

65 The fact that we are faced with a novel *Charter* claim does not, of course, mean that the claim cannot succeed. We are mandated to give the *Charter* a purposive interpretation, recognizing that it must "be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers": *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.), at p. 155. At the same time, we must recognize the importance "not to overshoot the actual purpose of the right or freedom in question" and ensure that the right or freedom is "placed in its proper linguistic, philosophic and historical [context]": *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344.

66 The judicial interpretation of the Constitution should be broad and generous but must also be disciplined by the need to provide a reasoned justification based upon recognized principles and values of our constitutional order. These principles confer on the courts a legal duty to interpret and protect guaranteed rights in a generous manner. But because our mandate is legal, the capacity of the courts to right all perceived wrongs is limited.

67 As I will explain, since the enactment of the *Charter*, the courts have recognized what has become a long list of new principles of fundamental justice. But the courts have also rejected a long list of other proposed principles of fundamental justice. It is not always easy to determine whether a novel principle of fundamental justice should or should not be recognized. However, we are assisted in that task by considering the pattern revealed by the decisions in past cases and by the need to satisfy three criteria summarized by the Supreme Court of Canada in *Malmo-Levine*, at para. 113, and *Canadian Foundation for Children*, at para. 8.

68 The first criterion is that the proposed principle of fundamental justice must be "a legal principle" to satisfy two purposes: (1) that it "provides meaningful content for the s. 7 guarantee"; and (2) that it avoids the "adjudication of policy matters": *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 503.

69 The second criterion is that the alleged principle must be "vital or fundamental to our societal notion of justice": *Rodriguez*, at p. 590. This was explained in *Canadian Foundation for Children*, at para. 8: "The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice."

70 The third criterion is that "the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results": *Canadian Foundation for Children*, at para. 8.

71 I agree with the appellant that the proposed new principle of fundamental justice meets none of these three criteria.

72 I turn first to the question of whether transparency, accountability and adequate funding qualifies as a "legal principle" capable of supporting s. 7 analysis.

73 The application judge gave as examples of transparency the open court principle and legislation relating to access to information. The need to support legal decisions with reasons was given as an example of accountability. In my view, those examples fall short of supporting what is required to constitute a legal principle that "provides meaningful content for the s. 7 guarantee" and that avoids the "adjudication of policy matters". A legal principle that is used "as a rule or test in common law, statutory or international law" will satisfy first criterion of the principles of fundamental justice test: *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2015 SCC 7, [2015] 1 S.C.R. 401 (S.C.C.), at para. 91. Transparency and accountability have a more limited legal pedigree. They are background values that the law sometimes takes into account in various ways and in various contexts. Courts may consider these values when interpreting the Constitution, statutes and common-law rules but they have not crystalized into the kind of operational or normative legal principle that can be independently deployed by a court to determine rights and obligations that will satisfy the s. 7 test.

74 Transparency and accountability were explicitly rejected by the Supreme Court of Canada in *Wakeling*, where the court stated, at para. 47:

> [W]hile the concepts of openness, transparency and accountability are important values or objectives, they are not legal principles, fundamental to the legal system, which can be identified with sufficient precision to be regarded as principles of fundamental justice pursuant to the test identified in *Malmo-Levine.* Rather, these concepts like the "harm principle" posited by the accused in *Malmo-Levine* are more properly regarded as matters falling into the realm of public policy.

75 I agree with that assessment.

76 In *Malmo-Levine*, it was argued that s. 7 precluded the criminalization of possession of marijuana because doing so would violate the principle that the criminal law could only impose imprisonment for conduct that results in harm to others. The majority rejected that proposition, explaining that while harm may justify criminalization, the absence of proven harm does not preclude legislative action. At para. 114, the majority explained: "the 'harm principle' is better characterized as a description of an important state interest rather than a normative 'legal' principle." In my view, the same can be said of transparency, accountability and proper funding. If the harm principle does not qualify as a legal principle, nor can the novel principle proposed in this case.

77 I turn to the second question, namely whether transparency, accountability and adequate funding are "vital or fundamental to our societal notion of justice." In *Canadian Foundation for Children*, the Supreme Court of Canada held that while "the best interests of the child" is a legal principle that succeeds at the first stage, it fails to meet the second criterion as a principle that is vital to our societal notion of justice. The majority stated, at para. 10, that while the "'best interests of the child' is widely supported in legislation and social policy and is an important factor for consideration in many contexts", it is not "a foundational requirement for the dispensation of justice" because it is only one factor to be considered and it "may be subordinated to other concerns in appropriate contexts."

78 In my view, "best interests of the child" is much closer to being "vital or fundamental to our societal notion of justice" than transparency, accountability and proper funding. The latter values are regularly subordinated to other concerns. For example, the right to access information under legislation such as the *Freedom of Information and Protection of Privacy Act* is heavily qualified by exemptions for matters such as Cabinet confidentiality, certain types of advice to government, the interests of law enforcement, and solicitor-client privilege. The open court principle is subject to many exceptions required to protect competing rights and interests. As explained by the British Columbia Supreme Court in *Wakeling*, at para. 49, with respect to transparency and accountability, "[t]here are areas relating to the administration of justice in which the application of these principles is either unworkable or rendered of secondary import because of other, more compelling interests." The adequacy of funding for law enforcement bodies is plainly a matter for political debate and subject to being reconciled with other competing demands on the public purse.

79 Finally, I do not think that the proposed principle satisfies the third branch of the test that it "be capable of being identified with precision and applied to situations in a manner that yields predictable results."

80 It is far from clear to me what measures would be required to satisfy this alleged principle of fundamental justice. Achieving transparency, accountability and adequate funding for any public body opens a complex and multifaceted inquiry that could yield a wide range of outcomes. In the words of *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, at p. 503, transparency, accountability and adequate funding "lie in the realm of general public policy" and they do not fall within the category of "the basic tenets of our legal system". Section 7 creates and protects individual legal rights and should not to be mistaken as a general guarantee of good governance. The design of a proper regime of law enforcement, one that ensures that peace officers are accountable, that their actions are subject to public scrutiny and that the law is enforced with integrity, are questions of public policy, not individual legal rights. The shape and contours of a properly designed system cannot be "identified with some precision" and we have been offered no standards that could be "applied to situations in a manner that yields predictable results."

81 Again, the observations of the Supreme Court in *Canadian Foundation for Children* are applicable. The majority held, at para. 11, that "best interests of the child" fell short:

> It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

82 If the "best interests of the child" principle falls short, transparency, accountability and adequate funding must fall well short. There is an extensive body of case law on "best interests of the child". It is applied every day in the courts of this province. Lawyers and judges understand what it means and know how to apply it. Transparency, accountability and adequate funding are, on the other hand, background values that some laws promote with varying degrees of stringency.

83 As Prof. Stewart explains in *Fundamental Justice*, at p. 124, recognizing a principle of fundamental justice creates a standard against which non-compliant legislation will be struck down. It is therefore "essential that the principle be sufficiently precise" so that "the public, the legislature, and other courts and tribunals understand exactly what is the defect in the legislation that leads to its invalidation and how that defect might be cured." The respondent and the interveners have failed to identify with any degree of precision the content of this alleged principle. There is very little legal guidance on what it means or requires.

84 I recognize, of course, that to satisfy the third branch of the principles of fundamental justice test, a proposed principle does not have to define a precise, bright-line rule and that the exercise of judgment may be required to determine its meaning in any given case. Obvious examples are the principles that laws must not be arbitrary, overly broad or grossly disproportionate: see *Bedford v. Canada (Attorney General)*, 2013 SCC 72, [2013] 3 S.C.R. 1101 (S.C.C.). However, a proposed principle does have to set out what the Supreme Court described in a similar context as an intelligible standard, capable of providing "an adequate basis for legal debate . . . as to its meaning by reasoned analysis applying legal criteria": *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at p. 693. This requirement is satisfied in the case of arbitrariness, overbreadth and gross disproportionality. Those principles require the court to "compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness": *Bedford*, at para. 123. The inquiry is disciplined, defined and confined by the right at issue and the contours and effect of the law that is being challenged. It requires the court to apply some general external value of good governance.

85 To accept transparency, accountability and adequate funding as a principle of fundamental justice would, in my view, create uncertainty and necessarily involve the courts in the "adjudication of policy matters". As the Railway Association of Canada points out, federal and provincial legislation confer law enforcement powers on a wide array of individuals, including railway constables, who are not members of any formal police force. The *Criminal Code* gives such powers to "every person" in many situations, including: assisting a police officer (s. 25(4)), preventing an offence causing harm to others (s. 27), and preventing a breach of the peace (s. 30). The principle of fundamental justice accepted by the application judge would, in my view, invite more questions than it would answer. It would inevitably involve the courts in complex policy issues regarding law enforcement and institutional design, issues for which legal analysis under the *Charter* is ill-suited.

86 I think it important to add as a final note that the operation of the Act is not entirely devoid of transparency and accountability. If a prosecution is brought by the OSPCA, any searches or seizures are subject to judicial and *Charter* scrutiny. Orders regarding animals in distress, including removal orders, may be appealed to the Animal Care Review Board. These features do subject the OSPCA to a certain level of accountability. Persons charged with offences are entitled to full disclosure of the fruits of an investigation under the principle established in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.), thereby ensuring transparency.

87 The Minister responsible for the administration of the Act has exercised the statutory authority to enact regulations "to oversee the inspectors and agents of the [OSPCA] in the performance of their duties": s. 22(2)(a) of the Act. These regulations require the Chief Inspector to establish standards for inspectors and agents, to oversee inspectors and agents in the performance of their duties, and where appropriate, to remove them: O Reg 59/09, s. 1.

88 The OSPCA has developed a detailed Investigations Policy and Procedures Manual. While the Manual is not a public document, it does set out the OSPCA's policies regarding searches, seizures, enforcement and disciplinary procedures applicable to inspectors and agents. The OSPCA's funding agreements with the province require detailed reporting to the Ministries providing the funding.

CONCLUSION

89 For these reasons, I would allow the appeal and set aside the application judge's declaration of invalidity. I would dismiss the cross-appeal.

COSTS

90 Both parties filed written costs submissions seeking costs of this appeal. The appellant submits that if successful, it should be awarded costs fixed at $20,000. The respondent submits that as a public interest litigant, he should be awarded $20,000, plus HST, regardless of the outcome of the appeal. None of the interveners asks for costs and no costs are requested against the interveners.

91 In my view, the circumstances of this appeal do not warrant an order requiring the respondent to pay the appellant's costs. The respondent was successful at first instance and following that decision the OSPCA withdrew from enforcing the Act. The appellant brought the appeal because of concern over the implications of the application judge's decision and to clarify the law. As is apparent from these reasons, I agree with the appellant's concerns and in my view the appeal was properly brought. That said, as the OSPCA had withdrawn from enforcement duties, the respondent has achieved practical if not legal success. I am not persuaded that the ordinary "loser pays" rule should be applied in these circumstances.

92 The case law recognizes a discretion to depart from the "loser pays" principle and decline a costs order in favour of a successful government litigant in constitutional litigation: see *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (Ont. S.C.J.), at para. 74; *Thompson v. Ontario (Attorney General)*, 2013 ONSC 6357, 118 O.R. (3d) 34 (Ont. S.C.J.). I would apply that discretion in this case and decline to order costs in favour of the appellant.

93 There is also a discretion to award an unsuccessful public interest litigant costs in *Charter* litigation. However, "highly unusual" circumstances are required to justify such an order which should be made "only in very rare cases": *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (S.C.C.), at p. 390. In my view, this case does not call for an exceptional order. The respondent is not a marginalized, disadvantaged person. There is no evidence that he is a person of limited means. He was given public interest standing and access to justice concerns are adequately met by departing from the "loser pays" principle and declining to order costs against him.

94 Accordingly, I would make no order as to the costs of this appeal.

***C.W. Hourigan J.A.*:**

I agree.

Appeal allowed, cross-appeal dismissed.

APPENDIX — Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O., c. O.36

1(1) In this Act,

"distress" means the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation or neglect;

3 The object of the Society is to facilitate and provide for the prevention of cruelty to animals and their protection and relief therefrom.

6.1(1) The Society shall appoint an employee of the Society as the Chief Inspector.

(2) In addition to the powers and duties of an inspector or an agent of the Society, the Chief Inspector shall have the powers and duties that may be prescribed by regulation, including the power to establish qualifications, requirements and standards for inspectors and agents of the Society, to appoint inspectors and agents of the Society and to revoke their appointments and generally to oversee the inspectors and agents of the Society in the performance of their duties.

7(3) The Lieutenant Governor in Council may annul any by-law of the Society.

11(1) For the purposes of the enforcement of this Act or any other law in force in Ontario pertaining to the welfare of or the prevention of cruelty to animals, every inspector and agent of the Society has and may exercise any of the powers of a police officer.

11.2(1) No person shall cause an animal to be in distress.

(2) No owner or custodian of an animal shall permit the animal to be in distress.

11.4(1) An inspector or an agent of the Society may, without a warrant, enter and inspect a building or place where animals are kept in order to determine whether the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with if the animals are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale.

(2) The power to enter and inspect a building or place under this section shall not be exercised to enter and inspect a building or place used as a dwelling except with the consent of the occupier.

11.4.1(1) An inspector or an agent of the Society may, for the purpose of ensuring that the standards of care or administrative requirements prescribed for the purpose of section 11.1 are being complied with, demand that a person produce a record or thing for inspection if the person owns or has custody or care of animals that are being kept for the purpose of animal exhibition, entertainment, boarding, hire or sale.

12(1) If a justice of the peace or provincial judge is satisfied by information on oath that there are reasonable grounds to believe that there is in any building or place an animal that is in distress, he or she may issue a warrant authorizing one or more inspectors or agents of the Society named in the warrant to enter the building or place, either alone or accompanied by one or more veterinarians or other persons as the inspectors or agents consider advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in distress.

(6) If an inspector or an agent of the Society has reasonable grounds to believe that there is an animal that is in immediate distress in any building or place, other than a dwelling, he or she may enter the building or place without a warrant, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the building or place and all the animals found there for the purpose of ascertaining whether there is any animal in immediate distress.

(8) For the purpose of subsection (6),

"immediate distress" means distress that requires immediate intervention in order to alleviate suffering or to preserve life.

13(1) Where an inspector or an agent of the Society has reasonable grounds for believing that an animal is in distress and the owner or custodian of the animal is present or may be found promptly, the inspector or agent may order the owner or custodian to,

(a) take such action as may, in the opinion of the inspector or agent, be necessary to relieve the animal of its distress; or

(b) have the animal examined and treated by a veterinarian at the expense of the owner or custodian.

(6) If an order made under subsection (1) remains in force, an inspector or an agent of the Society may enter without a warrant any building or place where the animal that is the subject of the order is located, either alone or accompanied by one or more veterinarians or other persons as he or she considers advisable, and inspect the animal and the building or place for the purpose of determining whether the order has been complied with.

14(1) An inspector or an agent of the Society may remove an animal from the building or place where it is and take possession thereof on behalf of the Society for the purpose of providing it with food, care or treatment to relieve its distress where,

(a) a veterinarian has examined the animal and has advised the inspector or agent in writing that the health and well-being of the animal necessitates its removal;

(b) the inspector or agent has inspected the animal and has reasonable grounds for believing that the animal is in distress and the owner or custodian of the animal is not present and cannot be found promptly; or

(c) an order respecting the animal has been made under section 13 and the order has not been complied with.

22(2) The Minister responsible for the administration of this Act may make regulations,

(a) prescribing and governing the powers and duties of the Chief Inspector of the Society, including the power to establish qualifications, requirements and standards for inspectors and agents of the Society, to appoint inspectors and agents of the Society and to revoke their appointments and generally to oversee the inspectors and agents of the Society in the performance of their duties;

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Dans l'affaire du: Renvoi relatif à la Loi sur la non-discrimination génétique édictée par les articles 1 à 7 de la Loi visant à interdire et à prévenir la discrimination génétique | 2018 QCCA 2193, 2018 CarswellQue 11522, 2018 CarswellQue 11830, EYB 2018-305486, 2019 C.L.L.C. 230-020, 305 A.C.W.S. (3d) 72 | (C.A. Que, Dec 21, 2018)

2003 SCC 74
Supreme Court of Canada

R. v. Malmo-Levine

2003 CarswellBC 3133, 2003 CarswellBC 3134, 2003 SCC 74, [2003] 3 S.C.R. 571, [2003] S.C.J. No. 79, [2004] 4 W.W.R. 407, 114 C.R.R. (2d) 189, 16 C.R. (6th) 1, 179 C.C.C. (3d) 417, 191 B.C.A.C. 1, 233 D.L.R. (4th) 415, 23 B.C.L.R. (4th) 1, 314 N.R. 1, 314 W.A.C. 1, 59 W.C.B. (2d) 116, J.E. 2004-131, REJB 2003-51751

David Malmo-Levine, Appellant v. Her Majesty The Queen, Respondent and Attorney General of Ontario, British Columbia Civil Liberties Association and Canadian Civil Liberties Association, Interveners

Victor Eugene Caine, Appellant v. Her Majesty The Queen, Respondent and Attorney General of Ontario, British Columbia Civil Liberties Association and Canadian Civil Liberties Association, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: May 6, 2003
Judgment: December 23, 2003 *
Docket: 28026, 28148

Proceedings: affirming (2000), 2000 BCCA 335, 2000 CarswellBC 1148, [2000] B.C.W.L.D. 833, 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, [2000] B.C.J. No. 1095, 74 C.R.R. (2d) 189, 138 B.C.A.C. 218, 226 W.A.C. 218 (B.C. C.A.); affirming (1998), 1998 CarswellBC 1164, 54 C.R.R. (2d) 291, [1998] B.C.J. No. 1025 (B.C. S.C.); affirming (1998), [1998] B.C.J. No. 885 (B.C. Prov. Ct.)

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Subject: Criminal; Constitutional; Human Rights
Headnote
Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person — Principles of fundamental justice — Fault
Parliament enacted Narcotic Control Act which, inter alia, prohibited possession of marijuana and made possession punishable by imprisonment — Accused challenged prohibition provisions as unconstitutional as impairing accused's right to life, liberty and security of person as guaranteed by s. 7 of Canadian Charter of Rights and Freedoms and matter proceeded to Supreme Court of Canada — Prohibition provisions were constitutional — "Harm" principle, requirement that personal offences not directly harming others not be punishable by imprisonment, did not constitute principle of fundamental justice — Prohibition provisions were not arbitrary and penalty was not grossly disproportionate.
Criminal law --- Charter of Rights and Freedoms — Right to equality before and under law

Parliament enacted Narcotic Control Act which, inter alia, prohibited possession of marijuana and made possession punishable by imprisonment — Accused challenged prohibition provisions as unconstitutional as impairing accused's right to equality before and under law as guaranteed by s. 15(1) of Canadian Charter of Rights and Freedoms and matter proceeded to Supreme Court of Canada — Prohibition provisions were constitutional — Section 15(1) Charter guarantee prohibits discrimination on basis of certain fundamental personal characteristics — Desire to consume marijuana, lifestyle choice, did not constitute personal characteristic sufficient to trigger s. 15(1) analysis.

Criminal law --- Constitutional authority — Federal criminal law powers — Criminal power

Parliament enacted Narcotic Control Act which, inter alia, prohibited possession of marijuana — Accused challenged prohibition provisions as ultra vires Parliament and matter proceeded to Supreme Court of Canada — Prohibition provisions were intra vires Parliament and lawfully enacted — Prohibition provisions were intra vires as valid criminal law.

Criminal law --- Constitutional authority — Federal criminal law powers — Peace, order and good government

Parliament enacted Narcotic Control Act which, inter alia, prohibited possession of marijuana — Accused challenged prohibition provisions as ultra vires Parliament and matter proceeded to Supreme Court of Canada — Prohibition provisions were intra vires Parliament and lawfully enacted — Prohibition provisions were intra vires pursuant to general federal power to make laws for peace, order and good government of Canada.

Narcotic and drug control --- Scope of statutory regulation — Constitutionality of legislation — General

Parliament enacted Narcotic Control Act which, inter alia, prohibited possession of marijuana — Accused challenged prohibition provisions as unconstitutional and matter proceeded to Supreme Court of Canada — Prohibition provisions were constitutional — Prohibition did not impair right to life, liberty and security of person or to equality before and under law as guaranteed by ss. 7 and 15(1) of Canadian Charter of Rights and Freedoms — Prohibition provisions were intra vires Parliament and lawfully enacted as valid criminal law and pursuant to general federal power to make laws for peace, order and good government of Canada.

Criminal law --- Charter of Rights and Freedoms — Demonstrably justified reasonable limit

Parliament enacted Narcotic Control Act which, inter alia, prohibited possession of marijuana — Accused challenged prohibition provisions as unconstitutional and matter proceeded to Supreme Court of Canada — Crown did not adduce evidence or provide argument on issue of application of s. 1 of Canadian Charter of Rights and Freedoms — Prohibition provisions were constitutional — In dissent, three justices held that prohibition provisions breached certain Charter rights — Dissenting justices held that Crown's failure to justify provisions under s. 1 properly resulted in order declaring breaches not to be reasonable limit.

Droit criminel --- Charte canadienne des droits et libertés — Vie, liberté et sécurité de la personne — Principes de justice fondamentale — Faute

Parlement a adopté la Loi sur les stupéfiants qui interdisait notamment d'avoir en sa possession de la marihuana et rendait cette possession punissable par l'emprisonnement — Accusés ont contesté les dispositions énonçant l'interdiction, soutenant qu'elles étaient inconstitutionnelles parce qu'elles portaient atteinte aux droits des accusés protégés par l'art. 7 de la Charte canadienne des droits et libertés; l'affaire s'est rendue jusqu'en Cour suprême du Canada — Dispositions énonçant l'interdiction étaient constitutionnelles — Principe du préjudice, en vertu duquel les infractions d'ordre personnel qui ne causent aucun préjudice à autrui ne sont pas punissables par emprisonnement, n'était pas un principe de justice fondamentale — Dispositions énonçant l'interdiction n'étaient pas arbitraires et la sanction n'était pas exagérément disproportionnée.

Droit criminel --- Charte canadienne des droits et libertés — Droit à l'égalité devant la loi

Parlement a adopté la Loi sur les stupéfiants qui interdisait notamment d'avoir en sa possession de la marihuana et rendait cette possession punissable par emprisonnement — Accusés ont contesté les dispositions énonçant l'interdiction, soutenant qu'elles étaient inconstitutionnelles parce qu'elles portaient atteinte au droit des accusés à l'égalité devant la loi protégé par l'art. 15 de la Charte canadienne des droits et libertés; l'affaire s'est rendue jusqu'en Cour suprême du Canada — Dispositions énonçant l'interdiction étaient constitutionnelles — Article 15(1) de la Charte interdit de faire de la discrimination sur la base de certaines caractéristiques personnelles fondamentales — Désir de consommer de la marijuana est un choix de vie et ne pouvait constituer une caractéristique personnelle déclenchant une analyse en vertu de l'art. 15(1).

Droit criminel --- Pouvoirs constitutionnels — Pouvoirs du fédéral en matière de droit criminel — Pouvoir en matière criminelle

Parlement a adopté la Loi sur les stupéfiants qui interdisait notamment d'avoir en sa possession de la marihuana — Accusés ont contesté les dispositions énonçant l'interdiction, soutenant qu'elles ne relevaient pas des compétences du Parlement; l'affaire

s'est rendue jusqu'en Cour suprême du Canada — Dispositions énonçant l'interdiction relevaient de la compétence du Parlement et avaient été adoptées légalement — Dispositions énonçant l'interdiction étaient valides en vertu du droit criminel.

Droit criminel --- Pouvoirs constitutionnels — Pouvoirs du fédéral en matière de droit criminel — Paix, ordre et bon gouvernement

Parlement a adopté la Loi sur les stupéfiants qui interdisait notamment d'avoir en sa possession de la marihuana — Accusés ont contesté les dispositions énonçant l'interdiction, soutenant qu'elles ne relevaient pas des compétences du Parlement; l'affaire s'est rendue jusqu'en Cour suprême du Canada — Dispositions énonçant l'interdiction relevaient de la compétence du Parlement et avaient été adoptées légalement — Dispositions énonçant l'interdiction relevaient du pouvoir général qu'a le fédéral de faire des lois pour assurer la paix, l'ordre et le bon gouvernement du Canada.

Contrôle des stupéfiants et des drogues --- Portée de la réglementation adoptée en vertu de la loi — Constitutionnalité des dispositions législatives — En général

Parlement a adopté la Loi sur les stupéfiants qui interdisait notamment d'avoir en sa possession de la marihuana — Accusés ont contesté les dispositions énonçant l'interdiction pour motif d'inconstitutionnalité; l'affaire s'est rendue jusqu'en Cour suprême du Canada — Dispositions énonçant l'interdiction étaient constitutionnelles — Interdiction ne portait pas atteinte au droit à la vie, à la liberté et à la sécurité de la personne ni au droit à l'égalité devant la loi, tels que protégés par les art. 7 et 15(1) de la Charte canadienne des droits et libertés — Dispositions énonçant l'interdiction relevaient de la compétence du Parlement et ont été adoptées légalement comme relevant du droit criminel et conformément au pouvoir général qu'a le fédéral de faire des lois pour assurer la paix, l'ordre et le bon gouvernement du Canada.

Droit criminel --- Charte canadienne des droits et libertés — Limite raisonnable pouvant se démontrer

Parlement a adopté la Loi sur les stupéfiants qui interdisait notamment d'avoir en sa possession de la marihuana — Accusés ont contesté les dispositions énonçant l'interdiction pour motif d'inconstitutionnalité; l'affaire s'est rendue jusqu'en Cour suprême du Canada — Ministère public n'a présenté aucune preuve ni soumis aucun argument relativement à la question de l'application de l'art. 1 de la Charte canadienne des droits et libertés — Dispositions énonçant l'interdiction étaient constitutionnelles — Trois juges dissidents étaient d'avis que les dispositions énonçant l'interdiction portaient atteinte à certains droits protégés par la Charte — Juges dissidents ont statué que le défaut du ministère public de démontrer que les dispositions étaient justifiées en vertu de l'art. 1 avait donné lieu à bon droit à une ordonnance déclarant que les atteintes ne constituaient pas des limites raisonnables.

Pursuant to Regulations promulgated under the Narcotic Control Act (since repealed and replaced by the Controlled Drugs and Substances Act), marijuana was included in the schedule of prohibited-to-possess narcotics. By operation of s. 3(1) of the Act, simple possession of marijuana was a summary conviction offence punishable by a fine of up to $1,000 or a term of imprisonment of up to six months or both, for a first conviction. Subsequent convictions were punishable by a fine of up to $2,000 or a term of imprisonment of up to one year or both.

The accused M was charged with possession of marijuana and possession of marijuana for the purpose of trafficking. The accused M ran a co-operative association allegedly dedicated to the reduction of potential harms associated with marijuana use. Police officers raided the co-operative association's premises and seized a large quantity of marijuana which was intended for the personal use of the accused and other co-operative members. At trial, M brought an application for leave to adduce evidence in support of his argument that the Narcotic Control Act prohibition provisions were unconstitutional as ultra vires the Parliament of Canada and as impairing certain rights guaranteed by the Canadian Charter of Rights and Freedoms. That application was dismissed and M was subsequently convicted. The accused M's appeal from conviction was dismissed and M appealed as of right to the Supreme Court of Canada.

The accused C was charged with possession of marijuana. Police officers observed C sitting in a motor vehicle. The motor vehicle attempted to drive away from police as they approached, and one police officer detected the odour of marijuana emanating from the vehicle. The accused C produced a very small amount of marijuana which he had in his possession for his sole personal use. At trial, the accused C brought an application for a declaration that the Narcotic Control Act prohibition provisions were unconstitutional. The application was dismissed and C was subsequently convicted. His appeal from conviction to the Court of Appeal was joined to M's appeal and was dismissed. The accused C appealed as of right to the Supreme Court of Canada. His appeal remained joined to that of M.

Held: The appeals were dismissed.

Per Gonthier and Binnie JJ. (McLachlin C.J.C., Iacobucci, Major and Bastarache JJ. concurring): Each accused consumed marijuana in order to alter his brain chemistry and mental function. That psychoactive quality of marijuana was accepted by all

parties. There was evidence in the courts below that the psychoactive qualities of marijuana carried a real risk of harm which was not trivial. Certain groups of persons are especially vulnerable to harm caused by marijuana use, including pregnant women and those suffering from schizophrenia. This is complicated by the fact that some vulnerable persons are not easily identified and separated from other users in advance. The use of the criminal law to protect those vulnerable persons is a matter of public policy within the legislative purview of Parliament. Parliament also has the legislative power to decriminalize marijuana use or to otherwise amend legislation with respect to marijuana where changes in policy occur.

While Parliament's decision is ultimately one of policy, nevertheless the Supreme Court of Canada had before it questions of law, namely whether the prohibition on marijuana possession was constitutional as within the legislative power of Parliament or whether the availability of imprisonment for simple possession was an unconstitutional infringement of any right as guaranteed by the Canadian Charter of Rights and Freedoms.

The Narcotic Control Act, both generally and in respect of the criminal control of marijuana, is a valid exercise of Parliament's criminal law power. It is intended to address broad social ills associated with drug use and drug trafficking — ills directly related to public health and safety and accordingly within the historical competence of Parliament. The protection of vulnerable persons or groups from harm is likewise a permissible use of the federal criminal law power. As the purpose of the Act's prohibition is a valid criminal law purpose and as it backed its purpose with a prohibition and a penalty, it was valid criminal law. Accordingly, it was not necessary to consider whether the prohibition on marijuana possession was within the ambit of Parliament on the basis of the residual federal peace, order and good government power.

Because simple possession of marijuana can result in a sentence of imprisonment, the Act prohibition on simple possession is subject to the s. 7 Charter life, liberty and security analysis. However, in the present case the prohibition simply cannot breach s. 7, as the accused's desire to consume marijuana is a bare lifestyle choice which is not entitled to protection under the Charter.

The proposition that the "harm principle", the idea that conduct must not attract imprisonment absent clear harm to a person other than the person performing the conduct, is a principle of fundamental justice is not valid. In order for a legal principle to be considered a principle of fundamental justice within the meaning of s. 7 of the Charter, the principle must be founded on a broad social consensus which says that the principle is an essential element of the criminal law, and that the administration of justice cannot function fairly and properly without resort to and consideration of the principle. Furthermore, it must provide an articulable standard of measurement by which an impartial observer could determine whether or not the principle was being satisfied. In the present case, the accused did not demonstrate that the "harm principle" is a principle of fundamental justice. Assuming without deciding that the "harm principle" is a legal principle at all, it fails the principles of fundamental justice test inter alia because no broad social consensus exists that the "harm principle" is necessary to the full and fair exercise of justice in Canada. While harm to persons other than the actor engaging in the prohibited activity may be a reasonable foundation for a criminal prohibition, it does not follow that this is a necessary prerequisite to any such prohibition. In any event, the "harm principle" provides no benchmark or objective standard against which the exercise of Parliament's criminal law power can be accurately measured.

However, although the "harm principle" is not a principle of fundamental justice, Parliament is entitled to consider public harm when drafting criminal law. Proof of a risk of public harm of more than a trifling nature, which was proved in the present case, entitled Parliament to craft an appropriate criminal response. Such a response is not to be precisely weighed by the courts, as ultimately for the courts to do so would constitute judicial legislating beyond the proper constitutional role of the judiciary.

The arbitrary application of the criminal law power constitutes a prima facie breach of s. 7 of the Charter. In the present case, however, the prohibition on the simple possession of marijuana was not imposed arbitrarily. The use of marijuana creates a risk of harm to others, for example where a user in the active state of marijuana use operates heavy machinery in the presence of others, or drives on a public highway. Certain persons and groups are also at particular risk of harm to themselves or to others, including pregnant women and schizophrenics. Those facts establish that Parliament has a state interest in protecting Canadians from public harm, and their choice to do so by employing the criminal law is reasonable, although Parliament may have chosen other, non-criminal means to attack similar public harm risks, such as tobacco use.

The bare fact that imprisonment is available as a punishment, if it breaches the Charter at all, breaches the s. 12 guarantee against "cruel or unusual treatment or punishment". A breach of s. 12 will normally be found where the punishment imposed is grossly disproportionate to the conduct punished. In the present case, as simple possession of marijuana does not carry a minimum punishment at all and because any conviction results in a punishment determined in accordance with statutory and common-law principles of sentencing, the mere possibility of a sentence of imprisonment does not violate s. 12. Even a determination

that a particular penalty violates s. 12 would not result in the remedy the accused seek, an order declaring the prohibition of no force or effect. The prohibition would still stand, and the matter would properly be returned to Parliament to craft a new and constitutionally acceptable penalty.

In point of fact, while imprisonment is available upon conviction for simple possession of marijuana, in practice it is seldom used as a punishment for simple possession. In the ordinary course, recreational users of small quantities of marijuana most often receive a conditional discharge, and the absence of a minimum sentence allows trial judges the freedom to craft appropriate sentences. The availability of imprisonment upon conviction for simple possession is intended as part of a broad anti-drug strategy and is not directed only toward marijuana. Absent the presence of serious aggravating circumstances, a review of jurisprudence indicates that imprisonment is not seriously considered as a punishment for simple possession of marijuana. Where imprisonment is imposed, and where that sentence may be excessive or otherwise unfit, an accused may appeal from sentence. A broad constitutional remedy is not required where a right of appeal exists.

The accused were engaged in deliberate, intentional lawbreaking. This lawbreaking was intended perhaps to call attention to their lifestyle choice. They could not be heard to argue that the effect of their deliberate disobedience was excessive or disproportionate where it would not be so for persons not engaged in deliberate lawbreaking. While a criminal conviction carries adverse consequences over and above the effect of sentence, this is not the effect of the Act's prohibition provisions, but of the administration of criminal law in general. Criminal law in general is constitutionally valid, and surely does not result in a breach of s. 7 of the Charter. In short, the prohibition on possession of marijuana and all of its effects on the accused, including the risk of imprisonment, are constitutional. The accused's allegation that the prohibition provisions are "ineffective" as effectively unenforceable was colourable as an excuse to avoid obeying the law. In any event, such an argument is properly reserved for consideration at the "reasonable limit" stage of s. 1 of the Charter, which requires the accused to first establish a breach of a substantive Charter right. This had not been established in the present case.

The prohibition provisions do not discriminate against the accused in a manner which infringes their rights to equality before and under the law as guaranteed by s. 15(1) of Canadian Charter of Rights and Freedoms. The accused's desire to consume marijuana did not constitute a "personal characteristic" fundamental to the accused which was properly protected by s. 15(1).

The trial judge in the case of M erred by failing to allow M the right to adduce evidence in support of his constitutional argument. The evidence was properly put before the court, if only to provide a record for use on appeal. The parties quite properly agreed to apply the evidence called by C on the constitutional issues on appeal and accordingly M suffered no prejudice.

Per Arbour J. (dissenting in part in respect of M's appeal; dissenting in respect of C's appeal): The Narcotic Control Act's marijuana simple possession prohibition provisions are a valid exercise of Parliament's criminal law power. The legislation is intended to ameliorate a public health risk; it contains an express prohibition and a penalty for breaches of the prohibition. Parliament is entitled to consider the level of risk of public harm associated with an activity when crafting criminal law, and in the present case the prohibition provisions are not a colourable attempt to legislate in areas reserved to the provincial legislatures.

The "harm principle" is a principle of fundamental justice. Any legislative instrument which carries the risk of imprisonment for the commission of an offence which causes little or no reasoned risk of harm to persons other than the person committing the offence offends this principle. Accordingly, criminal legislation which conflicts with the "harm principle" violates the s. 7 Charter guarantee of life, liberty and security of the person. The risk of imprisonment must be reserved to punishment for conduct which causes some reasoned risk of harm to others beyond the de minimis level. An attempt to justify the risk of imprisonment based upon a vague apprehension of "public harm" is not sufficient. Most crime has a clear nexus between the offender and the victim or victims, providing an obvious incident of fault. The allegation in the present case that the risk of harm responded to was the risk of a collective harm was not sufficient to meet the "harm principle". Where public or collective harm is alleged, the state must show that the perceived harm outweighs the effect of enforcement on persons accused of the offence charged.

In the present case, the risk of collective harm caused by marijuana use did not justify the risk of imprisonment for simple possession. Harm to self does not justify the use of imprisonment, even where the harm to self may be serious, as can be the case with heavy marijuana users in so-called vulnerable groups. Other offences, such as impaired driving and dangerous driving, "catch" truly dangerous public behaviours which may be associated with marijuana use.

The argument that the issue of the availability of imprisonment should be properly argued as a potential breach of the s. 12 Charter guarantee against cruel or unreasonable treatment or punishment is misleading. The jurisprudence clearly indicates that s. 12 is merely one specific example of the general rights contained within s. 7, so that punishment may breach s. 7 even where it is not necessarily cruel or unusual, so long as it is, for example, disproportionate. Likewise, to suggest that the presence of

"aggravating circumstances" would be necessary to consider the imprisonment of members of vulnerable groups who could cause public harm actually makes the prohibition provisions less tenable. It in effect states that persons who may harm only themselves and slightly, those recreational users not within vulnerable groups, may face imprisonment absent aggravating factors. Imprisonment is the most serious punishment available in criminal law, and should be reserved for offences causing harm to others. Parliament may not lawfully threaten all Canadians with imprisonment for conduct which can cause harm only to themselves on the basis that some other vulnerable person might hypothetically cause harm to others in a like situation. The simple possession prohibition provisions impair the accused's s. 7 Charter rights.

The marijuana possession prohibition does not offend s. 15 of the Charter, substantially for the reasons expressed by the majority.

A breach of s. 7 of the Charter having been established, it fell upon the Crown to justify the infringement in accordance with s. 1 of Charter. As the Crown led no evidence in support of a s. 1 justification, the prohibition could not be "saved" and must properly be struck out and declared of no force or effect.

Per LeBel J. (dissenting in part in respect of M's appeal; dissenting in respect of C's appeal): The "harm principle" is not a principle of fundamental justice. However, in the present case the marijuana prohibition provisions are arbitrary and thus breach s. 7 of the Charter. The provisions overreach, criminalizing harmless private conduct in order to respond to a perceived social problem. The overreaching breached the accused's fundamental rights, as Parliament's response to the social problem was arbitrary and no evidence before the court indicated any attempt to "solve" the social problems through less intrusive measures. Although few people may actually be imprisoned for simple possession of marijuana, the prohibition remains the law of Canada and thus a very serious risk attaches to private behaviour causing very little risk of public harm. The evidence that police agencies seem reluctant to enforce the prohibition provisions indicates that law enforcement agrees that the provisions overreach. In addition, the risk of a criminal record is significant, and some conduct more serious than that captured in the present case ought to take place before the significant opprobrium associated with a criminal record may attach.

Per Deschamps J. (dissenting in part in respect of M's appeal; dissenting in respect of C's appeal): The "harm principle" is not a principle of fundamental justice. It is too narrow to adequately describe the purpose of and need for the criminal law, as criminal law may properly be utilized to protect society in general.

Largely for the reasons expressed by LeBel J., in the present case, the inclusion of marijuana in the schedule to the Act and Regulations is overbroad and arbitrary, breaching principles of fundamental justice. The use of the criminal law, particularly where imprisonment is at risk, to prevent largely harmless private behaviour out of a bare apprehension of public risk is to employ an unnecessarily harsh blunt instrument where other, less serious means could have been employed. The result is a breach of the accused's right to life, liberty and security of the person as guaranteed by s. 7 of the Charter.

As the Crown did not attempt to justify the breach of s. 7 of the Charter on the basis of s. 1, the Narcotic Control Act simple possession of marijuana prohibition provisions must be struck down.

Conformément aux règlements adoptés en vertu de la Loi sur les stupéfiants (qui a depuis été abrogée et remplacée par la Loi réglementant certaines drogues et autres substances), la marihuana a été incluse dans l'annexe des stupéfiants qu'il était interdit d'avoir en sa possession. Selon l'art. 3(1) de la Loi, la simple possession de marihuana constituait une infraction sommaire punissable, pour ce qui était d'une première infraction, par une amende maximale de 1 000 $ ou par une peine d'emprisonnement maximale de six mois, ou par les deux. Les condamnations subséquentes étaient punissables par une amende maximale de 2 000 $ ou par une peine d'emprisonnement maximale de un an, ou par les deux.

L'accusé M a été inculpé d'avoir eu en sa possession de la marihuana et d'en avoir eu possession en vue d'en faire le trafic. L'accusé M exploitait une association coopérative qui disait chercher à réduire certains risques associés à l'usage de la marihuana. Les policiers ont visité les locaux de l'association coopérative et ont saisi une importante quantité de marihuana que l'accusé destinait à son usage personnel et à celui des autres membres. Au cours de son procès, M a présenté une demande afin d'obtenir la permission de produire des preuves à l'appui de son allégation que les dispositions énonçant l'interdiction contenues dans la Loi sur les stupéfiants étaient inconstitutionnelles parce qu'elles ne relevaient pas des compétences du Parlement du Canada et parce qu'elles portaient atteinte à certains droits protégés par la Charte canadienne des droits et libertés. La demande a été rejetée et M a par la suite été déclaré coupable. Le pourvoi interjeté par M à l'encontre de sa condamnation a été rejeté; M a interjeté appel de plein droit devant la Cour suprême du Canada.

L'accusé C a été inculpé d'avoir eu en sa possession de la marihuana. Les policiers ont aperçu C alors qu'il était assis dans un véhicule à moteur. Il a tenté de s'éloigner des policiers alors qu'ils s'approchaient; un des policiers a senti une odeur de marihuana provenant du véhicule. C avait une toute petite quantité de marihuana en sa possession, destinée exclusivement à son usage

personnel. À son procès, C a présenté une demande afin qu'il soit déclaré que les dispositions énonçant l'interdiction contenues dans la Loi sur les stupéfiants étaient inconstitutionnelles. La demande a été rejetée et C a par la suite été déclaré coupable. Son appel à l'encontre de sa déclaration de culpabilité a été joint à celui de M et a été rejeté. C a interjeté appel de plein droit devant la Cour suprême. Son appel est demeuré joint à celui de M.

Arrêt: Les pourvois ont été rejetés.

Gonthier et Binnie, JJ. (McLachlin, J.C.C., Iacobucci, Major et Bastarache, JJ., souscrivant à l'opinion de Gonthier et Binnie, JJ.):

Chaque accusé a consommé de la marihuana parce que celle-ci agit sur la chimie du cerveau et sur les fonctions mentales. Les parties ont reconnu la nature psychoactive de la marihuana. On a prouvé devant les instances inférieures que la marihuana, de par ses effets psychoactifs, comporte un risque de préjudice non négligeable. Certains groupes de personnes sont particulièrement vulnérables au préjudice causé par l'usage de la marihuana, dont les femmes enceintes et les personnes schizophrènes. La situation est empirée par le fait que les personnes vulnérables ne sont pas faciles à identifier et ne sont pas déjà identifiées par rapport aux autres usagers. L'usage du droit criminel pour protéger ces personnes vulnérables constitue une question d'ordre public qui relève de la compétence législative du Parlement. Celui-ci a également compétence pour décriminaliser l'usage de la marihuana ou pour modifier les dispositions législatives portant sur la marihuana advenant un changement de politique.

Même si, ultimement, la question en est une de politique pour le Parlement, il n'en demeure pas moins que la Cour suprême du Canada avait devant elle des questions de droit: celle de savoir si l'interdiction d'avoir de la marihuana en sa possession était constitutionnelle parce qu'elle relevait du pouvoir de légiférer du Parlement; et celle de savoir si la possibilité d'ordonner l'emprisonnement pour une simple possession constituait une atteinte inconstitutionnelle à l'un ou l'autre des droits garantis par la Charte canadienne des droits et libertés.

La Loi sur les stupéfiants, tant de façon générale qu'à l'égard de son contrôle de la marihuana, résulte d'un exercice légitime par le Parlement de sa compétence en matière de droit criminel. La Loi vise à répondre aux graves problèmes sociaux qui sont associés à l'usage de drogues et au trafic de drogues, des problèmes qui ont un lien direct avec la santé et la sécurité publiques et qui, par conséquent, relèvent de la compétence historique du Parlement. La protection des personnes et des groupes vulnérables contre les préjudices constitue également un usage justifié que peut faire le Parlement de son pouvoir en matière criminelle. La Loi était une loi pénale valide, étant donné que son objet était un objet pénal valide et que celui-ci était appuyé par une interdiction et une sanction. Par conséquent, il n'était pas nécessaire d'examiner la question de savoir si l'interdiction d'avoir de la marihuana en sa possession relevait du Parlement en vertu de son pouvoir d'assurer la paix, l'ordre et le bon gouvernement du Canada.

Étant donné que la simple possession de marihuana peut donner lieu à une peine d'emprisonnement, l'interdiction contenue dans la loi à cet égard est assujettie à l'analyse en vertu de l'art. 7. En l'espèce, cependant, l'interdiction ne pouvait tout simplement pas porter atteinte à l'art. 7, puisque le désir des accusés de consommer de la marihuana constitue un choix de vie, lequel n'est aucunement protégé par la Charte. On ne pouvait validement affirmer que le principe du préjudice, soit l'idée qu'un comportement ne peut donner lieu à un emprisonnement en l'absence d'un préjudice clair causé à une personne autre que celle qui a le comportement interdit, était un principe de justice fondamentale. Un principe juridique ne peut être considéré comme un principe de justice fondamentale au sens de l'art. 7 que s'il repose sur un consensus social général selon lequel ce principe constitue un élément essentiel du droit pénal et si l'administration de la justice n'arrive pas à fonctionner de façon juste et appropriée sans avoir recours au principe et sans en tenir compte. De plus, le principe doit fournir une norme de mesure qui s'exprime facilement et qui pourrait être utilisée par un observateur impartial pour déterminer si le principe était oui ou non respecté. En l'espèce, les accusés n'ont pas démontré que le principe du préjudice était un principe de justice fondamentale. Même en présumant que ce principe est un principe de droit, il ne réussit pas le test applicable aux principes de justice fondamentale, notamment parce qu'il n'existe aucun consensus social général voulant que le principe du préjudice soit nécessaire à l'exercice juste et complet de la justice au Canada. Même si le préjudice causé aux personnes autres que celui ayant le comportement interdit peut constituer un motif raisonnable justifiant l'interdiction criminelle, cela ne veut pas dire qu'il s'agit nécessairement d'une condition préalable à une telle interdiction. De toute façon, le principe du préjudice ne donne aucun repère ni norme objective pouvant être utilisé pour examiner comme il faut l'exercice par le Parlement de son pouvoir en matière pénale.

Même si le principe du préjudice ne constitue pas un principe de justice fondamentale, le Parlement a quand même le droit de tenir compte du préjudice pour le public lorsqu'il rédige une loi pénale; la preuve faite en l'espèce de l'existence d'un risque pour le public d'un préjudice qui était plus qu'insignifiant autorisait le Parlement à élaborer une réponse appropriée. Les tribunaux n'ont pas à faire une appréciation exacte d'une telle réponse, puisqu'une telle appréciation de leur part reviendrait ultimement à les faire légiférer en dehors de leur rôle judiciaire constitutionnel.

L'application arbitraire du pouvoir pénal constitue à première vue une atteinte à l'art. 7 de la Charte. En l'espèce, toutefois, l'interdiction de simple possession de marihuana n'avait pas été imposée arbitrairement. L'utilisation de la marihuana risque de causer un préjudice à autrui, comme dans le cas de l'usager qui consomme de la marihuana tout en opérant de la machinerie lourde en présence d'autres personnes ou dans le cas de celui qui conduit sur une autoroute publique. Comme on l'a déjà dit, il existe des personnes et des groupes de personnes pour qui cet usage comporte un risque de préjudice plus grave pour eux-mêmes ou pour autrui, dont les femmes enceintes et les schizophrènes. Tout ceci démontre l'intérêt qu'a l'État de protéger les Canadiens contre des préjudices pour le public, mais également qu'il était raisonnable d'utiliser le droit pénal à cette fin, et ce, malgré le fait que le Parlement aurait probablement pu choisir d'autres moyens non criminels pour s'attaquer aux risques de préjudice pour le public, comme il l'a fait pour l'usage du tabac.

Si tant est que le fait que l'une des sanctions possibles soit l'emprisonnement puisse porter atteinte à la Charte, alors il s'agirait d'une atteinte à la garantie de l'art. 12 qui protège contre les « traitements ou peines cruels et inusités ». On conclut généralement à une violation de l'art. 12 lorsque la sanction imposée est exagérément disproportionnée avec le comportement sanctionné. En l'espèce, la simple possibilité d'une peine d'emprisonnement ne portait pas atteinte à l'art. 12, étant donné que la simple possession de marihuana n'emporte pas du tout de peine minimale et que toute condamnation donne lieu à une peine déterminée conformément aux principes prévus par la loi et la common law qui sont applicables en matière de détermination de la peine. Même si l'on concluait qu'une sanction particulière portait atteinte à l'art. 12, celle-ci ne donnerait pas lieu à la réparation voulue par les accusés, soit la déclaration que l'interdiction est inopérante. L'interdiction serait toujours valide et l'affaire serait à juste titre renvoyée au Parlement pour qu'il élabore une nouvelle sanction qui soit constitutionnelle.

En fait, même si l'emprisonnement peut être utilisé advenant une condamnation pour simple possession de marihuana, un tel usage n'est que rarement fait en pratique dans ces cas-là. Ordinairement, les personnes qui font un usage récréatif de petites quantités de marihuana sont pour la plupart condamnées à des peines avec sursis; l'absence d'une peine minimale permet aux juges de première instance de concevoir des sentences appropriées. La possibilité d'ordonner l'emprisonnement à la suite d'une condamnation pour simple possession fait partie d'une stratégie anti-drogues générale et vise seulement la marihuana. Une étude de la jurisprudence révèle que, en l'absence de circonstances aggravantes sérieuses, l'emprisonnement n'est pas sérieusement considéré comme une sanction pouvant être utilisée à l'égard d'une simple possession de marihuana. Un accusé peut interjeter appel d'une sentence lui imposant un emprisonnement lorsqu'il la considère comme excessive ou inappropriée. Devant l'existence d'un droit d'appel, il n'est pas nécessaire de concevoir une réparation constitutionnelle d'application générale.

Les accusés ont délibérément et intentionnellement enfreint la loi. Ils l'ont peut-être fait pour attirer l'attention sur leur choix de vie. Ils ne peuvent cependant pas soutenir que la conséquence de leur désobéissance délibérée est excessive ou disproportionnée alors qu'elle ne le serait pas pour les personnes qui n'enfreignent pas la loi délibérément. Même si une condamnation au criminel emporte des conséquences négatives de loin supérieures à l'effet de la sentence, ces conséquences ne résultent pas des dispositions énonçant l'interdiction de la Loi mais de l'administration du droit pénal en général. Le droit pénal est en général valide constitutionnellement et ne porte certainement pas atteinte à l'art. 7 de la Charte. Bref, sont donc constitutionnels l'interdiction d'avoir de la marihuana en sa possession ainsi que les effets de cette interdiction sur les accusés, y compris le risque d'emprisonnement. L'allégation des accusés que les dispositions énonçant l'interdiction sont inefficaces parce que difficilement applicables constitue tout simplement une excuse pour ne pas avoir à respecter la loi. De toute façon, un tel argument est à bon droit considéré seulement à l'étape de la limite raisonnable de l'art. 1 de la Charte, ce qui nécessite que l'accusé commence par établir l'atteinte à un droit de la Charte. Une telle atteinte n'a pas été démontrée en l'espèce.

Les dispositions ne faisaient aucune discrimination à l'égard des accusés qui eût pu porter atteinte à leur droit à l'égalité devant la loi, tel que garanti par l'art. 15 de la Charte. Le désir des accusés de consommer de la marihuana ne constituait pas une caractéristique personnelle essentielle des accusés protégée à juste titre par l'art. 15(1).

En ce qui concernait M, le juge du procès a commis une erreur en ne lui permettant pas de produire de la preuve au soutien de son argument constitutionnel. La preuve a été admise à bon droit devant la Cour, si ce n'est que pour fournir un dossier pouvant servir en appel. Les parties ont accepté à bon droit d'utiliser la preuve présentée par C à l'égard des questions d'ordre constitutionnel; par conséquent, M n'a subi aucun préjudice.

Arbour, J. (dissidente en partie à l'égard du pourvoi de M; dissidente à l'égard du pourvoi de C): Le Parlement a exercé validement son pouvoir en matière de droit criminel en adoptant les dispositions de la Loi sur les stupéfiants qui interdisent la simple possession de marihuana. La Loi vise à réduire un risque pour la santé publique; elle contient une interdiction expresse ainsi qu'une sanction pour le non-respect de l'interdiction. Lorsqu'il élabore une loi pénale, le Parlement a le droit de tenir compte du

niveau de danger pour le public associé à une activité; en l'espèce, les dispositions énonçant l'interdiction ne constituaient pas une tentative d'empiètement visant à légiférer dans des domaines de compétence provinciale.

Le principe du préjudice est un principe de justice fondamentale. Il est violé par tout instrument législatif qui emporte un risque d'emprisonnement pour la perpétration d'une infraction comportant peu de risque de préjudice pour les personnes autres que celle qui commet l'infraction. Par conséquent, toute disposition pénale qui est incompatible avec le principe du préjudice porte ainsi atteinte au droit à la vie, à la liberté et à la sécurité de la personne protégé par l'art. 7 de la Charte canadienne. La possibilité d'emprisonnement doit se limiter aux sanctions punissant les conduites qui causent un réel danger de préjudice allant au-delà du niveau minimal. Une vague crainte de « danger pour le public » n'est pas suffisante pour justifier un risque d'emprisonnement. On retrouve dans la plupart des crimes une ligne de démarcation entre le contrevenant et la ou les victimes ainsi qu'une faute évidente. En l'espèce, l'allégation de la crainte de préjudice répondait à la crainte d'un préjudice pour la collectivité; cette crainte n'était cependant pas suffisante pour satisfaire au principe du préjudice. Lorsque l'État allègue un préjudice pour le public ou pour la collectivité, il doit prouver que le préjudice perçu l'emporte sur les effets qu'a l'application des dispositions sur les personnes accusées des infractions.

En l'espèce, le risque d'un préjudice pour la collectivité résultant de la consommation de marihuana ne justifiait aucunement le risque d'emprisonnement en cas de possession simple. L'emprisonnement ne peut se justifier lorsqu'il s'agit d'un préjudice qu'une personne se cause à elle-même, et ce, même lorsque ce préjudice peut être grave, comme dans le cas de grands consommateurs de marihuana qui font partie de groupes supposément vulnérables. Il existe d'autres infractions, comme, par exemple, celles de conduite avec les facultés affaiblies et de conduite dangereuse, qui permettent « d'attraper » les conduites dangereuses faites en public qui peuvent être associées à l'usage de marihuana.

Constitue un argument trompeur celui voulant que la question de la possibilité d'ordonner l'emprisonnement doive être à juste titre argumentée comme étant une atteinte potentielle à l'art. 12 de la Charte, lequel protège contre les traitements et peines cruels et inusités. La jurisprudence indique clairement que l'art. 12 n'est qu'un exemple précis des droits généraux qui font partie de l'art. 7; une sanction peut donc porter atteinte à l'art. 7 même si elle n'est pas cruelle et inusité, pour autant qu'elle soit, par exemple, disproportionnée. De même, la suggestion qu'il faudrait nécessairement la présence de « circonstances aggravantes » pour prendre en considération l'emprisonnement de membres de groupes vulnérables qui pourraient causer des préjudices publics rend dans les faits les dispositions encore moins soutenables. Cela veut dire que, dans les faits, les personnes pouvant se causer un préjudice léger, soit celles qui font un usage récréatif de la marihuana et ne font pas partie des groupes vulnérables, pourraient se faire emprisonner en l'absence de facteurs aggravants. L'emprisonnement est la peine la plus grave qui existe en droit pénal et elle ne devrait être utilisée qu'à l'égard des crimes qui causent un préjudice à autrui. Le Parlement ne peut légitimement menacer tous les Canadiens d'emprisonnement à cause d'une conduite qui pourrait seulement leur causer un préjudice à eux-mêmes, au seul motif qu'une personne vulnérable, dans une situation semblable, pourrait hypothétiquement causer un préjudice à d'autres personnes. Les dispositions énonçant l'interdiction de possession simple portent atteinte aux droits des accusés protégés par l'art. 7.

Par ailleurs, l'interdiction d'avoir de la marihuana en sa possession ne porte pas atteinte à l'art. 15 de la Charte canadienne, essentiellement pour les motifs exprimés par les juges majoritaires.

Une atteinte à l'art. 7 de la Charte ayant été établie, le ministère public devait justifier celle-ci conformément à l'art. 1. Le ministère public n'ayant présenté aucune preuve pouvant démontrer que l'interdiction était justifiée en vertu de l'art. 1, celle-ci n'était pas rachetée et devait à bon droit être annulée et déclarée inopérante.

LeBel, J. (dissident en partie à l'égard du pourvoi de M; dissident à l'égard du pourvoi de C): Le principe du préjudice n'est pas un principe de justice fondamentale. En l'espèce, cependant, les dispositions énonçant l'interdiction d'avoir en sa possession de la marihuana étaient arbitraires et portaient atteinte à l'art. 7 de la Charte. Les dispositions avaient une portée excessive; elles criminalisaient une conduite privée et inoffensive dans le but de répondre à une situation perçue comme un problème social. La portée excessive des dispositions portait atteinte aux droits fondamentaux des accusés, étant donné que la mesure élaborée par le Parlement pour répondre au problème social était arbitraire; il n'y avait aucune preuve devant le tribunal indiquant que l'on avait tenté de régler les problèmes sociaux à l'aide de mesures comportant moins d'ingérence. Même si peu de gens sont dans les faits emprisonnés pour simple possession de marihuana, il n'en demeure pas moins que l'interdiction fait loi au Canada et qu'un risque grave se rattache à un comportement privé comportant un bien faible risque de préjudice pour le public. La preuve que les corps de police semblent réticents à appliquer les dispositions démontre que les forces de l'ordre pensent également que les dispositions ont une portée excessive. Il y a de plus un risque important d'avoir un casier judiciaire; vu l'opprobre important

se rattachant à l'existence d'un casier judiciaire, ce sont les crimes plus graves que celui dont il est question en l'espèce qui devraient y donner lieu.

Deschamps, J. (dissidente en partie à l'égard du pourvoi de M; dissidente à l'égard du pourvoi de C): Le principe du préjudice n'est pas un principe de justice fondamentale. Il est trop étroit pour inclure correctement tant l'objet et la nécessité du droit criminel, lequel est à juste titre utilisé pour protéger la société en général.

Essentiellement pour les motifs exprimés par LeBel, J. en l'espèce, l'inclusion de la marihuana à l'annexe de la Loi et du Règlement est excessive et arbitraire et porte atteinte aux principes de justice fondamentale. Utiliser le droit criminel, surtout lorsqu'il comporte un risque d'emprisonnement, pour prévenir un comportement privé la plupart du temps inoffensif, en raison d'une simple crainte d'un préjudice pour le public, constitue l'emploi d'un instrument inutilement sévère, alors que d'autres instruments moins graves auraient pu être employés. En conséquence, on a porté atteinte aux droits des accusés à la vie, à la liberté et à la sécurité de leur personne, tels que protégés par l'art. 7 de la Charte.

Le ministère public n'ayant pas tenté de justifier, en vertu de l'article premier, l'atteinte à l'art. 7, les dispositions de la Loi sur les stupéfiants qui interdisaient la possession de marijuana devaient être annulées.

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R. v. Butler (1992), [1992] 2 W.W.R. 577, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.) — considered

R. v. Clay (2003), 2003 SCC 75, 2003 CarswellOnt 5179, 2003 CarswellOnt 5180 (S.C.C.) — referred to

R. v. Coady (1994), 122 Nfld. & P.E.I.R. 331, 379 A.P.R. 331, 1994 CarswellNfld 114 (Nfld. T.D.) — referred to

R. v. Crown Zellerbach Canada Ltd. (1988), [1988] 1 S.C.R. 401, [1988] 3 W.W.R. 385, 49 D.L.R. (4th) 161, 84 N.R. 1, 25 B.C.L.R. (2d) 145, 40 C.C.C. (3d) 289, 3 C.E.L.R. (N.S.) 1, 1988 CarswellBC 755, 1988 CarswellBC 137 (S.C.C.) — considered

R. v. Culley (1977), 36 C.C.C. (2d) 433, 1977 CarswellOnt 1008 (Ont. C.A.) — referred to

R. v. Dauphinee (1984), 62 N.S.R. (2d) 156, 136 A.P.R. 156, 1984 CarswellNS 172 (N.S. C.A.) — considered

R. v. Dufresne (1912), 19 C.C.C. 414, 5 D.L.R. 501 — referred to

R. v. F. (R.P.) (1996), 105 C.C.C. (3d) 435, 149 N.S.R. (2d) 91, 432 A.P.R. 91, 1996 CarswellNS 77 (N.S. C.A.) — considered

R. v. Find (2001), 2001 SCC 32, 2001 CarswellOnt 1702, 2001 CarswellOnt 1703, 42 C.R. (5th) 1, 154 C.C.C. (3d) 97, 199 D.L.R. (4th) 193, 269 N.R. 149, 146 O.A.C. 236, [2001] 1 S.C.R. 863, 82 C.R.R. (2d) 247 (S.C.C.) — referred to

R. v. Fleming (1992), 10 B.C.A.C. 79, 21 W.A.C. 79, 1992 CarswellBC 939 (B.C. C.A.) — referred to

R. v. Forbes (1937), 69 C.C.C. 140 (B.C. Co. Ct.) — referred to

R. c. Hamon (1993), 85 C.C.C. (3d) 490, 58 Q.A.C. 241, 20 C.R.R. (2d) 181, 1993 CarswellQue 306 (Que. C.A.) — referred to

R. v. Hauser (1979), [1979] 1 S.C.R. 984, 26 N.R. 541, [1979] 5 W.W.R. 1, 16 A.R. 91, 46 C.C.C. (2d) 481, 8 C.R. (3d) 89 (Eng.), 8 C.R. (3d) 281 (Fr.), 98 D.L.R. (3d) 193, 1979 CarswellAlta 220, 1979 CarswellAlta 280, 1979 CarswellAlta 170 (S.C.C.) — considered

R. v. Hebert (1990), 47 B.C.L.R. (2d) 1, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145, [1990] 5 W.W.R. 1, 57 C.C.C. (3d) 1, 110 N.R. 1, 49 C.R.R. 114, 1990 CarswellYukon 7, 1990 CarswellYukon 4 (S.C.C.) — referred to

R. v. Industrial Acceptance Corp. (1953), [1953] 2 S.C.R. 273, 107 C.C.C. 1, [1953] 4 D.L.R. 369, 1953 CarswellNat 259 (S.C.C.) — considered

R. v. Jobidon (1991), 7 C.R. (4th) 233, 128 N.R. 321, [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454, 49 O.A.C. 83, 1991 CarswellOnt 110, 1991 CarswellOnt 1023 (S.C.C.) — referred to

R. v. Keegstra (1995), 29 Alta. L.R. (3d) 305, 39 C.R. (4th) 205, 180 N.R. 120, 98 C.C.C. (3d) 1, 124 D.L.R. (4th) 289, 169 A.R. 50, 97 W.A.C. 50, [1995] 2 S.C.R. 381, 29 C.R.R. (2d) 256, 1995 CarswellAlta 172, 1995 CarswellAlta 411 (S.C.C.) — considered

R. v. Kripps Pharmacy Ltd. (1983), (sub nom. *R. v. Wetmore)* [1983] 2 S.C.R. 284, 2 D.L.R. (4th) 577, 49 N.R. 286, [1984] 1 W.W.R. 577, 7 C.C.C. (3d) 507, 38 C.R. (3d) 161, 1983 CarswellBC 693, 1983 CarswellBC 731 (S.C.C.) — referred to

R. v. Latimer (2001), 2001 SCC 1, 2001 CarswellSask 4, 2001 CarswellSask 5, 193 D.L.R. (4th) 577, 150 C.C.C. (3d) 129, 39 C.R. (5th) 1, 264 N.R. 99, 203 Sask. R. 1, 240 W.A.C. 1, [2001] 1 S.C.R. 3, [2001] 6 W.W.R. 409, 80 C.R.R. (2d) 189 (S.C.C.) — referred to

R. v. M. (C.A.) (1996), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500, 1996 CarswellBC 1000, 1996 CarswellBC 1000F (S.C.C.) — referred to

R. v. Mills (1999), [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Morgentaler (1988), (sub nom. *R. v. Morgentaler (No. 2))* [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281 (note), 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — considered

R. v. Morrisey (2000), 2000 SCC 39, 2000 CarswellNS 255, 2000 CarswellNS 256, 36 C.R. (5th) 85, 148 C.C.C. (3d) 1, 191 D.L.R. (4th) 86, 259 N.R. 95, 77 C.R.R. (2d) 259, [2000] 2 S.C.R. 90, 187 N.S.R. (2d) 1, 585 A.P.R. 1 (S.C.C.) — considered

R. v. Murdock (2003), 176 C.C.C. (3d) 232, 107 C.R.R. (2d) 152, 2003 CarswellOnt 2376, 11 C.R. (6th) 43, 173 O.A.C. 171 (Ont. C.A.) — referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — considered

R. v. Richards (1989), 88 N.S.R. (2d) 245, 225 A.P.R. 425, 1989 CarswellNS 276 (N.S. C.A.) — referred to

R. v. S. (S.) (1990), 77 C.R. (3d) 273, [1990] 2 S.C.R. 254, 110 N.R. 321, 41 O.A.C. 81, 49 C.R.R. 79, 57 C.C.C. (3d) 115, 1990 CarswellOnt 97, 1990 CarswellOnt 999 (S.C.C.) — referred to

R. v. Sharpe (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Smith (1987), [1987] 5 W.W.R. 1, [1987] 1 S.C.R. 1045, (sub nom. *Smith v. R.)* 40 D.L.R. (4th) 435, 75 N.R. 321, 15 B.C.L.R. (2d) 273, (sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, (sub nom. *Smith v. R.)* 31 C.R.R. 193, 1987 CarswellBC 198, 1987 CarswellBC 704 (S.C.C.) — considered

R. v. Swain (1991), 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 1991 CarswellOnt 93, 1991 CarswellOnt 1016 (S.C.C.) — considered

R. v. W. (L.W.) (2000), 2000 SCC 18, 2000 CarswellBC 749, 2000 CarswellBC 750, 143 C.C.C. (3d) 129, 32 C.R. (5th) 58, 184 D.L.R. (4th) 385, 252 N.R. 332, [2000] 1 S.C.R. 455, 134 B.C.A.C. 236, 219 W.A.C. 236 (S.C.C.) — referred to

R. v. Wakabayashi (1928), [1928] 1 W.W.R. 487, 39 B.C.R. 310, 49 C.C.C. 392, [1928] 3 D.L.R. 226, 1928 CarswellBC 12 (B.C. S.C.) — referred to

R. v. Witter (1997), 1997 CarswellOnt 2690 (Ont. Gen. Div.) — referred to

Reference re Firearms Act (Canada) (2000), 2000 SCC 31, 2000 CarswellAlta 517, 2000 CarswellAlta 518, 185 D.L.R. (4th) 577, 144 C.C.C. (3d) 385, 34 C.R. (5th) 1, [2000] 1 S.C.R. 783, [2000] 10 W.W.R. 1, 82 Alta. L.R. (3d) 1, 254 N.R. 201, 261 A.R. 201, 225 W.A.C. 201 (S.C.C.) — considered

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — considered

Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada) (1990), 77 C.R. (3d) 1, 48 C.R.R. 1, [1990] 1 S.C.R. 1123, 109 N.R. 81, 68 Man. R. (2d) 1, [1990] 4 W.W.R. 481, 56 C.C.C. (3d) 65, 1990 CarswellMan 206, 1990 CarswellMan 378 (S.C.C.) — considered

RJR-Macdonald Inc. c. Canada (Procureur général) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* [1995] 3 S.C.R. 199, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 187 N.R. 1, 1995 CarswellQue 119, 1995 CarswellQue 119F (S.C.C.) — considered

Rodriguez v. British Columbia (Attorney General) (1993), 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, [1993] 3 S.C.R. 519, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641, 1993 CarswellBC 228, 1993 CarswellBC 1267 (S.C.C.) — considered

Scowby v. Saskatchewan (Board of Inquiry) (1986), (sub nom. *Scowby v. Glendinning)* [1986] 6 W.W.R. 481, [1986] 2 S.C.R. 226, 32 D.L.R. (4th) 161, 70 N.R. 241, 51 Sask. R. 208, 29 C.C.C. (3d) 1, 8 C.H.R.R. D/3677, 1986 CarswellSask 249, 1986 CarswellSask 445 (S.C.C.) — referred to

Standard Sausage Co. v. Lee (1933), [1934] 1 W.W.R. 81, 47 B.C.R. 411, 60 C.C.C. 265 (sup. reasons), [1933] 4 D.L.R. 501, [1934] 1 D.L.R. 706 Addendum, 1933 CarswellBC 83 (B.C. C.A.) — referred to

Standard Sausage Co. v. Lee (1934), 61 C.C.C. 95, [1934] 1 D.L.R. 706 (B.C. C.A.) — referred to

Steele v. Mountain Institution (1990), [1990] 6 W.W.R. 673, 121 N.R. 198, [1990] 2 S.C.R. 1385, 51 B.C.L.R. (2d) 1, 60 C.C.C. (3d) 1, 80 C.R. (3d) 257, 2 C.R.R. (2d) 304, 1990 CarswellBC 245, 1990 CarswellBC 762 (S.C.C.) — considered

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3 (S.C.C.) — considered

Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research) (1990), 76 C.R. (3d) 129, [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161, 106 N.R. 161, 39 O.A.C. 161, 54 C.C.C. (3d) 417, 29 C.P.R. (3d) 97, 47 C.R.R. 1, 72 O.R. (2d) 415 (note), 1990 CarswellOnt 991, 1990 CarswellOnt 92 (S.C.C.) — considered

United States v. Burns (2001), 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 39 C.R. (5th) 205, [2001] 3 W.W.R. 193, 265 N.R. 212, 148 B.C.A.C. 1, 243 W.A.C. 1, 81 C.R.R. (2d) 1, [2001] 1 S.C.R. 283 (S.C.C.) — referred to

Vriend v. Alberta (1998), 1998 CarswellAlta 210, 1998 CarswellAlta 211, 156 D.L.R. (4th) 385, 50 C.R.R. (2d) 1, 224 N.R. 1, 212 A.R. 237, 168 W.A.C. 237, 31 C.H.R.R. D/1, [1998] 1 S.C.R. 493, 98 C.L.L.C. 230-021, 67 Alta. L.R. (3d) 1, [1999] 5 W.W.R. 451, 4 B.H.R.C. 140 (S.C.C.) — referred to

Cases considered by *Arbour J.*:

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1994), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, (sub nom. *Sheena B., Re)* 176 N.R. 161, (sub nom. *Sheena B., Re)* 78 O.A.C. 1, 1995 CarswellOnt 105, 1995 CarswellOnt 515 (S.C.C.) — considered

Canada (Procureure générale) c. Hydro-Québec (1997), 1997 CarswellQue 849, (sub nom. *R v. Hydro-Québec)* 118 C.C.C. (3d) 97, (sub nom. *R. v. Hydro-Québec)* 151 D.L.R. (4th) 32, 9 C.R. (5th) 157, (sub nom. *R. v. Hydro-Québec)* 217 N.R. 241, (sub nom. *R. v. Hydro-Québec)* [1997] 3 S.C.R. 213, 24 C.E.L.R. (N.S.) 167, 1997 CarswellQue 3705 (S.C.C.) — considered

Cunningham v. Canada (1993), 11 Admin. L.R. (2d) 1, 14 C.R.R. (2d) 234, 20 C.R. (4th) 57, 151 N.R. 161, 80 C.C.C. (3d) 492, 62 O.A.C. 243, [1993] 2 S.C.R. 143, 1993 CarswellOnt 84, 1993 CarswellOnt 977 (S.C.C.) — referred to

Fowler v. Padget (1798), 101 E.R. 1103, 7 Term Rep. 509 — considered

Godbout c. Longueuil (Ville) (1997), (sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, (sub nom. *Godbout v. Longueuil (Ville))* 219 N.R. 1, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (City))* 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout)* 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — considered

Labatt Breweries of Canada Ltd. v. Canada (Attorney General) (1979), [1980] 1 S.C.R. 914, 52 C.C.C. (2d) 433, 30 N.R. 496, 9 B.L.R. 181, 1979 CarswellNat 7, 1979 CarswellNat 631, 49 C.P.R. (2d) 179, 110 D.L.R. (3d) 594 (S.C.C.) — referred to

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1999), 1999 CarswellNB 305, 1999 CarswellNB 306, 26 C.R. (5th) 203, 244 N.R. 276, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615 (S.C.C.) — considered

R. v. Arkell (1990), [1990] 6 W.W.R. 180, 79 C.R. (3d) 207, 49 B.C.L.R. (2d) 1, [1990] 2 S.C.R. 695, 59 C.C.C. (3d) 65, 50 C.R.R. 193, 112 N.R. 175, 1990 CarswellBC 197, 1990 CarswellBC 758 (S.C.C.) — considered

R. v. Big M Drug Mart Ltd. (1985), [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321, 58 N.R. 81, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 60 A.R. 161, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 13 C.R.R. 64, 1985 CarswellAlta 316, 1985 CarswellAlta 609 (S.C.C.) — considered

R. v. Butler (1992), [1992] 2 W.W.R. 577, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.) — considered

R. v. Clay (1997), 1997 CarswellOnt 3168, 9 C.R. (5th) 349, 39 O.T.C. 81 (Ont. Gen. Div.) — referred to

R. v. Clay (2000), 2000 CarswellOnt 2626, 188 D.L.R. (4th) 468, 146 C.C.C. (3d) 276, 49 O.R. (3d) 577, 75 C.R.R. (2d) 310, 37 C.R. (5th) 170, 135 O.A.C. 66 (Ont. C.A.) — referred to

R. v. Creighton (1993), 23 C.R. (4th) 189, 157 N.R. 1, 65 O.A.C. 321, 105 D.L.R. (4th) 632, 83 C.C.C. (3d) 346, [1993] 3 S.C.R. 3, 17 C.R.R. (2d) 1, 1993 CarswellOnt 115, 1993 CarswellOnt 989 (S.C.C.) — considered

R. v. DeSousa (1992), 15 C.R. (4th) 66, [1992] 2 S.C.R. 944, 11 C.R.R. (2d) 193, 9 O.R. (3d) 544 (note), 142 N.R. 1, 76 C.C.C. (3d) 124, 95 D.L.R. (4th) 595, 56 O.A.C. 109, 1992 CarswellOnt 100, 1992 CarswellOnt 1006F (S.C.C.) — considered

R. v. Hauser (1979), [1979] 1 S.C.R. 984, 26 N.R. 541, [1979] 5 W.W.R. 1, 16 A.R. 91, 46 C.C.C. (2d) 481, 8 C.R. (3d) 89 (Eng.), 8 C.R. (3d) 281 (Fr.), 98 D.L.R. (3d) 193, 1979 CarswellAlta 220, 1979 CarswellAlta 280, 1979 CarswellAlta 170 (S.C.C.) — referred to

R. v. Heywood (1994), 34 C.R. (4th) 133, 174 N.R. 81, 50 B.C.A.C. 161, 82 W.A.C. 161, 24 C.R.R. (2d) 189, 120 D.L.R. (4th) 348, 94 C.C.C. (3d) 481, [1994] 3 S.C.R. 761, 1994 CarswellBC 592, 1994 CarswellBC 1247 (S.C.C.) — referred to

R. v. Hinchey (1996), 111 C.C.C. (3d) 353, 205 N.R. 161, 142 D.L.R. (4th) 50, 3 C.R. (5th) 187, 147 Nfld. & P.E.I.R. 1, 459 A.P.R. 1, [1996] 3 S.C.R. 1128, 1996 CarswellNfld 253, 1996 CarswellNfld 254 (S.C.C.) — considered

R. v. Keegstra (1995), 29 Alta. L.R. (3d) 305, 39 C.R. (4th) 205, 180 N.R. 120, 98 C.C.C. (3d) 1, 124 D.L.R. (4th) 289, 169 A.R. 50, 97 W.A.C. 50, [1995] 2 S.C.R. 381, 29 C.R.R. (2d) 256, 1995 CarswellAlta 172, 1995 CarswellAlta 411 (S.C.C.) — referred to

R. v. M. (C.) (1995), 23 O.R. (3d) 629, 41 C.R. (4th) 134, 98 C.C.C. (3d) 481, 30 C.R.R. (2d) 112, 82 O.A.C. 68, 1995 CarswellOnt 125 (Ont. C.A.) — considered

R. v. M. (C.A.) (1996), 46 C.R. (4th) 269, 194 N.R. 321, 105 C.C.C. (3d) 327, 73 B.C.A.C. 81, 120 W.A.C. 81, [1996] 1 S.C.R. 500, 1996 CarswellBC 1000, 1996 CarswellBC 1000F (S.C.C.) — considered

R. v. Martineau (1990), [1990] 6 W.W.R. 97, 112 N.R. 83, 58 C.C.C. (3d) 353, 76 Alta. L.R. (2d) 1, 79 C.R. (3d) 129, 50 C.R.R. 110, 109 A.R. 321, [1990] 2 S.C.R. 633, 1990 CarswellAlta 143, 1990 CarswellAlta 657 (S.C.C.) — considered

R. v. Mills (1999), [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Morgentaler (1988), (sub nom. *R. v. Morgentaler (No. 2)*) [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 63 O.R. (2d) 281 (note), 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — referred to

R. v. Murdock (2003), 176 C.C.C. (3d) 232, 107 C.R.R. (2d) 152, 2003 CarswellOnt 2376, 11 C.R. (6th) 43, 173 O.A.C. 171 (Ont. C.A.) — considered

R. v. Nette (2001), 2001 SCC 78, 2001 CarswellBC 2481, 2001 CarswellBC 2482, 158 C.C.C. (3d) 486, 46 C.R. (5th) 197, 205 D.L.R. (4th) 613, 96 B.C.L.R. (3d) 57, [2002] 2 W.W.R. 1, 16 M.V.R. (4th) 159, 158 B.C.A.C. 98, 258 W.A.C. 98, 277 N.R. 301, [2001] 3 S.C.R. 488 (S.C.C.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

R. v. Pan (1999), 1999 CarswellOnt 934, 134 C.C.C. (3d) 1, 120 O.A.C. 1, 62 C.R.R. (2d) 189, 26 C.R. (5th) 87, 44 O.R. (3d) 415 (Ont. C.A.) — referred to

R. v. Pan (2001), 2001 SCC 42, 2001 CarswellOnt 2261, 2001 CarswellOnt 2262, 155 C.C.C. (3d) 97, 200 D.L.R. (4th) 577, 43 C.R. (5th) 203, 147 O.A.C. 1, 85 C.R.R. (2d) 1, 270 N.R. 317, [2001] 2 S.C.R. 344 (S.C.C.) — referred to

R. v. Parker (2000), 2000 CarswellOnt 2627, 188 D.L.R. (4th) 385, 146 C.C.C. (3d) 193, 49 O.R. (3d) 481, 75 C.R.R. (2d) 233, 37 C.R. (5th) 97, 135 O.A.C. 1 (Ont. C.A.) — considered

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) — referred to

R. v. Sharpe (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Smith (1987), [1987] 5 W.W.R. 1, [1987] 1 S.C.R. 1045, (sub nom. *Smith v. R.)* 40 D.L.R. (4th) 435, 75 N.R. 321, 15 B.C.L.R. (2d) 273, (sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, (sub nom. *Smith v. R.)* 31 C.R.R. 193, 1987 CarswellBC 198, 1987 CarswellBC 704 (S.C.C.) — considered

R. v. Vaillancourt (1987), 81 N.R. 115, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399, 68 Nfld. & P.E.I.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289, (sub nom. *Vallaincourt v. R.)* 32 C.R.R. 18, 209 A.P.R. 281, 1987 CarswellQue 18, 1987 CarswellQue 98 (S.C.C.) — considered

R. v. W. (L.W.) (2000), 2000 SCC 18, 2000 CarswellBC 749, 2000 CarswellBC 750, 143 C.C.C. (3d) 129, 32 C.R. (5th) 58, 184 D.L.R. (4th) 385, 252 N.R. 332, [2000] 1 S.C.R. 455, 134 B.C.A.C. 236, 219 W.A.C. 236 (S.C.C.) — referred to

R. v. White (1999), 1999 CarswellBC 1224, 1999 CarswellBC 1225, 63 C.R.R. (2d) 1, 240 N.R. 1, 24 C.R. (5th) 201, 135 C.C.C. (3d) 257, 174 D.L.R. (4th) 111, 42 M.V.R. (3d) 161, 123 B.C.A.C. 161, 201 W.A.C. 161, [1999] 2 S.C.R. 417, 7 B.H.R.C. 120 (S.C.C.) — considered

R. v. Wholesale Travel Group Inc. (1991), 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 117, 1991 CarswellOnt 1029 (S.C.C.) — considered

R. v. Williams (2003), 176 C.C.C. (3d) 449, 230 D.L.R. (4th) 39, 13 C.R. (6th) 240, 208 N.R. 235, 2003 SCC 41, 2003 CarswellNfld 203, 2003 CarswellNfld 204 (S.C.C.) — referred to

R. v. Zingre (1981), [1981] 2 S.C.R. 392, 23 C.P.C. 259, 10 Man. R. (2d) 62, 38 N.R. 272, 61 C.C.C. (2d) 465, 127 D.L.R. (3d) 223, 1981 CarswellMan 47, 1981 CarswellMan 142 (S.C.C.) — referred to

Reference re Firearms Act (Canada) (2000), 2000 SCC 31, 2000 CarswellAlta 517, 2000 CarswellAlta 518, 185 D.L.R. (4th) 577, 144 C.C.C. (3d) 385, 34 C.R. (5th) 1, [2000] 1 S.C.R. 783, [2000] 10 W.W.R. 1, 82 Alta. L.R. (3d) 1, 254 N.R. 201, 261 A.R. 201, 225 W.A.C. 201 (S.C.C.) — referred to

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia) (1985), [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536, 63 N.R. 266, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 18 C.R.R. 30, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 1985 CarswellBC 398, [1986] D.L.Q. 90, 1985 CarswellBC 816 (S.C.C.) — considered

Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case) (1948), [1949] S.C.R. 1, [1949] 1 D.L.R. 433, 1948 CarswellNat 62 (S.C.C.) — considered

Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case) (1950), [1950] 4 D.L.R. 689, [1951] A.C. 179, 66 T.L.R. (Pt. 2) 774 (Canada P.C.) — referred to

RJR-Macdonald Inc. c. Canada (Procureur général) (1995), (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 127 D.L.R. (4th) 1, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* [1995] 3 S.C.R. 199, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 100 C.C.C. (3d) 449, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 62 C.P.R. (3d) 417, (sub nom. *RJR-MacDonald Inc. v. Canada (Attorney General))* 31 C.R.R. (2d) 189, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 187 N.R. 1, 1995 CarswellQue 119, 1995 CarswellQue 119F (S.C.C.) — considered

Rodriguez v. British Columbia (Attorney General) (1993), 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, [1993] 3 S.C.R. 519, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641, 1993 CarswellBC 228, 1993 CarswellBC 1267 (S.C.C.) — considered

Scowby v. Saskatchewan (Board of Inquiry) (1986), (sub nom. *Scowby v. Glendinning)* [1986] 6 W.W.R. 481, [1986] 2 S.C.R. 226, 32 D.L.R. (4th) 161, 70 N.R. 241, 51 Sask. R. 208, 29 C.C.C. (3d) 1, 8 C.H.R.R. D/3677, 1986 CarswellSask 249, 1986 CarswellSask 445 (S.C.C.) — referred to

United States v. Burns (2001), 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 85 B.C.L.R. (3d) 1, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 39 C.R. (5th) 205, [2001] 3 W.W.R. 193, 265 N.R. 212, 148 B.C.A.C. 1, 243 W.A.C. 1, 81 C.R.R. (2d) 1, [2001] 1 S.C.R. 283 (S.C.C.) — referred to

Cases considered by *LeBel J.*:

Godbout c. Longueuil (Ville) (1997), (sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, (sub nom. *Godbout v. Longueuil (Ville))* 219 N.R. 1, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (City))* 47 C.R.R. (2d) 1, 43 M.P.L.R. (2d) 1, (sub nom. *Longueuil (City) v. Godbout)* 97 C.L.L.C. 210-031, [1997] 3 S.C.R. 844 (S.C.C.) — referred to

R. v. Mills (1999), [1999] 3 S.C.R. 668, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1 (S.C.C.) — referred to

R. v. Seaboyer (1991), 7 C.R. (4th) 117, 4 O.R. (3d) 383 (headnote only), 48 O.A.C. 81, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 1991 CarswellOnt 1022, 1991 CarswellOnt 109 (S.C.C.) — referred to

Suresh v. Canada (Minister of Citizenship & Immigration) (2002), 2002 CarswellNat 7, 2002 CarswellNat 8, 2002 SCC 1, 18 Imm. L.R. (3d) 1, 208 D.L.R. (4th) 1, 281 N.R. 1, 90 C.R.R. (2d) 1, 37 Admin. L.R. (3d) 159, [2002] 1 S.C.R. 3 (S.C.C.) — referred to

Cases considered by *Deschamps J.*:

R. v. Arkell (1990), [1990] 6 W.W.R. 180, 79 C.R. (3d) 207, 49 B.C.L.R. (2d) 1, [1990] 2 S.C.R. 695, 59 C.C.C. (3d) 65, 50 C.R.R. 193, 112 N.R. 175, 1990 CarswellBC 197, 1990 CarswellBC 758 (S.C.C.) — referred to

R. v. Butler (1992), [1992] 2 W.W.R. 577, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.) — referred to

R. v. Heywood (1994), 34 C.R. (4th) 133, 174 N.R. 81, 50 B.C.A.C. 161, 82 W.A.C. 161, 24 C.R.R. (2d) 189, 120 D.L.R. (4th) 348, 94 C.C.C. (3d) 481, [1994] 3 S.C.R. 761, 1994 CarswellBC 592, 1994 CarswellBC 1247 (S.C.C.) — referred to

Rodriguez v. British Columbia (Attorney General) (1993), 82 B.C.L.R. (2d) 273, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, [1993] 3 S.C.R. 519, 17 C.R.R. (2d) 193, 24 C.R. (4th) 281, 158 N.R. 1, 34 B.C.A.C. 1, 56 W.A.C. 1, [1993] 7 W.W.R. 641, 1993 CarswellBC 228, 1993 CarswellBC 1267 (S.C.C.) — referred to

Statutes considered by *Gonthier, Binnie JJ.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

ss. 1-7 — referred to

s. 7 — considered

ss. 7-14 — referred to

ss. 8-14 — referred to

s. 12 — referred to

s. 15 — considered

s. 15(1) — considered
Combines Investigation Act, R.S.C. 1970, c. C-23
s. 15(2) — referred to

s. 32(1)(c) — referred to
Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

s. 91 — considered

s. 91 ¶ 27 — considered

s. 92 — referred to
Contraventions Act, S.C. 1992, c. 47
Generally — referred to
Controlled Drugs and Substances Act, S.C. 1996, c. 19
Generally — referred to
Criminal Code, R.S.C. 1970, c. C-34
s. 238 — referred to
Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 71 — referred to

s. 155 — referred to

s. 160 — referred to

s. 163.1(4) [en. 1993, c. 46, s. 2] — referred to

s. 182 — referred to

s. 251 — referred to

s. 253 — referred to

s. 718.1 [en. 1995, c. 22, s. 6] — referred to
Criminal Law Amendment Act, 1972, S.C. 1972, c. 13
s. 16 — referred to
Food and Drugs Act, R.S.C. 1970, c. F-27
s. 8 — referred to

s. 9 — referred to

s. 26 — referred to
Food and Drugs Act, R.S.C. 1985, c. F-27
Generally — referred to
Narcotic Control Act, S.C. 1960-61, c. 35
Generally — referred to

s. 17(1) — referred to

Narcotic Control Act, R.S.C. 1985, c. N-1
Generally — considered

s. 2 "marijuana" — referred to

s. 3 — considered

s. 3(1) — considered

s. 3(2) — considered

s. 4 — considered

s. 4(2) — considered

Sched., item 3 — referred to
Opium and Drug Act, S.C. 1911, c. 17
Generally — referred to
Opium and Narcotic Drug Act, S.C. 1953-54, c. 38
Generally — referred to

s. 3 — referred to
Opium and Narcotic Drug Act, 1923, S.C. 1923, c. 22
Generally — referred to
Opium and Narcotic Drug Act, 1929, S.C. 1929, c. 49
s. 4 — referred to
Opium and Narcotic Drug Act, Act to amend the, S.C. 1932, c. 20
Generally — referred to
Opium for other than medicinal purposes, Act to prohibit the importation, manufacture and sale of, S.C. 1908, c. 50
Generally — referred to
Young Offenders Act, S.C. 1980-81-82-83, c. 110
s. 4 — referred to

Statutes considered by *Arbour J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — considered

s. 2(b) — referred to

s. 7 — considered

ss. 8-12 — referred to

ss. 8-14 — referred to

s. 12 — considered

s. 15 — considered
Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

s. 91 ¶ 27 — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 253(a) — referred to

s. 718.1 [en. 1995, c. 22, s. 6] — referred to
Narcotic Control Act, R.S.C. 1985, c. N-1
s. 3(1) — considered

s. 3(2) — considered

s. 4(2) — considered
Statutes considered by *LeBel J.*:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 7 — considered

s. 12 — considered
Statutes considered by *Deschamps J.*:
Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — referred to

s. 7 — referred to
Criminal Code, R.S.C. 1985, c. C-46
s. 718 — referred to
Narcotic Control Act, R.S.C. 1985, c. N-1
Generally — referred to
Opium and Narcotic Drug Act, 1923, S.C. 1923, c. 22
Generally — referred to
Treaties considered by *Gonthier, Binnie JJ.*:
Single Convention on Narcotic Drugs, 1961, C.T.S. 1964/30, 520 U.N.T.S. 151, T.I.A.S. No. 6298
Generally — referred to
Treaties considered by *Arbour J.*:
Single Convention on Narcotic Drugs, 1961, C.T.S. 1964/30, 520 U.N.T.S. 151, T.I.A.S. No. 6298
Article 36 — referred to
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, C.T.S. 1990/42; 28 I.L.M. 493
Article 3(2) — referred to
Vienna Convention on the Law of Treaties, 1969, C.T.S. 1980/37; 1155 U.N.T.S. 331; (1969) 63 A.J.I.L. 875
Article 27 — referred to

APPEAL by accused from judgment reported at *R. v. Malmo-Levine* (2000), 2000 BCCA 335, 2000 CarswellBC 1148, 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, 74 C.R.R. (2d) 189, 138 B.C.A.C. 218, 226 W.A.C. 218 (B.C. C.A.), dismissing accused M's appeal from conviction on charges of possession of marijuana and possession of marijuana for purpose of trafficking and dismissing accused C's appeal from conviction on charge of possession of marijuana.

POURVOI des accusés à l'encontre de l'arrêt publié à *R. v. Malmo-Levine* (2000), 2000 BCCA 335, 2000 CarswellBC 1148, 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, 74 C.R.R. (2d) 189, 138 B.C.A.C. 218, 226 W.A.C. 218 (B.C. C.A.), qui a rejeté le pourvoi de l'accusé M à l'encontre de sa déclaration de culpabilité à l'égard d'accusations de possession de marijuana et de possession

de marijuana en vue d'en faire le trafic et qui a rejeté le pourvoi de l'accusé C à l'encontre de sa déclaration de culpabilité à l'égard d'une accusation de possession de marijuana.

***Gonthier, Binnie JJ.*:**

1 In these appeals, the Court is required to consider whether Parliament has the legislative authority to criminalize simple possession of marihuana and, if so, whether that power has been exercised in a manner that is contrary to the *Canadian Charter of Rights and Freedoms*. The appellant Caine argues in particular that it is a violation of the principles of fundamental justice for Parliament to provide for a term of imprisonment as a sentence for conduct which he says results in little or no harm to other people. The appellant Malmo-Levine puts in issue the constitutional validity of the prohibition against possession for the purpose of trafficking in marihuana.

2 The British Columbia Court of Appeal rejected the appellants' challenges to the relevant provisions of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 ("NCA"), and, in our view, it was right to do so. Upholding as we do the constitutional validity of the simple possession offence, it follows, for the same reasons, that Malmo-Levine's challenge to the prohibition against possession for the purpose of trafficking must also be rejected.

3 All sides agree that marihuana is a psychoactive drug which "causes alteration of mental function". That, indeed, is the purpose for which the appellants use it. Certain groups in society share a particular vulnerability to its effects. While members of these groups, whose identity cannot in general be distinguished from other users in advance, are relatively small as a percentage of all marihuana users, their numbers are significant in absolute terms. The trial judge estimated "chronic users" to number about 50,000. A recent Senate Special Committee report estimated users under 16 (which may overlap to some extent with the chronic user group) also at 50,000 individuals (*Cannabis: Our Position for a Canadian Public Policy* (2002) (the "Senate Committee Report"), vol. I, at pp. 165-66). Pregnant women and schizophrenics are also said to be at particular risk. Advancing the protection of these vulnerable individuals, in our opinion, is a policy choice that falls within the broad legislative scope conferred on Parliament.

4 A conviction for the possession of marihuana for personal use carries no mandatory minimum sentence. In practice, most first offenders are given a conditional discharge. Imprisonment is generally reserved for situations that also involve trafficking or hard drugs. Except in very exceptional circumstances, imprisonment for simple possession of marihuana would constitute a demonstrably unfit sentence and, if imposed, would rightly be set aside on appeal. Availability of imprisonment in a statute that deals with a wide variety of drugs from opium and heroin to crack and cocaine is not unconstitutional, and its rare imposition for marihuana offences (as a scheduled drug) can and should be dealt with under ordinary sentencing principles. A fit sentence, by definition, complies with s. 7 of the *Charter*. The mere fact of the *availability* of imprisonment in a statute dealing with a variety of prohibited drugs does not, in our view, make the criminalization of possession of a psychoactive drug like marihuana contrary to the principles of fundamental justice.

5 The appellants have assembled much evidence and argument attacking the wisdom of the criminalization of simple possession of marihuana. They say that the line between criminal and non-criminal conduct has been drawn inappropriately and that the evil effects of the law against marihuana outweigh the benefits, if any, associated with its prohibition. These are matters of legitimate controversy, but the outcome of that debate is not for the courts to determine. The Constitution provides no more than a framework. Challenges to the wisdom of a legislative measure within that framework should be addressed to Parliament. Our concern is solely with the issue of constitutionality. We conclude that it is within Parliament's legislative jurisdiction to criminalize the possession of marihuana should it choose to do so. Equally, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy.

6 The appeals are therefore dismissed.

I. Facts

A. Malmo-Levine

7 The appellant describes himself as a "marihuana/ freedom activist". Self-represented in these proceedings, his primary concern is with interference by the state in what he believes to be the personal autonomy of its citizens. He stated in his oral argument:

> I'm part of a growing number of such activists, who view cannabis re-legalization as a key part of protecting human rights and our Mother Earth, while, at the same time, helping to end [the] war on poverty.
>
> As you can see, I'm not a lawyer. I am, however, a cannabis user and a researcher, and I would like very much to be a cannabis retailer and perhaps grow a few plants.

8 Malmo-Levine does not deny that marihuana use can have harmful effects. On the contrary, since October 1996, he has helped operate an organization in East Vancouver known as the "Harm Reduction Club", a co-operative, non-profit association which recognizes some potential harm associated with the use of marihuana and seeks to reduce it. The stated object of the Club is to educate its users and the general public about marihuana and provide unadulterated marihuana at cost. It provides instruction about safe smoking habits "to minimize any harm from the use of marihuana", and requires its members to pledge not to operate motor vehicles or heavy equipment while under its influence.

9 On December 4, 1996, police entered the premises of the Harm Reduction Club and seized 316 grams of marihuana, much of it in the form of "joints". The appellant was charged with possession of cannabis (marihuana) for the purpose of trafficking. At trial, he sought to call evidence in support of a constitutional challenge but the trial judge refused to admit the evidence. On appeal, the majority of the Court of Appeal dismissed the appeal, Prowse J.A. dissenting.

B. Caine

10 On June 13, 1993, two RCMP officers on regular patrol observed the appellant and a male passenger sitting in a van by the ocean at White Rock, B.C. As the officers approached, the appellant, who was seated in the driver's seat, started the engine and began to back up. As one of the officers came alongside the van, he smelled a strong odour of recently smoked marihuana. The appellant Caine produced for the officer a partially smoked cigarette of marihuana that weighed 0.5 gram. He possessed the marihuana cigarette for his own use and not for any other purpose.

11 The appellant Caine's application for a declaration that the provisions of the NCA prohibiting the possession of marihuana were unconstitutional was denied at trial. The appeal was also dismissed, Prowse J.A. dissenting.

II. Relevant Statutory and Constitutional Provisions

Narcotic Control Act, R.S.C. 1985, c. N-1 (repealed S.C. 1996, c. 19, s. 94, effective May 14, 1997 (SI/97-47))

12 Section 2 of the NCA defines "marihuana" as *Cannabis sativa* L. and a "narcotic" as "any substance included in the schedule or anything that contains any substance included in the schedule". Marihuana became a scheduled drug when *The Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22 (the predecessor to the NCA) was enacted by Parliament. The relevant provisions of the NCA, impugned insofar as they relate to the simple possession and use of marihuana, state:

> 3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.
>
> (2) Every person who contravenes subsection (1) is guilty of an offence and liable
>
> (a) on summary conviction for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and, for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding seven years.
>
> . . . . .

SCHEDULE

. . . . .

3. *Cannabis sativa*, its preparations, derivatives and similar synthetic preparations, including:

(1) Cannabis resin,

(2) Cannabis (marihuana),

(3) Cannabidiol,

(4) Cannabinol (3-n-amyl-6,6,9-trimethyl-6-diben-zopyran-l-ol),

(4.1) Nabilone ((±)-trans-3 (1,1-dimethylheptyl)-6, 6a, 7, 8, 10, 10a-hexahydro-l-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one),

(5) Pyrahexyl (3-n-hexyl-6,6,9-trimethyl-7,8,9,10-tetrahydro-6-dibenzopyran-l-ol), and

(6) Tetrahydrocannabinol, but not including:

(7) non-viable Cannabis seed.

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . . . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

III. Judicial History

A. Trial Court

1. Malmo-Levine (1998), 54 C.R.R. (2d) 291 (B.C. S.C.)

13 Curtis J., after a lengthy *voir dire*, refused to hear evidence tendered to show the offence of possession of marihuana for the purpose of trafficking to be unconstitutional. He found that the proposed evidence was not relevant to his analysis under s. 7 of the *Charter*.

14 In his view, the freedom to use marihuana is not a matter of fundamental, personal importance, and such use is therefore not protected by s. 7 of the *Charter*. "There being no right to use marijuana created by the right to life, liberty and security of the person, the question of the principles of fundamental justice need not be considered" (p. 295). Malmo-Levine was subsequently convicted under s. 4(2) of the NCA for possession of marihuana for the purpose of trafficking.

2. Caine [1998] B.C.J. No. 885 (B.C. Prov. Ct.)

15 Howard Prov. Ct. J. heard extensive evidence about the alleged harm caused by marihuana. We will address her careful findings of fact in this regard later in these reasons. In the end, she held that she was bound by the decision in *Malmo-Levine* that the NCA did not infringe s. 7. Caine was therefore convicted under s. 3 of the NCA for simple possession.

B. British Columbia Court of Appeal (2000), 138 B.C.A.C. 218, 2000 BCCA 335 (B.C. C.A.)

1. Braidwood J.A.

16 Braidwood J.A., Rowles J.A. concurring, concluded that the "harm principle" was a principle of fundamental justice within the meaning of s. 7. "[The harm principle] is a legal principle and it is concise. Moreover, there is a consensus among reasonable people that it is vital to our system of justice. Indeed, I think that it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others" (para. 134).

17 In the result, however, he judged that the deprivation of the appellants' liberty caused by the penal provisions of the NCA was in accordance with the harm principle, and did not violate s. 7: "It is for Parliament to determine what level of risk is acceptable and what level of risk requires action. The *Charter* only demands ... a 'reasoned apprehension of harm' that is not [in] significant or trivial. The appellants have not convinced me that such harm is absent in this case" (para. 158). He therefore dismissed the appeals.

2. Prowse J.A. (dissenting)

18 Prowse J.A. disagreed that the threshold of harm justifying parliamentary intervention is harm that is "not insignificant or trivial". In her view, harm must be "serious" and "substantial" to survive a *Charter* challenge. She concluded that s. 3(1) of the NCA breached the appellants' s. 7 *Charter* rights in a manner inconsistent with a principle of fundamental justice. She would have adjourned the proceedings to permit counsel to make further submissions with respect to the justification of the breach under s. 1 of the *Charter*.

IV. Constitutional Questions

19 On October 19, 2001, the Chief Justice stated the following constitutional questions in the case of *R. v. Caine*:

> 1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?
>
> 3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867*; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

20 In the *Malmo-Levine* appeal, additional constitutional questions were stated putting in issue the validity of the prohibition against possession for the purpose of trafficking in marihuana in light of s. 7 (fundamental justice) and s. 15 (equality rights) of the *Charter*.

V. Analysis

21 The controversy over the criminalization of the use of marihuana has raged in Canada for at least 30 years. In 1972, the Commission of Inquiry into the Non-Medical Use of Drugs (the "Le Dain Commission"), in its preliminary report entitled

Cannabis, recommended that the prohibition against its use be removed from the *criminal* law. In 1974, the federal government introduced Bill S-19, which would have removed penal sanctions for possession of marihuana for a first offence and substituted a monetary fine in its place. The Bill, however, died on the Order Paper. At the beginning of the 32nd Parliament in 1980, the Throne Speech proclaimed:

> It is time ... to move cannabis offences to the Food and Drugs Act and remove the possibility of imprisonment for simple possession.
>
> (*House of Commons Debates*, vol. I, 1st Sess., 32nd Parl., April 14, 1980, at p. 5)

22 The trial judge in *Caine* estimated that over 600,000 Canadians now have criminal records for cannabis-related offences, and that widespread use despite the criminal prohibition encourages disrespect for the law. At the time of the hearing of the appeal in this Court, the government announced its intention of introducing a bill to eliminate the availability of imprisonment for simple possession. Bill C-38, as introduced, states that possession of amounts less than 15 grams of marihuana will render an individual "guilty of an offence punishable on summary conviction and liable to a fine" (s. 4(5.1)). Furthermore, the offence would be designated as a contravention, pursuant to the *Contraventions Act*, S.C. 1992, c. 47, with the effect that an individual convicted for such possession would not receive a criminal record.

23 These reports and legislative initiatives were directed to crafting what was thought to be the best legislative response to the marihuana controversy. Whether the Bill should proceed, and if so in what form, is a matter of legislative policy for Parliament to decide. The question before us is purely a matter of law. Is the prohibition, including the availability of imprisonment for simple possession, beyond the powers of Parliament, either because it does not properly fall within Parliament's legislative competence, or because the prohibition, and in particular the availability of imprisonment, violate the *Charter's* guarantees of rights and freedoms?

24 The legal issues arising on these appeals can be grouped under the following headings:

A. Exclusion of Constitutional Fact Evidence at the Trial of Malmo-Levine

B. The *Narcotic Control Act*

C. Evidence of Harm

D. Division of Powers

E. Section 7 of the *Charter*

F. Section 15 of the *Charter*

25 We turn, then, to the first issue.

A. Exclusion of Constitutional Fact Evidence at the Trial of Malmo-Levine

26 Curtis J. refused to admit expert evidence of legislative and constitutional facts relevant to the *Charter* challenge on the basis that, even if Malmo-Levine succeeded in establishing what he set out to establish, it would make no difference to the legal result. In the trial judge's view, "[t]here is no legal basis for hearing evidence in support of the defence challenge to the constitutionality of the marijuana laws; it is simply not relevant" (p. 296).

27 In our view, the evidence which Malmo-Levine wished to adduce, which was essentially the same as the evidence tendered in *Caine*, was relevant to his *Charter* challenge. His argument was clearly not frivolous. A trial judge is not required to listen to pointless, irrelevant or repetitive evidence that does not advance the work of the court, but here the proffered evidence was none of those things. Malmo-Levine was prepared to deal with serious matters in a serious way. Had the Crown been prepared to accept his evidentiary points, an admission by Crown counsel or an agreed Statement of Facts could have been filed to

make unnecessary the hearing of *viva voce* evidence. In the absence of any such Crown admissions, we agree with the British Columbia Court of Appeal that in the circumstances of this case the trial judge erred in excluding this "legislative fact" evidence. In the *Caine* case, the trial judge took judicial notice of certain government reports and documents, and proceeded to hear *viva voce* expert evidence on the more debatable aspects of the marihuana controversy. This was the correct procedure.

28 While the courts apply the requirements of judicial notice less stringently to the admission of legislative fact than to adjudicative fact (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1099), courts should nevertheless proceed cautiously to take judicial notice even as "legislative facts" of matters that are reasonably open to dispute, particularly where they relate to an issue that could be dispositive: *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32 (S.C.C.); *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, 2000 SCC 2 (S.C.C.). The evidence of harm, or the lack of it, was central to the argument raised by both Malmo-Levine and Caine. They regarded it as dispositive. Moreover, much of the evidence of "harm" was controversial, and needed to be tested by cross-examination.

29 Curtis J. was clearly unimpressed by what Malmo-Levine wished to establish. In some aspects, we have reached the same conclusion. However, with respect, the trial judge ought to have admitted the evidence despite his misgivings in the circumstances so as to permit Malmo-Levine to put forward a full record in the event of an appeal.

30 The complications that would otherwise have attended the hearing of the appeal however were obviated by the parties' agreement to treat the *Caine* evidence of legislative fact as equally applicable to Malmo-Levine's appeal. In the result, we agree with the Court of Appeal that the trial judge's error did not, in those circumstances, prejudice Malmo-Levine.

B. The Narcotic Control Act

1. History of the NCA

31 The NCA is structured as an omnibus measure covering all controlled drugs including heroin, crack cocaine and opium. The first such Act was passed by Parliament in 1908 in the form of *An Act to prohibit the importation, manufacture and sale of Opium for other than medicinal purposes*, S.C. 1908, c. 50, which aimed to control the use of narcotics for non-medicinal purposes. In 1911, this statute was replaced by *The Opium and Drug Act*, S.C. 1911, c. 17, which added prohibitions with regards to cocaine, morphine and eucaine. In 1923, Parliament enacted a consolidated *Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22, which added cannabis to the list of prohibited drugs. There was no discussion or debate in the house as to why this drug was added. In 1932, a number of important amendments were made in the *Act to amend The Opium and Narcotic Drug Act, 1929*, S.C. 1932, c. 20, referring to both synthetic and natural drugs. By 1938, the Act prohibited over 15 scheduled drugs (S.C. 1938, c. 9) (see Senate Committee Report, vol. II, at pp. 256-58).

32 In 1954, the *Opium and Narcotic Drug Act* was amended, and the offence of possession was supplemented by a new offence: "possession ... for the purpose of trafficking" (S.C. 1954, c. 38, s. 3). A reverse onus applied to this offence, meaning that those possessing large quantities of narcotics had to prove that they were *not* in possession for the purpose of trafficking (Senate Committee Report, vol. II, at p. 264). The Act contained much harsher penalties for trafficking than for possession, leading Braidwood J.A. to conclude that "Parliament's primary purpose was to stamp out the drug traffic and punish the traffickers" (para. 81).

33 Less than a decade later, Parliament replaced the *Opium and Narcotic Drug Act* with the *Narcotic Control Act*, S.C. 1960-61, c. 35, which gave effect to Canada's international commitments under the *Single Convention on Narcotic Drugs, 1961*, Can. T.S. 1964 No. 30. When debating the Bill, the Minister of National Health characterized marihuana as a gateway drug, stating that "[i]t... may well provide a stepping stone to addiction to heroin" (*House of Commons Debates*, vol. VI, 4th Sess., 24th Parl, June 7, 1961, at p. 5981). This strategy was to try to treat and cure the "evil" of marihuana by reducing the supply of drugs through stiff penalties, and reducing the demand for drugs by providing treatment for existing addicts.

34 In 1997, the NCA and Parts III and IV of the *Food and Drugs Act* were repealed and replaced by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"). The new Act was designed to discharge Canada's more recent international obligations with regard to narcotics. It introduced a legislative framework for the import, export, distribution and use of

substances scheduled under previous legislation (Senate Committee Report, vol. II, at p. 286). More than 150 substances now appear in the schedules to the CDSA.

2. Sanctions under the NCA

35 Since the enactment of the *Opium Act* in 1908, the sanctions for drug possession have been steadily decreasing. In 1929, the penalty for the offence of possession was a minimum of six months to a maximum of seven years or a fine of between $200 and $1,000, or both. It was also within the discretion of the court to sentence offenders to hard labour or a whipping: S.C. 1929, c. 49, s. 4. See, e.g., *R. v. Forbes* (1937), 69 C.C.C. 140 (B.C. Co. Ct.) (accused sentenced to 18 months of hard labour plus a $200 fine for possession of marihuana).

36 With the amendment of the *Opium and Narcotic Drug Act* in 1954, penalties for offences involving trafficking increased. For simple possession however, the availability of hard labour was removed. The mandatory six-month prison sentence was repealed in 1961 when the *Narcotic Control Act* was enacted. However, the 1961 Act provided, under s. 17(1), that if the accused was a drug addict, the court could impose custody for treatment for an indeterminate period in lieu of another sentence.

37 In 1969, possession was redesignated as a hybrid offence, and the penalty on summary conviction for possession carried a maximum fine of $1,000 or imprisonment for a term not exceeding six months or both for a first offence and, for a subsequent offence, a fine not exceeding $2,000 or imprisonment for a term not exceeding one year or both: S.C. 1968-69, c. 41, s. 12. The penalties are heavier, of course, if the Crown proceeds by indictment. These provisions were still in effect when the NCA was repealed in 1996.

3. Statutory Framework of the NCA

38 Parliament did not attach the penalty of imprisonment directly to marihuana offences. Rather, the NCA states at s. 3(1) that "[e]xcept as authorized by this Act or the regulations, no person shall have a narcotic in his possession". Narcotics are defined in the schedules to the NCA. Marihuana is a scheduled drug. The trial judge found that while marihuana is a psychoactive drug, it is not (medically speaking) a narcotic. It is deemed to be a "narcotic" only for the parliamentary purposes of the NCA schedule.

39 Various attacks were made on this statutory vehicle in the companion Ontario appeal, *R. v. Clay*, 2003 SCC 75 (S.C.C.), including allegations of overbreadth, and are considered further in our reasons for rejecting that appeal, released concurrently.

C. Evidence of Harm

40 The evidentiary issue at the core of the appellants' constitutional challenge is the "harm principle", and the contention that possession of marihuana for personal use is a "victimless crime". The appellants say that even with respect to the user himself or herself there is no cogent evidence of "significant" or "non-trivial" harm.

41 Malmo-Levine, a self-styled "chronic user", does not deny the existence of harm. The name of his organization, after all, is the "Harm Reduction Club". In his factum, he acknowledges that "Cannabis misuse can cause harm". In oral argument he said that

> my purpose here was to try to shift the debate from whether the harms are trivial, insignificant, to whether the harms are mitigatable and reducible.
>
> and
>
> vulnerable groups, the chronic users, the mentally ill, the pregnant mothers, and the immature youth, are the ones that need harm reduction the most.

1. Admissions by the Appellants

42 The appellants Malmo-Levine, Caine and Clay filed with the Court a Joint Statement of Legislative Facts in which they make the following limited admissions:

(i) Dependency

The appellants state that "[t]here appears to be little or no risk of physical addiction arising from cannabis use; however, a small percentage of users do seemingly develop problems with psychological dependence.... Psychological dependence is reportedly experienced by only 2% of all cannabis users".

(ii) Driving, flying, or operating complex machinery

The appellants acknowledge that "[c]annabis may be contributing to accidents". Note, as well, that the following is printed on the Harm Reduction Club's Membership Card (run by Mr. Malmo-Levine): "I, [name], promise not to operate any heavy machinery while impaired on any marijuana".

(iii) Damage to lungs

The appellants acknowledge that "Dr. Tashkin has recently demonstrated that chronic cannabis smoking will lead to chronic bronchial inflammation".

(iv) Schizophrenia and psychosis

The appellants state that "[c]annabis has not been shown to cause psychoses or schizophrenia, although there is some question as to whether or not cannabis can modify the course of a preexisting psychosis."

(v) Amotivational syndrome

The appellants state that "diminished motivation may be a symptom of chronic intoxication but one which dissipates upon cessation of use".

(vi) Effect on fetus/newborns

The appellants state that "[w]hile some tests have shown some impairment of memory, verbal ability and verbal expression of ideas in school age children, the changes were measurably small. More importantly, however, these minimal testing differences have not been linked to poor school performance in later years."

(vii) Reproductive system

The appellants state that "[t]here may ... be a brief or acute decrease of sex hormone level in the brain, but this level soon returns to normal even without the complete cessation of cannabis smoking".

43 There is no doubt that Canadian society has become much more sceptical about the alleged harm caused by the use of marihuana since the days when Emily Murphy, an Edmonton magistrate, warned that persons under the influence of marihuana "los[e] all sense of moral responsibility. ... are immune to pain ... becom[ing] raving maniacs... liable to kill... using the most savage methods of cruelty" (*The Black Candle* (1922), at pp. 332-33). However, to exonerate marihuana from such extreme forms of denunciation is not to say it is harmless.

2. The Le Dain Commission Report

44 The Le Dain Commission, established in 1969 and reporting in 1972, recommended decriminalization of marihuana but nevertheless identified various concerns regarding its use, including the following four identified by the majority of commissioners as the major areas of social concern (at p. 268):

1. "the effect of cannabis on adolescent maturation;"

2. "the implications of cannabis use for the safe operation of motor vehicles and other machinery;"

3. "the possibility that the long-term heavy use of cannabis will result in a significant amount of mental deterioration and disorder;" and

4. "the role played by cannabis in the development and spread of multi-drug use."

45 Research and further studies in the intervening 30 years have caused reconsideration of some of these findings.

3. The Trial Judge's Findings in Caine

46 Howard Prov. Ct. J., in response to some of the more strident warnings of the harm allegedly caused by marihuana use, reviewed the extensive evidence before her court to put in perspective the potential harms associated with the use of marihuana, as presently understood, as follows (at para. 40):

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;

2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;

3. there is no evidence demonstrating irreversible, organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;

4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;

5. there is no evidence that marihuana use induces psychosis in ordinary healthy adults who use [marihuana] occasionally or moderately and, in relation to the heavy user, the evidence of marihuana psychosis appears to arise only in those having a predisposition towards such a mental illness;

6. marihuana is not addictive;

7. there is a concern over potential dependence in heavy users, but marihuana is not a highly reinforcing type of drug, like heroin or cocaine and consequently physical dependence is not a major problem; psychological dependence may be a problem for the chronic user;

8. there is no causal relationship between marihuana use and criminality;

9. there is no evidence that marihuana is a gateway drug and the vast majority of marihuana users do not go on to try hard drugs ....

10. marihuana does not make people aggressive or violent, but on the contrary it tends to make them passive and quiet;

11. there have been no deaths from the use of marihuana;

12. there is no evidence of an amotivational syndrome, although chronic use of marihuana could decrease motivation, especially if such a user smokes so often as to be in a state of chronic intoxication;

13. assuming current rates of consumption remain stable, the health related costs of marihuana use are very, very small in comparison with those costs associated with tobacco and alcohol consumption.

47 Having concluded that the use of marihuana is not as harmful as is sometimes claimed, the trial judge went on to state in *Caine* that marihuana is *not* "a completely harmless drug for all individual users" (para. 42). She stated at paras. 121-22:

> The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with [marihuana use].
>
> There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.

48 Key to Howard Prov. Ct. J.'s findings was the identification of perhaps 50,000 chronic users, who cannot be identified in advance, but who pose both a risk to themselves and a potential cost to society at paras. 123-26:

> There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the vulnerable persons identified in the materials. It is not possible to identify these persons in advance.
>
> As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of all marihuana users are chronic users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.
>
> In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be min[u]seule.
>
> All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs [*sic*]. There is a risk that, with legalization, user rates will increase and so will these costs.
>
> [Emphasis added.]

49 Over 20 years after the Le Dain Commission's Report, the Hall Report was released in Australia. The trial judge noted in *Caine* that "[t]here was general agreement among the witnesses who appeared before me (save perhaps for Dr. Morgan) that the conclusions contained in the Hall Report were sound ... based on the scientific information available at this time" (par. 48). The 1994 Hall Report found the following to be "chronic effects":

> [T]he major *probable* adverse effects [from chronic use] appear to be:
>
> - respiratory diseases associated with smoking as the method of administration, such as chronic bronchitis, and the occurrence of histopathological changes that may be precursors to the development of malignancy;
> - development of a cannabis dependence syndrome, characterized by an inability to abstain from or to control cannabis use;
> - subtle forms of cognitive impairment, most particularly of attention and memory, which persist while the user remains chronically intoxicated, and may or may not be reversible after prolonged abstinence from cannabis.
>
> [T]he major *possible* adverse effects [from chronic use that is, effects] which remain to be confirmed by further research [are]:
>
> - an increased risk of developing cancers of the aerodigestive tract, i.e. oral cavity, pharynx, and oesophagus;

> • an increased risk of leukemia among offspring exposed while in utero;
>
> • a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents;
>
> • birth defects occurring among children of women who used cannabis during their pregnancies.
>
> (W. Hall, N. Solowij and J. Lemon, *National Drug Strategy: The health and psychological consequences of cannabis use* (1994) (the "Hall Report"), at p. ix (emphasis in original))

50 In 2001, a revised version of the Hall Report was released. Its conclusions are similar to the 1994 Report except that the cognitive impairment probability was demoted to a possibility, the cancer risk (from smoking marihuana) was promoted from a possibility to a probability and the risks of leukemia and birth defects were no longer listed.

51 The trial judge noted that the 1994 Hall Report identified three traditional "high risk groups" (at para. 46):

> (1) Adolescents with a history of poor school performance ...
>
> (2) Women of childbearing age ...; and
>
> (3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies ....

The inclusion of "women of childbearing age" may have to be reconsidered in light of more recent studies casting doubt on marihuana as a potential source of birth defects. However, given the immense importance of potential birth defects for all concerned, and the widely recognized need for further research, we have to accept that on this point as on many others "the jury is still out".

52 The trial judge noted, at para. 46, that the findings of the 1994 Hall Report were similar (except for the leukemia and birth defects concerns) to a report entitled *Cannabis: a health perspective and research agenda* (1997), published a few years later by the World Health Organization, Division of Mental Health and Prevention of Substance Abuse, which contained the following statement about the "acute health effects", i.e., the effects experienced by users during and for a period following the use of marihuana (at p. 30):

> **Acute health effects of cannabis use**
>
> The acute effects of cannabis use have been recognized for many years, and recent studies have confirmed and extended earlier findings. These may be summarized as follows:
>
> • cannabis impairs cognitive development (capabilities of learning), including associative processes; free recall of previously learned items is often impaired when cannabis is used both during learning and recall periods;
>
> • cannabis impairs psychomotor performance in a wide variety of tasks, such as motor coordination, divided attention, and operative tasks of many types; human performance on complex machinery can be impaired for as long as 24 hours after smoking as little as 20mg of THC in cannabis; there is an increased risk of motor vehicle accidents among persons who drive when intoxicated by cannabis.

53 The chronic and therapeutic effects of marihuana use were also listed by the World Health Organization and are set out in the Appendix.

4. Parliamentary Reports

54 Our attention was drawn by the parties to a number of parliamentary reports issued since the decision of the courts below, of which we may and do take judicial notice.

55 In September 2002, the Senate Special Committee on Illegal Drugs concluded that "the state of knowledge supports the belief that, for the vast majority of recreational users, cannabis use presents no harmful consequences for physical, psychological or social well-being in either the short or the long term" (vol. I, at p. 165).

56 At the same time, the Senate Committee acknowledged potential harm to a minority of users, including the vulnerable groups identified by the Hall Report and reported by the trial judge (vol. I, at pp. 166-67):

> The Committee feels that, because of its potential effects on the endogenous cannabinoid system and cognitive and psychosocial functions, any use in those under age 16 is at-risk use;
>
> Our estimation would suggest that approximately 50,000 youths fall in this category.
>
> . . . . .
>
> Heavy use of smoked cannabis can have certain negative consequences for physical health, in particular for the respiratory system (chronic bronchitis, cancer of the upper respiratory tract).
>
> Heavy use of cannabis can result in negative psychological consequences for users, in particular impaired concentration and learning and, in rare cases and with people already predisposed, psychotic and schizophrenic episodes.
>
> Heavy use of cannabis can result in consequences for a user's social well-being, in particular their occupational and social situation and their ability to perform tasks.
>
> Heavy use of cannabis can result in dependence requiring treatment; however, dependence caused by cannabis is less severe and less frequent tha[n] dependence on other psychotropic substances, including alcohol and tobacco.

57 Echoing many other studies and reports, the Senate Committee underlined the need for further research, e.g., with respect to the potential impact of marihuana use on some psychiatric disorders (vol. I, at p. 151):

> As it is, most scientific reports come to the same conclusion: more research is needed, with more rigorous protocols, allowing in particular for comparison with other populations and other substances.

58 In December 2002, the House of Commons Special Committee on Non-Medical Use of Drugs reported on the therapeutic benefits and potential adverse effects to some users of marihuana, and recommended that possession of marihuana be dealt with by a scheme of "ticketing, except where the offence is committed in the presence of specified aggravating circumstances", such as impaired driving (*Policy for the New Millennium: Working Together to Redefine Canada's Drug Strategy* (2002), at p. 130).

59 On May 27, 2003, the Minister of Justice introduced Bill C-38 which would eliminate the potential of imprisonment following a conviction for possession of no more than 15 grams of marihuana.

60 The Senate and House of Commons Committee Reports are consistent with the conclusions reached by the courts in British Columbia that, while marihuana is not a "harmless" drug, nevertheless the degree and extent of harm associated with its use is subject to continuing controversy, as is the wisdom of the present legislative scheme.

61 We have been shown no reason to interfere with these findings of fact. It seems clear that the use of marihuana has less serious and permanent effects than was once claimed, but its psychoactive and health effects can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial.

62 We turn, now, to the legal arguments raised by the parties.

D. Division of Powers

63 The appellant Caine contends that Parliament has no power to criminalize the possession of marihuana for personal use under either the residuary power of peace, order and good government ("POGG") or the criminal law power.

1. The Purpose of the NCA

64 The appellant Caine further argues that the Crown is resorting impermissibly to a "shifting purpose" in its effort to salvage the marihuana prohibition. He contends that the legislative origins of the prohibition on cannabis had nothing to do with legitimate claims that cannabis was injurious to public health but was based on racism against oriental drug users and irrational, unproven and unfounded fears. In light of changed thinking and greater knowledge, the alleged legislative facts underlying this original purpose have been refuted. The prohibition has thus ceased to be *intra vires*. As pointed out in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 335:

> Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

65 We need not review the law on this point because the argument was rejected on the facts by Braidwood J.A., who reviewed the legislative history in detail and concluded that the prohibition on simple possession of marihuana always "had more than one rationale. It was always meant to prevent the harm to society caused by drug addiction, such as the petty thefts that occur to raise funds to buy drugs" (para. 96). The post-1954 laws further evolved this general purpose with a larger plan to treat and "cure" drug addicts to eliminate the "market" for drug traffickers in Canada. We accept this analysis. Thus, although there was no explanation given during the parliamentary debates as to why cannabis (marihuana) was added to the NCA in 1923, the evidence supports the conclusion of Braidwood J.A. that a major purpose of the prohibition has been, since its enactment and continued thereafter, to be to protect health and public safety. This purpose did not change when the treatment provisions were added to the NCA in 1961. The purpose and character of the legislation remained the same, but new means were added to advance the original objectives of health and public safety. In these circumstances, it cannot be said that the Crown's argument is flawed by reliance on an impermissibly "shifting" purpose.

2. Legislative Jurisdiction with Respect to Narcotics

66 We turn next to the issue as to whether the NCA falls under Parliament's residuary jurisdiction for POGG, or whether it is an exercise of the criminal law power under s. 91(27) of the *Constitution Act, 1867*, or whether, as the appellants contend, it falls within neither head of federal jurisdiction and is *ultra vires*.

(a) Peace, Order and Good Government

67 Almost 25 years ago, a majority of this Court upheld the constitutional validity of the NCA under Parliament's residual authority to legislate for POGG: *R. v. Hauser*, [1979] 1 S.C.R. 984 (S.C.C.). Pigeon J., for the majority, took the view that the NCA "is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of 'Matters of a merely local or private nature'" (p. 1000). Accordingly, Pigeon J. reasoned, the subject matter of the NCA is similar to other new developments such as aviation and radio communication. Dickson J., as he then was, dissented on this point, finding that the NCA should be considered as a matter of federal criminal power, relying on the Court's earlier decision in *R. v. Industrial Acceptance Corp.*, [1953] 2 S.C.R. 273 (S.C.C.), which had upheld the *Opium and Narcotic Drug Act, 1929*, S.C. 1929, c. 49, under the federal criminal power.

68 The dissenting judgment of Dickson J. in *Hauser* focussed in part on whether the federal Crown had the authority to prosecute crimes (see, e.g., p. 1011). Some commentators have speculated that the Court strained to locate the law within the POGG power because the Court was deeply divided on this issue: see, e.g., P.W. Hogg, *Constitutional Law of Canada* (2002 student ed.), at p. 438. To the extent that such considerations were a factor in the thinking of the majority, the authority of the federal Attorney General to prosecute offences created under the criminal law power has since been affirmed in *Canadian National Transportation Ltd. v. Canada (Attorney General)*, [1983] 2 S.C.R. 206 (S.C.C.) (federal power to prosecute crimes under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, ss. 15(2) and 32(1)(*c*)), and *R. v. Kripps Pharmacy Ltd.*, [1983] 2

S.C.R. 284 (S.C.C.) (federal power to prosecute under *Food and Drugs Act*, R.S.C. 1970, c. F-27, ss. 8, 9, 26). See also *R. v. S. (S.)*, [1990] 2 S.C.R. 254 (S.C.C.), at p. 283 (Parliament has jurisdiction to delegate powers to provincial officials to prosecute offences under the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 4).

69 In *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)* (1979), [1980] 1 S.C.R. 914 (S.C.C.), at pp. 944-45, the Court outlined three instances in which the federal residual power applies:

> (i) the existence of a national emergency;
>
> (ii) with respect to a subject matter which did not exist at the time of Confederation and is clearly not in a class of matters of a merely local or private nature;
>
> (iii) where the subject matter "goes beyond local or provincial concern and must, from its inherent nature, be the concern of the Dominion as a whole".

70 It is not contended that the use of marihuana rises to the level of a national emergency. As to the second category, if, as we conclude *infra*, the NCA is a valid exercise of the criminal law power, it would not be consistent with that conclusion to uphold it under the branch of POGG that deals with "new" legislative subject matter not otherwise allocated. To that extent we disagree with the view taken by the majority in *Hauser*, *supra*.

71 These observations leave only the third category as a potential source of authority under POGG. The Attorney General of Canada contends that the control of narcotics is a legislative subject matter that "goes beyond local or provincial concern and must, from its inherent nature, be the concern of the Dominion as a whole". He puts his position as follows:

> The importation, manufacture, distribution, and use of psychoactive substances are matters having an impact on the country as a whole, and which can only be dealt with on an integrated national basis. Additionally, the international aspects are such that these matters cannot be effectively addressed at the local level.

72 We do not exclude the possibility that the NCA might be justifiable under the "national concern" branch on the rationale adopted in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 (S.C.C.), at p. 432, where we held that concerted action amongst provincial and federal entities, each acting within their respective spheres of legislative jurisdiction, was essential to deal with Canada's international obligations regarding the environment. In our view, however, the Court should decline in this case to revisit Parliament's residual authority to deal with drugs in general (or marihuana in particular) under the POGG power. If, as is presently one of the options under consideration, Parliament removes marihuana entirely from the criminal law framework, Parliament's continuing legislative authority to deal with marihuana use on a purely regulatory basis might well be questioned. The Court would undoubtedly have more ample legislative facts and submissions in such a case than we have in this appeal. Our conclusion that the present prohibition against the use of marihuana can be supported under the criminal law power makes it unnecessary to deal with the Attorney General's alternative position under the POGG power, and we leave this question open for another day.

(b) The Criminal Law Power

73 The federal criminal law power is "plenary in nature" and has been broadly construed:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. (*Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)*, [1949] S.C.R. 1 (S.C.C.) (the "*Margarine Reference*"), at p. 49)

In the present case the "evil or injurious or undesirable effect" is the harm attributed to the non-medical use of marihuana.

74 For a law to be classified as a criminal law, it must possess three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty: *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31 (S.C.C.), at para. 27. The criminal power extends to those laws that are designed to promote public peace, safety, order, health or other legitimate public purpose. In *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), it was held that some legitimate public purpose must underlie the prohibition. In *Labatt Breweries*, *supra*, in holding that a health hazard may ground a criminal prohibition, Estey J. stated the potential purposes of the criminal law rather broadly as including "public peace, order, security, health and morality" (p. 933). Of course Parliament cannot use its authority improperly, e.g. colourably, to invade areas of provincial competence: *Scowby v. Saskatchewan (Board of Inquiry)*, [1986] 2 S.C.R. 226 (S.C.C.), at p. 237.

75 In various instances members of this Court have upheld the constitutionality of the NCA on the basis of the criminal power: *Industrial Acceptance Corp.*, *supra*, *Hauser*, *supra* Dickson J., dissenting on this point, at p. 1060; and *Schneider v. The Queen*, [1982] 2 S.C.R. 112, *per* Laskin C.J., at p. 115. Other courts interpreting the *Opium Act* and its successors have also reached this conclusion. See, e.g., *R. v. Dufresne* (1912), 5 D.L.R. 501, and *R. v. Wakabayashi*, [1928] 3 D.L.R. 226 (B.C. S.C.).

76 The purpose of the NCA fits within the criminal law power, which includes the protection of vulnerable groups: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at p. 595. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.), at pp. 74-75, in which s. 251 of the *Criminal Code* prohibiting abortions except in therapeutic situations was held to have a valid objective, namely protecting the life and health of pregnant women, although it failed the s. 1 test on other grounds. On somewhat related issues arising under the *Charter*, the protection of vulnerable groups has also been upheld under s. 1 as a valid federal objective of the exercise of the criminal law power. In *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), we upheld s. 163.1(4) of the *Criminal Code* prohibiting the possession of child pornography, noting that the prevention of harm threatening vulnerable members of society is a valid limit on freedom of expression. Similarly in *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), at p. 497, we concluded that "legislation proscribing obscenity is a valid objective which justifies some encroachment on the right to freedom of expression". In so doing, we emphasized the impact of the exploitation of women and children, depicted in publications and films, which can in certain circumstances, lead to "abject and servile victimization". In *R. v. Keegstra*, [1995] 2 S.C.R. 381 (S.C.C.), we held that the restrictions on free speech imposed by the hate speech provision in the *Criminal Code* was a justifiable limit under s. 1 because of potential attacks on minorities.

77 The protection of vulnerable groups from self-inflicted harms does not, as Caine argues, amount to no more than "legal moralism". Morality has traditionally been identified as a legitimate concern of the criminal law (*Labatt Breweries, supra*, at p. 933) although today this does not include mere "conventional standards of propriety" but must be understood as referring to societal values beyond the simply prurient or prudish: *Butler*, *supra*, at p. 498; *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.), at para. 32. The protection of the chronic users identified by the trial judge, and adolescents who may not yet have become chronic users, but who have the potential to do so, is a valid criminal law objective. In *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.), the Court held at para. 131 that "Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power". See also *Berryland Canning Co. v. R.*, [1974] 1 F.C. 91 (Fed. T.D.), at pp. 94-95; *Standard Sausage Co. v. Lee* (1934), 61 C.C.C. 95 (B.C. C.A.), supplemented by addendum at (1934), 61 C.C.C. 95 (B.C. C.A.). In our view, the control of a "psychoactive drug" that "causes alteration of mental function" clearly raises issues of public health and safety, both for the user as well as for those in the broader society affected by his or her conduct.

78 The use of marihuana is therefore a proper subject matter for the exercise of the criminal law power. *Butler*held, at p. 504, that if there is a reasoned apprehension of harm Parliament is entitled to act, and in our view Parliament is also entitled to act on reasoned apprehension of harm even if on some points "the jury is still out". In light of the concurrent findings of "harm" in the courts below, we therefore confirm that the NCA in general, and the scheduling of marihuana in particular, properly fall within Parliament's legislative competence under s. 91(27) of the *Constitution Act, 1867*.

79 Prior to the enactment of the *Charter* in 1982, that finding, which validates the exercise of the criminal law power, would have ended the appellants' challenge. Now, of course, Parliament must not only find legislative authority within the *Constitution Act, 1867*, but it must exercise that authority subject to the individual rights and freedoms guaranteed by the *Charter*.

80 We therefore turn to the appellants' *Charter* arguments.

E. Section 7 of the Charter

81 The appellant Malmo-Levine argues that smoking marihuana is integral to his preferred lifestyle, and that the criminalization of marihuana in both its possession and trafficking aspects is an unacceptable infringement of his personal liberty.

82 The appellant Caine, on the other hand, takes aim at the potential for imprisonment for conviction of possession of marihuana, and argues that imprisonment for such an offence is not in accordance with the principles of fundamental justice. If the penalty falls, he says, the substantive offence must fall with it.

83 These "liberty" interests are, of course, very different. We propose therefore first to identify the s. 7 "interest" properly at stake, then secondly to discuss the applicable principles of fundamental justice. Thirdly we will examine whether the deprivation of the s. 7 interest thus identified is in accordance with the principles of fundamental justice relevant to these appeals. As will be seen, we find no s. 7 infringement. It will therefore not be necessary to move to s. 1 to determine if an infringement would be justified in a free and democratic society.

1. The Interests at Stake

84 We say at once that the availability of imprisonment for the offence of simple possession is sufficient to trigger s. 7 scrutiny: *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.). However, Malmo-Levine's position (which is supported by the intervener British Columbia Civil Liberties Association) requires us to address whether broader considerations of personal autonomy, short of imprisonment, are also sufficient to invoke s. 7 protection. The appellant Caine, whose factum talks of the "fun" or "social" use of cannabis, writes, at para. 30:

> It is submitted that a decision whether or not to possess and consume Cannabis (marijuana), even if potentially harmful to the user, is analogous to the decision by an individual as to what food to eat or not eat and whether or not to eat fatty foods, and as such is a decision of fundamental personal importance involving a choice made by the individual involving that individual's personal autonomy.

85 In *Morgentaler*, *supra*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state" (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference": *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.), at para. 80. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence": *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), at para. 54; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C. C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (Ont. C.A.).

86 While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, "basic choices going to the core of what it means to enjoy individual dignity and independence" (*Godbout*, *supra*, at para. 66).

87 In our view, with respect, Malmo-Levine's desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection. There is no free-standing constitutional right to smoke "pot" for recreational purposes.

88 The appellants also invoke their s. 7 interest in "security of the person". In *Morgentaler*, *supra*, Dickson C.J. accepted that "serious *state-imposed* psychological stress" (p. 56 (emphasis added)) would suffice to infringe this interest. The appellants, however, contend that use of marihuana is non-addictive. Prohibition would not therefore lead to a level of stress that is constitutionally cognizable. A very different issue would arise if the marihuana was required for medical purposes, but neither appellant uses marihuana for such a purpose.

89 The availability of imprisonment is a different matter. We have no doubt that the risk of being sent to jail engages the appellants' liberty interest. Accordingly, it is necessary to move to the next stage of the s. 7 analysis to determine what are the relevant principles of fundamental justice and whether this risk of deprivation of liberty is in accordance with the principles of fundamental justice.

2. Principles of Fundamental Justice

90 The appellants accept that Parliament may act to avoid harm to others without violating principles of fundamental justice. They focus on the alleged absence of such harm, and contend that it is a denial of fundamental justice to deprive them of their liberty where such denial does not enhance a legitimate interest of the state. To hold otherwise, they say, would require the courts to endorse the arbitrary or irrational use of the criminal law power, contrary to the principles of fundamental justice. As Sopinka J. stated in *Rodriguez*, *supra*, at p. 594:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

91 The appellants' s. 7 arguments have several branches predicated on the requirement of harm. First, they argue that the only permissible target of the criminal law is harm to others; in their view, the criminal law cannot prohibit conduct that harms only the accused. Second, they argue that, in any event, marihuana is not a harmful substance, so that the prohibition of simple possession is arbitrary or irrational. Third, they argue that the criminalization of cannabis possession has adverse consequences, both for those users who are charged and convicted and, because of the disrespect engendered by the law, for the administration of justice generally, that are wholly disproportionate to the societal interests sought to be served by the prohibition. Finally, they submit that the criminalization of cannabis possession is discriminatory and unfair, in light of Parliament's failure to criminalize the possession and use of alcohol and tobacco.

92 The appellant Malmo-Levine further submits that any harm-based analysis should focus on the healthy user who engages in harm-reduction strategies. He argues that the Court of Appeal erred "when they characterized the harms that may come with cannabis use as inherent, instead of a product of mis-cultivation, mis-distribution and mis-use" (Malmo-Levine's factum, at para. 2).

93 We will deal first with a number of preliminary points raised by the appellants.

(a) The Propriety of Balancing Societal and Individual Interests in Section 7

94 The appellant Caine submits that the British Columbia Court of Appeal erred in importing into s. 7 a number of societal interests that have nothing to do with the "principles of fundamental justice" but that he says should be considered, if at all, under a s. 1 justification. In other words, he argues that societal interests are not relevant to defining the right granted under s. 7 but only to determining whether a limit on that right is a reasonable one prescribed by law as can be demonstrably justified in a free and democratic society.

95 Braidwood J.A. considered that "the operative principle of fundamental justice" in these cases is the harm principle (see para. 159). However, having concluded that the prohibition against simple possession complies with the harm principle, he went on to consider a second question — "whether the *NCA* strikes the 'right balance' between the rights of the individual and the interests of the State" (para. 160). As authority for this approach, reference was made to *Cunningham v. Canada*, [1993] 2

S.C.R. 143 (S.C.C.), *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425 (S.C.C.), at p. 539, *per* La Forest J.; and *Rodriguez, supra*, at pp. 592-93, *per* Sopinka J. Prowse J.A., in dissent, engaged in a similar balancing exercise.

96 We do not think that these authorities should be taken as suggesting that courts engage in a freestanding inquiry under s. 7 into whether a particular legislative measure "strikes the right balance" between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7. The procedural implications of such a collapse are significant. Counsel for the appellant Caine, for example, urges that the appellants having identified a threat to the liberty or security of the person, the evidentiary onus should switch at once to the Crown *within s*. 7 "to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions" (Caine's factum, at para. 24).

97 We do not agree. In *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), a majority of this Court pointed out that, despite certain similarities between the balancing of interests in ss. 7 and 1, there are important differences. Firstly, the issue under s. 7 is the delineation of the boundaries of the rights and principles in question whereas under s. 1 the question is whether an infringement may be justified (para. 66). Secondly, it was affirmed that under s. 7 it is the claimant who bears the onus of proof throughout. It is only if an infringement of s. 7 is established that the onus switches to the Crown to justify the infringement under s. 1. Thirdly, the range of interests to be taken into account under s. 1 is much broader than those relevant to s. 7. The Court said in *Mills*, at para. 67:

> Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act, supra*, at p. 503: "the principles of fundamental justice are to be found in the basic tenets of our legal system". In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), Dickson C.J. stated, at p. 136, that these values and principles "embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society". In *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at p. 737, Dickson C.J. described such values and principles as "numerous, covering the guarantees enumerated in the *Charter* and more".

98 The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez*, *supra*, "*in arriving at these principles [of fundamental justice]*, a balancing of the interest of the state and the individual is required" (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.), at p. 977:

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.

99 The principles of fundamental justice asserted by the appellants include the contentions that their conduct should only be the subject of criminal sanction to the extent it harms others, that the state cannot infringe their interests in an arbitrary or irrational manner, or impose criminal sanctions that are disproportionate to the importance of the state interest sought to be protected. Implicit in each of these principles is, of course, the recognition that the appellants do not live in isolation but are part of a larger society. The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question.

(b) Malmo-Levine's "Harm-Reduction" Argument

100 We wish to be clear that we do not accept Malmo-Levine's argument that Parliament should proceed on the assumption that users will use marihuana "responsibly". We accept his point that careful use can *mitigate* the harmful effects, but it is open to Parliament to proceed on the more reasonable assumption that psychoactive drugs will to some extent be misused. Indeed, the evidence indicates the existence of both use and misuse by chronic users and by vulnerable groups who cause harm to themselves.

(c) Malmo-Levine's Pleasure Principle

101 Malmo-Levine's related argument, that the pleasure of a large number of people should not be curtailed because of (he says) relatively minor harm to a minority, is similarly misplaced under s. 7. Utilitarian arguments that urge a cost-benefit calculation of alleged benefit to the many versus alleged harm to the few, to the extent such arguments are relevant under the *Charter*, belong in s. 1. The appellants must first of all establish a violation of their s. 7 rights. Only if they are able to do so is the government then required to show that the purported limitation is demonstrably justified in a free and democratic society.

(d) The "Harm Principle"

102 The appellants contend that unless the state can establish that the use of marihuana is harmful to *others*, the prohibition against simple possession cannot comply with s. 7. Our colleague Arbour J. accepts this proposition as correct to the extent that "the state resorts to imprisonment" (para. 244). Accordingly, a closer look at the alleged "harm principle" is called for.

103 We should be clear about the direction of the appellants' argument. It is agreed by all parties that the *existence* of harm, especially harm to others, is a state interest sufficient to ground the exercise of the criminal law power. The appellants' contention, however, is that the *absence* of demonstrated harm to others deprives Parliament of the power to impose criminal liability. That is what they call the "harm principle".

104 We think it right to state at the outset that we do not agree that the "harm principle" plays the *essential* role assigned to it by the appellants in testing the criminal law against the requirements of the *Charter*. Further, with respect to our colleague's focus on the availability (if not the imposition) of imprisonment for the simple possession of marihuana, we think the punishment debate is more appropriately addressed under s. 12 of the *Charter* ("cruel and unusual treatment or punishment"), rather than under s. 7, although clearly it has implications for both s. 7 and s. 1, as will shortly be discussed.

105 The British Columbia Court of Appeal also dealt with this case on the premise that the harm principle was a controlling principle under s. 7 of the *Charter*. It is therefore appropriate that we deal with it in some detail.

(i) History and Definition of the Harm Principle

106 What is the "harm principle"? The appellants rely, in particular, on the writings of the liberal theorist, J. S. Mill, who attempted to establish clear boundaries for the permissible intrusion of the state into private life:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.
>
> [Emphasis added.]

(J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at pp. 8-9)

107 Thus Mill's principle has two essential features. First, it rejects paternalism — that is, the prohibition of conduct that harms only the actor. Second, it excludes what could be called "moral harm". Mill was of the view that such moral claims are insufficient to justify use of the criminal law. Rather, he required clear and tangible harm to the rights and interests of others.

108 At the same time, Mill acknowledged an exception to his requirement of harm "to others" for vulnerable groups. He wrote that "this doctrine is meant to apply to human beings in the maturity of their faculties.... Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury" (p. 9).

109 Mill's statement has the virtues of insight and clarity but he was advocating certain general philosophic principles, not interpreting a constitutional document. Moreover, even his philosophical supporters have tended to agree that justification for state intervention cannot be reduced to a single factor — harm — but is a much more complex matter. One of Mill's most distinguished supporters, Professor H. L. A. Hart, wrote:

> Mill's formulation of the liberal point of view may well be too simple. The grounds for interfering with human liberty are more various than the single criterion of 'harm to others' suggests: cruelty to animals or organizing prostitution for gain do not, as Mill himself saw, fall easily under the description of harm to others. Conversely, even where there is harm to others in the most literal sense, there may well be other principles limiting the extent to which harmful activities should be repressed by law. So there are multiple criteria, not a single criterion, determining when human liberty may be restricted.
>
> [Emphasis added.]
>
> (H. L. A. Hart, "Immorality and Treason", originally appearing in *The Listener* (July 30, 1959), at pp. 162-63, reprinted in *Morality and the Law* (1971), 49, at p. 51)
>
> To the same effect, see Professor J. Feinberg, *The Moral Limits of the Criminal Law* (1984), vol. 1: *Harm to Others*, at p. 12; vol. 4: *Harmless Wrongdoing*, at p. 323.

(ii) Is the Harm Principle a Principle of Fundamental Justice?

110 The appellants submit that the harm principle is a principle of fundamental justice for the purposes of s. 7 that operates to place limits on the type of conduct the state may criminalize. This limitation exists independently of the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*. In other words, the appellants contend that there is a double threshold. Even if the Crown is able to establish that the creation of a particular criminal offence is a valid exercise of the criminal law power, there is a second level of constraint on the type of conduct that can be made criminal by virtue of s. 7 of the *Charter*.

111 We agree that there is a form of "double threshold", in that the *Charter* imposes requirements that are separate from those imposed by ss. 91 and 92 of the *Constitution Act, 1867*. However, we do not agree with the attempted elevation of the harm principle to a principle of fundamental justice. That is, in our view the harm principle is not the constitutional standard for what conduct may or may not be the subject of the criminal law for the purposes of s. 7.

112 In *Re B.C. Motor Vehicle Act*, *supra*, Lamer J. (as he then was) explained that the principles of fundamental justice lie in "the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system" (p. 503). This Court provided further guidance as to what constitutes a principle of fundamental justice for the purposes of s. 7, in *Rodriguez*, *supra*, *per* Sopinka J. (at pp. 590-91 and 607):

> A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.

. . . . .

> While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people.
>
> [Emphasis added.]

113 The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder *only*": *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

a. Is the Harm Principle a Legal Principle?

114 In our view, the "harm principle" is better characterized as a description of an important state interest rather than a normative "legal" principle. Be that as it may, even if the harm principle could be characterized as a legal principle, we do not think that it meets the other requirements, as explained below.

b. There is No Sufficient Consensus that the Harm Principle is Vital or Fundamental to Our Societal Notion of Criminal Justice

115 Contrary to the appellants' assertion, we do not think there is a consensus that the harm principle is the sole justification for criminal prohibition. There is no doubt that our case law and academic commentary are full of statements about the criminal law being aimed at conduct that "affects the public", or that constitutes "a wrong against the public welfare", or is "injurious to the public", or that "affects the community". No doubt, as stated, the *presence* of harm to others may justify legislative action under the criminal law power. However, we do not think that the *absence* of proven harm creates the unqualified barrier to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused.

116 The appellants cite in aid of their position the observation of Sopinka J., writing for the majority in *Butler*, *supra*, that "[t]he objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*" (p. 498). However, Sopinka J. went on to clarify that it is open to Parliament to legislate "on the basis of some fundamental conception of *morality* for the purposes of safeguarding the values which are integral to a free and democratic society" (p. 493 (emphasis added)).

117 Several instances of crimes that do not cause harm to others are found in the *Criminal Code*, R.S.C. 1985, c. C-46. Cannibalism is an offence (s. 182) that does not harm another sentient being, but that is nevertheless prohibited on the basis of fundamental social and ethical considerations. Bestiality (s. 160) and cruelty to animals (s. 446) are examples of crimes that rest on their offensiveness to deeply held social values rather than on Mill's "harm principle".

118 A duel fought by consenting adults is an example of a crime where the victim is no less culpable than the perpetrator, and there is no harm that is not consented to, but the prohibition (s. 71 of the *Code*) is nevertheless integral to our ideas of civilized society. See also *R. v. Jobidon*, [1991] 2 S.C.R. 714 (S.C.C.). Similarly, in *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435 (N.S. C.A.), the Nova Scotia Court of Appeal upheld the prohibition of incest under s. 155 of the *Criminal Code* despite a *Charter* challenge by five consenting adults. In none of these instances of consenting adults does the criminal law conform to Mill's expression of the harm principle that "[o]ver himself, over his own body and mind, the individual is sovereign", as referenced earlier at para. 106.

119 Various jurists and commentators are said by the appellants to have endorsed the idea that harm is required, but we think that these sources, read in context, do not support the "harm principle" as defined by the appellants.

120 One source relied on by the appellants — the writings of Sir James Fitzjames Stephen — illustrates this point. Reference was made to Stephen's statement that the criminal law

> must be confined within narrow limits, and can be applied only to definite overt acts or omissions capable of being distinctly proved, which acts or omissions inflict definite evils, either on specific persons or on the community at large.

(J. F. Stephen, *A History of the Criminal Law of England* (1883), vol. II, at pp. 78-79)

121 However, Stephen himself was a prominent critic of Mill's harm principle. He believed that "immoral" behaviour *can* be a proper subject for the criminal law. Clearly, his reference to "evils" inflicted on the community includes the idea of moral harm, which Mill specifically excluded from the scope of his "harm principle". Stephen thus supported a much larger view of the legitimate purposes of the criminal law than is permitted by the appellants' argument.

122 The appellants also rely on a 1982 report by the Law Reform Commission of Canada entitled *The Criminal Law in Canadian Society* which concludes, at p. 45, that the criminal law "ought to be reserved for reacting to conduct that is seriously harmful". This seems, on its face, to support the harm principle. However, the report goes on to state, at p. 45, that such harm

> may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values — those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians.
>
> [Emphasis added.]

Such a definition of "harm" is clearly contrary to Mill's harm principle as endorsed by the appellants.

c. Nor Is There Any Consensus that the Distinction Between Harm to Others and Harm to Self Is of Controlling Importance

123 Our colleague Arbour J. takes the view that when the state wishes to make imprisonment available as a sanction for criminal conduct, it must be able to show the potential of such conduct to cause harm to others (para. 244). With respect, we do not think there is any such principle anchored in our law. As this Court noted in *Rodriguez*, *supra*, attempted suicide was an offence under Canadian criminal law (found in the original *Code* at s. 238) until its repeal by S.C. 1972, c. 13, s. 16. Sopinka J. emphasized, at p. 597, that

> the decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens.

The offence of attempted suicide was removed from the *Criminal Code* because Parliament came to prefer other ways of addressing the problem of suicide. In that case, as here, there was an important distinction between constitutional competence, which is for the courts to decide, and the wisdom of a particular measure, which, within its constitutional sphere, is up to Parliament.

124 Putting aside, for the moment, the proper approach to the appropriateness of imprisonment (which, as stated, we think should be addressed under s. 12 rather than s. 7), we do not accept the proposition that there is a general prohibition against the criminalization of harm to self. Canada continues to have paternalistic laws. Requirements that people wear seatbelts and motorcycle helmets are designed to "save people from themselves". There is no consensus that this sort of legislation offends our societal notions of justice. Whether a jail sentence is an appropriate penalty for such an offence is another question. However, the objection in that aspect goes to the validity of an assigned punishment — it does not go to the validity of prohibiting the underlying conduct.

125 A recent discussion policy paper from the Law Commission of Canada entitled *What is a Crime? Challenges and Alternatives* (2003) highlights the difficulties in distinguishing between harm to others and harm to self. It notes that "in a

society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively" (p. 17).

126 In short, there is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence.

d. The Harm Principle Is Not a Manageable Standard Against Which to Measure Deprivation of Life, Liberty or Security of the Person

127 Even those who agree with the "harm principle" as a regulator of the criminal law frequently disagree about what it means and what offences will meet or offend the harm principle. In the absence of any agreed definition of "harm" for this purpose, allegations and counter-allegations of non-trivial harm can be marshalled on every side of virtually every criminal law issue, as one author explains:

> The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate. Today, the issue is no longer whether a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent.
>
> (B.E. Harcourt, "The Collapse of the Harm Principle" (1999), 90 *J. Crim. L. & Criminology* 109, at p. 113)

Professor Harcourt goes on to point out that "[i]t is the hidden normative dimensions ... [that] do the work in the harm principle, not the abstract, simple notion of harm" (p. 185). In other words, the existence of harm (however defined) does no more than open a gateway to the debate; it does not give any precise guidance about its resolution.

128 Harm, as interpreted in the jurisprudence, can take a multitude of forms, including economic, physical and social (e.g., injury and/or offence to fundamental societal values). In the present appeal, for example, the respondents put forward a list of "harms" which they attribute to marihuana use. The appellants put forward a list of "harms" which they attribute to marihuana prohibition. Neither side gives much credence to the "harms" listed by the other. Each claims the "net" result to be in its favour.

129 In the result, we do not believe that the content of the "harm" principle as described by Mill and advocated by the appellants provides a manageable standard under which to review criminal or other laws under s. 7 of the *Charter*. Parliament, we think, is entitled to act under the criminal law power in the protection of legitimate state interests other than the avoidance of harm to others, subject to *Charter* limits such as the rules against arbitrariness, irrationality and gross disproportionality, discussed below.

(iii) "Avoidance of Harm" is Nevertheless a Valid State Interest

130 While we do not agree with the courts below that the "harm principle" is a principle of fundamental justice, there is nevertheless a state *interest* in the avoidance of harm to those subject to its laws which may justify parliamentary action.

131 In other words, avoidance of harm is a "state interest" within the rule against arbitrary or irrational state conduct mentioned in *Rodriguez*, *supra*, at p. 594, previously cited, that:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.
>
> [Emphasis added.]

132 The conclusion that the state has a particular interest in acting to protect vulnerable groups is also consistent with *Charter* jurisprudence affirming the state's power to intervene to protect children whose lives are in jeopardy and to promote their well-

being: *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 70; *B. (R.), supra*, at para. 88 (*per* La Forest J).

133 We do not agree with Prowse J.A. that harm must be shown to the court's satisfaction to be "serious" and "substantial" before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in]significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do. A "serious and substantial" standard of review would involve the courts in micromanagement of Parliament's agenda. The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected, as will be discussed.

134 Having said that, our understanding of the view taken of the facts by the courts below is that while the risk of harm to the great majority of users can be characterized at the lower level of "neither trivial nor insignificant", the risk of harm to members of the vulnerable groups reaches the higher level of "serious and substantial". This distinction simply underlines the difficulties of a court attempting to quantify "harm" beyond a *de minimis* standard.

(iv) In Light of the State Interest Thus Identified, the Prohibition is Neither Arbitrary nor Irrational

135 A criminal law that is shown to be arbitrary or irrational will infringe s. 7: *R. v. Arkell*, [1990] 2 S.C.R. 695 (S.C.C.), at p. 704; *R. c. Hamon* (1993), 85 C.C.C. (3d) 490 (Que. C.A.), at p. 492. Our colleagues LeBel and Deschamps JJ. consider the marihuana prohibition to be disproportionate to the societal problems at issue, and, thus arbitrary. This, we think, puts the threshold of judicial intervention too low. LeBel J. writes that "it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them" (para. 280). That being the case, we think the *Charter* allows Parliament a broad, though certainly not unlimited, legislative capacity to respond. Marihuana is a psychoactive drug whose "use causes alteration of mental function" according to the trial judge. This alteration creates a potential harm to others when the user engages in "driving, flying and other activities involving complex machinery". Chronic users may suffer "serious" health problems. Vulnerable groups are at particular risk, including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies. These findings of fact disclose a sufficient state interest to support Parliament's intervention should Parliament decide that it is wise to continue to do so, subject to a constitutional standard of *gross* dispro-portionality, discussed below.

136 The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana (*Morgentaler*, *supra*, at p. 70), and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. In light of these findings of fact it cannot be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.

137 It is true that Parliament can and has directly addressed some of the potential harmful conduct elsewhere in the *Criminal Code*. Section 253, for example, prohibits driving while impaired. One type of legal control to prevent harm does not logically oust other potential forms of legal control, subject as always to the limitation of gross disproportionality discussed below.

138 The appellants also contend that Parliament's failure to criminalize the consumption of alcohol and tobacco, while criminalizing the use of marihuana (which the appellants say is, if anything, *less* harmful) shows the arbitrariness of the law. It is clear that the consumption of alcohol and tobacco can be harmful. Moreover in some respects the harm is of a type comparable to that caused by marihuana consumption. Much of the bronchial harm associated with marihuana, for instance, comes from the smoking aspect rather than its intoxicating properties.

139 However, if Parliament is otherwise acting within its jurisdiction by enacting a prohibition on the use of marihuana, it does not lose that jurisdiction just because there are other substances whose health and safety effects could arguably justify

similar legislative treatment. To hold otherwise would involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements.

140 Parliament may, as a matter of constitutional law, determine what is *not* criminal as well as what is. The choice to use the criminal law in a particular context does not require its use in any other: *RJR-MacDonald*, *supra*, at para. 50. Parliament's decision to move in one area of public health and safety without at the same time moving in other areas is not, on that account alone, arbitrary or irrational.

(v) The Allegation of Disproportionality

141 Having rejected the appellants' contention that Parliament is without authority to criminalize conduct unless it causes harm to others, as well as their claim that criminalization of marihuana is arbitrary and irrational, we proceed to the next level of their argument, namely that even if it is not arbitrary and irrational, criminalization is nevertheless disproportionate to any threat posed by marihuana use.

142 In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), at para. 47, the Court accepted that the means taken to achieve an objective can be so disproportionate to the desired end so as to offend the principles of fundamental justice:

> Determining whether deportation to torture violates the principles of fundamental justice requires us to balance [under s. 7] Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se* disproportionate to any legitimate government interest: see *Burns*, *supra*. We must ask whether deporting a refugee to torture would be such a response.
>
> [Emphasis added.]

See also *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), at para. 78.

143 In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marihuana were, in the language of *Suresh*, "so extreme that they are *per se disproportionate* to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of *gross* disproportionality, the proof of which rests on the claimant.

144 The aspect of proportionality of interest to the appellants is the alleged lack of proportionality between the contribution of the marihuana prohibition to public health and safety (the appellants say the prohibition is so ineffective that it contributes little) and the adverse effects on persons subject to the prohibition, including those who are charged and convicted of the offence (the appellants say the adverse effects are severe and lasting). The relevant effects include those that relate to the life, liberty or security of an individual, and that are the product of the state action complained of.

145 We have already rejected Mr. Malmo-Levine's "pleasure principle" on the basis that depriving the general user of the freedom to smoke "pot" is not the violation of a freestanding constitutional right. We turn now to the effects of the criminalization of marihuana possession on accused persons.

3. The Availability of Imprisonment

146 Although this issue belongs to the s. 7 analysis, we wish to highlight its importance here to address our disagreement with Arbour J., for whom the availability of imprisonment is the controlling consideration (paras. 216, 244, 256 and 257).

147 Our colleague writes at para. 257:

> While the cases referred to by my colleagues clearly illustrate the state's interest in the protection of vulnerable groups from others who might harm them, they are far from suggesting that it is the vulnerable ones who should be sent to jail for their self-protection. Implicit in my colleagues' argument is that the state would be justified in threatening with imprisonment adolescents with a history of poor school performance, women of child-bearing age and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia and other drug dependencies, who are at particular risk of harming themselves by using marihuana. I do not think that an exception to the harm principle is justified to allow the state to threaten with imprisonment vulnerable people in order to prevent them from harming themselves.

148 We disagree with our colleague's view that it is unconstitutional for the state to attempt to deter vulnerable people from self-harm by criminalization of the harmful conduct backed up, where appropriate, by the "threat" of imprisonment. We disagree with the premise that vulnerable people of the sort she describes are in fact threatened with jail, or that imposition of a jail term in the circumstances she envisages would be upheld as a fit sentence or a constitutional sentence.

149 A finding that a particular form of penalty violates s. 12 may call for a constitutional remedy in relation to the penalty, but leave intact the criminalization of the conduct, which may still be constitutionally punishable by an alternative form of penalty.

150 Braidwood J.A., too, rested his analysis on the availability of imprisonment. He found that "it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others" (para. 134). The appellant in *Clay*, *supra*, released concurrently, similarly argued at para. 25 of his factum that "[w]hile a reasonable apprehension of a 'not insignificant' or 'not trivial' harm may suffice to justify a regulatory prohibition on the personal and private consumption of a substance, it is not constitutionally adequate for justifying the *use* of incarceration and the imposition of a criminal record to deter such consumption" (emphasis added). We agree with the observation that the operative concept here is the use of incarceration, not the *availability* of incarceration.

151 In addition to the possible penalty of imprisonment, the appellants highlight a number of other consequences of being charged and convicted for possession of marihuana, including the effects of having a criminal record, the cost of mounting a defence, and the potential adverse impact on education and job prospects (even prior to trial, and whether or not a conviction results). They submit that these harms to the individual accused are disproportionate to any societal interest served by the (largely ineffective) suppression of marihuana use.

152 As the appellants' principal argument on this branch of the case relates to the availability of imprisonment, we will turn first to that issue.

(a) No Mandatory Minimum Sentence

153 Possession of marihuana carries no minimum sentence. However, the general framework of the NCA permits imprisonment, and marihuana is one of the scheduled drugs. The prescription of sentencing options by Parliament reflects its view of the seriousness of the offence, and is ordinarily taken into consideration by the sentencing judge.

154 Imprisonment is imposed by the courts for simple possession only in exceptional circumstances. Our colleague Arbour J. writes, as mentioned earlier, about threatening with jail underachieving school age adolescents, women of childbearing age and the mentally afflicted, but the cases show that this analysis rests on a faulty premise. In most possession cases, offenders (whether vulnerable or not) receive discharges or conditional sentences. This is particularly true where the amounts of marihuana involved are small and for recreational uses, where the usual sentence is a conditional discharge. See, e.g., C.C. Ruby and D.L. Martin, *Criminal Sentencing Digest* (loose-leaf), 30§320, at p. 1251; *R. v. Fleming* (1992), 21 W.A.C. 79 (B.C. C.A.); *R. v. Culley* (1977), 36 C.C.C. (2d) 433 (Ont. C.A.).

155 The reality is this. There is no impediment (such as a mandatory minimum sentence) to a trial judge imposing a fit sentence after a conviction for simple possession of marihuana. The "availability" of imprisonment in respect of the scheduled drugs under the NCA is part of a statutory framework for dealing with drugs generally and is not specifically directed at marihuana. The case law discloses that it is only in the presence of aggravating circumstances, not likely to be present in the situation of the

"vulnerable persons" referred to by our colleague, where a court has been persuaded that imprisonment for simple possession of marihuana was, in the particular case, a fit sentence.

156 In *R. v. Dauphinee* (1984), 62 N.S.R. (2d) 156 (S.C. App. Div.), a three-month sentence of imprisonment for simple possession of one ounce of marihuana was upheld on appeal because the offender had five prior narcotics possession offences and the trial judge noted that the accused showed no signs of amending his conduct. Prison sentences are also occasionally handed out where an individual has been sentenced for a more serious drug offence. See, e.g., *R. v. Witter*, [1997] O.J. No. 2248 (Ont. Gen. Div.) (six-month sentence for possession of marihuana to be served concurrently with three-year sentence for trafficking in cocaine; accused had nine prior narcotics convictions); *R. v. Coady* (1994), 24 W.C.B. (2d) 459 (Nfld. T.D.) (sentenced to 14 days' imprisonment for possession of 70 grams of marihuana to be served concurrently with nine-month sentence for possession of hashish with intent to traffic); *R. v. Richards* (1989), 88 N.S.R. (2d) 245 (N.S. C.A.) (four-month sentence for possession of 113.5 grams of marihuana to be served concurrently with a sentence of one year for possession of 15 grams of cocaine, plus one year's probation; respondent had six prior narcotics-related convictions; the court noted his behaviour endangered the safety of his family and no leniency was warranted in light of his recidivism). In addition, some incarcerations associated with possession offences result from the failure to pay fines, or where the Crown has agreed to permit a plea bargain for a lesser included offence. See B. A. MacFarlane, R. J. Frater and C. Proulx, *Drug Offences in Canada* (3rd ed. (loose-leaf)), at p. 29-20.

157 It is no doubt true that in an earlier era judges may have resorted to imprisonment more frequently than would be considered acceptable under the *Charter*, but the argument here is a *post-Charter* argument. It asks whether the marihuana prohibition *can* be — and is *required* to be — applied consistently with the *Charter*. In our view, the answer to both questions is yes.

158 First, as mentioned above, we believe that the issue of punishment should be approached in light of s. 12 of the *Charter* (which protects against "cruel and unusual treatment or punishment"), and, in that regard, the constitutional standard is one of gross disproportionality. Second, in our opinion, the lack of any mandatory minimum sentence together with the existence of well-established sentencing principles mean that the mere availability of imprisonment on a marihuana charge cannot, without more, violate the principle against gross disproportionality.

(b) The Section 12 Standard — Gross Disproportionality

159 The standard set out in s. 12 of the *Charter* sheds light on the requirements of s. 7. As Lamer J. explained in *Re B.C. Motor Vehicle Act*, *supra*, ss. 8 to 14 of the *Charter* may be seen as specific illustrations of the principles of fundamental justice in s. 7. While proportionality "is the essence of a s. 12 analysis", *R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39 (S.C.C.), the constitutional standard is *gross* disproportionality. As the majority explained in *Morrisey* (at para. 26):

> Where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable. [First emphasis added; second emphasis in original.]

See *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), *per* Lamer J., as he then was, at p. 1072:

> The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. [Emphasis added.]

See also *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 (S.C.C.), at p. 1417: "The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*". See also *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1 (S.C.C.), at para. 77.

160 Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

161 Accordingly, even if we were persuaded by our colleague Arbour J. that punishment should be considered under s. 7 instead of s. 12, the result would remain the same. In both cases, the constitutional standard is gross disproportionality. In neither case is the standard met.

162 Further, even if the penalty of imprisonment were found to violate the gross disproportionality standard, the constitutional remedy would have to address the range of available penalties rather than the decriminalization of the underlying conduct of marihuana possession.

(c) Proportionality in Sentencing

163 At this point, we turn from the *Charter* to the *Criminal Code*, in which Parliament has made the idea of proportionality central to the principles of sentencing. Section 718.1 of the *Criminal Code* provides that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." The importance of proportionality in punishment has been discussed on several occasions by this Court. See, for instance, *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5 (S.C.C.) fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender". See also *R. v. W. (L.W.)*, [2000] 1 S.C.R. 455, 2000 SCC 18 (S.C.C.), at para. 18; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), at para. 40; and *Re B.C. Motor Vehicle Act, supra, per* Wilson J. (concurring), at p. 533.

164 The requirement of proportionality in sentencing undermines rather than advances the appellants' argument. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal.

165 There is no plausible threat, express or implied, to imprison accused persons — including vulnerable ones — for whom imprisonment is not a fit sentence.

166 On another branch of the imprisonment argument, our colleague Arbour J. argues that it is unconstitutional for the state to attempt to prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it (para. 258). In our view, with respect, this proposition is too broadly stated. In the present context, as previously noted, the evidence shows that it is not possible generally to distinguish in advance the general population from its more vulnerable members. Chronic users emerge from unexpected sources. If our colleague is correct, the impossibility of precise identification of "chronic users" in advance would incapacitate Parliament from taking any action at all to help those in need of its protection, a proposition we do not accept. Further, we do not agree with our colleague that it is a straightforward matter to distinguish between harm to self and harm to others. We noted earlier the recent comment of the Law Commission of Canada that "in a society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively" (p. 17).

167 We agree with the appellants that imprisonment would ordinarily be an unfit sentence for a conviction on simple possession of marihuana. We disagree, however, that this observation gives rise to a finding of unconstitutionality. Rather, it gives rise, in appropriate circumstances, to an ordinary sentence appeal.

168 In the result, where there is no minimum mandatory sentence, the mere availability of imprisonment on a charge of marihuana possession does not violate the s. 7 principle against gross disproportionality. There are circumstances, as noted, where imprisonment would constitute a fit sentence.

4. A More General Principle of Disproportionality

169 As stated, the proportionality argument made by the appellants is broader than the mere disproportionality of penalty. They are correct to point out that interaction by an accused with the criminal justice system brings with it a number of consequences, not least among them the possibility of a criminal record. We agree that the proportionality principle of fundamental justice recognized in *Burns* and *Suresh* is not exhausted by its manifestation in s. 12. The content of s. 7 is not limited to the sum of ss. 8 to 14 of the *Charter*. See, for instance, *R. v. Hebert*, [1990] 2 S.C.R. 151 (S.C.C.); *Thomson Newspapers, supra*. We thus accept that the principle against gross disproportionality under s. 7 is broader than the requirements of s. 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under s. 7, as under s. 12, remains one of *gross* disproportionality. In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.

170 In this respect, the appellants urge three factors. Firstly, they point to the adverse consequences to the individual accused other than imprisonment. Secondly, they suggest that the relative ineffectiveness of the ban shows that the prohibition only marginally advances the interest of the state, and that this should facilitate a judicial finding of gross disproportionality. Thirdly, and more generally, the appellants state that the salutary effects of the law are vastly outweighed by the deleterious effects.

171 We address these three aspects of the appellants' disproportionality argument in turn.

(a) The Consequences to the Individual Other Than Imprisonment

172 In addition to the possibility of imprisonment, the appellants refer to harms flowing from having a criminal record. At para. 26 of their Joint Statement of Legislative Facts, they state:

> The impact of criminal convictions on the futures of young Canadians has historically been identified as one of the most serious social harms generated by the criminal prohibition of cannabis. Upon being charged, tremendous costs are incurred during the pre-trial period, costs which tend to have a much more dramatic impact on young people. Most of the young people charged with cannabis offences are on the low end of the socio-economic scale and, thus, for them the financial burden is particularly onerous. Once a person is found guilty of a cannabis charge, s/he must confront the additional adverse effects associated with having a criminal record for such an offence.

There is no doubt that having a criminal record has serious consequences. The legislative policy embodied in the NCA is that a conviction for the possession of marihuana *should* have serious consequences. Therein lies the deterrent effect of the prohibition. The wisdom of this policy is, as mentioned, under review by Parliament. It appears that this review has been prompted, in part, by a recognition of the significant effects of being involved in the criminal justice system. For instance, background information from Health Canada states:

> [B]eing prosecuted and convicted in a criminal court bears a stigma that can have far-reaching consequences in an individual's life in such areas as job choices, travel and education. Participating in the criminal court process can also involve personal upheaval.

(Health Canada, "Information: Cannabis Reform Bill", May 2003)

173 However, the question before us is not whether Parliament *should* change its policy but whether it is *required* by the Constitution to do so. As Dickson C.J. commented in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), at p. 1142: "The issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system".

174 On this branch of the case the Court can only ask whether the effects on the accused are so grossly disproportionate that they render the prohibition contrary to s. 7 of the *Charter*. Once it is determined that Parliament acted pursuant to a valid state interest in attempting to suppress the use for recreational purposes of a particular psychoactive drug, and given the findings of harm flowing from marihuana use, already discussed, we do not think that the consequences in this case trigger a finding of

gross disproportionality. Firstly, the consequences are largely the product of deliberate disobedience to the law of the land. In his factum, Malmo-Levine speaks of "mass civil disobedience". He writes (at para. 10):

> The glaring hypocrisy of the war on "some" drugs, and the obvious effectiveness of cannabis will ensure users are never going to back down, and that we intend to outgrow the "low-functioning" stigma foisted upon us and assume our rightful place as the "mellow and imaginative" section of society.

This may be so, but evaluation of adverse effects has to take the nature of this political confrontation into account. Secondly, if the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise. To suggest that such "inherent" costs are fatal to the exercise of the power is to overshoot the function of s. 7.

175 We agree that the effects on an accused person of the criminalization of marihuana possession are serious. They are the legitimate subject of public controversy. They will undoubtedly be addressed in parliamentary debate. Applying a standard of gross disproportionality however, it is our view that the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action.

(b) Ineffectiveness of the Prohibition of Marihuana

176 The appellants next argue that the adverse effects on accused persons of the prohibition on possession are grossly disproportionate to any legitimate state interest because the prohibition is simply ineffective. It contributes virtually nothing to advancing the state interest in preventing the use of marihuana. Reliance is placed in this regard on the view of the trial judge in *Caine* who stated: "Thus, in Canada, it would appear that the variations in consumption rates noted above (in particular, the decline in consumption since 1969) have occurred with no apparent statistical relationship to any increase or decrease in the severity of the law or its application" (para. 57). Also, at para. 62: "It is a fair and common sense conclusion that marihuana consumption would increase upon legalization, thereby leading to an increase in the absolute number of chronic users and vulnerable persons adversely affected by the drug. However, it is impossible to conclude, from the evidence before me, whether this increase would be substantial, moderate, or negligible."

177 This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that "[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis" (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.

178 Questions about which types of measures and associated sanctions are best able to deter conduct that Parliament considers undesirable is a matter of legitimate ongoing debate. The so-called "ineffectiveness" is simply another way of characterizing the refusal of people in the appellants' position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice. Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual's personal discretion and taste.

(c) The Balance of Salutary and Deleterious Effects

179 Finally, the appellants say that the prohibition is disproportionate to the state's interest because its negative consequences are grossly disproportionate to its positive features, if any.

180 In this connection, Braidwood J.A. reproduced a summary of the evidence of harm to society resulting from the prohibition itself including disrespect for the law among those who disagree with it; distrust of health and educational authorities who have "promoted false and exaggerated allegations about marihuana"; lack of communication between youth and their elders about the use of marihuana; risks from involvement with criminals and hard-drug users; lack of governmental control over drug quality; "the creation of a lawless sub-culture"; financial costs associated with enforcing the law; and "the inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful" (para. 28).

181 In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7.

182 The appellants were correct to criticize the government's attempted wholesale importation of "societal interests" from s. 1 to s. 7 to try to support the constitutional validity of the prohibition. In our view, the appellants should equally be stopped from importing the "salutary/deleterious" effects balance from s. 1 in order to try to justify the opposite conclusion.

183 As, in our view, the appellants have not established an infringement of s. 7, there is no need to call on the government for a s. 1 justification.

F. Section 15 of the Charter

184 The appellant Malmo-Levine makes the additional argument that the criminalization of marihuana constitutes a breach of s. 15 of the *Charter*. He posits that marihuana users have a "substance orientation" which is a personal characteristic analogous to other s. 15 grounds such as sexual orientation: *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.). He further submits that s. 15 is meant to protect individuals who have experienced persecution for activities that are not inherently harmful to society, and in the appellant Malmo-Levine's view, cannabis use is simply "harmless hedonis[m]".

185 A taste for marihuana is not a "personal characteristic" in the sense required to trigger s. 15 protection: *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.). As Malmo-Levine argues elsewhere, it is a lifestyle choice. It bears no analogy with the personal characteristics listed in s. 15, namely race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It would trivialize this list to say that "pot" smoking is analogous to gender or religion as a "deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs": *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at para. 5; *Vriend*, *supra*, at para. 90. Malmo-Levine's equality claim therefore fails at the first hurdle of the requirements set out in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.). The true focus of s. 15 is "to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society": *Swain*, *supra*, at p. 992, *per* Lamer C.J.; and *Rodriguez*, *supra*, at p. 616. To uphold Malmo-Levine's argument for recreational choice (or lifestyle protection) on the basis of s. 15 of the *Charter* would simply be to create a parody of a noble purpose.

VI. Conclusion

186 For these reasons, it is our view that the *Charter* challenges must fail and that the appeals should be dismissed.

187 The constitutional questions in the *Malmo-Levine* appeal should therefore be answered as follows:

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 15(1) of the *Charter* by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

Answer: No.

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

188 The constitutional questions in the *Caine* appeal should be answered as follows:

(1) Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

(2) If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

(3) Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867*; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

Answer: Yes.

***Arbour J.*:**

189 The appeal of the appellant Caine calls into question the constitutionality of the provisions prohibiting possession of cannabis (marihuana) for personal use. The provisions are attacked on the ground that they are not within the legislative competence of the Parliament of Canada and that they infringe s. 7 of the *Canadian Charter of Rights and Freedoms*. In addition to challenging the prohibition on simple possession, the appellant Malmo-Levine also challenges the prohibition of possession of marihuana for the purpose of trafficking on the ground that it infringes ss. 7 and 15 of the *Charter*. The case of the appellant Clay (*R. v. Clay*, 2003 SCC 75 (S.C.C.)), on appeal from the decision of the Court of Appeal for Ontario (2000), 49 O.R. (3d) 577 (Ont. C.A.), was heard together with the cases of the appellants Caine and Malmo-Levine, on appeal from the decision of the Court of Appeal of British Columbia (2000), 138 B.C.A.C. 218, 2000 BCCA 335 (B.C. C.A.). The *Clay* appeal raises issues identical to the *Caine* appeal and is based on similar findings of fact. Therefore, I will address all three appeals in these reasons and refer to the findings of the courts below in Ontario and in British Columbia.

190 We are asked to address, directly for the first time, whether the *Charter* requires that harm to others or to society be an essential element of an offence punishable by imprisonment. In a landmark 1985 case, Lamer J. (as he then was) said: "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter* . . . " (*Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 492 ("*Motor Vehicle Reference*")). In my view, a "person who has not really done anything wrong" is a person whose conduct caused little or no

reasoned risk of harm or whose harmful conduct was not his or her fault. Therefore, for the reasons that follow, I am of the view that s. 7 of the *Charter* requires not only that some minimal mental element be an essential element of any offence punishable by imprisonment, but also that the prohibited act be harmful or pose a risk of harm to others. A law that has the potential to convict a person whose conduct causes little or no reasoned risk of harm to others offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter*. Imprisonment can only be used to punish blameworthy conduct that is harmful to others.

I. The Facts and the Proceedings

191 My colleagues Justices Gonthier and Binnie have referred to the salient facts. The adjudicative facts of each case are not in dispute and my colleagues have aptly summarized them. I propose to simply highlight what I consider essential to the disposition of these appeals, most of which is contained in the findings of fact of the trial judges with respect to the harms associated with marihuana use. My colleagues have also referred to recent studies and recent parliamentary reports on the effects of the use of marihuana. The conclusions and recommendations in these new documents are similar to those presented to the trial judges and in my view they add nothing to the full factual record upon which both the trial judges and the courts of appeal in these cases founded their conclusions. In light of this, I do not think that we need to come to our own assessment of the facts. Rather, we should defer to the trial courts absent a patent and overriding error on their part. I am content to rely entirely on the findings of fact below as I see nothing in the new materials introduced before us that suggests that these findings were in error.

192 The findings of fact made by the trial judges in *Caine* and *Clay* are similar in all respects (they are set out in full in para. 40 of the reasons for judgment of Howard Prov. Ct. J. in the *Caine* appeal, and in para. 25 of the reasons for judgment of McCart J. in the *Clay* appeal). In *Clay*, McCart J. made the following findings of fact, which were accepted by Rosenberg J.A. at the Court of Appeal for Ontario (at para. 10):

> 1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
>
> 2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
>
> 3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
>
> 4. There is no hard evidence that cannabis consumption induces psychoses;
>
> 5. Cannabis is not an addictive substance;
>
> 6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
>
> 7. That the consumption of marijuana probably does not lead to "hard drug" use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;
>
> 8. Marijuana does not make people more aggressive or violent;
>
> 9. There have been no recorded deaths from the consumption of marijuana;
>
> 10. There is no evidence that marijuana causes amotivational syndrome;
>
> 11. Less than 1% of marijuana consumers are daily users;

12. Consumption in so-called "de-criminalized states" does not increase out of proportion to states where there is no de-criminalization;

13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

193 After having thus established what harms are *not* associated with marihuana use, McCart J. found, at paras. 26-27:

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless. While marijuana may not cause schizophrenia, it may trigger it. Bronchial pulmonary damage is at risk of occurring with heavy use. However, to be fair, there is also general agreement among the experts who testified that moderate use of marijuana causes no physical or psychological harm. Field studies in Greece, Costa Rica and Jamaica generally supported the idea that marijuana was a relatively safe drug — not totally free from potential harm, but unlikely to create serious harm for most individual users or society.

The Le Dain Commission found at least four major grounds for social concern: the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation. This report went on to state that it did not yet know enough about cannabis to speak with assurance as to what constitutes moderate as opposed to excessive use.

194 In *Caine*, Howard Prov. Ct. J. found as follows with respect to what harms are *not* associated with marihuana use (at para. 40):

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;

2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;

3. there is no evidence demonstrating irreversible, organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;

4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;

5. there is no evidence that marihuana use induces psychosis in ordinary healthy adults who use [marihuana] occasionally or moderately and, in relation to the heavy user, the evidence of marihuana psychosis appears to arise only in those having a predisposition towards such a mental illness;

6. marihuana is not addictive;

7. there is a concern over potential dependence in heavy users, but marihuana is not a highly reinforcing type of drug, like heroin or cocaine and consequently physical dependence is not a major problem; psychological dependence may be a problem for the chronic user;

8. there is no causal relationship between marihuana use and criminality;

9. there is no evidence that marihuana is a gateway drug and the vast majority of marihuana users do not go on to try hard drugs; recent animal studies involving the release of dopamine and the release of cortico releasing factor when under stress do not support the gateway theory;

10. marihuana does not make people aggressive or violent, but on the contrary it tends to make them passive and quiet;

11. there have been no deaths from the use of marihuana;

12. there is no evidence of an amotivational syndrome, although chronic use of marihuana could decrease motivation, especially if such a user smokes so often as to be in a state of chronic intoxication;

13. assuming current rates of consumption remain stable, the health related costs of marihuana use are very, very small in comparison with those costs associated with tobacco and alcohol consumption.

195 The trial judge mentioned that these findings were consistent with, *inter alia*, the findings of the Commission of Inquiry into the Non-Medical Use of Drugs, chaired by Gerald Le Dain (later Le Dain J. of this Court). After almost four years of public hearings and research, the majority of the commissioners concluded that simple possession of marihuana should not be a criminal offence. The Commission made the following findings with respect to the harms that are *not* associated with marihuana use:

1. cannabis is not a "narcotic";

2. few acute physiological effects have been detected from current use in Canada;

3. few users (less than one percent) of cannabis move on to use harder and more dangerous drugs;

4. there is no scientific evidence indicating that cannabis use is responsible for other forms of criminal behaviour;

5. at present levels of use, the risks or harms from consumption of cannabis are much less serious than the risks or harms from alcohol use; and

6. the short term physical effects of cannabis are relatively insignificant and there is no evidence of serious long term physical effects.

(*Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (1972), at pp. 265-310)

196 Howard Prov. Ct. J. added, however, that marihuana is not a "completely harmless drug for all individual users" (para. 42). She first discussed the health risks for the user and summarized her findings as follows (at para. 39):

On the question of whether individual marihuana users face any health risks, the distinction between "low/occasional/moderate users" and "chronic users" is of considerable importance. Quite simply, the risk of harm from the use of marihuana depends upon which group one is talking about. All of the witnesses from whom I have heard, including Dr. Kalant, appear to agree that there is no evidence to sug[g]est that low/occasional/moderate users assume any significant health risks from smoking marihuana, so long as they are healthy adults and do not fall into one of the vulnerable groups, namely immature youths, pregnant women and the mentally ill. On the other hand, for the chronic user, there is a significant health risk although, this is primarily from the process of smoking, rather than from the chemical make-up of the drug.

Howard Prov. Ct. J. again referred, at para. 42, to the findings of the Le Dain Commission, this time with respect to the harm that may be occasioned by marihuana use. These findings were also referred to in *Clay*, at para. 27, and reproduced above, but I repeat them here for convenience:

1. "the probably harmful effect of cannabis on the maturing process in adolescence;"

2. "the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities...;"

> 3. "the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder;" and
>
> 4. "the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation."

197 Howard Prov. Ct. J. also referred to the Hall Report (W. Hall, N. Solowij and J. Lemon, *National Drug Strategy: The health and psychological consequences of cannabis use* (1994), and summarized its conclusions with regard to the "[a]cute effects" of marihuana use, that is, the adverse effects that might occur while actually under the influence (at para. 44):

> Taken as a whole, the findings suggest that: (1) naive users should be careful and if they choose to smoke should do so with experienced users and in an appropriate setting, (2) no one should be studying, writing an exam, or engaging in other complex mental activities while in a state of intoxication induced by cannabis (or alcohol, for that matter); (3) pregnant women should not smoke cannabis (of course, they should not be smoking tobacco or drinking alcohol either); (4) the mentally ill or those with a family history of mental illness should not use cannabis; and (5) as with alcohol, no one should drive, fly or operate complex machinery while under the influence of marihuana.
>
> As to the "chronic effects", that is, the adverse effects that might occur from the chronic use of cannabis (daily use over many years), the Hall Report notes that there is still considerable "uncertainty" and Howard Prov. Ct. J. summarized its findings as follows, at paras. 45-46:
>
> The "major probable adverse effects" from chronic use appear to be:
>
> • respiratory diseases associated with smoking as the method of administration, such as chronic bronchitis, and the occurrence of histo[pa]th[o]logical changes that may be precursors to the development of malignancy;
>
> • development of a cannabis dependence syndrome, characterized by an inability to abstain from or to control cannabis use;
>
> • subtle forms of cognitive impairment, most particularly of attention and memory, which persist while the user remains chronically intoxicated, and may or may not be reversible after prolonged abstinence from cannabis.
>
> The "major possible adverse effects" from chronic use (that is, effects which remain to be confirmed by further research) are:
>
> • an increased risk of developing cancers of the aerodigestive tract, i.e. oral cavity, pharynx, and oesophagus;
>
> • an increased risk of leukaemia among offspring exposed while in utero; (since disproved)
>
> • a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents;
>
> • birth defects occurring among children of women who used cannabis during pregnancies. (since disproved)
>
> Both Dr. Kalant and Dr. Connolly agreed that research since the publication of the Hall Report (1994) has failed to reveal any foundation for the above-noted concerns regarding (1) leukaemia among off-spring, and (2) birth defects among children of women who used marihuana during pregnancy. These concerns would no longer be considered as "risks" in the scientific community.
>
> Finally, the Hall Report identifies three traditional "high risk groups":

> (1) Adolescents with a history of poor school performance whose educational achievements may be further limited by cognitive impairments if chronically intoxicated, or who start using cannabis at an early age (there being a concern that such youths are at higher risk of becoming chronic users of cannabis as well as other drugs);
>
> (2) Women of childbearing age, because of the concern with the effects of smoking cannabis while pregnant; and
>
> (3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies, all of whom may face a risk of precipitating or exacerbating the symptoms of their d[is]eases.

198 On the basis of this evidence, Howard Prov. Ct. J. concluded as follows with respect to the health risks to the user occasioned by marihuana use (at para. 48):

> There was general agreement among the witnesses who appeared before me (save perhaps for Dr. Morgan) that the conclusions contained in the Hall Report were sound (except for the references to leukemia and birth defects), based on the scientific information available at this time. It should be noted that, apart from the "acute effects", which are rare and transient, none of the above reports raise any significant concerns about the well-being of a healthy adult who is a low/occasional/moderate user of marihuana.

199 Howard Prov. Ct. J. then discussed the risk of harm to others or to society as a whole. She concluded that the only possible harm to individual members of society is related to the fact that an "individual who is in a state of intoxication induced by marihuana poses a risk to the health and safety of others should he or she drive, fly or operate complex machinery" (para. 49). However, Howard Prov. Ct. J. noted that while the state had a legitimate interest in protecting members of society from such conduct, s. 253(a) of the *Criminal Code*, R.S.C. 1985, ch. C-46, already achieves this purpose. With respect to harm to society as a whole, Howard Prov. Ct. J., at paras. 51-52, concluded that

> [t]he current widespread use of marihuana does not appear to have had any significant impact on the health care system of this province and, more importantly, it has not been perceived by our health care officials as a significant health concern, either provincially or nationally....
>
> The evidence establishes that any health care concerns (including financial concerns) associated with marihuana use in this country are minor compared to the social, criminal and financial costs associated with the use of alcohol or to bacc[o].

200 Finally, Howard Prov. Ct. J. considered the harm caused by the prohibition of marihuana, which she summarized as follows, at para. 63:

> 1. countless Canadians, mostly adolescents and young adults, are being prosecuted in the "criminal" courts, subjected to the threat of (if not actual) imprisonment, and branded with criminal records for engaging [in] an activity that is remark[a]bly benign (estimates suggest that over 600,000 Canadians now have criminal records for cannabis related offences); meanwhile others are free to consume society's drugs of choice, alcohol and tobacco, even though these drugs are known killers;
>
> 2. disrespect for the law by upwards of one million persons who are prepared to engage in this activity, notwithstanding the legal prohibition;
>
> 3. distrust, by users, of health and educational authorities who, in the past, have promoted false and exaggerated allegations about marihuana; the risk is that marihuana users, especially the young, will no longer listen, even to the truth;
>
> 4. lack of open communication between young persons and their elders about their use of the drug or any problems they are experiencing with it, given that it is illegal;

> 5. the risk that our young people will be associating with actual criminals and hard drug users who are the primary suppliers of the drug;
>
> 6. the lack of governmental control over the quality of the drug on the market, given that it is available only on the black market;
>
> 7. the creation of a lawless sub-culture whose only reason for being is to grow, import and distribute a drug which is not available through lawful means;
>
> 8. the enormous financial costs associated with enforcement of the law; and
>
> 9. the inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful.

201 We have to analyse the constitutional questions raised in these appeals on the basis of these facts. Although criminalization of marihuana is a sensitive political issue and raises many social policy considerations, our analysis is circumscribed by the findings of fact of the trial judges, which are well supported by an extensive record. These findings are the basis upon which we must decide whether, or to what extent, Parliament may criminalize under threat of imprisonment possession of marihuana for personal use and, alternatively, for the purpose of trafficking. We must determine whether, on the basis of these facts, constitutional requirements are met, with respect to both the division of powers issue and the *Charter* considerations. These cases are not about whether Parliament should or should not prohibit or regulate possession of marihuana, whether the law is fair or unfair to marihuana users, or whether the legislation is effective in reducing the harm occasioned by marihuana use. These cases ask us to determine the limits imposed by the *Charter* upon Parliament to use imprisonment as a sanction for prohibited conduct.

II. Analysis

202 Parliament has full legislative power with respect to the criminal law, including the determination of the essential elements of any given crime. Prior to the enactment of the *Charter*, Parliament could prohibit any act and impose any penal consequences for infringing the prohibition, provided only that the prohibition served "a public purpose which can support it as being in relation to criminal law" (*Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)* (1948), [1949] S.C.R. 1 (S.C.C.) ("*Margarine Reference*"), p. 50; appeal to the Privy Council dismissed, (1950), [1951] A.C. 179 (Canada P.C.)). Once the legislation was found to have met this test, the courts had virtually no role in reviewing the substance of the legislation. However, with the entrenchment of the *Charter* in the Constitution, courts must now consider not only the *vires* of legislation, but also the compliance of legislation with the guarantees of the *Charter* (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636 (S.C.C.), at p. 651; *Motor Vehicle Reference, supra*, at pp. 496-97, *per* Lamer J., at p. 525, *per* Wilson J.).

203 In assessing *Charter* compliance, courts are to look both to the purpose and to the effect of the legislation (*R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), at p. 1071, *per* Lamer J. (as he then was)). As Dickson J. (as he then was) said, speaking for the majority of this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 334, "if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity". Thus, as Lamer J. said in *Smith, supra*, at p. 1071:

> ... even though the pursuit of a constitutionally invalid purpose will result in the invalidity of the impugned legislation irrespective of its effects, a valid purpose does not end the constitutional inquiry. The means chosen by Parliament to achieve that valid purpose may result in effects which deprive Canadians of their rights guaranteed under the *Charter*. In such a case it would then be incumbent upon the authorities to demonstrate under s. 1 that the importance of that valid purpose is such that, irrespective of the effect of the legislation, it is a reasonable limit in a free and democratic society.

Hence, in the cases before this Court, even if Parliament has the legislative power to prohibit and sanction possession of marihuana, i.e. if there is a legitimate legislative purpose falling under a federal head of power, the means chosen by Parliament

to achieve this purpose, for example the type of sanction chosen to enforce the prohibition, may infringe the rights to life, liberty or security of the appellants in a manner that is not in accordance with the principles of fundamental justice, as protected by s. 7 of the *Charter*.

204 These cases concern whether the provisions prohibiting possession of marihuana for personal use and, alternatively, for the purpose of trafficking, are within the constitutional legislative power of the Parliament of Canada, either under its general peace, order and good government power ("POGG power"), or under s. 91(27) of the *Constitution Act, 1867* pursuant to its criminal law power. These cases also concern whether the impugned provisions are contrary to s. 7 of the *Charter*. Much confusion has permeated the debate before us and in the courts below regarding these two related but distinct limits imposed upon Parliament's legislative power. Much of the debate thus far has indeed surrounded whether Parliament could "criminalize" possession of marihuana. This issue must be decided according to the division of powers principles, and is but one aspect of the constitutional challenge before us. The *Charter* imposes additional constraints on Parliament when it chooses to provide for deprivation of liberty. I will analyse these two limits on legislative power in turn and endeavour to distinguish the thresholds to be met, as they are in my view distinct and serve different purposes.

A. The Division of Powers Issue

205 The appellants Clay and Caine challenge the prohibition against possession of marihuana as being beyond the authority of Parliament under the *Constitution Act, 1867*. My colleagues Gonthier and Binnie JJ. have concluded that the impugned provisions fall under the criminal law head of power. For that reason, they conclude that it is not necessary to revisit the correctness of the conclusion in *R. v. Hauser*, [1979] 1 S.C.R. 984 (S.C.C.), with respect to Parliament's residual authority to deal with drugs in general or marihuana in particular under the peace, order and good government power. I am in general agreement with the conclusion reached by my colleagues and I will only make a few comments, which will inform the *Charter* analysis.

206 As mentioned above, legislation which properly falls under one of the federal heads of power will pass the division of powers challenge, but may still be found to infringe on a right or freedom protected by the *Charter*. With regard to the federal criminal law power, under s. 91(27) of the *Constitution Act, 1867*, Parliament has been accorded the power to make criminal law in the widest sense (see, *inter alia RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 28; *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.), at para. 118; *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783, 2000 SCC 31 (S.C.C.), at paras. 28-31). It is entirely within Parliament's discretion to determine what evil it wishes to suppress by penal prohibition and what threatened interest it thereby wishes to safeguard. Apart from the *Charter*, the only qualification attached to Parliament's plenary power over criminal law is that it cannot be employed colourably. Like other legislative powers, the criminal law power does not permit Parliament, simply by legislating in the proper form, colourably to invade areas of exclusively provincial legislative competence. To determine whether such a colourable attempt is made, we must determine whether a legitimate public purpose underlies the criminal prohibition (*Scowby v. Saskatchewan (Board of Inquiry)*, [1986] 2 S.C.R. 226 (S.C.C.), at p. 237; *Hydro-Québec*, *supra*, at para. 121).

207 In the *Margarine Reference*, *supra*, Rand J. drew attention, at pp. 49-50, to the need to identify the evil or injurious effect at which a penal prohibition was directed and explained that a prohibition is not criminal unless it serves "a public purpose which can support it as being in relation to criminal law". Further, he explained that the "ordinary though not exclusive ends" served by the criminal law are "[p]ublic peace, order, security, *health*, [and] morality" (emphasis added).

208 The main objective of the impugned legislation here is protection from the possible adverse health consequences of marihuana use. The objective of the state in prohibiting marihuana has been summarized by Rosenberg J.A. in *Clay*'s companion case *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.), at para. 143:

> First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may

> develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

Jurisdiction over health is shared between Parliament and the provincial legislatures; their respective competence depends on the pith and substance of the particular measure at issue.

209 In *RJR-MacDonald, supra*, the issue was whether Parliament could validly employ its criminal law power to prohibit tobacco manufacturers from advertising their products to Canadians, and to increase public awareness concerning the hazards of tobacco use. La Forest J., at para. 32, concluded that the detrimental health effects of tobacco are both dramatic and substantial and that Parliament could validly employ the criminal law:

> Given the "amorphous" nature of health as a constitutional matter, and the resulting fact that Parliament and the provincial legislatures may both validly legislate in this area, it is important to emphasize once again the plenary nature of the criminal law power. In the *Margarine Reference*, *supra*, at pp. 49-50, Rand J. made it clear that the protection of "health" is one of the "ordinary ends" served by the criminal law, and that the criminal law power may validly be used to safeguard the public from any "injurious or undesirable effect". The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law; see *Scowby*, *supra*, at pp. 237-38.
>
> [Emphasis added.]

210 The respondent argues that there is no baseline or threshold level of harm that must be reached before the criminal law power can be invoked. The Crown argues, citing *R. v. Hinchey*, [1996] 3 S.C.R. 1128 (S.C.C.), at para. 29, and *Hydro-Québec*, *supra*, at para. 121, that the recognition of a *Charter*principle precluding Parliament from criminalizing conduct unless it can demonstrate a potential for serious or substantial harm would be inconsistent with the well-established constitutional principle that the criminal law can be used to enact legislation to address social, political, or economic interests or "some legitimate public purpose". The respondent submits that even though there would be a rational basis for a statutory or regulatory prohibition, a "harm principle" would call for judicial review of what are essentially policy decisions. The submissions of the Attorney General of Ontario ("AGO") are similar on this respect. The AGO argues that whether a criminal offence is reviewed by way of a *vires* analysis under the division of powers doctrine, or by way of a "harm principle" within the ambit of s. 7, the result will necessarily be the same. The AGO argues that the "harm principle", at least as it has been formulated by Braidwood and Rosenberg JJA., does no more than reiterate the threshold test for Parliament's exercise of its criminal law jurisdiction. The AGO further submits that Lamer J.'s analysis in *Motor Vehicle Reference* should not apply to a consideration of the *actus reus* of the offence. The AGO states that consideration of the *actus reus* is precluded because "the decision to criminalize specific types of conduct belongs wholly to Parliament" (AGO's factum, at para. 12).

211 It is not the courts' function to reassess the wisdom of validly enacted legislation. As L'Heureux-Dubé J. said in *Hinchey*, *supra*, at para. 34, "the judiciary should not rewrite [legislation] to suit its own particular conception of what type of conduct can be considered criminal". And further, at para. 36: "If Parliament chooses to criminalize conduct which, notwithstanding *Charter* scrutiny, appears to be outside of what a judge considers 'criminal', there must be a sense of deference to the legislated authority which has specifically written in these elements."

212 Although courts cannot question the wisdom of legislation, they must assess its constitutionality. There is, as such, no constitutional threshold of harm required for legislative action under the criminal law power. There had been uncertainties in the past in this regard, as some would have required "significant, grave and serious risk of harm to public health, morality, safety or security" before a prohibition could fall within the purview of the criminal law power (see, e.g., *RJR-MacDonald*, *supra*, at paras. 199-202, *per* Major J.). It is now established that as long as the legislation is directed at a legitimate public health evil and contains a prohibition accompanied by a penal sanction, and provided that it is not otherwise a "colourable" intrusion upon provincial jurisdiction, Parliament has, under s. 91(27) of the *Constitution Act, 1867*, discretion to determine the extent

of the harm it considers sufficient for legislative action (*RJR-MacDonald*, *supra*, at para. 32; *Reference re Firearms Act (Can.)*, *supra*, at para. 27). Obviously, however, where Parliament relies on the protection of health as its legitimate public purpose, it has to demonstrate the "injurious or undesirable effect" from which it seeks to safeguard the public. This will likely be done by demonstrating the harm to the health of individuals or the public associated with the prohibited conduct. While there is no constitutional threshold level of harm required before Parliament may use its broad criminal law power, conduct with little or no threat of harm is unlikely to qualify as a "public health evil".

213 In *Hydro-Québec*, *supra*, at para. 120, La Forest J. came to a similar conclusion for the majority of this Court with regard to the mental element dimension of a criminal offence. He held:

> ... under s. 91(27) of the *Constitution Act, 1867*, it is also within the discretion of Parliament to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition.... This flows from the fact that Parliament has been accorded plenary power to make criminal law in the widest sense. This power is, of course, subject to the "fundamental justice" requirements of s. 7 of the *Canadian Charter of Rights and Freedoms*, which may dictate a higher level of *mens rea* for serious or "true" crimes ....

Just as Parliament may determine the nature of the mental element pertaining to different crimes, it may determine the nature of the "evil or injurious effect" from which it wishes to protect the public. However, while Parliament has the power to define the elements of a crime, the courts have the mandate to review that definition to ensure that it complies with the *Charter* (see, e.g., *Vaillancourt*, *supra*, at p. 652). As I will discuss below, the "fundamental justice" requirements of s. 7 of the *Charter* may, where imprisonment is available as a punishment, call for an "evil or injurious effect" of a certain nature or degree.

214 The concerns raised by the respondent and the AGO reflect the wrong focus in the courts below as to whether Parliament could "criminalize" possession of marihuana. Indeed, Howard Prov. Ct. J. in *Caine*, in considering the "harm principle", wrote as follows, at paras. 117-20:

> In my view, the proposals that the criminal law be used only to protect against conduct that involves demonstrable harm to another individual or other individuals or to society as a whole or against conduct that is seriously harmful or substantially harmful to society are not "principles of fundamental justice." The case authorities are to the contrary. . . .
>
> In fact, our Supreme Court has consistently granted Parliament "a broad discretion in proscribing conduct as criminal and in determining proper punishment". *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 (S.C.C.). The principles applicable to Parliament's law-making powers in the criminal sphere make clear that Parliament has a broad scope of authority to "criminalize" conduct in order to address any social, political or economic interests. . . .
>
> If there was any doubt of how this principle might be applied in the present context, it was resolved when the Supreme Court of Canada indicated, in *R.J.R. MacDonald Inc. v. Canada, (supra)* that Parliament may legislate under the criminal law power to protect Canadians from harmful drugs.... The correct position is, in my view, that which is set out in *Butler*, (*supra*) at 165. To paraphrase in terms that are applicable to the case before me: Parliament may enact penal legislation prohibiting use of a drug, when it has a reasonable basis for concluding that there is a risk of harm to the health of the user, or a risk of harm to society as a whole. [Emphasis added.]

With respect, the trial judge confused the tests developed by this Court in division of power jurisprudence, which are used to determine whether Parliament has validly used its criminal power in a manner that is not a colourable intrusion upon provincial competences, with the *Charter* constraints imposed upon Parliament when otherwise valid criminal legislation is alleged to infringe on rights protected by the *Charter*. In my respectful view, the same confusion appears in Braidwood J.A.'s analysis.

215 After a thorough review of the common law, leading treatises on the criminal law, law reform commission reports, Canadian federalism cases (addressing the federal criminal law power), and *Charter* jurisprudence, Braidwood J.A. came to the conclusion that the harm principle is indeed a principle of fundamental justice within the meaning of s. 7. After having concluded as to the existence of this principle, Braidwood J.A. set "the appropriate threshold for criminal sanctions" (para. 139) and determined that "[t]he degree of harm must be neither insignificant nor trivial" (para. 138). In determining the appropriate

threshold, Braidwood J.A. explained that he had to consider the "relationship, and parallels, between the Criminal Law power of Parliament pursuant to s. 91(27) of the *Constitution Act, 1867* and the test to be applied pursuant to s. 7 of the *Charter*" (para. 139). Braidwood J.A. was thus apparently concerned with affording Parliament the deference it is owed in legislating in criminal matters while at the same time give meaning to the harm principle, because, as he put it: "it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others" (para. 134). This tension led him to conclude, at paras. 158-60:

> In conclusion, the deprivation of the appellants' liberty caused by the presence of penal provisions in the *NCA* is in accordance with the harm principle. I agree that the evidence shows that the risk posed by marihuana is not large. Yet, it need not be large in order for Parliament to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action. The *Charter* only demands that a "reasoned apprehension of harm" that is not [in]significant or trivial. The appellants have not convinced me that such harm is absent in this case.
>
> Therefore, I find that the legal prohibition against the possession of marihuana does not offend the operative principle of fundamental justice in this case.
>
> Determining whether the *NCA* strikes the "right balance" between the rights of the individual and the interests of the State is more difficult. In the end, I have decided that such matters are best left to Parliament.... I do not feel it is the role of this court to strike down the prohibition on the non-medical use of marihuana possession at this time.
>
> [Emphasis added.]

With respect, Braidwood J.A. wrongly focused his analysis on Parliament's power to criminalize possession of marihuana. As I briefly mentioned above, and as my colleagues Gonthier and Binnie JJ. have also reviewed, the principles regarding the scope of Parliament's criminal law power are now well established and harm may not be the sole basis upon which criminal law may be used. Parliament may have the power to prohibit certain conduct, be it under its criminal law power or otherwise, but it must respect minimum *Charter* requirements before it resorts to imprisonment as a sanction. In other words, the harm principle as a principle of fundamental justice operates to prevent restriction of liberty under s. 7 of the *Charter* and *not* as a constraint inherent in Parliament's criminal law power.

216 The focus must therefore be on the use of imprisonment as a sanction attaching to a prohibited conduct. This becomes obvious upon consideration of the various sources of legislative power under which Parliament may prohibit and sanction certain activities or behaviours. To situate the harm principle within the principles regarding the criminal law power of Parliament would in fact exclude the applicability of this principle of fundamental justice to other prohibitions enforceable by imprisonment and, of course, to the enforcement of provincial statutes. For example, as my colleagues explained, the residual POGG power has application in only three situations: (i) a national emergency; (ii) the federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of merely local or private nature; and (iii) where the subject matter "goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole" (*Labatt Breweries of Canada Ltd. v. Canada (Attorney General)* (1979), [1980] 1 S.C.R. 914 (S.C.C.)). The determination of whether the impugned legislation meets these criteria thus focuses on characteristics of the legislation that have nothing to do with those falling under the criminal law power, such as the necessity to identify an evil or injurious effect at which the prohibition is directed and a valid criminal law purpose. Needless to say, no harm, be it to identifiable others, to society as a whole, or to self, is required, or even relevant to the determination of whether legislation falls under the POGG power. The harm principle as applied by the courts below would thus be inapplicable to prohibitions enacted under the POGG power, or any other noncriminal fields of federal competence.

217 The use of imprisonment, be it for a criminal offence, a prohibition enacted under the POGG power, or for any other offence created as a means of enforcement of non-criminal legislation, including provincial offences, must be subject to the same *Charter* requirements. The comments of Lamer C.J., in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.), at p. 189, are equally applicable here:

> In my view, whether this offence (or the Act generally) is better characterized as "criminal" or "regulatory" is not the issue. The focus of the analysis in *Re B. C. Motor Vehicle Act* and *Vaillancourt* was on the use of imprisonment to enforce the prohibition of certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice.
>
> [Emphasis in original.]

Similarly here, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which calls into play the harm principle as a principle of fundamental justice. I note here that the question is not whether imprisonment is used frequently or only in the rarest cases. The mere availability of imprisonment dictates the constitutional test to be applied (*Motor Vehicle Reference, supra*, at p. 515).

218 According to my colleagues' conclusion, the impugned legislation is within Parliament's legislative powers. For my purposes, once it is determined that the legislation falls within one of Parliament's constitutional heads of power, it does not matter whether the legislation falls under the criminal law power or otherwise. The key is indeed whether the approach taken by Parliament to enforce the prohibition of possession of marihuana is in accordance with the prescriptions of the *Charter*. This case is therefore an opportunity for this Court to evaluate the principles developed in *Motor Vehicle Reference* with respect to the *actus reus* of the offence.

B. The Charter Issues

219 The appellants Caine and Clay assert that the prohibition of possession of marihuana infringes s. 7 of the *Charter*. The s. 7 analysis requires the appellants to demonstrate a deprivation of liberty that is not in accordance with the principles of fundamental justice. Indeed, as *per* Iacobucci J. in *R. v. White*, [1999] 2 S.C.R. 417 (S.C.C.), at para. 38, the s. 7 analysis involves three stages:

> The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle ....

I will now consider each of these three stages. I note that the analysis will concentrate on the challenge of the provisions prohibiting simple possession of marihuana. At the end of the analysis I will address Malmo-Levine's challenge to the prohibition of possession of marihuana for the purpose of trafficking.

(1) Deprivation of Life, Liberty, or Security of the Person

220 The respondent concedes, as the lower courts found, that the possibility of imprisonment under s. 3(1) of the NCA engages the s. 7 liberty interest of the appellants. This is consistent with this Court's past holdings: *Motor Vehicle Reference, supra*, at p. 515; *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), at p. 789.

221 The appellants also argue that the right to use marihuana in the privacy of one's home is a fundamental aspect of personal autonomy and dignity. On this issue, I am in complete agreement with my colleagues Gonthier and Binnie JJ. Neither the widest view on liberty, as expressed by La Forest J.,writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ. on this issue, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.), at para. 80, nor the interpretation of security as including a right to personal autonomy, cover the recreational use of marihuana, even in the privacy of one's home. This use does not qualify as a matter of fundamental importance so as to engage the liberty and security interests under s. 7 of the *Charter*. Put another way:

> ...the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

Godbout c. Longueuil (Ville), [1997] 3 S.C.R. 844 (S.C.C.), at para. 66

222 The threat of imprisonment clearly engages the s. 7 liberty interest of the appellants; since no one has addressed whether sanctions other than imprisonment could engage the right to liberty or security of the person, I will limit my analysis to the threat of imprisonment. Thus, I need not address here, given the scope of my analysis and the nature of this appeal, whether the imposition of a fine for simple possession of marihuana, or imprisonment as an alternative to the non-payment of a fine, or imposition of a criminal record *simpliciter*, engage the right to security or liberty of the person. Those issues were not addressed by the courts below and it would be both unwise and unnecessary to address them here. As the threat of imprisonment clearly engages the s. 7 liberty interest of the appellants, it is necessary to determine the relevant principles of fundamental justice, to which I now turn.

(2) The Relevant Principles of Fundamental Justice

223 The primary principle of fundamental justice put forth by the appellants is the alleged "harm principle". The British Columbia Court of Appeal in *Caine* recognized the existence of a harm principle as a principle of fundamental justice, although the majority and the minority had different views on which threshold of harm was required by this principle. Rosenberg J.A. of the Court of Appeal for Ontario in *Clay* did not decide the issue but was ready to accept for the purposes of the case at bar that the harm principle was a principle of fundamental justice. The appellants also submit other principles of fundamental justice which they say are applicable to the cases at bar, namely the principle of restraint, the principle precluding irrationality and arbitrariness in the legislative scheme and the principle of overbreadth (see para. 31 of the appellant Caine's factum).

224 Principles of fundamental justice have been defined as follows by Sopinka J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at pp. 590-91:

> Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. in, *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at pp. 512-13, are as follows:
>
> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.
>
> . . . . .
>
> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

225 As I mentioned earlier, in determining which principles of fundamental justice are at play here and in assessing their content and their scope, the focus must remain on the choice made by the state to resort to imprisonment to enforce the prohibition of possession of marihuana for personal use and alternatively, of possession of marihuana for the purpose of trafficking (*Wholesale Travel Group Inc.*, *supra*, at p. 189, *per* Lamer C.J.).

a) Harm Principle

226 As Lamer J. recalled in *Motor Vehicle Reference, supra*, at p. 513, "[i]t has for time immemorial been part of our system of laws that the innocent not be punished". This fundamental principle is at the core of his introductory remarks, at p. 492:

> A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter of Rights and Freedoms* . . .
>
> In other words, absolute liability and imprisonment cannot be combined.

Since this landmark decision, courts have been "'empowered, indeed required, to measure the content of legislation' against the principles of fundamental justice contained in s. 7 of the *Charter*, and specifically, to ensure that the morally innocent not be punished" (*R. v. Creighton*, [1993] 3 S.C.R. 3 (S.C.C.) at p. 17).

227 It is a fundamental substantive principle of criminal law that there should be no criminal responsibility without an act or omission accompanied by some sort of fault. The Latin phrase is *actus non facit reum, nisi mens sit rea* or "the intent and the [a]ct must both concur to constitute the crime" (*Fowler v. Padget* (1798), 7 Term Rep. 509, 101 E.R. 1103 at p. 1106); see K. Roach, *Criminal Law* (2nd ed. 2000), p. 8; D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), p. 359; G. Côté-Harper, P. Rainville and J. Turgeon, *Traité de droit pénal canadien* (4th ed. rev. 1998), at pp. 263-64; J.C. Smith and B. Hogan, *Criminal Law: Cases and Materials* (7th ed. 1999), at p. 27; A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (2000), at p. 21). Legal causation, which seeks to link the prohibited consequences to a culpable act of the accused, also reflects the fundamental principle that the morally innocent should not be punished (see *R. v. Nette*, [2001] 3 S.C.R. 488, 2001 SCC 78 (S.C.C.), at para. 45). In determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred from his or her conduct. As I said in *Nette*, *supra*, at para. 47, "[w]hile causation is a distinct issue from *mens rea*, the proper standard of causation expresses an element of fault that is in law sufficient, in addition to the requisite mental element, to base criminal responsibility." This inquiry seeks in fact to determine whether blame can be attributed to the accused and is illustrative of criminal law's preoccupation that both the physical and mental elements of an offence coincide to reflect the blameworthiness attached to the offence and the offender.

228 In order to determine whether the principle developed in the *Motor Vehicle Reference* may apply to ground an element of fault in the *actus reus*, it is instructive to examine the interaction between the mental and physical elements of an offence and to review how the Court has applied that principle with respect to the *mens rea.* As Lamer J. explained in *Vaillancourt, supra*, at p. 652:

> In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re B.C. Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. . . . *Re B.C. Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. [Emphasis in original.]

Further, Lamer J. explained, at p. 653, that

> whatever the minimum *mens rea* for the act or the result may be, there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence.

The constitutionalization of fault requirements has indeed cast doubt on some *Criminal Code* offences and this Court has, in *Vaillancourt, supra*, and in, *R. v. Martineau*, [1990] 2 S.C.R. 633 (S.C.C.), for example, used the criteria of the stigma and punishment attached to an offence as determinative of the fault level or *mens rea* required for conviction. Specifically, the Court has decided that for murder and theft, principles of fundamental justice guaranteed by s. 7 of the *Charter* demand subjective

intent or recklessness. Thus, the constructive murder provisions of the *Code* which required only objective foreseeability of death and in some circumstances, only a causal connection, were held to be unconstitutional.

229 The special mental element required for these offences gives rise to the moral blameworthiness which justifies the stigma and sentence attached to them: *Vaillancourt*, *supra*, at p. 654; *Martineau*, *supra*, at p. 646. In *Martineau*, it was decided that the essential role of requiring subjective foresight of death in the context of murder was to "maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender" (p. 646). The principles of fundamental justice require, because of the special nature of the stigma attached to a murder conviction, and the available penalties, a *mens rea* reflecting the particular nature of the crime. The moral blameworthiness of a particular offender thus stems from the constitutionally required mental element, which is determined by considering the stigma and criminal sanction attaching to prohibited conduct.

230 In my view, the principle that stigma and punishment must be proportionate to the moral blameworthiness of the offender stands only if there is a sufficiently blameworthy element in the *actus reus* itself. A culpable mental state attached to a conduct may only be held "culpable" provided that the offender and his conduct *ought* to be blamed (see A. von Hirsch and N. Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991), 11 *Oxford J. Legal Stud.* 1, at p. 6). This was implicitly recognized by this Court in *R. v. DeSousa*, [1992] 2 S.C.R. 944 (S.C.C.), at pp. 964-65, where Sopinka J. held: "[p]rovided that there is a sufficiently blameworthy element in the *actus reus* to which a culpable mental state is attached, there is no additional requirement that any other element of the *actus reus* be linked to this mental state or a further culpable mental state" (emphasis added). Thus, in my opinion, the principles developed in *Motor Vehicle Reference* mandate a consideration of what is blamable in a specific conduct, i.e., what underlies stigma and punishment. Offences have both a mental and a physical element. An evaluation of the blameworthiness of conduct must take into account both elements so that wrongful conduct will not be held blamable without the necessary mental element and, on the other hand, a deliberate (or reckless or negligent) activity will not be held blamable without the activity being wrongful in the first place. Therefore, in assessing the moral blameworthiness of the offender, the inherent nature of the act committed, or the wrongfulness of the *actus reus*, must be considered.

231 What exactly is wrong or blameworthy in a given criminal offence is rarely an object of debate and is usually described by the harm or risk of harm associated with the conduct. Indeed, harm is so intrinsic to most offences that few would contest, for example, the harm to others associated with murder, assault, or theft. Murder affects the fundamental right to life; assault affects the victim's security and dignity; and theft affects the victim's material comfort and, in certain circumstances, his or her right to security, dignity and privacy. In fact, harm is often central to the requirement that punishment must be proportionate to the moral blameworthiness of the offender; in other words, "the fundamental principle of a morally based system of law [is] that those causing harm intentionally [should] be punished more severely than those causing harm unintentionally" (*Martineau, supra*, at p. 645; *Creighton, supra*, at p. 46; H.L.A. Hart, "Punishment and the Elimination of Responsibility", in *Punishment and Responsibility: Essays in the Philosophy of Law* (1968), at p. 162). Typically, the debate usually does not concern whether the conduct is harmful *per se*, but rather whether the level of harm caused or the inherent gravity of the conduct justify an increase in the harshness of labelling or sentencing.

232 Courts indeed often undertake an evaluation of the level of blameworthiness of the *actus reus*. Identical levels of intent (e.g. the intention to cause death) can lead to different degrees of labelling if the act itself is more deserving of condemnation. For instance, in *R. v. Arkell*, [1990] 2 S.C.R. 695 (S.C.C.) (released concurrently with *Martineau, supra*), this Court analysed in light of s. 7 whether a sentencing scheme which classified murders done while committing certain underlying offences as more serious, and thereby attaching more serious penalties to them, was unconstitutional. This Court found the increased harshness of labelling and punishment to be constitutionally valid under s. 7. Lamer C.J. came to this by examining the blameworthiness of the offence (at p. 704):

> The section is based on an organizing principle that treats murders committed while the perpetrator is illegally dominating another person as more serious than other murders. Further, the relationship between the classification and the moral blameworthiness of the offender clearly exists.... Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the

> principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender.
>
> [Emphasis added.]

233 Harm is frequently the determining factor in assessing the severity of an offence and in distinguishing between levels of responsibility for equally mentally blamable acts. For example, under s. 7, this Court, in *DeSousa (per* Sopinka J.), held that Parliament could treat crimes that produce certain consequences as more serious than crimes that lack those consequences: "[I]t is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused" (p. 967). See also *R. v. Williams*, 2003 SCC 41 (S.C.C.), at paras. 43-46.

234 These principles are also in line with all sentencing principles adopted by this Court. Indeed, harm, or the seriousness of prohibited conduct, along with mental blameworthiness, form the basis for culpability, and go hand in hand to determine the appropriate sentence (see D. E. Scheid, "Constructing a Theory of Punishment, Desert, and the Distribution of Punishments" (1997), 10 *Can. J.L. & Juris*. 441, at p. 484; von Hirsch and Jareborg, *supra*, at p. 2). It is a fundamental principle of sentencing that both the severity of the offence and the moral blameworthiness of the offender should dictate the quantum of sentence. As Lamer C.J. held in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.), at para. 36: "For offences where imprisonment is available, the *Code* sets maximum terms of incarceration in accordance with the relative severity of each crime". And further, at para. 40: "It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender." See also s. 718.1 of the *Criminal Code*, which states that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5 (S.C.C.), at para. 82; *R. v. W. (L.W.)*, [2000] 1 S.C.R. 455, 2000 SCC 18 (S.C.C.), at para. 18; G.P. Fletcher, *Rethinking Criminal Law* (1978), at pp. 461-62.

235 Hence, harm or the risk of harm is a determinative factor in the assessment of the seriousness or wrongfulness of prohibited conduct. Harm associated with victimizing conduct, i.e., conduct which infringes on the rights and freedoms of identifiable persons, is the most obvious, and the concern usually is with how much the person has been harmed. This, in turn, is likely to dictate the extent of punishment or the difference in the labelling of an offence, as well as the level of *mens rea* necessary to establish culpability. Other forms of conduct cause harm that is more diffuse, where no identifiable persons have had their rights or freedoms infringed by the conduct; the harm there is collective and it is the public interest that is adversely affected. Finally, other conduct is even more distant from this notion of harm, and the prohibition of that conduct is aimed at advancing public interests distinct from the protection of individuals or society.

236 The fundamental question raised in these appeals is whether harm is a constitutionally required component of the *actus reus* of any offence punishable by imprisonment. We have seen above that harm may not be the only basis upon which Parliament may decide to prohibit or regulate a given type of conduct. We must now determine whether the *Charter* requires that harm be the sole basis upon which the state may employ the threat of imprisonment as a sanction against a prohibited conduct.

237 The debate over the harm principle takes place around the traditional confrontation between harm and morality as a basis for restricting an individual's liberty. The liberal view was initially espoused by Victorian philosopher and economist John Stuart Mill in his essay, *On Liberty*. He wrote:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that,

> the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.
>
> [Emphasis added.]

(J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at pp. 8-9)

238 Mill's assertion was challenged by Sir James Fitzjames Stephen in *Liberty, Equality, Fraternity* (1967), initially published in 1874, who strongly opposed any limitation on the power of the state to enforce morality. Stephen's argument was best captured in a now-famous passage: "there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity" (p. 162). This debate between Mill and Stephen was reignited in England by the recommendation in 1957 of the Committee on Homosexual Offences and Prostitution to decriminalize homosexuality on the basis that it is not the duty of the law to concern itself with immorality as such (*The Wolfenden Report* (1963), at paras. 61-62). The reactions to the *Wolfenden Report* have been vehement. Lord Patrick Devlin, in his Maccabaean Lecture delivered at the British Academy in 1959 (later published: P. Devlin, *The Enforcement of Morals* (1965)), argued that purportedly immoral activities, like homosexuality and prostitution, should remain criminal offences and he became associated with the principle of legal moral-ism — the principle that moral offences should be regulated because they are immoral (see on this: B. E. Harcourt, "The Collapse of the Harm Principle" (1999), 90 *J. Crim. L. & Criminology* 109, at pp. 111-12; B. Lauzon, *Les champs légitimes du droit criminel et leur application aux manipulations génétiques transmissibles aux générations futures* (2002), at p. 26).

239 This position is opposed to the liberal view of Professors Hart and Feinberg who reiterated Mill's harm principle. According to J. Feinberg, who adopts a less exclusive view of the harm principle in *The Moral Limits of the Criminal Law* (1984), in the first volume, entitled *Harm to Others*, at p. 26, "[i]t is always a good reason in support of penal legislation that it would probably be effective in preventing ... harm to persons other than the actor." The debate between legal moralism and the harm principle has stimulated academic discussions and much has been written on this topic (see, *inter alia*, in addition to other sources cited throughout these reasons: "Symposium: The Moral Limits of the Criminal Law" (2001), 5 *Buff. Crim. L. Rev.* 1-319; *Mill's On Liberty: Critical Essays* (1997), edited by Gerald Dworkin). Braidwood J.A. referred, at paras. 107-12, to various authors who either adopted the harm principle or incorporated it in their writings. One of the most prominent, H. L. Packer, in his influential *The Limits of the Criminal Sanction* (1968) said, at p. 267, that "harm to others" must be a "limiting criteri[on] for invocation of the criminal sanction". This debate, which has remained focused, as I said earlier, on what should be *criminalized*, also permeated the work of the Law Reform Commissions in Canada on possible reforms of the *Criminal Code*. I need not expand on their recommendations for my purposes. Suffice it to say that Braidwood J.A. referred to various reports, all of which basically advocated that the criminal law should only be used, save in exceptional circumstances, where conduct causes or risks causing significant or grave harm to others or society (see paras. 113-16).

240 This philosophical and theoretical debate is of great interest and is a useful policy tool for law makers. It may also serve as a guide in the characterization of the harm principle as a principle of fundamental justice. However, as guardians of the *constitutional* principles of fundamental justice, courts are not expected to merely choose from among the competing theories of harm advanced by criminal law theorists. As Doherty J.A. said in *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.), at para. 31:

> Nor should the harm principle be taken as an invitation to the judiciary to consecrate a particular theory of criminal liability as a principle of fundamental justice. This is so even if that theory has gained the support of law reformers, some of whom also happen to be judges. Judicial review of the substantive content of criminal legislation under s. 7 should not be confused with law reform. Judicial review tests the validity of legislation against the minimum standards set out in the *Charter*. Law reform tests the legal *status quo* against the law reformer's opinion of what the law should be.

241 This Court has discussed, albeit under s. 1, the interaction between morality and harm as a valid basis to restrict *Charter* rights. In *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), at p. 498, Sopinka J., writing for the majority, held that "[t]he objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the

values of individual liberty which underlie the *Charter*. Sopinka J. also noted, at pp. 492-93, that "[t]o impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.... The prevention of 'dirt for dirt's sake' is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*". Sopinka J. however conceded that Parliament had the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society (p. 493):

> Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.
>
> As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. In this regard, criminalizing the proliferation of materials which undermine another basic *Charter* right may indeed be a legitimate objective.

Sopinka J. found that the overriding objective of the impugned provision was not however moral disapprobation but the avoidance of harm to society, which he considered a substantial concern that justified restriction of the freedom of expression.

242 In a concurring opinion, Gonthier J., writing for himself and L'Heureux-Dubé J., said, at p. 522, that "the avoidance of harm to society is but one instance of a fundamental conception of morality". Speaking about the type of moral claim that could justify an infringement of s. 2(b) of the *Charter*, Gonthier J. wrote, at pp. 523-24:

> First of all, the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste. Parliament cannot restrict *Charter* rights simply on the basis of dislike; this is what is meant by the expression "substantial and pressing" concern.
>
> Secondly, a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people. In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. ... In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality.

243 In the present case, the state does not advance morality as a basis for restricting the right to liberty of the appellants, although it appears to have played an important role in the original addition of cannabis to the list of prohibited narcotics (both trial judges put special emphasis on the provocative writings of Edmonton, Alberta Magistrate Emily Murphy, which, according to Howard Prov. Ct. J., "consisted of reckless assertions of fact which were, quite simply, untrue" and which "helped to create a climate of irrational fear which, no doubt, provided some impetus to the movement to prohibit the use of marihuana" (para. 32)). Had the respondent based its legislation on morality grounds, we would have had to determine the sufficiency of this justification to resort to imprisonment in light of the harm principle as a principle of fundamental justice. However, it is not necessary to comment on the eventual success of such an argument because in any event, here, as in *Butler*, *supra*, the overriding purpose of the prohibition is not moral disapprobation, but the protection against harm. Therefore, we are not asked in these cases to take side in the "*harm vs. morality*" debate nor to determine if, and if so in which circumstances, conduct that offends morality could be said to harm others or society as a whole. The state purports to prohibit conduct that it says is directly harmful to the health of individuals, and incidentally to society as a whole.

244 I am of the view that the principles of fundamental justice require that whenever the state resorts to imprisonment, a minimum of harm to others must be an essential part of the offence. The state cannot resort to imprisonment as a punishment for conduct that causes little or no reasoned risk of harm to others. Prohibited conduct punishable by imprisonment cannot be harmless conduct or conduct that only causes harm to the perpetrator. As Braidwood J.A. said in *Caine*, "it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others" (para. 134).

245 In *Murdoch*, *supra*, Doherty J.A. characterized the harm principle as follows, at para. 33:

> The harm principle, as a principle of fundamental justice, goes only so far as to preclude the criminalization of conduct for which there is no "reasoned apprehension of harm" to any legitimate personal or societal interest. If conduct clears that threshold, it cannot be said that criminalization of such conduct raises the spectre of convicting someone who has not done anything wrong. Difficult questions such as whether the harm justifies the imposition of a criminal prohibition or whether the criminal law is the best way to address the harm are policy questions that are beyond the constitutional competence of the judiciary and the institutional competence of the criminal law adversarial process.

Like Braidwood J.A. in *Caine* and Rosenberg J.A. in *Clay*, Doherty J.A.'s concern was, by his own words, to draw a distinction "between the harm principle as a principle of fundamental justice and closely related, but distinct policy questions surrounding the application of the criminal law" (para. 34). Indeed, he adds in a footnote at para. 33:

> For example, many argue that the criminal sanction should be a last resort employed only if other forms of governmental action cannot adequately address the harm flowing from the conduct. This minimalist approach to criminal law may well be sound criminal law policy. However, it hardly reflects the historical reality of the scope of the criminal law so as to be properly described as a principle of fundamental justice. Any attempt to apply minimalist doctrine to a specific piece of legislation would raise complex questions of social policy which would defy effective resolution in the context of the adversarial criminal law process.

246 As I said before, however, the focus must remain on the choice by the state to resort to imprisonment to sanction conduct that it has decided to prohibit through its criminal law power or otherwise. The power of Parliament to use criminal law is broad and any concern as to what should be criminalized remains in the hands of the elected representatives. However, in my view, be it as a criminal sanction or as a sanction to any other prohibition, imprisonment must, as a constitutional minimum standard, be reserved for those whose conduct causes a reasoned risk of harm to others. "Doing nothing wrong" in that sense means acting in a manner which causes little or no reasoned risk of harm to others or to society. The *Charter* requires that the highest form of restriction of liberty be reserved for those who, at a minimum, infringe on the rights or freedoms of other individuals or otherwise harm society. I note that the notion of harm is not foreign to s. 7. Indeed, in addition to the cases referred to earlier, McLachlin J. (as she then was), in her dissenting reasons in *Rodriguez*, *supra*, at p. 618, referred to the notion of harm to others while discussing the scope of the right to security under s. 7:

> Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact, alluded to by McEachern C.J.B.C. below, that "s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else": (1993), 76 B.C.L.R. (2d) 145, at p. 164.
>
> [Emphasis added.]

247 Where legislation which may deprive individuals of their liberty is aimed at protecting other individuals or society from the risk of harm caused by the prohibited conduct, courts must scrutinize carefully the harm alleged. In victimizing conduct, the attribution of fault is relatively straightforward because of the close links between the actor's culpable conduct and the resulting harm to the victim. This Court has used principles of interpretation aimed at excluding from the criminal ambit conduct that is tenuously related to the alleged harm. Thus, in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), the accused accepted that harm to children justified criminalizing possession of some forms of child pornography. The fundamental question was rather whether the prohibition went too far by criminalizing possession of an unjustifiable range of material. McLachlin C.J., for the majority of this Court, had this to say on whether the causal link between a specific prohibition and the harm to children was sufficient, at paras. 74, 75 and 95:

> These exclusions support the earlier suggestion that Parliament's goal was to prohibit possession of child pornography that poses a reasoned risk of harm to children. The primary definition of "child pornography" does not embrace every

> kind of material that might conceivably pose a risk of harm to children, but appears rather to target blatantly pornographic material....
>
> Yet problems remain. The interpretation of the legislation suggested above reveals that the law may catch some material that particularly engages the value of self-fulfilment and poses little or no risk of harm to children.
>
> . . . . .
>
> If the law is drafted in a way that unnecessarily catches material that has little or nothing to do with the prevention of harm to children, then the justification for overriding freedom of expression is absent.
>
> [Emphasis added.]

While these comments were made under s. 1, they illustrate the threshold to be met to establish a sufficient causal link between prohibited conduct and the harm alleged to be caused by such conduct. Thus, for our purposes, if the prohibition of conduct engages a s. 7 interest, as the threat of imprisonment does, while the conduct poses little or no risk of harm to others, then the law is contrary to s. 7.

248 Where harm to society as a whole is alleged, how must such harm be assessed? Harm caused to collective interests, as opposed to harm caused to identifiable individuals, is not easy to quantify and even less easy to impute to a distinguishable activity or actor. In order to determine whether specific conduct, which perhaps only causes direct harm to the actor, or which seems rather benign, causes more than little or no risk of harm to others, courts must assess the interest of society in prohibiting and sanctioning the conduct. "Societal interests" may indeed form part of the s. 7 analysis where the operative principle of fundamental justice necessarily involves issues like the protection of society. McLachlin J., in *Rodriguez*, *supra*, best summarized this idea. She stated, at p. 622:

> As my colleague Sopinka J. notes, this Court has held that the principles of fundamental justice may in some cases reflect a balance between the interests of the individual and those of the state. This depends upon the character of the principle of fundamental justice at issue. Where, for instance, the Court is considering whether it accords with fundamental justice to permit the fingerprinting of a person who has been arrested but not yet convicted (*R. c. Beare*, [1988] 2 S.C.R. 387), or the propriety of a particular change in correctional law which has the effect of depriving a prisoner of a liberty interest (*Cunningham v. Canada*, [1993] 2 S.C.R. 143 (S.C.C.)), it may be that the alleged principle will be comprehensible only if the state's interest is taken into account at the s. 7 stage.

(See, *Cunningham v. Canada*, [1993] 2 S.C.R. 143 (S.C.C.), at pp. 151-52; *Godbout*, *supra*, at para. 78: "From the foregoing discussion, it is clear that deciding whether the infringement of a s. 7 right is fundamental[ly] just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement"; *Parker*, *supra*, at para. 113; *R. v. Pan* (1999), 134 C.C.C. (3d) 1 (Ont. C.A.), at paras. 177-87, appeal dismissed [2001] 2 S.C.R. 344, 2001 SCC 42 (S.C.C.) at paras. 39-40.) Considering the nature of the harm principle, societal interests will have to be assessed where the harm alleged to be associated with the prohibited conduct affects society as a whole rather than identifiable individuals.

249 Societal interests in prohibiting conduct are evaluated by balancing the harmful effects on society if the conduct in question is not prohibited by law against the effects of prohibiting the conduct in question. It would indeed be misleading to engage in an assessment of the state's interest in prohibiting conduct by evaluating solely the collective harm that the state wishes to prevent without also evaluating the collective costs incurred by preventing such harm (see Packer, *supra*, at p. 267: "[o]ne cannot meaningfully deal with the question of 'harm to others' without weighing benefits against detriments"). The harm or risk of harm to society caused by the prohibited conduct must outweigh any harm that may result from enforcement.

250 The impact conduct has on society will be assessed by gauging the tolerance society has for the negative effects (or harm) occasioned by the conduct in question. Similarly to what Sopinka J. said in *Butler*, *supra*, at p. 485, the stronger the inference of a risk of harm, the lesser the likelihood of tolerance. Such an assessment is contextual; it cannot be undertaken in a vacuum and must therefore be made *in concreto*, by reference, where possible, to the tolerance society shows to the harm occasioned by comparable conduct. The risk of harm to society occasioned by the conduct must then be balanced against the

costs imposed upon society by the prohibition of the conduct in question. The stronger the risk of harm to society caused by the conduct, the greater the costs society will be ready to bear to enforce its prohibition. Here once again, if the prohibition of conduct engages a s. 7 interest, as the threat of imprisonment does, while the conduct poses little or no risk of harm to others, then the law is contrary to s. 7.

251 I stress that where direct harm to identifiable others is caused by conduct, societal interests are easier to identify because of the nature of the relationship between the state, the offender, and the victim. As Doherty J.A. mentioned in *Murdock*, *supra*, at para. 35, in those circumstances, the state's interest is the protection of individuals in the community from the harm occasioned by the conduct in question. In prohibiting the conduct and in threatening imprisonment for its enforcement, the state restricts the actor's liberty in order to protect the rights or freedoms of others. In circumstances where one's rights and freedoms are directly threatened by another's actions, the state is justified in using imprisonment to sanction the conduct, provided that it causes more than little or no reasoned risk of harm to others. The justification is then grounded in the outer limits of individual freedom which reflect the need to preserve the rights and freedoms of others. In those circumstances, it would be offensive to pursue a further analysis as to whether the costs of enforcement of the offence are such that they outweigh the victim's rights. However, where others' rights and interests are not directly threatened by the prohibited conduct, the justification has a different source. In those circumstances, societal interests, comprising the benefits and detriments of a prohibition, must be such that the restriction of the person's liberty produces a net benefit as a whole.

b) Other Principles of Fundamental Justice Involved

252 The harm principle is dispositive of these appeals. Therefore, I need not discuss whether other principles of fundamental justice are involved and whether the impugned provisions are in accordance with them.

253 We must now determine whether the harm associated with marihuana use justifies the state's decision to use imprisonment as a sanction against the prohibition of its possession.

(3) Has the Deprivation of Liberty Occurred in Accordance with the Principles of Fundamental Justice?

254 It is useful at this stage to briefly revisit the harm caused by marihuana use as found by the trial judges. Although there is no need at this stage to reproduce the findings of the trial judges as to what harms are *not* associated with marihuana use, remember that these findings displaced many commonly held but entirely erroneous assumptions regarding the effects of marihuana use (see para. 192, above). As to the harmful effects of marihuana use, recall that McCart J. held in *Clay* that the consumption of marihuana is "not completely harmless" but "unlikely to create serious harm for most individual users or society" (para. 26).

255 Howard Prov. Ct. J. in *Caine* summarized her overall findings on harm as follows, at paras. 121-26:

> The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with [marihuana use].
>
> There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.
>
> There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the vulnerable persons identified in the materials. It is not possible to identify these persons in advance.
>
> As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of

> all marihuana users are chron[i]c users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.
>
> In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be min[u]scule.
>
> All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs [*sic*]. There is a risk that, with legalization, user rates will increase and so will these costs.

256 The inevitable conclusion is that apart from the risks of impairment while driving, flying or operating complex machinery and the impact of marihuana use on the health care and welfare systems, to which I will return, the harms associated with marihuana use are exclusively health risks for the individual user, ranging from almost nonexistent for low/occasional/moderate users of marihuana to relatively significant for chronic users. In my view, as I stated above, harm to self does not satisfy the constitutional requirement that whenever the state resorts to imprisonment, there must be a minimum harm to others as an essential part of the offence. The prohibition of conduct that only causes harm to self, regardless of the gravity of the harm, is not in accordance with the principles of fundamental justice and, if imprisonment is available as a means to enforce the prohibition, a breach of s. 7 of the *Charter* will have been established.

257 It is important at this stage to address a specific issue raised by my colleagues. Although they find that the purpose of the impugned legislation is the protection of health and public safety in general (see majority reasons at para. 65), my colleagues put great emphasis on the fact that it also aims at protecting vulnerable groups from self-inflicted harm (see majority reasons at paras. 76, 77, 100, 108, 123-126 and 132). Specifically, they recall the state's interest in acting to protect vulnerable groups, citing *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 70; and *B. (R.)*, *supra*, at para. 88. They also claim that the protection of vulnerable groups is a valid exercise of the criminal law power, citing *Rodriguez*, *supra*, at p. 595; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.), at pp. 74-75; *R. v. Keegstra*, [1995] 2 S.C.R. 381 (S.C.C.); *Sharpe*, *supra*; and *Butler*, *supra*. While the cases referred to by my colleagues clearly illustrate the state's interest in the protection of vulnerable groups from others who might harm them, they are far from suggesting that it is the vulnerable ones who should be sent to jail for their self-protection. Implicit in my colleagues' argument is that the state would be justified in threatening with imprisonment adolescents with a history of poor school performance, women of childbearing age and persons with preexisting diseases such as cardiovascular diseases, respiratory diseases, schizophrenia and other drug dependencies, who are at particular risk of harming themselves by using marihuana. I do not think that an exception to the harm principle is justified to allow the state to threaten with imprisonment vulnerable people in order to prevent them from harming themselves. To this effect, I note Abella J.A.'s sound reasoning (with which the other members of the panel agreed, albeit on narrower grounds), in *R. v. M. (C.)* (1995), 30 C.R.R. (2d) 112 (Ont. C.A.), at pp. 121-23. In that case, the issue was the constitutionality of criminalizing anal intercourse between non-married persons under 18 years of age, regardless of consent:

> The issue then comes down to this: is sending young persons to jail a reasonable way for the state to protect them from any risks associated with consensual anal intercourse?
>
> If the prevention of harm by discouraging the risk is the objective, it is difficult to imagine a more intrusive way to protect an individual from harm than criminal prosecution.... The risk associated with unprotected sexual conduct is a health risk. It strikes me as decidedly inappropriate to deal with minimizing health risks at any age by using the punitive force of the *Criminal Code*, but especially so for young people.
>
> . . . . .
>
> There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the Draconian criminal means chosen to achieve them.

258 While these comments were made in the analysis of the proportionality test under s. 1, they reflect my view that sending vulnerable people to jail to protect them from self-inflicted harm does not respect the harm principle as a principle of fundamental justice. Similarly, the fact that some vulnerable people may harm themselves by using marihuana is not a sufficient justification to send other members of the population to jail for engaging in that activity. In other words, the state cannot prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it, particularly if one accepts that imprisonment would be inappropriate for the targeted vulnerable groups. I agree with Packer that to justify imprisonment of both vulnerable persons and other members of the population on that basis would create a society in which "all are safe but none is free" (Packer, *supra*, at p. 65).

259 My colleagues Gonthier and Binnie JJ. have argued that imprisonment for simple possession is not a serious threat upon conviction for possession of marihuana by members of vulnerable groups, since it is only in the presence of "aggravating circumstances" that imprisonment will be a fit sentence. This assertion does not strengthen their position. In fact, it highlights the main difficulty. Imprisonment is an available punishment for simple possession. As demonstrated by the cases cited by my colleagues (at para. 156), imprisonment has been and continues to be employed by Canadian courts in sentencing those convicted of possession *simpliciter*. By definition, the vulnerable groups are the ones whose members are most likely to suffer harm from the use of marihuana. However, by the reasoning of my colleagues, it is those offenders who are *not* members of vulnerable groups, i.e., those that do not risk anything more than negligible harm to self and others, who will face the threat of imprisonment due to the "presence of aggravating circumstances" (para. 155).

260 The argument of the majority that the availability of imprisonment as a fit sentence in this case is more appropriately approached under s. 12 than under s. 7 is unconvincing. Section 12 of the *Charter* protects against "cruel and unusual treatment or punishment". Although imprisonment is undoubtedly very serious, it is not inherently "cruel and unusual". Section 7 provides the proper scope for considering whether the availability of imprisonment for an offence and the consequent engagement of the liberty interest in s. 7 are in accordance with the principles of fundamental justice. This accords with Lamer J.'s observations in *Motor Vehicle Reference*, *supra*, at p. 515:

> A law enacting an absolute liability offence will violate s. 7 of the *Charter* only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.
>
> Obviously, imprisonment... deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.
>
> [Emphasis added.]

It is inappropriate to restrict the consideration of the constitutionality of a person's liberty interest to s. 12. Such a stance is counter to the notion that ss. 8 to 14 of the *Charter* are specific illustrations of the principles of fundamental justice in s. 7, as explained by Lamer J. in *Motor Vehicle Reference*, *supra*, at p. 502. Where, as here, a principle of fundamental justice that is not specifically named in ss. 8 to 12 — the harm principle — is invoked, the analysis is appropriately conducted pursuant to s. 7.

261 With respect to the harm to others or to society as a whole occasioned by marihuana use, Howard Prov. Ct. J. (McCart J. came to the same conclusion) identified (i) the risk that persons intoxicated from marihuana may be less adept at driving, flying, or doing other activities involving complex machinery, and (ii) the "cost to society, both to the health care and welfare systems" (para. 126). Regarding the former, she acknowledges that "[a]t current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant" (para. 122). Regarding the latter, she acknowledged, at para. 52, that "[t]he evidence establishes that any health care concerns (including financial concerns) associated with marihuana use in this country are minor compared to the social, criminal and financial costs associated with the use of alcohol or tobacc[o]", but considered that "[t]here is a risk that, with legalization, user rates will increase and so will these costs" (para. 126). Hence, describing the two risks of harm to others (from driving and from the burden on the health and welfare systems), Howard Prov. Ct. J. said that at current rates of use, the first risk "cannot be said to be significant", and that the second is "minor".

262 With respect, I can see no difference for the purpose of determining the level of harm to others caused by marihuana use between the terms "insignificant" and "trivial", used by Braidwood J.A. in *Caine* and Rosenberg J.A. in *Clay* to describe the threshold level of harm, and the expressions "cannot be said to be significant" and "negligible", used by Howard Prov. Ct. J. to quantify the level of harm to society. Both Braidwood J.A. and Rosenberg J.A. concluded that the findings of fact of the trial judges show that marihuana indeed poses a risk of harm to others and society that is not insignificant nor trivial (paras. 141-43 in *Caine;* para. 34 in *Clay)*. However, Braidwood J.A. came to this conclusion after he quoted in whole the passage from Howard Prov. Ct. J.'s reasons which summarizes all the possible harms associated with marihuana use, including health risks to the user. Rosenberg J.A. apparently did the same since he referred to the findings of McCart J. as a whole and concluded that this showed that "there is some harm associated with marijuana use" (para. 34). Braidwood J.A. and Rosenberg J.A. apparently failed to distinguish between harm caused only to self from harm which puts others or society as a whole at risk. Having made this essential distinction, I conclude that the evidence does not support a conclusion that marihuana use causes a reasoned risk of harm to others or to society that is not insignificant or trivial, to use Braidwood J.A.'s own terms.

263 In any event, in my view, the two spheres of risks to others or society as a whole identified by the trial judges are not sufficient to justify recourse to the most severe penalty imposed by law, a sentence generally viewed as a last resort (see *Motor Vehicle Reference*, *supra*, at p. 532, *per* Wilson J.). The two risks do not show that marihuana use causes more than little or no harm to others or to society. First, while the risk that persons experiencing the acute effects of the drug may be less adept at driving, flying and engaging in other activities involving complex machinery is indeed a valid concern, the act of driving while under the influence of alcohol or drugs is an activity separate from mere possession and use. Such dangerous driving is already dealt with in the *Criminal Code*, and rightly so, because it is this act which risks victimizing identifiable others as well as society as a whole. In my view, the state cannot rely on this separate offence to justify the prohibition of possession of marihuana *simpliciter*. This is indeed the approach Parliament has adopted regarding alcohol. I note that in *Caine*, *supra*, Howard Prov. Ct. J. stated explicitly that "[a]part from the above problem [operation of vehicles or other machinery while intoxicated], there is no evidence to suggest that harm of any kind will befall individual members of society as a result of any actions by individual marihuana users" (para. 50).

264 The second negative effect on society as a whole found by the trial judge, i.e., general harm to the health care and welfare systems, is simply too remote and minor to justify the threat of imprisonment for simple possession of marihuana. Much seemingly innocent conduct may have deleterious consequences. In fact, it is not easy to identify conduct which can be said confidently to be without risk of injury in the long run (see, *inter alia*, A. von Hirsch, "Extending the Harm Principle: 'Remote' Harms and Fair Imputation", in A. P. Simester and A. T. H. Smith, eds., *Harm and Culpability* (1996), 259, at p. 260; Harcourt, *supra*). Canadians have a universal health care system to deal with injuries and illnesses, irrespective of fault. Arguments solely based on vague general costs to the health care system cannot justify imprisonment for any kind of risky undertaking. There is hardly a net benefit to society in imprisoning, on the basis of the costs they impose on the health care and welfare systems, those very persons who may need access to and support from such systems. Canadians do not expect to go to jail whenever they embark on some adventure which involves a possibility of injury to themselves. I see no reason to single out those who may jeopardize their health by smoking marihuana.

265 In the cases before us, the societal interests in prohibiting marihuana possession must take into account, on the one hand, the burden that marihuana use imposes on the health care and welfare systems, and, on the other, the costs incurred by society because of the prohibition. Howard Prov Ct. J. noted that at current rates of use, the costs imposed upon the health care and welfare systems by marihuana are negligible compared to the costs associated with alcohol and drugs. As I mentioned earlier, society's tolerance for the harmful effects that the conduct may entail must be assessed, where possible, by reference to its tolerance for comparable conduct. I will thus simply take note of the trial judges' findings that the burden that marihuana use imposes on society is "negligible" or "very, very small" compared to the costs imposed by comparable conduct that society tolerates (i.e., alcohol and tobacco use).

266 If there remained any doubt as to whether the harms associated with marihuana use justified the state in using imprisonment as a sanction against its possession, this doubt disappears when the harms caused by the prohibition are put in the balance. The record shows and the trial judges found that the prohibition of simple possession of marihuana attempts to prevent

a low quantum of harm to society at a very high cost. A "negligible" burden on the health care and welfare systems, coupled with the many significant negative effects of the prohibition, cannot be said to amount to more than little or no reasoned risk of harm to society. I thus conclude that s. 3(1) and (2) of the *Narcotic Control Act*, as it prohibits the possession of marihuana for personal use under threat of imprisonment, violates the right of the appellants to liberty in a manner that is not in accordance with the harm principle, a principle of fundamental justice, contrary to s. 7 of the *Charter*.

(4) Possession for the Purpose of Trafficking

267 Before moving to the issue of whether the infringement is justified under s. 1 of the *Charter*, I will briefly address the issues raised by the appellant Malmo-Levine. Malmo-Levine argues that the prohibition of possession for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act* infringes ss. 7 and 15 of the *Charter*. My colleagues Gonthier and Binnie JJ. have discussed Malmo-Levine's argument under s. 15, and have concluded that s. 4(2) of the *Narcotic Control Act* does not discriminate against the appellant since the decision to possess and traffic in marihuana is not an immutable personal characteristic, and treating persons who choose to do so in a differential manner in no way infringes human dignity or reinforces prejudicial stereotypes or historical disadvantage. I agree entirely with this conclusion.

268 Considering their conclusion that the prohibition of simple possession of marihuana does not violate s. 7 of the *Charter*, my colleagues Gonthier and Binnie JJ. did not address the issue raised by Malmo-Levine with regard to s. 7 and, for the same reason, neither did the courts below. In fact, Malmo-Levine's challenge at the British Columbia Court of Appeal was restricted to the part of his charge relating to possession (para. 8 of Braidwood JA.'s reasons). Moreover, the findings of fact of the trial judges in *Clay* and *Caine* concern the harm related to marihuana use, but there is nothing in the factual record concerning the harm associated specifically with the act of trafficking. Most if not all of the arguments before this Court have focussed on possession for personal use. On this record, it is virtually impossible to determine whether possession of marihuana for the purpose of trafficking causes more than little or no harm to others. I am aware that the health risks associated with marihuana use could be used to demonstrate that the trafficker, involving third parties, puts their health at risk and thus risks causing more than little or no harm to others than himself or herself. However, this obvious argument cannot be properly addressed without consideration of many factors which were not argued by the parties, such as, for instance, the issue of consent (see, e.g., P. Alldridge, "Dealing with Drug Dealing", in *Harm and Culpability*, *supra*, at p. 239). A conclusion on this issue raised by the appellant Malmo-Levine would be based on pure speculation. On this record, I cannot conclude that the appellant has met his burden and therefore his constitutional challenge fails.

(5) Is the Infringement Justified Under Section 1 of the Charter?

269 This Court has explained, in *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), the relation between ss. 7 and 1. McLachlin J. (as she then was) and Iacobucci J., writing for the majority, held as follows, at paras. 65-67:

> It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter*. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. . . .
>
> However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the *Charter* rights.
>
> Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act, supra*, at p. 503: "the principles of fundamental justice are to be found in the basic tenets of our legal system". In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), Dickson C.J. stated, at p.

> 136, that these values and principles "embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society". In *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), at p. 737, Dickson C.J. described such values and principles as "numerous, covering the guarantees enumerated in the *Charter* and more". [Emphasis added.]

270 In the cases before this Court, certain factors would be better evaluated in the analysis under s. 1, where the Crown will bear the burden of proving them, rather than under s. 7. As Rosenberg J.A. held in *Parker*, *supra*, the companion case of *Clay* at the Court of Appeal for Ontario, at para. 119:

> Thus, the difference between the s. 1 and the s. 7 analysis is important not only because of the different interests to be considered but also because of the shift in the burden of proof. For example, the Crown argued that in considering whether the law struck the right balance between the accused's interests and the interests of the state under s. 7, the court should consider Canada's international treaty obligations. It may be, however, that such interests are more properly a matter for consideration under s. 1, in which case the Crown would bear the onus of demonstrating that the violation of s. 7 was necessary to uphold Canada's treaty obligations. See *R. c. Malmo-Levine*, 2000 BCCA 335 at para. 151, 145 C.C.C. (3d) 225.

Some balancing of societal interests has been done here under s. 7 in ascertaining the existence and the content of the harm principle as a principle of fundamental justice. In many instances, Canada's treaty obligations will be apposite to a s. 7 analysis. Indeed, in some cases an examination of international law will provide indispensable insight into the scope and content to be given to the "principles of fundamental justice" (*Motor Vehicle Reference, supra*, at p. 503; *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), at para. 46; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), at paras. 79-81). This is not the case here, however. Given the nature of the harm principle, Canada's treaty obligations are not particularly helpful in demonstrating the existence or application of the principle as a principle of fundamental justice. Treaty obligations and international law generally may, of course, also be considered under s. 1 in the determination of whether a violation of s. 7 can be justified (*R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), at pp. 140-41; *Mills, supra*, at paras. 65-67).

271 However, while s. 7 violations may be saved by s. 1, this will occur rarely, as was explained by Lamer C.J. in *New Brunswick (Minister of Health and Community Services), supra*, at para. 99:

> Section 7 violations are not easily saved by s. 1. . . .
>
> This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.

The general approach in international law is that a state may not invoke its internal law as justification for its failure to perform a treaty (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, Art. 27; *R. v. Zingre*, [1981] 2 S.C.R. 392 (S.C.C.), at p. 410). However, the treaty obligations Canada has undertaken in the war on drugs are subject to, *inter alia*, Canada's "constitutional limitations" (*Single Convention on Narcotic Drugs, 1961*, Can. T.S. 1964 No. 30, Art. 36), and Canada's "constitutional principles and the basic concepts of its legal system" (*United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Can. T.S. 1990 No. 42, Art. 3(2)). The express subordination of these treaties to the requirements of domestic constitutional law suggests that they would not significantly assist an attempt to justify the s. 7 violation in s. 1.

272 The respondent has not made any submissions regarding s. 1, and none of the courts below considered the issue. Given that the burden is on the Crown to establish that the infringement was justified under s. 1, I conclude that it has not met this burden.

III. Conclusion

A. Malmo-Levine

273 For the foregoing reasons, in the case of the appellant David Malmo-Levine, I would dismiss the appeal.

274 The constitutional questions in the *Malmo-Levine* appeal should be answered as follows:

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 15(1) of the *Charter* by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

Answer: No.

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

B. Caine

275 In the case of the appellant Victor Eugene Caine, I would allow the appeal and set aside the conviction for simple possession.

276 The constitutional questions in the *Caine* appeal should be answered as follows:

1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: No.

3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867;* as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

Answer: Yes.

***LeBel J.*:**

277 I have had the opportunity of reading the joint reasons of Justices Gonthier and Binnie who would dismiss the appeal, and those of Justice Arbour who would allow it. With respect for the other view, I am in agreement with the disposition suggested by Arbour J. and I would answer the constitutional questions as she proposes. Nevertheless, I am not yet convinced that we should raise the harm principle to the level of a principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms*. On this question, I share the skepticism of my colleagues Binnie and Gonthier JJ. I part company with them, however, at the point where they hold that the prohibition of simple possession of marihuana is not an arbitrary or irrational legislative response. On the evidence which is available to us and which was carefully reviewed by Arbour J., the law, as it stands, is indeed an arbitrary response to social problems. The Crown has failed to properly delineate the societal concerns and individual rights at stake, more particularly the liberty interest involved in this appeal.

278 The process of delineation of rights under s. 7 unavoidably involves balancing competing rights and interests (*R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.), at p. 715). In this respect, concerns about the harm done to society or some of its members or even to the accused themselves must be weighed together with the consequences which flow from the criminalization of simple possession. A balancing of this nature must occur when it is asserted that the liberty interest of the accused has been infringed in a way that is inconsistent with the tenets of fundamental justice under s. 7 of the *Charter*. Such an analysis is not as narrowly focussed as a review of a punishment under s. 12 of the *Charter* where courts must determine whether a specific penalty should be considered as cruel and unusual because of its grossly disproportionate nature.

279 In the course of a s. 7 analysis, the inquiry of the Court is more subtle, broader, and more difficult. Although the availability of imprisonment triggers the inquiry into the applicability of s. 7, the investigation must move beyond the sole question of the penalty and the courts must take into account all relevant factors viewed as a whole, in order to determine whether a breach of fundamental rights has been made out. It is made out if and when the response to a societal problem may overreach in such a way as to taint the particular legislative response with arbitrariness. (See for example, *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), at para. 47; *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 76; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.), at pp. 621, 625.)

280 On the evidence which is available in this appeal, such a legislative overreach happened. I do not need to engage in any additional review of this evidence, given that it was carefully reviewed and discussed by my colleagues. I will not even attempt to summarize it again. In my mind, it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them. Nevertheless, the harm its consumption may cause seems rather mild on the evidence we have. In contrast, the harm and the problems connected with the form of criminalization chosen by Parliament seem plain and important. Few people appear to be jailed for simple possession but the law remains on the books. The reluctance to enforce it to the extent of actually jailing people for the offence of simple possession seems consistent with the perception that the law, as it stands, amounts to some sort of legislative overreach to the apprehended problems associated with marihuana consumption. Moreover, besides the availability of jail as a punishment, the enforcement of the law has tarred hundreds of thousands of Canadians with the stigma of a criminal record. They have had to bear the burden of the consequences of such criminal records as Arbour J. points out. The fundamental liberty interest has been infringed by the adoption and implementation of a legislative response which is disproportionate to the societal problems at issue. It is thus arbitrary and in breach of s. 7 of the *Charter*. For these reasons, I agree with Arbour J. that fundamental rights are at stake, that they were breached, and that this Court must intervene as part of its duty under the Constitution to uphold the fundamental principles of our constitutional order.

***Deschamps J.*:**

281 The appellants contest Parliament's power to prohibit the simple possession of marihuana. Their challenge is based on two grounds: the division of powers and the *Canadian Charter of Rights and Freedoms*.

282 Like my colleagues, I conclude that, in Canada, the prohibition of the possession of drugs lies within federal jurisdiction. At issue here is Parliament's power to prohibit certain conduct by imposing a sanction of imprisonment, whether pursuant to its jurisdiction over peace, order and good government or under its criminal law power. As the exercise for determining the proper division of powers depends more upon a categorization of the nature of the enactment than on the enactment's legality,

which is the focus of a *Charter* challenge, I find that Parliament may validly exercise its coercive power by invoking a ground falling within its criminal law jurisdiction, namely health.

283 There remains the question of conformity with the *Charter*. Four main arguments are raised: Parliament may not use its coercive power to limit an individual's personal freedom to use marihuana; the purpose of the original statute (*The Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22) has shifted over time; the prohibition is unconstitutional because marihuana does not harm anyone other than its users; and the prohibition is disproportionate and arbitrary.

284 I agree with the majority of this Court on the arguments relating to the protection of lifestyle and the shifting purpose of the Act. I will limit my comments to the arguments concerning the "harm principle" and the arbitrary nature of the legislation. The latter argument leads me to conclude that the inclusion of cannabis in the schedule to the *Narcotic Control Act*, R.S.C. 1985, c. N-1 (rep. S.C. 1996, c. 19, s. 94), infringes the appellants' right to liberty.

I. The Harm Principle

285 The "harm principle", as defined by John Stuart Mill, is cited and interpreted in both the majority opinion and the opinion of Arbour J. I agree with the conclusion of the majority in that I am of the opinion that the "harm principle" is not a principle of fundamental justice *per se*, but I believe it would be useful to focus on one aspect of their reasoning and even elaborate upon it.

286 A vision of the criminal law based on Mill's work, attractive though it may be, leaves the state no room to intervene in order to safeguard the moral values that are fundamental to a free and democratic society: see *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), at p. 493. Mill's restrictive position does not fit well with the Canadian reality, in which it is accepted that social morality and criminal law are inextricably linked. Many prohibitions cannot be rationalized under the "harm principle", as emphasized in para. 118 of the majority opinion. Moreover, the state's intervention in punishing a crime is generally the expression of a popular consensus condemning socially reprehensible conduct, such as murder or sexual assault. Thus, reprehension for such conduct must generally be accompanied by the requirement that the individual understand that the conduct is blameworthy, in other words, that the individual have a guilty mind (*mens rea*): see in this regard H. L. Packer, *The Limits of the Criminal Sanction* (1968), at p. 262; V. V. Ramraj, "Freedom of the Person and the Principles of Criminal Fault" (2002), 18 5. *Afr. J. Hum. Rts*. 225. To be sure, morality alone cannot be the sole justification for the state's exercise of its criminal law power. Still, social morality remains an integral part of the justificatory framework for allowing the state to use this power, and its categorical exclusion under the "harm principle" demonstrates the limitations of this concept.

287 Moreover, I believe that restricting criminal law to situations in which harm is caused to others would minimize the role of the state as protector of society. Indeed, the fundamental purpose of criminal justice is the protection of society: see *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections* (the Ouimet Report) (1969), at p. 11. The "harm principle" can prove difficult to apply, for example, when the victim is not easily identifiable, as in the case of certain crimes against society as a whole. Mill was himself ambiguous on this point. The state's use of dissuasive sanctions can also help to eliminate conduct where the resulting harm may be difficult to evaluate or prove, such as corruption, in certain cases.

288 The criminal law thus finds its justification in the protection of society, both as a whole and in its individual components. While there can be no doubt that the state is justified in using its criminal law tools to prevent harm to others, this principle is too narrow to encompass all the elements that may place limits on the state's exercise of the criminal law. It cannot validly be characterized as a principle of fundamental justice.

II. Arbitrary Nature of the Inclusion of Marihuana in the Schedule to the Narcotic Control Act

289 The criminal law is one of the most aggressive weapons the state has to enforce its dictates. This weapon must be wielded with great care. The courts must intervene when an enactment violates constitutional guarantees. More specifically, and without repeating the detailed comments of my colleagues, the courts must act when the right to liberty is infringed without regard for the principles of fundamental justice. In the present case, I believe Parliament has exercised its power arbitrarily.

290 When the state prohibits socially neutral conduct, that is, conduct that causes no harm, that is not immoral and upon which there is no societal consensus as to its blameworthiness, it cannot do so without raising a problem of legitimacy and, consequently, losing credibility. Citizens become inclined not to take the criminal justice system seriously and lose confidence in the administration of justice. Judges become reluctant to impose the sanctions attached to such laws.

291 Recognizing this chain reaction allows one to grasp the importance of the principle of fundamental justice which holds that for the state to be able to justify limiting an individual's liberty, the legislation upon which it bases its actions must not be arbitrary: see, e.g., *R. v. Arkell*, [1990] 2 S.C.R. 695 (S.C.C.), at p. 704; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at pp. 619-20 (*per* McLachlin J. (as she then was) dissenting); *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), at p. 793. There are several basic tenets of criminal law that can be used to measure the arbitrariness of a prohibition. I shall rely on three of these principles here: the need for the state to protect society from harm, the availability of tools other than criminal law that could adequately control the conduct and the proportionality of the measure to the problem in question. In emphasizing these three rules, I do not mean to suggest that others could not be used to determine if an enactment is arbitrary, nor that these three rules must always be met in a given case. They do, however, serve to delineate the legitimate scope of criminal law. These rules are not new. They were referred to over 35 years ago by the Canadian Committee on Corrections (Ouimet Report, *supra*, at p. 12) in the chapter dealing with the basic principles and goals of criminal justice. I realize that such working groups usually attempt to describe the law as it should be, in a normative sense, but in this chapter, the Committee took care to outline the foundations specific to our criminal law. Those factors are still relevant today.

292 Is the inclusion of marihuana in the schedule to the *Narcotic Control Act* arbitrary?

293 As mentioned by the majority, the reasons for adding marihuana to the schedule to the *Narcotic Control Act* are nebulous, at best. The historical background outlined by the trial judge in the case of the appellant Caine clearly shows that Parliament's decision was made at a time when a climate of irrational fear predominated, owing to a campaign led by Edmonton magistrate Emily Murphy, who claimed that marihuana caused users to lose their minds, along with all sense of moral responsibility, becoming maniacs capable of murder and many other acts of cruelty.

294 Fortunately, the consequences of marihuana use are nothing like those described at that time. Although I do not accept the "harm principle" as an independent principle, I believe that the need for the state to protect society from harm plays an active role in any assessment of the arbitrariness of legislation. As a general rule, the state is justified in using the coercive tools of criminal law in cases where an individual willfully causes harm.

295 Although I do not adopt the approach of my colleague Arbour J., who would limit the sanction of imprisonment to cases where harm is done to others, I agree with her description of the consequences of marihuana use. The inherent risks of marihuana use, apart from those related to the operation of vehicles and the impact on public health care and social assistance systems, affect only the users themselves. These risks can be situated on a spectrum, ranging from no risk for occasional users to more significant risks for frequent users and vulnerable groups. On the whole, with a few exceptions, moderate use of marihuana is harmless. Thus, it seems doubtful that it is appropriate to classify marihuana consumption as conduct giving rise to a legitimate use of the criminal law in light of the *Charter*.

296 An examination of the second criterion, that of the availability of more tailored methods than the criminal law for controlling conduct, is equally perplexing.

297 The criminal law is an indispensable tool, but only in very limited circumstances: when society needs to be protected from an offender, when punishment is required to deter an individual or society in general from committing offences and when corrective measures specific to this field of law are necessary (see s. 718 of the *Criminal Code*, R.S.C. 1985, c. C-46). The minimal harm caused by marihuana does not fit squarely within the categories of conduct usually kept in check by the criminal law.

298 I would refer back to the comments made by Arbour J. (at paras. 192 to 200) concerning the risks identified by the trial judges. Only three groups are traditionally identified as requiring state intervention for their protection: young persons,

pregnant women and certain people with medical conditions. This line of reasoning does not have to be pushed very far before it becomes obvious that criminal law is not society's preferred means of controlling the conduct of these groups. The use of imprisonment and all the other aspects of the criminal justice system, including the imposition of a criminal record, to suppress conduct that causes little harm to moderate users or to control high-risk groups for whom the effectiveness of deterrence or correction is highly dubious and seems to me out of keeping with Canadian society's standards of justice.

299 This brings me to the third factor, proportionality. The harmful effects of marihuana use have already been discussed and are highly debatable. The harm caused by its prohibition, however, is clear and significant. For the details, I refer back once again to the effects listed by Arbour J. (para. 200). A balancing of these two factors yields the result that the harm caused by prohibiting marihuana is fundamentally disproportionate to the problems created by its use that the state seeks to suppress.

300 While I am more comfortable using three criteria for evaluating constitutionality rather than just one, I nevertheless agree with LeBel J.'s analysis with regard to proportionality.

301 The harm caused by using the criminal law to punish the simple use of marihuana far outweighs the benefits that its prohibition can bring. LeBel J. notes that the fact that jail sentences are rarely imposed illustrates the perception of judges that imprisonment is not a sanction that befits the inherent dangers of using marihuana. In the case of the appellant Caine, Howard Prov. Ct. J. also observed that the prohibition had brought the law into disrepute in the eyes of over one million people. These are exactly the kinds of reactions that are indicative of the arbitrariness of the impugned provisions. As I have already mentioned, and as Howard Prov. Ct. J. observed, when the state prohibits socially neutral conduct, it exposes itself to the risk of eroding its credibility.

302 Canadian society is changing. Its knowledge base is growing, and its morals are evolving. Even if it was once the case, and in my view it never was, the prohibition against cannabis is no longer defensible. My analysis leads me to conclude that the little harm caused by marihuana casts doubt on the appropriateness of state intervention in this case. When I weigh the prohibition against, first, other available methods for countering the harm that marihuana use presents and, second, the problems caused by marihuana use, I must conclude that the legislation is inconsistent with the constitutional guarantee in s. 7 of the *Charter*.

303 The respondent did not attempt to justify the prohibition under s. 1 of the *Charter*. It has therefore not satisfied its burden.

304 For these reasons, I agree with the disposition proposed by Arbour J.

APPENDIX

APPENDIX A

Extracts from a document entitled *Cannabis: a health perspective and research agenda*, Division of Mental Health and Prevention of Substance Abuse, World Health Organization (1997), at pp. 30-31:

Chronic health effects of cannabis use

The chronic use of cannabis produces additional health hazards including:

- selective impairments of cognitive functioning which include the organization and integration of complex information involving various mechanisms of attention and memory processes;

- prolonged use may lead to greater impairment, which may not recover with cessation of use, and which could affect daily life functions;

- development of a cannabis dependence syndrome characterized by a loss of control over cannabis use is likely in chronic users;

- cannabis use can exacerbate schizophrenia in affected individuals;

- epithelial injury of the trachea and major bronchi is caused by long-term cannabis smoking;

- airway injury, lung inflammation, and impaired pulmonary defence against infection from persistent cannabis consumption over prolonged periods;

- heavy cannabis consumption is associated with a higher prevalence of symptoms of chronic bronchitis and a higher incidence of acute bronchitis than in the non-smoking cohort;

- cannabis use during pregnancy is associated with impairment in fetal development leading to a reduction in birth weight;

- cannabis use during pregnancy may lead to postnatal risk of rare forms of cancer although more research is needed in this area.

The health consequences of cannabis use in developing countries are largely unknown because of limited and non-systematic research, but there is no reason *a priori* to expect that biological effects on individuals in these populations would be substantially different to what has been observed in developed countries. However, other consequences might be different given the cultural and social differences between countries.

Therapeutic uses of cannabinoids

Several studies have demonstrated the therapeutic effects of cannabinoids for nausea and vomiting in the advanced stages of illnesses such as cancer and AIDS. Dronabinol (tetrahydrocannabinol) has been available by prescription for more than a decade in the USA. Other therapeutic uses of cannabinoids are being demonstrated by controlled studies, including treatment of asthma and glaucoma, as an antidepressant, appetite stimulant, anticonvulsant and anti-spasmodic, research in this area should continue. For example, more basic research on the central and peripheral mechanisms of the effects of cannabinoids on gastrointestinal function may improve the ability to alleviate nausea and emesis. More research is needed on the basic neuropharmacology of THC and other cannabinoids so that better therapeutic agents can be found.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* Corrigenda received from the court on February 2, 6, 9 and 11, as well as March 11, 2004 have been incorporated herein.

Most Negative Treatment: Distinguished
Most Recent Distinguished: Catholic Children's Aid Society of Metropolitan Toronto v. S. (T.) | 1989 CarswellOnt 247, 69 O.R. (2d) 189, 33 O.A.C. 213, 20 R.F.L. (3d) 337, 15 A.C.W.S. (3d) 337, 40 C.R.R. 354, 60 D.L.R. (4th) 397, [1989] O.J. No. 754, [1989] W.D.F.L. 905 | (Ont. C.A., May 11, 1989)

1985 CarswellBC 398
Supreme Court of Canada

Reference re s. 94(2) of Motor Vehicle Act (British Columbia)

1985 CarswellBC 398, 1985 CarswellBC 816, [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73, [1986] 1 W.W.R. 481, [1986] D.L.Q. 90, 15 W.C.B. 343, 18 C.R.R. 30, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 36 M.V.R. 240, 48 C.R. (3d) 289, 63 N.R. 266, 69 B.C.L.R. 145, J.E. 86-99

Reference re SECTION 94(2) OF THE MOTOR VEHICLE ACT, R.S.B.C. 1979, c. 288

Dickson C.J.C., Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

Heard: November 15, 1984
Judgment: December 17, 1985
Docket: 17590

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J. J. Camp and *P. G. Foy*, for intervener the British Columbia branch of the Canadian Bar Association.

Subject: Public; Criminal; Constitutional
Headnote
Motor Vehicles --- Constitutional issues — Effect of Charter of Rights and Freedoms — General
Motor Vehicles --- Constitutional issues — Effect of Charter of Rights and Freedoms — Life, liberty and security of person — Licence suspension or cancellation
Constitutional law — Constitution Act, 1982 — Charter of Rights and Freedoms — Legal rights — Life, liberty and security — "Principles of fundamental justice" — Legislation making driving while prohibited absolute liability offence carrying possible term of imprisonment violating principles of fundamental justice and right to liberty under s. 7 of Charter of Rights and Freedoms.
Constitutional law — Constitution Act, 1982 — Charter of Rights and Freedoms — Interpretation of Charter — Proceedings and evidence of Parliamentary committee on Constitution admissible as extrinsic aid in interpreting Charter but to be given little weight — Meaning of words in Charter not to be limited to meanings given pre-Charter decisions interpreting Bill of Rights.
Motor vehicles — Offences and penalties — Constitutional validity — Section 94(2) of British Columbia Motor Vehicle Act making driving while prohibited absolute liability offence — Act providing mandatory imprisonment on conviction — Section violating principles of fundamental justice and right to liberty in s. 7 of Charter.
Per LAMER J. (DICKSON C.J.C., BEETZ, CHOUINARD and LE DAIN JJ. concurring): An absolute liability offence for which imprisonment is available as a penalty offends the principles of fundamental justice and the right to liberty under s. 7 of the Charter. Accordingly, s. 94(2) of the British Columbia Motor Vehicle Act, which provides that the offence of driving a

motor vehicle while a person is prohibited from driving or while the right to obtain a driving licence is suspended, is one of absolute liability, is offensive to s. 7 of the Charter and is of no force or effect.

The role of the court in interpreting s. 7 of the Charter is to secure for persons the full benefit of the Charter's protections while avoiding adjudication of the merits of public policy. The court can accomplish this only by a purposive analysis and the articulation of objective and manageable standards for the operation of the section within such a framework. The interests which the section is meant to protect are the life, liberty and security of the person. The right not to be deprived of these rights "except in accordance with the principles of fundamental justice" is a qualifier of those rights and is not itself a protected right; it serves to establish the parameters of the protected interests, and it cannot be interpreted so narrowly as to frustrate or stultify them. Accordingly, "fundamental justice" does not have the same meaning as "natural justice", for such an interpretation would strip the protected interests of most of their content. Sections 8-14 of the Charter illustrate some of the parameters of the right to life, liberty and security in s. 7 and provide a key to the meaning of "principles of fundamental justice". Those principles are to be found in the basic tenets of our legal system as a system for the administration of justice founded upon a belief in the dignity and worth of the human person and on the rule of law. The principles are not limited solely to procedural guarantees.

It is part of our system of laws that the innocent not be punished, and absolute liability in penal law offends the principles of fundamental justice. An absolute liability offence does not per se violate s. 7 of the Charter. A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving a person of life, liberty or security. Accordingly, the combination of imprisonment and of absolute liability violates s. 7 and legislation providing for such can only be salvaged if it can be justified under s. 1 of the Charter. Section 94(2) of the Motor Vehicle Act creates an absolute liability offence which effects a deprivation of liberty for a limited number of persons, and that is sufficient for it to be in violation of s. 7 of the Charter.

Although administrative expediency might justify such legislation under s. 1, it can only do so in cases arising out of exceptional conditions such as natural disasters, the outbreak of war, epidemics and the like. Although it is desirable that bad drivers be kept off the road, the government of British Columbia did not demonstrate that the legislation was a reasonable limit in a free and democratic society within s. 1 of the Charter.

The minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and House of Commons are admissible as extrinsic aids to the interpretation of Charter provisions. However, the minutes are inherently unreliable and the comments of a few federal civil servants cannot be determinative of the intent of the legislative bodies which adopted the Charter. Moreover, to interpret the provisions of the Charter in terms of the minutes would freeze the rights in time with little possibility of growth and development. Accordingly, the minutes should be given little weight.

Nor are decisions interpreting the Bill of Rights of much assistance in construing the meaning of "principles of fundamental justice". While in the Bill of Rights the phrase is used to qualify the right to a fair hearing, in the Charter the phrase qualifies much more fundamental rights. In any event, the meaning of the words in the Charter must not be limited to meanings given by judicial decisions at the time the Charter was enacted: the adoption of the Charter was a clear message to the courts that the restrictive attitude which at times characterized their approach to the Bill of Rights ought to be re-examined.

Per MCINTYRE J.: "Fundamental justice", as the term is used in s. 7 of the Charter, involves more than natural justice and includes a substantive element. The imposition of minimum imprisonment for an offence in respect of which no defence can be made and which may be committed unknowingly and without wrongful intent, deprives or may deprive of liberty and offends the principles of fundamental justice.

Per WILSON J.: Section 7 of the Charter provides that a person may be deprived of the rights to life, liberty and security if the deprivation is effected "in accordance with the principles of fundamental justice". This provision is not a qualification of the right to life, liberty and security of the person but is, rather, intended to protect the rights against deprivation or impairment except in accordance with the principles of fundamental justice. Section 7 is not limited to procedural injustice: there is nothing in the section to support such a limited construction. If a limit upon the right to life, liberty and security is in accordance with the principles of fundamental justice, it then has to meet the tests in s. 1. However, if the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, it cannot be justified under s. 1 because such a limit cannot be "reasonable" or "demonstrably justified in a free and democratic society".

An absolute liability offence will only violate s. 7 if it impairs the right to life, liberty or security of the person. Accordingly, absolute liability offences do not per se violate s. 7.

Although there is a presumption at common law that mens rea is an essential feature of criminal legislation, the legislature may create liability in the absence of mens rea if it does so in clear and unambiguous terms. Section 94(2) of the Motor Vehicle Act creates a statutory offence, guilt of which is established by proof of the act itself. Attaching a mandatory term of imprisonment to an absolute liability offence, however, violates the principles of fundamental justice. Such a penalty is totally disproportionate to an offence which may be committed unknowingly and unwittingly and after the exercise of due diligence. In such a case mandatory imprisonment is grossly excessive and inhumane and is incompatible with the objectives of a penal system. Accordingly, s. 94(2) is inconsistent with s. 7 of the Charter and is of no force and effect under s. 52 of the Constitution Act, 1982.

Annotation

Over the more than two years between the decision of the British Columbia Court of Appeal and the Supreme Court decision, observers and analysts of the growing body of Charter jurisprudence attached more importance to this case than to any other. The reason for this is alluded to in the majority opinion of Lamer J. Section 7 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, requires that governmental measures be struck down whenever they impair life, liberty or security of the person in a way not in accordance with the principles of fundamental justice; if the concept of fundamental justice were to be measured by reference to ideas of substantive justice, the implication, it was felt, would be that courts could question the "wisdom" of a very wide range of executive and legislative acts. This would be particularly so if "security of the person" were to be read widely to include the imposition of any burden that affected the vital interests of persons.

The Charter is, of course, full of substantive policies. It speaks in favour of free speech, the mobility of citizens, equal treatment and privacy interests. Hence the significance of the *Motor Vehicle Act Reference* was not that it presented the possibility of substantive review by courts, but that it presented that possibility detached from any identifiable, determinate policy and based on the vague idea that public ordering should be fundamentally just. Lamer J. in deciding that s. 7 does permit review of the substantive justice of measures, is at pains to explain that this conclusion does not constitue the court as a super-legislature. The court's job continues to be enforcing the supremacy of law, including the constitution. They do not become guarantors of the appropriateness or prudence of governmental policies. Nevertheless, the line between the administration of legal norms and general political supervision by the courts has grown a little dimmer by this decision. Notwithstanding this consequence, Lamer J. is surely correct in pointing out that the words of the Charter cannot be rewritten by the court, or given unnatural meaning, in order to keep the scope of judicial review in Canada within more comfortable or more traditional limits.

The question is: Do the words of s. 7 in themselves, or in their context within the Charter, compel substantive review? Lamer J.'s chief interpretative strategy is to claim that ss. 8 to 14 of the Charter (which, together with s. 7, constitute the "Legal Rights" part of the Charter) are instances of a general protection expressed in s. 7. Some of the protections in ss. 8 to 14, he says, go "beyond what could be characterized as 'procedural'" (p. 309), therefore, since s. 7 includes all of the protections in ss. 8 to 14, s. 7 must contain substantive protections. This logic is flawless except for its starting point. Lamer J. does not demonstrate his claim that the sections following s. 7 should be understood to be preceded by a phrase stating they are illustrative of s. 7 but do not limit its generality. However, something can be inferred from the structure of the Charter, and in particular from the inclusion of ss. 7 to 14 within "Legal Rights". It is that all the rights in that part pertain to the administration of justice. Although this does not mean they are procedural protections only, it does mean that the substantive rights included are ones that bear on the processes for determining legal liability, and in the case of s. 12 (the prohibition against cruel and unusual treatment or punishment) the consequences of such determinations. What s. 7 requires is that, in the administration of justice, the principles of fundamental justice (those fundamental principles which constrain legal proceedings that impose liability) be adhered to. Under this view s. 7 would not give rise to constitutional challenges on the ground only that the substance of the regulatory order is unjust.

It appears that this limited version of substantive review is what Lamer J. asserts. The "fundamental justice" principles of s. 7 are principles which, he says, have been recognized "as essential elements of a system for the administration of justice" (p. 317). Lamer J.'s contribution is to begin by noting that the distinction between procedural and substantive protection is not compelled by the language of s. 7 (this distinction would in any event create a classification system the unworkability of which would lead to arbitrary results) and then to show that there is another distinction, suggested by the structure of the Charter, which keeps s. 7 from being seen as a mandate for limitless judicial supervision. In the context of this case, the substantive side of law erected

by the British Columbia legislature (those who drive without a licence, whether they knew it or not, or could have known it, are liable to imprisonment) is bad not because British Columbia has decided to impose harsh punishment on unlicensed drivers but because the rule relates directly to and abridges a principle of fundamental criminal justice: in the normal course of events there should be no absolute liability criminal offences. To use the opening words of Lamer J.'s judgment, it is contrary to principles of fundamental justice "to convict a person who has not really done anything wrong" (p. 300).

The distinction at work here is between substantive review which evaluates the distributive and redistributive justice of all measures and substantive review under which legal processes are truncated or made particularly onerous for some classes of persons. It seems to be this latter, more limited, notion of substantive review which the Ontario Court of Appeal adopted in *R. v. Morgentaler* (1985), 48 C.R. (3d) 1 at 39:

"... we have concluded that, in applying the principles of fundamental justice, the court is not limited to procedural review but may also review the substance of legislation ... such substantive review should take place only in exceptional cases where there has been a marked departure from the norm of civil or criminal liability, resulting in the infringement of liberty or in some other injustice."

It would be wrong, however, to assume that this distinction is capable of more straightforward administration than the distinction between substantive review and the mere enforcement of procedural guarantees. For instance, the creation of a new offence, say, against possessing certain kinds of telecommunications equipment could not be challenged, since any such challenge would be based on the overall justice of creating such a crime. However, under the distinction drawn in this case, the creation of a new absolute liability offence could be challenged as being contrary to the principles of fundamental justice. While both pieces of legislation could be seen as substantive — they both create new classes of persons liable for punishment — only review of the latter is possible, since it alone changes an established pattern of legal administration. The results of these two situations have an element of arbitrariness. Notwithstanding this difficulty with Lamer J.'s judgment, it has contributed to the development of an understanding of s. 7 which promises to be fruitful.

There are a number of other important features in this case. The first is Lamer J.'s attempt to minimize the impact of the decision on some classes of absolute liability offences. In particular, he seems intuitively to accept that imposing absolute liability on corporations for despoiling the environment would not be unjust. This recognition of the difficulties in coming to a fixed opinion about the requirements imposed by the principles of fundamental justice is sensible. He advances two possible ameliorating strategies. First, he suggests that s. 7 may not be available to corporations. It is true that the section extends its protection to "everyone", whereas s. 11 uses "person", a word which more clearly includes corporate persons. However, "everyone" is used in s. 2 and s. 8, two sections which the Supreme Court of Canada has already applied for the benefit of corporations: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 85 C.L.L.C. 14,023, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81, and *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97 (sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*), [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241, respectively. It might be possible to argue that a corporation cannot lose life, liberty or security of the person. However, it is certainly possible that the last category will be construed to include important business assets the loss of which would frustrate the operation of a corporation.

The other strategy suggested by Lamer J. is that s. 1 might be used to justify absolute liability offences relating to the environment. One might wonder, as Wilson J. does, if it is possible for a court to determine that a law does not accord with the principles of fundamental justice yet conclude that it is a reasonable limit on a right. Of course, in an emergency situation it might make sense to say that a law does not meet fundamental justice but that the abridgment is tolerable in the particular political context. However, in the instance of environmental protection that Lamer J. addresses it would be preferable for a court simply to acknowledge that not in every circumstance do absolute liability offences violate principles of fundamental justice.

Another significant feature of Lamer J.'s opinion is his treatment of two interpretative devices which have been increasingly used since the advent of the Charter: legislative history and American "rights" jurisprudence. His rejection of the argument based on legislative history is, in the context of this case, particularly significant. The making of the Charter did not lead to a

great deal of analytical debate or very many crisply-expressed decisions about what was wanted. The scope of review created by s. 7 was one of the very few matters on which there was a clear preference and a clear answer. In both the Joint Parliamentary Committee and the House of Commons, members voiced concern that the Charter, particularly s. 7, would permit court review of the substantive merits of legislation. In both places, assurances were given that this would not be the result: see Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, no. 40 (27th January 1981) and House of Commons Debates, 32nd Parl., 1st Sess., 13438 (27th November 1981). Consequently, Lamer J.'s decision to give this evidence "minimal weight" (p. 314) represents a significant blow to the efficacy of any argument based on the legislative record.

One of the reasons given by Lamer J. for not paying regard to legislative history is that to do so would rob the Charter of its adaptability. As he states at p. 314, "the rights, freedom and values embodied in the Charter [would] in effect become frozen in time to the moment of adoption". In general terms, Lamer J. is right. It would be absurd to limit the Charter to circumstances that the legislators anticipated or to let legislators' ideas of specific applications become determinative. However, the issue raised in this case is not one of specific application. Whether s. 7 is limited to procedural protections is a large, general and constitutive question. The legislative record examined in the case goes to the question of the Charter's fundamental purposes. However, Lamer J. cannot be faulted for rejecting the message of the legislative history pertaining to s. 7; he concludes, on the basis of the text and structure of the Charter, that the meaning is clear (s. 7 is not designed to guarantee procedural requirements only), and therefore he is right not be influenced by the views of Parliamentarians and public officials.

With respect to Lamer J.'s rejection of the relevance of American precedents, this will provide great comfort to counsel faced with jurisprudence from the United States Supreme Court which weakens their case. Lamer J.'s words, however, should not be taken at face value. It is true that there are, as he says at p. 305, "fundamental structural differences between the two constitutions". This case illustrates one of them. This does not mean, however, that other constitutional values embodied in the Charter are so distinctive that American jurisprudence could not shed light on possible meanings. The Charter's guarantee of equality rights or freedom of association, for instance, could well be informed by United States cases under the First and Fourteenth Amendments. The inclusion of s. 1 or s. 33 in the Charter (for which there are no parallels in the United States Constitution) does not render cases under the latter constitution irrelevant in coming to an initial understanding of the content of some of our entrenched values.

Finally, Wilson J.'s exploration, in her concurring opinion, of the relationship between s. 7 and s. 1 is noteworthy, if perplexing. She states that s. 7 protects life, liberty and security of the person against deprivation unless the deprivation accords with the principles of fundamental justice. In s. 1 she sees a second condition that must be satisfied if the deprivation is to be permissible — it must be a reasonable limit prescribed by law. In other words, she takes the converse view to Lamer J.'s. He says deprivation must be either in accordance with principles of fundamental justice *or* a reasonable limit of s. 7 rights. She requires deprivations to be both just and reasonable before being valid. Although Wilson J.'s reading is syntactically plausible, it leads to surprising results. It leads to the conclusion that a deprivation of liberty might accord with principles of fundamental justice but would nevertheless be an unreasonable limit on the liberty right. The two tests would seem to draw on similar factors and, except for the circumstance of an emergency, it is not clear how different results would arise. One explanation is, however, possible. A deprivation of liberty might accord with principles of fundamental justice in the sense that the administration of the criminal proscription did not entail abridgements of fundamental criminal law principles. However, the crime and the resultant loss of liberty might not be reasonable when measured against a general standard of social justice. This strategy of raising liberty to an independent right and requiring all deprivations to satisfy the s. 1 test of reasonable limit leads to the fullest substantive review possible, a conclusion which the rest of the court was careful not to come to.

John D. White

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FUNDAMENTAL JUSTICE

. . . I am of the view that it would be wrong to interpret the term "fundamental justice" [in s. 7 of the *Charter*] as being synonymous with natural justice as the Attorney-General of British Columbia and others have suggested.

To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481 . . . per Estey J. and [*Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145].

. . . . .

. . . it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely.

. . . . .

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

. . . . .

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of [those] principles within the judicial process and in our legal system, as it evolves.

Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

PRINCIPLES OF FUNDAMENTAL JUSTICE

The term "principles of fundamental justice" [in s. 7 of the *Charter*] is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures . . . This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principle of fundamental justice is quite simply one in which, as Professor Tremblay has written, "future growth will be based on historical roots": 18 U.B.C.L. Rev. 201 at p. 254 (1980).

Appeal from judgment of British Columbia Court of Appeal, 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 33 C.R. (3d) 22, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 5 C.R.R. 148, 147 D.L.R. (3d) 539 , ruling that s. 94(2) of the Motor Vehicle Act is inconsistent with s. 7 of the Charter and of no force and effect.

***Mcintyre J.*:**

1 I agree with Lamer J. that s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, as amended by the Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, s. 19, is inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms. I agree that fundamental justice, as the term is used in the Charter, involves more than natural justice (which is largely procedural) and includes as well a substantive element. I am also of the view that on any definition of the term "fundamental justice" the

imposition of minimum imprisonment for an offence in respect of which no defence can be made, and which may be committed unknowingly and with no wrongful intent, deprives or may deprive of liberty and it offends the principles of fundamental justice.

2 I would accordingly dismiss the appeal [from case reported at 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 33 C.R. (3d) 22, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 5 C.R.R. 148, 147 D.L.R. (3d) 539] and answer the constitutional question in the negative.

3 LAMER J. (DICKSON C.J.C., BEETZ, CHOUINARD and LE DAIN JJ. concurring)

Introduction

4 A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the Charter of Rights and Freedoms (Constitution Act, 1982, as enacted by the Canada Act, 1982 (U.K.), c. 11).

5 In other words, absolute liability and imprisonment cannot be combined.

The Facts

6 On 16th August 1982 the Lieutenant Governor in Council of British Columbia referred the following question to the Court of Appeal of that province, by virtue of s. 1 of the Constitutional Question Act, R.S.B.C. 1979, c. 63:

> Is s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, as amended by the *Motor Vehicle Amendment Act*, 1982, consistent with the *Canadian Charter of Rights and Freedoms?*

7 On 3rd February 1983 the Court of Appeal handed down reasons in answer to the question in which it stated that s. 94(2) of the Act is inconsistent with the Canadian Charter of Rights and Freedoms: 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 33 C.R. (3d) 22, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 5 C.R.R. 148, 147 D.L.R. (3d) 539. The Attorney General for British Columbia launched an appeal to this court.

The Legislation

8 Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94, as amended by the Motor Vehicle Amendment Act, 1982 (B.C.), c. 36, s. 19:

> 94.(1) A person who drives a motor vehicle on a highway or industrial road while
>
> (*a*) he is prohibited from driving a motor vehicle under section 90, 91, 92 or 92.1, or
>
> (*b*) his driver's licence or his right to apply for or obtain a driver's licence under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the *Motor Vehicle Amendment Act, 1982*,
>
> commits an offence and is liable,
>
> (*c*) on a first conviction, to a fine of not less than $300 and not more than $2000 and to imprisonment for not less than 7 days and not more than 6 months, and
>
> (*d*) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2000 and to imprisonment for not less than 14 days and not more than one year.
>
> (2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

Canadian Charter of Rights and Freedoms, Constitution Act, 1982:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society ...

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice ...
>
> 11. Any person charged with an offence has the right ...
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...
>
> 52. The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The Judgment of the Court of Appeal of British Columbia

9 The court was of the view that the phrase "principles of fundamental justice" was not restricted to matters of procedure, but extended to substantive law, and that the courts were "therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation" [pp. 763-64 W.W.R.].

10 Relying on the decision of this court in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295 [Ont.], the Court of Appeal found [at p. 764] "that s. 94(2) [of the Motor Vehicle Act] is inconsistent with the principles of fundamental justice". They did not heed the invitation of counsel opposing the validity of s. 94(2) to declare that, as a result of that decision by our court, all absolute liability offences violated s. 7 of the Charter and could not be salvaged under s. 1. Quite the contrary, the Court of Appeal said [at p. 764] that "there are, and will remain, certain public welfare offences, e.g., air and water pollution offences, where the public interest requires that the offences be absolute liability offences". Their finding was predicated on the following reasoning [p. 765]:

> The effect of s. 94(2) is to transform the offence from a mens rea offence, to an absolute liability offence, hence giving the defendant no opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. Rather than placing the burden to establish such facts on the defendant and thus making the offence a strict liability offence, the legislature has seen fit to make it an absolute liability offence coupled with a mandatory term of imprisonment.

11 It can therefore be inferred with certainty that, in the court's view, the combination of mandatory imprisonment and absolute liability was offensive to s. 7. It cannot, however, be ascertained from their judgment whether the violation was triggered by the requirement of minimum imprisonment or solely by the availability of imprisonment as a sentence.

Section 7

12

1. Introduction

13 The issue in this case raises fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the Charter as well as the appropriateness of various techniques of constitutional interpretation. I shall deal first with these questions of a more general and theoretical nature as they underlie and have shaped much of the discussion surrounding s. 7.

2. The nature and legitimacy of constitutional adjudication under the Charter

14 The British Columbia Court of Appeal has written in the present case that the Constitution Act has added a new dimension to the role of the courts in that the courts have now been empowered by s. 52 to consider not only the vires of legislation but also to measure the content of legislation against the constitutional requirements of the Charter.

15 The novel feature of the Constitution Act, 1982, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the vires of legislation. The initial process in such adjudication has been characterized as "a distillation of the 'constitutional value' represented by challenged legislation" (Laskin, Canadian Constitutional Law, 3rd ed. revised (1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman (ed.), The Courts and the Canadian Constitution (1964), p. 186), and "an abstract of the statute's content" (Professor Abel ["The Neglected Logic of 91 and 92"] (1969), 19 Univ. of Toronto L.J. 487, p. 490). This process has of necessity involved a measurement of the content of legislation against the requirements of the Constitution, albeit within the more limited sphere of values related to the distribution of powers.

16 The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.

17 In neither case, be it before or after the Charter, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Saskatchewan*, [1977] 2 S.C.R. 576 at 590, [1976] 6 W.W.R. 61, 71 D.L.R. (3d) 1, 11 N.R. 222 [Sask.], continue to govern:

> The Courts will not question the wisdom of enactments ... but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

18 In this respect, s. 7 is no different that other Charter provisions. As the Attorney General for Ontario has noted in his factum:

> Section 7, like most of the other sections in the *Charter*, limits the bounds of legislative action. It is the function of the Court to determine whether the challenged legislation has honoured those boundaries. This process necessitates judicial review of the content of the legislation.

Yet, in the context of s. 7, and in particular of the interpretation of "principles of fundamental justice", there has prevailed in certain quarters an assumption that all but a narrow construction of s. 7 will inexorably lead the courts to "question the wisdom of enactments", to adjudicate upon the merits of public policy.

19 From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial legislatures and the electorate. The Attorney General for Ontario, in his written argument, stated that:

> ... the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.

This is an argument which was heard countless times prior to the entrenchment of the Charter but which has in truth, for better or for worse, been settled by the very coming into force of the Constitution Act, 1982. It ought not to be forgotten that the historic decision to entrench the Charter in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy.

20 The concerns with the bounds of constitutional adjudication explain the characterization of the issue in a narrow and restrictive fashion, i.e., whether the terms "principles of fundamental justice" have a substantive or merely procedural content. In my view, the characterization of the issue in such fashion preempts an open-minded approach to determining the meaning of "principles of fundamental justice".

21 The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the United States Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

22 The overriding and legitimate concern that courts ought not to question the wisdom of enactments, and the presumption that the legislator could not have intended same, have to some extent distorted the discussion surrounding the meaning of "principles of fundamental justice": This has led to the spectre of a judicial "super-legislature" without a full consideration of the process of constitutional adjudication and the significance of ss. 1, 33 and 52 of the Constitution Act, 1982. This in turn has also led to a narrow characterization of the issue and to the assumption that only a procedural content to "principles of fundamental justice" can prevent the courts from adjudicating upon the merits or wisdom of enactments. If this assumption is accepted, the inevitable corollary, with which I would have to then agree, is that the legislator intended that the words "principles of fundamental justice" refer to procedure only.

23 But I do not share that assumption. Since way back in time and even recently the courts have developed the common law beyond procedural safeguards without interfering with the "merits or wisdom" of enactments: e.g., *Kienapple v. R.*, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, 1 N.R. 322 [Ont.], entrapment, non-retrospectivity of offences, presumptions against relaxing the burden of proof and persuasion, to give a few examples.

24 The task of the court is not to choose between substantive or procedural content per se but to secure for persons "the full benefit of the Charter's protection" (Dickson C.J.C. in *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 85 C.L.L.C. 14,023, 60 A.R. 161, 58 N.R. 81), under s. 7, while avoiding adjudication of the merits of public policy. This can only be accomplished by a purposive analysis and the articulation (to use the words in *Curr v. R.*, [1972] S.C.R. 889 at 899, 18 C.R.N.S. 281, 7 C.C.C. (2d) 181, 26 D.L.R. (3d) 603 [Ont.]) of "objective and manageable standards" for the operation of the section within such a framework.

25 I propose therefore to approach the interpretation of s. 7 in the manner set forth by Dickson C.J.C. in *Hunter, Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.*, [1984] 2 S.C.R. 145, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 41 C.R. (3d) 97, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, *(*sub nom. *Hunter v. Southam Inc.)* 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 84 D.T.C. 6467, 11 D.L.R. (4th) 641, 55 A.R. 291, 55 N.R. 241, and *R. v. Big M Drug Mart Ltd.*, supra, and by Le Dain J. in *R. v. Therens*, [1985] 1 S.C.R. 613, [1985] 4 W.W.R. 285, 38 Alta. L.R. (2d) 99, 45 C.R. (3d) 97, 32 M.V.R. 153, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 40 Sask. R. 122, 59 N.R. 122. In *Big M Drug Mart Ltd.*, Dickson C.J.C. wrote at p. 344:

26 In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

27 In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.

3. The principles of fundamental justice

28 I would first note that I shared the views of Wilson J. in her statement in *Singh v. Min. of Employment & Immigration*, [1985] 1 S.C.R. 177 at 205, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1, that "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7". Each of these, in my view, is a distinct though related concept to be construed as such by the courts. It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. Furthermore, because of the fact that only deprivation of liberty was considered in these proceedings and no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited, as was the course taken by all, below and in this court, to determining the scope of the words "principles of fundamental justice"; I will not attempt to give any further content to "liberty" nor address that of the words "life" or "security of the person".

29 In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, supra), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

30 Given that, as the Attorney General for Ontario has acknowledged, "when one reads the phrase 'principles of fundamental justice', a single incontrovertible meaning is not apparent", its meaning must, in my view, be determined by reference to the interests which those words of the section are designed to protect and the particular role of the phrase within the section. As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which "has the most severe consequences upon an individual": *R. v. Cadeddu; R. v. Nunery* (1982), 40 O.R. (2d) 128 at 139, 32 C.R. (3d) 355, *(*sub nom. *Re Cadeddu and R.)* 4 C.C.C. (3d) 97, 3 C.R.R. 312, 146 D.L.R. (3d) 629 (H.C.).

31 For these reasons, I am of the view that it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice as the Attorney General of British Columbia and others have suggested.

32 To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this court toward the interpretation of Charter rights in *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 8 C.R.R. 193, 9 D.L.R. (4th) 161, 3 O.A.C. 321, 53 N.R. 169, per Estey J., and *Hunter v. Southam Inc.*, supra.

33 It would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8-14, greater content than the general concept from which they originate.

34 Sections 8-14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice and, as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more

narrowly than the rights in ss. 8-14. The alternative, which is to interpret all of ss. 8-14 in a "narrow and technical" manner for the sake of congruity, is out of the question: *L.S.U.C. v. Skapinker*, at p. 366.

35 Sections 8-14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7-14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections, the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

36 Thus, ss. 8-14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the Canadian Bill of Rights, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the Canadian Charter of Rights and Freedoms).

37 It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8-14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

38 Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term "natural justice", a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.

39 Whatever may have been the degree of synonymy between the two expressions in the past (which in any event has not been clearly demonstrated by the parties and intervenants), as of the last few decades this country has given a precise meaning to the words "natural justice" for the purpose of delineating the responsibility of adjudicators (in the wide sense of the word) in the field of administrative law.

40 It is, in my view, that precise and somewhat narrow meaning that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice", the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.

4. Proceedings and evidence of the special joint committee of the Senate and of the House of Commons on the Constitution of Canada

41 A number of courts have placed emphasis upon the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution in the interpretation of "principles of fundamental justice", e.g., *Latham v. Solicitor Gen. of Can.*, [1984] 2 F.C. 734, 39 C.R. (3d) 78, 5 Admin. L.R. 70, 12 C.C.C. (3d) 9, 10 C.R.R. 120, 9 D.L.R. (4th) 393 (T.D.); *Re Mason and R.* (1983), 43 O.R. (2d) 321, *(*sub nom. *Re Mason; Mason v. R. in Right of Can.)* 35 C.R. (3d) 393, 5 Admin. L.R. 16, 7 C.C.C. (3d) 426, 7 C.R.R. 293, 1 D.L.R. (4th) 712 (H.C.); and *R. v. Holman* (1982), 28 C.R. (3d) 378, 16 M.V.R. 225 (B.C. Prov. Ct.).

42 In particular, the following passages dealing with the testimony of federal civil servants from the Department of Justice have been relied upon:

43 Mr. Strayer (Assistant Deputy Minister, Public Law):

> Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.
>
> This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness ...
>
> Mr. Strayer: The term "fundamental justice" appears to us to be essentially the same thing as natural justice.

Mr. Tassé (Deputy Minister) also said of the phrase "principles of fundamental justice" in testimony before the committee:

> We assume that the Court would look at that much like a Court would look at the requirements of natural justice, and the concept of natural justice is quite familiar to courts and they have given a good deal of specific meaning to the concept of natural justice. We would think that the Court would find in that phraseology principles of fundamental justice a meaning somewhat like natural justice or inherent fairness.
>
> Courts have been developing the concept of administrative fairness in recent years and they have been able to give a good deal of consideration, certainly to these sorts of concepts and we would expect they could do the same with this.

44 The Honourable Jean Chrétien, then federal Minister of Justice, also indicated to the committee that, while he thought "fundamental justice marginally more appropriate than natural justice" in s. 7, either term was acceptable to the government.

a) Admissibility

45 The first issue which arises is whether the Minutes of the Proceedings and Evidence of the Joint Committee may even be considered admissible as extrinsic aids to the interpretation of Charter provisions. Such extrinsic materials were traditionally excluded from consideration in constitutional adjudication: e.g., *Gosselin v. R.* (1903), 33 S.C.R. 255 at 264, 7 C.C.C. 139 [Que.]; *Ref. re Wartime Leasehold Regulations*, [1950] S.C.R. 124, [1950] 2 D.L.R. 1.

46 In *Ref. re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 at 317, *(*sub nom. *Churchill Falls (Labrador) Corp. v. A.G. Nfld.)* 8 D.L.R. (4th) 1, 47 Nfld. & P.E.I.R. 125, 139 A.P.R. 125, 53 N.R. 268 (Nfld.), however, McIntyre J. stated that:

> The general exclusionary rule formerly considered to be applicable in dealing with the admissibility of extrinsic evidence in constitutional cases has been set aside or at least greatly modified and relaxed.

47 Indeed, in *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, 9 N.R. 541, Laskin C.J.C. stated, at p. 389:

> ... no general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and ... the questions of resort to extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought adduce such evidence.

48 This approach was adopted by Dickson J. (as he then was) in *Ref. re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 [Ont.], and McIntyre J. in *Ref. re Upper Churchill Water Rights Reversion Act*, supra, in which he stated at p. 318:

> It will therefore be open to the Court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation.

49 It is to be noted, however, that McIntyre J.'s remarks are in relation to the interpretation of the challenged statutory enactment rather than the interpretation of the Constitution itself. The same is true of the remarks of Laskin C.J.C. and Dickson J. (as he then was).

50 With respect to the interpretation of the Constitution, however, such extrinsic materials were considered, in at least two cases, by this court.

51 In the *Re Authority of Parliament in relation to the Upper House* Reference, [1980] 1 S.C.R. 54, *(*sub nom. *Ref. re Legislative Authority of Parliament to Alter or Replace the Senate))* 102 D.L.R. (3d) 1, 30 N.R. 271 (sub nom. Re B.N.A. Act and Fed. Senate), the court stated, at p. 66 [S.C.R.]:

> It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate. Its important purpose is stated in the following passages in speeches delivered in the debates on Confederation in the parliament of the province of Canada ...

52 The other case is *A.G. Can. v. C.N. Tpt. Ltd.*, [1983] 2 S.C.R. 206, [1984] 1 W.W.R. 193, 28 Alta. L.R. (2d) 97, 38 C.R. (3d) 97, 7 C.C.C. (3d) 449, 76 C.P.R. (2d) 1, 3 D.L.R. (4th) 16, 49 A.R. 39, 49 N.R. 241. Laskin C.J.C., in that case, referred to the pre-Confederation debates in the course of interpreting ss. 91(27) and 92(14) of the Constitution Act, 1867 (at p. 225).

53 I would adopt this approach when interpreting the Charter. Consequently, the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution should, in my view, be considered.

b) Weight

54 Having said that, however, I nonetheless believe that the logic underlying the reluctance to allow the use of materials such as speeches in Parliament carries considerable force with respect to the Minutes of the Committee as well.

55 In *Ref. re Upper Churchill Water Rights Reversion Act*, supra, McIntyre J. wrote at p. 319;

> ... I would say that the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence. They represent, no doubt, the considered views of the speakers at the time they were made, but cannot be said to be expressions of the intent of the Legislative Assembly.

56 Professor J. Magnet has written in "The Presumption of Constitutionality" (1980), 18 Osgoode Hall L.J. 87, pp. 99-100:

> In an administrative law setting, "The admissibility of ... [factual] evidence [on the issue of legislative intent] ... seems so clear as not to require authority ..."
>
> The transposition of the administrative law principle to a constitutional context is problematic. In the administrative law cases, the issue of intent concerns the intent of a specific person. In the constitutional cases, the issue of intent concerns the legislature, an incorporeal body made up of hundreds of persons. It may be said that such a body, like a corporation, is a legal fiction and has no intention in the relevant sense. It would follow that legislative intent, in the constitutional setting, is a hollow concept.
>
> Largely in consideration of this argument, Canadian courts have developed the rule that, in scrutinizing legislative intent for the purpose of determining constitutional validity, statements by members of the legislature during passage of the challenged Act are irrelevant and inadmissible. Several explanations of the rule have been put forward. Strayer has argued that the rule is sound because legislative motive is irrelevant to constitutional validity: "The essential factual issue here is that of effect ..." More convincingly, it has been argued that, considering the way in which the Canadian process of enactment differs from that of the United States, "Hansard gives no convincing proof of what the government intended ..."

> Moreover, by allowing ambiguities in the statute to be resolved by statements in the legislature, ministers would be given power in effect to legislate indirectly by making such statements. "Cabinets already have powers enough without having this added unto them."

57 If speeches and declarations by prominent figures are inherently unreliable (per McIntyre J. in *Ref. re Upper Churchill Water Rights Reversion Act*, supra, at p. 319) and "speeches made in the Legislature at the time of enactment of the measures are inadmissible as having little evidential weight" (per Dickson J. (as he then was) in *Ref. re Residential Tenancies Act, 1979*, supra, at p. 721), the Minutes of the Proceedings of the Special Joint Committee, though admissible and granted somewhat more weight than speeches, should not be given too much weight. The inherent unreliability of such statements and speeches is not altered by the mere fact that they pertain to the Charter of Rights rather than a statute.

58 Moreover, the simple fact remains that the Charter is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the Charter. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?

59 Were this court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, i.e., the intention of the legislative bodies which adopted the Charter. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

60 Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the Charter in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the Charter debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the Charter, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth. As Estey J. wrote in *L.S.U.C. v. Skapinker*, supra, at pp. 366-67:

> Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

5. The Canadian Bill of Rights

61 The appellant states that s. 7 "is a blend of s. 1(*a*) and s. 2(*e*) of the Canadian Bill of Rights". Considerable emphasis is then placed upon the case of *Duke v. R.*, [1972] S.C.R. 917, 18 C.R.N.S. 302, 7 C.C.C. (2d) 474, 28 D.L.R. (3d) 129 [Ont.], in which this court interpreted the words "principles of fundamental justice" in s. 2(*e*) of the Bill. Fauteux C.J.C. noted, at p. 923:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias, and in a judicial temper, and must give to him the opportunity adequately to state his case.

62 However, as Le Dain J. has written in *R. v. Therens*, supra, with the implicit support of the majority, at p. 638:

63 In my opinion the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts. And after at pp. 638-39:

> Although it is clear that in several instances, as in the case of s. 10, the framers of the *Charter* adopted the wording of the *Canadian Bill of Rights*, it is also clear that the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection ...
>
> In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the *Charter*, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of parliament. The significance of the new constitutional mandate for judicial review provided by the *Charter* was emphasized by this Court in its recent decisions in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, and *Hunter v. Southam, Inc., supra*.

64 This view was also put forward by Wilson J. in her judgment in *Singh v. Min. of Employment & Immigration*, supra, with which Dickson C.J.C. and Lamer J. concurred, at p. 209:

> It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *Canadian Bill of Rights* ought to be re-examined.

65 In any event, the *Duke* case is of little assistance in the interpretation of s. 7 of the Charter. Section 2(*e*) of the Canadian Bill of Rights states:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations ...

66 In s. 2(*e*) of the Bill of Rights, the words "principles of fundamental justice" were placed explicitly in the context of, and qualify, a "right to a fair hearing". Section 7 of the Charter does not create the same context. In s. 7, the words "principles of fundamental justice" are placed in the context of, and qualify, much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important.

Conclusion

67 I have, in this judgment, undertaken a purposive analysis of the term "principles of fundamental justice" in s. 7 of the Charter in accordance with the method established by this court in *Big M Drug Mart Ltd.*, supra. Accordingly, the point of departure for the analysis has been a consideration of the general objectives of the Charter in the light of the general principles of Charter interpretation set forth in *Skapinker* and *Southam*, both supra. This was followed by a detailed analysis of the language and structure of the section as well as its immediate context within the Charter.

68 The main sources of support for the argument that "fundamental justice" is simply synonymous with natural justice have been the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution and the Bill of Rights jurisprudence. In my view, neither the Minutes nor the Bill of Rights jurisprudence are persuasive or of any great force. The historical usage of the term "fundamental justice" is, on the other hand, shrouded in ambiguity. Moreover, not any one of these arguments, taken singly or as a whole, manages to overcome in my respectful view the textual and contextual analyses.

69 Consequently, my conclusion may be summarized as follows:

70 The term *principles of fundamental justice* is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

71 Sections 8-14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

72 Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

73 We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frankfurter J. wrote in *McNabb v. U.S.*, 318 U.S. 332 at 347, 87 L. Ed. 819 (1942): "The history of liberty has largely been the history of observance of procedural safeguards". This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor Tremblay has written, "future growth will be based on historical roots": (1984), 18 Univ. of B.C. L. Rev. 201, at p. 254.

74 Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

75 Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

76 I now turn to such an analysis of the principle of mens rea and absolute liability offences in order to determine the question which has been put to the court in the present Reference.

Absolute Liability and Fundamental Justice In Penal Law

77 It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin: actus non facit reum nisi mens sit rea.

78 As Glanville Williams said (Glanville Williams, Criminal Law, The General Part, 2nd ed. (1961), p. 30):

> There is no need here to go into the remote history of *mens rea;* suffice it to say that the requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke, which is as far back as the modern lawyer needs to go. "If one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium*."

79 One of the many judicial statements on the subject worth mentioning is of the highest authority, per Goddard C.J. in *Harding v. Price*, [1948] 1 K.B. 695 at 700, [1948] 1 All E.R. 283 (Div. Ct.), where he said:

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood* [(1946), 62 T.L.R. 462, 463]: "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

80 This view has been adopted by this court in unmistakable terms in many cases, amongst which the better known are *Beaver v. R.*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129 [Ont.], and the most recent and often quoted judgment of Dickson J. (as he then was), writing for the court in *R. v. Sault Ste. Marie*, supra.

81 This court's decision in the latter case is predicated upon a certain number of postulates, one of which, given the nature of the rules it elaborates, has to be to the effect that absolute liability in penal law offends the principles of fundamental justice. Those principles are, to use the words of Dickson J. [at p. 1310], to the effect that "there is a generally held revulsion against punishment of the morally innocent." He also stated [at p. 1311] that the argument that absolute liability "violates fundamental principles of penal liability" was the most telling argument against absolute liability and one of greater force than those advanced in support thereof.

82 In my view it is because absolute liability offends the principles of fundamental justice that this court created presumptions against legislatures having intended to enact offences of a regulatory nature falling within that category. This is not to say, however, and to that extent I am in agreement with the Court of Appeal, that, as a result, absolute liability per se offends s. 7 of the Charter.

83 A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.

84 Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.

85 I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the Charter and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

86 As no one has addressed imprisonment as an alternative to the non-payment of a fine, I prefer not to express any views in relation to s. 7 as regards that eventuality as a result of a conviction for an absolute liability offence; nor do I need to address here, given the scope of my finding and the nature of this appeal, minimum imprisonment, whether it offends the Charter per se or whether such violation, if any, is dependent upon whether it be for a mens rea or strict liability offence. Those issues were not addressed by the court below and it would be unwise to attempt to address them here. It is sufficient and desirable for this appeal to make the findings I have and no more, that is, that no imprisonment may be imposed for an absolute liability offence and, consequently, given the question put to us, an offence punishable by imprisonment cannot be an absolute liability offence.

87 Before considering s. 94(2) in the light of these findings, I feel we are, however, compelled to go somewhat further for the following reason. I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s. 7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependent upon the content given to the words "security of the person". That issue was and is a live one. Indeed, though the question as framed focuses on absolute liability (s. 94(2)) in relation to the whole Charter, including the right to security of the person in s. 7, because of the presence of mandatory imprisonment in s. 94(1), only deprivation of liberty was considered. As the effect of imprisonment on the right to liberty is a foregone conclusion, a fortiori minimum imprisonment, everyone directed their arguments, when discussing s. 7, to considering whether absolute liability violated the principles of fundamental justice, and then subsidiarily argued pro or contra the effect of s. 1 of the Charter.

88 Counsel for those opposing the validity of s. 94(2) took the position in this court that absolute liability and severe punishment, always referring to imprisonment, violated s. 7 of the Charter. From the following passage of the judgment in the Court of Appeal [at p. 764] it would appear that counsel for those opposing the validity of the section took the wider position in that court that all absolute liability offences violated s. 7 because of "punishment of the morally innocent":

> In seeking to persuade the court to that conclusion counsel opposing the validity of s. 94(2) contended all absolute offences are now of no force and effect because of s. 7 of the Charter and that the provisions of s. 1 of the Charter should not be invoked to sustain them. In support of this submission counsel relied upon the view expressed by Dickson J. in *Sault Ste. Marie* that there was "a generally held revulsion against punishment of the morally innocent". They contended that, had the Charter been in effect when *Sault Ste. Marie* was decided, all absolute liability offences would have been struck down.
>
> We accept without hesitation the statement expressed by the learned justice but do not think it necessarily follows that because of s. 7 of the Charter this category of offence can no longer be legislated. To the contrary, there are, and will remain, certain public welfare offences, e.g., air and water pollution offences, where the public interest requires that the offences be absolute liability offences.

89 While I agree with the Court of Appeal, as I have already mentioned, that absolute liability does not per se violate s. 7 of the Charter, I am somewhat concerned with leaving without comment the unqualified reference by the Court of Appeal to the requirements of the "public interest".

90 If, by reference to public interest, it was meant that the requirements of public interest for certain types of offences is a factor to be considered in determining whether absolute liability offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the court as a possible justification under s. 1 of a limitation to the rights protected at s. 7, then I do agree.

91 Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the Charter if, as a result, anyone is deprived of their life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.

92 In this latter regard, something might be added.

93 Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

94 Of course I understand the concern of many as regards corporate offences, specially, as was mentioned by the Court of Appeal, in certain sensitive areas such as the preservation of our vital environment and our natural resources. This concern might well be dispelled were it to be decided, given the proper case, that s. 7 affords protection to human persons only and does not extend to corporations.

95 Even if it be decided that s. 7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give very different results from that of balancing public interest and the liberty or security of the person of a human being.

96 Indeed, the public interest as regards "air and water pollution offences" requires that the guilty be dealt with firmly, but the seriousness of the offence does not in my respectful view support the proposition that the innocent *human* person be open to conviction, quite the contrary.

Section 94(2)

97 No doubt s. 94(2) enacts in the clearest of terms an absolute liability offence, for the conviction for which a person will be deprived of his or her liberty, and little more, if anything, need be added. However, I should not want to conclude without addressing an argument raised by the appellant in this court and considered by the British Columbia Court of Appeal.

98 The appellant argues that, as a result of the case of *R. v. MacDougall*, [1982] 2 S.C.R. 605, 31 C.R. (3d) 1, 18 M.V.R. 180, 1 C.C.C. (3d) 65, 142 D.L.R. (3d) 216, 54 N.S.R. (2d) 562, 112 A.P.R. 562, 44 N.R. 560, s. 94(2) (the absolute liability provision) is of limited effect. Hence, the section raises "a false impression of a potential for wholesale injustice", says the appellant. In my view, this argument is of little relevance to the determination of this appeal. Whether the provision is of broad or of "limited" effect does not change its nature nor lead to a different characterization for the purpose of determining a violation of s. 7. The question is whether the provision offends s. 7 of the Charter at all, rather than whether it does so in "limited" or "wholesale" fashion. At best, this argument may be considered under s. 1.

99 The appellant summarizes the decision in *MacDougall* as establishing that:

> ... where an accused is charged with driving a motor vehicle while his licence was cancelled (contrary to a provincial statute), ignorance by the accused of the fact that his licence was revoked is ignorance of law and cannot provide the basis for an acquittal.

100 The respondent, however, distinguishes the *MacDougall* case from the case at bar on two grounds. First, the offence under consideration in *MacDougall* was one of strict liability rather than absolute liability. Secondly, while *MacDougall*:

> ... dealt only with a suspension by operation of law, s. 94(2) encompasses Court imposed suspensions (s. 90(2)), suspensions arising under the "old law" in the absence of the accused, and suspensions imposed by administrative review by the Superintendent of Motor Vehicles requiring delivery of notice ("old" act, Section 82(3)).

Thus, the respondent concludes that there are:

> ... at least three classes of morally innocent persons who are, by section 94(2) deprived of the opportunity to present a defence of the type outlined by Dickson J. in *R. v. Sault Ste. Marie*, supra, at p. 1326:
>
> > The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

101 In the final analysis, it seems that both the appellant and the respondent agree that s. 94 will impact upon the right to liberty of a limited number of morally innocent persons. It creates an absolute liability offence which effects a deprivation of liberty for a limited number of persons. To me, that is sufficient for it to be in violation of s. 7.

Section 1

102 Having found that s. 94(2) offends s. 7 of the Charter, there remains the question as to whether the appellants have demonstrated that the section is salvaged by the operation of s. 1 of the Charter. No evidence was adduced in the Court of Appeal or in this court. The position in that regard and the argument in support of the operability of s. 94(2) is as follows in appellant's factum:

> If this Court rules that s. 94(2) of the Motor Vehicle Act is inconsistent with S. 7 (or S. 11(*d*)) of the Charter, then it is submitted that S. 1 of the Charter is applicable. It is submitted that Laskin J. (as he then was) made it clear in *Curr v. The Queen*, supra, that it is within the scope of judicial notice for this Court to recognize that a statutory provision was enacted as part of a legislative scheme aimed at reducing the human and economic cost of bad driving. S. 94 is but part of the overall scheme laid out in the Motor Vehicle Act by which the Legislature is attempting to get bad drivers off the road. S. 94 imposes severe penalties on those who drive while prohibited from driving and those who drive while their driver's licence is suspended.
>
> It is submitted that if S. 94(2) is inconsistent with one of the above-noted provisions of the Charter, then S. 94(2) contains a "reasonable limit, etc." within the meaning of S. 1 of the Charter.

103 I do not take issue with the fact that it is highly desirable that "bad drivers" be kept off the road. I do not take issue either with the desirability of punishing severely bad drivers who are in contempt of prohibitions against driving. The bottom line of the question to be addressed here is: whether the government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocent is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.

104 As did the Court of Appeal, I find that this demonstration has not been satisfied, indeed, not in the least.

105 In the result, I would dismiss the appeal and answer the question in the negative, as did the Court of Appeal, albeit for somewhat different reasons, and declare s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, as amended by the Motor Vehicle Amendment Act, 1982, inconsistent with s. 7 of the Canadian Charter of Rights and Freedoms.

106 Having come to this conclusion, I choose, as did the Court of Appeal, not to address whether the section violates the rights guaranteed under ss. 11(*d*) and 12 of the Charter.

***Wilson J.*:**

107 I agree with my colleague, Lamer J., that s. 94(2) of the Motor Vehicle Act violates s. 7 of the Charter and is not saved by s. 1 [appeal from case reported at 42 B.C.L.R. 364, [1983] 3 W.W.R. 756, 33 C.R. (3d) 22, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 5 C.R.R. 148, 147 D.L.R. (3d) 539]. I reach that result, however, by a somewhat different route.

108 I start with a consideration of statutory "offences". These are divisible into offences for which mens rea is required and those for which it is not. Statutory offences are subject to a presumption in favour of a mens rea requirement as a matter of interpretation, but the courts have increasingly come to accept the proposition that legislatures may create non mens rea offences provided they make it clear that the actus reus itself is prohibited. This is typically so in the case of the so-called "regulatory" or "public welfare" offences. There is no moral delinquency involved in these offences. They are simply designed to regulate conduct in the public interest.

109 Two questions, therefore, have to be answered on this appeal. The first is: do absolute liability offences created by statute per se offend the Charter? The second is: assuming they do not, can they be attended by mandatory imprisonment or can such a sanction only be attached to true mens rea offences? Certainly, in the absence of the Charter, legislatures are free to create absolute liability offences and to attach to them any sanctions they please. Does s. 7 of the Charter circumscribe their power in this regard?

1. Absolute liability offences

110 Section 7 affirms the right to life, liberty and security of the person while at the same time indicating that a person may be deprived of such a right if the deprivation is effected "in accordance with the principles of fundamental justice". I do not view the latter part of the section as a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Its purpose seems to me to be the very opposite, namely, to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

111 Section 7 does not, however, affirm a right to the principles of fundamental justice per se. There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the inquiry, in my view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of

fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the tests in s. 1.

112 Assuming that I am correct in my analysis of s. 7 and its relationship to s. 1, an absolute liability offence cannot violate s. 7 unless it impairs the right to life, liberty or security of the person. It cannot violate s. 7 because it offends the principles of fundamental justice because they are not protected by s. 7 absent an impairment of the s. 7 right. Leaving aside for the moment the mandatory imprisonment sanction, I cannot find an interference with life, liberty or security of the person in s. 94 of the Motor Vehicle Act. It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. It would be my view, therefore, that absolute liability offences of this type do not per se offend s. 7 of the Charter.

2. Absolute liability plus mandatory imprisonment

113 The real question, as I see it, is whether s. 7 of the Charter is violated by the attachment of a mandatory imprisonment sanction to an absolute liability offence. Clearly a s. 7 right is interfered with here in that a person convicted of such an offence automatically loses his liberty.

114 In what circumstances then may the citizen be deprived of his right to liberty? Clearly not if he was deprived of it through a process which was procedurally unfair. But is s. 7 limited to that?

115 I would assume that one of the reasons for the rider attached to the right to liberty affirmed in s. 7 is to accommodate the criminal justice system. It will be through the criminal justice system that citizens will typically lose their liberty at the hands of government. The system must not, therefore, cause them to lose their liberty in violation of the principles of fundamental justice. The system must reflect those principles and the validity of the penal provisions must be assessed in relation to them.

116 Since s. 94(2) of the Motor Vehicle Act imposes a limit prescribed by law on the s. 7 right, we must determine whether fundamental justice is offended by attaching mandatory imprisonment to an absolute liability offence. Given that we can have statutory non mens rea offences, what is repugnant to fundamental justice in imprisoning someone for their commission?

117 At common law imprisonment was reserved for the more serious mens rea offences. However, we are dealing here with statutory offences and the legislation must stand unless it violates s. 7. We cannot, in my view, simply state as a bald proposition that absolute liability and imprisonment cannot co-exist in a statutory context. Legislatures can supersede the common law. The legislature may consider it so important to prevent a particular act from being committed that it absolutely forbids it and, if it is committed, may subject the offender to a penalty whether he has any mens rea or not and whether or not he had any intention of breaking the law. Prior to the Charter such legislation would have been unassailable. Now it must meet the test of s. 7. Where the legislature has imposed a penalty in the form of mandatory imprisonment for the commission of an absolute liability offence and has done so in clear and unambiguous language, can the legislation survive an attack under s. 7? It is suggested that such legislation cannot survive because it offends the principles of fundamental justice and, in particular, the principle that punishment is inappropriate in the absence of moral culpability.

118 The common law distinguished sharply the conduct of the wrongdoer from his state of mind at the time. Hence the famous maxim referred to by my colleague — actus non facit reum nisi mens sit rea. The important thing to note, however, is that while the maxim has always been viewed as identifying the essential ingredients of a crime at common law, its meaning has been subject to a process of historical and juridical development, particularly the concept of mens rea. In the earliest beginnings of criminal liability the mental state of the wrongdoer was not considered at all; it was enough that he had done the fell deed: see Holdsworth, A History of English Law, 3rd ed. (1923), vol. II, p. 50 et seq. At a later stage the accused's state of mind was considered for two distinct purposes, namely (1) to determine whether his conduct was voluntary or involuntary; and (2) to

determine whether he realized what the consequences of his conduct might be. But the first purpose was viewed as the key one. It was considerably later in the development of the law of criminal responsibility that the emphasis changed and an appreciation of the consequences of his act became the central focus. The movement towards the concept of the "guilty mind" was not, however, a sudden or dramatic one. This is understandable. The judges of the day found the new rule hard to apply because it was difficult to look into the state of a man's mind. The ecclesiastical authorities, however, had no such problem and legal historians seem to agree that the ecclesiastical influence was largely responsible for moving the focus to the mental element in common law crime: see Holdsworth, p. 259.

119 The introduction of concepts of morality into criminal responsibility inevitably led to a sharp distinction between crimes which were mala in se and crimes which were merely mala prohibita. Blackstone describes crimes which were mala in se as offences against "those rights which God and nature have established" (Blackstone, Commentaries on the Laws of England, 17th ed. (1830), by E. Christian, p. 53) and crimes which were mala prohibita as breaches of "those laws which enjoin only positive duties, and forbid any such things as are not *mala in se* ... without any intermixture of moral guilt" (Blackstone, p. 57). This distinction is now pretty well discredited: see Archbold's Criminal Pleading, Evidence and Practice, 30th ed. (1938), p. 900; Allen, Legal Duties (1931), p. 239. While it is undoubtedly a fact that certain crimes evoke feelings of revulsion and condemnation in the minds of most people, those feelings are now generally perceived as dependent upon a number of variable factors such as environment, education and religious prejudice and are no longer seen as providing a secure basis for the segregation of crimes into two different categories. Quoting from Kenny's Outlines of Criminal Law (1952), ed. J.W.C. Turner, at pp. 22-23:

> Among the members of any community at a given period, certain offences are by general agreement regarded as especially serious and excite deep moral reprobation, whereas other transgressions are regarded as venial and are more or less condoned, especially when they infringe rules of law which are unpopular. It is indeed inevitable that this apportionment of blame should be made. Yet the vague and fluctuating line which in everyday life is drawn between the one group and the other only marks a variation in degree; it is not a boundary which separates things fundamentally alien in kind. Ethical reprobation of homicide, homosexuality, libel, adultery, bigamy and slave trading, to take a few examples, is not the same in all countries, and indeed may vary from section to section of the people in the same country ...
>
> This defective classification of crimes clearly formed an unsound premise from which to draw any jurisprudential conclusion but it has an insidious attraction, and in the form of English phrases such as "in itself unlawful" it has penetrated into one or two modern judgments with vitiating effects upon the logic and clarity of the argument.

120 Accepting that a guilty mind was an essential ingredient of a crime at common law, it does not, of course, follow that the same is true of a "crime" created by statute. I have already referred to the presumption against absolute liability as a matter of statutory interpretation. This undoubtedly reflects the common law approach to the nature of crime. It is, however, only a presumption. Provided it does so in clear and unambiguous terms, the legislature is free to make a person liable for the actus reus with or without mens rea.

121 In Kenny's Outlines of Criminal Law, p. 4, the author highlights the difficulty in identifying any essential characteristics of crimes created by statute. He points out that such crimes originate in the government policy of the day and that, so long as crimes continue to be created by government policy, the nature of statutory crime will elude definition. Lord Atkin adverted to the same difficulty in *Proprietary Articles Trade Assn. v. A.G. Can.; Re Combines Investigation Act and S. 498 Criminal Code*, [1931] A.C. 310, [1931] 1 W.W.R. 552, 55 C.C.C. 241, [1931] 2 D.L.R. 1 (P.C.). He stated at p. 324:

> ... the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

122 In *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5, 12 C.R.N.S. 272, [1970] 5 C.C.C. 193, 12 D.L.R. (3d) 591 [N.S.], Ritchie J., speaking for the majority of this court, said at p. 199:

> Generally speaking, there is a presumption at common law that *mens rea* is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety, and the general welfare of the public which are not subject to any such presumption.

123 There seems to be no doubt that in s. 94 of the Motor Vehicle Act the legislature of British Columbia has created such an offence. Subsection (2) expressly precludes the application of any presumption in favour of a mens rea requirement. However, as already indicated, I do not believe that any principle of fundamental justice is offended by the creation of an absolute liability offence absent an impairment of the s. 7 right.

124 Is fundamental justice offended then by the attachment of a mandatory term of imprisonment to the s. 94 offence? Is there something repugnant about imprisoning a person for the commission of an absolute liability offence? Presumably no objection can be taken to attaching penal consequences such as a fine to a validly enacted absolute liability offence, only to penal consequences in the form of imprisonment if this gives rise to a violation of s. 7 of the Charter. If it does, then the court is not only empowered, but obligated by the Constitution, to strike the section down.

125 I have already indicated that in my view a law which interferes with the liberty of the citizen in violation of the principles of fundamental justice cannot be saved by s. 1 as being either reasonable or justified. The concepts are mutually exclusive. This is not, of course, to say that no limits can be put upon the right to life, liberty and security of the person. They clearly can, but only if they are imposed in accordance with the principles of fundamental justice and survive the tests in s. 1 as being reasonable and justified in a free and democratic society. Nor is the government precluded from resort to s. 33 of the Charter in order to dispense with the requirements of fundamental justice when, in a case of emergency, it seeks to impose restrictions on the s. 7 right. This, however, will be a policy decision for which the government concerned will be politically accountable to the people. As it is, s. 94 cannot, in my view, be saved by s. 1 if it violates s. 7. The sole question is whether it violates s. 7.

126 My colleague, in finding that s. 94 offends the principles of fundamental justice, has relied heavily upon the common law which precluded punishment in the absence of a guilty mind. We are not, however, dealing with a common law crime here. We are dealing with a statutory offence as to which the legislature has stated in no uncertain terms that guilt is established by proof of the act itself.

127 Unlike my colleague, I do not think that ss. 8-14 of the Charter shed much light on the interpretation of the phrase "in accordance with the principles of fundamental justice" as used in s. 7. I find them very helpful as illustrating facets of the right to life, liberty and security of the person. I am not ready at this point, however, to equate unreasonableness or arbitrariness or tardiness as used in some of these sections with a violation of the principles of fundamental justice as used in s. 7. Delay, for example, may be explained away or excused or justified on a number of grounds under s. 1. I prefer, therefore, to treat these sections as self-standing provisions, as indeed they are.

128 I approach the interpretative problem raised by the phrase "the principles of fundamental justice" on the assumption that the legislature was very familiar with the concepts of "natural justice" and "due process" and the way in which those phrases had been judicially construed and applied. Yet they chose neither. Instead they chose the phrase "the principles of fundamental justice". What is "fundamental justice"? We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system. What would "fundamental principles of justice" mean? And would it mean something different from "principles of fundamental justice"? I am not entirely sure. We have been left by the legislature with a conundrum. I would conclude, however, that if the citizen is to be guaranteed his right to life, liberty and security of the person — surely one of the most basic rights in a free and democratic society — then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system.

129 It has been argued very forcefully that s. 7 is concerned only with procedural injustice but I have difficulty with that proposition. There is absolutely nothing in the section to support such a limited construction. Indeed, it is hard to see why one's

life and liberty should be protected against procedural injustice and not against substantive injustice in a Charter that opens with the declaration:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law: ...
>
> and sets out the guarantee in broad and general terms as follows:
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

I cannot think that the guaranteed right in s. 7 which is to be subject only to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system. Certainly the rule of law acknowledged in the preamble as one of the foundations on which our society is built is more than mere procedure. It will be for the courts to determine the principles which fall under the rubric "the principles of fundamental justice". Obviously not all principles of law are covered by the phrase; only those which are basic to our system of justice.

130 I have grave doubts that the dichotomy between substance and procedure which may have served a useful purpose in other areas of the law such as administrative law and private international law should be imported into s. 7 of the Charter. In many instances the line between substance and procedure is a very narrow one. For example, the presumption of innocence protected in s. 11(*d*) of the Charter may be viewed as a substantive principle of fundamental justice but it clearly has both a substantive and a procedural aspect. Indeed, any rebuttable presumption of fact may be viewed as procedural, as going primarily to the allocation of the burden of proof. Nevertheless, there is also an interest of substance to be protected by the presumption, namely, the right of an accused to be treated as innocent until proved otherwise by the Crown. This right has both a societal and an individual aspect and is clearly fundamental to our justice system. I see no particular virtue in isolating its procedural from its substantive elements or vice versa for purposes of s. 7. A similar analysis may be made of the rule against double jeopardy protected in s. 11(*h*).

131 How then are we to decide whether attaching a mandatory term of imprisonment to an absolute liability offence created by statute offends a principle of fundamental justice? I believe we must turn to the theory of punishment for the answer.

3. Punishment and fundamental justice

132 It is now generally accepted among penologists that there are five main objectives of a penal system: see Nigel Walker, Sentencing in a Rational Society (1969). They are:

> 1) to protect offenders and suspected offenders against unofficial retaliation;
>
> 2) to reduce the incidence of crime;
>
> 3) to ensure that offenders atone for their offences;
>
> 4) to keep punishment to the minimum necessary to achieve the objectives of the system; and
>
> 5) to express society's abhorrence of crime.

Apart from death, imprisonment is the most severe sentence imposed by the law and is generally viewed as a last resort, i.e., as appropriate only when it can be shown that no other sanction can achieve the objectives of the system.

133 The Law Reform Commission of Canada in its Working Paper 11, "Imprisonment and Release" (Studies on Imprisonment (1976)), states at p. 10:

> Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective.

134 Because of the absolute liability nature of the offence created by s. 94(2) of the Motor Vehicle Act, a person can be convicted under the section even although he was unaware at the time he was driving that his licence was suspended and was unable to find this out despite the exercise of due diligence. While the legislature may as a matter of government policy make this an offence, and we cannot question its wisdom in this regard, the question is whether it can make it mandatory for the courts to deprive a person convicted of it of his liberty without violating s. 7. This, in turn, depends on whether attaching a mandatory term of imprisonment to an absolute liability offence such as this violates the principles of fundamental justice. I believe that it does. I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system referred to in para. (4) above.

135 It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system. This is not to say that there is an inherently appropriate relationship between a particular offence and its punishment but rather that there is a scale of offences and punishments into which the particular offence and punishment must fit. Obviously this cannot be done with mathematical precision and many different factors will go into the assessment of the seriousness of a particular offence for purposes of determining the appropriate punishment, but it does provide a workable conventional framework for sentencing. Indeed, judges in the exercise of their sentencing discretion have been employing such a scale for over a hundred years.

136 I believe that a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane. It is not required to reduce the incidence of the offence. It is beyond anything required to satisfy the need for "atonement". And society, in my opinion, would not be abhorred by an unintentional and unknowing violation of the section. I believe, therefore, that such a sanction offends the principles of fundamental justice embodied in our penal system Section 94(2) is accordingly inconsistent with s. 7 of the Charter and must, to the extent of the inconsistency, be declared of no force and effect under s. 52. I express no view as to whether a mandatory term of imprisonment for such an offence represents an arbitrary imprisonment within the meaning of s. 9 of the Charter or "cruel and unusual treatment or punishment" within the meaning of s. 12 because it is not necessary to decide those issues in order to answer the constitutional question posed.

137 I would dismiss the appeal and answer the constitutional question in the negative.

Appeal dismissed.

Most Negative Treatment: Check subsequent history and related treatments.

2013 SCC 72
Supreme Court of Canada

Bedford v. Canada (Attorney General)

2013 CarswellOnt 17681, 2013 CarswellOnt 17682, 2013 SCC 72, [2013] 3 S.C.R. 1101, [2013] S.C.J. No. 72, 110 W.C.B. (2d) 753, 128 O.R. (3d) 385 (note), 297 C.R.R. (2d) 334, 303 C.C.C. (3d) 146, 312 O.A.C. 53, 366 D.L.R. (4th) 237, 452 N.R. 1, 7 C.R. (7th) 1

Attorney General of Canada, Appellant/Respondent on cross-appeal and Terri Jean Bedford, Amy Lebovitch and Valerie Scott, Respondents/Appellants on cross-appeal

Attorney General of Ontario, Appellant/Respondent on cross-appeal and Terri Jean Bedford, Amy Lebovitch and Valerie Scott, Respondents/Appellants on cross-appeal and Attorney General of Quebec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secretariat of the Joint United Nations Programme on HIV/AIDS, British Columbia Civil Liberties Association, Evangelical Fellowship of Canada, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc., Interveners

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: June 13, 2013
Judgment: December 20, 2013 *
Docket: 34788

Proceedings: reversing *Bedford v. Canada (Attorney General)* (2012), 91 C.R. (6th) 257, 2012 ONCA 186, 2012 CarswellOnt 3557, 109 O.R. (3d) 1, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 290 O.A.C. 236, (sub nom. *Canada (Attorney General) v. Bedford)* 256 C.R.R. (2d) 143 (Ont. C.A.)**Proceedings: reversing in part *Bedford v. Canada (Attorney General)* (2010), 327 D.L.R. (4th) 52, 2010 CarswellOnt 7249, 2010 ONSC 4264, 102 O.R. (3d) 321, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256 (Ont. S.C.J.)Proceedings: additional reasons at *Bedford v. Canada (Attorney General)* (2010), 2010 ONSC 5712, 330 D.L.R. (4th) 159, 265 C.C.C. (3d) 387, 2010 CarswellOnt 10876 (Ont. S.C.J.)**

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Subject: Criminal; Constitutional; Civil Practice and Procedure; Evidence; Public; Human Rights

Headnote

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Miscellaneous

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation — Court of Appeal upheld finding against bawdy-house provision — Court of Appeal reversed application judge's finding in part by reading in "in circumstances of exploitation" into provision barring living off avails of prostitution — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — Basic values under s. 7 of Charter in present case were against arbitrariness, overbreadth, and gross disproportionality — Question under s. 7 is whether anyone's life, liberty or security of person has been denied by law that is inherently bad — Grossly disproportionate, overbroad, or arbitrary effect on just one person is sufficient to establish breach of s. 7 — Prohibitions at issue do not merely impose conditions on how sex trade workers operate: by imposing dangerous conditions on prostitution, they prevent people engaged in risky but legal activity from taking steps to protect themselves from risks — Prohibitions engaged s. 7 of Charter — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Overbreadth

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation — Court of Appeal upheld finding against bawdy-house provision — Court of Appeal agreed that prohibition against living off avails was overly broad but reversed application judge's finding in part by reading in "in circumstances of exploitation" — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — As found by courts below, living on avails provision is overbroad — Law punishes everyone who lives on avails of prostitution without distinguishing between those who exploit sex trade workers, such as pimps, and those who could increase their safety and security, such as drivers, receptionists or security personnel — Prohibitions engaged s. 7 of Charter — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Criminal law --- Offences — Prostitution and related offences — Living on avails of prostitution — Miscellaneous

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation — Court of Appeal upheld finding against bawdy-house provision — Court of Appeal agreed that prohibition against living off avails was overly broad but reversed application judge's finding in part by reading in "in circumstances of exploitation" — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — As found by courts below, living on avails provision is overbroad — Law punishes everyone who lives on avails of prostitution without distinguishing between those who exploit sex trade workers, such as pimps, and those who could increase their safety and security, such as drivers, receptionists or security personnel — Prohibitions engaged s. 7 of Charter — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Criminal law --- Offences — Prostitution and related offences — Soliciting — Miscellaneous

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Provisions included prohibition on communication in public place under s. 213(1)(c) of Code, which made face-to-face communication illegal — Application judge found that face-to-face communication was "essential tool" in reducing risks sex trade workers face by allowing them to screen prospective clients — Application judge also found that making it illegal had effect of displacing sex trade workers from familiar areas to more isolated areas, thereby making them more vulnerable — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation — Court of Appeal also upheld finding against bawdy-house provision but reversed application judge's finding in part by narrowing provision by reading in "in circumstances of exploitation" — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — Application judge correctly concluded that prohibition of such communication sufficed to engage security of person under s. 7 of Charter — Majority of Court of Appeal wrongly attributed errors in reasoning to application judge, who had concluded that s. 213(1)(c) was grossly disproportionate response to possibility of nuisance caused by street prostitution — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Criminal law --- Offences — Bawdy-house offences — Keeping common bawdy-house — Keeping

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, as well as living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Application judge found, on balance of probabilities, that safest form of prostitution was working independently from fixed location — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal upheld finding against bawdy-house provision — However, Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation and reversed application judge's finding in part by reading in "in circumstances of exploitation" into provision barring living off avails of prostitution — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — As was held by lower courts, objectives of bawdy-house provision are to combat neighbourhood disruption or disorder and to safeguard public health and safety — Negative impact of bawdy-house prohibition on respondents' security of person is grossly disproportionate to its objective — Harms identified by courts below are grossly disproportionate to deterrence of community disruption that is object of law — By imposing dangerous conditions on prostitution, prohibition prevents people engaged in risky but legal activity from taking steps to protect themselves from risks — Prohibitions engaged s. 7 of Charter — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Declaration of invalidity

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation — Court of Appeal upheld finding against bawdy-house provision — Court of Appeal reversed application judge's finding in part by reading in "in circumstances of exploitation" into provision barring living off avails of prostitution — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — Basic values under s. 7 of Charter in present case were against arbitrariness, overbreadth, and gross disproportionality — Question under s. 7 is whether anyone's life, liberty or security of person has been denied by law that is inherently bad — Grossly disproportionate, overbroad, or arbitrary effect on just one person is sufficient to establish breach of s. 7 — Prohibitions engaged s. 7 of Charter and were not saved by s. 1 — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Reading in

Criminal Code of Canada contained provisions that created offences barring keeping common bawdy-house, living off avails of prostitution and communication ("soliciting") for purpose of prostitution — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 7 of Canadian Charter of Rights and Freedoms — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that application judge erred in holding that provision barring "soliciting" constituted s. 7 Charter violation — Court of Appeal upheld finding against bawdy-house provision — Court of Appeal agreed that prohibition against living off avails was overly broad but reversed application judge's finding in part by reading in "in circumstances of exploitation" — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — As found by courts below, living on avails provision is overbroad — Law punishes everyone who lives on avails of prostitution without distinguishing between those who exploit sex trade workers, such as pimps, and those who could increase their safety and security, such as drivers, receptionists or security personnel — Prohibitions engaged s. 7 of Charter — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Judges and courts --- Stare decisis — Obiter dicta — Of Supreme Court of Canada

In 1990, Supreme Court of Canada held in Prostitution Reference that certain prostitution-related criminal offences, including keeping common bawdy-house, living off of avails of prostitution and communication ("soliciting") for purpose of prostitution, did not violate s. 7 of Canadian Charter of Rights and Freedoms — Majority judgment in Prostitution Reference considered s. 7 solely in context of "physical liberty" — Current and former sex trade workers brought application for declaration that these provisions were in violation of s. 2(b) and s. 7 of Charter — Application was granted and provisions were struck down — Crown brought appeal that was allowed in part — Court of Appeal held that trial judge asking to depart from precedent on basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by higher courts, but cannot apply them to arrive at different conclusion from previous precedent — Crown brought appeals against finding on bawdy-house prohibition; sex trade workers cross-appealed on soliciting provision and reading-in remedy — Appeals dismissed; cross-appeal allowed — While reference opinions may not be legally binding, in practice they have been followed — Supreme Court of Canada's advisory opinion upholding constitutionality of prohibitions on bawdy-houses and communicating was based on physical liberty interest under s. 7, not security of person — Principles of arbitrariness, overbreadth, and gross disproportionality raised in case at bar were developed only in past twenty years: arguments based on Charter provisions that were not raised in earlier case constituted new legal issue — As well, common law principle of stare decisis is subordinate to Constitution and cannot require court to uphold law that is unconstitutional — Prohibitions were declared to be inconsistent with Charter and hence void — Declaration of invalidity suspended for one year.

Droit criminel --- Charte des droits et libertés — Vie, liberté et sécurité de la personne [art. 7] — Divers

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Requête a été accordée et les dispositions ont été annulées — Appel interjeté

par le ministère public a été accueilli en partie — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Cour d'appel a infirmé en partie la conclusion de la juge de première instance en interprétant la disposition sur le proxénétisme comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Valeurs fondamentales qui sous-tendent l'art. 7 dans le présent dossier s'opposaient à l'arbitraire, à la portée excessive et à la disproportion totale — Question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement mauvaise prive qui que ce soit du droit à la vie, à la liberté ou à la sécurité de sa personne — Effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7 — Législateur ne se contente pas d'encadrer la pratique de la prostitution : en imposant des conditions dangereuses à la pratique de la prostitution, les interdictions empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus — Interdictions mettaient en jeu l'art. 7 de la Charte — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Charte des droits et libertés — Vie, liberté et sécurité de la personne [art. 7] — Principes de justice fondamentale — Portée excessive

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Cour d'appel convenait que l'interdiction concernant le proxénétisme avait une portée trop large, mais a infirmé en partie la conclusion de la juge de première instance en interprétant cette disposition comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Comme l'estimaient les juridictions inférieures, la portée de la disposition sur le proxénétisme est excessive — Disposition sanctionne quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite une prostituée, tel un proxénète, et celui qui peut accroître la sécurité d'une prostituée, tel un chauffeur, un réceptionniste ou un préposé à sa sécurité — Interdictions mettaient en jeu l'art. 7 de la Charte — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Infractions — Prostitution et infractions liées — Vivre des produits de la prostitution — Divers

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Cour d'appel convenait que l'interdiction concernant le proxénétisme avait une portée trop large, mais a infirmé en partie la conclusion de la juge de première instance en interprétant cette disposition comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Comme l'estimaient les juridictions inférieures, la portée de la disposition sur le proxénétisme est excessive — Disposition

sanctionne quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite une prostituée, tel un proxénète, et celui qui peut accroître la sécurité d'une prostituée, tel un chauffeur, un réceptionniste ou un préposé à sa sécurité — Interdictions mettaient en jeu l'art. 7 de la Charte — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Infractions — Prostitution et infractions liées — Sollicitation — Divers

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Parmi les dispositions visées, il y avait l'art. 213(1)c) du Code interdisant la communication en public, qui faisait en sorte que la communication entre les intéressés ne soit pas légale — Juge de première instance a conclu que la communication entre les intéressés était [TRADUCTION] « essentielle » à l'accroissement de la sécurité des travailleurs du sexe en permettant aux travailleurs du sexe de jauger leurs clients éventuels — Juge de première instance a également conclu que le fait de rendre la communication illégale avait pour effet de faire migrer les travailleurs du sexe vers des lieux isolés, ce qui les rendait plus vulnérables — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a également confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche, mais a infirmé en partie la conclusion de la juge de première instance en interprétant une disposition comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Juge de première instance a eu raison de conclure que l'interdiction de telles communications suffisait pour mettre en jeu la sécurité de personne en vertu de l'art. 7 de la Charte — Juges majoritaires de la Cour d'appel ont relevé à tort des erreurs dans le raisonnement de la juge de première instance, laquelle avait conclu que l'art. 213(1)c) constituait une réaction totalement disproportionnée au risque de nuisance causée par la prostitution de rue — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Infractions — Infractions concernant des maisons de débauche — Tenir une maison de débauche — Tenir les lieux

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Juge de première instance a conclu, selon la prépondérance des probabilités, que la forme de prostitution la plus sûre était celle qui se pratique de façon autonome dans un même lieu — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Toutefois, la Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte et a infirmé en partie la conclusion de la juge de première instance en interprétant la disposition portant sur le proxénétisme comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Comme l'estimaient les juridictions inférieures, l'objectif de la disposition sur les maisons de débauche est de lutter contre les troubles de voisinage et de protéger la santé et la sécurité publiques — Effet préjudiciable de l'interdiction de tenir des maisons de débauche sur la sécurité des demanderesses est totalement disproportionné à l'objectif poursuivi — Préjudices relevés par les juridictions inférieures sont totalement disproportionnés à l'objectif de réprimer le désordre public — En imposant des conditions dangereuses à la pratique de la prostitution, les interdictions empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus — Interdictions

mettaient en jeu l'art. 7 de la Charte — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Charte des droits et libertés — Réparations en vertu de la Charte [art. 24] — Déclaration d'invalidité

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Cour d'appel convenait que l'interdiction concernant le proxénétisme avait une portée trop large, mais a infirmé en partie la conclusion de la juge de première instance en interprétant cette disposition comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Valeurs fondamentales qui sous-tendent l'art. 7 dans le présent dossier s'opposaient à l'arbitraire, à la portée excessive et à la disproportion totale — Question que commande l'art. 7 est celle de savoir si une disposition législative intrinsèquement mauvaise prive qui que ce soit du droit à la vie, à la liberté ou à la sécurité de sa personne — Effet totalement disproportionné, excessif ou arbitraire sur une seule personne suffit pour établir l'atteinte au droit garanti à l'art. 7 — Interdictions mettaient en jeu l'art. 7 de la Charte et ne pouvaient pas être sauvegardées par application de l'article premier — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Charte des droits et libertés — Réparations en vertu de la Charte [art. 24] — Interpréter une disposition comme si certains mots s'y trouvaient

Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Cour d'appel convenait que l'interdiction concernant le proxénétisme avait une portée trop large, mais a infirmé en partie la conclusion de la juge de première instance en interprétant cette disposition comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Comme l'estimaient les juridictions inférieures, la portée de la disposition sur le proxénétisme est excessive — Disposition sanctionne quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite une prostituée, tel un proxénète, et celui qui peut accroître la sécurité d'une prostituée, tel un chauffeur, un réceptionniste ou un préposé à sa sécurité — Interdictions mettaient en jeu l'art. 7 de la Charte — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Juges et tribunaux --- Stare decisis — Obiter dicta — De la Cour suprême du Canada

En 1990, dans le Renvoi sur la prostitution, la Cour suprême du Canada a estimé que certaines infractions criminelles relatives à la prostitution, notamment l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et la communication en public (la « sollicitation ») à des fins de prostitution ne contrevenaient pas à l'art. 7 de la Charte canadienne des droits et libertés — Juges majoritaires, dans le Renvoi sur la prostitution, ont interprété l'art. 7 uniquement dans le contexte de la « liberté physique » — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 2b) et à l'art. 7 de la Charte — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a conclu que le tribunal de première instance invité à rompre avec un précédent en raison de nouveaux éléments de preuve ou de nouvelles données sociales, politiques ou

économiques peut tirer des conclusions de fait susceptibles d'être examinées ensuite par une juridiction supérieure, mais ne peut les appliquer pour arriver à une solution différente de celle retenue dans le précédent — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Bien que les avis consultatifs puissent ne pas être juridiquement contraignants, dans les faits, il sont suivis — Dans l'avis consultatif de la Cour suprême du Canada confirmant la constitutionnalité des interdictions de tenir une maison de débauche et de communiquer à des fins de prostitution, les juges statuaient en fonction du droit à la liberté physique de la personne garanti à l'art. 7, et non en fonction de la sécurité de la personne — Principes soulevés en l'espèce concernant le caractère arbitraire, la portée excessive et la disproportion totale des dispositions contestées n'ont été développés qu'au cours des vingt dernières années : les prétentions d'ordre constitutionnel qui n'ont pas été invoquées dans l'affaire antérieure constituaient de nouvelles questions de droit — Aussi, la règle du stare decisis issue de la common law est subordonnée à la Constitution et ne saurait avoir pour effet d'obliger un tribunal à valider une loi inconstitutionnelle — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Juges et tribunaux --- Compétence — Cours supérieures — Cour d'appel — Divers

Déférence — Dispositions du Code criminel canadien créaient des infractions relatives à l'acte de tenir une maison de débauche, de vivre des produits de la prostitution d'autrui et à la communication en public (la « sollicitation ») à des fins de prostitution — Travailleuses du sexe actives et retraitées ont déposé une requête en vue de faire déclarer que ces dispositions contrevenaient à l'art. 7 de la Charte canadienne des droits et libertés — Requête a été accordée et les dispositions ont été annulées — Appel interjeté par le ministère public a été accueilli en partie — Cour d'appel a estimé que les conclusions tirées en première instance sur des faits sociaux ou législatifs ne commandaient pas la déférence — Cour d'appel a conclu que la juge de première instance avait commis une erreur en concluant que la disposition portant sur la sollicitation contrevenait à l'art. 7 de la Charte — Cour d'appel a confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche — Cour d'appel a infirmé en partie la conclusion de la juge de première instance en interprétant la disposition interdisant le proxénétisme comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés — Ministère public a formé des pourvois à l'encontre des conclusions sur l'interdiction de tenir une maison de débauche; les travailleuses du sexe ont formé un pourvoi incident portant sur la disposition relative à la sollicitation et sur la mesure de réparation ayant pour effet d'interpréter une disposition en y ajoutant des mots qui ne s'y trouvent pas — Pourvois rejetés; pourvoi incident accueilli — Cour d'appel a commis une erreur en concluant que les conclusions tirées en première instance sur des faits sociaux ou législatifs ne commandaient pas la déférence — Appliquer une norme de contrôle aux faits en litige ainsi qu'à la crédibilité des témoins et en appliquer une autre aux faits sociaux ou législatifs revient à demander l'impossible aux juridictions d'appel — Cour d'appel ne devrait pas intervenir dans les conclusions tirées en première instance sur des faits sociaux ou législatifs, à moins que la juge de première instance ait commis une erreur susceptible de révision dans son appréciation de la preuve — Interdictions ont été déclarées non conformes à la Charte et, par conséquent, invalidées — Effet de la déclaration d'invalidité a été suspendu pendant un an.

Droit criminel --- Charte des droits et libertés — Limite raisonnable dont la justification peut se démontrer [art. 1]

Parallèles entre les règles qui interdisent le caractère arbitraire, la portée excessive ou la disproportion totale au regard de l'art. 7 de la Charte canadienne des droits et libertés et les éléments de l'analyse, fondée sur l'article premier, de la justification d'une disposition qui porte atteinte à un droit garanti par la Charte ne devraient pas permettre d'occulter les différences cruciales entre ces deux articles.

Parliament has criminalized various prostitution-related activities, including keeping a common bawdy-house (s. 210 of the Criminal Code of Canada); living off the avails of prostitution (s. 212(1)(j)); and communicating ("soliciting") for the purpose of prostitution (s. 213(1)(c)). In 1990, in Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada) ("The Prostitution Reference"), the Supreme Court of Canada held that the offences of keeping a common bawdy-house and communicating for the purpose of prostitution were constitutional.

Three sex trade workers brought an application for a declaration that the above-noted charging provisions were unconstitutional under the Canadian Charter of Rights and Freedoms.

The application was granted and all of the impugned provisions were declared unconstitutional, subject to a judicial stay pending the disposition of any appellate proceedings. The Crown appealed.

The appeal was allowed in part. The majority of the Court of Appeal upheld the invalidity of the bawdy-house provision. It agreed that the provision against living off the avails was overbroad; its remedy was to read in the words "in circumstances of exploitation". The majority allowed the appeal with respect to the communication or "soliciting" provision.

The Attorney General appealed from the Court of Appeal's declaration that ss. 210 and 212(1)(j) of the Code were unconstitutional. The respondents cross-appealed on the issue of the constitutionality of s. 213(1)(c), and in respect of the Court of Appeal's remedy to resolve the unconstitutionality of s. 210.

Held: The appeals were dismissed; the cross-appeal was allowed.

Per McLachlin C.J.C. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ. concurring): The Court of Appeal erred in holding that the application judge's findings on social and legislative facts were not entitled to deference. A court of appeal should not interfere with the trial judge's conclusions on social and legislative facts, absent reviewable error in the trial judge's appreciation of the evidence.

The Supreme Court of Canada's advisory opinion in The Prostitution Reference was based on the physical liberty interest under s. 7, not security of the person. Arguments based on Charter provisions that were not raised in the earlier case constituted a new legal issue.

The application judge correctly concluded that the bawdy-house prohibition materially increases the risks sex trade workers face, including preventing resort to safe houses. The bawdy-house provision negatively impacts the security of the person of sex trade workers and engages s. 7 of the Charter.

The evidence amply supported the application judge's conclusion that hiring drivers, receptionists, and bodyguards could increase the safety of sex trade workers but was prevented by the prohibition against living on the avails of prostitution of another person. Accordingly, s. 212(1)(j) of the Code negatively impacts security of the person and engages s. 7.

The application judge found that face-to-face communication was an "essential tool" in reducing the risks sex trade workers face by allowing them to screen prospective clients. The prohibition on soliciting (s. 213(1)(c) of the Code) had the effect of displacing sex trade workers from familiar areas to more isolated areas, thereby making them more vulnerable. The application judge correctly concluded that the prohibition of such communication sufficed to engage security of the person under s. 7.

The applicable standard for causation should be the flexible "sufficient causal connection", which allows the circumstances of each particular case to be taken into account and represents a fair and workable threshold for engaging s. 7 of the Charter.

The basic values under s. 7 in the present case are against arbitrariness, overbreadth, and gross disproportionality. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. Under s. 1, the question is whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest.

The negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. A law that prevents resort to a safe haven while a suspected serial killer prowls the streets is a law that has lost sight of its purpose.

As found by the courts below, the living on the avails provision is overbroad. The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit sex trade workers and those who could increase their safety and security.

The majority of the Court of Appeal wrongly attributed errors in reasoning to the application judge, who had had correctly concluded that prohibition on soliciting has a negative impact on the safety and lives of sex trade workers on the street that is grossly disproportionate to the possibility of nuisance caused by street prostitution.

By imposing dangerous conditions on prostitution, the prohibitions at issue prevent people engaged in a risky but legal activity from taking steps to protect themselves from the risks.

Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of sex trade workers. The regulation of prostitution is a complex and delicate matter. It will be for Parliament to devise a new approach, reflecting different elements of the existing regime, should it choose to do so.

Sections 210, 212(1)(j) and 213(1)(c) of the Code were declared to be inconsistent with the Charter and hence void. The declaration of invalidity was suspended for one year.

Le législateur a criminalisé diverses activités liées à la prostitution, notamment l'acte de tenir une maison de débauche (art. 210 du Code criminel canadien), de vivre des produits de la prostitution d'autrui (art. 212(1)j)) et la communication en public (la « sollicitation ») à des fins de prostitution (art. 213(1)c)). En 1990, dans le Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (canadien) (le « Renvoi sur la prostitution »), la Cour suprême du Canada a estimé que les infractions relatives à l'acte de tenir une maison de débauche et à la communication en public à des fins de prostitution étaient constitutionnelles.

Trois travailleuses du sexe ont déposé une requête en vue de faire déclarer que les dispositions susmentionnées étaient inconstitutionnelles en vertu de la Charte canadienne des droits et libertés.

La requête a été accordée et les dispositions contestées ont été déclarées inconstitutionnelles, l'effet de la décision étant suspendu le temps que les procédures d'appel connaissent leur dénouement. Le ministère public a interjeté appel.

L'appel a été accueilli en partie. Les juges majoritaires de la Cour d'appel ont confirmé l'invalidité de la disposition portant sur l'acte de tenir une maison de débauche. On a convenu que la disposition sur le proxénétisme avait une portée excessive et que la façon d'y remédier était de l'interpréter comme si les mots [TRADUCTION] « dans des situations d'exploitation » y étaient employés. Les juges majoritaires ont accueilli l'appel relativement à la disposition portant sur la communication ou la « sollicitation ».

Le procureur général a formé un pourvoi à l'encontre de la déclaration de la Cour d'appel selon laquelle les art. 210 et 212(1)j) du Code étaient inconstitutionnels. Les intimées ont formé un pourvoi incident portant sur la question de la constitutionnalité de l'art. 213(1)c) et à l'égard de la mesure de réparation adoptée par la Cour d'appel pour résoudre l'inconstitutionnalité de l'art. 210.

Arrêt: Les pourvois ont été rejetés; le pourvoi incident a été accueilli.

McLachlin, J.C.C. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) :

La Cour d'appel a commis une erreur en concluant que les conclusions tirées en première instance sur des faits sociaux ou législatifs ne commandaient pas la déférence. La Cour d'appel ne devrait pas intervenir dans les conclusions tirées en première instance sur des faits sociaux ou législatifs, à moins que la juge de première instance ait commis une erreur susceptible de révision dans son appréciation de la preuve.

L'avis consultatif de la Cour suprême du Canada dans le Renvoi sur la prostitution portait sur le droit à la liberté physique de la personne garanti par l'art. 7, et non sur la sécurité de la personne. Les prétentions d'ordre constitutionnel qui n'ont pas été invoquées dans l'affaire antérieure constituaient de nouvelles questions de droit.

La juge de première instance a eu raison de conclure que l'interdiction de tenir une maison de débauche augmente sensiblement le risque auquel s'exposent actuellement les travailleurs du sexe, notamment en empêchant l'existence d'endroits sûrs. La disposition sur les maisons de débauche a un effet préjudiciable sur le droit à la sécurité des travailleurs du sexe et met en jeu l'art. 7 de la Charte.

La preuve étayait amplement la conclusion de la juge de première instance selon laquelle l'embauche d'un chauffeur, d'un réceptionniste ou d'un garde du corps pourrait accroître la sécurité des travailleurs du sexe, mais que l'interdiction de vivre des produits de la prostitution d'autrui y faisait obstacle. Aussi, l'art. 212(1)j) du Code a un effet préjudiciable sur le droit à la sécurité de la personne et met en jeu l'art. 7.

La juge de première instance a conclu que la communication entre les intéressés était [TRADUCTION] « essentielle » à l'accroissement de la sécurité des travailleurs du sexe en permettant aux travailleusr du sexe de jauger leurs clients éventuels. L'interdiction de la communication (art. 213(1)c) du Code) a eu pour effet de faire migrer les travailleurs du sexe vers des lieux isolés, ce qui les a rendues plus vulnérables. La juge de première instance a eu raison de conclure que l'interdiction de la communication a une incidence sur la sécurité de la personne et met en jeu l'art. 7.

La norme de causalité applicable devrait être flexible et exiger un [TRADUCTION] « lien de causalité suffisant », ce qui permet de prendre en considération les circonstances propres à chaque affaire et constitue un critère juste et fonctionnel pour déterminer si l'art. 7 de la Charte est en jeu.

Les valeurs fondamentales qui sous-tendent l'art. 7 dans le présent dossier s'opposent à l'arbitraire, à la portée excessive et à la disproportion totale. Les trois notions supposent la comparaison de l'atteinte aux droits causée par la loi avec l'objectif de la loi, et non avec son efficacité. Pour les besoins de l'article premier, il faut se demander si l'effet préjudiciable sur les droits des personnes est proportionné à l'objectif urgent et réel de la loi dans la défense de l'intérêt public.

L'effet préjudiciable de l'interdiction de tenir des maisons de débauche sur la sécurité des demanderesses est totalement disproportionné à l'objectif. Les préjudices relevés par les juridictions inférieures sont totalement disproportionnés à l'objectif

de réprimer le désordre public. La disposition qui empêche un travailleur du sexe de recourir à un refuge sûr alors qu'un tueur en série est soupçonné de sévir dans les rues est une disposition qui a perdu de vue son objectif.

Comme l'estimaient les juridictions inférieures, la portée de la disposition sur le proxénétisme est excessive. La disposition sanctionne quiconque vit des produits de la prostitution d'autrui sans que ne soit établie de distinction entre celui qui exploite un travailleur du sexe et celui qui peut accroître la sécurité d'un travailleur du sexe.

Les juges majoritaires de la Cour d'appel ont relevé à tort des erreurs dans le raisonnement de la juge de première instance, laquelle avait eu raison de conclure que l'interdiction de la communication a un effet préjudiciable sur la sécurité et la vie des travailleurs du sexe de la rue qui est totalement disproportionné au risque de nuisance causée par la prostitution de rue.

En imposant des conditions dangereuses à la pratique de la prostitution, les interdictions faisant l'objet du présent litige empêchent des personnes qui se livrent à une activité risquée, mais légale, de prendre des mesures pour assurer leur propre protection contre les risques ainsi courus.

Il est loisible au législateur de limiter les modalités et les lieux d'exercice de la prostitution à condition qu'il le fasse sans porter atteinte aux droits constitutionnels des travailleurs du sexe. L'encadrement de la prostitution est un sujet complexe et délicat. Il appartiendra au législateur, s'il le juge opportun, de concevoir une nouvelle approche qui intègre les différents éléments du régime actuel.

Les articles 210, 212(1)j) et 213(1)c) du Code ont été déclarés non conformes à la Charte et, par conséquent, invalidés. L'effet de la déclaration d'invalidité a été suspendu pendant un an.

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s. 2(b) — considered

s. 7 — considered

s. 15 — considered

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Generally — referred to

Pt. V — referred to

s. 197(1) "common bawdy-house" — referred to

s. 197(1) "place" — considered

s. 210 — unconstitutional

s. 210(1) — considered

s. 212(1)(j) — unconstitutional

s. 213(1)(c) — unconstitutional

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Generally — referred to

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Words and phrases considered:

place

"Place" includes any defined space, even if unenclosed and used only temporarily (s. 197(1) of the [*Criminal Code*, R.S.C. 1985, c. C-46]; *R. v. Pierce and Golloher* (1982), 37 O.R. (2d) 721 (C.A.)). And by definition, it applies even if resorted to by only one person (s. 197(1); *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.)).

in-call

. . . where the john comes to the prostitute's residence . . .

out-call

. . . where the prostitute goes out and meets the client at a designated location, such as the client's home . . .

prostitution

. . . the exchange of sex for money . . .

arbitrariness

Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law.

. . .

Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person ([Stewart, Hamish: *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*. Toronto: Irwin Law, 2012], at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests.

overbreadth

. . . "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective.

. . .

Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary in part. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts.

failures of instrumental rationality

. . . "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* [Hamish Stewart, Toronto: Irwin Law] (2012), at p. 151). As Peter Hogg has explained:

The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.

("The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209 (citation omitted)).

gross disproportionality

Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.

Termes et locutions cités :

Local ou endroit

On entend par « local » ou « endroit » tout lieu défini, même s'il n'est pas enclos et n'est employé que temporairement (par. 197(1) du [*Code criminel*, L.R.C. 1985, ch. C-46]; *R. c. Pierce and Golloher* 1982 CanLII 2153 (ON CA), (1982), 37 O.R. (2d) 721 (C.A.)). De plus, il y a « local » ou « endroit » au sens de cette définition même lorsque le lieu est utilisé par une seule personne (par. 197(1); *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (C.A. Ont.)).

prostitution pratiquée chez soi

. . . où la prostituée reçoit ses clients chez elle . . .

prostitution itinérante

. . . où la prostituée rejoint le client dans un lieu convenu, telle la résidence de ce dernier . . .

prostitution

. . . l'échange de services sexuels contre de l'argent . . .

arbitraire

On a qualifié d'« arbitraire » la disposition dont l'effet n'avait aucun lien avec son objet.

. . .

Déterminer qu'une disposition est arbitraire ou non exige qu'on se demande s'il existe un lien direct entre son objet et l'effet allégué sur l'intéressé, s'il y a un certain rapport entre les deux. Il doit exister un lien rationnel entre l'objet de la mesure qui cause l'atteinte au droit garanti à l'art. 7 et la limite apportée au droit à la vie, à la liberté ou à la sécurité de la personne ([Stewart, Hamish: *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms*. Toronto: Irwin Law, 2012], p. 136). La disposition qui limite ce droit selon des modalités qui n'ont aucun lien avec son objet empiète arbitrairement sur ce droit.

portée excessive

. . . lorsqu'[une disposition] va trop loin et empiète sur un comportement sans lien avec son objectif.

. . .

Il y a portée excessive lorsqu'une disposition s'applique si largement qu'elle vise certains actes qui n'ont aucun lien avec son objet. La disposition est alors en partie arbitraire. Essentiellement, la situation en cause est celle où il n'existe aucun lien rationnel entre les objets de la disposition et certains de ses effets, mais pas tous.

manque de logique fonctionnelle

. . . [TRADUCTION] « manque de logique fonctionnelle », à savoir que la disposition « n'est pas suffisamment liée à son objectif ou, dans un certain sens, qu'elle va trop loin pour l'atteindre » (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* ([Hamish Stewart, Toronto: Irwin Law] 2012, p. 151). Peter Hogg explique :

[TRADUCTION] Les principes liés à la portée excessive, à la disproportion et au caractère arbitraire visent tous au fond à pallier ce que Hamish Stewart appelle un « manque de logique fonctionnelle », en ce sens que le tribunal reconnaît l'objectif législatif, mais examine le moyen choisi pour l'atteindre. Si ce moyen ne permet pas logiquement d'atteindre l'objectif, la disposition est dysfonctionnelle eu égard à son propre objectif.

(« The Brilliant Career of Section 7 of the Charter » (2012), 58 *S.C.L.R.* (2d) 195, p. 209, renvois omis)).

disproportion totale

La disproportion totale s'attache à d'autres éléments que ceux considérés pour le caractère arbitraire et la portée excessive. Elle vise la seconde faille fondamentale, à savoir le fait que les effets de la disposition sur la vie, la liberté ou la sécurité de la personne sont si totalement disproportionnés à ses objectifs qu'ils ne peuvent avoir d'assise rationnelle.

APPEALS and CROSS-APPEAL from judgment reported at *Bedford v. Canada (Attorney General)* (2012), 91 C.R. (6th) 257, 2012 ONCA 186, 2012 CarswellOnt 3557, 109 O.R. (3d) 1, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 290 O.A.C. 236, *(*sub nom. *Canada (Attorney General) v. Bedford)* 256 C.R.R. (2d) 143 (Ont. C.A.), overturning in part declaration that certain prostitution-related offences in *Criminal Code* were unconstitutional and of no force or effect as impairing certain rights as guaranteed by *Canadian Charter of Rights and Freedoms*.

POURVOIS et POURVOI INCIDENT formés à l'encontre d'un jugement publié à *Bedford v. Canada (Attorney General)* (2012), 91 C.R. (6th) 257, 2012 ONCA 186, 2012 CarswellOnt 3557, 109 O.R. (3d) 1, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 290 O.A.C. 236, *(*sub nom. *Canada (Attorney General) v. Bedford)* 256 C.R.R. (2d) 143 (Ont. C.A.), ayant infirmé en partie la déclaration selon laquelle certaines infractions liées à la prostitution prévues au *Code criminel* étaient inconstitutionnelles et étaient nulles et sans effet en ce qu'elles portaient atteinte à certains droits garantis par la *Charte canadienne des droits et libertés*.

McLachlin C.J.C. **(LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.

2 These appeals and the cross-appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster. I conclude that they do not. I would therefore make a suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament.

I. The Case

3 Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are unconstitutional.

4 The three impugned provisions criminalize various activities related to prostitution. They are primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. Section 212(1)(*j*) makes it an offence to live on the avails of another's prostitution. Section 213(1)(*c*) makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

5 However, prostitution itself is not illegal. It is not against the law to exchange sex for money. Under the existing regime, Parliament has confined lawful prostitution to two categories: street prostitution and "out-calls" — where the prostitute goes out and meets the client at a designated location, such as the client's home. This reflects a policy choice on Parliament's part. Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes.

6 The applicants allege that all three provisions infringe s. 7 of the *Canadian Charter of Rights and Freedoms* by preventing prostitutes from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violent clients. The applicants also allege that s. 213(1)(*c*) infringes s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

7 The backgrounds of the three applicants as revealed in their evidence were reviewed in the application judge's decision (2010 ONSC 4264, 102 O.R. (3d) 321 (Ont. S.C.J.)).

8 Terri Jean Bedford was born in Collingwood, Ontario, in 1959, and as of 2010 had 14 years of experience working as a prostitute in various Canadian cities. She worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. Ms. Bedford had a difficult childhood and adolescence during which she was subjected to various types of abuse. She also encountered brutal violence throughout her career — largely, she stated, while working on the street. In her experience, indoor prostitution is safer than prostitution on the street, although she conceded that safety of an indoor location can vary. Ms. Bedford has been convicted of both keeping and being an inmate of a common bawdy-house, for which she has paid a number of fines and served 15 months in jail.

9 When she ran an escort service in the 1980s, Ms. Bedford instituted various safety measures, including: ensuring someone else was on location during in-calls, except during appointments with well-known clients; ensuring that women were taken to and from out-call appointments by a boyfriend, husband, or professional driver; if an appointment was at a hotel, calling the hotel to verify the client's name and hotel room number; if an appointment was at a client's home, calling the client's phone to ensure it was the correct number; turning down appointments from clients who sounded intoxicated; and verifying that credit card numbers matched the names of clients. She claimed she was not aware of any incidents of violence by the clientele towards her employees during that time. At some point in the 1990s, Ms. Bedford ran the Bondage Bungalow, where she offered dominatrix services. She also instituted various safety measures at this establishment, and claimed she only experienced one incident of "real violence" (application decision, at para.30).

10 Ms. Bedford is not currently working in prostitution but asserted that she would like to return to working as a dominatrix in a secure, indoor location; however, she is concerned that in doing so, she would be exposed to criminal liability. Furthermore, she does not want the people assisting her to be subject to criminal liability due to the living on the avails of prostitution provision.

11 Amy Lebovitch was born in Montréal in 1979. She comes from a stable background and attended both CEGEP and university. She currently works as a prostitute and has done so since approximately 1997 in various cities in Canada. She worked first as a street prostitute, then as an escort, and later in a fetish house. Ms. Lebovitch considers herself lucky that she was never subjected to violence during her years working on the streets. She moved off the streets to work at the escort agency after seeing other women's injuries and hearing stories of the violence suffered by other street prostitutes. Ms. Lebovitch maintains that she felt safer in an indoor location; she attributed remaining safety issues mainly to poor management. Ms. Lebovitch experienced

one notable instance of violence, which she did not report to the police out of fear of police scrutiny and the possibility of criminal charges.

12 Presently, Ms. Lebovitch primarily works independently out of her home, where she takes various safety precautions, including: making sure client telephone calls are from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; getting referrals from regular clients; and calling a third party — her "safe call" — when the client arrives and before he leaves. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She says that the fear of criminal charges has caused her to work on the street on occasion. She is also concerned that her partner will be charged with living on the avails of prostitution. She has never been charged with a criminal offence of any kind. Ms. Lebovitch volunteers as the spokesperson for Sex Professionals of Canada ("SPOC"), and she also records information from women calling to report "bad dates" — incidents that ended in violence or theft. Ms. Lebovitch stated that she enjoys her job and does not plan to leave it in the foreseeable future.

13 Valerie Scott was born in Moncton, New Brunswick, in 1958. She is currently the executive director of SPOC, and she no longer works as a prostitute. In the past, she worked indoors, from her home or in hotel rooms; she also worked as a prostitute on the street, in massage parlours, and she ran a small escort business. She has never been charged with a criminal offence of any kind. When Ms. Scott worked from home, she would screen new clients by meeting them in public locations. She never experienced significant harm working from home. Around 1984, as awareness about HIV/AIDS increased, Ms. Scott was compelled to work as a street prostitute, since indoor clients felt entitled not to wear condoms. On the street, she was subjected to threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong.

14 Ms. Scott worked as an activist and, among other things, advocated against Bill C-49 (which included the current communicating provision). Ms. Scott stated that following the enactment of the communicating law, the Canadian Organization for the Rights of Prostitutes ("CORP") began receiving calls from women working in prostitution about the increased enforcement of the laws and the prevalence of bad dates. In response, Ms. Scott was involved in setting up a drop-in and phone centre for prostitutes in Toronto; within the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrest. In 2000, Ms. Scott formed SPOC to revitalize and continue the work previously done by CORP. As the executive director of this organization, she testified before a Parliamentary Subcommittee on Solicitation Laws in 2005. Over the years, Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution. If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

15 The three applicants applied pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that the provisions restricting prostitution are unconstitutional. The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many other documents. Some of the affiants were cross-examined.

II. Legislation

16 The relevant legislation is as follows:

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . . . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Criminal Code

197. (1) In this Part,

. . . . .

"common bawdy-house" means a place that is

(a) kept or occupied, or

(b) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

212. (1) Every one who

. . . . .

(*j*) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

213. (1) Every person who in a public place or in any place open to public view

. . . . .

(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

III. Prior Decisions

Ontario Superior Court of Justice (Himel J.)

17 The application judge, Himel J., concluded that the applicants had private interest standing to challenge the provisions. She held that the decision of this Court upholding the bawdy-house and communicating law in the *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) ("*Prostitution Reference*"), did not prevent her from reviewing their constitutionality because: (1) s. 7 jurisprudence has evolved considerably since 1990; in particular, the doctrines of arbitrariness, overbreadth and gross disproportionality had not yet been fully articulated and therefore were not argued or considered in the *Prostitution Reference*; (2) the evidentiary record before her was much richer, based on research not available in 1990; (3) the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid; and (4) the type of expression at issue differed from that considered in the *Prostitution Reference*.

18 In considering the legislative scheme as it exists and the evidence before her, Himel J. found that each of the impugned laws deprived the applicants and others like them of their liberty (by reason of potential imprisonment) and their security of the person (because they increased the risk of injury). The increased risk of violence created by the laws constituted a "sufficient" cause, engaging the security of the person protected by s. 7. She stated:

> With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial, stage of a potential transaction, thereby putting them at an increased risk of violence.
>
> In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence. [paras. 361-62]

19 Himel J. concluded that the deprivation of security thus established was not in accordance with the principles of fundamental justice, notably the requirements that laws not infringe security of the person in a way that is arbitrary, overbroad or grossly disproportionate.

20 Himel J. found the bawdy-house provision (s. 210) overbroad because it extended to virtually any place and allowed for convictions that were unrelated to the objective of preventing community nuisance. And the harms it inflicted were grossly disproportionate to the few nuisance complaints received. The effect of preventing prostitutes from working in-call at a regular indoor location was to force them to choose between their liberty interest (obeying the law) and their personal security.

21 Himel J. found the prohibition against living on the avails of prostitution (s. 212(1)(*j*)) arbitrary, overbroad and grossly disproportionate. While targeting exploitation by pimps, the provision encompasses virtually anyone who provides services to prostitutes. Prostitutes are forced to work alone, increasing the risk of harm, or work with people prepared to break the law. It increases reliance on pimps, and is therefore arbitrary. It catches non-exploitative relationships, and is therefore overbroad. And it creates the risk of severe violence from pimps and exploiters, making it grossly disproportionate.

22 Finally, Himel J. found the prohibition on communicating for the purposes of prostitution (s. 213(1)(*c*)) violates the principle against gross disproportionality. By preventing prostitutes from screening clients — an essential tool for enhancing

their safety — it endangers them out of all proportion to the small social benefit it provides. It also infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*.

23 Himel J. found that the infringement of the s. 7 and s. 2(*b*) rights imposed by the laws could not be justified under s. 1 of the *Charter*.

24 In the result, Himel J. declared the communicating and living on the avails offences unconstitutional, without suspension, and rectified the bawdy-house prohibition by striking the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210.

Ontario Court of Appeal (Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.)

25 The majority of the Court of Appeal, *per* Doherty, Rosenberg and Feldman J.J.A. (with whom the minority *per* MacPherson J.A. concurred on these issues), agreed with the application judge that the bawdy-house and living on the avails provisions were unconstitutional on the basis that they engaged the security of the person in a way that was not in accordance with the principles of fundamental justice (*Bedford v. Canada (Attorney General)*, 2012 ONCA 186, 109 O.R. (3d) 1 (Ont. C.A.)). In particular, the majority found as follows.

26 The prohibition on bawdy-houses was overbroad and had an impact on security that was grossly disproportionate to any benefit conferred. The court agreed that the word "prostitution" should be struck from the definition of "common bawdy-house". However, it suspended the declaration of invalidity for 12 months.

27 The prohibition on living on the avails was not arbitrary, as the application judge found, but was overbroad and grossly disproportionate in its effects. However, instead of striking the provision out, the court narrowed the provision by reading in "in circumstances of exploitation" (para. 267).

28 The majority of the Court of Appeal found the prohibition on communicating in public for the purpose of prostitution was constitutional. While it engaged security of the person, it did so in accordance with the principles of fundamental justice. The provision aims to combat nuisance-related problems caused by street solicitation. It is not arbitrary; it has been effective in protecting residential neighbourhoods from the targeted harms. Nor is it overbroad or grossly disproportionate. In finding the provision grossly disproportionate, the application judge erred by understating the objective in a way that did not reflect the evidence, and by over-emphasizing the impact of the provision on prostitutes' security of the person. The evidence did not establish that inability to communicate with customers contributed to the harm experienced by prostitutes to a degree that made the impact grossly disproportionate to the benefits. The majority also found that it was bound by the *Prostitution Reference*: thus, this provision violated s. 2(*b*) of the *Charter*, but was justified under s. 1 of the *Charter*.

29 The minority, *per* MacPherson J.A. (dissenting only on this one issue), would have struck down the communicating prohibition under ss. 7 and 1 of the *Charter* as grossly disproportionate to the legislative objective of combatting social nuisance. The minority found that: (1) its effects were equally or more serious than the other provision; (2) the application judge correctly stated the objective of the provision; (3) the record supported the conclusion that screening is an essential tool for safety; (4) beyond screening, the provision adversely impacts safety by forcing prostitutes to work in isolated and dangerous areas; (5) the provision impacts the most vulnerable class of prostitutes, street workers, raising s. 15 equality concerns; (6) the recent decision of this Court in *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), supports the conclusion that the provision violates s. 7; and (7) the compounding effect of legislation that drives prostitutes onto the streets and then denies them the ability to evaluate prospective clients supports unconstitutionality. This conclusion made it unnecessary for the minority to consider s. 2(*b*) of the *Charter*.

30 In the course of arriving at its conclusions, the majority of the Court of Appeal made a number of ancillary observations of importance.

31 In considering the doctrine of *stare decisis* and whether the application judge was bound by the *Prostitution Reference*, the court adopted a narrow view of when a trial judge can reconsider previous decisions of the Supreme Court of Canada on the

basis of changes in the social, economic or political landscapes: the trial judge cannot change the law, but is limited to making findings of fact and credibility to create the necessary evidentiary record which the Supreme Court of Canada can then consider. Reasons that justify a court departing from its own prior decisions cannot justify a lower court revisiting binding authority. This applies to determining what constitutes a reasonable limit on a right under s. 1 of the *Charter* (paras. 75-76).

32 On the standard of causation required to engage s. 7, the Court of Appeal held that the traditional causation analysis is inappropriate where it is legislation, and not the actions of a government official, that is said to have interfered with a s. 7 interest. Rather, the judge should conduct a practical, pragmatic analysis to determine what the legislation prohibits or requires, its impact on the persons affected, and whether this amounts to an interference with protected rights (paras. 107-9).

33 On the issue of deference to findings of fact of the application judge, the Court of Appeal held that findings on social and legislative facts are not entitled to appellate deference, while findings on the credibility of affiants and the objectivity of expert witnesses attract deference (paras. 128-31).

34 Regarding the purpose of the laws, the court rejected the Attorney General of Ontario's submission that there was an overarching legislative objective to eradicate, or at least discourage, prostitution. Rather, the purpose of each of the laws must be independently ascertained with reference to its unique historical context (paras. 165-70).

35 On the principles of fundamental justice, the Court of Appeal held that arbitrariness, overbreadth, and gross disproportionality each use a different filter to examine the connection between the law and the legislative objective. Arbitrariness is the absence of any link between the objective of the law and its negative impact on security of the person. Overbreadth addresses the situation where the law imposes limits on security of the person that go beyond what is required to achieve its objective. Gross disproportionality describes the case where the effects of the impugned law are so extreme that they cannot be justified by its object (paras. 143-49).

IV. Discussion

36 The appellant Attorneys General appeal from the Court of Appeal's declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. The respondents cross-appeal on the issue of the constitutionality of s. 213(1)(*c*), and in respect of the Court of Appeal's remedy to resolve the unconstitutionality of s. 210.

37 Before turning to the *Charter* arguments before us, I will first discuss two preliminary issues: (1) whether the 1990 decision in the *Prostitution Reference*, upholding the bawdy-house and communication prohibitions, is binding on trial judges and this Court; and (2) the degree of deference to be accorded to the application judge's findings on social and legislative facts.

Preliminary Issues

Revisiting the Prostitution Reference

38 Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.

39 The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.

40 In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on bawdy-houses and communicating — two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(*b*) of the *Charter*, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(*b*), it was a justifiable limit under s. 1 of the *Charter*. While reference opinions may not be legally binding, in practice they have been followed (G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168, at p. 175).

41 The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal disagreed with respect to the s. 2(*b*) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (at para. 76).

42 In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

43 The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).

44 I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

45 It follows that the application judge in this case was entitled to rule on whether the laws in question violated the security of the person interests under s. 7 of the *Charter*. In the *Prostitution Reference*, the majority decision was based on the s. 7 physical liberty interest alone. Only Lamer J., writing for himself, touched on security of the person — and then, only in the context of economic interests. Contrary to the submission of the Attorney General of Canada, whether the s. 7 interest at issue is economic liberty or security of the person is *not* "a distinction without a difference" (A.F., at para. 94). The rights protected by s. 7 are "independent interests, each of which must be given independent significance by the Court" (*R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.), at p. 52). Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years.

46 These considerations do not apply to the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference*. Re-characterizing the type of expression alleged to be infringed did not convert this argument into a new legal issue, nor did the more current evidentiary record or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate.

47 This brings me to the question of whether this Court should depart from its previous decision on the s. 2(*b*) aspect of this case. At heart, this is a balancing exercise, in which the Court must weigh correctness against certainty (*Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.), at para. 27). In this case, however, it is not necessary to determine whether this Court can depart from its s. 2(*b*) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds.

Deference to the Application Judge's Findings on Social and Legislative Facts

48 The Court of Appeal held that the application judge's findings on social and legislative facts — that is, facts about society at large, established by complex social science evidence — were not entitled to deference. With respect, I cannot agree. As this Court stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error.

49 When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.

50 There are two important practical reasons not to depart from the usual standard of review simply because social or legislative facts are at issue.

51 First, to do so would require the appeal court to duplicate the sometimes time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the experts, studies and research results. A new set of judges would need to take the hours if not weeks required to intimately appreciate and analyze the evidence. And counsel for the parties would be required to take the appellate judges through all the evidence once again so they could draw their own conclusions. All this would increase the costs and delay in the litigation process. In a review for error — which is what an appeal is — it makes more sense to have counsel point out alleged errors in the trial judge's conclusions on the evidence and confine the court of appeal to determining whether those errors vitiate the trial judge's conclusions.

52 Second, social and legislative facts may be intertwined with adjudicative facts — that is, the facts of the case at hand — and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.

53 As the Attorney General of Canada points out, this Court's decision in *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), suggested that legislative fact findings are owed less deference. However, the use of social science evidence in *Charter* litigation has evolved significantly since *RJR-MacDonald* was decided. In the intervening years, this Court has expressed a preference for social science evidence to be presented through an expert witness (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 (S.C.C.), at paras. 26-28; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 (S.C.C.), at para. 68). The assessment of expert evidence relies heavily on the trial judge (*R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), at paras. 62-96). This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence (*Inquiry into Pediatric Forensic Pathology in Ontario*: *Report*, vol. 3, *Policy and Recommendations* (2008)). The distinction between adjudicative and legislative facts can no longer justify gradations of deference.

54 This case illustrates the problem. The application judge arrived at her conclusions on the impact of the impugned laws on s. 7 security interests on the basis of the personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records. The Court of Appeal conceded that it must accord deference to her findings of adjudicative facts and the credibility of affiants and experts, but said it owes no deference to findings on social and legislative facts. The task of applying different standards of review when the evidence is intertwined would be daunting.

55 It is suggested that no deference is required on social and legislative facts because appellate courts are in as good a position to evaluate such evidence as trial judges. If this were so, adjudicative facts presented only in affidavit form would similarly be owed less deference. Yet this Court has been clear that, absent express statutory instruction, there is no middling standard of review for findings of fact (*L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.)). Furthermore, this view does not meet the concerns of duplication of effort and the intertwining of such evidence with other kinds of evidence. Nor does it address the point that the appellate task is not to review evidence globally, but rather to review the conclusions the first instance judge has drawn from the evidence.

56 For these reasons, I am of the view that a no-deference standard of appellate review for social and legislative facts should be rejected. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error.

Section 7 Analysis

57 In the discussion that follows, I first consider whether the applicants have established that the impugned laws impose limits on security of the person, thus engaging s. 7. I then examine the appellant Attorneys Generals' arguments that the laws do not cause the alleged harms. I go on to consider whether any limits on security of the person are in accordance with the principles of fundamental justice.

Is Security of the Person Engaged?

58 Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*.[1]

59 Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

60 For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

Sections 197 and 210: Keeping a Common Bawdy-House

61 It is not an offence to sell sex for money. The bawdy-house provisions, however, make it an offence to do so in any "place" that is "kept or occupied" or "resorted to" for the purpose of prostitution (ss. 197 and 210(1) of the *Code*). The reach of these provisions is broad. "Place" includes any defined space, even if unenclosed and used only temporarily (s. 197(1) of the *Code*; *R. v. Pierce* (1982), 37 O.R. (2d) 721 (Ont. C.A.)). And by definition, it applies even if resorted to by only one person (s. 197(1); *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.)).

62 The practical effect of s. 210 is to confine lawful prostitution to two categories: street prostitution and out-calls (application decision, at para. 385). In-calls, where the john comes to the prostitute's residence, are prohibited. Out-calls, where the prostitute goes out and meets the client at a designated location, such as the client's home, are allowed. Working on the street is also permitted, though the practice of street prostitution is significantly limited by the prohibition on communicating in public (s. 213 (1) (*c*)).

63 The application judge found, on a balance of probabilities, that the safest form of prostitution is working independently from a fixed location (para. 300). She concluded that indoor work is far less dangerous than street prostitution — a finding that the evidence amply supports. She also concluded that out-call work is not as safe as in-call work, particularly under the current regime where prostitutes are precluded by virtue of the living on the avails provision from hiring a driver or security guard. Since the bawdy-house provision makes the safety-enhancing method of in-call prostitution illegal, the application judge concluded that the bawdy-house prohibition materially increased the risk prostitutes face under the present regime. I agree.

64 First, the prohibition prevents prostitutes from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations, especially given the current prohibition on hiring drivers or security guards. This, in turn, prevents prostitutes from having a regular clientele and from setting up indoor safeguards like receptionists, assistants, bodyguards and audio room monitoring, which would reduce risks (application decision, at para. 421). Second, it interferes with provision of health checks and preventive health measures. Finally — a point developed in argument before us

— the bawdy-house prohibition prevents resort to safe houses, to which prostitutes working on the street can take clients. In Vancouver, for example, "Grandma's House" was established to support street workers in the Downtown Eastside, at about the same time as fears were growing that a serial killer was prowling the streets — fears which materialized in the notorious Robert Pickton. Street prostitutes — who the application judge found are largely the most vulnerable class of prostitutes, and who face an alarming amount of violence (para. 361) — were able to bring clients to Grandma's House. However, charges were laid under s. 210, and although the charges were eventually stayed — four years after they were laid — Grandma's House was shut down (supplementary affidavit of Dr. John Lowman, May 6, 2009, J.A.R., vol. 20, at p. 5744). For some prostitutes, particularly those who are destitute, safe houses such as Grandma's House may be critical. For these people, the ability to work in brothels or hire security, even if those activities were lawful, may be illusory.

65 I conclude, therefore, that the bawdy-house provision negatively impacts the security of the person of prostitutes and engages s. 7 of the *Charter*.

(b) Section 212(1)(j): Living on the Avails of Prostitution

66 Section 212(1)(*j*) criminalizes living on the avails of prostitution of another person, wholly or in part. While targeting parasitic relationships (*R. v. Downey*, [1992] 2 S.C.R. 10 (S.C.C.)), it has a broad reach. As interpreted by the courts, it makes it a crime for anyone to supply a service to a prostitute, because she is a prostitute (*R. v. Grilo* (1991), 2 O.R. (3d) 514 (Ont. C.A.); *R. v. Barrow* (2001), 54 O.R. (3d) 417 (Ont. C.A.)). In effect, it prevents a prostitute from hiring bodyguards, drivers and receptionists. The application judge found that by denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of the person (para. 361). As such, she found that the law engages s. 7 of the *Charter*.

67 The evidence amply supports the judge's conclusion. Hiring drivers, receptionists, and bodyguards, could increase prostitutes' safety (application decision, at para. 421), but the law prevents them from doing so. Accordingly, I conclude that s. 212(1)(*j*) negatively impacts security of the person and engages s. 7.

(c) Section 213(1)(c): Communicating in a Public Place

68 Section 213(1)(*c*) prohibits communicating or attempting to communicate for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute, in a public place or a place open to public view. The provision extends to conduct short of verbal communication by prohibiting stopping or attempting to stop any person for those purposes (*R. v. Head* (1987), 59 C.R. (3d) 80 (B.C. C.A.)).

69 The application judge found that face-to-face communication is an "essential tool" in enhancing street prostitutes' safety (para. 432). Such communication, which the law prohibits, allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face (paras. 301 and 421). This conclusion, based on the evidence before her, sufficed to engage security of the person under s. 7.

70 The application judge also found that the communicating law has had the effect of displacing prostitutes from familiar areas, where they may be supported by friends and regular customers, to more isolated areas, thereby making them more vulnerable (paras. 331 and 502).

71 On the evidence accepted by the application judge, the law prohibits communication that would allow street prostitutes to increase their safety. By prohibiting communicating in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.

72 I conclude that the evidence supports the application judge's conclusion that s. 213(1)(*c*) impacts security of the person and engages s. 7.

A Closer Look at Causation

73 For the reasons discussed above, the application judge concluded — and I agree — that the impugned laws negatively impact and thus engage security of the person rights of prostitutes. However, the appellant Attorneys General contend that s. 7 is not engaged because there is an insufficient causal connection between the laws and the risks faced by prostitutes. First, they argue that the courts below erroneously measured causation by an attenuated standard. Second, they argue that it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face. These arguments cannot succeed.

(a) The Nature of the Required Causal Connection

74 Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection", adopted by the application judge (paras. 287-88); (2) a general "impact" approach, adopted by the Court of Appeal (paras. 108-9); and (3) "active, foreseeable and direct" causal connection, urged by the appellant Attorneys General (A.G. of Canada factum, at para. 65; A.G. of Ontario factum, at paras. 14-15).

75 I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.), and applied in a number of subsequent cases (see e.g. *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 (S.C.C.); *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.)), it posits the need for "a *sufficient* causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).

76 A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Khadr v. Canada (Prime Minister)*, 2010 SCC 3, [2010] 1 S.C.R. 44 (S.C.C.), at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation — as opposed to the conduct of state actors — engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

77 The Attorney General of Canada argues for a higher standard. The prejudice to the claimant's security interest, he argues, must be active, foreseeable, and a "necessary link" (factum, at paras. 62 and 65). He relies on this Court's statement in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), (cited by way of contrast in *Blencoe*, at para. 69) that "[i]n the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights." He also relies on the Court's statement in *Suresh*, at para. 54, that "[a]t least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice". These statements establish that a causal connection is made out when the state action is a foreseeable and necessary cause of the prejudice. They do not, however, establish that this is the only way a causal connection engaging s. 7 of the *Charter* can be demonstrated.

78 Finally, from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the *Charter*. This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.

(b) Is the Causal Connection Negated by Choice or the Role of Third Parties?

79 The Attorneys General of Canada and Ontario argue that prostitutes choose to engage in an inherently risky activity. They can avoid both the risk inherent in prostitution and any increased risk that the laws impose simply by choosing not to engage in this activity. They say that choice — and not the law — is the real cause of their injury.

80 The Attorneys General contend that Parliament is entitled to regulate prostitution as it sees fit. Anyone who chooses to sell sex for money must accept these conditions. If the conditions imposed by the law prejudice their security, it is their choice to engage in the activity, not the law, that is the cause.

81 What the applicants seek, the Attorneys General assert, is a constitutional right to engage in risky commercial activities. Thus the Attorney General of Ontario describes the s. 7 claim in this case as a "veiled assertion of a positive right to vocational safety" (factum, at para. 25).

82 The Attorneys General rely on this Court's decision in *Malmo-Levine*, which upheld the constitutionality of the prohibition of possession of marijuana on the basis that the recreational use of marijuana was a "lifestyle choice" and that lifestyle choices were not constitutionally protected (para. 185).

83 The Attorneys General buttress this argument by asserting that if this Court accepts that these laws can be viewed as causing prejudice to the applicants' security, then many other laws that leave open the choice to engage in risky activities by only partially or indirectly regulating those activities will be rendered unconstitutional.

84 Finally, in a variant on the argument that the impugned laws are not the cause of the applicants' alleged loss of security, the Attorneys General argue that the source of the harm is third parties — the johns who use and abuse prostitutes and the pimps who exploit them.

85 For the following reasons, I cannot accept the argument that it is not the law, but rather prostitutes' choice and third parties, that cause the risks complained of in this case.

86 First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself" (cross-examination of Ms. Bedford, J.A.R., vol. 2, at p. 92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras. 458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" (transcript, at p. 22) — these are not people who can be said to be truly "choosing" a risky line of business (see *PHS*, at paras. 97-101).

87 Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution — the exchange of sex for money — is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.

88 Nor is it accurate to say that the claim in this case is a veiled assertion of a positive right to vocational safety. The applicants are not asking the government to put into place measures making prostitution safe. Rather, they are asking this Court to strike down legislative provisions that aggravate the risk of disease, violence and death.

89 It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

90 The government's call for deference in addressing the problems associated with prostitution has no role at this stage of the analysis. Calls for deference cannot insulate legislation that creates serious harmful effects from the charge that they negatively

impact security of the person under s. 7 of the *Charter*. The question of deference arises under the principles of fundamental justice, not at the early stage of considering whether a person's life, liberty, or security of the person is infringed.

91 Finally, recognizing that laws with serious harmful effects may engage security of the person does not mean that a host of other criminal laws will be invalidated. Trivial impingements on security of the person do not engage s. 7 (*New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 59). As already discussed, the applicant must show that the impugned law is sufficiently connected to the prejudice suffered before s. 7 is engaged. And even if s. 7 is found to be engaged, the applicant must then show that the deprivation of security is not in accordance with the principles of fundamental justice.

92 For all these reasons, I reject the arguments of the Attorneys General that the cause of the harm is not the impugned laws, but rather the actions of third parties and the prostitutes' choice to engage in prostitution. As I concluded above, the laws engage s. 7 of the *Charter*. That conclusion remains undisturbed.

Principles of Fundamental Justice

The Applicable Norms

93 I have concluded that the impugned laws deprive prostitutes of security of the person, engaging s. 7. The remaining step in the s. 7 analysis is to determine whether this deprivation is in accordance with the principles of fundamental justice. If so, s. 7 is not breached.

94 The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.) ("*Motor Vehicle Reference*"), at p. 512).

95 The principles of fundamental justice have significantly evolved since the birth of the *Charter*. Initially, the principles of fundamental justice were thought to refer narrowly to principles of natural justice that define procedural fairness. In the *Motor Vehicle Reference*, this Court held otherwise:

> ... it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice .... To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*. [pp. 501-2]

96 The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

97 The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel *Charter* claims.

98 Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law. In *Morgentaler*, the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to

the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law. Beetz J. called this "manifest unfairness" (*Morgentaler*, at p. 120), but later cases interpreted this as an "arbitrariness" analysis (see *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.), at para. 133, *per* McLachlin C.J. and Major J.).

99 In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.

100 Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.

101 Another way in which laws may violate our basic values is through what the cases have called "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective. In *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Court found that the law, which aimed to protect children from sexual predators, was overbroad; insofar as the law applied to offenders who did not constitute a danger to children, and insofar as it applied to parks where children were unlikely to be present, it was unrelated to its objective.

102 In *R. c. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489 (S.C.C.), the challenged provisions of the *Criminal Code* prevented an accused who was found unfit to stand trial from receiving an absolute discharge, and subjected the accused to indefinite appearances before a review board. The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (at para. 41). The Court found that insofar as the law applied to permanently unfit accused, who would never become fit to stand trial, the objective did "not apply" and therefore the law was overbroad (at paras. 42-43).

103 Laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state's objective. In *Malmo-Levine*, the accused challenged the prohibition on the possession of marijuana on the basis that its effects were grossly disproportionate to its objective. Although the Court agreed that a law with grossly disproportionate effects would violate our basic norms, the Court found that this was not such a case: "... the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action" (para. 175).

104 In *PHS*, this Court found that the Minister's refusal to exempt the safe injection site from drug possession laws was not in accordance with the principles of fundamental justice because the effect of denying health services and increasing the risk of death and disease of injection drug users was grossly disproportionate to the objectives of the drug possession laws, namely public health and safety.

105 The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.

106 As these principles have developed in the jurisprudence, they have not always been applied consistently. The Court of Appeal below pointed to the confusion that has been caused by the "commingling" of arbitrariness, overbreadth, and gross disproportionality (at paras. 143-51). This Court itself recently noted the conflation of the principles of overbreadth and gross disproportionality (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555 (S.C.C.), at paras. 38-40; see also *R. v. C. (S.S.)*, 2008

BCCA 262, 257 B.C.A.C. 57 (B.C. C.A.), at para. 72). In short, courts have explored different ways in which laws run afoul of our basic values, using the same words — arbitrariness, overbreadth, and gross disproportionality — in slightly different ways.

107 Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:

> The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.
>
> ("The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209 (citation omitted))

108 The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

109 The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

110 Against this background, it may be useful to elaborate on arbitrariness, overbreadth and gross disproportionality.

111 Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

112 Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.

113 Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.

114 It has been suggested that overbreadth is not truly a distinct principle of fundamental justice. The case law has sometimes said that overbreadth straddles both arbitrariness and gross disproportionality. Thus, in *Heywood*, Cory J. stated: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate" (p. 793).

115 And in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735 (S.C.C.), the companion case to *Malmo-Levine*, Gonthier and Binnie JJ. explained:

> Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out [in *Heywood*], related to arbitrariness. [Emphasis deleted; para. 38.]

116 In part this debate is semantic. The law has not developed by strict labels, but on a case-by-case basis, as courts identified laws that were inherently bad because they violated our basic values.

117 Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

118 An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective (see, e.g., *Chaoulli*, at paras. 233-34).

119 As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

120 Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

121 Gross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law. As this Court said in *Malmo-Levine*:

> In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7. [para. 181]

122 Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.

123 All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general

population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

The Relationship Between Section 7 and Section 1

124 This Court has previously identified parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights. These parallels should not be allowed to obscure the crucial differences between the two sections.

125 Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

126 As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

127 By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.

128 In brief, although the concepts under s. 7 and s. 1 are rooted in similar concerns, they are analytically distinct.

129 It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter (Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *Malmo-Levine*, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.

Do the Impugned Laws Respect the Principles of Fundamental Justice?

Section 210: The Bawdy-House Prohibition

(i) The Object of the Provision

130 The bawdy-house provision has remained essentially unchanged since it was moved to Part V of the *Criminal Code*, "Disorderly Houses, Gaming and Betting", in the 1953-54 *Code* revision (c. 51, s. 182). In *R. v. Rockert*, [1978] 2 S.C.R. 704 (S.C.C.), Estey J. found "little, if any, doubt" in the authorities that the disorderly house provisions were not directed at the mischief of betting, gaming and prostitution *per se*, but rather at the harm to the community in which such activities were carried on in a notorious and habitual manner (p. 712). This objective can be traced back to the common law origins of the bawdy-house provisions (see, e.g., E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, first published 1644, at pp. 205-6).

131 The appellant Attorneys General argue that the object of this provision, considered alone and in conjunction with the other prohibitions, is to deter prostitution. The record does not support this contention; on the contrary, it is clear from the legislative record that the purpose of the prohibition is to prevent community harms in the nature of nuisance.

132 There is no evidence to support a reappraisal of this purpose by Parliament. The doctrine against shifting objectives does not permit a new object to be introduced at this point (*R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.)). On its face, the provision is only directed at in-call prostitution, and so cannot be said to aim at deterring prostitution generally. To find that it operates with the other *Criminal Code* provisions to deter prostitution generally is also unwarranted, given their piecemeal evolution and patchwork construction, which leaves out-calls and prostitution itself untouched. I therefore agree with the lower courts that the objectives of the bawdy-house provision are to combat neighbourhood disruption or disorder and to safeguard public health and safety.

(ii) Compliance With the Principles of Fundamental Justice

133 The courts below considered whether the bawdy-house prohibition is overbroad, or grossly disproportionate.

134 I agree with them that the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. I therefore find it unnecessary to decide whether the prohibition is overbroad insofar as it applies to a single prostitute operating out of her own home (C.A., at para. 204). The application judge found on the evidence that moving to a bawdy-house would improve prostitutes' safety by providing "the safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate" (para. 427). Balancing this against the evidence demonstrating that "complaints about nuisance arising from indoor prostitution establishments are rare" (*ibid.*), she found that the harmful impact of the provision was grossly disproportionate to its purpose.

135 The Court of Appeal acknowledged that empirical evidence on the subject is difficult to gather, since almost all the studies focus on street prostitution. However, it concluded that the evidence supported the application judge's findings on gross disproportionality — in particular, the evidence of the high homicide rate among prostitutes, with the overwhelming number of victims being street prostitutes. The Court of Appeal agreed that moving indoors amounts to a "basic safety precaution" for prostitutes, one which the bawdy-house provision makes illegal (paras. 206-7).

136 In my view, this conclusion was not in error. The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.

Section 212(1)(j): Living on the Avails of Prostitution

(iii) The Object of the Provision

137 This Court has held, *per* Cory J. for the majority in *Downey*, that the purpose of this provision is to target pimps and the parasitic, exploitative conduct in which they engage:

> It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(j) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [p. 32]

138 The Attorneys General of Canada and Ontario argue that the true objective of s. 212(1)(*j*) is to target the commercialization of prostitution, and to promote the values of dignity and equality. This characterization of the objective does not accord with *Downey*, and is not supported by the legislative record. It must be rejected.

(iv) Compliance With the Principles of Fundamental Justice

139 The courts below concluded that the living on the avails provision is overbroad insofar as it captures a number of non-exploitative relationships which are not connected to the law's purpose. The courts below also concluded that the provision's negative effect on the security and safety of prostitutes is grossly disproportionate to its objective of protecting prostitutes from harm.

140 I agree with the courts below that the living on the avails provision is overbroad.

141 The provision has been judicially restricted to those who provide a service or good to a prostitute because she is a prostitute, thus excluding grocers and doctors, for instance (*Shaw v. Director of Public Prosecutions* (1961), [1962] A.C. 220 (U.K. H.L.)). It also has been held to require that exploitation be proven in the case of a person who lives with the prostitute, in order to exclude people in legitimate domestic relationships with a prostitute (*Grilo*). These refinements render the prohibition narrower than its words might suggest.

142 The question here is whether the law nevertheless goes too far and thus deprives the applicants of their security of the person in a manner unconnected to the law's objective. The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

143 The appellant Attorneys General argue that the line between an exploitative pimp and a prostitute's legitimate driver, manager or bodyguard, blurs in the real world. A relationship that begins on a non-exploitative footing may become exploitative over time. If the provision were tailored more narrowly — for example, by reading in "in circumstances of exploitation" as the Court of Appeal did — evidentiary difficulties may lead to exploiters escaping liability. Relationships of exploitation often involve intimidation and manipulation of the kind that make it very difficult for a prostitute to testify. For these reasons, the Attorneys General argue, the provision must be drawn broadly in order to effectively capture those it targets.

144 This argument is more appropriately addressed under the s. 1 analysis. As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one way the government may justify an overbroad law under s. 1 of the *Charter*.

145 Having found that the prohibition on living on the avails of prostitution is overbroad, I find it unnecessary to consider whether it is also grossly disproportionate to its object of protecting prostitutes from exploitative relationships.

Section 213(1)(c): Communicating in Public for the Purposes of Prostitution

(v) The Object of the Provision

146 The object of the communicating provision was explained by Dickson C.J. in the *Prostitution Reference*:

> Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) [now s. 213(1)(*c*)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.
>
> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. [pp. 1134-35]

147 It is clear from these reasons that the purpose of the communicating provision is not to eliminate street prostitution for its own sake, but to take prostitution "off the streets and out of public view" in order to prevent the nuisances that street prostitution can cause. The *Prostitution Reference* belies the Attorneys General's argument that Parliament's overall objective in these provisions is to deter prostitution.

(vi) Compliance With the Principles of Fundamental Justice

148 The application judge concluded that the harm imposed by the prohibition on communicating in public was grossly disproportionate to the provision's object of removing the nuisance of prostitution from the streets. This was based on evidence that she found established that the ability to screen clients was an "essential tool" to avoiding violent or drunken clients (application decision, at para. 432).

149 The majority of the Court of Appeal found that the application judge erred in her analysis of gross disproportionality by attaching too little importance to the objective of s. 213(1)(*c*), and by incorrectly finding on the evidence that face-to-face communication with a prospective customer is essential to enhancing prostitutes' safety (at paras. 306 and 310).

150 In my view, the Court of Appeal majority's reasoning on this question is problematic, largely for the reasons set out by MacPherson J.A., dissenting in part. Four aspects of the majority's analysis are particularly troubling.

151 First, in concluding that the application judge accorded too little weight to the legislative objective of s. 213(1)(*c*), the majority of the Court of Appeal criticized her characterization of the object of the provision as targeting "noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby" (C.A., at para. 306). But the application judge's conclusion was in concert with the object of s. 213(1)(*c*) established by Dickson C.J. in the *Prostitution Reference*, which the majority of the Court of Appeal endorsed earlier in their reasons (at para. 286).

152 Compounding this error, the majority of the Court of Appeal inflated the objective of the prohibition on public communication by referring to "drug possession, drug trafficking, public intoxication, and organized crime" (para. 307), even though Dickson C.J. explicitly *excluded* the exposure of "related violence, drugs and crime" to vulnerable young people from the objectives of s. 213(1)(*c*). At most, the provision's effect on these other issues is an ancillary benefit — and, as such, it should not play into the gross disproportionality analysis, which weighs the actual objective of the provision against its negative impact on the individual's life, liberty and security of the person.

153 The three remaining concerns with the majority's reasoning relate to the other side of the balance: the assessment of the impact of the provision.

154 First, the majority of the Court of Appeal erroneously substituted its assessment of the evidence for that of the application judge. It found that the application judge's conclusion that face-to-face communication is essential to enhancing prostitutes' safety was based only on "anecdotal evidence ... informed by her own common sense" (para. 311). This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts. MacPherson J.A. for the minority, correctly countered that the evidence on this point came from both prostitutes' own accounts and from expert assessments, and provided a firm basis for the application judge's conclusion (at paras. 348-50).

155 Second, the majority ignored the law's effect of displacing prostitutes to more secluded, less secure locations. The application judge highlighted this displacement (at para. 331), citing the evidence found in the report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws (*The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (2006)) on the effects of s. 213(1)(*c*). The majority's conclusion that the application judge did not have a proper basis to conclude that face-to-face communication enhances safety may be explained in part by their failure to consider the impact of the provision on displacement.

156 Related to this is the uncontested fact that the communication ban prevents street workers from bargaining for conditions that would materially reduce their risk, such as condom use and the use of safe houses.

157 Finally, the majority of the Court of Appeal majority, in rejecting the application judge's conclusions, relied on its own speculative assessment of the impact of s. 213(1)(*c*):

> While it is fair to say that a street prostitute might be able to avoid a "bad date" by negotiating details such as payment, services to be performed and condom use up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk. [para. 312]

158 It is certainly conceivable, as this passage suggests, that some street prostitutes would not refuse a client even if communication revealed potential danger. It is also conceivable that the danger may not be perfectly predicted in advance. However, that does not negate the application judge's finding that communication is an essential tool that can decrease risk. The assessment is qualitative, not quantitative. If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established.

159 In sum, the Court of Appeal wrongly attributed errors in reasoning to the application judge and made a number of errors in considering gross disproportionality. I would restore the application judge's conclusion that s. 213(1)(*c*) is grossly disproportionate. The provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

Do the Prohibitions Against Communicating in Public Violate Section 2(b) of the Charter?

160 Having concluded that the impugned laws violate s. 7, it is unnecessary to consider this question.

Are the Infringements Justified Under Section 1 of the Charter?

161 The appellant Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1 of the *Charter*. Only the Attorney General of Canada addressed this in his factum, and then, only briefly. I therefore find it unnecessary to engage in a full s. 1 analysis for each of the impugned provisions. However, some of their arguments under s. 7 of the *Charter* are properly addressed at this stage of the analysis.

162 In particular, the Attorneys General attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of

the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

163 The Attorneys General have not raised any other arguments distinct from those considered under s. 7. I therefore find that the impugned laws are not saved by s. 1 of the *Charter*.

V. Result and Remedy

164 I would dismiss the appeals and allow the cross-appeal. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) are declared to be inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void. The word 'prostitution' is struck from the definition of 'common bawdy-house' in s. 197(1) of the *Criminal Code* as it applies to s. 210 only.

165 I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.

166 This raises the question of whether the declaration of invalidity should be suspended and if so, for how long.

167 On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.)) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.

168 On the other hand, leaving the prohibitions against bawdy-houses, living on the avails of prostitution and public communication for purposes of prostitution in place in their present form leaves prostitutes at increased risk for the time of the suspension — risks which violate their constitutional right to security of the person.

169 The choice between suspending the declaration of invalidity and allowing it to take immediate effect is not an easy one. Neither alternative is without difficulty. However, considering all the interests at stake, I conclude that the declaration of invalidity should be suspended for one year.

Appeals dismissed; cross-appeal allowed.

Pourvois rejetés; pourvoi incident accueilli.

Footnotes

* Corrigenda issued by the Court on January 16 and 20, 2014 have been incorporated herein.

1 The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.

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Most Negative Treatment: Check subsequent history and related treatments.

1996 SCC 230
Supreme Court of Canada

R. v. M. (C.A.)

1996 CarswellBC 1000F, 1996 CarswellBC 1000, 1996 SCC 230, [1996] 1 S.C.R. 500, [1996] B.C.W.L.D. 1085, [1996] S.C.J. No. 28, 105 C.C.C. (3d) 327, 120 W.A.C. 81, 194 N.R. 321, 30 W.C.B. (2d) 177, 46 C.R. (4th) 269, 73 B.C.A.C. 81, EYB 1996-67066

R. v. C.A.M.

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 1, 1995
Judgment: March 21, 1996
Docket: Doc. 24027

Counsel: *Elizabeth Bennett, Q.C.*, for the Crown.
Clayton C. Ruby, for respondent.

Subject: Criminal

Headnote

Criminal Law --- Sentencing — Sentencing principles — Totality

Criminal Law --- Sentencing — Sentencing principles — Retribution and denunciation

Criminal Law --- Dangerous offender — Miscellaneous

Extended sentence where no dangerous offender application.

Sentencing — Principles — Fixed sentences not capped at 20 years — Sentencing judge having discretion to set just and appropriate sentence reflecting traditional goals subject to principle of proportionality.

Sentencing — Principles — Retribution being accepted principle of sentencing but must be distinguished from vengeance.

Sentencing — Considerations on sentencing — Possibility of parole — Effect of parole eligibility rules not constraining trial judge's discretion by capping fixed sentences at 20 years — Sentencing judge having discretion to set just and appropriate sentence reflecting traditional goals subject to principle of proportionality.

Sentencing — Appeals — Standard of review being whether sentence demonstrably unfit absent error in principle, failure to consider relevant factor or overemphasis of appropriate factors.

Appeals — Sentence appeals — Standard of review being whether sentence demonstrably unfit absent error in principle, failure to consider relevant factor or overemphasis of appropriate factors.

Appeals — Appeals to Supreme Court of Canada — Court having discretion to award costs but not conventionally done in criminal cases — Case not being remarkable or oppressive — Crown's conduct not being improper.

The accused was sentenced to a term of 25 years after pleading guilty to numerous counts of sexual assault, incest, assault with a weapon and other lesser offences arising from a pattern of sexual, emotional and physical abuse inflicted on his children over a period of years. The accused was 55 years old with no previous criminal record. He came from a dysfunctional background which included sexual abuse. The Crown had argued that 30 years was warranted in light of the devastating pattern of abuse and the questionable prospects for rehabilitation. On appeal, the total sentence was reduced to 18 years and 8 months on the basis that, where a life sentence is not available, the principle of totality places a ceiling on fixed-term cumulative sentences at a term of 20 years. The Crown appealed.

Held:

The appeal was allowed; the sentence of 25 years was restored.

Although Canadian courts have been reluctant to impose sentences totalling more than 20 years, Parliament has not placed a numerical cap on fixed-term sentences. Subject to stipulated maxima and minima, the sentencing judge is given considerable

latitude in determining the appropriate period of incarceration which advances the goals of sentencing and reflects the offender's culpability. Parliament intended to vest trial judges with a wide ambit of authority to impose a sentence which is just and appropriate and which adequately advances the core sentencing objectives of deterrence, denunciation, rehabilitation and the protection of society. The principle of proportionality requires that the quantum of sentence should be commensurate with the gravity of the offence and the moral blameworthiness of the offender. The principle of proportionality expresses itself as a constitutional obligation since a sentence that is so grossly disproportionate as to outrage standards of decency will violate s. 12 of the *Charter*. In the context of consecutive sentences, proportionality expresses itself through the totality principle which requires that the cumulative sentence not exceed the overall culpability of the offender. Only rarely have Canadian courts sustained sentences totalling more than 20 years.

There is no evidence that Parliament intended to constrain a sentencing judge's discretion by imposing a numerical ceiling on sentences at 20 years. Some appellate courts have fashioned a qualified ceiling rule which limits sentences to 20 years barring special circumstances that warrant a more onerous sentence. The next step up in the sentencing process would be life imprisonment. The principal argument in support of this rule arises from the applicable parole eligibility provisions which provide that a person serving a life sentence as a maximum punishment is eligible for parole after serving seven years from the date of arrest. For a fixed-term sentence, parole eligibility is set fractionally at one-third of the sentence of imprisonment calculated from the date of imposition to a limit of seven years. Accordingly, it has been argued that Parliament considers a fixed sentence beyond 21 years as largely irrelevant. Parliament established the parole system as a regime by which the conditions of incarceration could be altered by subsequent executive review rather than as a system by which a sentence could be reduced. There is no indication that parole eligibility rules were intended to constrain a court's ability to impose sentences beyond 20 years. The *Corrections and Conditional Release Act* was enacted to establish an administrative regime for executing and implementing the scheme of discretionary punishments authorized by the *Criminal Code*, not to restrict the sentencing discretion of trial judges. The history, structure and existing practice of the conditional release system indicates that parole represents a change in the conditions under which a sentence is served, not a reduction of the sentence. The setting of parole eligibility rules is animated by the sentencing goals of deterrence and denunciation. While one can infer that Parliament concluded that deterrence and denunciation require only a seven-year eligibility threshold, that does not mean that a court's ability to advance the goals of deterrence, denunciation, rehabilitation and protection of society are exhausted by a sentence of 20 years. The sentencing judge should be mindful of the age of an offender in applying relevant rules of sentencing. The utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence surpasses any reasonable estimation of the offender's remaining natural life span.

Retribution is an accepted and important principle of sentencing. While its legitimacy was questioned in the Court of Appeal, this did not play a significant or decisive role in the reduction of the sentence. Retribution represents the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should be imposed to sanction the moral culpability of the offender. Retribution is woven into the principles of sentencing through the requirement that the sentence be "just and appropriate". Retribution offers the conceptual link between criminal liability and the criminal sanction through the recognition of moral blameworthiness. Retribution bears little resemblance to vengeance. Vengeance is an uncalibrated act of harm upon another motivated by emotion and anger, while retribution is an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender having regard to the intentional risk-taking, the consequential harm and the normative character of the offender's conduct. Retribution incorporates the principle of restraint. It is conceptually distinct from denunciation because it requires the sentence to reflect the moral blameworthiness of the particular offender as compared to a denunciation of the offender's conduct. A sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching upon society's code of values as enshrined within our criminal law. In the justice system, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for punishment. Retribution must be considered in conjunction with other legitimate sentencing objectives, the weight and importance of which will vary depending on the nature of the crime and the circumstances of the offender.

The Crown was not required to invoke dangerous offender proceedings rather than seek an extended period of incarceration. Although the majority of the Court of Appeal did suggest that, once the Crown had chosen not to invoke dangerous offender proceedings, an extended term of imprisonment should not be imposed based on dangerousness and protection of society, these remarks did not substantially contribute to the reduction of the sentence and did not constitute a reversible error. The issue of

whether there are circumstances where a stringent fixed term motivated exclusively by dangerousness should be available to circumvent the substantive and procedural protections of Pt. XXIV of the Code should be left for another day.

A court of appeal should intervene to vary a sentence imposed at trial only if the sentence is demonstrably unfit absent an error in principle, failure to consider a relevant factor or an overemphasis of the appropriate factors. Sentencing judges are vested with the discretion to determine the appropriate degree and kind of punishment, and courts of appeal should apply a deferential standard of review. A sentencing judge who has presided over the trial and sentencing enjoys an advantage over an appellate judge, who only has the benefit of written and oral submissions. A sentencing judge also has experience in the front lines and in the local community where the consequences of the offence are felt. Appellate courts play an important role in minimizing disparity but must still exercise a margin of deference. Sentences should be expected to vary between communities and regions. A court of appeal should intervene where the sentence is a substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes. Here, the Court of Appeal engaged in an overly interventionist mode of review when, notwithstanding empirical studies on general deterrence, it was open to the sentencing judge to conclude that the particular blend of sentencing goals warranted a sentence of 25 years.

Although s. 47 of the *Supreme Court Act* provides a discretion to award costs in a criminal case, the general convention is that a criminal defendant, whether successful or not, is generally not entitled to costs. Here, there was nothing remarkable about the accused's case or any oppressive or improper conduct on the part of the Crown. The accused should not be awarded costs.

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R. v. Chaisson, [1995] 2 S.C.R. 1118, 99 C.C.C. (3d) 289, 41 C.R. (4th) 193, 183 N.R. 300, 163 N.B.R. (2d) 81, 419 A.P.R. 81 — *referred to*

R. c. Charest (1989), 30 Q.A.C. 227 (C.A.) — *referred to*

R. v. Childs (1984), 52 N.B.R. (2d) 9, 137 A.P.R. 9 (C.A.) — *referred to*

R. v. Currie (1990), 98 N.S.R. (2d) 287, 263 A.P.R. 287 (C.A.) — *referred to*

R. v. D. (E.) (1992), 16 B.C.A.C. 193, 28 W.A.C. 193 (C.A.) — *distinguished*

R. v. D. (G.W.) (March 8, 1990), Doc. Vancouver CA009244, Lambert, Hutcheon and Hinds JJ.A. (B.C. C.A.), [1990] B.C.W.L.D. 969 — *distinguished*

R. v. Dipietro (1991), 120 A.R. 102, 8 W.A.C. 102 (C.A.) — *referred to*

R. v. Eneas (February 10, 1994), Southin, Wood and Gibbs JJ.A. (B.C. C.A.) [unreported], leave to appeal to S.C.C. refused (March 21, 1996), Doc. 24086, Lamer C.J.C., Cory and Iacobucci JJ. (S.C.C.) — *referred to*

R. v. Gamble, 66 C.R. (3d) 193, [1988] 2 S.C.R. 595, 45 C.C.C. (3d) 204, *(*sub nom. *Gamble v. R.)* 89 N.R. 161, 31 O.A.C. 81, 37 C.R.R. 1 — *considered*

R. v. Gardiner, [1982] 2 S.C.R. 368, 30 C.R. (3d) 289, 140 D.L.R. (3d) 612, 68 C.C.C. (2d) 477, 43 N.R. 361 — *considered*

R. v. Goltz, 8 C.R. (4th) 82, 31 M.V.R. (2d) 137, 61 B.C.L.R. (2d) 145, 67 C.C.C. (3d) 481, 131 N.R. 1, 7 C.R.R. (2d) 1, [1991] 3 S.C.R. 485, 5 B.C.A.C. 161, 11 W.A.C. 161 — *considered*

R. v. Gorham (1987), 22 O.A.C. 237 (C.A.) — *referred to*

R. v. Gourgon (No. 2) (1981), 21 C.R. (3d) 384, 58 C.C.C. (2d) 193 (B.C. C.A.) — *considered*

R. v. Haig (1974), 26 C.R.N.S. 247 (Ont. C.A.) — *referred to*

R. v. Hastings (1985), 36 Alta. L.R. (2d) 193, 44 C.R. (3d) 143, 19 C.C.C. (3d) 86, 58 A.R. 108 (C.A.) — *referred to*

R. v. Hicks (1995), 56 B.C.A.C. 259, 92 W.A.C. 259 (C.A.) — *referred to*

R. v. Hill (1974), 15 C.C.C. (2d) 145 (Ont. C.A.), affirmed *(*sub nom. *Hill v. R.)* [1977] 1 S.C.R. 827, 23 C.C.C. (2d) 321, 6 N.R. 413, 58 D.L.R. (3d) 697 — *considered*

R. v. Hinch (1967), 2 C.R.N.S. 350, 62 W.W.R. 205, [1968] 3 C.C.C. 39 (B.C. C.A.) — *referred to*

R. v. Hoyt (1992), 17 C.R. (4th) 338, 77 C.C.C. (3d) 289, 19 B.C.A.C. 231, 34 W.A.C. 231 (C.A.) — *referred to*

R. v. J. (J.T.) (1991), 73 Man. R. (2d) 103, 3 W.A.C. 103 (C.A.) — *distinguished*

R. v. Jones, 30 C.R. (4th) 1, 166 N.R. 321, 43 B.C.A.C. 241, 69 W.A.C. 241, 89 C.C.C. (3d) 353, [1994] 2 S.C.R. 229, 114 D.L.R. (4th) 645, 21 C.R.R. (2d) 286 — *referred to*

R. v. Kempton (1980), 21 A.R. 212, 12 Alta. L.R. (2d) 258, 53 C.C.C. (2d) 176 (C.A.)*referred to*

R. v. Knife (1982), 16 Sask. R. 40 (C.A.) — *referred to*

R. v. L. (T.P.), *(*sub nom. *R. v. L.)* 80 N.R. 161, [1987] 2 S.C.R. 309, 61 C.R. (3d) 1, 82 N.S.R. (2d) 271, 207 A.P.R. 271, *(*sub nom. *L. v. R.)* 37 C.C.C. (3d) 1, 44 D.L.R. (4th) 193, 32 C.R.R. 41 — *considered*

R. v. Luxton, [1990] 6 W.W.R. 137, 79 C.R. (3d) 193, 76 Alta. L.R. (2d) 43, 112 N.R. 193, 58 C.C.C. (3d) 449, [1990] 2 S.C.R. 711, 50 C.R.R. 175, 111 A.R. 161 — *referred to*

R. v. Ly (1992), 72 C.C.C. (3d) 57, *(*sub nom. *R. v. Ly (No. 2))* 78 Man. R. (2d) 209, 16 W.A.C. 209 (C.A.) — *considered*

R. v. M. (D.E.S.) (1993), 21 C.R. (4th) 55, 80 C.C.C. (3d) 371, 24 B.C.A.C. 305, 40 W.A.C. 305 (C.A.) — *referred to*

R. v. M. (J.J.), 20 C.R. (4th) 295, 152 N.R. 274, [1993] 2 S.C.R. 421, 81 C.C.C. (3d) 487, 85 Man. R. (2d) 161, 41 W.A.C. 161 — *considered*

R. v. Martineau, [1990] 6 W.W.R. 97, 58 C.C.C. (3d) 353, 112 N.R. 83, 79 C.R. (3d) 129, 76 Alta. L.R. (2d) 1, [1990] 2 S.C.R. 633, 109 A.R. 321, 50 C.C.C. 110 — *referred to*

R. v. Mellstrom, [1975] 3 W.W.R. 385, 29 C.R.N.S. 327, 22 C.C.C. (2d) 472 (Alta. C.A.) — *referred to*

R. v. Morrissette (1970), 75 W.W.R. 644, 12 C.R.N.S. 392, 1 C.C.C. (2d) 307, 13 Cr. L.Q. 268 (Sask. C.A.) — *referred to*

R. v. Nichols (1978), 9 A.R. 203 (C.A.) — *referred to*

R. v. Nienhuis (1991), 117 A.R. 253, 2 W.A.C. 253 (C.A.) — *referred to*

R. v. Olan (October 11, 1977), Doc. 14000 (S.C.C.) — *referred to*

R. v. Parsons (1993), 24 C.R. (4th) 112, 15 O.R. (3d) 1, 65 O.A.C. 61, 84 C.C.C. (3d) 226, 17 C.R.R. (2d) 104 (C.A.) — *referred to*

R. c. Pelletier (1989), 1989 CarswellQue 591, 52 C.C.C. (3d) 340 (Que. C.A.) — *referred to*

R. v. Pettigrew (1990), 56 C.C.C. (3d) 390 (B.C. C.A.) — *referred to*

R. v. Pontello (1977), 38 C.C.C. (2d) 262 (Ont. C.A.) — *referred to*

R. v. Pruner (1979), 9 C.R. (3d) S-8 (Ont. C.A.) — *referred to*

R. v. Rooke (February 9, 1990), Docs. Victoria V000354 and V000355, Lambert, Taylor and Wood JJ.A. (B.C. C.A.), [1990] B.C.W.L.D. 903 — *distinguished*

R. v. Sargeant (1974), 60 Cr. App. Rep. 74 (C.A.) — *considered*

R. v. Saumer, [1977] 3 W.W.R. 385 (B.C. C.A.) — *referred to*

R. v. Shropshire, 43 C.R. (4th) 269, 102 C.C.C. (3d) 193, 188 N.R. 284, 129 D.L.R. (4th) 657, 65 B.C.A.C. 37, 106 W.A.C. 37, [1995] 4 S.C.R. 227 — *considered*

R. v. Smith, [1987] 5 W.W.R. 1, 75 N.R. 321, 15 B.C.L.R. (2d) 273, 58 C.R. (3d) 193, [1987] 1 S.C.R. 1045, *(*sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 40 D.L.R. (4th) 435, 31 C.R.R. 193 — *considered*

R. v. Sweeney (1992), 33 M.V.R. (2d) 1, 11 C.R. (4th) 1, 71 C.C.C. (3d) 82, 7 B.C.A.C. 1, 15 W.A.C. 1 (C.A.) — *referred to*

R. v. Trask, 59 C.R. (3d) 179, 79 N.R. 145, 66 Nfld. & P.E.I.R. 262, 204 A.P.R. 262, [1987] 2 S.C.R. 304, 68 Nfld. & P.E.I.R. 271, 209 A.P.R. 271, *(*sub nom. *Trask v. R.)* 37 C.C.C. (3d) 92, 32 C.C.C. 187 — *referred to*

R. v. Vaillancourt, 81 N.R. 115, 60 C.R. (3d) 289, [1987] 2 S.C.R. 636, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, *(*sub nom. *Vaillancourt v. R.)* 32 C.R.R. 18 — *referred to*

R. v. Velmurugu (1994), 74 O.A.C. 393 (C.A.) — *referred to*

R. v. Wilmott, [1966] 2 O.R. 654, 49 C.R. 22, [1967] 1 C.C.C. 171, 58 D.L.R. (2d) 33 (C.A.) — *referred to*

R. v. Wood (1979), 21 C.L.Q. 423 (Ont. C.A.)*referred to*

R. v. Yazdani, *(*sub nom. *Yazdani c. R.)* [1992] R.J.Q. 2385, 50 Q.A.C. 288 (C.A.) — *referred to*

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30 — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11 —

s. 7

s. 12

Conditional Liberation of Penitentiary Convicts, An Act to provide for the, S.C. 1899, c. 49.

Corrections and Conditional Release Act, S.C. 1992, c. 20 —

s. 3(*a*)

s. 99(1) "full parole"

s. 120(1)

s. 120(2)

s. 128(1)

s. 133(3)

s. 133(4)

s. 135(1)

Criminal Code, R.S.C. 1985, c. C-46 —

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s. 155(1)

s. 235

s. 264.1(1)(*a*)

s. 266

s. 267(1)

s. 271

s. 683(3)

s. 687(1)

s. 717

s. 717(1)

s. 717(2)

s. 717(4)(*c*)

s. 721(1)

s. 721(3)

s. 741.2

s. 744

s. 839(3)

Criminal Law Amendment Act, 1977, S.C. 1976-77, c. 53.

Parole Act, S.C. 1958, c. 38 —

s. 2(*d*) "parole"

s. 11(1)

Parole Act, R.S.C. 1970, c. P-2 [R.S.C. 1985, c. P-2] [rep. Corrections and Conditional Release Act, S.C. 1992, c. 20, s. 213].

Penitentiary Act of 1868, The, S.C. 1868, c. 75.

Supreme Court Act, R.S.C. 1985, c. S-26 —

s. 47

Regulations considered:

Corrections and Conditional Release Act, S.C. 1992, c. 20 —

Corrections and Conditional Release Regulations,

SOR/92-620,

s. 161(1)

Parole Act, S.C. 1958, c. 38 —

Parole Regulations,

SOR/60-216,

s. 2(1)(*a*) [re-en. SOR/73-298, s. 1]

Words and phrases considered:

RETRIBUTION

Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender.

. . . retribution bears little relation to vengeance . . . Vengeance . . . represents an uncalibrated act of harm upon another, frequently motivated by emotion or anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured denunciation of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflects the moral blameworthiness of that particular offender.

TOTALITY PRINCIPLE

The totality principle . . . requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not extend the overall culpability of the offender.

Appeal from judgment reported at (1994), 28 C.R. (4th) 106, 40 B.C.A.C. 7, 65 W.A.C. 7 (C.A.) allowing accused's appeal to reduce sentence.

The judgment of the court was delivered by *Lamer C.J.C.*:

1 In 1992, the respondent, C.A.M., pleaded guilty to numerous counts of sexual assault, incest, assault with a weapon, in addition to other lesser offences, arising from a largely uncontested pattern of sexual, physical and emotional abuse inflicted upon his children over a number of years. None of the offences committed by the respondent carried a penalty of life imprisonment. The trial judge, remarking that the offences of the respondent were "as egregious as any offences that I have ever had the occasion to deal with", sentenced him to a cumulative sentence of 25 years, with individual sentences running both consecutively and concurrently. The British Columbia Court of Appeal, however, reduced the sentence of the respondent to 18 years and 8 months: (1994), 28 C.R. (4th) 106, 40 B.C.A.C. 7, 65 W.A.C. 7. Following a line of jurisprudence it had developed in recent years, the Court of Appeal concluded that where life imprisonment is not available as a penalty, the "principle of totality" requires trial judges to limit fixed-term cumulative sentences under the *Criminal Code* of Canada, R.S.C. 1985, c. C-46, to a term of imprisonment of 20 years, absent special circumstances. Accordingly, the fundamental issue presented by this appeal concerns whether or not the Court of Appeal erred in law in holding that there is such a qualified ceiling on fixed-term sentences under the *Criminal Code*.

I. Factual Background

2 The respondent is a 55-year-old man with no prior history of criminal conduct. In 1972, after two previous marriages, the respondent married his third wife (now deceased). During that marriage, he fathered nine children. The children included an older pair of female twins, E.M.M. and J.P.M., born in 1974, and a number of younger male and female children. For most of his life, the respondent worked as a labourer across the Western provinces, alternatively employed as a hard rock miner, a truck driver, a mechanic and an oil field worker. As a result of the transient nature of his employment, the family was somewhat itinerant and moved frequently from locations in Manitoba, Alberta, Saskatchewan and British Columbia. In or about February 1987, the family moved to Fort Nelson, B.C., and in or about February, 1988, the family relocated again to Saanich, B.C.

3 On May 14, 1992, a Canada Post letter carrier called the Saanich Police Department to report that he had observed several young children who had been left unattended in distressing living conditions at the respondent's residence. At 1:30 p.m. that day, two police constables visited the residence accompanied by a social services worker. By their accounts, the residence contained no furniture or food, and was filthy. The children were barely clothed, malnourished, and slightly delirious. One constable also noticed numerous long-term scars over the arms and legs of the children. In his report, the same constable described his reaction to the exigent circumstances under which the children were living:

> I have attended hundreds of residences in the past seven and a half years and in my opinion the residence was the worst I had ever seen, and that the children were in need of apprehension.

Upon inquiries, the older children advised the constables that their father, the respondent, had left the home approximately one year before. The respondent, it would later be revealed, had left the residence in 1990 for Fort Nelson, and eventually Moose Jaw, Saskatchewan, following separation from his wife. In their ensuing discussions with the constables, the older daughters also began to disclose allegations of past physical and sexual abuse by their father.

4 In the next two days, one of the daughters met with the police constables, at which time she spoke at length concerning the physical and sexual abuse which she had suffered at the hands of the respondent. In the course of the ensuing investigation, the respondent was arrested in Moose Jaw and was returned to Victoria in police custody. On November 30, 1992, the respondent entered a plea of guilty before Filmer Prov. Ct. J. to an amended information which included five counts of assault with a weapon, two counts of assault, two counts of sexual assault, one count of incest and one count of uttering a threat. The respondent was convicted, and the judge ordered psychological and psychiatric evaluations and scheduled a hearing for the purpose of sentencing.

II. Sentencing Submissions

5 On February 8, 1993, Filmer Prov. Ct. J. convened a hearing to entertain submissions as to sentence. Although the respondent had been convicted of a number of serious offences, none of the offences carried life imprisonment as a penalty. The respondent, however, had pleaded guilty to one offence which bore a maximum term of imprisonment of 14 years, and to six offences which carried maximum terms of imprisonment of 10 years, in addition to the remaining lesser offences which carried maximum sentences of 5 years. The Crown, from the outset, requested a cumulative sentence of more than twenty years imprisonment given the magnitude of the respondent's crimes. In its oral and written submissions before the court, the Crown presented a psychological report by a Dr. Malcolm, a psychiatric report by a Dr. Lohrasbe, and written victim impact statements by E.M.M. and J.P.M., among other exhibits including letters and poems written by children. Counsel for the defence, in reply, contended that the Crown's request was excessive and that a sentence of ten to fourteen years was adequate to advance the sentencing goals of deterrence and denunciation. While conceding the "extensive" physical and sexual abuse committed by the respondent, counsel underscored his client's past personal experiences with abuse, his client's willingness to forego a painful trial, and his client's genuine expressions of remorse for his crimes.

6 Given that this appeal implicates questions concerning the reasonableness of the sentence imposed by Filmer Prov. Ct. J., I find it necessary to examine the sentencing submissions of both the Crown and the respondent in some depth in order to illustrate the full gravity of the respondent's crimes.

A. Submissions of the Crown

7 In the course of developing its submissions, the Crown revealed a disturbing, horrific pattern of physical and sexual abuse which the nine children suffered at the hands of the respondent. From 1988 to 1991, it does not appear to be seriously contested that the daily lives of these children were punctuated by cruel, spontaneous acts of aggravated violence perpetrated by their father. Rather than representing a caring figure of love and protection, their father appeared to represent a haunting, malevolent figure who instilled fear in their daily existence.

8 In its pleadings, the Crown described how the four eldest children suffered a long history of physical abuse which consisted of almost daily beatings administered by their father. Although the beatings normally involved the use of open hands, fists and feet, on more serious occasions they included the use of weapons such as steel-toed work boots, knives, belts, broomsticks, electrical cords, tools and (on one alleged occasion) a toaster. Although the children could not identify any discrete point in time during which the beatings began, the physical assaults assumed a regularity in timing and in intensity once the family had moved to Fort Nelson. The beatings did not appear to follow any consistent pattern of motivation on behalf of the respondent; at times, it appears that the respondent was motivated by spontaneous bursts of anger, while other times, the respondent's violence was provoked by superficial excuses related to the misbehaviour or failure of the children, such as the receipt of a poor report card or an incident of bed-wetting.

9 E.M.M., one of the two female twins, suffered some of the most severe abuse. On seemingly countless occasions, she was beaten with the bare hands of the respondent, including being thrown by the respondent against cupboards and down stairs. When the family moved to Victoria, she was subjected to more aggravated assaults involving repetitive whippings with a wet electrical cord, or with a leather belt emblazoned with metal snaps — an instrument the children would learn to call the "Devil's Fang" because the hook of the buckle would cut skin when pulled away. E.M.M. also sustained beatings with miscellaneous

household instruments ranging from broomsticks, screwdrivers, wrenches to hammers. According to her accounts, during one egregious incident, the respondent castigated her for burning toast by shoving her face into the hot toaster.

10 By the Crown's description, the other children were similarly forced to endure a regular pattern of fist beatings. The respondent, however, appeared to single out his older children for the most violent abuse. Often, he would force the other children to watch as he targeted one particular child out for corporal punishment. The older children were all exposed to the electric cord whippings. The sheer brutality of the respondent's whippings is clearly conveyed by E.M.M.'s description of the event. As she described one particular incident in her impact statement:

> The cord was doubled and doubled and doubled until the whole thing looked like a bunch of hoops held together. Anyways he started whipping us with it. We still had our wet clothes on but after a few swats he told us to take them off. I remember screaming with every strike, it felt like my whole entire body was being struck by lightning. The pain was so strong it felt like electrical shocks travelling all over my body with every whip. He didn't care where he hit. It landed on our backs, arms, legs, anywhere he pleased. Anyways, he wouldn't stop unless we stopped screaming. ... I managed to stop screaming by biting into my cheeks and tongue finding out afterwards the reason he stopped was because he saw blood. I was bleeding and bruising on my back, buttocks, legs, arms and shoulders, but most of the bleeding and bruising was on my back. [Three of the children] had the same, only [J.P.M.] had it mostly on her legs, [another] had it mostly on his shoulders and arms, [the third] had it mostly on her butt.

One particular daughter suffered additional abuse because she would not (or could not) stop crying during and following her beatings. She was once purportedly hit so many times that she lost consciousness. One son was frequently kicked by the respondent's steel-toed boots in his shins, abdomen and back. J.P.M. was subjected to physical discipline administered with a wrench, a screwdriver and the flat portion of a knife. She still carries an approximately three-inch long scar on her arm when the respondent cut her while she was cleaning dishes.

11 The pain and suffering experienced by the three eldest daughters was magnified by a degrading pattern of sexual abuse inflicted by the respondent. According to the Crown's interviews with the victims, the respondent would watch and fondle all three children as they bathed and dressed themselves. When the family was living in Fort Nelson, both E.M.M. and J.P.M. were forced to masturbate the respondent and perform oral sex on him. E.M.M. recalls one night in Fort Nelson when the respondent had some of his friends over, and the group of men forced her to undress and collectively felt her genitalia. During one particularly disturbing occasion involving J.P.M. (an occasion which the respondent submits he does not recollect), the respondent allegedly invited his friends to the family residence, and permitted his friends to have intercourse with his young daughter in exchange for money. According to J.P.M.'s account of the event, when she resisted, the respondent helped physically restrain his daughter to facilitate the transaction.

12 When the family moved to Saanich in February 1988, the sexual assaults against three older female children became more frequent and grew in intensity. The bathroom fondlings became a regular event in the lives of E.M.M. and J.P.M. and they escalated to include full digital penetration by the respondent. When E.M.M. was about thirteen, she was forced to perform full intercourse with the respondent on a number of occasions in the parents' bedroom. J.P.M. too was compelled to engage in full intercourse with her father on more than one occasion. By her accounts, the accused would sleep in some days and call her into his room to have sex with him before he started his day. J.P.M. recalls that the last incident of intercourse occurred in the spring of 1991 shortly before her father had moved from the province.

13 The suffering and degradation experienced by the children from the physical and sexual abuse was only aggravated by the respondent's persistent, dehumanizing emotional abuse. The respondent exhibited a callous disregard for the emotional well-being of his children. As the Crown described, he would rarely call his offspring by their given names. Rather, he would ordinarily label them collectively according to an obscene expletive. Additionally, the respondent regularly terrorized his children with death threats. According to their statements, there appears to be little doubt that the children were convinced that their father would kill them if they ever discussed the abuse they had experienced under his care.

14 The Crown's submissions and the children's respective impact statements suggest that the abused children will continue to experience the devastating consequences of the respondent's physical, sexual and emotional abuse for a significant time to come. The children appear to live in enduring fear that even if their father is sent to prison, he will eventually return and kill them. As Dr. Lohrasbe indicated in his psychiatric report:

> The family are totally terrorized. They believe that [C.M.] will somehow return to carry out his threats. They are fearful that he will work his way through the correctional system, or escape, and return to carry out his threats. It is unlikely that these fears will subside any time soon.

The children are clearly withdrawn, and they appear to have experienced considerable difficulty in socially adjusting to their environment at school. Perhaps most tragically of all, the children seem to partially blame themselves for the physical and sexual brutality they experienced at the hands of their father. In her statement, E.M.M. rebukes herself for the cruel abuse she has suffered:

> It's driving me crazy! I mean how could I let these people treat me so badly? Why did I allow my body to go through all the torture and the pain? How could I be so stupid?

Dr. Lohrasbe expressed considerable pessimism over whether the children would ever fully recover from the lasting effects of the abuse they had endured. As the doctor expressed his clinical findings in his report: "there is little doubt in my mind that recovery, if it is to occur, will take many, many years".

15 The Crown argued on the basis of the psychological report and the psychiatric report that the respondent enjoys few prospects for rehabilitation. In his report, Dr. Lohrasbe cast serious doubt on the sincerity of the respondent's *ex post* expressions of remorse. As the expert expressed his view:

> In regards to rehabilitating this man, it is important for me to point out that [C.A.M.] currently shows little interest or motivation in genuine change. His verbal expressions of contrition appear to be little more [than] a contrivance to protect his self-esteem. He is unwilling to acknowledge, never mind change, his more serious acts.

More generally, Dr. Lohrasbe concluded that the respondent experiences "severe and pervasive distortions in his personality that overlap several discrete diagnostic patterns of personality disorder". Accordingly, the psychiatrist was not optimistic about the respondent's possibilities for reform. As the psychiatrist described his diagnostic conclusions:

> The extent and depth of the personality distortions suggest that it is going to be extraordinarily difficult to change this man's attitudes and behaviour. ...
>
> Individuals with less severe syndromes of controlling abuse are still difficult treatment candidates. There is no recognized treatment method by which change can predictably occur. With [C.A.M.], it would be wise to assume that very little, if anything, can be done to examine and eliminate the causes of his offending. It will have to be assumed that, at whatever point he is able to dominate other individuals, he will continue in his controlling and abusive ways.

Dr. Malcolm, the psychologist, generally shared Dr. Lohrasbe's pessimism. As Dr. Malcolm concluded in his report:

> Certainly, therapy should be made available to [the respondent] but at the present time it has not been notable for success in others with this diagnostic pattern. Sadly, given [the respondent's] long history of abusing all three of his wives and many of his children it is difficult to presume that his aggressiveness towards others, especially family members, would diminish. ... There is no present reason to assume that this pattern would change without intensive therapy which may well, as noted, be unsuccessful.

16 Accordingly, in light of the devastating pattern of physical, sexual and emotional abuse the respondent inflicted upon his children, and in light of the respondent's questionable prospects for rehabilitation, the Crown requested a stringent term

of imprisonment in excess of 20 years. The Crown was of the view that a term of 30 years might even be warranted by the crimes of the respondent.

B. Submissions of Counsel for the Defence

17 In his submissions, counsel for the defence largely accepted the Crown's account of the physical and sexual abuse committed by the respondent. It was admitted that "there can be no doubt" that the abuse visited by the respondent upon his children was both "extensive" and "terrible". Counsel, however, did take issue with some of the particular allegations of the Crown. While the respondent recalls striking and kicking the children on numerous occasions, including with the electrical cord, he could not recall assaulting the children with a knife or a screwdriver. Furthermore, in relation to the sexual abuse, contrary to the Crown's suggestion, he asserted that he only had sexual intercourse with E.M.M. and J.P.M. on a few discrete occasions. He also denied recollection of the incident during which he purportedly held down J.P.M. for the benefit of his friends. But on the whole, the respondent did not seriously dispute the larger pattern of physical, sexual and emotional abuse depicted by the Crown.

18 Counsel did, however, spend considerable effort in calling attention to the mitigating circumstances surrounding the respondent's crimes. To begin, counsel underscored the respondent's dysfunctional childhood and troubled youth. As a result of recently revived memories which had allegedly been repressed, C.A.M. contends that he has discovered that he himself was a victim of sexual abuse at a very early age. He also emphasized the long-term trauma he has suffered in relation to two near-death experiences, one in relation to a serious automobile accident, and one in relation to "mine gassings" which occurred while he was working as a miner.

19 In addition to the foregoing factors, the respondent also stressed his advanced age, and his willingness to plead guilty to almost all of the counts of the information in order to avoid having his children endure the pain of a lengthy trial. As well, it was contended through counsel that responsibility for the abuse of the children ought to be shared with his deceased wife; in his characterization of the relevant events, the mother was a "willing participant" in the physical beatings of the children. Finally, he represented that he was genuinely remorseful for his crimes. In light of all these factors, counsel for the defence submitted that an appropriate term of imprisonment should be set at ten to fourteen years.

III. Judgments Below

A. Provincial Court

20 At the outset, Filmer Prov. Ct. J. commented that the crimes of the respondent were "as egregious as any offenses that I have ever had the occasion to deal with, either as counsel or in these courts". He further remarked that "[t]his matter transcends what I would consider the parameters of the worst case". However, he noted that none of the respondent's offences carried life imprisonment as an available punishment. Furthermore, he took cognizance of two recent rulings of the British Columbia Court of Appeal in *R. v. Rooke*, B.C.C.A., Victoria Registry VO00354 and VO00355, February 9, 1990, [1990] B.C.J. No. 643, and *R. v. D. (G. W.)*, Vancouver Registry CA009244, March 8, 1990, [1990] B.C.J. No. 728 (sub nom. *R. v. D.*), which held that where life imprisonment is available as a punishment but is not imposed, the maximum numerical sentence available under the *Criminal Code* is 20 years imprisonment, absent special circumstances warranting a more onerous sentence.

21 Filmer Prov. Ct. J. concluded that the qualified ceiling on sentences established in *Rooke* and *D. (G. W.)* did not apply in this instance, as the *ratio decidendi* of that line of jurisprudence was limited to circumstances where life imprisonment was available as penalty. Accordingly, he held that he could consider sentences which exceeded 20 years.

22 Filmer Prov. Ct. J. found that, based on the psychological and psychiatric reports, "therapy in this particular matter, if it is to be successful at all, will take a protracted period of time". He then stressed the "extremely high" and "shocking" level of violence exhibited in the respondent's physical and sexual abuse, and the "devastating consequences to the victims" resulting from the abuse. With these factors in mind, Filmer Prov. Ct. J. concluded that a cumulative sentence of 25 years, with no credit for time served, was appropriate and just. As he reasoned:

> [The circumstances of this case] fit[] all of the criteria of the serious side of this type of offence. It is in the extreme upper limits. ...
>
> It is my view that the sentence in this particular case must exceed twenty years. ... I know I potentially walk in harm's way if the Court of Appeal feels that their dictate is that a sentence that is not a life sentence should only in very limited circumstances not exceed twenty years. ...
>
> I intend to use a sentence in this particular matter that, in my view, will give the parole system an opportunity to function appropriately. I think they require a significant period of rehabilitation, of counselling ... in this man's best interests.

23 To give effect to this aggregate sentence, Filmer Prov. Ct. J. structured his sentencing order according to the following terms, with a number of particular sentences running concurrently.

Consecutive Sentences

Offence	Criminal Code Provision	Max. Statutory Sentence (Years)	Sentence Imposed (Years)
Sexual Assault	s. 271	10	8
Incest	s. 155(1)	14	7
Sexual Assault	s. 271	10	5
Assault w/Weapon	s. 267(1)	10	5
Total	-	-	25

Concurrent Sentences

Offence	Criminal Code Provision	Max. Statutory Sentence (Years)	Sentence Imposed (Years)
Assault w/Weapon	s. 267(1)	10	3
Assault w/Weapon (Three Counts)	s. 267(1)	10 (for each)	6 (total)
Common Assault	s. 266	5	3

Common Assault	s. 266	5	2
Threatening	s. 264.1(1)(a)	5	1
Total	-	-	15

B. British Columbia Court of Appeal (1994), 28 C.R. (4th) 106

24 In contrast to Filmer Prov. Ct. J., the majority of the Court of Appeal held that the qualified ceiling on fixed-term sentences set out in *Rooke* and *D. (G. W.)* applied equally to cases of cumulative sentencing where life imprisonment is *not* available as a penalty. Accordingly, the majority (Wood J.A. and Rowles J.A.) concluded that "the principle of totality" required the Court to reduce the respondent's sentence from 25 years to 18 years and 8 months' imprisonment, incorporating credit for time served prior to the imposition of sentence.

1. Reasons of Wood J.A.

25 While Wood J.A. agreed with the trial judge that the respondent ought to be sentenced to a "severe" punishment, Wood J.A. was not persuaded that the traditional objectives of sentencing would be better served in this instance through a sentence of 25 years relative to a sentence of 20 years. As he explained, at p. 116:

> The [respondent's] crimes against his children were such as to bring forth in all decent and right thinking people a natural desire to see the most severe form of punishment imposed upon him. But the law stands between the convicted felon and such natural emotions. The law requires a principled approach to sentencing, one that restrains the urge to punish by its adherence to definable and rational sentencing objectives, as well as by its acceptance of such guidance as Parliament has offered in the *Criminal Code* and in other statutes such as the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
>
> I do not need to dwell at length on the proper objectives of sentencing which have been recognized and accepted many times in past decisions of this court. Suffice it to say that general deterrence, denunciation, and direct protection of the public through isolation, are all accepted objectives of punishment which in this case, whether considered individually or collectively, require that a long sentence of imprisonment be imposed on the [respondent]. *What must be asked, however, is whether those objectives are significantly better served by a total sentence substantially in excess of twenty years than they would be by a sentence of twenty years. In my view, there is no reason to think that they would be*. [Emphasis added.]

26 To illustrate his point, Wood J.A. proceeded to examine whether or not a marginal increase in sentence of five years beyond a sentence of twenty years would, in this instance, result in a significant advancement of the sentencing goals of deterrence, denunciation, rehabilitation and the protection of society. To begin, he argued that an increased sentence of 25 years imprisonment would not better promote the objectives of general and specific deterrence; relying on the empirical research he outlined in his concurring judgment in *R. v. Sweeney* (1992), 11 C.R. (4th) 1 (B.C. C.A.), Wood J.A. further argued that the incremental deterrent effect of an increased sentence drops off sharply past the 20-year mark. Wood J.A. also argued that the incremental returns to societal denunciation follow a similar path of diminishing returns. As he stated: "it does not seem realistic to assume that the measure of society's denunciation of this appellant's crimes would be lessened in any way by imposing a sentence of twenty years" (p. 116). On that point, he noted that denunciation ought to be distinguished from its "illegitimate retributive cousin", as "retribution is not a legitimate goal of sentencing", citing *R. v. Hinch* (1967), [1968] 3 C.C.C. 39 (B.C. C.A.).

27 Along the same theme, he argued that relative to a 20-year sentence, a 25-year sentence would not significantly advance the utilitarian goals of the protection of society and the rehabilitation of the offender given the present structure of the *Criminal Code* and the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "*Corrections Act*"). With respect to the former

goal, Wood J.A. noted that under the combined parole eligibility provisions of both statutes, an increase in sentence to 25 years would not significantly extend the respondent's eligible date for parole. As he explained (at p. 117):

> As for the extra protection society receives from the imposition of an isolative sentence of twenty-five years, it must be noted that, in the absence of an order under s. 741.2 of the *Criminal Code*, and no such order was made in this case, the minimum eligibility date for a full parole in respect of all sentences, except those imposed for murder and treason, is the lesser of one third of the sentence imposed and seven years, calculated from the date of sentencing. Thus, if the prison system has the rehabilitative effect on the [respondent] which the trial judge apparently expects it to have, *the increase in the isolative "value" of the sentence he imposed, compared with one of twenty years, is potentially limited to an additional four months of imprisonment, with the balance of the sentence served under parole*. [Emphasis added.]

With respect to the latter goal, Wood J.A. concluded that in the absence of dangerous offender proceedings initiated by the Crown, the trial judge was not entitled to impose a lengthy term of sentence to reflect the respondent's resistance to rehabilitation. As he continued (at p. 117):

> [The trial judge] was apparently of the view that an additional five years of parole supervision would add substantially to the rehabilitative value of the sentence he imposed. With respect, the appellant was 52 years of age when sentenced. *If there was any realistic possibility that he would not be fully rehabilitated by the time he finished serving his parole from a twenty-year sentence, the Crown had an obligation to bring dangerous offender proceedings against him*. No such proceedings were brought. [Emphasis added.]

28 More fundamentally, in his examination of the parole eligibility scheme of the *Corrections Act*, Wood J.A. suggested that Parliament did not contemplate fixed-term sentences beyond 20 years under the *Code*. To begin, under s. 120(1) of the *Corrections Act*, as a default rule, any sentence beyond 20 years carries a fixed parole eligibility date of seven years. As such, Wood J.A. concluded that "at least for the purposes of parole eligibility, Parliament regards the numerical difference between a sentence of twenty-one years and anything in excess thereof, including life imprisonment, as largely irrelevant" (p. 118). Secondly, as a result of s. 120(2) of the *Corrections Act*, Wood J.A. noted that if the respondent could be sentenced to life imprisonment, he would be eligible for parole *before* the date he would be eligible for parole if he were sentenced to 21 years or more. Given the counter-intuitive implication that a person sentenced to life for a more serious offence would be eligible for parole *before* a person sentenced to 20 or more years for a less serious offence, Wood J.A. strongly intimated that Parliament did not intend for trial judges to impose numerical sentences beyond 20 years' imprisonment.

29 Accordingly, Wood J.A. held that the "proper approach to sentencing" in this case was established in *Rooke* and *D. (G.W.)*. He rejected the trial judge's attempt to distinguish both cases, and concluded that the qualified ceiling on numerical sentences applied whether or not life imprisonment was available as a penalty. As he articulated the applicable legal principle of sentencing (at p. 119):

> ... in the absence of circumstances which *direct* that a specific term of imprisonment in excess of twenty years be imposed, the totality principle should be applied in a case such as this to restrain the imposition of punishment beyond that limit. That principle applies equally to cases involving convictions for offences which carry a maximum punishment of less than life imprisonment, as it does to those where life imprisonment is available. [Emphasis in original.]

2. Reasons of Rowles J.A.

30 Rowles J.A. concurred with the substance of the reasons of Wood J.A. However, she wrote separately to reiterate that the logic of *Rooke* and *D. (G.W.)* applied equally to circumstances involving cumulative sentences where life imprisonment was not available as a penalty. Furthermore, she stressed, at p. 125, that the trial judge made no particular finding that a sentence beyond 20 years was necessary to advance the core sentencing principle of "the protection of society". Rowles J.A. emphasized that lengthy sentences justified by reference to "the protection of society" should not be used "as an expedient alternative to dangerous offender proceedings which may be taken by the Crown under Pt. XXIV of the *Criminal Code*" (p. 125). On that point, it was hinted that the Crown should not be permitted to seek such a lengthy sentence in order to obviate the "procedural and

substantive safeguards [of Pt. XXIV] which are not part of the usual sentencing process" (p. 125). Finally, she held that the facts of this case did not amount to sufficient "special circumstances" warranting a sentence beyond 20 years, hence distinguishing this case from *R. v. D. (E.)* (1992), 16 B.C.A.C. 193 (C.A.).

3. Reasons of Seaton J.A.

31 Seaton J.A. dissented from the reasons of Wood J.A. and Rowles J.A. He reviewed the reasons of Filmer Prov. Ct. J. in some detail, and expressed agreement with the sentencing judge that this case represents a "worst offence" involving a "worst offender". Accordingly, consistent with the framework set out in *Rooke* and *D. (G.W.)*, Seaton J.A. was of the view that special circumstances were indeed present warranting a sentence in excess of 20 years. As such, Seaton J.A. was not persuaded that the respondent's sentence of 25 years ought to be reduced on appeal. However, he suggested that the sentence imposed by Filmer Prov. Ct. J. approached the legal ceiling of numerical sentences under the *Criminal Code*; as he stated: "I have no doubt that 25 years is at the outer edge of suitable sentences and would be available only where there was a number of worst offences by a worst offender" (p. 111).

IV. Grounds of Appeal

32 The Crown sought leave to appeal the Court of Appeal's reduction of sentence on the basis of the following grounds:

> 1. That the Court of Appeal for British Columbia erred in law in applying as a principle of sentencing that absent the imposition of a life sentence, the maximum sentence that may be imposed for any number of offences is 20 years.
>
> 2. That the Court of Appeal for British Columbia erred in law in finding that retribution is not a legitimate principle of sentencing.
>
> 3. That the Court of Appeal for British Columbia erred in law in finding that if the respondent would not be rehabilitated during a 20-year sentence the Crown was obligated to bring dangerous offender proceedings against him.
>
> 4. That the Court of Appeal for British Columbia erred in law in reducing the sentence from 25 years' imprisonment to 18 years and eight months' imprisonment.

V. Analysis

33 As a matter of established practice and sound policy, this Court rarely hears appeals relating to the fitness of individual sentences. As Dickson J. expressed in *R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 404:

> Although I am of the view that the Court has jurisdiction to assess the fitness, *i.e.* the quantum of a sentence, I am equally of the view that as a matter of policy we should not do so. It is a rule of our own making and a good rule.

Nonetheless, as part of its national duty as a general court of appeal for the better administration of the laws of Canada, this Court will entertain appeals involving the legal principles which ought to govern the pronouncement of sentence. See *Gardiner*, at p. 405; *R. v. Chaisson*, [1995] 2 S.C.R. 1118, at p. 1123. Given that this appeal raises a number of important legal issues in relation to the general principles of criminal sentencing, we granted leave.

34 In my view, the most important issue posed by this appeal concerns whether the Court of Appeal erred in holding that there is a legal ceiling on fixed-term sentences under the *Criminal Code*, albeit qualified with an exception for special circumstances. Accordingly, I will address this issue first and in the most depth.

A. Did the Court of Appeal err in holding that there is a qualified ceiling on numerical sentences under the Code?

35 Before dealing with the crux of this issue, it would be instructive to survey both the general principles governing fixed-term sentences and parole eligibility under the *Code* and the *Corrections Act*, as well the evolution of the qualified legal ceiling developed by the British Columbia Court of Appeal in *Rooke* and *D. (G.W.)*.

1. General Principles

36 For the multiplicity of offences against public order contained in the *Criminal Code*, the *Code* provides for a range of punishments including absolute and conditional discharges, probation orders, and fines. But by far the most common and recognized form of criminal sanction under our justice system is imprisonment. For offences where imprisonment is available, the *Code* sets maximum terms of incarceration in accordance with the relative severity of each crime. The current structure of the *Code* staggers maximum sentences for the full range of offences at numerical intervals of one year, two years, five years, ten years, and fourteen years, followed next by the most severe punishment under our general criminal law, life imprisonment. It has often been remarked that such maximum sentences ought to be reserved for the worst offender committing the worst type of offence. See *R. c. Bédard* (1989), 21 Q.A.C. 173 (C.A.), at p. 181; *Ko v. R.* (1978), *(*sub nom. *R. v. Ko)* 50 C.C.C. (2d) 430 (B.C. C.A.), at p. 436; *R. v. Pruner* (1979), 9 C.R. (3d) S-8 (Ont. C.A.), at p. S-11; C. Ruby, *Sentencing* (4th ed. 1994), at pp. 44-45; Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987), at p. 63. On the basis of this standard, the Commission noted that as a matter of judicial practice, the sentencing maxima of the *Code* for individual offences are rarely imposed by Canadian courts. For this and other reasons, the Commission commented that the structure of maximum penalties under the *Code* frequently provides little guidance to sentencing judges in imposing punishments in individual cases. See similarly, M.L. Friedland, "Controlling the Administrators of Justice" (1988-89) 31 *Crim. L.Q.* 280, at p. 311.

37 In some instances, the *Code* also sets mandatory minimum sentences for a number of offences. For instance, under s. 235, the mandatory minimum sentence for first and second degree murder is life imprisonment. In the past, however, this Court has viewed some such mandatory minimum sentences with constitutional suspicion in light of s. 12 of the *Canadian Charter of Rights and Freedoms*. See *R. v. Smith*, [1987] 1 S.C.R. 1045. But within these two distant statutory poles, the *Code* delegates to trial judges considerable latitude in ordering an appropriate period of incarceration which advances the goals of sentencing and properly reflects the overall culpability of the offender. See s. 717(1), 717(2) of the *Code*.

38 The text of the *Code*, however, falls silent with regard to whether there is an upper limit on *fixed-term* or *numerical* terms of incarceration (i.e., non-life, quantitative terms of imprisonment). In a number of potential situations, a trial judge will be a position to impose a total fixed-term sentence beyond fourteen years, but life imprisonment will either be unavailable or inappropriate as a potential sentence. The first such instance will arise when an offender is convicted of a single count of an offence which carries a maximum punishment of life imprisonment, but the trial judge concludes that life imprisonment is not warranted on the facts. In such circumstances, the trial judge is presumably entitled to impose a sentence beyond 14 years, but the *Code* offers no guidance as to the upper range of fixed- term sentences which he or she may impose short of life imprisonment.

39 The second such instance arises when an offender is convicted of a number of distinct counts in relation to a single offence or in relation to a set of different offences. In such situations, s. 717(4)(*c*) of the *Code* empowers a trial judge to order that certain numerical sentences be served consecutively as opposed to concurrently. In the presence of such an order, an offender could quite easily be forced to serve a cumulative fixed-term sentence well beyond fourteen years, depending on the number of counts and the maximum sentence associated with each count. But once again, the *Code* falls silent as to whether or not there is an upper limit on cumulative sentences in our criminal law.

40 In both such circumstances, notwithstanding the lack of any explicit statutory ceiling on numerical sentences, Canadian courts have generally refrained from exploring whether there is indeed a limit on fixed-term sentences under the *Code*. Rather, guided by the legal obligation that a term of imprisonment be "just and appropriate" under the circumstances, courts have generally avoided imposing excessively harsh and onerous sentences which might test the potential legal ceilings governing the imposition of sentence. It is a well established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender. As Wilson J. expressed in her concurring judgment in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, at p. 533:

> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Cory J. similarly acknowledged the importance of "the principle of proportionality" in speaking for the Court in *R. v. M. (J.J.)*, [1993] 2 S.C.R. 421, at p. 431, noting that "[i]t is true that for both adults and minors the sentence must be proportional to the offence committed". Indeed, the principle of proportionality in punishment is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may only be imposed on those actors who possess a morally culpable state of mind. In discussing the constitutional requirement of fault for murder in *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645, I noted the related principle that "punishment must be proportionate to the moral blameworthiness of the offender", and that "those causing harm intentionally [should] be punished more severely than those causing harm unintentionally". On the principle of proportionality generally, see *R. v. Wilmott* (1966), [1967] 1 C.C.C. 171, at pp. 178-79 (Ont. C.A.); *Sentencing Reform: A Canadian Approach, supra*, at p. 154.

41 Within broader parameters, the principle of proportionality expresses itself as a constitutional obligation. As this Court has recognized on numerous occasions, a legislative or judicial sentence that is grossly disproportionate, in the sense that it is so excessive as to outrage standards of decency, will violate the constitutional prohibition against cruel and unusual punishment under s. 12 of the *Charter*. See *Smith, supra*, at p. 1072; *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 724; *R. v. Goltz*, [1991] 3 S.C.R. 485, at pp. 498-99. However, as I noted in *Smith*, at p. 1072, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation", and thus the review of the proportionality of sentences should normally be left to the "usual sentencing appeal process" directed at the fitness of sentence.

42 In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

> The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing, supra*, at pp. 44-45:

> The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

43 Whether under the rubric of the "totality principle" or a more generalized principle of proportionality, Canadian courts have been reluctant to impose single and consecutive fixed-term sentences beyond 20 years. See M. E. Rice, "Fixed-Term Sentences of More Than 20 Years Versus Life Imprisonment" (1994) 36 *Crim. L. Q.* 474, at p. 474, n. 1. As Rice has noted, as a matter of practice, provincial courts of appeal have only been willing to sustain sentences in excess of 20 years on rare occasions. See, e.g., *R. v. Saumer*, [1977] 3 W.W.R. 385 (B.C. C.A.) (cumulative sentence of 25 years for robbery); *R. v. Nichols* (1978), 9 A.R. 203 (C.A.) (cumulative sentence of 27 years for robbery); *R. v. Belmas* (1986), 27 C.C.C. (3d) 142 (B.C. C.A.) (cumulative sentence of 22 years for terrorist activities); *R. v. Gorham* (1987), 22 O.A.C. 237 (C.A.) (cumulative sentence of 23 years for robbery and firearms); *R. v. Currie* (1990), 98 N.S.R. (2d) 287 (C.A.) (cumulative sentence of 26 years for robbery and sexual assault); *R. v. Yazdani*, (sub nom. *Yazdani c. R.*, [1992] R.J.Q. 2385 (C.A.) (cumulative sentence of 25 years for heroin importation). More commonly, sentences in excess of 20 years imposed at trial have been reduced to beneath 20 years on appeal, often through reference to the principle of totality. See, e.g., *R. v. Velmurugu* (1994), 74 O.A.C. 393 (C.A.); *R. v. Parsons* (1993), 24 C.R. (4th) 112 (Ont. C.A.); *R. c. Pelletier* (1989), 52 C.C.C. (3d) 340 (C.A. Qué.); *R. c. Charest* (1989), 30 Q.A.C. 227 (C.A.); *R. v. Childs* (1984), 52 N.B.R. (2d) 9 (C.A.).

44 In contrast to the absence of any explicit codal rules governing the limits on fixed-term sentences of imprisonment, the *Criminal Code*, read together with the *Corrections Act*, sets very clear rules governing the determination of parole eligibility. A person sentenced to a numerical term of imprisonment under the *Code* (i.e., not life) becomes eligible for full parole after serving the lesser of one third of the sentence or seven years. As s. 120(1) of the *Corrections Act* reads:

> 120. (1) Subject to sections 747 and 761 of the *Criminal Code* and to any order made under section 741.2 of that Act, the portion of a sentence of imprisonment that must be served before an offender may be released on full parole is the lesser of
>
> (*a*) *one third of the sentence of imprisonment*, and
>
> (*b*) *seven years*. [Emphasis added.]

The commencement date for the determination of parole eligibility has generally been understood to coincide with the commencement of sentence, namely the date when sentence is imposed. See s. 721(1) of the *Code*.

45 A person sentenced to life imprisonment other than as a minimum punishment (i.e., non-murder offences) becomes eligible for full parole after serving seven years. However, in contrast to a person sentenced to a numerical term of imprisonment, the calculation of parole eligibility for life imprisonment begins at an earlier date. Under s. 120(2) of the *Corrections Act*, the parole eligibility clock effectively begins to run from the date of arrest. The provision stipulates as follows:

> 120 (2) The portion of a sentence of imprisonment for life, imposed otherwise than as a minimum punishment, that must be served before an offender may be released on full parole is *seven years less any time spent in custody between the day on which the offender was arrested and taken into custody, in respect of the offence for which the sentence was imposed, and the day on which the sentence was imposed*. [Emphasis added.]

In the case of most violent offences short of first and second degree murder and most drug offences prosecuted by indictment, these default periods of parole ineligibility may be extended by the trial judge pursuant to an order under s. 741.2 of the *Code*. I note that these default rules of parole eligibility, specifically the seven-year limit on parole ineligibility, have been a feature of our correctional system for quite some time. See *Parole Regulations*, SOR/60-216, s. 2(1)(*a*), promulgated under the *Parole Act*, S.C. 1958, c. 38 (four years maximum); SOR/73-298, s. 1 (increasing the maximum to seven years).

46 It is against this backdrop of statutory provisions that the British Columbia Court of Appeal has developed its qualified judicial rule limiting fixed-term sentences of imprisonment.

2. The Jurisprudence

47 In response to the silence of the *Criminal Code* on maximum numerical sentences, through the course of a number of cases, the British Columbia Court of Appeal has fashioned a rule which limits fixed-term sentences to a period of 20 years, barring special circumstances warranting a more onerous term of imprisonment. In justifying this qualified rule, the Court of Appeal has placed considerable reliance upon inferences drawn from the mechanics of the parole eligibility provisions of the *Code* and *Corrections Act*. For a cogent summary of this line of judicial authority, see Rice, "Fixed-Term Sentences", *supra*.

48 The origin of this judicially created rule of sentencing appears to trace to *Rooke, supra*. In *Rooke*, the offender was convicted of conspiracy to traffic in cocaine, among other drug offences; the offence carried a maximum term of life imprisonment. The trial judge sentenced the offender to 25 years' imprisonment. On appeal, the Court of Appeal reduced the sentence to 20 years. In reducing the sentence, Lambert J.A., speaking for the majority, attached considerable weight to the language of McIntyre J.A. (as he then was) in *R. v. Bell*, B.C.C.A., Vancouver Registry CA771150, September 27, 1978. As Lambert J.A. responded to the Crown's request for a sentence beyond 20 years as follows:

> Most markedly, counsel for the Crown was not able to indicate any case where a sentence of less than life imprisonment was merited and the sentence imposed was nonetheless more than 20 years. That this seems to be the conclusion, namely, that the appropriate sentence for the worst offence committed by the worst offender is life imprisonment and the next step

> down the scale is a sentence of 20 years imprisonment, is borne out by the reasons of Mr. Justice McIntyre in *R. v. Bell* .... Mr. Justice McIntyre was there giving the Judgment of the Court on a sentence appeal. He said:
>
> > "Life imprisonment is the maximum sentence that can be imposed for this offence. In my view, this offence, grave as it is, does not quite reach the maximum and does not call for the maximum punishment."
> >
> > "Considering all the circumstances of this case, and particularly the reports from prison authorities, which the trial judge did not have before him and which we have had, and which are strongly in favour of the appellant, I would allow the appeal and substitute a sentence of 20 years' imprisonment."
>
> Mr. Justice McIntyre uses the phrase "this offence ... does not quite reach the maximum". *It seems to me that Mr. Justice McIntyre is suggesting that there is no intervening step between 20 years imprisonment and life imprisonment, unless there are peculiar circumstances that would demand the insertion of such a step*. [Emphasis added.]

Wood J.A., the author of the majority ruling of the Court of Appeal in this instance, concurred separately in *Rooke*. He would have preferred to leave the question of the ceiling open for another day, since, in his view, the issue was a "matter[] of some complexity upon which I would want the benefit of a full argument devoted to the rational underlying principles of sentencing."

49 Nearly a month later, the formative rule of *Rooke* was applied again in *D. (G.W.), supra*. In *D. (G.W.)*, the offender was convicted of a number of sexual offences against young children, and was sentenced to a cumulative sentence of 25 years. On appeal, Lambert J.A., speaking for a unanimous court, reduced the sentence to 20 years. Lambert J.A. held that life imprisonment, the maximum available penalty, was not a fitting sentence in this instance. He thus turned to consider what an appropriate fixed-term sentence would be. In so doing, however, Lambert J.A. noted that if the offender had been sentenced to life, a more serious sentence, he would have been eligible for parole *a full year earlier* than if he had been sentenced to 25 years. As Lambert J.A. explained the apparent irony of the provisions:

> In this case a sentence of life imprisonment would, in some respects, be a better sentence from the point of view of the appellant than a sentence of 25 years, the sentence which was imposed. The reason is that the eligibility for parole in the case of a life sentence is calculated as seven years. Indeed, in every case the eligibility for parole arises on serving one-third of the sentence or seven years, whichever is less. But in the case of a life sentence, the sentence is considered to start running from when the imprisonment started before trial. That introduces a quirk to the sentencing principles in this case.
>
> In the case of a sentence of a fixed period, the sentence is considered to start running from the time when the sentence was imposed. Because the appellant spent more than a year in custody *the effect would be that he would have eligibility for parole, in this case, a year at least earlier if he received a life sentence than he would on the basis of a sentence of 25 years*. [Emphasis added.]

In light of this "quirk" of the parole eligibility rules, Lambert J.A. concluded that the rule in *Rooke* ought to be followed.

50 The qualified ceiling set out in *Rooke* and *D. (G.W.)* has been reaffirmed by the British Columbia Court of Appeal, and has since been followed by other provincial courts of appeal. In *D. (E.)*, *supra*, a unanimous bench of the court endorsed the rulings of both cases, and expressed the sentencing rule in the following terms, at pp. 203-4:

> It is recognized that apart from a sentence of life imprisonment, in the absence of special circumstances the totality principle operates to curtail a single sentence, or a number of consecutive sentences, to a total of 20 years.

The qualified ceiling ruling has also been adopted by the Manitoba Court of Appeal in *R. v. J. (J.T.)* (1991), 73 Man. R. (2d) 103 (C.A.). In *J. (J.T.)*, after a number of trials, the offender was convicted of manslaughter, and sentenced to 22 years' imprisonment. The offender appealed the sentence, relying in part on the jurisprudence of the B.C. Court of Appeal in *Rooke* and *D. (G. W.)*. Twaddle J.A., speaking for the court, agreed that fixed-term sentences ought to be generally limited to 20 years, with the next sentencing step being life imprisonment. In so holding, Twaddle J.A. attached similar importance to the operation of the parole eligibility provisions, at p. 107:

> As Lambert J.A. pointed out in *R. v. Danchella*, supra, the *Parole Regulations* provide that a prisoner becomes eligible for parole no matter how long his sentence, it not being for murder or high treason, after he has served seven years. The only purpose, therefore, of imposing a fixed term in excess of 20 years is to ensure that the offender may be detained for a longer time if the Parole Board is of the view at the end of 20 years that the offender's release would still constitute an undue risk to society. But, if a judge thinks it is necessary to authorize detention for more than 20 years, surely the next step is life. At that point, the additional period of detention required is speculative. No judge can safely foresee how much longer is required.

But in contrast to the previous cases, instead of reducing the offender's sentence from 22 years to 20 years, Twaddle J.A. concluded that in light of the gravity of the offender's crimes, his sentence ought to be *increased* to life. See also *R. v. Nienhuis* (1991), 117 A.R. 253 (C.A.), and *R. v. Dipietro* (1991), 120 A.R. 102 (C.A.), where the Alberta Court of Appeal increased an offender's sentence from 23 1/2 years and 22 years respectively to life imprisonment, although in neither case did the court base its ruling on the operation of the parole eligibility provisions.

51 More recently, however, the B.C. Court of Appeal has emphasized the qualified nature of its rule. More specifically, in two cases since *Rooke* and *D. (G. W.)*, the Court has found special circumstances warranting the imposition of a sentence beyond 20 years. In *D. (E.)*, supra, the court sustained a cumulative sentence of 23 years for numerous offences against women and children. Speaking for the court, Hinds J.A. endorsed the case law of *Rooke* and *D. (G. W.)*, but noted, at p. 204, that "there are cases where in special circumstances sentences totalling more than 20 years have been approved or given by this Court". In light of the "extremely serious circumstances of the offences" and "the danger of [the offender] repeating his transgressions against women and children", he concluded that special circumstances were present justifying a lengthy sentence beyond the qualified legal ceiling. Similarly, in *R. v. Caissie* (1993), 24 B.C.A.C. 57 (C.A.), the court upheld a cumulative sentence of 22 years for sexual assault and robbery. Although life imprisonment was available for the robbery conviction, Hinds J.A. declined to impose the maximum penalty since the offender did not represent a "worst offender". Nonetheless, Hinds J.A. held that the offender's propensity for violence and his dim prospects for rehabilitation justified a cumulative sentence beyond 20 years. As he held, at p. 65: "In the special circumstances of this case the totality principle of sentencing is not offended."

52 Finally, it is appropriate to note that the judicial consensus on the qualified ceiling rule has not been unanimous. Following the majority decision of Wood J.A. in the Court of Appeal below, the Ontario Court of Appeal had the opportunity to consider the wisdom of the *Rooke* and *D. (G.M.)* jurisprudence in *R. v. C. (J.A.)* (1995), 86 O.A.C. 135. The offender in *C. (J.A.)* was found guilty by a jury of a pattern of physical and sexual abuse against his stepchildren which has disturbing parallels with the pattern of abuse inflicted by the respondent. The trial judge, finding that the case represented "one of the worst offences involving the worst offender" (p. 141), sentenced the offender to 30 years' imprisonment through consecutive sentences. On appeal of sentence, the Court acknowledged the majority ruling of the B.C. Court of Appeal in this case, but declined to adopt the qualified ceiling rule. As the court stated (at p. 142): "we would respectfully disagree with Wood J.A. in the *R. v. C.A.M.* case that there should be some cap or limit to the sentences for these serious cases". Nevertheless, the Court of Appeal concluded that the 30-year sentence was excessive and reduced the offender's sentence to 21 years.

3. The Argument for a Qualified Ceiling on Fixed-Term Sentences

53 The core issue in this appeal concerns whether or not Parliament intended fixed-term sentences under the *Code* to generally be limited to 20 years' imprisonment, whether as a sentence for a single offence where life imprisonment is available but unwarranted, or as a sentence for multiple offences involving consecutive terms of imprisonment. If I have understood the jurisprudence of the British Columbia and Manitoba Courts of Appeal correctly, the principal arguments in support of such an intent to limit the otherwise broad sentencing discretion of trial judges are based on inferences drawn from the operation of the parole eligibility provisions contained within both the *Code* and the *Corrections Act*.

54 The central argument advanced by the proponents of such a ceiling is that Parliament, by fixing the default parole ineligibility period for any numerical sentence beyond 20 years (absent an order under s. 741.2) at seven years, implicitly intended to cap numerical sentences at 20 years. Given the fact that an offender sentenced to 30 or 40 years is still eligible for full parole at seven years, the suggestion is that Parliament saw little utility in such lengthy terms of imprisonment. As Wood J.A.

argued at the Court of Appeal, "at least for the purposes of parole eligibility, Parliament regards the numerical difference between a sentence of twenty-one years and anything in excess thereof, including life imprisonment, as largely irrelevant" (p. 118).

55 As a related argument, the same proponents point to an apparently absurd consequence which would result if fixed-term sentences beyond 20 years were permitted under the *Code*. When one compares the parole eligibility rules governing life imprisonment to the analogous rules governing numerical sentences, it is clear that an offender sentenced to life is eligible for parole *before* an offender sentenced to a numerical term beyond 20 years. Given the apparently absurd result that an offender sentenced for a more serious offence is eligible for parole *before* an offender sentenced for a less serious offence or set of offences, the suggestion advanced is that Parliament must have intended to preclude numerical sentences beyond 20 years.

56 With the greatest respect, I find no evidence in either the *Code* or the *Corrections Act* that Parliament intended to constrain a trial judge's traditionally broad sentencing discretion through the imposition of a qualified legal ceiling on numerical sentences pegged at 20 years' imprisonment. Rather, in my reading of both statutes, beyond setting statutory maximum and minimum sentences which reflect the relative severity of different offences, Parliament intended to vest trial judges with a wide ambit of authority to impose a sentence which is "just and appropriate" under the circumstances and which adequately advances the core sentencing objectives of deterrence, denunciation, rehabilitation and the protection of society. Accordingly, in my view, whether or not life imprisonment is available as a maximum sentence in the particular case, there is no pre-set ceiling on fixed-term sentences under the *Code*.

57 Given the nature of the parole regime, there are limited, if any, inferences that one can draw concerning the structure of maximum sentences under the *Code* from the operation of the parole eligibility provisions of the *Corrections Act*. As I shall endeavour to demonstrate, Parliament established the parole system as a regime by which the *conditions of incarceration of a sentence* could be altered by subsequent executive review, rather than as a regime by which *the sentence itself* could be reduced. In my view, the fact that conditions of incarceration are subject to review and possible change at a particular point in time says little about the efficacy and limits of a global fixed-term sentence in advancing the traditional goals of sentencing. Put differently, there is no indication that the parole ineligibility rules of the *Corrections Act* were intended to constrain a court's ability to advance the goals of deterrence, denunciation, rehabilitation and the protection of society through numerical sentences beyond 20 years. Indeed, the *Corrections Act* was enacted to establish an administrative regime for executing and implementing the scheme of discretionary punishments anticipated by its legislative parent, the *Criminal Code*. To suggest that the mechanical parole rules contained within the *Corrections Act* have the contrary effect of dramatically restricting the sentencing discretion of trial judges under the *Code*, with respect, fundamentally misreads the relationship between the two statutes.

4. The Nature of the Parole System

58 The origins of our modern parole system date from the early part of this century. Prior to Confederation, a sentence imposed at trial could be commuted to "banishment" or "transportation" (i.e., forced removal to another colony), or could be reduced through an exercise of the Royal prerogative of mercy. But apart from these exceptional means, the laws of Canada provided no general mechanism for the administrative modification or suspension of a judicial sentence. See, generally, D. P. Cole and A. Manson, *Release from Imprisonment* (1990), at pp. 159-63. The earliest legislative scheme resembling parole appears to date from *The Penitentiary Act of 1868*, S.C. 1868, c. 75, which provided for a simple mechanism for sentence remission. However, the first contemporary regime for conditional release was established at the end of the 19th century with the "Ticket of Leave Act", *An Act to provide for the Conditional Liberation of Penitentiary Convicts*, S.C. 1899, c. 49. Under that statute, a convict could apply to executive authorities for early release, subject to a variety of conditions of supervision, prior to the expiration of his sentence. See Cole & Manson, *supra*, at pp. 164-167. As M. Campbell and D.P. Cole point out, "Conditional Release Considerations in Sentencing" (1985), 42 C.R. (3d) 191, at p. 203, n. 14, the "Ticket of Leave Act" was generally viewed as a mechanism which codified and regularized the exercise of the Crown's prerogative of clemency. Accordingly, applications under the *Act* were understood as a mechanism for the *reduction of sentence*.

59 However, with the publication of the "Fauteux Report", *Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice* (1956), and the ensuing passage of the first modern Canadian *Parole Act (An Act to provide for the Conditional Liberation of Persons Undergoing Sentences of Imprisonment)*,

S.C. 1958, c. 38, the parole system was transformed into a regime by which executive authorities were vested with authority to review and alter *the* conditions under which imprisonment is served. Under s. 11(1) of that Act, the judicially imposed sentence of a paroled inmate was "deemed to *continue* in force" until the expiry of the term of imprisonment (emphasis added). Similarly, under s. 2(*d*), parole was defined as "authority granted under this Act to an inmate to be at large *during* his term of imprisonment" (emphasis added). Under that Act and its subsequent incarnations, administrative parole authorities enjoyed no authority to reduce a sentence by altering the expiry date of the warrant of committal, i.e. the formal judicial order imposing sentence. See *Parole Act*, R.S.C. 1970, c. P-2, as amended by S.C. 1976-77, c. 53. See also Campbell and Cole, *supra*, at p. 203. As McLennan J.A. described the legal premise of the modern parole system in *Wilmott, supra*, at pp. 181-82.

> It is to be emphasized that the effect of a grant of parole is not to alter the length of a sentence imposed by a Court upon an offender. Parole provides that the offender serves his sentence outside the prison, not as a free man, but under supervision and subject to terms and conditions imposed. A person on parole is not a free man. The grant may be revoked in the discretion of the Board and the offender is thereupon recommitted to serve the portion of the original term of imprisonment that remains unexpired at the date parole was granted. ...
>
> *A grant of parole does not reduce a sentence. The Board has power in appropriate cases only to change the place where it is served*. [Emphasis added.]

60 The essential nature of the parole system remained unchanged with the legislative modernization of the *Parole Act* in 1992. Section 99(1) of the *Corrections Act* continues to define "full parole" as the authority to grant an offender the right "to be at large *during* the offender's term of imprisonment" (emphasis added). As well, s. 128(1) reiterates that "[a]n offender who is released on parole, statutory release or unescorted temporary absence *continues*, while entitled to be at large, to serve the sentence of imprisonment until its expiration according to law" (emphasis added).

61 Furthermore, as Campbell and Cole underscore, *supra*, at pp. 204-5, the realities of the conditional release system reinforce the argument that parole is an alteration of the conditions of sentence, rather than a reduction of sentence. Under the *Corrections Act* and its attendant regulations, an offender on parole is subject to strict limits on his or her freedom. While an offender on conditional release is no longer physically confined, a parolee is subject to mandatory parole conditions set out under the *Corrections and Conditional Release Regulations*, SOR/92-620 (October 29, 1992). For instance, a parolee must remain at all times within a fixed area designated by the parole supervisor, must report to the police as instructed by the supervisor, and must advise the supervisor of any change in his or her residential, financial, or occupational status. See *Regulations*, s. 161(1). Additionally, under the *Corrections Act*, a parolee is subject to any additional restrictions that the National Parole Board deems "reasonable and necessary" in order "to protect society." A parolee may also be ordered to reside in a community-based residential facility. The Parole Board may suspend parole in response to a breach of these conditions, or if at any time it is "necessary and reasonable" to prevent such a breach *or* to protect society. See ss. 133(3) and (4) and 135(1) of the *Corrections Act*.

62 In short, the history, structure and existing practice of the conditional release system collectively indicate that a grant of parole represents *a change in the conditions* under which a judicial sentence must be served, rather than *a reduction* of the judicial sentence itself. Needless to say, an offender enjoys a greater measure of freedom and liberty when the conditions of his or her imprisonment are changed from physical confinement to full parole. Indeed, as we implicitly held in *R. v. Gamble*, [1988] 2 S.C.R. 595, at pp. 609, 647, continued incarceration with an extended period of parole ineligibility (much less continued incarceration through an actual denial of parole) may constitute a deprivation of a cognizable liberty interest under s. 7 of the *Charter*. But even though the conditions of incarceration are subject to change through a grant of parole to the offender's benefit, the offender's sentence continues in full effect. The offender remains under they strict control of the parole system, and the offender's liberty remains significantly curtailed for the full duration of the offender's numerical or life sentence. The deterrent and denunciatory purposes which animated the original sentence remain in force, notwithstanding the fact that the conditions of sentence have been modified. The goal of specific deterrence is still advanced, since the offender remains supervised to the extent and degree necessary to prevent possible crime, and since the offender remains under the shadow of re-incarceration if he or she commits another crime. As well, the goal of denunciation continues to operate, as the offender still carries the societal stigma of being a convicted offender who is serving a criminal sentence.

5. The Effect of the Parole Eligibility Rules

63 Against this backdrop, the purpose and effect of the parole eligibility rules in the *Corrections Act* become clear. Within the broad statutory minimum and maximum sentences of the *Code*, Parliament has vested trial judges with considerable discretion to direct a just and appropriate sentence which advanced the principles of deterrence, denunciation, rehabilitation and protection of society among other sentencing goals. But in addition to providing for the imposition of a global sentence which reflects the culpability of the offender, Parliament also established threshold periods of parole ineligibility, because it concluded that the traditional blend of sentencing principles also required that a minimum portion of the global sentence be served through conditions of physical confinement. As Iacobucci J. recently noted in *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 23, in discussing the mandatory minimum period of parole ineligibility for first degree murder: "parole ineligibility is part of the "punishment" and thereby forms an important element of sentencing policy".

64 While Parliament was undoubtedly animated by the full range of sentencing principles in setting such threshold periods, it appears to have been principally motivated by the sentencing goals of deterrence and denunciation. By establishing a fixed formula for a minimum period of parole ineligibility under s. 120(1) of the *Corrections Act* (i.e., the lesser of 1/3 of the sentence or seven years), Parliament seems to have concluded that a minimum period of physical confinement was necessary to advance the causes of general deterrence and denunciation even if the offender was completely rehabilitated and posed absolutely no threat to society at the time of sentence. Courts of appeal have similarly concluded that other minimum parole ineligibility periods set by the *Code* are principally motivated by the concerns of deterrence and denunciation. As the Manitoba Court of Appeal concluded in *R. v. Ly* (1992), 72 C.C.C. (3d) 57, at p. 61, in discussing the 10-year parole ineligibility for second-degree murder under s. 744 of the *Code*: "Parliament's purpose in adding a minimum period of parole ineligibility to a life sentence was, in my view, twofold. It was to deter and denounce the crime."

65 But I find no necessary inference from this larger scheme of parole eligibility rules governing review of the *conditions* of sentence that Parliament intended to cap the *quantum* of sentence available under the *Code*. Under s. 120(1) of the *Corrections Act*, Parliament quite clearly fixed the default parole ineligibility period for any numerical sentence beyond 20 years at seven years. As I understand the purpose of the seven-year rule, Parliament apparently concluded that the principles of deterrence and denunciation only required that an offender spend seven years under the conditions of physical confinement. *But there is no indication that the default parole ineligibility rules exhaust a court's ability to advance the goals of deterrence, denunciation, rehabilitation and the protection of society through the imposition of a numerical sentence beyond 20 years*. Even though the conditions of the offender's term of imprisonment may be subject to change after seven years, the interaction of well-accepted sentencing principles could still require that the offender remain under the supervisory aegis of the parole system (if not under imprisonment) for well beyond twenty years. In short, I am not persuaded that the parole eligibility rules necessarily undermine a trial judge's ability to advance the goals of sentencing through a fixed-term sentence beyond 20 years. As such, there is no necessary inference that Parliament implicitly imposed a qualified cap on fixed-term sentences through its adoption of the *Corrections Act* and its predecessors.

66 The argument advanced by the B.C. Court of Appeal in favour of a sentence ceiling suffers from other logical flaws. On the basis of the seven-year rule contained within s. 120(1) of the *Corrections Act*, Wood J.A. submits that Parliament attached little practical utility to terms of imprisonment which exceed 20 years. But with respect, if that was the case, it seems odd that Parliament would nonetheless have explicitly provided for life imprisonment as a potential sentence, since a life sentence will often exceed 20 years in effect. Furthermore, even if one can finesse that logical difficulty, there is no reasonable basis for inferring from s. 120(1) that Parliament intended a *qualified* ceiling on fixed-term sentences, which permits sentences beyond 20 years in the presence of vaguely defined "special circumstances".

67 In addition to the foregoing arguments in support of a legal ceiling on numerical sentences, the B.C. Court of Appeal attached some weight to an apparent absurdity in the mechanics of the parole eligibility rules. Interpreting the provisions of the *Corrections Act* according to their plain meaning, as a default rule, an offender sentenced to life imprisonment would be eligible for parole *before* an offender sentenced to a numerical sentence beyond 20 years. At face value, the operation of the parole ineligibility rules seems counter-intuitive; one would normally think that an offender sentenced to a more serious crime

where life imprisonment was available would be eligible for parole *after* an offender sentenced to a lesser crime. As such, the suggestion is that Parliament must have intended to avoid such an absurdity, and that the courts ought to prevent such an absurdity through the imposition of a cap on fixed-term sentences.

68 Quite frankly, I fail to see any obvious absurdity on the face of the parole eligibility scheme. Upon close examination, one can readily infer an intelligible legislative intent behind the operation of the rules. Parliament could have concluded that as a result of the unique life-long parole restrictions associated with a term of life imprisonment, an offender sentenced to life ought to be entitled to have his or her pre-trial custody credited to his or her parole ineligibility time.

69 Furthermore, any alleged absurdity on the face of the statute will rarely manifest itself in the actual release dates of prisoners. The rules of the *Corrections Act* only govern an offender's *eligibility* for full parole; the actual *granting* of full parole remains within the discretion of the National Parole Board. If an offender has committed a severe enough offence to warrant a life sentence, the offender will, *ceteris paribus*, represent a greater threat to society than an offender who received a non-life sentence. As such, notwithstanding the operation of the parole eligibility rules, I am inclined to believe that the Parole Board will ordinarily conclude that the protection of society requires an offender sentenced to life imprisonment to remain under conditions of physical incarceration longer than an offender serving a fixed-term sentence of imprisonment. Accordingly, in the actual operation of these rules, it will simply not be the normal practice that an offender sentenced to life will receive conditional release *before* an offender sentenced to a fixed-term sentence beyond 20 years.

70 Finally, even if one assumes that the parole eligibility rules result in an absurdity, I believe that such a legislative absurdity would only be compounded rather than corrected by imposing a strict restriction on the sentencing discretion of trial judges under the *Criminal Code*. The *Corrections Act* was enacted for the purpose of creating a comprehensive correctional system to execute the larger system of criminal sentencing established by the *Code*. As the *Corrections Act* defines its own purpose:

> *3.* The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by
>
> (*a*) *carrying out sentences imposed by courts* through the safe and humane custody and supervision of offenders .... [Emphasis added.]

In my view, it would seriously pervert both the very purpose and function of the statute to suggest that the peculiarities of the parole eligibility rules contained within the *Corrections Act* ought to dictate and control the structure of sentences under the *Code*. The *Corrections Act* was intended to facilitate the sentencing discretion of trial judges rather than frustrate it. As such, I simply cannot accept that we should modify the basic architecture of our criminal justice system to avoid a potential anomaly arising from the comparative rules governing the commencement of parole eligibility under ss. 120(1) and 120(2) of the *Corrections Act*.

6. Conclusion

71 In summary, I find no evidence from the parole eligibility rules under the *Corrections Act* that Parliament intended to impose a qualified ceiling on numerical sentences under the *Code*. A numerical sentence beyond 20 years may still significantly advance the traditional continuum of sentencing goals ranging from deterrence, denunciation, rehabilitation to the protection of society, notwithstanding the fact that an offender is eligible for review of the conditions of his or her incarceration after seven years (absent an order extending the period of ineligibility under s. 741.2 of the *Code*). Accordingly, I remain thoroughly unpersuaded that Parliament intended to preclude such numerical sentences through the adoption of the *Corrections Act* and its legislative predecessors. The very purpose of the *Corrections Act* was to enable a trial judge's sentencing discretion under the *Code* rather than to hobble it. In the absence of a clearer expression of legislative intent on such an important subject implicating the basic structure of our criminal justice system, I decline to read such a dramatic restriction on the sentencing discretion of judges into the *Criminal Code*.

72 In my view, within the broad statutory maximum and minimum penalties defined for particular offences under the *Code*, trial judges enjoy a wide ambit of discretion under s. 717 in selecting a "just and appropriate" fixed-term sentence which adequately promotes the traditional goals of sentencing, subject only to the fundamental principle that the global sentence

imposed reflect the overall culpability of the offender and the circumstances of the offence. As such, I decline to delineate any pre-fixed outer boundary to the sentencing discretion of a trial judge, whether at 20 years, or even at 25 years as suggested by Seaton J.A. in dissent at the Court of Appeal. Similarly, I see no reason why numerical sentences in Canada ought to be *de facto* limited at 20 years as a matter of judicial habit or convention. Whether a fixed-term sentence beyond 20 years is imposed as a sentence for a single offence where life imprisonment is available but not imposed, or as a cumulative sentence for multiple offences where life imprisonment is not available, there is no *a priori* ceiling on fixed-term sentences under the *Code*.

73 The bastion which protects Canadians from unduly harsh fixed-term sentences is not found in the mechanics of the *Corrections Act* but rather in the good sense of our nation's trial judges. For many of the lesser crimes presently before our courts, a single or cumulative sentence beyond 20 years would undoubtedly be grossly excessive, and probably cruel and unusual. In other circumstances, such a stern sentence would be both fitting and appropriate. In our system of justice, the ultimate protection against excessive criminal punishment lies within a sentencing judge's overriding duty to fashion a "just and appropriate" punishment which is proportional to the overall culpability of the offender.

74 However, in the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the *Code*, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value. But with that consideration in mind, the governing principle remains the same: Canadian courts enjoy a broad discretion in imposing numerical sentences for single or multiple offences, subject only to the broad statutory parameters of the *Code* and the fundamental principle of our criminal law that global sentences be "just and appropriate".

75 Pursuant to the foregoing discussion, I conclude that the British Columbia Court of Appeal erred in applying as a principle of sentencing that fixed-term sentences under the *Criminal Code* ought to be capped at 20 years, absent special circumstances. However, the Court of Appeal also justified its reduction of the respondent's sentence on the grounds that the sentence imposed by Filmer Prov. Ct. J. was unfit under the particular circumstances. Accordingly, it is still necessary to examine whether the Court of Appeal erred in law in its review of the fitness of the respondent's sentence. But before turning to that question, I intend to deal briefly with the Crown's two remaining grounds of appeal.

B. Did the Court of Appeal err in holding that retribution is not a legitimate principle of sentencing?

76 As a second and independent ground of appeal, the Crown argues that the Court of Appeal erred in law by relying on the proposition that "retribution is not a legitimate goal of sentencing" (p. 116) in reducing the sentence imposed by Filmer Prov. Ct. J. to 18 years and 8 months. In my reading of the judgment of the Court of Appeal below, I find little evidence that the passing remarks of Wood J.A. in relation to the legitimacy of retribution played a significant role in his conclusion that the respondent's sentence ought to be reduced to 18 years and 8 months' imprisonment. It should be noted that Rowles J.A., in her concurring reasons, did not even discuss retribution as a principle of sentencing. Similarly, there is no evidence that Filmer Prov. Ct. J. placed any explicit reliance on the objective of "retribution" in initially rendering his stern sentence. Accordingly, whether or not Wood J.A. erred as a strict matter of law in his discussion of the philosophical merits of retribution as a principle of sentencing, I conclude that Wood J.A.'s discussion of retribution was not a decisive element in the majority of the Court of Appeal's conclusion that the sentence of the respondent ought to be reduced to below 19 years. Therefore, I am persuaded that the remarks of Wood J.A. in relation to retribution did not constitute a reversible error. However, given the continued judicial debate over this issue, particularly in recent judgments of the B.C. Court of Appeal (see, e.g., *R. v. Hicks* (1995), 56 B.C.A.C. 259, at para. 14 (rejecting retribution), *R. v. Eneas*, [1994] B.C.J. No. 262, at paras. 45 and 46 (endorsing retribution); *R. v. M. (D.E.S.)* (1993), 80 C.C.C. (3d) 371, at p. 376 (rejecting retribution); *R. v. Hoyt*, [1992] B.C.J. No. 2315 [reported at 17 C.R. (4th) 338], at paras. 21 and 22 (rejecting retribution); *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390, at pp. 394-95 (endorsing retribution)), it would be prudent for this Court to clarify briefly the existing state of Canadian law in this important area.

77 It has been recognized by this Court that retribution is an accepted, and indeed important, principle of sentencing in our criminal law. As La Forest J. acknowledged in discussing the constitutionality of the dangerous offender provisions of the *Criminal Code* in *R. v. L. (T.P.)*, (sub nom. *R. v. L.)* [1987] 2 S.C.R. 309, at p. 329:

> In a rational system of sentencing, the respective importance of prevention, deterrence, *retribution* and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. *No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing*. [Emphasis added.]

This Court has since re-endorsed this passage on a number of occasions as a proper articulation of some of the guiding principles of sentencing in a number of subsequent cases. See *Luxton, supra*, at p. 721; *Goltz, supra*, at p. 503; and *Shropshire, supra*, at para. 23.

78 The Canadian Sentencing Commission in its 1987 Report on Sentencing Reform also endorsed retribution as a legitimate and relevant consideration in the sentencing process. While the Commission noted that strict retributivist theory on its own fails to provide a general justification for the imposition of criminal sanctions, the Commission argued that retribution, in conjunction with other utilitarian justifications of punishment (i.e., deterrence and rehabilitation), contributes to a more coherent theory of punishment (*supra*, at pp. 141-42, 143-45). More specifically, the Commission argued that a theory of retribution centred on "just deserts" or "just sanctions" provides a helpful organizing principle for the imposition of criminal sanctions (at p. 143). Indeed, as the Commission noted, retribution frequently operates as a principle of restraint, as utilitarian principles alone may direct individualized punishments which unfairly exceed the culpability of the offender. As the Report stated at pp. 133-34:

> The ethical foundation of retributivism lies in the following principle: it is immoral to treat one person as a resource for others. From this principle it follows that the only legitimate ground for punishing a person is the blameworthiness of his or her conduct. It also follows that sanctions must be strictly proportionate to the culpability of a person and to the seriousness of the offence for which that person has been convicted. ... According to these principles, all exemplary sentences (i.e. the imposition of a harsher sanction on an individual offender so that he or she may be made an example to the community) are unjustified, because they imply that an offender's plight may be used as a means or as a resource to deter potential offenders.

See, similarly, B. P. Archibald, *Crime and Punishment: The Constitutional Requirements for Sentencing Reform in Canada* (August 1988), at p. 18. With these considerations in mind, the Commission explicitly defined the fundamental purpose of sentencing with reference to the normative goal of imposing "just sanctions". As the Commission cast the guiding purpose of criminal sentencing, at p. 153:

> In furtherance of the overall purpose of the criminal law of maintaining a just, peaceful and safe society, the fundamental purpose of sentencing is to preserve the authority of and promote respect for the law *through the imposition of just sanctions*. [Emphasis added.]

A majority of this Court has since expressed approval of this passage as an accurate statement of the essential goals of sentencing. See *R. v. Jones*, [1994] 2 S.C.R. 229, at p. 291 (although I dissented on the merits of the case).

79 Retribution, as an objective of sentencing, represents nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender. In my view, retribution is integrally woven into the existing principles of sentencing in Canadian law through the fundamental requirement that a sentence imposed be "just and appropriate" under the circumstances. Indeed, it is my profound belief that retribution represents an important unifying principle of our penal law by offering an essential conceptual link between the attribution of *criminal liability* and the imposition of *criminal sanctions*. With regard to the attribution of criminal liability, I have repeatedly held that it is a principle of "fundamental justice" under s. 7 of the *Charter* that criminal liability may only be imposed if an accused possesses a minimum "culpable mental state" in respect of the ingredients of the alleged offence. See *R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645. See, similarly, *Motor Vehicle Act (British Columbia), supra; R. v. Vaillancourt*, [1987] 2 S.C.R. 636. It is this mental state which gives rise to the "moral blameworthiness"

which justifies the state in imposing the stigma and punishment associated with a criminal sentence. See *Martineau*, at p. 646. I submit that it is this same element of "moral blameworthiness" which animates the determination of the appropriate quantum of punishment for a convicted offender as a "just sanction." As I noted in *Martineau* in discussing the sentencing scheme for manslaughter under the *Code*, it is a recognized principle of our justice system that "punishment be meted out with regard to the level of moral blameworthiness of the offender" (p. 647). See the similar observations of W. E. B. Code in "Proportionate Blameworthiness and the Rule against Constructive Sentencing" (1992), 11 C.R. (4th) 40, at pp. 41-42.

80 However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance. See, e.g., *R. v. Hinch, supra*, at pp. 43-44; *R. v. Calder* (1956), 114 C.C.C. 155 (Man. C.A.), at p. 161. But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. See Ruby, *Sentencing, supra*, at p. 13. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the *moral culpability* of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and *nothing more*. As R. Cross has noted in *The English Sentencing System* (2nd ed. 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."

81 Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular *offender*. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's *conduct*. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. Rep. 74 (C.A.), at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass." The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.

82 As a closing note to this discussion, it is important to stress that neither retribution nor denunciation alone provides an exhaustive justification for the imposition of criminal sanctions. Rather, in our system of justice, normative and utilitarian considerations operate in conjunction with one another to provide a coherent justification for criminal punishment. As Gonthier J. emphasized in *Goltz, supra*, at p. 502, the goals of the penal sanction are both "broad and varied". Accordingly, the meaning of retribution must be considered in conjunction with the other legitimate objectives of sentencing, which include (but are not limited to) deterrence, denunciation, rehabilitation and the protection of society. Indeed, it is difficult to perfectly separate these inter-related principles. And as La Forest J. emphasized in *L. (T.P.)*, the relative weight and importance of these multiple factors will frequently vary depending on the nature of the crime and the circumstances of the offender. In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.

C. Did the Court of Appeal err in holding that the Crown was obligated to bring dangerous offender proceedings?

83 As a third ground of appeal, the Crown submits that the majority of the Court of Appeal erred by stating that the Crown had an obligation to bring dangerous offender proceedings under Part XXIV of the *Criminal Code* against the respondent. The

relevant passage of the judgment of Wood J.A. occurs in his discussion of the alleged justifications of the respondent's sentence, at p. 117:

> The other utilitarian goal of sentencing which must be taken into account when sentence is passed is the rehabilitation of the offender. Very little was said about the appellant's rehabilitation by the trial judge, although as the second passage from his reasons indicates he clearly had it in mind. He was apparently of the view that an additional five years of parole supervision would add substantially to the rehabilitative value of the sentence he imposed. With respect, the appellant was 52 years of age when sentenced. *If there was any realistic possibility that he would not be fully rehabilitated by the time he finished serving his parole from a twenty-year sentence, the Crown had an obligation to bring dangerous offender proceedings against him. No such proceedings were brought*. [Emphasis added.]

In the course of its oral and written submissions, the Crown argued that the foregoing statement of Wood J.A. represented a serious intrusion upon an established domain of prosecutorial discretion in finding that the Crown was required to initiate dangerous offender proceedings in this instance. In support of its argument, the Crown drew attention to this Court's judgment in *L. (T.P.)*, at p. 348, which unambiguously recognized the importance of prosecutorial discretion in the imposition of dangerous offender proceedings under Part XXIV.

84 With respect, I believe that the Crown has profoundly misunderstood the remarks of Wood J.A. in this context. In contrast to the Crown, I would stress the conditional tone of the introductory clause of Wood J.A.'s remark ("*If* there was any realistic possibility ..."). I do not interpret the foregoing passage as holding that the Crown was *required* to invoke dangerous offender proceedings in this case. Indeed, it would be quite odd for Wood J.A. to insist that the respondent ought to have been subjected to indefinite detention for dangerousness in the context of a larger judgment in which he concluded that the fixed-term sentence of the respondent was overly harsh and ought to be significantly reduced. Rather, I understand the relevant passage as stating that given that the Crown has chosen *not* to invoke dangerous offender, there are limits to the ability of the sentencing judge to impose a long fixed-term sentence in light of the existence of the dangerous offenders regime. The meaning of the disputed passage is elucidated by the concurring remarks of Rowles J.A. on the implications of the existence of the dangerous offenders regime for the sentencing discretion of judges. As she stated, at pp. 125-26:

> There is no dispute that one of the applicable sentencing principles which had to be considered by the trial judge in this case was the protection of society. Consideration of that principle generally arises in the case of violent offenders, but *its application is not to be used as an expedient alternative to dangerous offender proceedings which may be taken by the Crown under Pt. XXIV of the Criminal Code*. ... Part XXIV of the Code provides for some procedural and substantive safeguards which are not part of the usual sentencing process. The wisdom of having such safeguards cannot, I think, be seriously questioned, considering the substantial body of literature on the problems and complexities of predicting dangerousness over the long term. ...
>
> . . . . .
>
> *As Mr. Justice Wood has pointed out, dangerous offender proceedings were not brought by the Crown in this case, and no determination was made by the trial judge that an isolative sentence beyond 20 years was required for the protection of society*. [Emphasis added.]

In short, I interpret the position of the majority of the Court of Appeal to be that since the Crown did not pursue dangerous offender proceedings in this instance, the sentencing judge should not have imposed a lengthy term of imprisonment motivated principally by the dangerousness of the respondent and the protection of society which obviated the substantive and procedural protections of Part XXIV of the *Code*.

85 As such, I find that this ground of appeal, as originally framed by the Crown, must fail. The comments of Wood J.A., interpreted in light of the parallel comments of Rowles J.A., did not hold that the Crown was obliged to pursue dangerous offender proceedings against the respondent.

86 The comments of the Court of Appeal, however, raise important questions concerning the relationship between a trial judge's traditional sentencing discretion and the statutory regime for dangerous offenders created under Part XXIV of the

Criminal Code. More specifically, Wood J.A. and Rowles J.A. identify issues relating to the sentencing responsibility of judges where the Crown has declined to pursue dangerous offender proceedings. In *L. (T.P.), supra*, I was in substantial agreement with the majority judgment of La Forest J. that there may indeed be circumstances where a life sentence, motivated in large part by the dangerousness of the offender, may be undesirable in light of Parliament's creation of a separate and distinct dangerous offenders regime. Prior to *Lyons*, a number of appellate court decisions, most notably *R. v. Hill* (1974), 15 C.C.C. (2d) 145 (Ont. C.A.), affirmed [1977] 1 S.C.R. 827, had suggested that a trial judge should exercise his or her discretion to impose a sentence of life imprisonment (if available) when faced with a patently dangerous offender who enjoys no prospects for rehabilitation. As Jessup J.A. expressed the sentencing principle in *Hill*, at p. 147:

> When an accused has been convicted of a serious crime in itself calling for a substantial sentence and when he suffers from some mental or personality disorder rendering him a danger to the community but not subjecting him to confinement in a mental institution and when it is uncertain when, if ever, the accused will be cured of his affliction, in my opinion *the appropriate sentence is one of life*. [Emphasis added.]

Pursuant to this principle, the Court of Appeal increased a sentence of 12 years for an aggravated rape to one of life imprisonment. See, similarly, *R. v. Hastings* (1985), 58 A.R. 108 (C.A.), at pp. 111-12; *R. v. Kempton* (1980), 53 C.C.C. (2d) 176 (Alta. C.A.), at pp. 191-92; *R. v. Pontello* (1977), 38 C.C.C. (2d) 262 (Ont. C.A.), at pp. 268-69; *R. v. Haig* (1974), 26 C.R.N.S. 247 (Ont. C.A.), at pp. 247-48. In *L. (T.P.)*, however, this Court cast serious doubt on the continuing validity of the *Hill* principle. As La Forest J. stated, at pp. 330-31:

> It is true that the *Hill* principle, which amounts to judge-made dangerous offender law, has clearly been limited by subsequent decisions. However, the basis of the retrenchment has not been a rejection of the principle of indeterminate detention for dangerous offenders. *Rather it has been the concern that the Hill principle not be used to circumvent the provisions of Part XXI [now Part XXIV* with its attendant safeguards for the offender]. [Emphasis added.]

87 In my view, however, the *Hill* principle is not implicated by this appeal. Upon a close examination of the reasons of decision of both Wood J.A. and Rowles J.A., I am satisfied that their joint comments on the relationship between fixed terms of imprisonment and the dangerous offenders regime did not substantially contribute to their mutual decision to reduce the sentence of the respondent to 18 years and 8 months. Therefore, similar to my conclusion in relation to Wood J.A.'s remarks on retribution as a principle of sentencing, I hold that the remarks of both appellate judges on this issue did not amount to a reversible error. Furthermore, in my scrutiny of the reasons of decision of the sentencing judge, I find no evidence that Filmer Prov. Ct. J. relied principally or even substantially on the dangerousness of the offender in justifying his imposition of a 25-year term of imprisonment. Accordingly, for the purposes of this appeal, it is unnecessary to address the question of whether there are circumstances where a stringent *fixed-term* sentence (as opposed to a *life* sentence) motivated almost exclusively by the acute dangerousness of the offender may inappropriately circumvent the substantive and procedural protections of Part XXIV of the *Criminal Code*. That question is best left for another day.

D. Did the Court of Appeal err in reducing the sentence from twenty-five years to eighteen years and eight months?

88 In addition to relying on the sentencing principles it had developed in *Rooke* and *D. (G.W.)*, the Court of Appeal also justified its reduction of the respondent's sentence on the grounds of fitness. More specifically, the Court of Appeal concluded that the sentence of 25 years imposed by the sentencing judge ought to be reduced as it was "unfit" under the circumstances. Accordingly, the Court of Appeal exercised its power of review under s. 687(1) of the *Code* to vary the sentence of the respondent from 25 years to 18 and 8 months, incorporating credit for time served in custody.

89 In *Shropshire, supra*, this Court recently articulated the appropriate standard of review that a court of appeal should adopt in reviewing the fitness of sentence under s. 687(1). In the context of reviewing the fitness of an order of parole ineligibility, Iacobucci J. described the standard of review as follows, at para. 46:

> An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the

> advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. *That is to say, that it has found the sentence to be clearly unreasonable*. [Emphasis added.]

As my learned colleague noted, this standard of review traces part of its lineage to the jurisprudence of the B.C. Court of Appeal. As Bull J.A. described the nature of a trial judge's sentencing discretion in *R. v. Gourgon (No. 2)* (1981), 58 C.C.C. (2d) 193 (B.C. C.A.), at p. 197:

> ... the matter is clearly one of discretion and unless patently wrong, or wrong principles applied, or correct principles applied erroneously, or proper factors ignored or overstressed, an appellate Court should be careful not to interfere with the exercise of that discretion of a trial Judge.

90 Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a *discretion* to determine the appropriate degree and kind of punishment under the *Criminal Code*. As s. 717(1) reads:

> *717.* (1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the *discretion* of the court that convicts a person who commits the offence. [Emphasis added.]

91 This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire*, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

92 Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. See, e.g., *R. v. Knife* (1982), 16 Sask. R. 40 (C.A.), at p. 43; *R. v. Wood* (1979), 21 C.L.Q. 423 (Ont. C.A.), at p. 424; *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 (Alta. C.A.), at p. 485; *R. v. Morrissette* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.), at pp. 311-12; *Re Baldhead*, (sub nom. *R. v. Baldhead*), [1966] 4 C.C.C. 183 (Sask. C.A.), at p. 187. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See *Mellstrom*, *Morrissette* and *Baldhead*. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

93 In the case at hand, the majority of the Court of Appeal reduced the sentence of the respondent primarily as a result of the framework of sentencing principles the court inherited from the previous cases of *Rooke* and *D. (G.W.), supra*. As I have argued previously, I believe that this framework was incorrect in law. But the Court of Appeal also justified its reduction of sentence with reference to a contextual application of the accepted principles of sentencing to this case. More specifically, the majority concluded that the goals of deterrence and denunciation do not support a sentence of 25 years in this case, because both of these sentencing goals experience sharply diminishing returns following 20 years. On the subject of deterrence, Wood J.A. pointed to the empirical studies he outlined in his concurring judgment in *Sweeney, supra*, which question the deterrent effect of criminal sanctions. The majority also concluded that the protection of society would not be advanced by such a sentence; as Wood J.A. argued, as a result of the parole eligibility rules, an increase of sentence of 5 years to 25 years is potentially limited to an additional 4 months of imprisonment.

94 With the greatest respect, I believe the Court of Appeal erred in this instance by engaging in an overly interventionist mode of appellate review of the "fitness" of sentence which transcended the standard of deference we articulated in *Shropshire*. Notwithstanding the existence of some empirical studies which question the *general* deterrent effect of sentencing, it was open for the sentencing judge to reasonably conclude that the particular blend of sentencing goals, ranging from specific *and* general deterrence, denunciation and rehabilitation to the protection of society, required a sentence of 25 years *in this instance*. Moreover, on the facts, the sentencing judge was entitled to find that an overall term of imprisonment of 25 years represented a "just sanction" for the crimes of the respondent.

95 The respondent committed a vile pattern of physical and sexual abuse against the very children he was entrusted to protect. The degree of violence exhibited in these crimes was disturbingly high, and the respondent's children will undoubtedly be scarred for life. The psychiatrist and psychologist who examined the respondent agree that he faces dim prospects of rehabilitation. Without doubt, the respondent deserves a severe sentence which expresses the society's revulsion at his crimes.

96 After taking into account all the circumstances of the offence, the trial judge sentenced the respondent to 25 years' imprisonment. In imposing that term of imprisonment, Filmer Prov. Ct. J. was at liberty to incorporate credit for time served in custody pursuant to s. 721(3) of the *Code*, but chose not to. I see no reason to believe that the sentencing order of Filmer Prov. Ct. J. was demonstrably unfit.

VI. Costs

97 Finally, the respondent has filed a request for costs on a solicitor-client basis under this Court's discretionary authority under s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26. We have previously acknowledged that this discretionary power extends to making an order for costs in a criminal case, including both summary conviction matters (*R. v. Trask*, [1987] 2 S.C.R. 304 (costs denied)) and indictable matters (*R. v. Olan*, No. 14000, October 11, 1977 (costs allowed)). But the prevailing convention of criminal practice is that whether the criminal defendant is successful or unsuccessful on the merits of the case, he or she is generally not entitled to costs. See *Berry v. British Transport Commission* (1961), [1962] 1 Q.B. 306 (C.A.), at p. 326, *per* Devlin L.C.J. The *Criminal Code* codifies this convention as a matter of appellate practice before provincial courts of appeal in cases involving indictable offences. See s. 683(3) of the *Code*, but see. s. 839(3) regarding summary conviction cases. Consistent with this established convention, in *Trask*, we denied costs under s. 47 to a criminal defendant following a *successful* appeal of a summary conviction matter, as there was nothing "remarkable" about the defendant's case, nor was there any "oppressive or improper conduct" alleged against the Crown (at pp. 307-8).

98 Since I would allow the Crown's appeal in light of the errors committed by the B.C. Court of Appeal, and since I similarly fail to find anything "remarkable" about this case warranting an order for costs against the Crown, I would deny the respondent's request.

VII. Disposition

99 For the foregoing reasons, I find that the B.C. Court of Appeal erred in law in reducing the respondent's sentence through its application of sentencing principles and through its standard of review for reviewing the fitness of sentence. I would allow the

appeal, set aside the judgment of the B.C. Court of Appeal, and restore the trial judge's sentence of 25 years which commenced to run as of February 8, 1993.

Appeal allowed; sentence restored.

Most Negative Treatment: Check subsequent history and related treatments.

2000 SCC 31, 2000 CSC 31
Supreme Court of Canada

Reference re Firearms Act (Canada)

2000 CarswellAlta 517, 2000 CarswellAlta 518, 2000 SCC 31, 2000 CSC 31, [2000] 10 W.W.R. 1, [2000] 1 S.C.R. 783, [2000] A.W.L.D. 482, [2000] S.C.J. No. 31, 144 C.C.C. (3d) 385, 185 D.L.R. (4th) 577, 225 W.A.C. 201, 254 N.R. 201, 261 A.R. 201, 34 C.R. (5th) 1, 46 W.C.B. (2d) 450, 82 Alta. L.R. (3d) 1, 97 A.C.W.S. (3d) 64, J.E. 2000-1234

In the Matter of Section 27(1) of the *Judicature Act*, R.S.A. 1980, chapter J-1

In the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta for hearing and consideration of the questions set out in Order in Council 461/96 respecting the *Firearms Act*, S.C. 1995, chapter 39

The Attorney General for Alberta, Appellant v. The Attorney General of Canada, Respondent and The Attorney General for Ontario, the Attorney General of Nova Scotia, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Saskatchewan, the Government of the Northwest Territories, the Minister of Justice for the Government of the Yukon Territory, the Federation of Saskatchewan Indian Nations, the Coalition of Responsible Firearm Owners and Sportsmen (CORFOS), the Law-Abiding Unregistered Firearms Association (LUFA), the Shooting Federation of Canada, the Association pour la santé publique du Québec inc., the Alberta Council of Women's Shelters, CAVEAT, the Fondation des victimes du 6 décembre contre la violence, the Canadian Association for Adolescent Health, the Canadian Pediatric Society, the Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg, Interveners

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: February 21-22, 2000
Judgment: June 15, 2000
Docket: 26933

Proceedings: affirming (1998), 19 C.R. (5th) 63 (Alta. C.A.)

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Jill Copeland, for Interveners Coalition for Gun Control, the Canadian Association of Chiefs of Police, the Corporation of the City of Toronto, the City of Montreal and the City of Winnipeg.

Subject: Criminal; Constitutional

Headnote

Criminal law --- Constitutional issues in criminal law — Constitutional responsibility for criminal law — Federal powers — Firearms

Parliament enacted Firearms Act, legislation amending Criminal Code to compel licensing of firearm owners and registration of all firearms — Legislation purported to apply to non-prohibited, non-restricted firearms — Province directed reference concerning whether licensing and registration provisions of Firearms Act were intra vires Parliament — Court of Appeal upheld constitutionality of legislation as valid exercise of criminal law power and province appealed — Appeal dismissed — Parliament traditionally retains power to legislate control over firearms, which were special and dangerous form of property — Legislation was valid exercise of Parliament's criminal law power and did not infringe unconstitutionally on province's jurisdiction to make laws concerning property and civil rights — Legislation was reasoned extension of extant and constitutional federal firearms legislation — Firearms Act, S.C. 1995, c. 39 — Criminal Code, R.S.C. 1985, c. C-46.

Constitutional law --- Distribution of legislative powers — Relation between federal and provincial powers — Ancillary and necessarily incidental legislation (double aspect, pith and substance) — General principles

Parliament enacted Firearms Act, legislation amending Criminal Code to compel licensing of firearm owners and registration of all firearms — Legislation purported to apply to non-prohibited, non-restricted firearms — Province directed reference concerning whether licensing and registration provisions of Firearms Act were intra vires Parliament — Court of Appeal upheld constitutionality of legislation as valid exercise of criminal law power and province appealed — Appeal dismissed — In pith and substance, legislation was directed toward public safety — Licensing and registration provisions, regulatory in nature, were necessarily incidental provisions enabling fundamentally valid exercise of criminal law power — Firearms Act, S.C. 1995, c. 39 — Criminal Code, R.S.C. 1985, c. C-46.

Droit criminel --- Questions constitutionnelles en droit criminel — Responsabilité constitutionnelle en droit criminel — Compétences fédérales — Armes à feu

Parlement a décrété la Loi sur les armes à feu, modifiant le Code criminel pour contraindre les propriétaires d'armes à feu à obtenir un permis et à enregistrer toutes les armes à feu — Loi prétendait s'appliquer aux armes à feu non-interdites et non-restreintes — Province a dirigé un renvoi pour déterminer si les dispositions de la Loi étaient de la compétence du Parlement — Cour d'appel a maintenu la constitutionnalité de la législation comme un exercice valide de la compéence du Parlement en matière de droit criminel et la province a formé un pourvoi — Pourvoi rejeté — Parlement détient traditionnellement le pouvoir de légiférer sur le contrôle des armes à feu, propriété spéciale et dangereuse — Loi était un exercice valide de la compéence du Parlement en matière de droit criminel et ne violait pas de façon inconstitutionnelle la compétence de la province à faire des lois sur la propriété et les droits civils — Loi était une extension raisonnée de la législation fédérale existante et constitutionnelle sur les armes à feu — Loi sur les armes à feu, L.C. 1995, c. 39 — Code criminel, L.R.C. 1985, c. C-46.

Droit constitutionnel --- Partage des compétences — Relation entre les compétences fédérale et provinciale — Législation subordonnée et nécessairement accessoire (dualité, nature fondamentale) — Principes généraux

Parlement a décrété la Loi sur les armes à feu, modifiant le Code criminel pour contraindre les propriétaires d'armes à feu à obtenir un permis et l'enregistrement de toutes les armes à feu — Loi prétendait s'appliquer aux armes à feu non-interdites et non-restreintes — Province a dirigé un renvoi pour déterminer si les dispositions de la Loi étaient de la compétence du Parlement — Cour d'appel a maintenu la constitutionnalité de la législation comme un exercice de la compétence du Parlement en matière de droit criminel et la province a formé un pourvoi — Pourvoi rejeté — De par sa nature fondamentale, la Loi a été orientée sur la sécurité publique — Dispositions sur le permis et l'enregistrement, de nature réglementaire, étaient nécessairement des dispositions incidentes permettant l'exercice fondamentalement valide de la compétence en matière de droit criminel — Loi sur les armes à feu, L.C. 1995, c. 39 — Code criminel, L.R.C. 1985, c. C-46.

In 1995, Parliament enacted new gun control legislation, the *Firearms Act*. The Act amended the *Criminal Code* to require all persons holding firearms to obtain a firearms licence and to register each firearm in the holder's possession.

The province of Alberta directed a reference to the Alberta Court of Appeal. The province asked the Court of Appeal to determine whether the licensing and registration provisions of the *Firearms Act* were *ultra vires* Parliament as infringing the Alberta legislature's exclusive jurisdiction over property and civil rights within Alberta, a general provincial power pursuant to s. 92¶13 of the *Constitution Act, 1867*. By a majority, the Court of Appeal answered the reference questions "no" and upheld Parliament's jurisdiction to enact the impugned legislative provisions. The province appealed.

Held: The appeal was dismissed.

In order to adjudge whether a particular enactment or legislative instrument falls within federal or provincial jurisdiction, a reviewing court must first determine the essential purpose and character of the enactment. What, in "pith and substance", is the enactment under review about?

In "pith and substance", the *Firearms Act* is concerned with public safety. It purports to control access to firearms by creating new offences and penalties. The *Firearms Act* is a valid exercise of Parliament's criminal law power, a matter within exclusive federal jurisdiction pursuant to s. 91¶27 of the *Constitution Act, 1867*.

The *Firearms Act* is a reasoned expansion of existing, valid gun control measures enacted by Parliament. The registration and licensing provisions in particular address domestic and international gun smuggling, the use of guns in crime and their role in suicides and accidental death. In Canada, gun control legislation has traditionally been considered criminal law under federal legislative jurisdiction.

While the registration and licensing provisions of the *Firearms Act* clearly have regulatory aspects, this alone does not make these provisions colourable intrusions on provincial legislative authority. The purpose of the registration and licensing scheme is integrally connected to the public safety purpose of the broader statute.

Parliament has the authority to use its criminal law power to prohibit activities which do not directly relate to public morality. In the case at bar, Parliament has the power to require gun registration and licensing as an exercise of criminal law power as the *Firearms Act* possesses the three elements of a criminal law: it was enacted for a valid criminal purpose, it prohibits certain conduct, and it creates penalties for breaches of the prohibition. Being a law concerned with public safety, the Act is clearly within the criminal law's purpose of protecting public peace, order, security and health. Moreover, the courts have repeatedly held that gun control comes within the criminal sphere. Furthermore, the legislation contains a number of prohibitions (s. 112 of the *Firearms Act* and s. 91 of the *Criminal Code*), backed by penalty provisions (s. 115 of the *Firearms Act* and s. 91 of the Code).

The Act does not fall within the exclusive jurisdiction of the provinces as being a matter concerned with property and civil rights. Firearms are a special type of property, different from, inter alia, existing provincial property regulation schemes related to automobiles and land title registries. Guns are restricted because they are dangerous. Provinces regulate automobiles not as dangerous products, but as items of property and as an exercise of civil rights. Moreover, guns cannot be neatly separated into two categories — those that are dangerous (and should be subject to the criminal law power) and those that are not. All guns are capable of maiming, killing and being used in crime. All guns pose a threat to public safety.

The *Firearms Act* does not upset the balance of Confederation by its impact on the provincial power over property and civil rights. The law mainly relates to criminal law. Its incidental effects in the provincial sphere are minimal and, therefore, constitutionally irrelevant. The Act does not hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Most provinces already have regulations that deal with hunting licences, discharging firearms within municipal boundaries and other aspects of firearm uses that are legitimate subjects of provincial regulation.

En 1995, le Parlement a décrété une nouvelle législation sur le contrôle des armes, la *Loi sur les armes à feu*. La Loi modifiait le *Code criminel* afin d'exiger de toutes les personnes détenant des armes à feu qu'elles obtiennent un permis et qu'elles enregistrent chaque arme à feu en possession du détenteur.

La province de l'Alberta a dirigé un renvoi devant la Cour d'appel de l'Alberta. La province a demandé à la Cour d'appel de déterminer si les dispositions sur le permis et l'enregistrement de la *Loi sur les armes à feu* étaient ultra vires du Parlement comme violant la compétence exclusive de la législature de l'Alberta sur la propriété et les droits civils à l'intérieur de l'Alberta, un pouvoir général provincial en vertu de l'art. 92¶13 de la *Loi constitutionnelle de 1867*. Par une majorité, la Cour d'appel a répondu "non" aux questions du renvoi et a maintenu la compétence du Parlement pour décréter les dispositions législatives contestées. La province a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Afin de décider si une promulgation particulière ou un instrument législatif tombe à l'intérieur de la compétence fédérale ou provinciale, une cour de révision doit d'abord déterminer le but et le caractère essentiel de la promulgation. De quoi traite, fondamentalement, la promulgation sous révision?

Fondamentalement, la *Loi sur les armes à feu* traite de la sécurité publique. Elle prétend contrôler l'accès aux armes à feu en créant de nouvelles infractions et pénalités. La *Loi sur les armes à feu* est un exercice valide de la compétence du Parlement en matière de droit criminel, une matière à l'intérieur de la compétence fédérale exclusive en vertu de l'art. 91¶27 de la *Loi constitutionnelle de 1867*.

La *Loi sur les armes à feu* est un accroissement limité de la portée des mesures de contrôle valides et existantes sur les armes, décrétée par le Parlement. Les dispositions d'enregistrement et de permis s'adressent en particulier à la contrebande domestique et internationale d'armes, l'utilisation des armes dans le crime et leur rôle dans les suicides et la mort accidentelle. Au Canada, la législation sur le contrôle des armes a traditionnellement été considérée comme du droit criminel sous la compétence législative fédérale.

Alors que les dispositions sur l'enregistrement et les permis de la *Loi sur les armes à feu* ont clairement des aspects réglementaires, ce seul fait ne fait pas de ces dispositions des instrusions spécieuses sur l'autorité législative provinciale. Le but de l'arrangement d'enregistrement et de permis est intégralement relié au but de sécurité publique de la législation élargie.

Le Parlement possède l'autorité pour utiliser son pouvoir en matière de droit criminel afin d'interdire les activités qui ne s'associent pas directement à la moralité publique. En l'espèce, le Parlement a le pouvoir d'exiger l'enregistrement et un permis pour arme à feu de par l'exercice de la compétence en matière de droit criminel puisque la *Loi sur les armes à feu* possède les trois éléments d'une loi criminelle: elle a été décrétée pour un but de criminalité valide, elle interdit une certaine conduite, et elle crée des sanctions pour des infractions à l'interdiction. Étant une loi concernée par la sécurité publique, la Loi est clairement à l'intérieur du but du droit criminel qui est de protéger la paix, l'ordre, la sécurité et la santé publique. D'ailleurs, les tribunaux ont soutenu à plusieurs reprises que le contrôle des armes relève de la sphère criminelle. De plus, la législation contient un certain nombre d'interdictions (art. 112 de la *Loi sur les armes à feu* et art. 91 du *Code criminel*), soutenues par des dispositions de sanction (art. 115 de la *Loi sur les armes à feu* et art. 91 du Code).

La Loi ne tombe pas à l'intérieur de la compétence exclusive des provinces comme étant une matière concernée par la propriété et les droits civils. Les armes à feu sont un type spécial de propriété, différente des, inter alia, arrangements provinciaux existants en matière de propriété concernant les automobiles et les droits immobiliers. Les armes sont restreintes parce qu'elles sont dangereuses. Les provinces réglementent les automobiles non pas en tant que produits dangereux, mais en tant qu'items de propriété et d'exercice des droits civils. D'ailleurs, des armes ne peuvent pas être séparées d'une manière ordonnée en deux catégories — celles qui sont pas dangereuses (et qui devraient être assujetties au pouvoir de droit criminel) et celles qui ne le sont pas. Toutes les armes à feu sont susceptibles de mutiler, de tuer et d'être utilisées dans le crime. Toutes les armes constituent une menace à la sécurité publique.

La *Loi sur les armes à feu* ne dérange pas l'équilibre de la confédération par son impact sur la compétence provinciale de la propriété et des droits civils. La Loi s'associe principalement au droit criminel. Ses effets incidents sur la sphère provinciale sont minimes et, par conséquent, constitutionnellement non pertinents. La Loi ne gêne pas la capacité des provinces à réglementer la propriété et les aspects de droits civils des armes. La plupart des provinces ont déjà des règlements qui traitent des permis de chasse, du déchargement des armes à feu dans les limites municipales et d'autres aspects des utilisations d'une arme à feu qui sont des sujets légitimes de la réglementation provinciale.

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Generally/en général — referred to

APPEAL by Province of Alberta from judgment upon reference reported at(1998), 19 C.R. (5th) 63, 164 D.L.R. (4th) 513, 128 C.C.C. (3d) 225, [1999] 2 W.W.R. 579, 65 Alta. L.R. (3d) 1, 219 A.R. 201, 179 W.A.C. 201 (Alta. C.A.), declaring licensing and registration provisions of *Firearms Act* intra vires Parliament of Canada as validly enacted criminal law.

POURVOI de la province de l'Alberta à l'encontre d'un jugement sur un renvoi publié à (1998), 19 C.R. (5th) 63, 164 D.L.R. (4th) 513, 128 C.C.C. (3d) 225, [1999] 2 W.W.R. 579, 65 Alta. L.R. (3d) 1, 219 A.R. 201, 179 W.A.C. 201 (C.A. Alta.), déclarant les dispositions d'obtention de permis et d'enregistrement de la *Loi sur les armes à feu* intra vires du Parlement du Canada comme du droit criminel valablement promulgué.

***Per curiam*:**

I. Introduction

1 In 1995, Parliament amended the *Criminal Code*, R.S.C. 1985, c. C-46, by enacting the *Firearms Act*, S.C. 1995, c. 39, commonly referred to as the gun control law, to require the holders of all firearms to obtain licences and register their guns. In 1996, the Province of Alberta challenged Parliament's power to pass the gun control law by a reference to the Alberta Court of Appeal. The Court of Appeal by a 3:2 majority upheld Parliament's power to pass the law. The Province of Alberta now appeals that decision to this Court.

2 The issue before this Court is not whether gun control is good or bad, whether the law is fair or unfair to gun owners, or whether it will be effective or ineffective in reducing the harm caused by the misuse of firearms. The only issue is whether or not Parliament has the constitutional authority to enact the law.

3 The answer to this question lies in the Canadian Constitution. The Constitution assigns some matters to Parliament and others to the provincial legislatures: *Constitution Act, 1867*. The federal government asserts that the gun control law falls under its criminal law power, s. 91(27), and under its general power to legislate for the "Peace, Order and good Government" of Canada. Alberta, on the other hand, says the law falls under its power over property and civil rights, s. 92(13). All agree that to resolve this dispute, the Court must first determine what the gun control law is really about — its "pith and substance" — and then ask which head or heads of power it most naturally falls within.

4 We conclude that the gun control law comes within Parliament's jurisdiction over criminal law. The law in "pith and substance" is directed to enhancing public safety by controlling access to firearms through prohibitions and penalties. This brings it under the federal criminal law power. While the law has regulatory aspects, they are secondary to its primary criminal law purpose. The intrusion of the law into the provincial jurisdiction over property and civil rights is not so excessive as to upset the balance of federalism.

II. Reference Questions

5 The formal questions put to the Alberta Court of Appeal by the Alberta government in 1996 are attached in Appendix A. Simply put, the issue before us is whether or not the licensing and registration provisions in the *Firearms Act*, as they relate to ordinary firearms, were validly enacted by Parliament. The impugned provisions of the Act are attached in Appendix B.

III. Legislation

6 For many years, the *Criminal Code* has restricted access to firearms, mainly automatic weapons and handguns, by classifying some as prohibited and some as restricted. The *Firearms Act* amendments extended this regulation to all firearms, including rifles and shotguns. As a result, s. 84 of the *Criminal Code* now controls three classes of firearms: (1) prohibited firearms (generally automatic weapons); (2) restricted firearms (generally handguns); and (3) all other firearms (generally rifles and shotguns). The third class of guns is variously referred to as" ordinary firearms", "long guns", and "unrestricted firearms". We will refer to this class as "ordinary firearms".

7 The reference questions focus on the validity of the licensing and registration provisions for ordinary firearms introduced by the *Firearms Act*. The licensing sections of the Act provide that a person must be licensed in order to possess a firearm. Eligibility for a licence reflects safety interests. An applicant with a criminal record involving drug offences or violence, or a history of mental illness, may be denied a licence. An applicant who seeks to acquire a firearm must pass a safety course which requires a basic understanding of firearm safety and the legal responsibilities of firearm ownership. The chief firearms officer, who issues licences, may conduct a background check on the applicant in order to determine eligibility, and may attach conditions to a licence. Once issued, a licence is valid for five years, but it may be revoked for contravention of its conditions or for certain criminal convictions. A licence refusal or revocation may be appealed to a court.

8 The registration provisions of the Act are more limited. A firearm cannot be registered unless the applicant is licensed to possess that type of firearm. Registration is generally done by reference to the serial number on the firearm. A registration certificate is valid as long as its holder owns the weapon. If ownership of a registered weapon is transferred, the new owner must register the weapon. In order to give gun owners time to register their weapons, people who owned ordinary firearms as of January 1, 1998 are deemed to hold registration certificates that are valid until January 1, 2003. Possession of an unregistered firearm of any type is an offence. All licences and registration certificates, along with imported, exported, lost and stolen guns, are recorded in the Canadian Firearms Registry, which is operated by a federal appointee.

IV. Reasons of the Alberta Court of Appeal(1998), 65 Alta. L.R. (3d) 1 (Alta. C.A.)

9 The Alberta Court of Appeal upheld the 1995 gun control law by a 3:2 majority. The court wrote four judgments.

A. Majority

10 Chief Justice Fraser, in a comprehensive judgment, began by noting that guns may be regulated by both the federal and provincial governments for different purposes, and that the effectiveness of the law is irrelevant to its constitutional characterization. She found that Parliament's purpose in enacting the law was to enhance public safety. While guns preserve lives and serve as useful tools, they also wound and kill. The latter aspect of guns — their inherent dangerousness — is the focus of the impugned provisions of the Act. Parliament's aim was to reduce the misuse of guns in crime, including domestic violence, as well as to reduce suicides and accidents caused by the misuse of firearms. The licensing provisions, which require applicants to pass a safety course and undergo a criminal record check and background investigation, support this purpose. The registration system, by seeking to reduce smuggling, theft and illegal sales, also addresses misuse. The licensing and registration provisions are inextricably intertwined. While the provisions entail the regulation of property rights, this regulation is the means of the law, not its end. On this basis, Chief Justice Fraser concluded that the Act is in pith and substance designed to protect public safety from the misuse of firearms.

11 Chief Justice Fraser went on to the second step in the analysis: considering whether or not that pith and substance could be allocated to one of Parliament's heads of power under the *Constitution Act, 1867*. She held that the legislation falls under

the criminal law power, s. 91(27), under either its" prevention" aspect or its "prohibition, penalty, and purpose" aspect. The law does not represent a "colourable" or improper intrusion into provincial jurisdiction.

12 Justices Berger and Hetherington wrote separate opinions agreeing with the Chief Justice. Justice Hetherington held that any firearm, used improperly, is dangerous to human life and health. As a result, Parliament's purpose, in seeking to prevent crime and promote public safety by discouraging possession, is a valid criminal law purpose. The potential inefficacy of the law, highlighted by Alberta and the other provincial governments, is irrelevant unless it shows that Parliament had a different purpose — a colourable motive. Colourability has not been shown because the law genuinely attempts to improve firearms storage, reduce trafficking, and aid in tracking guns generally. While the law may affect property and civil rights, that does not prevent Parliament from enacting it. Justice Hetherington concluded that the *Firearms Act* contains prohibitions accompanied by penal sanctions, enacted for criminal public purposes, and therefore it is a valid law under the test propounded by La Forest J. of this Court in *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), and *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.).

13 Justice Berger likewise noted that all guns are capable of causing death if misused. He held that Parliament's purpose in enacting the legislation was to ensure that firearms are only possessed by those qualified to use them. The licensing provisions identify those who are qualified. The registration system ensures that only qualified people can acquire firearms. As a prohibition backed by a penalty, for a public purpose, the law is a valid exercise of Parliament's criminal law power. The regulatory aspects of the law are merely the means to an end.

B. Minority

14 Justice Conrad dissented, Justice Irving concurring. Justice Conrad broadly defined the purpose of the law as regulating all aspects of the possession and use of firearms. While firearms and safety are subjects of both federal and provincial concern, the criminal law power represents a "carve-out" from provincial jurisdiction. The regulation of ownership rather than use and the complexity of the regulations demonstrate that this legislation cannot be classified as valid criminal law. The *Criminal Code* generally prohibits acts, rather than regulating ownership. Possession itself is not dangerous; it is only misuse that is dangerous, and the law goes far beyond prohibiting misuse. This led Justice Conrad to conclude that the *Firearms Act* represents a colourable intrusion into the provincial jurisdiction over property and civil rights, and is invalid as an exercise of Parliament's jurisdiction over criminal law or its peace, order and good government power. While she would have struck down the legislation entirely, she held that if the licensing scheme were deemed valid, the registration scheme could be severed from the licensing scheme.

V. Analysis

15 The issue before us is whether the licensing and registration provisions of the *Firearms Act* constitute a valid federal enactment pursuant to Parliament's jurisdiction over criminal law or its peace, order and good government power. In order to answer this question, we must engage in the division of powers analysis used so often by this Court, and most recently summarized in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21 (S.C.C.): see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 (S.C.C.); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.); and *R. v. Morgentaler*, [1993] 3 S.C.R. 463 (S.C.C.). There are two stages to this analysis. The first step is to determine the "pith and substance" or essential character of the law. The second step is to classify that essential character by reference to the heads of power under the *Constitution Act, 1867* in order to determine whether the law comes within the jurisdiction of the enacting government. If it does, then the law is valid.

A. Characterization: What Is the Pith and Substance of the Law?

16 The first task is to determine the "pith and substance" of the legislation. To use the wording of ss. 91 and 92, what is the "matter" of the law? What is its true meaning or essential character, its core? To determine the pith and substance, two aspects of the law must be examined: the purpose of the enacting body, and the legal effect of the law.

17 A law's purpose is often stated in the legislation, but it may also be ascertained by reference to extrinsic material such as Hansard and government publications: see *Morgentaler*, *supra*, at pp. 483-84. While such extrinsic material was at one

time inadmissible to facilitate the determination of Parliament's purpose, it is now well accepted that the legislative history, Parliamentary debates, and similar material may be quite properly considered as long as it is relevant and reliable and is not assigned undue weight: see *Global Securities Corp.*, *supra*, at para. 25; *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 35; and *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), at para. 14. Purpose may also be ascertained by considering the" mischief" of the legislation — the problem which Parliament sought to remedy: see *Morgentaler*, *supra*, at pp. 483-84.

18 Determining the legal effects of a law involves considering how the law will operate and how it will affect Canadians. The Attorney General of Alberta states that the law will not actually achieve its purpose. Where the legislative scheme is relevant to a criminal law purpose, he says, it will be ineffective (e.g. criminals will not register their guns); where it is effective it will not advance the fight against crime (e.g. burdening rural farmers with pointless red tape). These are concerns that were properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the Court's division of powers analysis: *Morgentaler*, *supra*, at pp. 487-88; and *Reference re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373 (S.C.C.). Rather, the inquiry is directed to how the law sets out to achieve its purpose in order to better understand its "total meaning": William R. Lederman, *Continuing Canadian Constitutional Dilemmas* (1981), at pp. 239-40. In some cases, the effects of the law may suggest a purpose other than that which is stated in the law: see *Morgentaler*, *supra*, at pp. 482-83; *Reference re Alberta Legislation* (1938), [1939] A.C. 117 (Alberta P.C.) (*Alberta Bank Taxation Reference*); and *Texada Mines Ltd. v. British Columbia (Attorney General)*, [1960] S.C.R. 713 (S.C.C.); see generally Peter W. Hogg, *Constitutional Law of Canada* (looseleaf ed.), at pp. 15-14 - 15-16. In other words, a law may say that it intends to do one thing and actually do something else. Where the effects of the law diverge substantially from the stated aim, it is sometimes said to be" colourable".

19 Against this background, we turn to the purpose of the *Firearms Act*. Section 4 states that the purpose of the Act is "to provide ... for the issuance of licences, registration certificates and authorizations under which persons may possess firearms" and "to authorize ... the manufacture of" and "transfer of" ordinary firearms. This is the language of property regulation. However, this regulatory language is directly tied to a purpose cast in the language of the criminal law. The licensing, registration and authorization provisions delineate the means by which people can own and transfer ordinary firearms "in circumstances that would otherwise constitute [a criminal] offence". Those who challenge the legislation point to the first part of the section and its regulatory focus. Those who seek to uphold the law point to the second part of the section and its criminal focus.

20 The statements of the Honourable Allan Rock, Minister of Justice at the time, in his second-reading speech in the House of Commons, reveal that the federal government's purpose in proposing the law was to promote public safety. He stated: "The government suggests that the object of the regulation of firearms should be the *preservation of the safe, civilized and peaceful nature of Canada*" (*House of Commons Debates*, vol. 133, No. 154, 1st Sess., 35th Parl., February 16, 1995, at p. 9706). Mr. Rock went on to describe the contents of the bill in more detail:

> First, tough measures to deal with the criminal misuse of firearms; second, specific penalties to punish those who would smuggle illegal firearms; and third, measures overall to provide a context in which the legitimate use of firearms can be carried on in a manner consistent with public safety. [Emphasis added.] (*House of Commons Debates, supra*, at p. 9707. See also the judgment of Fraser C.J.A., at paras. 169-72.)

Later, the Minister referred to the problems of suicide, accidental shootings, and the use of guns in domestic violence, and detailed some of the shooting tragedies that had spurred public calls for gun control. Russell MacLellan, the Parliamentary Secretary of Justice at the time, underscored the government's concerns, noting that the Act pursues "three fundamental policies: the deterrence of the misuse of firearms, general controls on persons given access to firearms, and controls placed on specific types of firearms" ("Canada's firearms proposals" (1995), 37 *Can. J. Crim.* 163).

21 Another way to determine the purpose of legislation is to look at the problems it is intended to address — the so-called "mischief" approach. The *Firearms Act* is aimed at a number of evils or" mischiefs". One is the illegal trade in guns, both within Canada and across the border with the United States: see *The Government's Action Plan on Firearms Control*, tabled in the House of Commons in 1994. Another is the link between guns and violent crime, suicide, and accidental deaths. In a paper

commissioned by the Department of Justice in 1994, "The impact of the availability of firearms on violent crime, suicide, and accidental death: A review of the literature with special reference to the Canadian situation", Thomas Gabor found that all three causes of death may increase in jurisdictions where there are the fewest restrictions on guns. Whether or not one accepts Gabor's conclusions, his study indicates the problem which Parliament sought to address by enacting the legislation: the problem of the misuse of firearms and the threat it poses to public safety.

22 Finally, there is a strong argument that the purpose of this legislation conforms with the historical public safety focus of all gun control laws. This reference challenges the licensing and registration provisions of the Act only as they relate to ordinary firearms. Alberta does not question the licensing and registration of restricted and prohibited weapons. It freely admits that the restrictions on those categories of weapons are constitutional. Indeed, Alberta would have difficulty alleging otherwise, as numerous courts have upheld the validity of different aspects of the federal gun control legislation that existed prior to the enactment of this Act: see *R. v. Schwartz*, [1988] 2 S.C.R. 443 (S.C.C.); *R. v. McGuigan*, [1982] 1 S.C.R. 284 (S.C.C.); and *Canada (Attorney General) v. Pattison* (1981), 30 A.R. 83 (Alta. C.A.).

23 More specifically, before the introduction of the *Firearms Act*, the registration of all restricted weapons was upheld by the British Columbia Court of Appeal in *Martinoff v. Dawson* (1990), 57 C.C.C. (3d) 482 (B.C. C.A.). Furthermore, the *Criminal Code* required anyone seeking to obtain *any kind* of firearm to apply for a firearms acquisition certificate. This requirement was upheld in *R. v. Northcott*, [1980] 5 W.W.R. 38 (B.C. Prov. Ct.). These cases upheld the previous gun control legislation on the basis that Parliament's purpose was to promote public safety. The *Firearms Act* extends that legislation in two respects: (1) it requires all guns to be registered, not just restricted and prohibited firearms; and (2) eventually all gun owners will be required to be licensed, not just those who wish to acquire a firearm. These changes represent a continuation of Parliament's focus on safety concerns, and constitute a limited expansion of the pre-existing legislation. Given the general acceptance of the gun control legislation that has existed for the past hundred years, the constitutional validity of which has always been predicated on Parliament's concern for public safety, it is difficult to now impute a different purpose to Parliament. This supports the view that the law in pith and substance is about public safety.

24 The effects of the scheme — how it impacts on the legal rights of Canadians — also support the conclusion that the 1995 gun control law is in pith and substance a public safety measure. The criteria for acquiring a licence are concerned with safety rather than the regulation of property. Criminal record checks and background investigations are designed to keep guns out of the hands of those incapable of using them safely. Safety courses ensure that gun owners are qualified. What the law does not require also shows that the operation of the scheme is limited to ensuring safety. For instance, the Act does not regulate the legitimate commercial market for guns. It makes no attempt to set labour standards or the price of weapons. There is no attempt to protect or regulate industries or businesses associated with guns (see *Pattison*, *supra*, at para. 22). Unlike provincial property registries, the registry established under the Act is not concerned with prior interests, and unlike some provincial motor vehicle schemes, the Act does not address insurance. In short, the effects of the law suggest that its essence is the promotion of public safety through the reduction of the misuse of firearms, and negate the proposition that Parliament was in fact attempting to achieve a different goal such as the total regulation of firearms production, trade, and ownership. We therefore conclude that, viewed from its purpose and effects, the *Firearms Act* is in "pith and substance" directed to public safety.

B. Classification: Does Parliament Have Jurisdiction to Enact the Law?

25 Having assessed the pith and substance or matter of the law, the second step is to determine whether that matter comes within the jurisdiction of the enacting legislature. We must examine the heads of power under ss. 91 and 92 of the *Constitution Act, 1867* and determine what the matter is "in relation to". In this case, the question is whether the law falls under federal jurisdiction over criminal law or its peace, order and good government power; or under provincial jurisdiction over property and civil rights. The presumption of constitutionality means that Alberta, as the party challenging the legislation, is required to show that the Act does not fall within the jurisdiction of Parliament: see *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662 (S.C.C.).

26 The determination of which head of power a particular law falls under is not an exact science. In a federal system, each level of government can expect to have its jurisdiction affected by the other to a certain degree. As Dickson C.J. stated in *City*

National Leasing Ltd. v. General Motors of Canada Ltd., [1989] 1 S.C.R. 641 (S.C.C.), at p. 669, "overlap of legislation is to be expected and accommodated in a federal state". Laws mainly in relation to the jurisdiction of one level of government may overflow into, or have "incidental effects" upon, the jurisdiction of the other level of government. It is a matter of balance and of federalism: no one level of government is isolated from the other, nor can it usurp the functions of the other.

27 As a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty: *RJR-Macdonald Inc.*, supra; *Hydro-Québec* supra; and *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case)* (1948), [1949] S.C.R. 1 (S.C.C.) (the "*Margarine Reference*"). The Attorney General of Canada argues that the 1995 gun control law meets these three requirements, and points to commentary on this legislation which supports its position: Dale Gibson, "The *Firearms Reference* in the Alberta Court of Appeal" (1999), 37 *Alta. L. Rev.* 1071; David M. Beatty," Gun Control and Judicial Anarchy" (1999), 10 *Constitutional Forum* 45; Allan C. Hutchinson and David Schneiderman, "Smoking Guns: The Federal Government Confronts the Tobacco and Gun Lobbies" (1995), 7 *Constitutional Forum* 16; and Peter Hogg's testimony before the Standing Senate Committee on Legal and Constitutional Affairs, October 26, 1995.

28 Before determining whether the three criminal law criteria are met by this legislation, some general observations on the criminal law power may be apposite. Criminal law, as this Court has stated in numerous cases, constitutes a broad area of federal jurisdiction: *RJR-Macdonald Inc.*, supra *Hydro-Québec* supra; and *Margarine Reference*, supra. The criminal law stands on its own as federal jurisdiction. Although it often overlaps with provincial jurisdiction over property and civil rights, it is not "carved out" from provincial jurisdiction, contrary to the view of Conrad J.A. It also includes the law of criminal procedure, which regulates many aspects of criminal law enforcement, such as arrest, search and seizure of evidence, the regulation of electronic surveillance and the forfeiture of stolen property.

29 Not only is the criminal law a "stand-alone" jurisdiction, it also finds its expression in a broad range of legislation. The *Criminal Code* is the quintessential federal enactment under its criminal jurisdiction, but it is not the only one. The *Food and Drugs Act*, the *Hazardous Products Act*, the *Lord's Day Act*, and the *Tobacco Products Control Act* have all been held to be valid exercises of the criminal law power: see *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501 (B.C. C.A.); *R. v. Cosman's Furniture (1972) Ltd.* (1976), 73 D.L.R. (3d) 312 (Man. C.A.); *Big M Drug Mart, supra* (legislation struck down on other grounds); and *RJR-Macdonald Inc.*, supra (legislation struck down on other grounds), respectively. Thus the fact that some of the provisions of the *Firearms Act* are not contained within the *Criminal Code* has no significance for the purposes of constitutional classification.

30 Although the criminal law power is broad, it is not unlimited. Some of the parties before us expressed the fear that the criminal law power might be illegitimately used to invade the provincial domain and usurp provincial power. A properly restrained understanding of the criminal law power guards against this possibility.

31 Within this context, we return to the three criteria that a law must satisfy in order to be classified as criminal. The first step is to consider whether the law has a valid criminal law purpose. Rand J. listed some examples of valid purposes in the *Margarine Reference* at p. 50: "Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by [criminal] law". Earlier, we concluded that the gun control law in pith and substance is directed at public safety. This brings it clearly within the criminal law purposes of protecting public peace, order, security and health.

32 In determining whether the purpose of a law constitutes a valid criminal law purpose, courts look at whether laws of this type have traditionally been held to be criminal law: see *Morgentaler*, *supra*, at p. 491, and *RJR-Macdonald Inc.*, *supra*, at para. 204: see also *Scowby v. Saskatchewan (Board of Inquiry)*, [1986] 2 S.C.R. 226 (S.C.C.); *R. v. Westendorp*, [1983] 1 S.C.R. 43 (S.C.C.); and *R. v. Zelensky*, [1978] 2 S.C.R. 940 (S.C.C.). Courts have repeatedly held that gun control comes within the criminal law sphere. As Fraser C.J.A. demonstrated in her judgment, gun control has been a matter of criminal law since before the enactment of the *Criminal Code* in 1892, and has continued since that date (see also Elaine Davies, "The 1995 Firearms Act: Canada's public relations response to the myth of violence" (2000), *Appeal* 44, and Martin L. Friedland, *A Century of Criminal Justice* (1984), at pp. 125 ff.).

33 Gun control has traditionally been considered valid criminal law because guns are dangerous and pose a risk to public safety. Section 2 of the *Criminal Code* (as amended by s. 138(2) of the *Firearms Act*) defines a" firearm" as "a barrelled weapon from which any shot, bullet or other projectile can be discharged and *that is capable of causing serious bodily injury or death to a person*" (emphasis added). This demonstrates that Parliament views firearms as dangerous and regulates their possession and use on that ground. The law is limited to restrictions which are directed at safety purposes. As such, the regulation of guns as dangerous products is a valid purpose within the criminal law power: see *R. v. Felawka*, [1993] 4 S.C.R. 199 (S.C.C.); *RJR-Macdonald Inc.*, *supra*; *R. v. Kripps Pharmacy Ltd.*, *(*sub nom. *R. v. Wetmore)* [1983] 2 S.C.R. 284 (S.C.C.); and *Cosman's Furniture*, *supra*.

34 The finding of a valid criminal law purpose does not end the inquiry, however. In order to be classified as a valid criminal law, that purpose must be connected to a prohibition backed by a penalty. The 1995 gun control law satisfies these requirements. Section 112 of the *Firearms Act* prohibits the possession of a firearm without a registration certificate. Section 91 of the *Criminal Code* (as amended by s. 139 of the *Firearms Act*) prohibits the possession of a firearm without a licence and a registration certificate. These prohibitions are backed by penalties: see s. 115 of the *Firearms Act* and s. 91 of the *Code*.

35 It thus appears that the 1995 gun control law possesses all three criteria required for a criminal law. However, Alberta and the provinces raised a number of objections to this classification which must be considered.

(1) Regulation or Criminal Prohibition?

36 The first objection is that the *Firearms Act* is essentially regulatory rather than criminal legislation because of the complexity of the law and the discretion it grants to the chief firearms officer. These aspects of the law, the provinces argue, are the hallmarks of regulatory legislation, not the criminal law: see Hogg, *supra*, at pp. 18-25 and 18-26.

37 Despite its initial appeal, this argument fails to advance Alberta's case. The fact that the Act is complex does not necessarily detract from its criminal nature. Other legislation, such as the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 (4th Supp.), are legitimate exercises of the criminal law power, yet highly complex. Nor does the Act give the chief firearms officer or Registrar undue discretion. The offences are not defined by an administrative body, avoiding the difficulty identified in the dissenting judgment in *Hydro-Québec*, *supra*. They are clearly stated in the Act and the *Criminal Code*: no one shall possess a firearm without a proper licence and registration. While the Act provides for discretion to refuse to issue an authorization to carry or transport under s. 68 or a registration certificate under s. 69, that discretion is restricted by the Act. A licence shall be refused if the applicant is not eligible to hold one: s. 68. Eligibility to hold a licence is delineated in the rest of the Act: a person is ineligible to hold a licence if the person has been convicted of certain offences (s. 5(2)) or is subject to a prohibition order (s. 6); s. 7 requires the applicant to complete a safety course. Discretion regarding registration is also bounded by the Act. A refusal by the chief firearms officer or the Registrar must be for "good and sufficient reason": ss. 68 and 69; the refusal must be in writing with reasons given (s. 72). These provisions demonstrate that the Act does not give the chief firearms officer or the Registrar undue discretion. Furthermore, the chief firearms officer and the Registrar are explicitly subject to the supervision of the courts. Refusal or revocation of a licence or a registration certificate may be referred to a provincial court judge: s. 74. The courts will interpret the words "good and sufficient reason" in ss. 68 and 69 in line with the public safety purpose of the Act, ensuring that the exercise of discretion by the chief firearms officer and the Registrar is always wed to that purpose.

38 Furthermore, the law's prohibitions and penalties are not regulatory in nature. They are not confined to ensuring compliance with the scheme, as was the case in *R. v. Boggs*, [1981] 1 S.C.R. 49 (S.C.C.), but stand on their own, independently serving the purpose of public safety. Nor are the prohibitions and penalties directed to the object of revenue generation. Parliament's intention was not to regulate property, but to ensure that only those who prove themselves qualified to hold a licence are permitted to possess firearms of any sort.

39 Alberta and the supporting interveners argued that the only way Parliament could address gun control would be to prohibit ordinary firearms outright. With respect, this suggestion is not supported by either logic or jurisprudence. First, the

jurisprudence establishes that Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required: see *Reference re ss. 193& 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.); and *RJR-Macdonald Inc.*, *supra*. Second, exemptions from a law do not preclude it from being prohibitive and therefore criminal in nature: see *R. v. Furtney*, [1991] 3 S.C.R. 89 (S.C.C.), *R. v. Morgentaler (No. 5)* (1975), [1976] 1 S.C.R. 616 (S.C.C.), and *Lord's Day Alliance of Canada v. British Columbia (Attorney General)*, [1959] S.C.R. 497 (S.C.C.). Third, as noted above, the prohibition in this case is not merely designed to enforce a fee payment or regulatory scheme separate from the essential safety focus of the law: by way of contrast, see *Boggs*, *supra*. Finally, if prohibition is not required to make handgun control constitutional, which no one suggests, why should it be required for ordinary firearms?

40 In a related argument, some provincial interveners contended that if the purpose of the legislation is to reduce misuse, then the legislation should deal with misuse directly. On this view, Parliament could prohibit the careless or intentional misuse of guns, as it has in ss. 85-87 of the *Criminal Code*, but could not prohibit people from owning guns if they present risks to public safety or regulate how people store their guns. Again, the answer is that Parliament may use indirect means to further the end of public safety. The risks associated with ordinary firearms are not confined to the intentional or reckless conduct that might be deterred by a prohibition on misuse. The Attorney General of Canada argued, for example, that the suicide rate is increased by the availability of guns. A person contemplating suicide may be more likely to actually commit suicide if a gun is available, it was argued; therefore Parliament has a right to prevent people at risk, for example due to mental illness, from owning a gun. A prohibition on misuse is unlikely to deter a potential suicide; a prohibition on gun ownership may do so. Other examples where a prohibition on misuse falls short are not hard to envisage. A prohibition on misuse is unlikely to prevent the death of a child who plays with a gun; a prohibition on irresponsible ownership or careless storage may do so. Again, reducing availability may have a greater impact on whether a robber uses a gun than a law forbidding him to use it. Whether the 1995 gun law actually achieves these ends is not at issue before us; what is at issue is whether Parliament, in targeting these dangers, strayed outside its criminal law power. In our view, it did not.

(2) Property and Civil Rights or Criminal Law?

41 Alberta's second major objection to classifying the 1995 gun control scheme as criminal law is that it is indistinguishable from existing provincial property regulation schemes such as automobile and land title registries.

42 This argument overlooks the different purposes behind the federal restrictions on firearms and the provincial regulation of other forms of property. Guns are restricted because they are dangerous. While cars are also dangerous, provincial legislatures regulate the possession and use of automobiles not as dangerous products but rather as items of property and as an exercise of civil rights, pursuant to the provinces' s. 92(13) jurisdiction: *Canadian Indemnity Co. v. British Columbia (Attorney General)* (1976), [1977] 2 S.C.R. 504 (S.C.C.); *Reference re s. 92(4) of the Vehicles Act (Saskatchewan)*, [1958] S.C.R. 608 (S.C.C.); *Prince Edward Island (Provincial Secretary) v. Egan*, [1941] S.C.R. 396 (S.C.C.).

43 The argument that the federal gun control scheme is no different from the provincial regulation of motor vehicles ignores the fact that there are significant distinctions between the roles of guns and cars in Canadian society. Both firearms and automobiles can be used for socially approved purposes. Likewise, both may cause death and injury. Yet their primary uses are fundamentally different. Cars are used mainly as means of transportation. Danger to the public is ordinarily unintended and incidental to that use. Guns, by contrast, pose a pressing safety risk in many if not all of their functions. Firearms are often used as weapons in violent crime, including domestic violence; cars generally are not. Thus Parliament views guns as particularly dangerous and has sought to combat that danger by extending its licensing and registration scheme to all classes of firearms. Parliament did not enact the *Firearms Act* to regulate guns as items of property. The Act does not address insurance or permissible locations of use. Rather, the Act addresses those aspects of gun control which relate to the dangerous nature of firearms and the need to reduce misuse.

44 In a variation on the theme of property and civil rights, the opponents of the 1995 gun control law argue that ordinary guns, like rifles and shotguns, are common property, not dangerous property. Ordinary firearms are different, they argue, from the automatic weapons and handguns that Parliament has regulated in the past. Ordinary guns are used mainly for lawful purposes in hunting, trapping and ranching. Automatic weapons and handguns, by contrast, have few uses outside crime or war. The fact

that Parliament has the right under the criminal law power to control automatic weapons and handguns does not, they argue, mean that Parliament has the right to regulate ordinary guns.

45 The difficulty with this argument is that while ordinary guns are often used for lawful purposes, they are also used for crime and suicide, and cause accidental death and injury. Guns cannot be divided neatly into two categories — those that are dangerous and those that are not dangerous. All guns are capable of being used in crime. All guns are capable of killing and maiming. It follows that all guns pose a threat to public safety. As such, their control falls within the criminal law power.

46 In a further variation on this argument, the provinces of Ontario and Saskatchewan submitted that even if the licensing provisions of the law were valid criminal legislation, the registration provisions are mainly provincial property legislation and should be severed and struck out. The argument is that the registration portions of the Act simply amount to regulation, with little connection to the public safety purpose advanced by the federal government to justify the Act as a whole. Conrad J.A. agreed with this argument, finding that although the Act "cleverly intertwines" the licensing and registration provisions through "clever packaging", the registration provisions could be severed from the gun control law. As proof, she pointed to the fact that the pre-existing firearms acquisition certificate scheme, governing prohibited and restricted arms, applied to ordinary firearms without being connected to a registration system.

47 We are not persuaded that the registration provisions can be severed from the rest of the Act, nor that they fail to serve Parliament's purpose in promoting public safety. The licensing provisions require everyone who possesses a gun to be licensed. The registration provisions require all guns to be registered. The combination of the two parts of the scheme is intended to ensure that when a firearm is transferred from one person to another, the recipient is licensed. Absent a registration system, this would be impossible to ascertain. If a gun is found in the possession of an unlicensed person, the registration system permits the government to determine where the gun originated. With a registration scheme in place, licensed owners can be held responsible for the transfer of their weapons. The registration system is also part of the general scheme of the law in reducing misuse. If someone is found guilty of a crime involving violence, or is prohibited from possessing a weapon, the registration scheme is expected to assist the police in determining whether the offender actually owns any guns and in confiscating them. The registration scheme is also intended to reduce smuggling and the illegal trade in guns. These interconnections demonstrate that the registration and licensing portions of the *Firearms Act* are both tightly linked to Parliament's goal in promoting safety by reducing the misuse of any and all firearms. Both portions are integral and necessary to the operation of the scheme. The government is not prevented from improving the system because the pre-existing firearms acquisition certificate system was not connected to a registration system. Moreover, prior to this Act, the federal government had a registration system for handguns. It now seeks to extend it to all guns. Contrary to the suggestions of Conrad J.A., no improper purpose in including registration in the scheme has been demonstrated.

(3) Undue Intrusion into Provincial Powers?

48 In a related argument, Alberta and the provincial interveners submit that this law inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism. In support of its submission, Alberta cites the work of David M. Beatty, who suggests applying considerations of rationality and proportionality from *Charter* s. 1 cases to questions of legislative competence: *Constitutional Law in Theory and Practice* (1995). It seems far from clear to us that it would be helpful to apply the technique of weighing benefits and detriments used in s. 1 jurisprudence to the quite different exercise of defining the scope of the powers set out in ss. 91 and 92 of the *Constitution Act, 1867*. This said, however, it is beyond debate that an appropriate balance must be maintained between the federal and provincial heads of power. A federal state depends for its very existence on a just and workable balance between the central and provincial levels of government, as this Court affirmed in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.); see also *City National Leasing Ltd. v. General Motors of Canada Ltd.*, *supra*. The courts, critically aware of the need to maintain this balance, have not hesitated to strike down legislation that does not conform with the requirements of the criminal law: see *Boggs*, *supra*, and the *Margarine Reference*, *supra*. The question is not whether such a balance is necessary, but whether the 1995 gun control law upsets that balance.

49 The argument that the 1995 gun control law upsets the balance of Confederation may be seen as an argument that, viewed in terms of its effects, the law does not in pith and substance relate to public safety under the federal criminal law power but

rather to the provincial power over property and civil rights. Put simply, the issue is whether the law is mainly in relation to criminal law. If it is, incidental effects in the provincial sphere are constitutionally irrelevant: see e.g. *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 (S.C.C.); and *Mitchell v. Sandy Bay Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.). On the other hand, if the effects of the law, considered with its purpose, go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is *ultra vires* the federal government. In summary, the question is whether the "provincial" effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or" in pith and substance", the regulation of property and civil rights.

50 In our view, Alberta and the provinces have not established that the effects of the law on provincial matters are more than incidental. First, the mere fact that guns are property does not suffice to show that a gun control law is in pith and substance a provincial matter. Exercises of the criminal law power often affect property and civil rights to some degree: *British Columbia (Attorney General) v. Canada (Attorney General)*, [1937] A.C. 368 (Canada P.C.). Such effects are almost unavoidable, as many aspects of the criminal law deal with property and its ownership. The fact that such effects are common does not lessen the need to examine them. It does suggest, however, that we cannot draw sharp lines between criminal law and property and civil rights. Food, drugs and obscene materials are all items of property and are all legitimate subjects of criminal laws. In order to determine the proper classification of this law, then, we must go beyond the simplistic proposition that guns are property and thus any federal regulation of firearms is *prima facie* unconstitutional.

51 Second, the Act does not significantly hinder the ability of the provinces to regulate the property and civil rights aspects of guns. Most provinces already have regulations dealing with hunting, discharge within municipal boundaries, and other aspects of firearm use, and these are legitimate subjects of provincial regulation: see *R. v. Chiasson* (1982), 66 C.C.C. (2d) 195 (N.B. C.A.), aff'd [1984] 1 S.C.R. 266 (S.C.C.). The Act does not affect these laws.

52 Third, the most important jurisdictional effect of this law is its elimination of the ability of the provinces to *not* have any regulations on the ownership of ordinary firearms. The provinces argue that it is in their power to choose whether or not to have such a law. By taking over the field, the federal government has deprived the provinces of that choice. Assuming (without deciding) that the provincial legislatures would have the jurisdiction to enact a law in relation to the property aspects of ordinary firearms, this does not prevent Parliament from addressing the safety aspects of ordinary firearms. The double aspect doctrine permits both levels of government to legislate in one jurisdictional field for two different purposes: *Egan*, *supra*.

53 Fourth, as discussed above, this law does not precipitate the federal government's entry into a new field. Gun control has been the subject of federal law since Confederation. This law does not allow the federal government to significantly expand its jurisdictional powers to the detriment of the provinces. There is no colourable intrusion into provincial jurisdiction, either in the sense that Parliament has an improper motive or that it is taking over provincial powers under the guise of the criminal law. While we are sensitive to the concern of the provincial governments that the federal jurisdiction over criminal law not be permitted such an unlimited scope that it erodes the constitutional balance of powers, we do not believe that this legislation poses such a threat.

(4) Is Moral Content Required?

54 Yet another argument is that the ownership of guns is not criminal law because it is not immoral to own an ordinary firearm. There are two difficulties with this argument. The first is that while the ownership of ordinary firearms is not in itself regarded by most Canadians as immoral, the problems associated with the misuse of firearms are firmly grounded in morality. Firearms may be misused to take human life and to assist in other immoral acts, like theft and terrorism. Preventing such misuse can be seen as an attempt to curb immoral acts. Viewed thus, gun control is directed at a moral evil.

55 The second difficulty with the argument is that the criminal law is not confined to prohibiting immoral acts: see *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] A.C. 310 (Canada P.C.). While most criminal conduct is also regarded as immoral, Parliament can use the criminal law to prohibit activities which have little relation to public morality. For instance, the criminal law has been used to prohibit certain restrictions on market competition: see *British Columbia (Attorney General)*

v. Canada (Attorney General), *supra*. Therefore, even if gun control did not involve morality, it could still fall under the federal criminal law power.

(5) Other Concerns

56 We recognize the concerns of northern, rural and aboriginal Canadians who fear that this law does not address their particular needs. They argue that it discriminates against them and violates treaty rights, and express concerns about their ability to access the scheme, which may be administered from a great distance. These apprehensions are genuine, but they do not go to the question before us — Parliament's jurisdiction to enact this law. Whether a law could have been designed better or whether the federal government should have engaged in more consultation before enacting the law has no bearing on the division of powers analysis applied by this Court. If the law violates a treaty or a provision of the *Charter*, those affected can bring their claims to Parliament or the courts in a separate case. The reference questions, and hence this judgment, are restricted to the issue of the division of powers.

57 We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis. Furthermore, the federal government points out that it is not only career criminals who are capable of misusing guns. Domestic violence often involves people who have no prior criminal record. Crimes are committed by first-time offenders. Finally, accidents and suicides occur in the homes of law-abiding people, and guns are stolen from their homes. By requiring everyone to register their guns, Parliament seeks to reduce misuse by everyone and curtail the ability of criminals to acquire firearms. Where criminals have acquired guns and used them in the commission of offences, the registration system seeks to make those guns more traceable. The cost of the program, another criticism of the law, is equally irrelevant to our constitutional analysis.

VI. Conclusion

58 We conclude that the impugned sections of the *Firearms Act* contain prohibitions and penalties in support of a valid criminal law purpose. The legislation is in relation to criminal law pursuant to s. 91(27) of the *Constitution Act, 1867* and hence *intra vires* Parliament. It is not regulatory legislation and it does not take the federal government so far into provincial territory that the balance of federalism is threatened or the jurisdictional powers of the provinces are unduly impaired.

59 Having determined that the legislation constitutes a valid exercise of Parliament's jurisdiction over criminal law, it is unnecessary to consider whether the legislation can also be justified as an exercise of its peace, order and good government power.

60 We would dismiss the appeal. The licensing and registration provisions in the *Firearms Act* do not constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to s. 92(13) of the *Constitution Act, 1867*. The Act is a valid exercise of Parliament's jurisdiction over criminal law pursuant to s. 91(27).

61 The answers to the reference questions are as follows:

Question 2:

(1) No.

(2) No.

Question 3:

(1) No.

(2) No.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX A — The Reference Questions

The Reference was initiated by Her Majesty the Queen in Right of Alberta on September 26, 1996 by Order in Council 461/96. The Lieutenant Governor in Council referred four specific questions to the Court (under headings 2 and 3):

1. In this Appendix,

(a) "*Firearms Act*" means the *Firearms Act*, chapter 39 of the Statutes of Canada, 1995;

(b) "ordinary firearm" means "firearm", as defined in section 2 of the *Criminal Code* (Canada), as amended by section 138 of the *Firearms Act*, except that it does not include a "prohibited firearm" or a "restricted firearm" as those terms are defined in section 84 of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*.

(c) "licensing provisions" means those portions of the *Firearms Act* relating to the mandatory regime of licensing for those persons who own or possess or wish to own or possess an ordinary firearm, including, without limitation, sections 5 to 10, 54, 55, 56, 58, 61, 64, 67, 68 and 70, and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*;

(d) "Registration provisions" means those portions of the *Firearms Act* relating to the mandatory regime of registration for an ordinary firearm, including, without limitation, sections 13 to 16, 54, 60, 61, 66, 69, 71, 82 to 94, 112 and 115, and the related enforcement provisions of the *Criminal Code* (Canada), as enacted by section 139 of the *Firearms Act*.

2(1) Do the licensing provisions, insofar as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

(2) If the answer to the question posed in subsection (1) is "yes", are the licensing provisions ultra vires the Parliament of Canada insofar as they regulate the possession or ownership of an ordinary firearm?

3(1) Do the registration provisions, as they relate to an ordinary firearm, constitute an infringement of the jurisdiction of the Legislature of Alberta with respect to the regulation of property and civil rights pursuant to subsection 92(13) of the *Constitution Act, 1867*?

(2) If the answer to the question posed in subsection (1) is "yes" are the registration provisions ultra vires the Parliament of Canada insofar as they require registration of an ordinary firearm?

APPENDIX B — The Legislation

This is the version of the Act as assented to, and as referred to the Alberta Court of appeal by Order in Council 461/96. It does not take into account any amendments to the Act.

5. (1) A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.

(2) In determining whether a person is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge shall have regard to whether the person, within the previous five years,

(*a*) has been convicted or discharged under section 736 of the *Criminal Code* of

(i) an offence in the commission of which violence against another person was used, threatened or attempted,

(ii) an offence under this Act or Part III of the *Criminal Code*,

(iii) an offence under section 264 of the *Criminal Code* (criminal harassment), or

(iv) an offence relating to the contravention of subsection 39(1) or (2) or 48(1) or (2) of the *Food and Drugs Act* or subsection 4(1) or (2) or 5(1) of the *Narcotic Control Act*;

(*b*) has been treated for a mental illness, whether in a hospital, mental institute, psychiatric clinic or otherwise and whether or not the person was confined to such a hospital, institute or clinic, that was associated with violence or threatened or attempted violence on the part of the person against any person; or

(*c*) has a history of behaviour that includes violence or threatened or attempted violence on the part of the person against any person.

(3) Notwithstanding subsection (2), in determining whether a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms is eligible to hold a licence under subsection (1), a chief firearms officer or, on a reference under section 74, a provincial court judge may but need not have regard to the criteria described in subsection (2).

6. (1) A person is eligible to hold a licence only if the person is not prohibited by a prohibition order from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition.

(2) Subsection (1) is subject to any order made under section 113 of the *Criminal Code* (lifting of prohibition order for sustenance or employment).

7. (1) An individual is eligible to hold a licence only if the individual

(*a*) successfully completes the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(*b*) except in the case of an individual who is less than eighteen years old, passes the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course;

(*c*) successfully completed, before January 1, 1995, a course that the attorney general of the province in which the course was given had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act; or

(*d*) passed, before January 1, 1995, a test that the attorney general of the province in which the test was administered had, during the period beginning on January 1, 1993 and ending on December 31, 1994, approved for the purposes of section 106 of the former Act.

(2) An individual is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual

(*a*) successfully completes a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and passes any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course; or

(*b*) passes a restricted firearms safety test, as administered by an instructor who is designated by a chief firearms officer, that is approved by the federal Minister.

(3) An individual against whom a prohibition order was made

(*a*) is eligible to hold a licence only if the individual has, after the expiration of the prohibition order,

(i) successfully completed the Canadian Firearms Safety Course, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed the tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that Course; and

(*b*) is eligible to hold a licence authorizing the individual to possess restricted firearms only if the individual has, after the expiration of the prohibition order,

(i) successfully completed a restricted firearms safety course that is approved by the federal Minister, as given by an instructor who is designated by a chief firearms officer, and

(ii) passed any tests, as administered by an instructor who is designated by a chief firearms officer, that form part of that course.

(4) Subsections (1) and (2) do not apply to an individual who

(*a*) in the prescribed circumstances, has been certified by a chief firearms officer as meeting the prescribed criteria relating to the safe handling and use of firearms and the laws relating to firearms;

(*b*) is less than eighteen years old and requires a firearm to hunt or trap in order to sustain himself or herself or his or her family;

(*c*) on the commencement day, possessed one or more firearms and does not require a licence to acquire other firearms;

(*d*) requires a licence merely to acquire cross-bows; or

(*e*) is a non-resident who is eighteen years old or older and by or on behalf of whom an application is made for a sixty-day licence authorizing the non-resident to possess firearms that are neither prohibited firearms nor restricted firearms.

(5) Subsection (3) does not apply to an individual in respect of whom an order is made under section 113 of the *Criminal Code* (lifting of prohibition order for sustenance or employment) and who is exempted by a chief firearms officer from the application of that subsection.

8. (1) An individual who is less than eighteen years old and who is otherwise eligible to hold a licence is not eligible to hold a licence except as provided in this section.

(2) An individual who is less than eighteen years old and who hunts or traps as a way of life is eligible to hold a licence if the individual needs to hunt or trap in order to sustain himself or herself or his or her family.

(3) An individual who is twelve years old or older but less than eighteen years old is eligible to hold a licence authorizing the individual to possess, in accordance with the conditions attached to the licence, a firearm for the purpose of target practice, hunting or instruction in the use of firearms or for the purpose of taking part in an organized competition.

(4) An individual who is less than eighteen years old is not eligible to hold a licence authorizing the individual to possess prohibited firearms or restricted firearms or to acquire firearms or cross-bows.

(5) An individual who is less than eighteen years old is eligible to hold a licence only if a parent or person who has custody of the individual has consented, in writing or in any other manner that is satisfactory to the chief firearms officer, to the issuance of the licence.

9. (1) A business is eligible to hold a licence authorizing a particular activity only if every person who stands in a prescribed relationship to the business is eligible under sections 5 and 6 to hold a licence authorizing that activity or the acquisition of restricted firearms.

(2) A business other than a carrier is eligible to hold a licence only if

(*a*) a chief firearms officer determines that no individual who stands in a prescribed relationship to the business need be eligible to hold a licence under section 7; or

(*b*) the individuals who stand in a prescribed relationship to the business and who are determined by a chief firearms officer to be the appropriate individuals to satisfy the requirements of section 7 are eligible to hold a licence under that section.

(3) A business other than a carrier is eligible to hold a licence only if every employee of the business who, in the course of duties of employment, handles or would handle firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition is the holder of a licence authorizing the holder to acquire restricted firearms.

(4) In subsection (3), "firearm" does not include a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon

(*a*) from which any shot, bullet or other projectile can be discharged; and

(*b*) that is capable of causing serious bodily injury or death to a person.

(5) Subsection (1) does not apply in respect of a person who stands in a prescribed relationship to a business where a chief firearms officer determines that, in all the circumstances, the business should not be ineligible to hold a licence merely because of that person's ineligibility.

(6) Subsection (3) does not apply in respect of an employee of a museum

(*a*) who, in the course of duties of employment, handles or would handle only firearms that are designed or intended to exactly resemble, or to resemble with near precision, antique firearms, and who has been trained to handle or use such a firearm; or

(*b*) who is designated, by name, by a provincial minister.

10. Sections 5, 6 and 9 apply in respect of a carrier whose business includes the transportation of firearms, prohibited weapons, restricted weapons, prohibited devices or prohibited ammunition from one province to any other province, or beyond the limits of a province, as if each reference in those sections to a chief firearms officer were a reference to the Registrar.

13. A person is not eligible to hold a registration certificate for a firearm unless the person holds a licence authorizing the person to possess that kind of firearm.

14. A registration certificate may be issued only for a firearm

(*a*) that bears a serial number sufficient to distinguish it from other firearms; or

(*b*) that is described in the prescribed manner.

15. A registration certificate may not be issued for a firearm that is owned by Her Majesty in right of Canada or a province or by a police force.

16. (1) A registration certificate for a firearm may be issued to only one person.

(2) Subsection (1) does not apply in the case of a firearm for which a registration certificate referred to in section 127 was issued to more than one person.

54. (1) A licence, registration certificate or authorization may be issued only on application made in the prescribed form containing the prescribed information and accompanied by payment of the prescribed fees.

(2) An application for a licence, registration certificate or authorization must be made to

(*a*) a chief firearms officer, in the case of a licence, an authorization to carry or an authorization to transport; or

(*b*) the Registrar, in the case of a registration certificate, an authorization to export or an authorization to import.

(3) An individual who, on the commencement day, possesses one or more restricted firearms or one or more handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) must specify, in any application for a licence authorizing the individual to possess restricted firearms or handguns that are so referred to,

(*a*) except in the case of a firearm described in paragraph (*b*), for which purpose described in section 28 the individual wishes to continue to possess restricted firearms or handguns that are so referred to; and

(*b*) for which of those firearms was a registration certificate under the former Act issued because they were relics, were of value as a curiosity or rarity or were valued as a memento, remembrance or souvenir.

55. (1) A chief firearms officer or the Registrar may require an applicant for a licence or authorization to submit such information, in addition to that included in the application, as may reasonably be regarded as relevant for the purpose of determining whether the applicant is eligible to hold the licence or authorization.

(2) Without restricting the scope of the inquiries that may be made with respect to an application for a licence, a chief firearms officer may conduct an investigation of the applicant, which may consist of interviews with neighbours, community workers, social workers, individuals who work or live with the applicant, spouse, former spouse, dependants or whomever in the opinion of the chief firearms officer may provide information pertaining to whether the applicant is eligible under section 5 to hold a licence.

56. (1) A chief firearms officer is responsible for issuing licences.

(2) Only one licence may be issued to any one individual.

(3) A business other than a carrier requires a separate licence for each place where the business is carried on.

58. (1) A chief firearms officer who issues a licence, an authorization to carry or an authorization to transport may attach any reasonable condition to it that the chief firearms officer considers desirable in the particular circumstances and in the interests of the safety of the holder or any other person.

(2) Before attaching a condition to a licence that is to be issued to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer must consult with a parent or person who has custody of the individual.

(3) Before issuing a licence to an individual who is less than eighteen years old and who is not eligible to hold a licence under subsection 8(2) (minors hunting as a way of life), a chief firearms officer shall have a parent or person who has custody of the individual sign the licence, including any conditions attached to it.

60. The Registrar is responsible for issuing registration certificates for firearms and assigning firearms identification numbers to them and for issuing authorizations to export and authorizations to import.

61. (1) A licence or registration certificate must be in the prescribed form and include the prescribed information and any conditions attached to it.

(2) An authorization to carry, authorization to transport, authorization to export or authorization to import may be in the prescribed form and include the prescribed information, including any conditions attached to it.

(3) An authorization to carry or authorization to transport may take the form of a condition attached to a licence.

(4) A licence that is issued to a business must specify each particular activity that the licence authorizes in relation to prohibited firearms, restricted firearms, firearms that are neither prohibited firearms nor restricted firearms, cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or prohibited ammunition.

64. (1) A licence that is issued to an individual who is eighteen years old or older expires on the earlier of

(*a*) five years after the birthday of the holder next following the day on which it is issued, and

(*b*) the expiration of the period for which it is expressed to be issued.

(2) A licence that is issued to an individual who is less than eighteen years old expires on the earlier of

(*a*) the day on which the holder attains the age of eighteen years, and

(*b*) the expiration of the period for which it is expressed to be issued.

(3) A licence that is issued to a business other than a museum expires on the earlier of

(*a*) one year after the day on which it is issued, and

(*b*) the expiration of the period for which it is expressed to be issued.

(4) A licence that is issued to a museum expires on the earlier of

(*a*) three years after the day on which it is issued, and

(*b*) the expiration of the period for which it is expressed to be issued.

66. A registration certificate for a firearm expires where

(*a*) the holder of the registration certificate ceases to be the owner of the firearm; or

(*b*) the firearm ceases to be a firearm.

67. (1) A chief firearms officer may renew a licence, authorization to carry or authorization to transport in the same manner and in the same circumstances in which a licence, authorization to carry or authorization to transport may be issued.

(2) On renewing a licence authorizing an individual to possess restricted firearms or handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns), a chief firearms officer shall decide whether any of those firearms or handguns that the individual possesses are being used for

(*a*) the purpose described in section 28 for which the individual acquired the restricted firearms or handguns; or

(*b*) in the case of any of those firearms or handguns that were possessed by the individual on the commencement day, the purpose described in that section that was specified by the individual in the licence application.

(3) A chief firearms officer who decides that any restricted firearms or any handguns referred to in subsection 12(6) (pre-February 14, 1995 handguns) that are possessed by an individual are not being used for that purpose shall

(*a*) give notice of that decision in the prescribed form to the individual; and

(*b*) inform the Registrar of that decision.

(4) Subsections (2) and (3) do not apply to a firearm

(*a*) that is a relic, is of value as a curiosity or rarity or is valued as a memento, remembrance or souvenir;

(*b*) that was specified in the licence application as being a firearm for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir;

(*c*) for which a registration certificate under the former Act was issued because the firearm was a relic, was of value as a curiosity or rarity or was valued as a memento, remembrance or souvenir; and

(*d*) in respect of which an individual, on the commencement day, held a registration certificate under the former Act.

(5) A notice given under paragraph (3)(*a*) must include the reasons for the decision and be accompanied by a copy of sections 74 to 81.

68. A chief firearms officer shall refuse to issue a licence if the applicant is not eligible to hold one and may refuse to issue an authorization to carry or authorization to transport for any good and sufficient reason.

69. The Registrar may refuse to issue a registration certificate, authorization to export or authorization to import for any good and sufficient reason including, in the case of an application for a registration certificate, where the applicant is not eligible to hold a registration certificate.

70. (1) A chief firearms officer who issues a licence, authorization to carry or authorization to transport may revoke it for any good and sufficient reason including, without limiting the generality of the foregoing,

(*a*) where the holder of the licence or authorization

(i) is no longer or never was eligible to hold the licence or authorization,

(ii) contravenes any condition attached to the licence or authorization, or

(iii) has been convicted or discharged under section 736 of the *Criminal Code* of an offence referred to in paragraph 5(2)(*a*); or

(*b*) where, in the case of a business, a person who stands in a prescribed relationship to the business has been convicted or discharged under section 736 of the *Criminal Code* of any such offence.

(2) The Registrar may revoke an authorization to export or authorization to import for any good and sufficient reason.

71. (1) The Registrar

(*a*) may revoke a registration certificate for any good and sufficient reason; and

(*b*) shall revoke a registration certificate for a firearm held by an individual where the Registrar is informed by a chief firearms officer under section 67 that the firearm is not being used for

(i) the purpose for which the individual acquired it, or

(ii) in the case of a firearm possessed by the individual on the commencement day, the purpose specified by the individual in the licence application.

(2) A registration certificate for a prohibited firearm referred to in subsection 12(3) (pre-August 1, 1992 converted automatic firearms) is automatically revoked on the change of any alteration in the prohibited firearm that was described in the application for the registration certificate.

82. The Commissioner of the Royal Canadian Mounted Police shall, after consulting with the federal Minister and the Solicitor General of Canada, appoint an individual as the Registrar of Firearms.

83. (1) The Registrar shall establish and maintain a registry, to be known as the Canadian Firearms Registry, in which shall be kept a record of

(*a*) every licence, registration certificate and authorization that is issued or revoked by the Registrar;

(*b*) every application for a licence, registration certificate or authorization that is refused by the Registrar;

(*c*) every transfer of a firearm of which the Registrar is informed under section 26 or 27;

(*d*) every exportation from or importation into Canada of a firearm of which the Registrar is informed under section 42 or 50;

(*e*) every loss, finding, theft or destruction of a firearm of which the Registrar is informed under section 88; and

(*f*) such other matters as may be prescribed.

(2) The Registrar is responsible for the day-to-day operation of the Canadian Firearms Registry.

84. The Registrar may destroy records kept in the Canadian Firearms Registry at such times and in such circumstances as may be prescribed.

85. (1) The Registrar shall establish and maintain a record of

(*a*) firearms acquired or possessed by the following persons and used by them in the course of their duties or for the purposes of their employment, namely,

(i) peace officers,

(ii) persons training to become police officers or peace officers under the control and supervision of

(A) a police force, or

(B) a police academy or similar institution designated by the federal Minister or the lieutenant governor in council of a province,

(iii) persons or members of a class of persons employed in the public service of Canada or by the government of a province or municipality who are prescribed by the regulations made by the Governor in Council under Part III of the *Criminal Code* to be public officers, and

(iv) chief firearms officers and firearms officers; and

(*b*) firearms acquired or possessed by individuals on behalf of, and under the authority of, a police force or a department of the Government of Canada or of a province.

(2) A person referred to in subsection (1) who acquires or transfers a firearm shall have the Registrar informed of the acquisition or transfer.

(3) The Registrar may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

86. The records kept in the registry maintained pursuant to section 114 of the former Act that relate to registration certificates shall be transferred to the Registrar.

87. (1) A chief firearms officer shall keep a record of

(*a*) every licence and authorization that is issued or revoked by the chief firearms officer;

(*b*) every application for a licence or authorization that is refused by the chief firearms officer;

(*c*) every prohibition order of which the chief firearms officer is informed under section 89; and

(*d*) such other matters as may be prescribed.

(2) A chief firearms officer may destroy any record referred to in subsection (1) at such times and in such circumstances as may be prescribed.

88. A chief firearms officer to whom the loss, finding, theft or destruction of a firearm is reported shall have the Registrar informed without delay of the loss, finding, theft or destruction.

89. Every court, judge or justice that makes, varies or revokes a prohibition order shall have a chief firearms officer informed without delay of the prohibition order or its variation or revocation.

90. The Registrar has a right of access to records kept by a chief firearms officer under section 87 and a chief firearms officer has a right of access to records kept by the Registrar under section 83 or 85 and to records kept by other chief firearms officers under section 87.

91. (1) Subject to the regulations, notices and documents that are sent to or issued by the Registrar pursuant to this or any other Act of Parliament may be sent or issued in electronic or other form in any manner specified by the Registrar.

(2) For the purposes of this Act and Part III of the *Criminal Code*, a notice or document that is sent or issued in accordance with subsection (1) is deemed to have been received at the time and date provided by the regulations.

92. (1) Records required by section 83 or 85 to be kept by the Registrar may

(*a*) be in bound or loose-leaf form or in photographic film form; or

(*b*) be entered or recorded by any system of mechanical or electronic data processing or by any other information storage device that is capable of reproducing any required information in intelligible written or printed form within a reasonable time.

(2) Subject to the regulations, a document or information received by the Registrar under this Act in electronic or other form may be entered or recorded by any information storage device, including any system of mechanical or electronic data processing, that is capable of reproducing stored documents or information in intelligible written or printed form within a reasonable time.

(3) Where the Registrar maintains a record of a document otherwise than in written or printed form, an extract from that record that is certified by the Registrar has the same probative value as the document would have had if it had been proved in the ordinary way.

93. (1) The Registrar shall, as soon as possible after the end of each calendar year and at such other times as the Solicitor General of Canada may, in writing, request, submit to the Solicitor General a report, in such form and including such information as the Solicitor General may direct, with regard to the administration of this Act.

(2) The Solicitor General of Canada shall have each report laid before each House of Parliament on any of the first fifteen days on which that House is sitting after the Solicitor General receives it.

94. A chief firearms officer shall submit the prescribed information with regard to the administration of this Act at the prescribed time and in the prescribed form for the purpose of enabling the Registrar to compile the reports referred to in section 93.

112. (1) Subject to subsections (2) and (3), every person commits an offence who, not having previously committed an offence under this subsection or subsection 91(1) or 92(1) of the *Criminal Code*, possesses a firearm that is neither a prohibited firearm nor a restricted firearm without being the holder of a registration certificate for the firearm.

(2) Subsection (1) does not apply to

(*a*) a person who possesses a firearm while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it;

(*b*) a person who comes into possession of a firearm by operation of law and who, within a reasonable period after acquiring possession of it, lawfully disposes of it or obtains a registration certificate for it; or

(*c*) a person who possesses a firearm and who is not the holder of a registration certificate for the firearm if the person

(i) has borrowed the firearm,

(ii) is the holder of a licence under which the person may possess it, and

(iii) is in possession of the firearm to hunt or trap in order to sustain himself or herself or his or her family.

(3) Every person who, at any particular time between the commencement day and the later of January 1, 1998 and such other date as is prescribed, possesses a firearm that, as of that particular time, is neither a prohibited firearm nor a restricted firearm is deemed for the purposes of subsection (1) to be, until January 1, 2003 or such other earlier date as is prescribed, the holder of a registration certificate for the firearm.

(4) Where, in any proceedings for an offence under this section, any question arises as to whether a person is the holder of a registration certificate, the onus is on the defendant to prove that the person is the holder of the registration certificate.

115. Every person who commits an offence under section 112, 113 or 114 is guilty of an offence punishable on summary conviction.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Crouch v. Snell | 2015 NSSC 340, 2015 CarswellNS 995, 79 C.P.C. (7th) 249, 346 C.R.R. (2d) 273, 1157 A.P.R. 357, 367 N.S.R. (2d) 357, [2015] N.S.J. No. 536, 262 A.C.W.S. (3d) 627 | (N.S. S.C., Dec 10, 2015)

2004 SCC 4
Supreme Court of Canada

Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)

2004 CarswellOnt 252, 2004 CarswellOnt 253, 2004 SCC 4, [2004] 1 S.C.R. 76, [2004] W.D.F.L. 85, [2004] S.C.J. No. 6, 115 C.R.R. (2d) 88, 16 C.R. (6th) 203, 180 C.C.C. (3d) 353, 183 O.A.C. 1, 234 D.L.R. (4th) 257, 315 N.R. 201, 46 R.F.L. (5th) 1, 60 W.C.B. (2d) 81, 70 O.R. (3d) 94 (note), J.E. 2004-350, REJB 2004-53164

Canadian Foundation for Children, Youth and the Law, Appellant v. Attorney General in Right of Canada, Respondent and Focus on the Family (Canada) Association, Canada Family Action Coalition, the Home School Legal Defence Association of Canada and REAL Women of Canada, together forming the Coalition for Family Autonomy, Canadian Teachers' Federation, Ontario Association of Children's Aid Societies, Commission des droits de la personne et des droits de la jeunesse, on its own behalf and on behalf of Conseil canadien des organismes provinciaux de défense des droits des enfants et des jeunes and Child Welfare League of Canada, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.A.

Heard: June 6, 2003
Judgment: January 30, 2004
Docket: 29113

Proceedings: affirming (2002), 2002 CarswellOnt 32, 207 D.L.R. (4th) 632, [2002] W.D.F.L. 94, 161 C.C.C. (3d) 178, 48 C.R. (5th) 218, 154 O.A.C. 144, 23 R.F.L. (5th) 101, 57 O.R. (3d) 511, 90 C.R.R. (2d) 223 (Ont. C.A.); affirming (2000), 2000 CarswellOnt 2409, [2000] O.J. No. 2535, 146 C.C.C. (3d) 362, 188 D.L.R. (4th) 718, 49 O.R. (3d) 662, 36 C.R. (5th) 334, 76 C.R.R. (2d) 251, [2000] O.T.C. 769 (Ont. S.C.J.); additional reasons at (2001), [2001] O.J. No. 1110, 2001 CarswellOnt 935 (Ont. S.C.J.)

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Michael E. Barrack, Christopher Wayland, for Intervener, Child Welfare League of Canada

Subject: Criminal; Family; Constitutional; Civil Practice and Procedure; Human Rights

Headnote

Criminal law --- Defences — Lawful authority — Physical discipline of children

Section 43 of Criminal Code creates statutory defence against assault charge for parents and teachers using reasonable physical force to discipline children — Provision was constitutional — Provision did not offend ss. 7, 12 or 15(1) of Canadian Charter of Rights and Freedoms.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person — Principles of fundamental justice — Vagueness

Section 43 of Criminal Code creates statutory defence against assault charge for parents and teachers using reasonable physical force to discipline children — Provision was constitutional — Provision was not unduly vague or overbroad — Provision provided built-in safeguards for welfare of children — Provision did not offend s. 7 of Canadian Charter of Rights and Freedoms.

Criminal law --- Charter of Rights and Freedoms — Cruel and unusual punishment

Section 43 of Criminal Code creates statutory defence against assault charge for parents and teachers using reasonable physical force to discipline children — Provision was constitutional — Provision provided defence only in cases of "reasonable" force — Use of "reasonable" force did not admit of force so excessive as to be "cruel or unusual treatment" — Provision did not offend s. 12 of Canadian Charter of Rights and Freedoms.

Criminal law --- Charter of Rights and Freedoms — Right to equality before and under law

Section 43 of Criminal Code creates statutory defence against assault charge for parents and teachers using reasonable physical force to discipline children — Provision was constitutional — Provision did not offend dignity of children, who require both safe environment and discipline to protect from harm and develop as citizens — Striking down provision could have effect of causing greater harm by criminalizing any physical contact with child and breaking up families — Provision did not offend s. 15(1) of Canadian Charter of Rights and Freedoms.

Family law --- Relationship of parent and child — Effect of statutory provisions

Section 43 of Criminal Code creates statutory defence against assault charge for parents and teachers using reasonable physical force to discipline children — Provision was constitutional — Provision did not offend ss. 7, 12 or 15(1) of Canadian Charter of Rights and Freedoms.

Criminal law --- Charter of Rights and Freedoms — Demonstrably justified reasonable limit

Section 43 of Criminal Code creates statutory defence against assault charge for parents and teachers using reasonable physical force to discipline children — Majority in Supreme Court of Canada held that provision was constitutional and offended no rights as guaranteed by Canadian Charter of Rights and Freedoms — In dissenting reasons, one justice held that provision offended certain Charter rights and was saved by s. 1 of Charter in respect of parents but not saved in respect of teachers — In dissenting reasons, two justices held that provision offended certain Charter rights and could not be saved by s. 1 of Charter.

Droit criminel --- Moyens de défense — Autorité légitime — Discipline physique des enfants

Article 43 du Code criminel crée un moyen de défense à l'égard d'accusations contre les parents et instituteurs qui ont employé une force physique raisonnable pour corriger des enfants — Disposition était constitutionnelle — Disposition ne contrevenait pas aux art. 7, 12 et 15(1) de la Charte canadienne des droits et libertés.

Droit criminel --- Charte canadienne des droits et libertés — Vie, liberté et sécurité de la personne — Principes de justice fondamentale — Imprécision

Article 43 du Code criminel crée un moyen de défense à l'égard d'accusations contre les parents et instituteurs qui ont employé une force physique raisonnable pour corriger des enfants — Disposition était constitutionnelle — Disposition n'était pas trop imprécise ni n'avait une portée excessive — Disposition prévoyait des garanties procédurales pour protéger les enfants — Disposition ne portait pas atteinte à l'art. 7 de la Charte canadienne des droits et libertés.

Droit criminel --- Charte canadienne des droits et libertés — Peine cruelle et inusitée

Article 43 du Code criminel crée un moyen de défense à l'égard d'accusations contre les parents et instituteurs qui ont employé une force physique raisonnable pour corriger des enfants — Disposition était constitutionnelle — Disposition prévoyait un moyen de défense qui ne s'appliquait que dans les cas d'emploi d'une force « raisonnable » — Emploi d'une force « raisonnable » ne permettait pas l'usage d'une force excessive au point de constituer un « traitement cruel et inusité » — Disposition ne portait pas atteinte à l'art. 12 de la Charte canadienne des droits et libertés.

Droit criminel --- Charte canadienne des droits et libertés — Droit à l'égalité devant la loi

Article 43 du Code criminel crée un moyen de défense à l'égard d'accusations contre les parents et instituteurs qui ont employé une force physique raisonnable pour corriger les enfants — Disposition était constitutionnelle — Disposition ne portait pas atteinte à la dignité des enfants, lesquels ont besoin de vivre dans un milieu sûr et de discipline afin d'empêcher qu'on leur fasse du mal et de favoriser leur développement à titre de citoyens — Invalider la disposition pourrait causer plus de mal que de bien, puisque cela aurait pour effet de criminaliser tout contact physique avec l'enfant et de détruire les familles — Disposition ne portait pas atteinte à l'art. 15 de la Charte canadienne des droits et libertés.

Droit de la famille --- Relation entre le parent et l'enfant — Impact des dispositions législatives
Article 43 du Code criminel crée un moyen de défense à l'égard d'accusations contre les parents et instituteurs qui ont employé une force physique raisonnable pour corriger des enfants — Disposition était constitutionnelle — Disposition ne portait pas atteinte aux art. 7, 12 et 15(1) de la Charte canadienne des droits et libertés.
Droit criminel --- Charte canadienne des droits et libertés — Limite raisonnable dont la justification puisse se démontrer
Article 43 du Code criminel crée un moyen de défense à l'égard d'accusations contre les parents et instituteurs qui ont employé une force physique raisonnable pour corriger les enfants — Majorité de la Cour suprême du Canada a statué que la disposition était constitutionnelle et qu'elle ne portait atteinte à aucun droit protégé par la Charte canadienne des droits et libertés — Un des juges dissidents a statué que la disposition portait atteinte à certains droits de la Charte, mais qu'elle était sauvegardée par l'art. 1 en ce qui a trait aux parents mais non en ce qui a trait aux instituteurs — Deux des juges dissidents ont statué que la disposition portait atteinte à certains droits de la Charte et qu'elle n'était pas sauvegardée par l'art. 1.
By operation of Criminal Code, s. 43, parents and teachers are justified in using reasonable force against their children or pupils for the purpose of correction. That justification acts as an affirmative defence to a charge of assault.
A children's rights organization brought an action for a declaration that s. 43 was unconstitutional as impairing children's rights to life, liberty and security of the person, to be secure against cruel or unusual treatment or punishment and to equality before and under the law, as guaranteed by ss. 7, 12 and 15(1) of Canadian Charter of Rights and Freedoms.
The action was dismissed, the plaintiff's appeal to the Court of Appeal was dismissed and the plaintiff appealed to the Supreme Court of Canada.
Held: The appeal was dismissed.
Per McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache and LeBel JJ. concurring: Section 43 of Criminal Code is constitutional. It impairs no rights as guaranteed by the Canadian Charter of Rights and Freedoms. With respect to the s. 7 of Charter right to life, liberty and security of the person, s. 43 of Code does have an adverse impact on children's security of the person and thereby triggers a s. 7 analysis. However, the impact of s. 43 of Code is in accordance with the principles of fundamental justice. While the law does not expressly recognize the rights of criminal complainants in the same way that the rights of an accused are recognized, a child qua complainant's rights are represented by the Crown, a procedural safeguard which guarantees that the "reasonable" force requirement is strictly adhered to. Additionally, while the "best interests of the child" is a legal principle, it is not a principle of fundamental justice requiring every law affecting children to be in their immediate best interests at all times. Section 43 is also not impermissibly vague or overbroad. Vagueness does not require absolute certainty; it must provide a standard for judicial interpretation. Read properly, s. 43 is not vague or overbroad, as on its face it contains strict limits for its own application. It is strictly limited to parents and teachers, may only be relied upon where the force used is for the purpose of correction, and the force used must be reasonable in the circumstances. Taken together, "purpose of correction" and "reasonable in the circumstances" provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement. "Purpose of correction" excludes the use of physical force motivated by anger or frustration from the ambit of the defence. It also requires that the child be capable of actually learning from the physical force. Accordingly, the defence does not operate where the child is under the age of two and perhaps in cases of disability, as on the evidence those children are incapable of understanding the reason why they are hit. "Reasonable in the circumstances" imports the notion of "reasonableness" which is well known to the criminal law. In the present case, a clear public understanding of what is "reasonable" excludes conduct which causes harm or raises a reasonable prospect of harm. This limits its operation to the mildest forms of assault. Canada's international treaty obligations confirm that physical correction that either harms or degrades a child is unreasonable. A consensus of the evidence before the court indicated that corporal punishment of teenagers is harmful and thus unreasonable, because it can induce aggressive or antisocial behaviour. There was a further consensus that corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful and accordingly unreasonable. Blows to the head may cause serious brain injuries even at low levels of force, and are accordingly unreasonable as harmful. Like the exclusion from application of s. 43 in the case of children under the age of two, conduct which uses force against teenagers, with objects or to the head is likewise excluded from the statutory defence on its face, as such conduct is never "reasonable in the circumstances". The consensus of evidence, together with the operation of Canada's international obligation, suggests that the use of corporal punishment as opposed to corrective force used to secure compliance with instructions or to remove a pupil from a classroom, is likewise unreasonable and not protected by s. 43. With the above exclusions resulting from a proper reading of "purpose of correction" and "reasonable in the circumstances", s. 43 does not offend s. 7 of Charter.

S. 43 of Code does not offend s. 12 of Canadian Charter of Rights and Freedoms, being guarantee against "cruel or unusual treatment or punishment". The s. 12 guarantee applies to state action, and as such the conduct of a parent is not reviewable under this section. Teachers may be state employees, and to that extent s. 12 analysis is required. On its face, the s. 43 defence is available only where the force used is "reasonable". Logically it is impossible to have "reasonable" force which is also "cruel or unusual".

S. 43 of the Code does not constitute prohibited discrimination so as to violate s. 15(1) of Canadian Charter of Rights and Freedoms. The s. 43 defence de-criminalizes limited forms of physical contact with children in order to provide them with guidance, discipline and protection from harm. Absent the limited protection of s. 43, the law of criminal assault would apply to criminalize behaviour far short of what would be thought of as abuse or even corporal punishment. Physical contact which causes harm to the child is abusive and is not captured by the s. 43 defence. The educative or corrective purposes of s. 43 would cause a reasonable person properly apprised of the totality of circumstances to conclude that any distinction made between children and other persons in the context of s. 43 did not amount to unconstitutional discrimination.

Per Binnie J. (dissenting in part): S. 43 of the Code offends equality guarantee under s. 15(1) of Canadian Charter of Rights and Freedoms. This is so because some physical assaults which would constitute criminal acts when committed against an adult person are not criminal when committed against a child. The reasons of the majority state in effect that this different treatment of children is required in order to promote the education and development of children, and thus that the different treatment actually promotes their substantive equality. This reliance on substantive rather than formal equality is in reality a balancing argument, one properly made in a s. 1 Charter reasonable limit analysis rather than when determining whether a violation of a particular right, in this case the s. 15(1) right, has been violated. Section 43 does not protect children; on the contrary, it protects those parents and teachers who see fit to apply force to children. Whether that protection is a reasonable limit demonstrably justified in a free and democratic society falls to be determined at the s. 1 stage.

A reasonable person charged with representing the interests of children could not conclude that immunizing conduct which would otherwise constitute a criminal assault where the "victim" of that conduct is a child is in any real way in the best interests if the child. The s. 43 defence is premised on the idea that the role of family in society properly leaves certain behaviours to the discretion of parents qua leaders or supervisors of families. Again, however, this premise is a balancing of interests argument which should be factored in to a s. 1 Charter analysis, not when determining whether a substantive breach of s. 15(1) has occurred.

The application of s. 1 of Canadian Charter of Rights and Freedoms saves the s. 15(1) breach committed by s. 43 of Criminal Code, but only in respect of parents. The objective of the impugned provision, minimizing governmental interference with family life, is pressing and substantial, and is rationally connected to the means chosen to effect that objective, limiting the application of the Criminal Code to conduct within families. The means chosen are also proportional, as on the face of s. 43 the application of the defence is limited to reasonable force used for the purpose of correction. In addition, child welfare legislation protects children from abusive or improper treatment, and accordingly the protection of the criminal law of assault is only one part of the law protecting children, who have other avenues of complaint and redress. The extension of the s. 43 protection to teachers is not a reasonable limit and is not saved by s. 1 of Charter. The objective of maintaining order in schools is pressing and substantial, but immunizing teachers from criminal accountability for conduct which otherwise constitutes assault is not rationally connected to that objective. In addition, the s. 43 defence for teachers fails the minimal impairment test, as many other options which would provide further protection to children could have been employed to meet the objective of school order.

Per Arbour J. (dissenting): The judiciary may not "read down" a criminal defence which passes constitutional muster, thus rendering criminal conduct which Parliament has expressly stated to be non-criminal. That is a legislative activity outside the proper purview of the judiciary. The judiciary may only "read down" a statutory provision to render it constitutional where the provision is on its face unconstitutional and requires remediation. The language of s. 43 of Criminal Code makes no reference to any of the exceptions created by the majority, so those exceptions do not exist and the court must decide the constitutionality of the provision on its face.

Section 43 is impermissibly vague and accordingly infringes children's right to life, liberty and security of the person as guaranteed by s. 7 of Canadian Charter of Rights and Freedoms. It is "void for vagueness" because it purports to immunize the application of force which is "reasonable in the circumstances", and that term does not provide sufficient guidance as to its content, what conduct is prohibited and what is allowed. The resulting interpretive gap provides excessive discretion to police, who may then engage in selective or arbitrary prosecution, inappropriate practices. The idea of what is "reasonable" is a

question of public policy not easy interpreted by courts in circumstances like the present case. It is intimately related to the broad social variation in what are considered proper familial roles and responsibilities, which regularly engage moral, cultural and religious norms not easily accounted for by a criminal law which by its nature is intended for general application. No judicial interpretation can adequately resolve these difficulties; in particular, the limitations proposed by the majority are not in accord with the express terms of s. 43.

A statutory provision such as s. 43 of Criminal Code which is "void for vagueness" is obviously not "prescribed by law" so as to constitute a reasonable limit within the meaning of s. 1 of Canadian Charter of Rights and Freedoms. It likewise fails the minimal impairment test, as a less vague provision would by necessary implication impair the s. 7 Charter right less than does a provision which is "void for vagueness". The appropriate remedy in all such cases is a declaration of invalidity which strikes down the provision in its entirety. This returns the question to Parliament so it may perform its rightful legislative task. In the interim, truly limited, otherwise justifiable physical contact with children may be defended on the basis of the common-law de minimis and necessity defences, and by the exercise of appropriate prosecutorial discretion. Were the exceptions to the s. 43 defence suggested by the majority enacted, on occasion parents would likely have to resort to the defence of necessity in any event, for example to prevent a child too young to learn from the physical contact from seriously injuring herself. While the de minimis defence will likely be used more often, this is salutary in order to prevent criminalization of trivial or technical violations of the assault provision.

Per Deschamps J. (dissenting): On its face, s. 43 of Criminal Code permits a great range of physical contact with children which would be considered criminal assault absent the provision's application. The court is required to consider the statute as enacted on its own terms, and may not engage in the practice of reading the provision down to craft an entirely new provision.

Section 43 violates children's equality rights as guaranteed by s. 15(1) of Canadian Charter of Rights and Freedoms. In clear and unambiguous terms, the provision denies to children the equal protection of the law merely because they are children. Discrimination on the basis of age is an enumerated prohibited ground of discrimination. The discrimination violates the dignity of children qua children, as any reasonable person would find that denying the protection of the law from assaults against one's person merely because of one's age is an insult to one's dignity. Children are especially vulnerable members of society and deserve the assiduous protection of the law, including the criminal law. Section 43 compounds children's natural vulnerability and perpetuates the myth that children are essentially the property of their parents.

S. 43 of Criminal Code cannot be saved by operation of s. 1 of Canadian Charter of Rights and Freedoms. The reasons of Binnie J. and of Arbour J. were agreed with insofar as they state that s. 43 was enacted for a pressing and substantial objective. The means chosen, limiting the application of the criminal law in order to make allowance for the discipline of children, is rationally connected to the objective. However, the provision does not satisfy the proportionality or minimal-impairment test. Less intrusive means could have been chosen by Parliament to effect its objective. As read, s. 43 allows for a broad range of conduct including potentially-serious assaults. Additionally, the deleterious effect of s. 43 on children outweighs its salutary effects, because the right of children to be free from violence is a very significant and fundamental right. Any salutary effect would have to be very compelling before it could be proportional.

Only a declaration of invalidity is a satisfactory remedy in the present case. Section 43 is inconsistent with the Constitution of Canada and accordingly is of no force or effect.

En vertu de l'art. 43 du Code criminel, les parents et les instituteurs sont fondés à employer une force raisonnable pour corriger leurs enfants ou leurs élèves. Cette justification constitue un moyen de défense concret à une accusation de voies de fait.

Un organisme de protection des droits des enfants a présenté une action en jugement déclaratoire afin que l'art. 43 soit déclaré inconstitutionnel au motif qu'il porterait atteinte aux droits des enfants à la vie, à la liberté et à la sécurité de leur personne, à la protection contre tous traitements ou peines cruels et inusités et à l'égalité devant la loi, tels qu'ils sont protégés par les art. 7, 12 et 15(1) de la Charte canadienne des droits et libertés.

L'action a été rejetée, le pourvoi à la Cour d'appel de la demanderesse a été rejeté et celle-ci a interjeté appel devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

McLachlin, J.C.C. (Gonthier, Iacobucci, Major, Bastarache et LeBel, JJ., souscrivant à l'opinion de la juge McLachlin): L'article 43 du Code criminel est constitutionnel. Il ne porte atteinte à aucun droit protégé par la Charte canadienne des droits et libertés. En ce qui concerne le droit à la vie, à la liberté et à la sécurité de sa personne, protégé par l'art. 7 de la Charte, l'art. 43 porte effectivement atteinte au droit des enfants à la sécurité de leur personne et déclenche ainsi la nécessité d'un examen en vertu

de l'art. 7. L'impact de l'art. 43 est cependant conforme aux principes de justice naturelle. Même si la loi ne reconnaît pas expressément de droits aux victimes d'infractions, contrairement aux accusés, les intérêts des enfants sont néanmoins représentés par la Couronne, ce qui constitue une garantie procédurale s'assurant de l'application stricte de la condition que la force employée soit « raisonnable ». De plus, même si « l'intérêt supérieur de l'enfant » constitue un principe juridique, il ne s'agit cependant pas d'un principe de justice fondamentale exigeant que chaque loi qui touche les enfants soit dans leur intérêt supérieur immédiat, et ce, à tous moments. L'article 43 n'est pas trop imprécis et n'a pas une portée excessive. La règle de l'imprécision n'exige pas une certitude absolue; elle doit fournir une norme à appliquer pour l'interprétation judiciaire. Interprété correctement, l'art. 43 n'est pas trop imprécis et n'a pas une portée excessive puisque, à sa face même, il renferme des limites à sa propre application. Il ne s'applique qu'aux parents et aux instituteurs, il ne peut être invoqué que lorsque la force a été employée dans le but d'infliger une correction et que la force employée était raisonnable dans les circonstances. Prises ensemble, les expressions « pour corriger » et « raisonnable dans les circonstances » sont suffisamment précises pour délimiter la zone de risque et éviter l'application discrétionnaire de la loi. L'expression « pour corriger » exclut de la portée du moyen de défense l'emploi de la force physique motivé par la colère ou la frustration. Elle exige aussi que l'enfant ait la capacité de tirer une leçon de l'emploi de la force physique. Par conséquent, le moyen de défense ne peut être invoqué lorsque l'enfant a moins de deux ans, et aussi peut-être dans des cas d'enfants handicapés, étant donné qu'il a été démontré que ces enfants sont incapables de comprendre la raison pour laquelle on les frappe. L'expression « raisonnable dans les circonstances » importe la notion du « caractère raisonnable », laquelle est bien connue en droit pénal. En l'espèce, une compréhension claire et générale de ce qui est « raisonnable » exclut la conduite qui cause un préjudice ou soulève une possibilité raisonnable de préjudice. Cela limite donc l'application du moyen de défense aux formes de voies de fait les plus bénignes. Les obligations du Canada en vertu des traités internationaux confirment que le châtiment corporel qui met en danger un enfant ou le dégrade est déraisonnable. Le consensus tiré de la preuve produite devant le tribunal indiquait que le châtiment corporel des adolescents était préjudiciable et donc déraisonnable, puisqu'il pouvait déclencher un comportement agressif ou antisocial. On s'entendait également pour dire que le châtiment corporel infligé à l'aide d'un objet, comme une règle ou une ceinture, était préjudiciable physiquement et émotionnellement et, donc, déraisonnable. Les coups portés à la tête peuvent causer de graves blessures au cerveau, même en employant un faible niveau de force, et sont donc déraisonnables parce que préjudiciables. Comme dans le cas des enfants de moins de deux ans qui sont exclus de l'application de l'art. 43, l'emploi de la force contre les adolescents, à l'aide d'objets ou de coups portés vers la tête, est également exclu à sa face même de l'application du moyen de défense prévu par la loi, étant donné qu'un tel emploi n'est jamais « raisonnable dans les circonstances ». Le consensus qui se dégage de la preuve, pris en conjonction avec l'application des obligations internationales du Canada, suggère que l'infliction d'un châtiment corporel, contrairement à l'emploi de la force pour assurer le respect des directives ou pour expulser un élève de la classe, est tout autant déraisonnable et n'est pas protégé par l'art. 43. Ce dernier ne porte pas atteinte à l'art. 7 de la Charte, étant donné les exclusions qui résultent de l'interprétation correcte des expressions « pour corriger » et « raisonnable dans les circonstances ».

L'article 43 du Code ne porte pas atteinte à l'art. 12 de la Charte canadienne des droits et libertés, qui protège contre les « traitements ou peines cruels et inusités ». Puisque l'art. 12 vise les actions de l'État, l'examen de la conduite d'un parent ne peut se faire en vertu de cet article. Dans la mesure où les instituteurs sont considérés comme des employés de l'État, il est alors nécessaire de procéder à un examen en vertu de l'art. 12. À sa face même, le moyen de défense prévu par l'art. 43 ne peut être invoqué que lorsque la force employée est « raisonnable ». Il est logiquement impossible qu'une force qui est « raisonnable » soit aussi « cruel[le] et inusité[e] ».

L'article 43 du Code ne fait pas de discrimination prohibée et, donc, ne viole pas l'art. 15(1) de la Charte canadienne des droits et libertés. Le moyen de défense découlant de l'art. 43 décriminalise des formes limitées de contacts physiques à l'égard des enfants qui sont utilisées afin de les guider, de les discipliner et de les protéger contre toute forme de mal. En l'absence de la protection limitée accordée par l'art. 43, les règles de droit en matière de voies de fait criminelles auraient pour effet de criminaliser les comportements qui sont loin de constituer ce qui est considéré comme de l'abus ou même un châtiment corporel. Tout contact physique qui cause un préjudice à l'enfant est abusif et n'est pas visé par le moyen de défense de l'art. 43. En raison de l'objet éducatif ou correctif de l'art. 43, toute personne raisonnable et informée correctement de l'ensemble des circonstances ne pourrait que conclure que toute distinction faite, dans le contexte de l'art. 43, entre les enfants et les autres personnes n'était pas équivalente à de la discrimination inconstitutionnelle.

Binnie, J. (dissident en partie): L'article 43 du Code porte atteinte au droit à l'égalité protégé par l'art. 15(1) de la Charte canadienne des droits et libertés. Cette conclusion résulte du fait que certaines voies de fait, qui sont considérées comme des

actes criminels lorsque perpétrées sur la personne d'un adulte, ne le sont pas lorsqu'elles sont perpétrées sur la personne d'un enfant. Les motifs énoncés par les juges majoritaires disent essentiellement que cette différence de traitement à l'égard des enfants est nécessaire pour favoriser leur éducation et leur développement et, donc, que la différence de traitement a pour effet de favoriser leur égalité substantive. Cette décision de s'appuyer sur l'égalité substantive plutôt que formelle constitue en réalité un argument d'équilibre, qui doit être invoqué dans le cadre de l'analyse fondée sur l'art. 1 plutôt qu'au moment de déterminer si un droit particulier a été violé, comme l'art. 15 en l'espèce. L'article 43 ne protège pas les enfants; au contraire, il protège les parents et les instituteurs qui décident d'employer la force à l'égard des enfants. C'est à l'étape de l'art. 1 qu'il faut déterminer si la protection accordée constitue une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.

Une personne raisonnable à qui on aurait confié le soin de représenter les intérêts des enfants ne pourrait conclure qu'il est réellement dans leur intérêt supérieur d'accorder une immunité à une conduite qui, autrement, constituerait des voies de fait criminelles alors que la « victime » de cette conduite est un enfant. Le moyen de défense découlant de l'art. 43 se fonde sur l'idée que le rôle de la famille au sein de la société laisse à juste titre aux parents, aux chefs ou aux superviseurs des familles une discrétion à l'égard de certains gestes. Ici encore, ce fondement constitue une mise en équilibre des intérêts argumentés, lesquels devraient être pris en compte lors de l'analyse en vertu de l'art. 1 de la Charte, et non au moment de déterminer si l'art. 15 a été violé.

La violation de l'art. 15(1) par l'art. 43 du Code criminel est justifiée par l'art. 1, mais uniquement à l'égard des parents. L'objectif visé par la disposition attaquée, soit minimiser l'intervention de l'État dans la vie familiale, est urgent et réel, et il existe un lien rationnel entre l'objectif et les moyens utilisés pour l'atteindre, soit limiter l'application du Code criminel à l'égard du comportement au sein des familles. Les moyens choisis sont également proportionnels, étant donné que, à la face même de l'art. 43, le moyen de défense ne peut être invoqué que lorsqu'une force raisonnable a été employée pour corriger. De plus, les lois de protection de l'enfant protègent les enfants contre les traitements abusifs ou inappropriés; la protection à l'égard des voies de fait criminelles ne constitue donc qu'une partie des dispositions législatives qui protègent les enfants, puisque ceux-ci disposent d'autres moyens pour se plaindre et demander réparation. Par ailleurs, étendre l'application de la protection conférée par l'art. 43 aux instituteurs ne constitue pas une limite raisonnable et n'est pas justifié en vertu de l'art. 1 de la Charte. Bien que l'objectif visant à maintenir l'ordre au sein des écoles soit urgent et réel, il n'existe cependant aucun lien rationnel entre cet objectif et l'immunité accordée aux instituteurs à l'égard de leur responsabilité criminelle pour une conduite qui, autrement, constituerait des voies de fait. De plus, le moyen de défense de l'art. 43 ne satisfait pas au critère de l'atteinte minimale pour ce qui est des instituteurs, étant donné qu'il existe plusieurs autres moyens pouvant être utilisés pour maintenir l'ordre au sein des écoles.

Arbour, J. (dissidente): Les tribunaux ne peuvent faire une interprétation restrictive d'un moyen de défense pénal qui satisfait aux normes constitutionnelles, puisque cela aurait pour effet de criminaliser un comportement que le Parlement a expressément décriminalisé. Il s'agit d'une activité législative qui est hors de la portée des tribunaux. Ceux-ci peuvent seulement faire une interprétation restrictive d'une disposition législative afin de la rendre constitutionnelle lorsqu'elle apparaît à sa face même inconstitutionnelle et nécessite qu'on y remédie. Les termes utilisés dans l'art. 43 ne font aucunement référence aux exceptions créées par les juges majoritaires; par conséquent, ces exceptions n'existent pas et la Cour doit déterminer si la disposition est constitutionnelle à sa face même.

L'article 43 est trop vague et, donc, porte atteinte au droit des enfants à la vie, à la liberté et à la sécurité de leur personne que leur garantit l'art. 7 de la Charte canadienne. Il est « nul pour cause d'imprécision », vu qu'il tend à accorder une immunité à la force employée qui est « raisonnable dans les circonstances » et vu que cette expression ne fournit pas assez de repères pour pouvoir déterminer son contenu et quelle conduite est interdite ou permise. Le vide interprétatif qui en résulte fournit ainsi une discrétion excessive à la police, laquelle pourrait intenter des poursuites de façon sélective ou arbitraire ou avoir une conduite inappropriée. Déterminer ce qui est « raisonnable » est une question d'ordre public qui ne peut être facilement tranchée par les tribunaux dans le cadre de circonstances comme en l'espèce. Cette question est intimement reliée aux conceptions sociales, qui varient énormément, de ce qui constitue des rôles et responsabilités familiaux appropriés, lesquels mettent régulièrement en jeu des normes morales, culturelles et religieuses qui sont difficilement prises en compte par le droit pénal qui, de par sa nature, doit faire l'objet d'une application générale. Ces difficultés ne peuvent être résolues adéquatement à l'aide d'une interprétation judiciaire; plus particulièrement, les limites proposées par les juges de la majorité ne sont pas conformes aux termes explicites de l'art. 43.

Une disposition législative qui, comme l'art. 43 du Code criminel, est « nulle pour cause d'imprécision » n'est manifestement pas prévue par la loi et ne constitue pas une limite raisonnable au sens de l'art. 1 de la Charte canadienne. Elle ne satisfait pas non plus au critère de l'atteinte minimale, vu que, par implication nécessaire, une disposition moins imprécise porterait moins atteinte à l'art. 7 que ne le fait une décision qui est « nulle pour cause d'imprécision ». Dans de tels cas, la réparation appropriée est de prononcer une déclaration qui invalide en entier la disposition. Cela a pour effet de renvoyer la question au Parlement, lequel peut jouer son rôle de législateur légitime. Entre-temps, un contact physique réellement limité et généralement justifié peut être défendable à l'aide des moyens de défense de fondés sur le principe de minimis et sur la nécessité qui proviennent de la common law et à l'aide d'un exercice approprié par la poursuite de son pouvoir discrétionnaire. Advenant que les exceptions au moyen de défense de l'art. 43 suggérées par la majorité soient adoptées, il se pourrait que les parents aient parfois recours au moyen de défense fondé sur la nécessité, comme par exemple pour empêcher que se blesse sérieusement un enfant qui est trop jeune pour tirer une leçon du contact physique. Même si le moyen de défense fondé sur le principe de minimis sera probablement utilisé plus souvent, ces moyens de défense seront salutaires, en ce qu'ils aideront à empêcher la criminalisation de violations anodines ou techniques de la disposition relative aux voies de fait.

Deschamps, J. (dissidente): L'article 43 du Code criminel permet, à sa face même, une vaste gamme de contacts physiques sur les enfants qui, en l'absence de cette disposition, seraient considérés comme des voies de fait criminelles. La Cour a l'obligation d'examiner la loi telle qu'adoptée; elle ne peut faire une interprétation stricte de la disposition afin d'en créer une nouvelle.

L'article 43 viole le droit à l'égalité des enfants qui est protégé par l'art. 15(1) de la Charte canadienne. Cette disposition utilise des termes clairs et non équivoques pour nier aux enfants la protection de la loi tout simplement parce qu'ils sont des enfants. L'âge est une motif de discrimination interdit et énuméré. La discrimination porte atteinte à la dignité des enfants, puisque toute personne raisonnable arriverait à la conclusion qu'enlever la protection de la loi à l'égard des voies de fait sur sa personne, pour le seul motif de l'âge, constituerait une insulte à la dignité. Les enfants sont des membres de la société extrêmement vulnérables et ils méritent d'être protégés par la loi avec assiduité, y compris par les lois en matière criminelle. L'article 43 accentue la vulnérabilité naturelle des enfants et perpétue le mythe voulant qu'ils soient essentiellement la propriété de leurs parents.

L'article 43 ne peut être sauvegardé par l'art. 1 de la Charte canadienne. Les motifs des juges Binnie et Arbour étaient partagés, dans la mesure où ils énonçaient que l'art. 43 a été adopté pour répondre à un objectif urgent et réel. Il y a un lien rationnel entre l'objectif et le moyen choisi, soit limiter l'application des dispositions criminelles afin de permettre de corriger les enfants. La disposition ne satisfait cependant pas aux critères de la proportionnalité et de l'atteinte minimale. Le Parlement aurait pu choisir des moyens moins attentatoires pour atteindre son objectif. Tel qu'interprété, l'art. 43 permet une vaste gamme de comportements, dont des voies de fait potentiellement graves. De plus, les effets préjudiciables de l'art. 43 sur les enfants l'emporte sur ses effets bénéfiques parce que le droit des enfants de ne pas subir de violence est un droit extrêmement important et fondamental. Tout effet bénéfique devrait être extrêmement convaincant pour être proportionnel.

L'invalidation est la seule réparation appropriée en l'espèce. L'article 43 n'est pas compatible avec la Constitution canadienne et, par conséquent, est inopérant.

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Cases considered by *Binnie J.*:

Andrews v. Law Society (British Columbia) (1989), [1989] 2 W.W.R. 289, 56 D.L.R. (4th) 1, 91 N.R. 255, 34 B.C.L.R. (2d) 273, 25 C.C.E.L. 255, 36 C.R.R. 193, [1989] 1 S.C.R. 143, 10 C.H.R.R. D/5719, 1989 CarswellBC 16, 1989 CarswellBC 701 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — considered

Eaton v. Brant (County) Board of Education (1996), 31 O.R. (3d) 574 (note), 41 C.R.R. (2d) 240, 142 D.L.R. (4th) 385, *(*sub nom. *Eaton v. Board of Education of Brant County)* 207 N.R. 171, *(*sub nom. *Eaton v. Board of Education of Brant County)* 97 O.A.C. 161, [1997] 1 S.C.R. 241, 1996 CarswellOnt 5035, 1996 CarswellOnt 5036 (S.C.C.) — considered

Egan v. Canada (1995), 95 C.L.L.C. 210-025, 12 R.F.L. (4th) 201, C.E.B. & P.G.R. 8216, 124 D.L.R. (4th) 609, 182 N.R. 161, 29 C.R.R. (2d) 79, [1995] 2 S.C.R. 513, 96 F.T.R. 80 (note), 1995 CarswellNat 6, 1995 CarswellNat 703 (S.C.C.) — referred to

Gosselin c. Québec (Procureur général) (2002), [2002] 4 S.C.R. 429, 2002 SCC 84, 2002 CarswellQue 2706, 2002 CarswellQue 2707, (sub nom. *Gosselin v. Québec (Procureur général))* 298 N.R. 1, (sub nom. *Gosselin v. Quebec (Attorney General))* 221 D.L.R. (4th) 257, (sub nom. *Gosselin v. Quebec (Attorney General))* 100 C.R.R. (2d) 1, (sub nom. *Gosselin v. Quebec (Attorney General))* 44 C.H.R.R. D/363 (S.C.C.) — considered

Granovsky v. Canada (Minister of Employment & Immigration) (2000), 2000 SCC 28, 2000 CarswellNat 760, 2000 CarswellNat 761, 50 C.C.E.L. (2d) 177, 186 D.L.R. (4th) 1, 253 N.R. 329, [2000] 1 S.C.R. 703, 74 C.R.R. (2d) 1 (S.C.C.) — referred to

Jones v. Ontario (Attorney General) (1988), 40 M.P.L.R. 17, 65 O.R. (2d) 737, 53 D.L.R. (4th) 273, 1988 CarswellOnt 575 (Ont. H.C.) — referred to

Law v. Canada (Minister of Employment & Immigration) (1999), 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development))* 60 C.R.R. (2d) 1, 170 D.L.R. (4th) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development)* C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — considered

Little Sisters Book & Art Emporium v. Canada (Minister of Justice) (2000), 2000 SCC 69, 2000 CarswellBC 2442, 2000 CarswellBC 2452, 83 B.C.L.R. (3d) 1, [2001] 2 W.W.R. 1, 38 C.R. (5th) 209, 150 C.C.C. (3d) 1, 193 D.L.R. (4th) 193, 263 N.R. 203, [2000] 2 S.C.R. 1120, 145 B.C.A.C. 1, 237 W.A.C. 1, 28 Admin. L.R. (3d) 1, 79 C.R.R. (2d) 189 (S.C.C.) — considered

Martin v. Nova Scotia (Workers' Compensation Board) (2003), 4 Admin. L.R. (4th) 1, 28 C.C.E.L. (3d) 1, (sub nom. *Nova Scotia (Workers' Compensation Board) v. Martin)* 231 D.L.R. (4th) 385, 310 N.R. 22, [2003] 2 S.C.R. 504, 2003 SCC 54, 2003 CarswellNS 360, 2003 CarswellNS 361 (S.C.C.) — considered

Miron v. Trudel (1995), 10 M.V.R. (3d) 151, 23 O.R. (3d) 160 (note), [1995] I.L.R. 1-3185, 13 R.F.L. (4th) 1, C.E.B. & P.G.R. 8217, 181 N.R. 253, 124 D.L.R. (4th) 693, 81 O.A.C. 253, [1995] 2 S.C.R. 418, 29 C.R.R. (2d) 189, 1995 CarswellOnt 93, 1995 CarswellOnt 526 (S.C.C.) — considered

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1999), 1999 CarswellNB 305, 1999 CarswellNB 306, 26 C.R. (5th) 203, 244 N.R. 276, 177 D.L.R. (4th) 124, 50 R.F.L. (4th) 63, 66 C.R.R. (2d) 267, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615 (S.C.C.) — considered

Piercey Estate v. General Bakeries (1986), 31 D.L.R. (4th) 373, 61 Nfld. & P.E.I.R. 147, 185 A.P.R. 147, 1986 CarswellNfld 195 (Nfld. T.D.) — referred to

R. v. Cuerrier (1998), 229 N.R. 279, 1998 CarswellBC 1772, 127 C.C.C. (3d) 1, 162 D.L.R. (4th) 513, 18 C.R. (5th) 1, 111 B.C.A.C. 1, 181 W.A.C. 1, [1998] 2 S.C.R. 371, [1999] 4 W.W.R. 1, 57 B.C.L.R. (3d) 42, 1998 CarswellBC 1773 (S.C.C.) — considered

R. v. Jobidon (1991), 7 C.R. (4th) 233, 128 N.R. 321, [1991] 2 S.C.R. 714, 66 C.C.C. (3d) 454, 49 O.A.C. 83, 1991 CarswellOnt 110, 1991 CarswellOnt 1023 (S.C.C.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

R. v. Ogg-Moss (1984), [1984] 2 S.C.R. 173, 41 C.R. (3d) 297, 14 C.C.C. (3d) 116, 11 D.L.R. (4th) 549, 6 C.H.R.R. D/2498, 5 O.A.C. 81, 54 N.R. 81, 1984 CarswellOnt 804, 1984 CarswellOnt 64 (S.C.C.) — considered

Streng v. Winchester (Township) (1986), 43 M.V.R. 1, 31 D.L.R. (4th) 734, 11 C.P.C. (2d) 183, 37 C.C.L.T. 296, 56 O.R. (2d) 649, 34 M.P.L.R. 116, 25 C.R.R. 357, 1986 CarswellOnt 399 (Ont. H.C.) — referred to

Winnipeg Child & Family Services (Central Area) v. W. (K.L.) (2000), 2000 SCC 48, 2000 CarswellMan 469, 2000 CarswellMan 470, 191 D.L.R. (4th) 1, [2001] 1 W.W.R. 1, 260 N.R. 203, 10 R.F.L. (5th) 122, 78 C.R.R. (2d) 1, [2000] 2 S.C.R. 519, 150 Man. R. (2d) 161, 230 W.A.C. 161 (S.C.C.) — considered

Cases considered by *Arbour J.*:

Canada v. Pharmaceutical Society (Nova Scotia) (1992), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353 (S.C.C.) — considered

Fonder c. R. (1993), 1993 CarswellQue 810 (C.A. Que.) — referred to
Irwin Toy Ltd. c. Québec (Procureur général) (1989), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — considered
Kindler v. Canada (Minister of Justice) (1991), 8 C.R. (4th) 1, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 129 N.R. 81, 6 C.R.R. (2d) 193, 1991 CarswellNat 3, 45 F.T.R. 160 (note), 1991 CarswellNat 831 (S.C.C.) — considered
Law v. Canada (Minister of Employment & Immigration) (1999), 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development)*) 60 C.R.R. (2d) 1, 170 D.L.R. (4th) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development)* C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — considered
Osborne v. Canada (Treasury Board) (1991), 37 C.C.E.L. 135, 91 C.L.L.C. 14,026, 125 N.R. 241, 41 F.T.R. 239 (note), 82 D.L.R. (4th) 321, 4 C.R.R. (2d) 30, [1991] 2 S.C.R. 69, 1991 CarswellNat 348, 1991 CarswellNat 830 (S.C.C.) — considered
Perka v. R. (1984), [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1, 55 N.R. 1, [1984] 6 W.W.R. 289, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, 1984 CarswellBC 823, 28 B.C.L.R. (2d) 205 (S.C.C.) — referred to
R. v. Asante-Mensah (2003), 39 M.V.R. (4th) 155, 306 N.R. 289, 175 O.A.C. 317, 2003 SCC 38, 174 C.C.C. (3d) 481, 227 D.L.R. (4th) 75, 11 C.R. (6th) 1, 2003 CarswellOnt 2667, 2003 CarswellOnt 2668, [2003] 2 S.C.R. 3 (S.C.C.) — considered
R. v. Atkinson (1994), [1994] 9 W.W.R. 485, 1994 CarswellMan 167 (Man. Prov. Ct.) — considered
R. v. Bell (2001), 2001 CarswellOnt 1552 (Ont. S.C.J.) — referred to
R. v. C. (G.C.) (2001), 2001 CarswellNfld 286, 206 Nfld. & P.E.I.R. 231, 618 A.P.R. 231 (Nfld. T.D.) — referred to
R. v. Campbell (1977), 38 C.C.C. (2d) 6, 17 O.R. (2d) 673, 1 C.R. (3d) 309, 1 C.R. (3d) S-49, 1977 CarswellOnt 5 (Ont. C.A.) — referred to
R. c. Caouette (2002), 2002 CarswellQue 1323 (C.Q.) — referred to
R. v. Dunfield (1990), 103 N.B.R. (2d) 172, 259 A.P.R. 172, 1990 CarswellNB 270 (N.B. Q.B.) — referred to
R. v. Dupperon (1984), [1985] 2 W.W.R. 369, 37 Sask. R. 84, 43 C.R. (3d) 70, 16 C.C.C. (3d) 453, 1984 CarswellSask 198 (Sask. C.A.) — considered
R. v. Fritz (1987), 55 Sask. R. 302, 1987 CarswellSask 263 (Sask. Q.B.) — referred to
R. v. Gallant (1993), 110 Nfld. & P.E.I.R. 174, 346 A.P.R. 174 (P.E.I. Prov. Ct.) — referred to
R. v. Goforth (1991), 98 Sask. R. 26, 1991 CarswellSask 360 (Sask. Q.B.) — referred to
R. v. Graham (1995), 39 C.R. (4th) 339, 160 N.B.R. (2d) 306, 412 A.P.R. 306, 1995 CarswellNB 7 (N.B. Q.B.) — considered
R. v. H. (V.) (2001), 2001 CarswellNfld 299 (Nfld. Prov. Ct.) — referred to
R. v. Harriott (1992), 128 N.B.R. (2d) 155, 322 A.P.R. 155, 1992 CarswellNB 426 (N.B. Prov. Ct.) — referred to
R. v. Heywood (1994), 34 C.R. (4th) 133, 174 N.R. 81, 50 B.C.A.C. 161, 82 W.A.C. 161, 24 C.R.R. (2d) 189, 120 D.L.R. (4th) 348, 94 C.C.C. (3d) 481, [1994] 3 S.C.R. 761, 1994 CarswellBC 592, 1994 CarswellBC 1247 (S.C.C.) — considered
R. v. Hinchey (1996), 111 C.C.C. (3d) 353, 205 N.R. 161, 142 D.L.R. (4th) 50, 3 C.R. (5th) 187, 147 Nfld. & P.E.I.R. 1, 459 A.P.R. 1, [1996] 3 S.C.R. 1128, 1996 CarswellNfld 253, 1996 CarswellNfld 254 (S.C.C.) — considered
R. c. Holmes (June 19, 2001), Doc. 555-36-000004-009 (C.S. Que.) — referred to
R. v. J. (O.) (February 22, 1996), Doc. 96-06334 (Ont. Prov. Div.) — referred to
R. v. James (1998), 1998 CarswellOnt 1396 (Ont. Prov. Div.) — considered
R. v. K. (L.A.) (1992), 104 Nfld. & P.E.I.R. 118, 329 A.P.R. 118, 1992 CarswellNfld 312 (Nfld. Prov. Ct.) — considered
R. v. K. (M.) (1992), [1992] 5 W.W.R. 618, 74 C.C.C. (3d) 108, 16 C.R. (4th) 121, 81 Man. R. (2d) 151, 30 W.A.C. 151, 1992 CarswellMan 126 (Man. C.A.) — referred to
R. v. Kormos (1998), 1998 CarswellOnt 473, 14 C.R. (5th) 312 (Ont. Prov. Div.) — considered
R. v. L. (V.) (October 31, 1995), Vaillancourt Prov. J. (Ont. Prov. Div.) — considered
R. v. LeBeau (1988), 25 O.A.C. 1, 62 C.R. (3d) 157, 41 C.C.C. (3d) 163, 1988 CarswellOnt 46 (Ont. C.A.) — referred to
R. v. Lepage (1989), 79 Sask. R. 246, 74 C.R. (3d) 368, 1989 CarswellSask 27 (Sask. Q.B.) — referred to
R. v. Li (1984), 16 C.C.C. (3d) 382, 1984 CarswellOnt 1189 (Ont. H.C.) — referred to
R. v. Malmo-Levine (2003), 2003 SCC 74, 2003 CarswellBC 3133, 2003 CarswellBC 3134 (S.C.C.) — referred to

R. v. Manning (1994), 31 C.R. (4th) 54, 1994 CarswellBC 583 (B.C. Prov. Ct.) — considered
R. v. Matsuba (1993), 137 A.R. 34, 1993 CarswellAlta 599 (Alta. Prov. Ct.) — considered
R. v. McBurney (1974), [1974] 3 W.W.R. 546, 26 C.R.N.S. 114, 15 C.C.C. (2d) 361, 1974 CarswellBC 100 (B.C. S.C.) — referred to
R. v. McBurney (1975), [1975] 5 W.W.R. 554, 24 C.C.C. (2d) 44, 1975 CarswellBC 139 (B.C. C.A.) — referred to
R. v. McCraw (1991), 7 C.R. (4th) 314, 128 N.R. 299, 66 C.C.C. (3d) 517, [1991] 3 S.C.R. 72, 49 O.A.C. 47, 1991 CarswellOnt 113, 1991 CarswellOnt 1024 (S.C.C.) — considered
R. v. Morales (1992), 17 C.R. (4th) 74, 12 C.R.R. (2d) 31, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91, 144 N.R. 176, 51 Q.A.C. 161, 1992 CarswellQue 18, 1992 CarswellQue 121 (S.C.C.) — considered
R. v. Morgentaler (No. 5) (1975), [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 4 N.R. 277, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 1975 CarswellQue 3, 1975 CarswellQue 31F (S.C.C.) — referred to
R. v. Morris (1981), 23 C.R. (3d) 175, 61 C.C.C. (2d) 163, 31 A.R. 189, 1981 CarswellAlta 160 (Alta. Q.B.) — considered
R. v. Murphy (1996), 49 C.R. (4th) 321, 108 C.C.C. (3d) 414, 78 B.C.A.C. 151, 128 W.A.C. 151, 1996 CarswellBC 1552 (B.C. C.A.) — referred to
R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered
R. v. Ogg-Moss (1984), [1984] 2 S.C.R. 173, 41 C.R. (3d) 297, 14 C.C.C. (3d) 116, 11 D.L.R. (4th) 549, 6 C.H.R.R. D/2498, 5 O.A.C. 81, 54 N.R. 81, 1984 CarswellOnt 804, 1984 CarswellOnt 64 (S.C.C.) — considered
R. v. Overvold (1972), [1972] 6 W.W.R. 473, 20 C.R.N.S. 327, 9 C.C.C. (2d) 517, 1972 CarswellNWT 17 (N.W.T. Mag. Ct.) — referred to
R. v. Pickard (November 27, 1995), Doc. Quesnel 17103 (B.C. Prov. Ct.) — considered
R. c. Plourde (1993), 140 N.B.R. (2d) 273, 358 A.P.R. 273, 1993 CarswellNB 454 (N.B. Prov. Ct.) — considered
R. v. Robinson (1986), 1 Y.R. 161, 1986 CarswellYukon 32 (Y.T. Terr. Ct.) — considered
R. v. Ruzic (2001), 2001 SCC 24, 2001 CarswellOnt 1238, 2001 CarswellOnt 1239, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, 197 D.L.R. (4th) 577, 82 C.R.R. (2d) 1, 268 N.R. 1, 145 O.A.C. 235, [2001] 1 S.C.R. 687 (S.C.C.) — considered
R. v. S. (N.) (February 5, 1999), Doc. 521-98 (Ont. Gen. Div.) — referred to
R. v. Sharpe (2001), 2001 SCC 2, 2001 CarswellBC 82, 2001 CarswellBC 83, 194 D.L.R. (4th) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, 264 N.R. 201, 146 B.C.A.C. 161, 239 W.A.C. 161, 88 B.C.L.R. (3d) 1, [2001] 6 W.W.R. 1, [2001] 1 S.C.R. 45, 86 C.R.R. (2d) 1 (S.C.C.) — referred to
R. v. Skidmore (June 27, 2000), Doc. 8414/99 (Ont. C.J.) — referred to
R. v. Stimpson (1974), 26 C.R.N.S. 130, [1974] 3 W.W.R. 598, 17 C.C.C. (2d) 181, 1974 CarswellMan 40 (Man. Prov. Ct.) — referred to
R. v. Vivian (1992), 1992 CarswellBC 1790 (B.C. S.C.) — considered
R. v. Wetmore (1996), 172 N.B.R. (2d) 224, 439 A.P.R. 224, 1996 CarswellNB 2 (N.B. Q.B.) — considered
R. v. Wheeler (October 10, 1990), Doc. 90-00040 (Y.T. Terr. Ct.) — referred to
R. v. White (1999), 1999 CarswellBC 1224, 1999 CarswellBC 1225, 63 C.R.R. (2d) 1, 240 N.R. 1, 24 C.R. (5th) 201, 135 C.C.C. (3d) 257, 174 D.L.R. (4th) 111, 42 M.V.R. (3d) 161, 123 B.C.A.C. 161, 201 W.A.C. 161, [1999] 2 S.C.R. 417, 7 B.H.R.C. 120 (S.C.C.) — considered
R. v. Wood (1995), 176 A.R. 223, 1995 CarswellAlta 961 (Alta. Prov. Ct.) — considered
Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada) (1990), 77 C.R. (3d) 1, 48 C.R.R. 1, [1990] 1 S.C.R. 1123, 109 N.R. 81, 68 Man. R. (2d) 1, [1990] 4 W.W.R. 481, 56 C.C.C. (3d) 65, 1990 CarswellMan 206, 1990 CarswellMan 378 (S.C.C.) — referred to
"Reward" (The) (1818), 165 E.R. 1482, 2 Dods. 265 (Eng. Adm. Ct.) — considered
Winnipeg Child & Family Services (Central Area) v. W. (K.L.) (2000), 2000 SCC 48, 2000 CarswellMan 469, 2000 CarswellMan 470, 191 D.L.R. (4th) 1, [2001] 1 W.W.R. 1, 260 N.R. 203, 10 R.F.L. (5th) 122, 78 C.R.R. (2d) 1, [2000] 2 S.C.R. 519, 150 Man. R. (2d) 161, 230 W.A.C. 161 (S.C.C.) — referred to

Cases considered by *Deschamps J.*:

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1994), 9 R.F.L. (4th) 157, 21 O.R. (3d) 479 (note), 122 D.L.R. (4th) 1, [1995] 1 S.C.R. 315, 26 C.R.R. (2d) 202, (sub nom. *Sheena B., Re)* 176 N.R. 161, (sub nom. *Sheena B., Re)* 78 O.A.C. 1, 1995 CarswellOnt 105, 1995 CarswellOnt 515 (S.C.C.) — referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered

Canada v. Pharmaceutical Society (Nova Scotia) (1992), 15 C.R. (4th) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 93 D.L.R. (4th) 36, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* [1992] 2 S.C.R. 606, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 43 C.P.R. (3d) 1, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 74 C.C.C. (3d) 289, (sub nom. *R. v. Nova Scotia Pharmaceutical Society)* 10 C.R.R. (2d) 34, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 139 N.R. 241, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))* 114 N.S.R. (2d) 91, 1992 CarswellNS 15, 313 A.P.R. 91, 1992 CarswellNS 353 (S.C.C.) — referred to

Law v. Canada (Minister of Employment & Immigration) (1999), 1999 CarswellNat 359, 1999 CarswellNat 360, (sub nom. *Law v. Canada (Minister of Human Resources Development))* 60 C.R.R. (2d) 1, 170 D.L.R. (4th) 1, 236 N.R. 1, [1999] 1 S.C.R. 497, 43 C.C.E.L. (2d) 49, (sub nom. *Law v. Minister of Human Resources Development)* C.E.B. & P.G.R. 8350 (headnote only) (S.C.C.) — considered

M v. H (1999), (sub nom. *M. v. H.)* 171 D.L.R. (4th) 577, (sub nom. *M. v. H.)* 238 N.R. 179, 1999 CarswellOnt 1348, 1999 CarswellOnt 1349, (sub nom. *M. v. H.)* 43 O.R. (3d) 254 (headnote only), (sub nom. *M. v. H.)* 62 C.R.R. (2d) 1, (sub nom. *M. v. H.)* 121 O.A.C. 1, 46 R.F.L. (4th) 32, (sub nom. *Attorney General for Ontario v. M. & H.)* C.E.B. & P.G.R. 8354 (headnote only), (sub nom. *M. v. H.)* [1999] 2 S.C.R. 3, 7 B.H.R.C. 489 (S.C.C.) — referred to

R. v. Cuerrier (1998), 229 N.R. 279, 1998 CarswellBC 1772, 127 C.C.C. (3d) 1, 162 D.L.R. (4th) 513, 18 C.R. (5th) 1, 111 B.C.A.C. 1, 181 W.A.C. 1, [1998] 2 S.C.R. 371, [1999] 4 W.W.R. 1, 57 B.C.L.R. (3d) 42, 1998 CarswellBC 1773 (S.C.C.) — referred to

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R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — considered

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R. v. Swain (1991), 63 C.C.C. (3d) 481, 125 N.R. 1, 3 C.R.R. (2d) 1, 47 O.A.C. 81, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 1991 CarswellOnt 93, 1991 CarswellOnt 1016 (S.C.C.) — referred to

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Schachter v. Canada (1992), 92 C.L.L.C. 14,036, 10 C.R.R. (2d) 1, 139 N.R. 1, 93 D.L.R. (4th) 1, 1992 CarswellNat 658, 1992 CarswellNat 1006, 53 F.T.R. 240 (note), [1992] 2 S.C.R. 679 (S.C.C.) — referred to

Slaight Communications Inc. v. Davidson (1989), 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100, 1989 CarswellNat 695, 1989 CarswellNat 193 (S.C.C.) — referred to

Winnipeg Child & Family Services (Central Area) v. W. (K.L.) (2000), 2000 SCC 48, 2000 CarswellMan 469, 2000 CarswellMan 470, 191 D.L.R. (4th) 1, [2001] 1 W.W.R. 1, 260 N.R. 203, 10 R.F.L. (5th) 122, 78 C.R.R. (2d) 1, [2000] 2 S.C.R. 519, 150 Man. R. (2d) 161, 230 W.A.C. 161 (S.C.C.) — referred to

Statutes considered by *McLachlin C.J.C.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 12 — considered

s. 15 — considered

s. 15(1) — considered

Child and Family Services Act, R.S.O. 1990, c. C.11

s. 1(1) — referred to

Children's Law Reform Act, R.S.O. 1990, c. C.12

s. 19(a) — referred to

Criminal Code, 1892, S.C. 1892, c. 29

Generally — referred to

s. 44 — referred to

s. 45 — referred to

s. 55 — considered

Criminal Code, S.C. 1953-54, c. 51

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 43 — considered

s. 45 — referred to

s. 265 — referred to

s. 273.2(b) [en. 1992, c. 38, s. 1] — referred to

s. 495 — referred to

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 16(8) — referred to

s. 16(10) — referred to

s. 17(5) — referred to

s. 17(9) — referred to

Education Act, S.Y. 1989-90, c. 25

s. 36 — referred to

Education Act, S.N.W.T. 1995, c. 28

s. 34(3) — referred to

Education Act, S.N.B. 1997, c. E-1.12

s. 23 — referred to

Family Relations Act, R.S.B.C. 1996, c. 128

s. 24(1) — referred to

Immigration and Refugee Protection Act, S.C. 2001, c. 27

s. 25 — referred to

s. 28 — referred to

s. 60 — referred to

s. 67 — referred to

s. 68 — referred to

s. 69 — referred to

School Act, R.S.B.C. 1996, c. 412

s. 76(3) — referred to

School Act, S.P.E.I. 1993, c. 35

s. 73 — referred to

Schools Act, 1997, S.N. 1997, c. S-12.2

s. 42 — referred to

Youth Criminal Justice Act, S.C. 2002, c. 1

s. 25(8) — referred to

s. 27(1) — referred to

s. 30(3) — referred to

s. 30(4) — referred to

Statutes considered by *Binnie J.*:

Age of Majority and Accountability Act, R.S.O. 1990, c. A.7

s. 1 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 7 — considered

s. 12 — considered

s. 15 — considered

s. 15(1) — considered

Crimes Act, 1961, No. 43

s. 59 — referred to

Criminal Code, S.C. 1953-54, c. 51

s. 43 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 43 — considered

s. 265 — considered

Education Act, 1989, No. 80

s. 139A — referred to

Education Act (No. 2), 1986, c. 61

s. 47 — referred to

Statutes considered by *Arbour J.*:

Canada Shipping Act, 2001, S.C. 2001, c. 26

s. 294 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 7 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Generally — referred to

Criminal Code, 1892, S.C. 1892, c. 29

s. 55 — referred to

Criminal Code, S.C. 1953-54, c. 51

Generally — referred to

s. 44 — referred to

Criminal Code, R.S.C. 1970, c. C-34

s. 245.1(1)(a) [en. 1980-81-82-83, c. 125, s. 19] — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 2 "bodily harm" — considered

s. 8(3) — referred to

s. 9 — referred to

s. 27 — considered

s. 30 — considered

s. 32 — considered

s. 34 — considered

s. 35 — considered

s. 37 — considered

s. 39 — considered

s. 40 — considered

s. 41 — considered

s. 43 — considered

s. 121(1)(c) — referred to

s. 232 — referred to

s. 265(1) — considered

s. 265(2) — considered

Statutes considered by *Deschamps J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 7 — referred to

s. 12 — referred to

s. 15 — considered

s. 15(1) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 43 — considered

s. 265 — considered

s. 265(2) — referred to

Treaties considered by *McLachlin C.J.C.*:

Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, E.T.S. no. 5; 213 U.N.T.S. 221

Article 3 — considered

Convention on the Elimination of All Forms of Discrimination against Women, 1981, C.T.S. 1982/31; 19 I.L.M. 33

Article 5(b) — referred to

Article 16 ¶ 1(d) — referred to

Convention on the Rights of the Child, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25

Generally — referred to

Article 3 ¶ 1 — considered

Article 5 — considered

Article 19 ¶ 1 — considered

Article 37(a) — considered

International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171

Generally — referred to

Preamble — referred to

Article 7 — considered

Treaties considered by *Arbour J.*:

Convention on the Rights of the Child, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25

Generally — referred to

Article 43 ¶ 1 — considered
International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171
Generally — referred to
Treaties considered by *Deschamps J.*:
Convention on the Rights of the Child, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25
Generally — referred to
International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171
Article 24 — referred to

APPEAL by plaintiff from judgment reported at 2002 CarswellOnt 32, 207 D.L.R. (4th) 632, 161 C.C.C. (3d) 178, 48 C.R. (5th) 218, 154 O.A.C. 144, 23 R.F.L. (5th) 101, 57 O.R. (3d) 511, 90 C.R.R. (2d) 223 (Ont. C.A.), dismissing plaintiff's appeal from judgment dismissing action for declaration that s. 43 of Criminal Code was unconstitutional as impairing rights as guaranteed by ss. 7, 12 and 15(1) of Canadian Charter of Rights and Freedoms.

POURVOI de la demanderesse à l'encontre de l'arrêt publié à 2002 CarswellOnt 32, 207 D.L.R. (4th) 632, 161 C.C.C. (3d) 178, 48 C.R. (5th) 218, 154 O.A.C. 144, 23 R.F.L. (5th) 101, 57 O.R. (3d) 511, 90 C.R.R. (2d) 223 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement qui avait rejeté son action afin que l'art. 43 du Code criminel soit déclaré inconstitutionnel au motif qu'il portait atteinte aux droits protégés par les art. 7, 12 et 15(1) de la Charte canadienne des droits et libertés.

***McLachlin C.J.C.*:**

1 The issue in this case is the constitutionality of Parliament's decision to carve out a sphere within which children's parents and teachers may use minor corrective force in some circumstances without facing criminal sanction. The assault provision of the *Criminal Code*, R.S.C. 1985, c. C-46, s. 265, prohibits intentional, non-consensual application of force to another. Section 43 of the *Criminal Code* excludes from this crime reasonable physical correction of children by their parents and teachers. It provides:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

> The Canadian Foundation for Children, Youth and the Law ("the Foundation") seeks a declaration that this exemption from criminal sanction: (1) violates s. 7 of the *Canadian Charter of Rights and Freedoms* because it fails to give procedural protections to children, does not further the best interests of the child, and is both overbroad and vague; (2) violates s. 12 of the *Charter* because it constitutes cruel and unusual punishment or treatment; and (3) violates s. 15(1) of the *Charter* because it denies children the legal protection against assaults that is accorded to adults.

2 The trial judge and the Court of Appeal rejected the Foundation's contentions and refused to issue the declaration requested. Like them, I conclude that the exemption from criminal sanction for corrective force that is "reasonable under the circumstances" does not offend the *Charter*. I say this, having carefully considered the contrary view of my colleague, Arbour J., that the defence of reasonable correction offered by s. 43 is so vague that it must be struck down as unconstitutional, leaving parents who apply corrective force to children to the mercy of the defences of necessity and "*de minimis*". I am satisfied that the substantial social consensus on what is reasonable correction, supported by comprehensive and consistent expert evidence on what is reasonable presented in this appeal, gives clear content to s. 43. I am also satisfied, with due respect to contrary views, that exempting parents and teachers from criminal sanction for reasonable correction does not violate children's equality rights. In the end, I am satisfied that this section provides a workable, constitutional standard that protects both children and parents.

I. Does Section 43 of the Criminal Code Offend Section 7 of the Charter?

3 Section 7 of the *Charter* is breached by state action depriving someone of life, liberty, or security of the person contrary to a principle of fundamental justice. The burden is on the applicant to prove both the deprivation and the breach of

fundamental justice. In this case the Crown concedes that s. 43 adversely affects children's security of the person, fulfilling the first requirement.

4 This leaves the question of whether s. 43 offends a principle of fundamental justice. The Foundation argues that three such principles have been breached: (1) the principle that the child must be afforded independent procedural rights; (2) the principle that legislation affecting children must be in their best interests; and (3) the principle that criminal legislation must not be vague or overbroad. I will consider each in turn.

A. Independent Procedural Rights for Children

5 It is a principle of fundamental justice that accused persons must be accorded adequate procedural safeguards in the criminal process. By analogy, the Foundation argues that it is a principle of fundamental justice that innocent children who are alleged to have been subjected to force exempted from criminal sanction by s. 43 of the *Criminal Code* have a similar right to due process in the representation of their interests at trial. Section 43 fails to accord such process, it is argued, and therefore breaches s. 7 of the *Charter*. The implication is that for s. 43 to be constitutional, it would be necessary to provide for separate representation of the child's interests.

6 Thus far, jurisprudence has not recognized procedural rights for the alleged victims of an offence. However, I need not consider that issue. Even on the assumption that alleged child victims are constitutionally entitled to procedural safeguards, the Foundation's argument fails because s. 43 provides adequate procedural safeguards to protect this interest. The child's interests are represented at trial by the Crown. The Crown's decision to prosecute and its conduct of the prosecution will necessarily reflect society's concern for the physical and mental security of the child. There is no reason to suppose that, as in other offences involving children as victims or witnesses, the Crown will not discharge that duty properly. Nor is there any reason to conclude on the arguments before us that providing separate representation for the child is either necessary or useful. I conclude that no failure of procedural safeguards has been established.

B. The Best Interests of the Child

7 The Foundation argues that it is a principle of fundamental justice that laws affecting children must be in their best interests, and that s. 43's exemption of reasonable corrective force from criminal sanction is not in the best interests of the child. Therefore, it argues, s. 43 violates s. 7 of the *Charter*. I disagree. While "the best interests of the child" is a recognized legal principle, this legal principle is not a principle of fundamental justice.

8 Jurisprudence on s. 7 has established that a "principle of fundamental justice" must fulfill three criteria: *R. v. Malmo-Levine*, 2003 SCC 74 (S.C.C.), at para. 113. First, it must be a legal principle. This serves two purposes. First, it "provides meaningful content for the s. 7 guarantee"; second, it avoids the "adjudication of policy matters": *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), at p. 503. Second, there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice": *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at p. 590. The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice. Third, the alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results. Examples of principles of fundamental justice that meet all three requirements include the need for a guilty mind and for reasonably clear laws.

9 The "best interests of the child" is a legal principle, thus meeting the first requirement. A legal principle contrasts with what Lamer J. (as he then was) referred to as "the realm of general public policy" (*Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, *supra*, per Lamer J., at p. 503), and Sopinka J. referred to as "broad" and "vague generalizations about what our society considers to be ethical or moral" (*Rodriguez*, *supra*, at p. 591), the use of which would transform s. 7 into a vehicle for policy adjudication. The "best interests of the child" is an established legal principle in international and domestic law. Canada is a party to international conventions that treat "the best interests of the child" as a legal principle: see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Art. 3(1), and the *Convention on the Elimination of All Forms of Discrimination*

Against Women, Can. T.S. 1982, No. 31, Arts. 5(b) and 16(1)(d). Many Canadian statutes explicitly name the "best interests of the child" as a legal consideration: see, for example, *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 25, 28, 60, 67, 68 and 69; *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 25(8), 27(1), 30(3) and 30(4); *Divorce Act*, R.S.C. 1985, c. 3 (2nd supp.), ss. 16(8), 16(10), 17(5) and 17(9). Family law statutes are saturated with references to the "best interests of the child" as a legal principle of paramount importance: though not an exhaustive list, examples include: *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 24(1); *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 1(a); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 19(a). Clearly, the best interests of the child has achieved the status of a legal principle; the first requirement is met.

10 However, the "best interests of the child" fails to meet the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice. The "best interests of the child" is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. It is not, however, a foundational requirement for the dispensation of justice. Article 3(1) of the *Convention on the Rights of the Child* describes it as "a primary consideration" rather than "the primary consideration" (emphasis added). Drawing on this wording, L'Heureux-Dubé J. noted in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 75:

> [T]he decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration.

It follows that the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests. Society does not always deem it essential that the "best interests of the child" trump all other concerns in the administration of justice. The "best interests of the child", while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.

11 The third requirement is that the alleged principle of fundamental justice be "capable of being identified with some precision" (*Rodriguez*, *supra*, at p. 591) and provide a justiciable standard. Here, too, the "best interests of the child" falls short. It functions as a factor considered along with others. Its application is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield, particularly in areas of the law where it is one consideration among many, such as the criminal justice system. It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

12 To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice.

C. Vagueness and Overbreadth

(1) Vagueness

13 The Foundation argues that s. 43 is unconstitutional because first, it does not give sufficient notice as to what conduct is prohibited; and second, it fails to constrain discretion in enforcement. The concept of what is "reasonable under the circumstances" is simply too vague, it is argued, to pass muster as a criminal provision.

14 Applying the legal requirements for precision in a criminal statute to s. 43, I conclude that s. 43, properly construed, is not unduly vague.

(a) The Standard for "Vagueness"

15 A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible". The law must offer a "grasp to the judiciary": *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at pp. 639-40. Certainty is not required. As Gonthier J. pointed out in *Pharmaceutical Society (Nova Scotia)*, *supra*, at pp. 638-39,

> ...conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances. [Emphasis added.]

16 A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. Rockford (City)*, 408 U.S. 104 (U.S.S.C. 1972), at p. 109.

17 *Ad hoc* discretionary decision making must be distinguished from appropriate judicial interpretation. Judicial decisions may properly add precision to a statute. Legislators can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case-by-case basis.

18 It follows that s. 43 of the *Criminal Code* will satisfy the constitutional requirement for precision if it delineates a risk zone for criminal sanction. This achieves the essential task of providing general guidance for citizens and law enforcement officers.

(b) Does Section 43 delineate a Risk Zone for Criminal Sanction?

19 The purpose of s. 43 is to delineate a sphere of non-criminal conduct within the larger realm of common assault. It must, as we have seen, do this in a way that permits people to know when they are entering a zone of risk of criminal sanction and that avoids *ad hoc* discretionary decision-making by law enforcement officials. People must be able to assess when conduct approaches the boundaries of the sphere that s. 43 provides.

20 To ascertain whether s. 43 meets these requirements, we must consider its words and court decisions interpreting those words. The words of the statute must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme's purpose and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26. Since s. 43 withdraws the protection of the criminal law in certain circumstances, it should be strictly construed: see *R. v. Ogg-Moss*, [1984] 2 S.C.R. 173 (S.C.C.), at p. 183.

21 Section 43 delineates *who may access* its sphere with considerable precision. The terms "schoolteacher" and "parent" are clear. The phrase "person standing in the place of a parent" has been held by the courts to indicate an individual who has assumed "*all* the obligations of parenthood": *Ogg-Moss*, *supra*, at p. 190. These terms present no difficulty.

22 Section 43 identifies less precisely *what conduct* falls within its sphere. It defines this conduct in two ways. The first is by the requirement that the force be "by way of correction". The second is by the requirement that the force be "reasonable under the circumstances". The question is whether, taken together and construed in accordance with governing principles, these phrases provide sufficient precision to delineate the zone of risk and avoid discretionary law enforcement.

23 I turn first to the requirement that the force be "by way of correction". These words, considered in conjunction with the cases, yield two limitations on the content of the protected sphere of conduct.

24 First, the person applying the force must have intended it to be for educative or corrective purposes: *Ogg-Moss*, *supra*, p. 193. Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are

designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child: *Ogg-Moss*, *supra*, p. 193.

25 Second, the child must be capable of benefiting from the correction. This requires the capacity to learn and the possibility of successful correction. Force against children under two cannot be corrective, since on the evidence they are incapable of understanding why they are hit (trial decision, (2000), 49 O.R. (3d) 662 (Ont. S.C.J.), at para. 17). A child may also be incapable of learning from the application of force because of disability or some other contextual factor. In these cases, force will not be "corrective" and will not fall within the sphere of immunity provided by s. 43.

26 The second requirement of s. 43 is that the force be "reasonable under the circumstances". The Foundation argues that this term fails to sufficiently delineate the area of risk and constitutes an invitation to discretionary *ad hoc* law enforcement. It argues that police officers, prosecutors and judges too often assess the reasonableness of corrective force by reference to their personal experiences and beliefs, rendering enforcement of s. 43 arbitrary and subjective. In support, it points to the decision of the Manitoba Court of Appeal in *R. v. K. (M.)* (1992), 74 C.C.C. (3d) 108 (Man. C.A.), in which, at p. 109, O'Sullivan J.A. stated that "[t]he discipline administered to the boy in question in these proceedings [a kick to the rear] was mild indeed compared to the discipline I received in my home".

27 Against this argument, the law has long used reasonableness to delineate areas of risk, without incurring the dangers of vagueness. The law of negligence, which has blossomed in recent decades to govern private actions in nearly all spheres of human activity, is founded upon the presumption that individuals are capable of governing their conduct in accordance with the standard of what is "reasonable". But reasonableness as a guide to conduct is not confined to the law of negligence. The criminal law also relies on it. The *Criminal Code* expects that police officers will know what constitutes "reasonable grounds" for believing that an offence has been committed, such that an arrest can be made (s. 495); that an individual will know what constitutes "reasonable steps" to obtain consent to sexual contact (s. 273.2(*b*)); and that surgeons, in order to be exempted from criminal liability, will judge whether performing an operation is "reasonable" in "all the circumstances of the case" (s. 45). These are merely a few examples; the criminal law is thick with the notion of "reasonableness".

28 The reality is that the term "reasonable" gives varying degrees of guidance, depending upon the statutory and factual context. It does not insulate a law against a charge of vagueness. Nor, however, does it automatically mean that a law is void for vagueness. In each case, the question is whether the term, considered in light of principles of statutory interpretation and decided cases, delineates an area of risk and avoids the danger of arbitrary *ad hoc* law enforcement.

29 Is s. 43's reliance on reasonableness, considered in this way, unconstitutionally vague? Does it indicate what conduct risks criminal sanction and provide a principled basis for enforcement? While the words on their face are broad, a number of implicit limitations add precision.

30 The first limitation arises from the behaviour for which s. 43 provides an exemption, simple non-consensual application of force. Section 43 does not exempt from criminal sanction conduct that causes harm or raises a reasonable prospect of harm. It can be invoked only in cases of non-consensual application of force that results neither in harm nor in the prospect of bodily harm. This limits its operation to the mildest forms of assault. People must know that if their conduct raises an apprehension of bodily harm they cannot rely on s. 43. Similarly, police officers and judges must know that the defence cannot be raised in such circumstances.

31 Within this limited area of application, further precision on what is reasonable under the circumstances may be derived from international treaty obligations. Statutes should be construed to comply with Canada's international obligations: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437 (S.C.C.), at para. 137. Canada's international commitments confirm that physical correction that either harms or degrades a child is unreasonable.

32 Canada is a party to the United Nations *Convention on the Rights of the Child*. Article 5 of the Convention requires state parties to

> respect the responsibilities, rights and duties of parents or ... other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 19(1) requires the state party to

> protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. [Emphasis added.]

Finally, Art. 37(a) requires state parties to ensure that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment" (emphasis added). This language is also found in the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada is a party. Article 7 of the Covenant states that "[no] one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The preamble to the *International Covenant on Civil and Political Rights* makes it clear that its provisions apply to "all members of the human family". From these international obligations, it follows that what is "reasonable under the circumstances" will seek to avoid harm to the child and will never include cruel, inhuman or degrading treatment.

33 Neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* explicitly require state parties to ban all corporal punishment of children. In the process of monitoring compliance with the *International Covenant on Civil and Political Rights*, however, the Human Rights Committee of the United Nations has expressed the view that corporal punishment of children in schools engages Art. 7's prohibition of degrading treatment or punishment: see for example, *Report of the Human Rights Committee*, Vol. I, UN GAOR, Fiftieth Session, Supp. No. 40 (A/50/40) (1995), at paras. 426 and 434; *Report of the Human Rights Committee*, Vol. I, UN GAOR, Fifty-fourth Session, Supp. No. 40 (A/54/40) (1999), at para. 358; *Report of the Human Rights Committee*, Vol. I, UN GAOR, Fifty-fifth Session, Supp. No. 40 (A/55/40) (2000), at paras. 306 and 429. The Committee has not expressed a similar opinion regarding parental use of mild corporal punishment.

34 Section 43's ambit is further defined by the direction to consider the circumstances under which corrective force is used. National and international precedents have set out factors to be considered. Article 3 of the *European Convention on Human Rights*, 213 U.N.T.S. 221, forbids inhuman and degrading treatment. The European Court of Human Rights, in determining whether parental treatment of a child was severe enough to fall within the scope of Article 3, held that assessment must take account of "all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim": Eur. Court H.R., *A v. United Kingdom* [(1998), 27 E.H.R.R. 611 (European Ct. Human Rights)], judgment of 25 September 1998, *Reports of Judgments and Decisions* 1998-VI, 2692, pp. 2699-2700. These factors properly focus on the prospective effect of the corrective force upon the child, as required by s. 43.

35 By contrast, it is improper to retrospectively focus on the gravity of a child's wrongdoing, which invites a punitive rather than corrective focus. "[T]he nature of the offence calling for correction", an additional factor suggested in *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.), at p. 460, is thus not a relevant contextual consideration. The focus under s. 43 is on the correction of the child, not on the gravity of the precipitating event. Obviously, force employed in the absence of any behaviour requiring correction by definition cannot be corrective.

36 Determining what is "reasonable under the circumstances" in the case of child discipline is also assisted by social consensus and expert evidence on what constitutes reasonable corrective discipline. The criminal law often uses the concept of reasonableness to accommodate evolving mores and avoid successive "fine-tuning" amendments. It is implicit in this technique that current social consensus on what is reasonable may be considered. It is wrong for caregivers or judges to apply their own subjective notions of what is reasonable; s. 43 demands an objective appraisal based on current learning and consensus. Substantial consensus, particularly when supported by expert evidence, can provide guidance and reduce the danger of arbitrary, subjective decision making.

37 Based on the evidence currently before the Court, there are significant areas of agreement among the experts on both sides of the issue (trial decision, para. 17). Corporal punishment of children under two years is harmful to them, and has no corrective value given the cognitive limitations of children under two years of age. Corporal punishment of teenagers is harmful, because it can induce aggressive or antisocial behaviour. Corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful. Corporal punishment which involves slaps or blows to the head is harmful. These types of punishment, we may conclude, will not be reasonable.

38 Contemporary social consensus is that, while teachers may sometimes use corrective force to remove children from classrooms or secure compliance with instructions, the use of corporal punishment by teachers is not acceptable. Many school boards forbid the use of corporal punishment, and some provinces and territories have legislatively prohibited its use by teachers: see, e.g., *Schools Act, 1997*, S.N.L. 1997, c. S-12.2, s. 42; *School Act*, R.S.B.C. 1996, c. 412, s. 76(3); *Education Act*, S.N.B. 1997, c. E-1.12, s. 23; *School Act*, R.S.P.E.I. 1988, c. S-2.1, s. 73; *Education Act*, S.N.W.T. 1995, c. 28, s. 34(3); *Education Act*, S.Y. 1989-90, c. 25, s. 36. This consensus is consistent with Canada's international obligations, given the findings of the Human Rights Committee of the United Nations noted above. Section 43 will protect a teacher who uses reasonable, corrective force to restrain or remove a child in appropriate circumstances. Substantial societal consensus, supported by expert evidence and Canada's treaty obligations, indicates that corporal punishment by teachers is unreasonable.

39 Finally, judicial interpretation may assist in defining "reasonable under the circumstances" under s. 43. It must be conceded at the outset that judicial decisions on s. 43 in the past have sometimes been unclear and inconsistent, sending a muddled message as to what is and is not permitted. In many cases discussed by Arbour J., judges failed to acknowledge the evolutive nature of the standard of reasonableness, and gave undue authority to outdated conceptions of reasonable correction. On occasion, judges erroneously applied their own subjective views on what constitutes reasonable discipline — views as varied as different judges' backgrounds. In addition, charges of assaultive discipline were seldom viewed as sufficiently serious to merit in-depth research and expert evidence or the appeals which might have permitted a unified national standard to emerge. However, "[t]he fact that a particular legislative term is open to varying interpretations by the courts is not fatal": *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), at p. 1157. This case, and those that build on it, may permit a more uniform approach to "reasonable under the circumstances" than has prevailed in the past. Again, the issue is not whether s. 43 has provided enough guidance in the past, but whether it expresses a standard that can be given a core meaning in tune with contemporary consensus.

40 When these considerations are taken together, a solid core of meaning emerges for "reasonable under the circumstances", sufficient to establish a zone in which discipline risks criminal sanction. Generally, s. 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature. On the basis of current expert consensus, it does not apply to corporal punishment of children under two or teenagers. Degrading, inhuman or harmful conduct is not protected. Discipline by the use of objects or blows or slaps to the head is unreasonable. Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment. Coupled with the requirement that the conduct be corrective, which rules out conduct stemming from the caregiver's frustration, loss of temper or abusive personality, a consistent picture emerges of the area covered by s. 43. It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances"; the test is objective. The question must be considered in context and in light of all the circumstances of the case. The gravity of the precipitating event is not relevant.

41 The fact that borderline cases may be anticipated is not fatal. As Gonthier J. stated in *Pharmaceutical Society (Nova Scotia)*, at p. 639, "...it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective".

42 Section 43 achieves this objective. It sets real boundaries and delineates a risk zone for criminal sanction. The prudent parent or teacher will refrain from conduct that approaches those boundaries, while law enforcement officers and judges will proceed with them in mind. It does not violate the principle of fundamental justice that laws must not be vague or arbitrary.

43 My colleague, Arbour J., by contrast, takes the view that s. 43 is unconstitutionally vague, a point of view also expressed by Deschamps J. Arbour J. argues first that the foregoing analysis amounts to an impermissible reading down of s. 43. This contention is answered by the evidence in this case, which established a solid core of meaning for s. 43; to construe terms like "reasonable under the circumstances" by reference to evidence and argument is a common and accepted function of courts interpreting the criminal law. To interpret "reasonable" in light of the evidence is not judicial amendment, but judicial interpretation. It is a common practice, given the number of criminal offences conditioned by the term "reasonable". If "it is the function of the appellate courts to rein in overly elastic interpretations" (Binnie J., at para. 122), it is equally their function to define the scope of criminal defences.

44 Arbour J. also argues that unconstitutional vagueness is established by the fact that courts in the past have applied s. 43 inconsistently. Again, the inference does not follow. Vagueness is not argued on the basis of whether a provision has been interpreted consistently in the past, but whether it is capable of providing guidance for the future. Inconsistent and erroneous applications are not uncommon in criminal law, where many provisions admit of difficulty; we do not say that this makes them unconstitutional. Rather, we rely on appellate courts to clarify the meaning so that future application may be more consistent. I agree with Arbour J. that Canadians would find the decisions in many of the past cases on s. 43 to be seriously objectionable. However, the discomfort of Canadians in the face of such unwarranted acts of violence toward children merely demonstrates that it *is* possible to define what corrective force is reasonable in the circumstances. Finally, Arbour J. argues that parents who face criminal charges as a result of corrective force will be able to rely on the defences of necessity and "*de minimis*". The defence of necessity, I agree, is available, but only in situations where corrective force is not in issue, like saving a child from imminent danger. As for the defence of *de minimis*, it is equally or more vague and difficult in application than the reasonableness defence offered by s. 43.

(2) Overbreadth

45 Section 43 of the *Criminal Code* refers to corrective force against children generally. The Foundation argues that this is overbroad because children under the age of two are not capable of correction and children over the age of 12 will only be harmed by corrective force. These classes of children, it is argued, should have been excluded.

46 This concern is addressed by Parliament's decision to confine the exemption to reasonable correction, discussed above. Experts consistently indicate that force applied to a child too young to be capable of learning from physical correction is not corrective force. Similarly, current expert consensus indicates that corporal punishment of teenagers creates a serious risk of psychological harm: employing it would thus be unreasonable. There may however be instances in which a parent or school teacher reasonably uses corrective force to restrain or remove an adolescent from a particular situation, falling short of corporal punishment. Section 43 does not permit force that cannot correct or is unreasonable. It follows that it is not overbroad.

II. Does Section 43 of the Criminal Code Offend Section 12 of the *Charter*?

47 Section 12 of the *Charter* guarantees "the right not to be subjected to any cruel and unusual treatment or punishment". The Foundation argues that s. 43 offends s.12 by authorizing the use of corrective force against children. In order to engage s. 12, the Foundation must show both (a) that s. 43 involves some treatment or punishment by the state (*Rodriguez*, *supra*, at pp. 608-09), and (b) that such treatment is "cruel and unusual". These conditions are not met in this case.

48 Section 43 exculpates corrective force *by parents or teachers*. Corrective force by parents in the family setting is not treatment by the state. Teachers, however, may be employed by the state, raising the question of whether their use of corrective force constitutes "treatment" by the state.

49 It is unnecessary to answer this question since the conduct permitted by s. 43 does not in any event rise to the level of being "cruel and unusual", or "so excessive as to outrage standards of decency": *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.), at p. 1072; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 (S.C.C.), at para. 34. Section 43 permits only corrective force that is reasonable. Conduct cannot be at once both reasonable and an outrage to standards of decency. Corrective force that might rise to the level of "cruel and unusual" remains subject to criminal prosecution.

III. Does Section 43 of the Criminal Code Offend Section 15 of the *Charter*?

50 Section 43 permits conduct toward children that would be criminal in the case of adult victims. The Foundation argues that this distinction violates s. 15 of the *Charter*, which provides that "[e]very individual is equal before and under the law" without discrimination. More particularly, the Foundation argues that this decriminalization discriminates against children by sending the message that a child is "less capable, or less worthy of recognition or value as a human being or as a member of Canadian society": *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 51. This, it argues, offends the purpose of s. 15, to "prevent the violation of essential human dignity and freedom": *Law*, *supra*, at para. 51. Equality can be assured, in the Foundation's submission, only if the criminal law treats simple assaults on children in the disciplinary context the same as it treats simple assaults on adults.

51 The difficulty with this argument, as we shall see, is that it equates equal treatment with identical treatment, a proposition which our jurisprudence has consistently rejected. In fact, declining to bring the blunt hand of the criminal law down on minor disciplinary contacts of the nature described in the previous section reflects the resultant impact this would have on the interests of the child and on family and school relationships. Parliament's choice not to criminalize this conduct does not devalue or discriminate against children, but responds to the reality of their lives by addressing their need for safety and security in an age-appropriate manner.

A. The Appropriate Perspective

52 Section 43 makes a distinction on the basis of age, which s. 15(1) lists as a prohibited ground of discrimination. The only question is whether this distinction is discriminatory under s. 15(1) of the *Charter*.

53 Before turning to whether s. 43 is discriminatory, it is necessary to discuss the matter of perspective. The test is whether a reasonable person possessing the claimant's attributes and in the claimant's circumstances would conclude that the law marginalizes the claimant or treats her as less worthy on the basis of irrelevant characteristics: *Law*, *supra*. Applied to a child claimant, this test may well confront us with the fiction of the reasonable, fully apprised preschool-aged child. The best we can do is to adopt the perspective of the reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs. To say this, however, is not to minimize the subjective component; a court assessing an equality claim involving children must do its best to take into account the subjective viewpoint of the child, which will often include a sense of relative disempowerment and vulnerability.

B. Is Discrimination Made Out in this Case?

54 Against this backdrop, the question may be put as follows: viewed from the perspective of the reasonable person identified above, does Parliament's choice not to criminalize reasonable use of corrective force against children offend their human dignity and freedom, by marginalizing them or treating them as less worthy without regard to their actual circumstances?

55 In *Law*, *supra*, Iacobucci J. listed four factors helpful in answering this question: (1) pre-existing disadvantage; (2) correspondence between the distinction and the claimant's characteristics or circumstances; (3) the existence of ameliorative purposes or effects; and (4) the nature of the interest affected.

56 The first *Law* factor, vulnerability and pre-existing disadvantage, is clearly met in this case. Children are a highly vulnerable group. Similarly, the fourth factor is met. The nature of the interest affected — physical integrity — is profound. No one contends that s. 43 is designed to ameliorate the condition of another more disadvantaged group: the third factor. This leaves the second factor: whether s. 43 fails to correspond to the actual needs and circumstances of children.

57 This factor acknowledges that a law that "properly accommodates the claimant's needs, capacities, and circumstances" will not generally offend s. 15(1): *Law*, *supra*, at para. 70. "By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory":

Gosselin c. Québec (Procureur général), [2002] 4 S.C.R. 429, 2002 SCC 84 (S.C.C.), at para. 37. The question in this case is whether lack of correspondence, in this sense, exists.

58 Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.

59 Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children; in this way, by decriminalizing only minimal force of transient or trivial impact, s. 43 is sensitive to children's need for a safe environment. But s. 43 also ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.

60 This decision, far from ignoring the reality of children's lives, is grounded in their lived experience. The criminal law is the most powerful tool at Parliament's disposal. Yet it is a blunt instrument whose power can also be destructive of family and educational relationships. As the Ouimet Report explained:

> To designate certain conduct as criminal in an attempt to control anti-social behaviour should be a last step. Criminal law traditionally, and perhaps inherently, has involved the imposition of a sanction. This sanction, whether in the form of arrest, summons, trial, conviction, punishment or publicity is, in the view of the Committee, to be employed only as an unavoidable necessity. Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense: all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere. [Emphasis added.]
>
> (Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969), at pp. 12-13)

Concluding that s. 43 should not be repealed, the Law Reform Commission of Canada pointed out that repeal "could have unfortunate consequences, consequences worse than those ensuing from retention of the section", and which would "expose the family to the incursion of state law enforcement for every trivial slap or spanking". "[I]s this", it asked, "the sort of society in which we would want to live?" (Law Reform Commission of Canada, Working Paper 38 *Assault* (1984), at p. 44.)

61 The trial judge in this case found that experts on both sides were agreed that only abusive physical conduct should be criminalized and that extending the criminal law to all disciplinary force "would have a negative impact upon families and hinder parental and teacher efforts to nurture children" (trial judge, at para. 17).

62 The reality is that without s. 43, Canada's broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute "time-out". The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.

63 The Foundation argues that these harms could be effectively avoided by the exercise of prosecutorial discretion. However, as the Foundation asserts in its argument on vagueness, our goal should be the rule of law, not the rule of individual discretion. Moreover, if it is contrary to s. 15(1) for legislation to deny children the benefit of the criminal law on the basis of their age

and consequent circumstances, it is equally discriminatory for a state agent (e.g., a police officer or prosecutor) to choose not to charge or prosecute on the same basis.

64 The Foundation argues that this is not the original purpose of the law and does not reflect its actual effects. In the Foundation's view, s. 43 was intended, and continues, to promote the view that the use of corrective force against children is not simply permitted for the purposes of the criminal law, but laudable because it is "good for children". In making this argument, the Foundation relies upon s. 43's statement that parents and teachers are "justified" in the use of reasonable corrective force. Considering "justification" in *Ogg-Moss*, *supra*, Dickson J. (as he then was) stated that s. 43 exculpates force in the correction of the child "because it considers such an action not a wrongful, but a *rightful*, one" (p.193) (emphasis in original). The Foundation submits that as a "justification", s. 43 necessarily identifies praise-worthy conduct.

65 In my view, this position is overstated. We cannot conclude that Parliament intended to endorse using force against children from a single word, without also considering the history and context of the provision. In our first *Criminal Code*, enacted in 1892, Parliament used "lawful" instead of "justified" in the analogous provision:

> **55**. It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.

It did so even though the term "justified" appeared in other defences such as the use of force to prevent the commission of a major offence (s. 44) and self-defence (s. 45) - defences that we classically associate with moral approval. So at this time, it is clear that Parliament was not asserting the exempted force was moral or good. It was not until the 1953-54 re-enactment of the *Criminal Code* that Parliament replaced "it is lawful" with "justified". We do not know why it did so. We do know that the change was not discussed in Parliament, and that there is no indication that Parliament suddenly felt that the reasonable force in the correction of children now demanded the state's explicit moral approval. Finally, we know that the government has adopted a program designed to educate parents and caregivers on the potentially negative effects of using corporal punishment against children. Viewing s. 43 in light of its history and the larger legislative and policy context, it is difficult to conclude that Parliament intended by using the word "justify" to send the message that using force against children is "right" or "good". The essence of s. 43 is not Parliament's endorsement of the use of force against children; it is the exemption from criminal sanction for their parents and teachers in the course of reasonable correction.

66 My colleague, Binnie J., suggests that the negative impact of criminalizing minor corrective force is irrelevant to the s. 15 equality analysis and should only be considered at the stage of justifying a breach of s. 15 under s. 1 of the *Charter* (paras. 74 and 85). More particularly, he argues, at para. 100, that "[s]ection 43 protects parents and teachers, not children" (emphasis added), and therefore inquiry into the impugned laws precludes correspondence to children's needs, capacities and circumstances in the s. 15 analysis. With respect, I cannot agree. The claimants here are children. The *Law* analysis requires that the Court consider whether the limited exemption from criminal sanction for parents and teachers corresponds to the needs of children. This is a necessary step in determining whether the distinction demeans children and treats them as less worthy. We should not artificially truncate the s. 15 equality analysis because similar considerations may be relevant to justification in the event a breach of s. 15 is established.

67 Some argue that, even if the overall effect of s. 43 is salutary, for some children the effects of s. 43 will turn out to be more detrimental than beneficial. To this, two responses lie. First, where reasonable corrective force slips into harmful, degrading or abusive conduct, the criminal law remains ready to respond. Secondly, as Iacobucci J. stated in *Law*, *supra*, compliance with s. 15(1) of the *Charter* does not require "that legislation must always correspond perfectly with social reality..." (para. 105). Rather,

> [n]o matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected... (*Gosselin*, *supra*, at para. 55)

68 I am satisfied that a reasonable person acting on behalf of a child, apprised of the harms of criminalization that s. 43 avoids, the presence of other governmental initiatives to reduce the use of corporal punishment, and the fact that abusive and harmful

conduct is still prohibited by the criminal law, would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1). Children often feel a sense of disempowerment and vulnerability; this reality must be considered when assessing the impact of s. 43 on a child's sense of dignity. Yet, as emphasized, the force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting. Section 43 is not arbitrarily demeaning. It does not discriminate. Rather, it is firmly grounded in the actual needs and circumstances of children. I conclude that s. 43 does not offend s. 15(1) of the *Charter*.

IV. Conclusion

69 I would dismiss the appeal. The Canadian Foundation for Children, Youth and the Law has, on behalf of children, brought an important issue of constitutional and criminal law that was not otherwise capable of coming before the Court. This justifies deviating from the normal costs rule and supports an order that both parties bear their own costs throughout.

70 I would answer the constitutional questions as follows:

1. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

3. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

5. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

***Binnie J.*:**

71 A child is guaranteed "equal protection and equal benefit of the law" by s. 15(1) of the *Canadian Charter of Rights and Freedoms*. Section 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, denies children the protection of the criminal law against the infliction of physical "force" that would be a criminal assault if used against an adult. The sole reason for children being placed in this inferior position is that they are children.

72 Notwithstanding these facts, my colleague, the Chief Justice, is of the view that the equality rights of the child are not infringed by s. 43 because "a reasonable person acting on behalf of a child ... would not conclude that the child's dignity has been offended in the manner contemplated by s. 15(1)" (para. 68). With all due respect to the majority of my colleagues, there can be few things that more effectively designate children as second-class citizens than stripping them of the ordinary protection of the assault provisions of the *Criminal Code*. Such stripping of protection is destructive of dignity from any perspective, including that of a child. Protection of physical integrity against the use of unlawful force is a fundamental value that is applicable to all. The "dignity" requirement, which gathered full force in this Court's judgment in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), provides a useful and important insight into the purpose of s. 15(1), but it should not become an unpredictable side-wind powerful enough to single-handedly blow away the protection that the *Criminal Code* would otherwise provide.

73 I therefore agree with my colleague Deschamps J., albeit for somewhat different reasons, that there has been a *prima facie* infringement of children's equality rights guaranteed by s. 15(1). I would dismiss the challenges brought by the appellant under s. 7 and s. 12. "Reasonableness" is not a standard that is unconstitutionally vague (s. 7), nor would s. 43 condone corrective force that is "cruel and unusual" (s. 12).

74 My respectful disagreement with the majority opinion is not only with the narrowed scope of s. 15(1) protection, but with the technique by which this narrowing is accomplished, namely by moving into s. 15(1) a range of considerations that, in my view, ought properly to be left to government justification under s. 1. The Chief Justice states, for example, that there are good reasons for "declining to bring the blunt hand of the criminal law down on minor disciplinary contacts of the nature described in the previous section[, with] the resultant impact this would have on the interests of the child and on family and school relationships" (para. 51), and that families should be protected from "the incursion of state law enforcement for every trivial slap or spanking" (para. 60). These are important matters but they are not matters that relate to equality. They relate to a justification to deny equality. These are arguments that say that in light of broader social considerations related to the values of privacy in family life, and *despite* the infringement of the child's equality rights, a degree of parental immunity is nevertheless a reasonable limit demonstrably justified in a free and democratic society.

75 As will be seen, I would uphold s. 43 in relation to parents or those who stand in the place of parents, and in that respect dismiss the appeal. While the equality rights of the children (i.e., persons under 18 years old) *are prima facie* infringed by s. 43, I conclude that in balancing the needs of the claimants against the legitimate needs of our collective social existence, the infringement is a reasonable limit that has been justified under s. 1.

76 On the other hand, the s. 1 justification for extending parent-like protection to teachers is not convincing. In my view, the references to "schoolteacher" and "pupil" should be struck out of s. 43 and declared to be null and void.

77 I propose to organize my reasons for these conclusions under the following headings:

1. The proper interpretation of s. 43 of the *Criminal Code*;

2. The scope of s. 15(1) of the *Charter*;

3. The meaning of discrimination and the "correspondence" factor;

4. Resurgence of the "relevance" factor;

5. The violation of human dignity;

6. The s. 1 justification

    (a) in relation to parents or persons standing in the place of parents;

    (b) in relation to teachers.

1. The Proper Interpretation of Section 43 of the Criminal Code

78 Section 43 reads as follows:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

79 In *R. v. Ogg-Moss*, [1984] 2 S.C.R. 173 (S.C.C.), the Court held that the section applied in the case of force applied to "a child" which was held to mean "a person chronologically younger than the age of majority" (p. 186) which, in Ontario, pursuant to the *Age of Majority and Accountability Act*, R.S.O. 1990, c. A.7, s. 1, is 18 years.

80 As will be discussed, the assault provisions of the *Criminal Code* are extremely broad. In addition to the obvious purpose of maintaining public order, the prohibition of assault and battery has been considered since the time of Blackstone to protect the "sacred" right of everyone to physical inviolability:

> ...the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner.
>
> (W. Blackstone, *Commentaries on the Laws of England*, Book III (1742), at p. 120)

More recently, it was stated in this Court:

> Clearly, the purpose of the assault scheme is much broader than just the protection of persons from serious physical harm. The assault scheme is aimed more generally at protecting people's physical integrity.
>
> (*R. v. Cuerrier*, [1998] 2 S.C.R. 371, L'Heureux-Dubé J. concurring, at para. 11)

81 The majority read significant limitations into the scope of s. 43 protection, concluding that it provides no defence or justification where force is used (i) against children under two, or (ii) against children of any age suffering a disability, or (iii) that "causes harm or raises a reasonable prospect of harm" to children of two years or older, or (iv) that is degrading to children two years or older, or (v) that constitutes corporal punishment of teenagers, or (vi) that includes the use of objects such as a belt on any child of whatever age, or (vii) which involves slaps or blows to the head. Such an interpretive exercise, gearing itself off the references in s. 43 to "correction" and "reasonable under the circumstances", introduces a series of classifications and sub-classifications which are helpful to the protection of children, but do not relieve a court from the statutory direction to consider what is reasonable in *all* the circumstances. The accused, too, is entitled to receive the full protection that the s. 43 defence, fairly interpreted, allows. Moreover, my colleagues' differentiation between the type of protection given to teachers from that given to parents, and the confinement of protection of teachers to matters affecting order in the schools as opposed to more general "correction", could be seen as going beyond a definition of "the scope of criminal defences" (reasons of the Chief Justice, para. 43) and pushing the boundary between judicial interpretation and judicial amendment.

82 Nevertheless, as my disagreement with the majority relates to the interpretation of s. 15(1) of the *Charter*, rather than statutory interpretation, these reasons will focus on s. 15(1) and its relationship to s. 1. The interpretation of s. 43 offered by the Chief Justice still leaves considerable scope for "corporal punishment" of children between 2 and 12, including "sober, reasoned uses of force" (para. 24) and "corrective force to restrain or remove an adolescent [i.e., 12 to 18 years old] from a particular situation, falling short of corporal punishment" (para. 46). Section 43, thus interpreted, still withholds from children protection of their physical integrity in circumstances where the amount of force used would be criminal if used against an adult.

2. The Scope of Section 15(1) of the Charter

83 The legislative history of s. 15 is of some interest here. As originally proposed, what is now s. 15(1) was more tightly circumscribed. The original draft provided:

> Non-discrimination Rights
>
> Everyone has the right to equality before the law and to the equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex.
>
> (*The Canadian Constitution 1980: Proposed Resolution respecting the Constitution of Canada* (1980), at p. 20)

84 As a result of the deliberations of the Special Joint Committee of the Senate and of the House of Commons on the Constitution, s. 15(1) as recommended and ultimately adopted had blossomed into a full equality rights clause:

> Equality Rights
>
> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The addition of the words "and, in particular" was seemingly designed to bifurcate the section, thereby liberating the first branch (the broad equality right) from the confines of the second branch (the traditional grounds of prohibited discrimination). Thus there were some early judicial efforts to measure legislative classifications against the principles of equal protection and equal benefit of the law even where the ground of distinction did *not* relate to an enumerated or analogous ground: see, e.g., *Streng v. Winchester (Township)* (1986), 31 D.L.R. (4th) 734 (Ont. H.C.); *Jones v. Ontario (Attorney General)* (1988), 65 O.R. (2d) 737 (Ont. H.C.); and *Piercey Estate v. General Bakeries* (1986), 31 D.L.R. (4th) 373 (Nfld. T.D.). This Court, in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), concluded that a narrower view of s. 15 would best fulfill its purpose. McIntyre J. identified differential treatment on the basis of the listed or analogous personal characteristics as an essential condition precedent to s. 15(1) relief. However wise that interpretation, based as much as anything on the judiciary's reluctance to accept an invitation to second-guess Parliament on every legislative classification, irrespective of the ground giving rise to the distinction, *Andrews* nevertheless had the effect of narrowing the potential constituency of s. 15(1) claimants. Complainants who argued generally about unequal treatment were held not to be covered. A claimant had to identify a particular basis for the unequal treatment and show that the basis thus identified resided in a personal characteristic, either listed in s. 15 or analogous to those that were listed.

85 We should be careful in this case not to additionally circumscribe s. 15(1) protection by burdening those who still remain within its coverage with making proof of matters (sometimes proof of a negative) that ought to be dealt with by governments by way of justification under s. 1.

3. The Meaning of Discrimination and the "Correspondence" Factor

86 In *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.), at para. 110, a majority of the Court summarized the approach to s. 15(1) claims as follows:

> It is now clearly established that the [equality] analysis proceeds in three stages with close regard to context. At the first stage the claimant must show that the law, program or activity imposes differential treatment between the claimant and others with whom the claimant may fairly claim equality. The second stage requires the claimant to demonstrate that this differentiation is based on one or more of the enumerated or analogous grounds. The third stage requires the claimant to establish that the differentiation amounts to a form of discrimination that has the effect of demeaning the claimant's human dignity. The "dignity" aspect of the test is designed to weed out trivial or other complaints that do not engage the purpose of the equality provision.

See also *Law*, *supra*, at para. 39, and *Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429, 2002 SCC 84 (S.C.C.), at para. 17.

87 The Crown concedes that a formal distinction is made in s. 43 on the basis of age, *viz.*, an enumerated ground. However, as the cases have held, distinctions made on enumerated or analogous grounds do not necessarily amount to discrimination. The debate, therefore, shifts to whether the distinction made in s. 43 amounts, in law, to discrimination.

88 The nature of the children's interest, physical integrity, clearly warrants constitutional protection.

89 There is no doubt, in my view, that s. 43 is caught by the definition of discrimination given by McIntyre J. in *Andrews*, *supra*, at pp. 174-75:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

Applying this definition to s. 43, it cannot be disputed that s. 43 intentionally withholds from children the benefit available to everyone else (i.e., adults) of the protection of the assault provisions of the *Criminal Code* in the circumstances therein contemplated, and that the only reason for this withholding is that they are children. Protection of the *Criminal Code* is an advantage. Applying the *Andrews* test as originally laid down, therefore, I believe the claimant has established a *prima facie* breach of s. 15(1).

90 In *Law*, this Court, speaking through Iacobucci J., expressly endorsed the *Andrews* test (paras. 22 and 26), but also went on to synthesize the subsequent case law into a series of propositions designed to add structure to the s. 15(1) analysis. This included the identification of four contextual factors as markers for distinctions that amount to discrimination, "although", as Iacobucci J. pointed out, "there are undoubtedly others, and not all four factors will necessarily be relevant in every case" (para. 62). The purpose of the contextual factors is to focus attention on the impact of the impugned law — how "severe and localized the ... consequences [are] on the affected group" (see *Gosselin*, *supra*, para. 63, citing *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at para. 63).

91 The Chief Justice agrees that three of these four contextual factors point to discrimination in this case, including (i) the pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at children, (ii) the nature and scope of the children's interests affected, namely their physical integrity, and (iii) the fact that s. 43 does not have an ameliorative purpose or effect for a more disadvantaged group. In my colleague's view, these markers of discrimination are outweighed by the importance of the fourth "contextual factor", i.e., the alleged *correspondence* between the actual needs and circumstances of children and the diminished protection they enjoy under s. 43. In her view, the objective of substantive equality (as distinguished from formal equality) justifies the differential treatment of children.

92 I agree with my colleague that the first three "contextual factors" support a finding of discrimination. I also agree with Iacobucci J. in *Law* that not every factor is relevant in every case. Not every "contextual factor" will point in the same direction, and judgment is required to weigh up the importance of different elements of the context in a particular case.

93 The factor of "correspondence" presents special difficulty because of its potential overlap with s. 1. It was described by Iacobucci J. in *Law*, at para. 70, as follows:

> ...it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances. [Emphasis added.]

To some extent, the "correspondence" factor was also anticipated in *Andrews* by McIntyre J. when he said, at p. 169:

> [T]he accommodation of differences ... is the essence of true equality.

94 The "correspondence" factor was also considered in *Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 (S.C.C.), where a disabled child was placed, against her parents' wishes, in a special education class. The Court declined to find that special classes for persons with special disabilities amounted to discrimination. There was a reasonable match between the differential treatment (special classes) and the ground of alleged discrimination (disability), even though special classes undermined achievement of the objective of inclusion. This was outweighed in the circumstances by the fact the special classes were in purpose and effect ameliorative of the young girl's condition.

95 The "correspondence" between grounds and the claimant group's characteristics or circumstances was also a factor supporting the Court's decision in *Gosselin*, *supra*, that use of a training component in a welfare scheme for recipients under 30 was not discriminatory. The majority held that, "[p]erfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required" to comply with the *Charter* (para. 55). The "polycentric" balancing inherent in formulation of social benefit schemes appears to have played some role in *Gosselin* as it did in the earlier case of *Granovsky v. Canada (Minister of Employment & Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 (S.C.C.). More recently, in *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.), the Court struck down the separate legislative treatment of injured workers suffering from chronic pain who were denied the regular benefits provided to other disabled workers, but instead were provided a four-week Functional Restoration Program, beyond which no further benefits were available. Gonthier J., writing for the Court, held at para. 91 that "in my view, the gravamen of the appellants' s. 15 claim is the lack of correspondence between the differential treatment imposed by the Act and the true needs and circumstances of chronic pain sufferers" (referring to *Law*, *supra*, at paras. 64-65).

96 In these cases, it seems to me, the "correspondence" factor was appropriately used to determine if the legislative distinction reflected *equal consideration* of people even though, at the end of the day, equal consideration resulted in *unequal treatment*.

4. Resurgence of the "Relevance" Factor

97 Care must be taken, however, to ensure that the "correspondence" factor is kept to its original purpose as a marker for discrimination and not allowed to become a sort of Trojan horse to bring into s. 15(1) matters that are more properly regarded as "reasonable limits ... demonstrably justified in a free and democratic society" (s. 1).

98 In particular, there is a danger that the "correspondence" factor will revive the "relevance" debate of the 1990s in which it was contended by some members of the Court that a s. 15(1) rights claimant could be defeated if it were shown that the ground of complaint was "relevant" to achievement of a legitimate legislative objective. This position was advanced by Gonthier J., dissenting, in *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), where he suggested, at para. 15:

> This third step thus comprises two aspects: determining the personal characteristic shared by a group and then assessing its relevancy having regard to the functional values underlying the legislation. [Emphasis added.]

The issue in that case was whether common law spouses should be treated the same as married spouses for insurance purposes. In effect, as the onus of proof of an infringement of s. 15(1) lies on the claimants, they were put in the position of having to show that marriage was *irrelevant* to achievement of the legislative objective. In Gonthier J.'s view, that objective was to promote the benefits of marriage, and achievement of this objective was "relevant" to its denial of the rights of unmarried couples, and s. 15(1) was not therefore infringed. McLachlin J. (as she then was) in her majority reasons, gave the "relevance" point short shrift (at para. 137):

> Relevance as the ultimate indicator of non-discrimination suffers from the disadvantage that it may validate distinctions which violate the purpose of s. 15(1). A second problem is that it may lead to enquiries better pursued under s. 1.

99 In my view, the same answer should be given to the argument here that, because children have certain vulnerabilities that "correspond" to (or are relevant to) s. 43's denial of ordinary *Criminal Code* protection, then no discrimination is made out.

100 While the child needs the family, the protection of s. 43 is given not to the child but to the parent or teacher who is using "reasonable" force for "correction". Section 43 protects parents and teachers, not children. A child "needs" no less protection under the *Criminal Code* than an adult does. That is why, in my view, the social justification for the immunity of parents and teachers should be dealt with under s. 1.

101 The majority view denies equality relief to persons under 18 years old in this case because of the role and importance of family life in our society. However, to proceed in this way, it seems to me, just incorporates the "legitimate objective" element from the s. 1 *Oakes* test into s. 15, while incidentally switching the onus to the rights claimant to show the legislative objective is *not* legitimate, and relieving the government of the onus of demonstrating proportionality, including minimal impairment (*R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.)). One of the stated objectives of *Andrews* was to keep s. 15(1) and s. 1 analytically distinct. Use of the "correspondence" factor in the wrong circumstances risks breaching that divide.

102 I do not accept that the use of force against a child (that in the absence of s. 43 would result in a criminal conviction) can be said to "correspond" to a child's "needs, capacities and circumstances" from the vantage point identified by the Chief Justice, namely, that of a "reasonable person acting on behalf of a child, who seriously considers and values the child's views and developmental needs" (para. 53) (emphasis added). I have difficulty with the proposition that a child "needs" correction through conduct that, but for s. 43, amounts to a criminal assault that exceeds the *de minimis* threshold. (If the use of force falls below the *de minimis* standard, then, as Arbour J. points out, there is an alternative defence available to the accused and no need to resort to s. 43.)

103 As to tailoring the distinction to fit a child's "capacities and circumstances", the words "pupil or child" embrace the whole range of human development from birth to 18 years of age. It is difficult to generalize about the "capacities and circumstances" of such a disparate group of people. A 2-year-old and a 12-year-old (let alone a 17-year-old) do not share the same needs, have enormously different capacities and deal with the world in very different circumstances. The fact the Chief Justice finds it necessary to undertake an interpretive exercise that reads into s. 43 multiple sub-classifications of children (according to age) and assaultive behaviour (according to type) shows that a "one size fits all" approach to the "needs, capacities and circumstances" of children does not fit reality. Such an extensive "reading in" exercise, if appropriate, should take place only after an infringement of s. 15(1) is acknowledged, and the Court turns to the issue of the s. 1 justification and the appropriate remedy.

104 In short, I disagree with the view of the majority that s. 43 is "firmly grounded in the actual needs and circumstances of children" (para. 68). I believe the error in this approach is evident, with respect, from the following excerpts from the judgment of the Chief Justice, at paras. 58, 59 and 60:

> Children ... depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family and school setting is essential to this growth process.
>
> Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them.
>
> The criminal law ... is a blunt instrument whose power can also be destructive of family and educational relationships.

105 Accelerating these societal considerations into the s. 15(1) analysis, instead of requiring the government to establish such matters as "reasonable limits" under s. 1, inappropriately denies children the protection of their right to equal treatment.

5. The Violation of Human Dignity

106 The Court has repeatedly stated that

> ...the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(*Law, supra*, at para. 51, and *Gosselin, supra*, at para. 20)

The concept of "human dignity" is somewhat elusive, but nevertheless expresses an essential part of the purpose of s. 15(1). It seeks to avoid the mechanical application of the s. 15 analysis to distinctions that do not, appropriately viewed, raise a compelling human rights dimension. This is illustrated, as mentioned earlier, by the Canada Pension Plan cases. The state is required to value each of its citizens equally, but equal *consideration* of the personal characteristics and strengths of each individual may, in the circumstances of government benefit programs, dictate differential *treatment*. This is hardly the case here. Few things are more demeaning and disrespectful of fundamental values than to withdraw the full protection of the *Criminal Code* against deliberate, forcible, unwanted violation of an individual's physical integrity.

107 I agree entirely with the conclusion of the authors of a report entitled *Corporal Punishment as a Means of Correcting Children* by the Quebec Commission des droits de la personne et des droits de la jeunesse (at p. 8):

> Corporal punishment violates the child's dignity, partly due to the humiliation he or she is likely to feel, but mainly due to the lack of respect inherent in the act.

108 Reference should also be made to the analysis of Peter Newell, a witness for the appellants and the author of *Children Are People Too: The Case Against Physical Punishment* (1989), who wrote, at pp. 2 and 4:

> Childhood, too, is an institution. Society, even in those areas like education which are supposedly for the benefit of children, remains unsympathetic to them. All too often children are treated as objects, with no provision made for hearing their views or recognising them as fellow human beings. Children — seen but not heard — face the double jeopardy of discrimination on grounds of age, and discrimination on all the other grounds as well. Giving legal sanction to hitting children confirms and reflects their low status.
>
> . . . . .
>
> The basic argument is that children are people, and hitting people is wrong.

109 Everyone in society is entitled to respect for their person, and to protection against physical force. To deny this protection to children at the hands of their parents, parent-substitutes and teachers is not only disrespectful of a child's dignity but turns the child, for the purpose of the *Criminal Code*, into a second-class citizen (*Ogg-Moss*, p. 187). As Iacobucci J. noted in *Law*, at para. 53:

> Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.

110 It should not be suggested that because, as Peter Newell notes, a child may not enjoy much dignity anyway in the home or classroom, he or she can be whacked with impunity "by way of correction".

111 I therefore agree with my colleague, Deschamps J., that s. 43 discriminates against children and infringes their equality rights. The onus falls on the government to justify it.

6. The Section 1 Justification

112 Parents and teachers play very different roles in a child's life and there is no reason why they should be treated on the same legal plane for the purposes of the criminal assault provisions of the *Criminal Code*.

(a) In Relation to Parents or Persons Standing in the Place of a Parent

113 While s. 43 infringes a child's s. 15 equality rights by making a distinction that discriminates on the basis of age, it is nonetheless evident that the effect of giving the *Criminal Code* a larger role in the home would be profound. The heavy machinery of the criminal courts is not designed to deal with domestic disputes of the type envisaged in s. 43. The definition of assault in s. 265 is extremely broad. Parliament could reasonably conclude that the intervention of the police or criminal courts

in a child's home in respect of "reasonable" correction would inhibit rather than encourage the resolution of problems within families. Such an outcome could be judged unacceptable, not because the child's equality rights are without importance, but because the intervention of the criminal law in the home in the limited circumstances set out in s. 43 comes at too high a cost.

114 It is scarcely necessary to cite authority for the importance of the family in Canadian law. In *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519, 2000 SCC 48 (S.C.C.), at para. 72, L'Heureux-Dubé J. noted that parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. In *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.), at para. 76, Lamer C.J. pointed out that parents are presumed to act in their child's best interests: "Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship."

115 These affirmations of the importance of family relationships need to be considered in light of the sweeping definition of assault in s. 265 of the *Criminal Code* which makes it an offence for a person, without the consent of another person, to apply "force intentionally to that other person, directly or indirectly", or even to *threaten* to do so if he or she has a "present ability to effect his purpose". The s. 1 justification for the "spanking defence" is very much a function of the immense breadth of the definition of criminal assault. One need only pause to reflect on the type of threats routinely issued by Canadian parents to their children in the heat of family altercations. Adolescent or pre-adolescent behaviour occasionally results in physical touching by the parent, unwanted by the child, or the threat thereof, and where reasonable and for the purpose of correction, this type of "assault" could justifiably be seen by Parliament as outside the appropriate sphere of criminal prosecution.

116 Section 265 is very broad on its face and it has been interpreted broadly, because, as pointed out in Blackstone, *supra*, at p. 120, it has always been considered unworkable to draw a principled distinction between "degrees of violence". Professor Ashworth adds:

> Is it right that the criminal law should extend to mere touchings, however trivial? The traditional justification is that there is no other sensible dividing line, and that this at least declares the law's regard for the physical integrity of citizens.
>
> (A. Ashworth, *Principles of Criminal Law* (4th ed. 2003), at p. 319)

117 This near-zero tolerance (i.e., subject to the *de minimis* principle) for physical intervention continues to be the law, although in *R. v. Jobidon*, [1991] 2 S.C.R. 714 (S.C.C.), Gonthier J. suggested that, in the family context, the law of assault should have a more nuanced application. Otherwise, he said, at pp. 743-44,

> ...a father would assault his daughter if he attempted to place a scarf around her neck to protect her from the cold but she did not consent to that touching, thinking the scarf ugly or undesirable. That absurd consequence could not have been intended by Parliament.

118 We are not asked in this case to establish the threshold for a criminal "assault" in the family context, or whether the unwanted touching in Gonthier J.'s example could be said to be "by way of correction". Section 43 presupposes the existence of conduct that does amount to a criminal assault. Section 265 would clearly be triggered by much of the non-violent physical contact that is not out of place growing up in a robust family environment. The appellant points to some other jurisdictions like Sweden, which do without a parental defence provision equivalent to s. 43; but Sweden, at least, has a very different criminal law regime applicable to physical assaults.

119 Section 1 requires a government to show that the objective of the legislation is pressing and substantial. Government must also establish that the means chosen to attain the end are reasonable; this requires showing that: (i) the rights violation is rationally connected to the aim of the legislation, (ii) the impugned provision minimally impairs the *Charter* guarantee, and (iii) there is proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right (*Egan*, *supra*, at para. 182; *Oakes*, *supra*). In addition, the deleterious effects of the measure must not outweigh its benefits: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), at p. 878.

120 I agree with Goudge J.A. ((2002), 57 O.R. (3d) 511 (Ont. C.A.), at para. 59) that the objective of the legislation is pressing and substantial insofar as it permits parents or persons standing in the place of parents

> ...to apply strictly limited corrective force to children without criminal sanctions so that they can carry out their important responsibilities to train and nurture children without the harm that such sanctions would bring to them, to their tasks and to the families concerned.

However, I do not agree with Goudge J.A. that this justification extends to teachers as well.

121 Providing a defence to a criminal prosecution in the circumstances stated in s. 43 is rationally connected to the objective of limiting the intrusion of the *Criminal Code* into family life.

122 As to minimal impairment, the wording of s. 43 not only permits calibration of the immunity to different circumstances and children of different ages, but it allows for adjustment over time. In this respect, the Crown's expert, Nicholas Bala, stated:

> In the past, the use of belts, straps, rulers, sticks and other similar objects to deliver a punishment was commonly accepted, both by society and the courts, as reasonable in the chastisement of children. Today, most courts hold that, in most circumstances, the use of these objects is excessive. As well, previously, courts have considered punishment causing temporary pain lasting a few days, but without permanent injury, to be reasonable. Today's courts scrutinize the level of pain, bruises, red marks and other signs of temporary harm carefully. In most cases, when they find that a child has suffered some injury, the teacher, parent or person taking the place of a parent is convicted of assault.

In the past, as Arbour J. demonstrates in her reasons, the elasticity of s. 43 has led to acquittals in some quite shocking circumstances. However, in my view, it is the function of the appellate courts to rein in overly elastic interpretations that undermine the limited purpose of s. 43, which is what the interpretive guidance offered by the Chief Justice is designed to do, provided the courts stop short of judicial amendment.

123 Once the legislative objective is found to be pressing and substantial, I think the proportionality requirements are met by Parliament's limitation of the s. 43 defence to circumstances where: (i) the force is for corrective purposes, and (ii) the measure of force is shown to be reasonable under the circumstances. What is reasonable in relation to achievement of the legitimate legislative objective will not, by definition, be disproportionate to such achievement. Moreover, the salutary effects of s. 43 exceed its potential deleterious effects when one considers that the assault provisions of the *Criminal Code* are just a part, and perhaps a less important part, of the overall protections afforded to children by child welfare legislation. I note, for example, the testimony of Allan Simpson, a Sergeant with the Toronto Police Service, that:

> Whether in any particular circumstance a charge is laid *or not*, the Children's Aid Society is normally contacted, when they have not been the first to investigate the circumstances. The primary consideration is always the safety and well-being of the child. [Emphasis in original.]

124 To deny children the ability to have their parents, or persons standing in their parents' place, to be successfully prosecuted for reasonable corrective force under the *Criminal Code* does not leave them without effective recourse. It just helps to keep the family out of the criminal courts. In my view, s. 43 in relation to parents and persons standing in their place is justified on this basis.

(b) The Application of Section 1 in relation to Teachers

125 The extension of s. 43 protection to teachers has not been justified under the s. 1 test. It is argued that the legislative objective in the case of teachers echoes the policy reasons applicable to parents, but the logic for keeping criminal sanctions out of the schools is much less compelling than for keeping them out of the home. Compared with a family, a teacher's commitment to a particular child is typically of a different order and for a more limited period of time. While at one time teachers were regarded as parent-type figures, s. 43 itself draws a distinction between "a person standing in the place of a parent" and a teacher. Less harm may flow from discipline inflicted by a parent who typically shares a loving relationship with the child. The pupil-

teacher relationship is closer to the master-apprentice relationship for which s. 43 protection was abolished by Parliament in 1955 (see S.C. 1953-54, c. 51, s. 43).

126 The evidence is that most teachers do not favour the use of force in schools for "correction". Their point is that there is a need to maintain order in schools, and keeping order may involve unwanted touching, such as "sitting" down an obstreperous child, or marching belligerents off to the principal's office.

127 The question is whether the undoubted need to keep order in schools justifies the s. 43 exemption of teachers from the assault provisions of the *Criminal Code*. The Law Reform Commission of Canada recommended the repeal of the s. 43 defence for school teachers, stating that the ultimate sanction should be the removal of a child from school, not corporal punishment: Law Reform Commission of Canada, Working Paper 38, *Assault* (1984), at p. 44. A number of countries have abolished or modified similar legislative immunities for teachers: see, e.g., s. 47 of the British *Education (No. 2) Act 1986* (U.K.), 1986, c. 61; s. 59 of the New Zealand *Crimes Act 1961* (N.Z.), 1961/43; and s. 139A of the New Zealand *Education Act 1989* (N.Z.), 1989/80.

128 While I accept that order in the schools is a legitimate objective, I do not think that giving non-family members an immunity for the criminal assault of children "by way of correction" is a reasonable or proportionate legislative response to that problem. The attempt to save the constitutionality of s. 43 by rewriting it to distinguish between parents and teachers and carving out school order from the more general subject matter of "correction" is, in my view, a job for Parliament. In short, s. 43 does not minimally impair the child's equality right, and is not a proportionate response to the problem of order in the schools.

Disposition

129 I would therefore uphold the validity of s. 43 in relation to parents and persons standing in the place of a parent, but declare it unconstitutional insofar as it extends to teachers. To that extent, the appeal should be allowed.

130 I would answer the constitutional questions as follows:

1. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

3. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: No

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

5. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes in relation to parents and persons standing in the place of parents. No in relation to teachers.

***Arbour J.*:**

I. Introduction

131 This appeal raises the constitutional validity of s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, which justifies the reasonable use of force by way of correction by parents and teachers against children in their care. Although I come to a conclusion which may not be very different from that reached by the Chief Justice, I do so for very different reasons. The Chief Justice significantly curtails the scope of the defence of s. 43 of the *Code*, partly on the basis that s. 43 should be strictly construed since it withdraws the protection of the criminal law in certain circumstances. According to her analysis, s. 43 can only be raised as a defence to a charge of simple (common) assault; it applies only to corrective force, used against children older than two but not against teenagers; it cannot involve the use of objects, and should not consist of blows to the head; and it should not relate to the "gravity" of the conduct attracting correction.

132 With respect, in my opinion, such a restrictive interpretation of a statutory defence is inconsistent with the role of courts *vis-à-vis* criminal defences, both statutory and common law defences. Furthermore, this restrictive interpretation can only be arrived at if dictated by constitutional imperatives. Canadian courts have not thus far understood the concept of reasonable force to mean the "minor corrective force" advocated by the Chief Justice. In my view, the defence contained in s. 43 of the *Code*, interpreted and applied inconsistently by the courts in Canada, violates the constitutional rights of children to safety and security and must be struck down. Absent action by Parliament, other existing common law defences, such as the defence of necessity and the "*de minimis*" defence, will suffice to ensure that parents and teachers are not branded as criminals for their trivial use of force to restrain children when appropriate.

133 Section 43 of the *Code* justifies the use of force by parents and teachers by way of correction. The force that is justified is force that is "reasonable under the circumstances". The section does not say that forcible correction is a defence only to common assault. Nor has it been understood to be so restrictive: see *R. v. Pickard*, [1995] B.C.J. No. 2861 (B.C. Prov. Ct.); *R. v. C. (G.C.)* (2001), 206 Nfld. & P.E.I.R. 231 (Nfld. T.D.); *R. v. Fritz* (1987), 55 Sask. R. 302 (Sask. Q.B.); *R. v. Bell*, [2001] O.J. No. 1820 (Ont. S.C.J.); and *R. v. S. (N.)*, [1999] O.J. No. 320 (Ont. Gen. Div.), where s. 43 was successfully raised as a defence against charges of assault with a weapon and/or assault causing bodily harm.

134 In the *Code*, the justifiable use of force may be advanced as a defence against a wide range of offences that have at their origin the application of force. These offences range from common assault, to assault causing bodily harm and eventually to manslaughter. Where, for example, a civilian performs a lawful arrest, the force used may be justified (see *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3, 2003 SCC 38 (S.C.C.), at para. 34) even though it causes "hurt or injury . . . that is more than merely transient or trifling in nature" (s. 2 of the *Code*), thereby exonerating the accused from what would otherwise be an assault causing bodily harm.

135 In the case at bar, the critical inquiry turns on the meaning of the phrases "force by way of correction" and "reasonable under the circumstances"(s. 43 of the *Code*). To say, as the Chief Justice does, that this defence cannot be used to justify any criminal charge beyond simple assault, that the section cannot justify the use of corrective force against a child under 2 or against a teenager, and that force is never reasonable if an object is used, is a laudable effort to take the law where it ought to be. However, s. 43 can only be so interpreted if the law, as it stands, offends the Constitution and must therefore be curtailed. Absent such constitutional constraints, it is neither the historic nor the proper role of courts to enlarge criminal responsibility by limiting defences enacted by Parliament. In fact, the role of the courts is precisely the opposite.

136 Setting aside any constitutional considerations for the moment, courts are expressly prohibited by s. 9 of the *Code* from creating new common law offences. All criminal offences must be enacted by statute. On the other hand, the courts have been and continue to be the guardians of common law defences. This reflects the role of courts as enforcers of fundamental principles of criminal responsibility including, in particular, the fundamental concept of fault which can only be reduced or displaced by statute.

137 Our recent decision in *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 SCC 24 (S.C.C.), exemplifies this classical and sound approach. *R. v. Ogg-Moss*, [1984] 2 S.C.R. 173 (S.C.C.), can be considered an exception because it curtailed a statutory defence, yet, as I will attempt to demonstrate below, it still failed to achieve a constitutionally acceptable result.

138 In this case, we have been asked to either curtail or abolish altogether a defence created by Parliament. If we are to do this, as I believe we must, it should be for higher constitutional imperatives. Absent a finding of a constitutional violation by Parliament, the reading down of a statutory defence as is done by the Chief Justice amounts to, in my respectful opinion, an abandonment by the courts of their proper role in the criminal process.

139 Courts, including this Court, have until now properly focussed on what constitutes force that is "reasonable under the circumstances". No pre-emptive barriers have been erected. Nothing in the words of the statute, properly construed, suggests that Parliament intended that some conduct be excluded at the outset from the scope of s. 43's protection. This is the law as we must take it in order to assess its constitutionality. To essentially rewrite it before validating its constitutionality is to hide the constitutional imperative.

140 The role of the courts when applying defences must be contrasted with the role of courts when they are called upon to examine the constitutional validity of criminal *offences*. In such cases, it is entirely appropriate for the courts to interpret the provisions that proscribe conduct in a manner that least restricts "the liberty of the subject", consistent with the wording of the statute and the intent of Parliament. This is what was done in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), for example. But such a technique cannot be employed to restrict the scope of statutory *defences* without the courts compromising the core of their interplay with Parliament in the orderly development and application of the criminal law.

141 In the end, I will conclude, not unlike the Chief Justice, that the use of corrective force by parents and teachers against children under their care is only permitted when the force is minimal and insignificant. I so conclude not because this is what the *Code* currently provides but because it is what the Constitution requires.

II. Analysis

142 Before turning to the constitutional challenge brought before us by the Canadian Foundation for Children, Youth and the Law (the "Foundation"), we must expose the current state of the law in Canada on the use of force against children by way of correction. Section 43 of the *Code*, under the heading "Protection of Persons in Authority" provides that:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

143 Section 43 is situated among many other sections of the *Code* which justify the use of force in a variety of circumstances: s. 27 justifies the use of reasonable force to prevent the commission of an offence; s. 30 justifies the reasonable use of force to prevent a breach of the peace; s. 32 justifies the use of reasonable force to suppress a riot; s. 34 justifies the use of force in self-defence against an unprovoked assault; s. 35 justifies the use of force in self-defence in the case of aggression; s. 37 justifies the use of force in defence of oneself to prevent assault; s. 39 justifies the use of force in defence of personal property with a claim of right; s. 40 justifies the use of force in preventing any person from forcibly breaking into a dwelling-house; and s. 41 justifies the use of force in preventing any person from trespassing on a dwelling-house or real property.

144 As I indicated earlier, s. 43 may be relied on in defence of any charge which stems from the use of force. Section 265(1) of the *Code* defines assault in the following terms:

> A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or

(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

The application of the assault provision reads:

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

145 This definition becomes the foundation for the prohibition of a range of offences that have as their central feature the non-consensual use of force, with aggravating circumstances or consequences. For example, assault with a weapon or assault causing bodily harm (which includes psychological harm — *per* Cory J. in *R. v. McCraw*, [1991] 3 S.C.R. 72 (S.C.C.), at p. 81) is defined under s. 267 of the *Code* as:

Every one who, in committing an assault,

(*a*) carries, uses or threatens to use a weapon or an imitation thereof, or

(*b*) causes bodily harm to the complainant, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Section 2 of the *Code* defines bodily harm as: "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". Eventually, the application of non-consensual force can lead to homicide: murder, if accompanied by an intention to kill, or manslaughter if death is caused by an unlawful act such as an assault.

146 In many instances Parliament has explicitly foreclosed the application of certain defences to certain charges. This is so, for example, with respect to the defence of provocation in s. 232 of the *Code*. Provocation is only available as a defence to murder and not to any other offence (*R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.). By contrast, Parliament has not explicitly limited the defence under s. 43 to certain offences. Therefore the use of corrective force against children by parents and teachers is justified, even though it may cause bodily harm, as defined in s. 2 of the *Code*, if it is *reasonable under the circumstances*.

147 It was noted in *Pickard*, *supra*, at para.16, that "it is at least theoretically possible to cause bodily harm with reasonable force". Indeed s. 43 has been raised successfully in defence of more than mere common assault (see para. 133).

148 Parliament has not dictated *a priori* that uses of force will never be reasonable in any circumstances. The statutory framework is one that leaves the appreciation of reasonableness to the courts to develop on a case-by-case basis as the myriad of live circumstances are brought before the courts or are screened out by prosecutorial discretion. This is not a novel approach either in the law generally or within the criminal law context where reasonableness often plays a crucial part in the determination of criminal responsibility. Appellate courts review findings of reasonableness, or the lack thereof, while remaining generally attuned to the reality that reasonableness is intensely fact-specific. This is reflected in the broad expression "reasonable under the circumstances" which has precluded, until today, the demarcation, at the outset, of some sets of circumstances as unreasonable in all cases (e.g., "use of objects or blows or slaps to the head" as described by the Chief Justice, at para. 40).

149 In light of the framework established by Parliament for the s. 43 defence, we must now examine its application by the courts to date.

150 Two cases have been heralded as the most important in establishing parameters for the interpretation of s. 43. This Court in *Ogg-Moss*, *supra*, at p. 183, has stated that s. 43 must be strictly construed because it has the effect of depriving individuals or groups of equal protection under the criminal law, specifically the right to be free from unconsented invasions

of physical security or dignity. In *Ogg-Moss*, *supra*, the Court provided additional guidance with regard to one of the two key definitional aspects of s. 43, the requirement that force be used "by way of correction". In Dickson J.'s view (as he then was), force administered "by way of correction" requires that the person applying the force intends it for corrective purposes and that the child at whom the force is directed is capable of learning.

151 The scope of the second key aspect of the provision, "reasonable under the circumstances", is much more difficult to determine. Indeed, the Saskatchewan Court of Appeal's attempt at interpreting this phrase in *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453 (Sask. C.A.), is perhaps the most frequently cited case on the parameters of reasonableness under s. 43. In *Dupperon*, *supra*, at p. 460 the Court of Appeal set out some factors to guide the determination of whether force exceeds what is reasonable under the circumstances. The factors, which are to be considered from both an objective and subjective standpoint are:

- the nature of the offence calling for correction;
- the age and character of the child;
- the likely effect of the punishment on this particular child;
- the degree of gravity of the punishment;
- the circumstances under which the punishment was inflicted; and
- the injuries, if any, suffered.

The Court of Appeal added that if the child suffered injuries which may endanger life, limbs or health or if the child was disfigured, that alone would be sufficient to find that the punishment was unreasonable.

(1) Applications of the Section 43 Test Post-Dupperon

152 The following provides some recent examples of cases decided after the judicial interpretation in *Ogg-Moss*, *supra*, and *Dupperon*, *supra*, in which more severe physical discipline, including discipline involving blows to the face and discipline with an implement, has been found to be reasonable.

a) Acquittals of Teachers Using Force

153 In *R. v. Wetmore* (1996), 172 N.B.R. (2d) 224 (N.B. Q.B.), a high school teacher, who did not believe in suspension as a sanction, applied his training in karate to discipline four students in his grade 10 class. He demonstrated his karate skills on the students, striking them about the shoulders and hitting one student's face and the hands of another student which were covering the student's face. The judge noted that there were no injuries, that the force used was "minimal" and that the obnoxious behaviour of the students was effectively controlled (para. 13). It was reasonable for the teacher to use physical force to instill fear in the high school students to gain their respect. The judge noted that "[w]hile the punishment rendered might be unorthodox, it was not unreasonable" (para. 22).

154 In *R. v. Graham* (1995), 160 N.B.R. (2d) 306 (N.B. Q.B.), a school principal lifted an 8 or 9-year-old girl out of her desk and struck her buttocks. A red mark remained on her buttocks for 24 hours. The child was being inattentive and disruptive in class. She was not doing her work and was bothering other children. The judge followed older cases in which it was held that a slight wound was not determinative given that corporal punishment must be severe enough to take effect lest it encourages "indifference", "independence and defiance" (para. 11).

155 In *R. c. Plourde* (1993), 140 N.B.R. (2d) 273 (N.B. Prov. Ct.), a grade 8 teacher faced with undisciplined behaviour in the classroom picked up one of the students to remove him from the classroom and banged his back on the chalkboard causing a red mark on his back and red marks on his forearm. When the teacher returned, he confronted another student who began to stand up. The teacher slapped him on the head while grabbing him by the shoulders to make him sit down. A girl called the teacher crazy. The teacher grabbed her arm and pulled her to the intercom where he called the principal. The judge said that

this teacher, facing "insolent behaviour", must ensure respect for authority (at para. 8). It had not been shown that the force was unreasonable under the circumstances.

156 For other instances of acquittals of teachers see: *R. c. Caouette*, [2002] Q.J. No. 1055 (C.Q.), where a teacher grabbed a 12-year-old student by the throat with both hands, then gave him a "cuff" in the stomach with an open hand; *R. v. Skidmore* (June 27, 2000), Doc. 8414/99 (Ont. C.J.), *per* Nosanchuk J., where a teacher grabbed a 13-year-old boy by the arm and throat and pushed him up against a wall; *R. v. Gallant* (1993), 110 Nfld. & P.E.I.R. 174 (P.E.I. Prov. Ct.) where a teacher struck an 11-year-old boy in the face with an open hand; and *Fonder c. R.*, [1993] Q.J. No. 238 (C.A. Que.), where a teacher hit a 14-year-old on the head with a book.

b) Acquittals Involving Use of Force to the Face or Head

157 In *R. v. James*, [1998] O.J. No. 1438 (Ont. Prov. Div.) a father hit his 11-year-old son in the face with an open hand during an argument in which the child swore. The father testified that his purpose in smacking his son was to "stamp out" the son's foul language and "attitude" right there and then. When the child went to school that afternoon, a teacher noticed finger marks on the boy's cheek.

158 In *R. v. Wood* (1995), 176 A.R. 223 (Alta. Prov. Ct.), a father slapped his 4-year-old child on the face when he refused to stop yelling during the course of his lunch. The boy was suffering from an ear infection at the time and attended at a hospital that same day for treatment. The first thing that the attending physician noticed upon examination of the child were marks on the side of his face opposite to that side which involved the draining ear. "[A]n actual imprint of a hand was visible on the child's face" (para. 5). Citing several examples, the judge noted that "the administration of a slap to the head of a child is not *per se* excessive force constituting an assault" (para. 14).

159 In *R. v. Vivian*, [1992] B.C.J. No. 2190 (B.C. S.C.), a stepfather grabbed his stepdaughter by the hair and pushed her head against a cupboard during a disagreement. Despite the fact that the provincial court judge described the stepfather as "more angry than he is now prepared to admit", Leggatt J. found that the force used was minimal.

160 For other acquittals involving use of force to the face or head see: *Fonder*, *supra*; *Plourde*, *supra*; *Wetmore*, *supra*; and *Gallant*, *supra*.

161 For other acquittals involving serious infliction of injury on children see: *R. v. Murphy* (1996), 108 C.C.C. (3d) 414 (B.C. C.A.), where the accused used electrical tape to restrain the 3-year-old nephew of his common-law wife in a chair; *R. v. K. (M.)* (1992), 74 C.C.C. (3d) 108 (Man. C.A.), where a father kicked his 8-year-old son for having spilled a packet of sunflower seeds on the floor after being asked not to open the packet; *R. v. Goforth* (1991), 98 Sask. R. 26 (Sask. Q.B.), where a father disciplined his 8-year-old son causing marks of bruising and discolouration; and *R. v. Wheeler*, [1990] Y.J. No. 191 (Y.T. Terr. Ct.), where a foster mother slapped a 7-year-old on the hand and wrist approximately 12 times causing bruising.

c) Acquittals Involving Use of Force Against Teenagers

162 In *C. (G.C.)*, *supra*, a father struck his 14-year-old daughter with a belt three to four times across the top of the back of her legs, leaving welts and bruises. He was charged with assault with a weapon *per* s. 245.1(1)(*a*) of the *Code*. Despite expressing the personal view that the use of a belt in disciplining is always unreasonable, the judge, citing several authorities as examples, noted that there are occasions when the law recognizes such behaviour as not criminal (para. 44). He concluded that the force used was not unreasonable in the circumstances.

163 In *Pickard*, *supra*, a father, seeking to forcibly remove his 15-year-old son from a room in order to show him "who was boss" (para. 10), was charged with assault causing bodily harm. The father punched his son and knocked him down. This resulted in scratches and a bruise on the son's forehead and caused him "considerable pain and discomfort" (para. 13) for several days. The court acquitted the father of assault on the grounds that he and his son were physically almost evenly matched and "[a]nything less than a hard blow to [the son's] body would have failed to evoke a submissive response" (para. 19).

164 In *R. v. L. (V.)*, [1995] O.J. No. 3346 (Ont. Prov. Div.) a stepfather, in response to offensive comments from his stepson, struck the 13-year-old boy in the mouth with an open hand causing a swollen lip. While noting that a "parent delivering a blow to the head area of a child is definitely entering dangerous waters" (para. 24), the court found that in the circumstances the force was reasonable as the boy's behaviour warranted corrective action on the part of the parent. The court also noted that the "fact that an injury results from the punishment of a child does not in and of itself prove that the force was excessive" (para. 23).

165 For other acquittals involving the use of force on teenagers see: *Fritz*, *supra*, where an aunt and uncle of two teenaged girls (13 and 14) were charged with assault with a weapon. The uncle told his nieces to strip to their bra and panties and strapped them with a plastic belt across the buttocks and thighs; *R. c. Holmes*, [2001] Q.J. No. 7640 (C.S. Que.) where a teacher lifted a 13-year-old boy from the floor using a wrestling hold to the back of the head and under the chin; and *R. v. Harriott* (1992), 128 N.B.R. (2d) 155 (N.B. Prov. Ct.), where a teacher grabbed and shook a 14-year-old by the head and pushed him into his seat. See also *Wetmore*, *supra*; *Plourde*, *supra*; *Fonder*, *supra*; and *Skidmore*, *supra*.

d) Acquittals Involving Use of Force Against Children Under 2

166 In *R. v. Atkinson*, [1994] 9 W.W.R. 485 (Man. Prov. Ct.), two of the children were 2 years old and a third child was almost 3 $^{1}/_{2}$ years of age when the foster-mother/aunt hit the children with a belt on their diapered bottoms sometimes leaving red marks. In the absence of evidence describing the type of belt used (i.e., what it was made of, its length, or width, or whether it had a buckle), the judge felt unable to assess whether the use of the belt was unreasonable and excessive in the circumstances (para. 22). One child was also struck in the chest with an open hand. The judge noted, at para. 23, that:

> [w]hile clearly a child's chest should never be struck as a disciplining measure, there is no evidence in this case from which it could be concluded that the force used during this particular incident was excessive.

e) Acquittals Involving the Use of Implements

167 In *Bell*, *supra*, a father was charged with assault with a weapon for striking his 11-year-old son with a belt two or three times for stealing candy and lying about it. At least one blow struck the child on his right thigh which left a bruise that matched the shape of the buckle. The judge noted, at para. 30:

> When appropriate deference is shown to the parent's value system and to their decision that they see the transgression as serious, then the infliction of some pain and a bruise that is merely transient or trifling in nature ... cannot as a matter of law, constitute unreasonable force.

168 In *R. v. K. (L.A.)* (1992), 104 Nfld. & P.E.I.R. 118 (Nfld. Prov. Ct.), the use of a belt by a father in correcting his 11-year-old daughter which resulted in some bruising was held to fall within the parameters of the s. 43 defence. Though the discipline "must have had a significant impact on [the daughter]" (para. 37), evidenced by the fact that she reported the incident to a social worker, the judge went on to find somewhat contradictorily that the injury "was of transient and perhaps trifling consequence for her" (para. 39). Interestingly, despite dismissing the charges against the father, the judge also noted, at para. 33:

> I am satisfied that if L.K. and his wife and their children, rethought the whole matter of discipline they could probably come to the conclusion that the use of force could be abandoned and other effective sanctions could be devised by them as disciplinary measures.

169 In *R. v. Robinson*, [1986] Y.J. No. 99 (Y.T. Terr. Ct.), a father strapped his 12-year-old daughter about four or five times with a leather belt that was doubled over twice. She sustained bruises, which doctors predicted would disappear within seven to ten days. The court described the punishment as "an administration of short-term pain in the hope that it will have a corrective effect on the child" (para. 7). Finding that the accused's conduct was justified, the court dismissed the charges against him.

170 For another instance of an acquittal where a child was struck with a belt, see: *R. v. H. (V.)*, [2001] N.J. No. 307 (Nfld. Prov. Ct.), at paras. 87-91, where a grandfather struck his granddaughter on her behind with a belt. For instances of acquittals

involving the striking of children with other implements, see: *S. (N.)*, *supra*, where a father was charged with assault with a weapon causing bodily harm for punishing his two children with a horse harness leaving welts; *R. v. J. (O.)*, [1996] O.J. No. 647 (Ont. Prov. Div.), where a mother hit her 6-year-old on the buttocks with a plastic ruler, causing bruises and red marks; and *R. v. Dunfield* (1990), 103 N.B.R. (2d) 172 (N.B. Q.B.), where a foster mother hit a 9-year-old on the arm with a ruler causing bruising and breaking the ruler. See also *Fritz*, *supra*.

171 It is this body of law that the appellant attacks as unconstitutional. Absent a constitutional challenge, the law would likely continue to evolve and would no doubt reflect changing attitudes in society regarding the merits and acceptability of the corporal punishment of children. As a society, we have in the past tolerated or even encouraged the use of corporal punishment against women, apprentices, employees, passengers on ships and prisoners. Each of these practices eventually fell into disrepute without any constitutional intervention.

172 By the time of the codification of Canadian criminal law in 1892, the right to use corporal punishment on wives and servants was no longer legally justified (see S.D. Greene, "The Unconstitutionality of Section 43 of the Criminal Code: Children's Right to be Protected from Physical Assault, Part I" (1999), 41 *Crim. L.Q.* 288, at pp. 292-93). The physical discipline of apprentices by masters was codified in *The Criminal Code, 1892*, S.C. 1892, c. 29, s. 55, and omitted in the 1955 version of the *Code* (*Martin's Criminal Code* (1955), at p. 118; see also D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), at p. 503). Whipping as a form of criminal punishment also survived the 1892 codification of criminal law, for such offences as rape and gross indecency. The penalty was later abolished in 1973 (see A. McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law" (1997), 5 *Int'l J. Child. Rts.* 193, at p. 199). Similarly, s. 44 added in the 1955 version of the *Code* which justified the use of force in maintaining discipline by a master or officer of a ship will be repealed when the 2001 amendments to the *Canada Shipping Act* come into force (S.C. 2001, c. 26, s. 294). As Cory J. (in dissent) noted in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (S.C.C.), at p. 818:

> What is acceptable as punishment to a society will vary with the nature of that society, its degree of stability and its level of maturity. The punishments of lashing with the cat-o-nine tails and keel-hauling were accepted forms of punishment in the 19th century in the British navy. Both of those punishments could, and not infrequently, did result in death to the recipient. By the end of the 19th century, however, it was unthinkable that such penalties would be inflicted. A more sensitive society had made such penalties abhorrent.

173 That s. 43 is rooted in an era where deploying "reasonable" violence was an accepted technique in the maintenance of hierarchies in the family and in society is of little doubt. Children remain the only group of citizens who are deprived of the protection of the criminal law in relation to the use of force (A. McGillivray, "*R. v K. (M.)*: Legitimating Brutality" (1993), 16 C.R. (4th) 125, at pp. 129-30). Whether such policy ought to be acceptable today with respect to children is the subject of ongoing debate in society about the appropriateness and effectiveness of the use of corporal punishment by way of correction. We have not been asked to take a side in that debate. However, the issue is also the subject of the constitutional challenge brought before us by the Foundation. This legal challenge is what we must address.

174 The Foundation argues that the use of force permitted under s. 43, which exonerates a person who would otherwise be guilty of a crime, violates the constitutional rights of children and must be declared of no force or effect. I now turn to the appellant's constitutional argument under s. 7 of the *Charter*.

(2) Section 7

175 Where an infringement of s. 7 is alleged, the analysis has three main stages: 1) determining whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests; 2) identifying and defining the relevant principle(s) of fundamental justice; and 3) determining whether the deprivation has occurred in accordance with the relevant principle(s) (*R. v. White*, [1999] 2 S.C.R. 417 (S.C.C.), at para. 38).

176 The parties agree that the first stage has been met, specifically that s. 43 engages the "security of the person" interest of children. The criminal law is the mechanism by which the state protects the liberty and security of its citizens. Where the

application of the criminal law is withdrawn from a portion of the population, the state has removed the protective force of the law from this group. The absence of this protective force, and the correlative sanction by the state of what would otherwise be an assault, suffices, in my view, to amount to a deprivation of children's security of the person interest. In *Ogg-Moss*, *supra*, at p. 187, the Court noted (although not in the context of the *Charter*) that s. 43 resulted in an "attenuation of [a child's] right to dignity and physical security". I will therefore proceed on the basis that s. 43 deprives children of their security of the person interest. The question then becomes whether this deprivation of children's security of the person is in accordance with the principles of fundamental justice.

177 The appellant argues that s. 43 violates the principle of vagueness. I agree. A vague law violates the principles of fundamental justice as it offends two values that are fundamental to the legal system. First, vague laws do not provide "fair warning" to individuals as to the legality of their actions, making it more difficult to comply with the law. Second, vague laws increase the amount of discretion given to law enforcement officials in their application of the law, which may lead to arbitrary enforcement (*Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) ("*Prostitution Reference*"), at p. 1152; see also P.W. Hogg, *Constitutional Law of Canada* (4th ed. (loose-leaf)), at pp. 44-48 to 44-50.

178 The test for finding unconstitutional vagueness was first articulated by Gonthier J. in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at pp. 639-40:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. [Emphasis added.]

This test is well known, often cited, and is generally perceived as setting the bar high before a finding of vagueness can be asserted.

179 The doctrine of vagueness does not "require that a law be absolutely certain; no law can meet that standard" (*Prostitution Reference, supra*, at p. 1156). However, while discretion is inevitable, a law will be too vague if "the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances" (*Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), per Dickson C.J., Lamer and Wilson JJ., at p. 983, albeit within s. 1).

180 In the *Prostitution Reference, supra*, at p. 1157, Lamer J. (as he then was) expressly relied on the dictum of the Court of Appeal for Ontario in *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163 (Ont. C.A.), at p. 173, that

> the void for vagueness doctrine is not to be applied to the bare words of the statutory provision, but rather to the provision as interpreted and applied in judicial decisions. [Emphasis added.]

According to Lamer J. the question was

> whether the impugned sections of the *Criminal Code* can be or have been given sensible meanings by the courts. In other words is the statute so pervasively vague that it permits a "standardless sweep" allowing law enforcement officials to pursue their personal predilections?

181 In my view, the case law speaks for itself with respect to whether s. 43 delineates the appropriate boundaries of legal debate. It is wholly unpersuasive for this Court to declare today what the law is *de novo* and to assert that this now frames the legal debate: *i.e.*, anything outside the framework was simply wrongly decided! This approach robs the test in *Pharmaceutical Society (Nova Scotia)*, *supra*, of any usefulness. There is no need to speculate about whether s. 43 is capable, in theory, of circumscribing an acceptable level of debate about the scope of its application. It demonstrably has not succeeded in doing so. Canadian courts have been unable to articulate a legal framework for s. 43 despite attempts to establish guidelines. It is important to note that all of the troubling results in the cases listed above were decided after judicial guidance in *Ogg-Moss*, *supra*, and *Dupperon*, *supra*, had been delivered.

182 Judges themselves have often referred to the lack of consensus in this area of the law, with Weagant Prov. J. in *James*, *supra*, at para. 8, for instance, noting:

> Exactly what is needed to establish, or what legal test demonstrates that the force exceeds what is reasonable, is a matter of some variance across this nation. For some trial courts, the act speaks for itself, especially if there is bodily harm or an injury which may endanger life, limbs or health (*R. v. Dupperon* (1985), 16 C.C.C. (3d) 453 (Sask. C.A.)). Other courts pay lip service to the necessity of having a view to community standards, although just how that is established through evidence remains unclear (*R. v. Halcrow* (1993), 80 C.C.C. (3d) 320 ([B.C.] C.A.): the Appeal Court noted that the defendant had called no evidence suggesting the treatment of the foster children was in accordance with community standards, a burden our Court of Appeal has decided falls upon the Crown). Other trial courts have rejected the notion that a judge can take notice of community standards (*R. v. Myers*, [1995] P.E.I.J. No. 180, P.E.I. Prov. Ct., November 27, 1995, *per* Thompson, P.C.J.). Yet another trial court says it is the trier of fact's responsibility to reflect community standards, as a jury would (*R. v. R.S.D.*, [1995] O.J. No. 3341, Ontario Prov. Ct., October 30, 1995, *per* Megginson, P.J.O.). And still another court was of the view that section 43 does not deal with the concept of a community standard of tolerance at all (*R. v. Peterson*, [1995] O.J. No. 1366, Ontario Prov. Ct., April 26, 1995, *per* Menzies, P.J.O.).

That judges have been at a loss to appreciate the "reasonableness" referred to by Parliament is not surprising and yet is not endemic to the notion of reasonableness.

183 "Reasonableness" with respect to s. 43 is linked to public policy issues and one's own sense of parental authority. "Reasonableness" will always entail an element of subjectivity. As McCombs J. recognized in the case at bar, "[b]ecause the notion of reasonableness varies with the beholder, it is perhaps not surprising that some of the judicial decisions applying s. 43 to excuse otherwise criminal assault appear to some to be inconsistent and unreasonable" ((2000), 49 O.R. (3d) 662 (Ont. S.C.J.), at para. 4). It is clear, however, that the concept of reasonableness, so widely used in the law generally, and in the criminal law in particular, is not in and of itself unconstitutionally vague. "Reasonableness" functions as an intelligible standard in many other criminal law contexts. This Court has been clear that constitutional analysis must always be contextual (*Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 6). Accordingly, whether a given phrase is unconstitutionally vague must also vary with context.

184 Other instances of the words "reasonable under the circumstances" may not be overly vague because they occur in contexts in which the factors for assessing reasonableness are clear and commensurable. Some general agreement as to the standard against which to measure the "reasonableness" of conduct will assist in providing sufficient clarity to a standard of "reasonableness". For example, reasonable force in self-defence can be measured for proportionality against the assault for which one is defending oneself. Similarly, it is possible to frame a legal debate about the proper boundaries of the use of reasonable force in performing an arrest (see *Asante-Mensah*, *supra*, per Binnie J., at paras. 51-59). This is not so in the case of corporal punishment of children, where there is no built-in commensurability between physical punishment and bad behaviour that can be used to assess proportionality. Indeed the Chief Justice concludes, at para. 35, that the gravity of the child's conduct is not a "relevant contextual consideration" as it invites a punitive, rather than a corrective focus.

185 Corporal punishment is a controversial social issue. Conceptions of what is "reasonable" in terms of the discipline of children, whether physical or otherwise, vary widely, and often engage cultural and religious beliefs as well as political and ethical ones. Such conceptions are intertwined with how other controversial issues are understood, including the relationship between the state and the family and the relationship between the rights of the parent and the rights of the child. Whether a person considers an instance of child corporal punishment "reasonable" may depend in large part on his or her own parenting style and experiences. While it may work well in other contexts, in this one the term "reasonable force" has proven not to be a workable standard. Lack of clarity is particularly problematic here because the rights of children are engaged. This Court has confirmed that children are a particularly vulnerable group in society (*Sharpe*, *supra*, at para. 169, and *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519, 2000 SCC 48 (S.C.C.), at para. 73). Vagueness in defining the terms of a defence which affects the physical integrity of children may be even more invidious than is vagueness in defining an offence or a defence in another context, and may therefore call for a stricter standard.

186 Canada's international obligations with respect to the rights of the child must also inform the degree of protection that children are entitled to under s. 7 of the *Charter*. As the Chief Justice notes (at para. 32), Canada is a party to both the United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. The Chief Justice has referred, at para. 33, to the Report of the Human Rights Committee, Vol. I, UN GAOR, Fiftieth Session, Supp. No. 40 (A/50/40) (1995) with respect to corporal punishment of children in schools. I would also make reference to the Concluding Observations of the Committee on the Rights of the Child. Article 43(1) of the *Convention on the Rights of the Child* establishes a Committee on the Rights of the Child "[f]or the purpose of examining the progress made by State Parties in achieving the realization of the obligations undertaken" in the *Convention*. The Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland, which has a legal provision similar to s. 43 dealing with reasonable chastisement within the family, state:

> The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the . . . legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the Convention. [Emphasis added.]
>
> Committee on the Rights of the Child, *Report adopted by the Committee at its 209th meeting on 27 January 1995*, Eighth Session, CRC/C/38, at para. 218.

The Committee has identified the vagueness inherent in provisions such as s. 43 in this and other Concluding Observations.

187 It is notable that the Committee has not recommended clarifying these laws so much as abolishing them entirely. The Chief Justice notes, at para. 33, that neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* "require state parties to ban all corporal punishment of children". However, the Committee's Concluding Observations on Canada's First Report are illustrative:

> [P]enal legislation allowing corporal punishment of children by parents, in schools and in institutions where children may be placed, should be considered for review]. In this regard ... physical punishment of children in families [should] be prohibited. In connection with the child's right to physical integrity ... and in the light of the best interests of the child, ... the possibility of introducing new legislation and follow-up mechanisms to prevent violence within the family [should be considered], and ... educational campaigns [should] be launched with a view to changing attitudes in society on the use of physical punishment in the family and fostering the acceptance of its legal prohibition. [Emphasis added.]
>
> Committee on the Rights of the Child, *Report adopted by the Committee at its 233rd meeting on 9 June 1995*, Ninth Session, CRC/C/43, at para. 93.

188 In its most recent Concluding Observations, the Committee expressed "deep concern" that Canada had taken "no action to remove section 43 of the Criminal Code" and recommended the adoption of

> legislation to remove the existing authorization of the use of "reasonable force" in disciplining children and explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed.
>
> Committee on the Rights of the Child, *Consideration of Reports submitted by State Parties Under Article 40 of the Convention*, Thirty-fourth session, CRC/C/15/Add. 215 (2003), at paras. 32-33.

189 I doubt that it can be said, on the basis of the existing record, that the justification of corporal punishment of children when the force used is "reasonable under the circumstances" gives adequate notice to parents and teachers as to what is and is not permissible in a criminal context. Furthermore, it neither adequately guides the decision-making power of law enforcers nor delineates, in an acceptable fashion, the boundaries of legal debate. The Chief Justice rearticulates the s. 43 defence as the

delineation of a "risk zone for criminal sanction" (para. 18). I do not disagree with such a formulation of the vagueness doctrine in this context. Still, on this record, the "risk zone" for victims and offenders alike has been a moving target.

190 In the Chief Justice's reasons, it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise: (1) the word "child" must be construed as including children only over age 2 and younger than teenage years; (2) parts of the body must be excluded; (3) implements must be prohibited; (4) the nature of the offence calling for correction is deemed not a relevant contextual consideration; (5) teachers are prohibited from utilizing corporal punishment; and (6) the use of force that causes injury that is neither transient nor trifling (assault causing bodily harm) is prohibited (it seems even if the force is used by way of restraint). At some point, in an effort to give sufficient precision to provide notice and constrain discretion in enforcement, mere interpretation ends and an entirely new provision is drafted. As this Court concluded in *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.), at p. 803:

> The changes which would be required to make s. 179(1)(*b*) [here, s. 43] constitutional would not constitute reading down or reading in; rather, they would amount to judicial rewriting of the legislation. [Emphasis added.]

The restrictions put forth by the Chief Justice with respect to the scope of the defence have not emerged from the existing case law. These restrictions are far from self-evident and would not have been anticipated by many parents, teachers or enforcement officials.

191 In my view, we cannot cure vagueness from the top down by declaring that a proper legal debate has taken place and that anything outside its boundaries is simply wrong and must be discarded. Too many people have been engaged in attempting to define the boundaries of that very debate for years in Canadian courtrooms to simply dismiss their conclusions because they do not conform with a norm that was never apparent to anyone until now. As demonstrated earlier, s. 43 has been subject to considerable disparity in application, some courts justifying conduct that other courts have found wholly unreasonable, despite valiant efforts by the lower courts to give intelligible content to the provision. Attempts at judicial interpretation which would structure the discretion in s. 43 have, in my opinion, failed to provide coherent or cogent guidelines that would meet the standard of notice and specificity generally required in the criminal law. Thus, despite the efforts of judges, some of whom have openly expressed their frustration with what has been described as "no clear test" and a "legal lottery" in the criminal law (McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law", *supra*, at p. 228; *James*, *supra*, per Weagant Prov. J., at paras. 11-12), the ambit of the justification remains about as unclear as when it was first codified in 1892. As Lamer C.J. stated in *R. v. Morales*, [1992] 3 S.C.R. 711 (S.C.C.), at p. 729:

> A standardless sweep does not become acceptable simply because it results from the whims of judges and justices of the peace rather than the whims of law enforcement officials. Cloaking whims in judicial robes in not sufficient to satisfy the principles of fundamental justice.

This would not only raise the already high bar set in *Pharmaceutical Society (Nova Scotia)*, *supra*; it would essentially make it unreachable.

192 As a result, I find that the phrase "reasonable under the circumstances" in s. 43 of the *Code* violates children's security of the person interest and that the deprivation is not in accordance with the relevant principle of fundamental justice, in that it is unconstitutionally vague.

(3) Section 1

193 In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.), at pp. 94-95, Sopinka J. held:

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not

> met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

The requirement that a limit be prescribed by law also calls for fair notice to the citizen and limitations on the discretion of enforcement officials (*Pharmaceutical Society (Nova Scotia)*, *supra*). Because I have found that s. 43 is unconstitutionally vague, it cannot pass the "prescribed by law" or minimal impairment stage of the *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), analysis, and accordingly, cannot be saved under s. 1.

(4) Remedy

194 I am of the view that striking down s. 43 for vagueness is the most appropriate remedy in the case at bar. Parliament is best equipped to reconsider this vague and controversial provision. The legislature should have a chance to consider the issues in light of the *Charter*, current social norms and all of the evidence. While the record of expert testimony in this litigation is voluminous, the court process is necessarily adversarial and does not cover all of the interests that one would expect to be heard in a legislative debate, committee hearings or in the public at large. Yet parliamentary intervention may prove unnecessary.

195 It is useful to put the potential effect of striking down s. 43 of the *Code* into context. Some are concerned that striking down s. 43 will expose parents and persons standing in the place of parents to the blunt instrument of the criminal law for every minor instance of technical assault. Indeed the respondent and the Chief Justice raise (at paras. 59-61) the spectre of criminal culpability on parents for trivial and insignificant uses of force if s. 43 is repealed. While it is true that Canada's broad assault laws could be resorted to in order to incriminate parents and/or teachers for using force that falls short of corporal punishment, I am of the view that the common law defences of necessity and *de minimis* adequately protect parents and teachers from excusable and/or trivial conduct.

(5) The Defence of Necessity

196 The common law defence of necessity operates by virtue of s. 8(3) of the *Code* (see also *R. v. Morgentaler (No. 5)* (1975), [1976] 1 S.C.R. 616 (S.C.C.)). The defence "rests upon a realistic assessment of human weaknesses and recognizes that there are emergency situations where the law does not hold people accountable if the ordinary human instincts overwhelmingly impel disobedience in the pursuit of self-preservation or the preservation of others" (*Mewett & Manning on Criminal Law* (3rd ed. 1994), at p. 531). In 1984, the common law defence of necessity was clearly recognized by this Court in *Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.).

197 In *R. v. Manning* (1994), 31 C.R. (4th) 54 (B.C. Prov. Ct.), at para. 23, the court rearticulated the elements of the defence of necessity as set out in *Perka*, *supra*. It stated that the defence of necessity is an excuse rather than a justification and that the moral involuntariness of the wrongful action is a criterion. The involuntariness of the action should be measured against society's expectation of appropriate and normal resistance to pressure. That the accused has been involved in criminal or immoral activity or has been negligent does not disentitle him or her to the defence. Actions or circumstances that indicate that the offence was not truly involuntary will disentitle the accused from relying on the defence. Similarly, the existence of a reasonable legal alternative will also disentitle the accused. The defence will only apply in circumstances of imminent risk, where the action was taken to avoid direct and immediate peril. Necessity will not excuse the infliction of a greater harm, so as to allow the accused to avert a lesser evil. Finally, where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

198 I see no reason why, if the above requirements are met, the defence of necessity would not be available to parents and teachers should they intervene to protect children from themselves or others. Other authors have also proposed the use of necessity for parents, and teachers should the s. 43 defence be abolished (see McGillivray, "'He'll learn it on his body': Disciplining childhood in Canadian law", *supra*, at p. 240, and Stuart, *supra*, at p. 506). In *R. v. Morris* (1981), 61 C.C.C. (2d) 163 (Alta. Q.B.), the defence of necessity succeeded in absolving a husband on a charge of common assault of his wife. The

husband had restrained his inebriated wife when she tried to jump out of the truck and grab the steering wheel. The husband honestly and reasonably believed that the intervention was necessary. The judge noted, at p. 166, that:

> To have allowed his wife to get out of the truck to walk on a dark road in an intoxicated condition would have shown wanton or reckless disregard for her life or safety and could have constituted criminal negligence on his part.

199 Because the s. 43 defence only protects parents who apply force for corrective purposes (see *Ogg-Moss*, *supra*, at p. 193), the common law may have to be resorted to in any event in situations where parents forcibly restrain children incapable of learning. Indeed, even if one understands the law as per the Chief Justice (at paras. 24-25), s. 43 may be of no assistance to parents who apply some degree of force for the purpose of restraint. It is not inconceivable to think of situations where force might be applied to young children for reasons other than education or correction. For example, a two-year-old child who struggles to cross the street at a red light will have to be forcibly held back and secured against his or her will. In my view, the force being applied to the child is not for the purpose of correction *per se*, but to ensure the child's safety. Similarly, if a parent were to forcibly restrain a child in order to ensure that the child complied with a doctor's instructions to receive a needle, s. 43 would be of no assistance to excuse the use of restraint, but the parent would, in my view, have the common law defence of necessity available to him or her should a charge of assault be pursued. The common law defence of necessity has always been available to parents in appropriate circumstances and would continue to be available if the s. 43 defence were struck down.

(6) The Defence of De Minimis

200 The Chief Justice is rightly unwilling to rely exclusively on prosecutorial discretion to weed out cases undeserving of prosecution and punishment. The good judgment of prosecutors in eliminating trivial cases is necessary but not sufficient to the workings of the criminal law. There must be legal protection against convictions for conduct undeserving of punishment. And indeed there is. The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of "a crime" (e.g., theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges.

201 The application of some force upon another does not always suggest an assault in the criminal sense. "Quite the contrary, there are many examples of incidental touching that cannot be considered criminal conduct" (*R. v. Kormos* (1998), 14 C.R. (5th) 312 (Ont. Prov. Div.), at para. 34).

202 The common law concept of *de minimis non curat lex* was expressed in the English decision of *"Reward" (The)* (1818), 2 Dods. 265, 165 E.R. 1482 (Eng. Adm. Ct.), at p. 1484 in the following manner:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. — Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

203 Admittedly, the case law on the application of the defence is limited. It may be that the defence of *de minimis* has not been used widely by courts because police and prosecutors screen all criminal charges such that only the deserving cases find their way to court. Nonetheless *de minimis* exists as a common law defence preserved by s. 8(3) of the *Code* and falls within the courts' discretion (J. Hétu, "Droit judicaire: De minimis non curat praetor: une maxime qui a toute son importance" (1990), 50 *R. du B.* 1065, at pp. 1065-1076) to apply and develop as it sees fit. In effect, the defence is that there was only a "technical" commission of the *actus reus* and that "the conduct fell within the words of an offence description but was too trivial to fall within the range of wrongs which the description was designed to cover" (E. Colvin, *Principles of Criminal Law* (2nd ed. 1991), at p. 100). The defence of *de minimis* does not mean that the act is justified; it remains unlawful, but on account of its triviality it goes unpunished (S.A. Strauss, "Book Review of *South African Criminal Law and Procedure*", by E.M. Burchell, J.S. Wylie and P.M.A. Hunt (1970), 87 *So. Afr. L.J.* 470, at p. 483).

204 Generally, the justifications for a *de minimis* excuse are that: (1) it reserves the application of the criminal law to serious misconduct; (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe

penalties for relatively trivial conduct; and (3) it saves courts from being swamped by an enormous number of trivial cases (K.R. Hamilton, "De Minimis Non Curat Lex", December 1991, discussion paper mentioned in the Canadian Bar Association, Criminal Recodification Task Force Report, *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada*, (1992), at p. 189). In part, the theory is based on a notion that the evil to be prevented by the offence section has not actually occurred. This is consistent with the dual fundamental principle of criminal justice that there is no culpability for harmless and blameless conduct (see my opinion in *R. v. Malmo-Levine*, 2003 SCC 74 (S.C.C.), at paras. 234-35 and 244).

205 In Canadian jurisprudence, the defence of *de minimis* has been raised in drug cases that involve a tiny quantity of the drug (*R. v. Overvold* (1972), 9 C.C.C. (2d) 517 (N.W.T. Mag. Ct.), at pp. 519-21; *R. v. Stimpson* (1974), 17 C.C.C. (2d) 181 (Man. Prov. Ct.), at p. 186; and *R. v. McBurney* (1974), 15 C.C.C. (2d) 361 (B.C. S.C.), aff'd (1975), 24 C.C.C. (2d) 44 (B.C. C.A.)), in theft cases where the value of the stolen property is very low (*R. v. Li* (1984), 16 C.C.C. (3d) 382 (Ont. H.C.), at p. 384), or in assault cases where there is extremely minor or no injury (*R. v. Lepage* (1989), 74 C.R. (3d) 368 (Sask. Q.B.); *R. v. Matsuba* (1993), 137 A.R. 34 (Alta. Prov. Ct.); and in *obiter* in *Kormos*, *supra*); see also: Department of Justice Canada, *Reforming the General Part of the Criminal Code: A Consultation Paper* (1994), "Trivial violations", at pp. 24-25). Though the case law is somewhat unsatisfactory, the defence has succeeded on several occasions (see Stuart, *supra*, at pp. 594-99) and this Court has expressly left the existence of the defence open (see: *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (S.C.C.), at para. 21, and *R. v. Hinchey*, [1996] 3 S.C.R. 1128 (S.C.C.), at para. 69). In discussing the *actus reus* of the offence of "fraud on the government" under s. 121(1)(*c*) of the *Code*, L'Heureux-Dubé J. in *Hinchey*, *supra*, wrote the following, at para. 69:

> In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a *Code* section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability*: Proposals for a New General Part of the Criminal Code of Canada ... and others: see Professor Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day. [Emphasis added.]

206 A statutory formulation of the defence was proposed in the American Law Institute's, *Model Penal Code* (1985), s. 2.12 under "De Minimis Infractions" (in Stuart, *supra*, at p. 598). The C.B.A. Task Force Report reviewed the uncertain state of the law and recommended codification of a power to stay for trivial violations (see Stuart, *supra*, at p. 598). A codification of the defence may cure judicial reluctance to rely on *de minimis*; however, the common law defence of *de minimis*, as preserved under s. 8(3) of the *Code*, is sufficient to prevent parents and others from being exposed to harsh criminal sanctions for trivial infractions.

207 I am of the view that an appropriate expansion in the use of the *de minimis* defence — not unlike the development of the doctrine of abuse of process — would assist in ensuring that mere technical violations of the assault provisions of the *Code* that ought not to attract criminal sanctions are stayed. In this way, judicial resources are not wasted, and unwanted intrusions of the criminal law in the family context, which may be harmful to children, are avoided. Therefore, if s. 43 were to be struck down, and absent Parliament's re-enactment of a provision compatible with the constitutional rights of children, parents would be no more at risk of being dragged into court for a "pat on the bum" than they currently are for "tasting" a single grape in the supermarket.

208 I conclude that s. 43 of the *Criminal Code* infringes the rights of children under s. 7 of the *Charter*. The infringement cannot be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Charter*. Parents and persons standing in the place of parents will not be exposed to the criminal law unnecessarily as the common law defences of necessity and *de minimis* will protect them from excusable and/or trivial conduct.

209 In light of my conclusion on the doctrine of vagueness, it is unnecessary for me to consider the other constitutional challenges advanced by the appellant.

III. Disposition

210 For these reasons, I would allow the appeal.

211 I would answer the constitutional questions as follows:

1. Does. s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No

3. Does. s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

5. Does. s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to decide this question.

***Deschamps J.*:**

212 This appeal raises the question of whether s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, is constitutionally sound, in particular, with regard to ss. 7, 12, and 15 of the *Canadian Charter of Rights and Freedoms*. Section 43 creates a defence of justification for parents, school teachers and persons standing in the place of a parent, when they use force by way of correction towards a child under their care, if the force does not exceed what is reasonable under the circumstances.

213 In my opinion, the ordinary and contextual meaning of s. 43 cannot bear the restricted interpretation proposed by the majority. Section 43 applies to and justifies an extensive range of conduct, including serious uses of force against children. I agree with Arbour J. that the body of case law applying s. 43 is evidence of its broad parameters and wide scope. I also agree with her analysis of the appellant's argument on s. 7 of the *Charter*, but I prefer to deal with the problem under s. 15 of the *Charter*. I find that the inferior protection s. 43 affords to children results in a violation of their constitutional equality right, which is not saved under s. 1 of the *Charter*.

I. Interpretation of Section 43

214 It is well established in this Court's jurisprudence that statutes should be interpreted contextually, according to their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament

(see *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, and cases cited there). The aim of statutory interpretation is to determine and apply the intention of Parliament at the time of the enactment, as evidenced by the language that was chosen, and as examined in context.

215 There does exist a general principle that if a legislative provision is capable of both a constitutional and an unconstitutional interpretation, then the former should be preferred (see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), at p. 1078; *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439 (S.C.C.), at para. 66). However, the application of this interpretative aid is premised on there existing *two equally plausible* interpretations on the language of the statute (see *Bell ExpressVu Ltd. Partnership*, *supra*, at para. 62). Where, as here, the text of the provision does not support a severely restricted scope of conduct that would avoid constitutional disfavour, the Court cannot read the section down to *create* a constitutionally valid provision. Such an approach would divest the *Charter* of its power to test the validity of statutes, deprive the legislatures of their ability to enact reasonable limits, and intermingle the purpose of statutory interpretation with the exercise of judicial review (see *Bell ExpressVu Ltd. Partnership*, *supra*, at paras. 62-66).

216 In this case, the language of s. 43 does not bear a narrow interpretation which encompasses only those minor uses of force that "restrain, control or express some symbolic disapproval" (McLachlin C.J., at para. 24). The words of the provision relate to *any* use of force toward a pupil or child by a teacher or parent that is "by way of correction" and is "reasonable under the circumstances". To read into the text implicit exclusions based on the age of the child, the part of the body hit, the type of assault committed, and whether an implement is used, would turn the exercise of statutory interpretation into one of legislative drafting. It is the duty of the Court to determine the intent of the legislator by looking at the text, context and purpose of the provision. The Court would be substituting its own views and opinions rather than interpreting those of the legislator if it were to severely circumscribe a statutory provision and drastically limit its intended application. This is not its role.

217 While I rely for the most part on the detailed reasons of Arbour J. on the interpretation of s. 43, I would emphasize that the ordinary meaning of s. 43 does not support the restrictive interpretation proposed by the Chief Justice. As one example, the Chief Justice reads into s. 43 completely different standards for teachers as opposed to parents: "Teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment" (at para. 40). However, this distinction is not available on the text of the provision, which plainly places teachers on par with parents. In the same vein, the prohibition on the use of objects or blows to the head is also not supported, considering that s. 43 simply applies to "uses of force". Bearing in mind that the non-consensual use of force underpins all forms of assault (s. 265(2)), this presumptively includes assault with a weapon. Nothing in s. 43 indicates that Parliament intended that the application of force with an object would be irrebuttably excluded. The same is true of creating blanket exclusions for the use of force on children under two, on teenagers, and on the head as opposed to other body parts. As noted by both the Chief Justice (at para. 28) and Arbour J. (at para.148), the assessment of reasonableness is a factually heavy and contextually specific inquiry. The choice of this standard indicates that Parliament did not intend that blanket exclusions be read into s. 43 to preemptively delineate the boundaries of its application. That choosing this standard may leave s. 43 vulnerable to constitutional challenge is to be addressed under the constitutional questions, and should not colour the statutory interpretation exercise *ex ante*.

218 On that note, I will now proceed to explain why, in my view, s. 43 does not pass constitutional muster under s. 15 of the *Charter*.

II. Infringement of Section 15

219 Section 15 is meant to catch government action that has a discriminatory purpose or effect on the basis of an enumerated or analogous ground and impairs a person's dignity. At the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable and equally deserving.

220 The test for determining a s. 15(1) infringement is three-pronged (see *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 39):

> First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? [Emphasis omitted.]

A. Distinction in Purpose or Differential Treatment in Effect

221 Clearly, s. 43 on its face, as well as in its result, creates a distinction between children and others. Section 265 prohibits the non-consensual application of force to anyone and uses the weight of the criminal justice system to protect invasions of one's fundamental right to bodily integrity (see *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (S.C.C.), at paras. 11-12). Section 43 then withdraws this protection from a designated group of people in society: children. Parliament decided to criminalize certain conduct which is seen as sufficiently morally blameworthy as to merit the disfavour of the criminal law. It then specifically chose to lift protection for one group while leaving protection intact for all others.

B. Based on an Enumerated Ground

222 Equally clearly, the distinction is based on an enumerated ground: age. The respondent's argument that s. 43 is not primarily an age-based distinction but rather one based on the "relationship" between parent and child or school teacher and pupil is overly formalistic. Although s. 43 applies only in circumstances where the accused has a particular relationship with the child, this does not alter the fact that children, as a group, are given inferior protection against criminal assault.

C. Whether the Distinction or Differential Treatment under Section 43 is Discrimination

223 *Law*, *supra*, identified four factors for determining whether the dignity of the group in question is being impaired, thus indicating an infringement of the s. 15 equality guarantee. Not all four factors are necessarily relevant in every case, but the entire context must be considered in determining whether, from the perspective of a reasonable person in the place of the claimant, an infringement of her or his human dignity can be found. In this case, it should be remembered that we should not focus on whether corporal punishment infringes a child's dignity or whether the legislative purpose has properly weighed competing interests, but rather, whether the distinction at issue — the government's explicit choice not to criminalize some assaults against children — violates their dignity.

(1) Nature of the Interest at Stake

224 Clearly, there is a significant interest at stake in the case at bar. The withdrawal of the protection of the criminal law for incursions on one's physical integrity would lead the reasonable claimant to believe that her or his dignity is being harmed. Section 43 sends the message that a child's physical security is less worthy of protection, even though it is seen as a fundamental right for all others.

(2) Pre-existing Disadvantage, Vulnerability, Stereotyping or Prejudice Experienced by the Individual or Group

225 Children as a group face pre-existing disadvantage in our society. They have been recognized as a vulnerable group time and again by legislatures and courts. Historically, their vulnerability was entrenched by the traditional legal treatment of children as the property or chattel of their parents or guardians. Fortunately, this attitude has changed in modern times with a recognition that children, as individuals, have rights, including the right to have their security and safety protected by their parents, families and society at large. This recognition is illustrated by several decisions of this Court (see, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.); *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519, 2000 SCC 48 (S.C.C.); *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.)), by government policy and laws (for example, specific criminal law protections, family law reforms, and child protection services), and by international

legal authorities (see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, Art. 24).

226 However, by permitting incursions on children's bodies by their parents or teachers, s. 43 appears to be a throwback to old notions of children as property. Section 43 reinforces and compounds children's vulnerability and disadvantage by withdrawing the protection of the criminal law. Moreover, because the accused is the very person most often charged with the control and trusteeship of the child, being deprived of the legal protection to which everyone else is presumptively entitled exacerbates the already vulnerable position of children. The entitlement to protection is derived by virtue of our status as persons and the status of children as persons deserves equal recognition.

(3) Proposed Ameliorative Purposes or Effects

227 This contextual factor was described in *Law v. Canada (Minister of Employment & Immigration)*, *supra*, at para. 72, as follows:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.
>
> In other words, this contextual factor is aimed mainly at recognizing the importance and value of affirmative government measures to ameliorate the position of already disadvantaged groups. This particular factor is a negative one: the presence of an ameliorative purpose or effect for a more disadvantaged group will mitigate against a finding of dignity infringement, but the lack of an ameliorative purpose or effect has a merely neutral effect on the dignity analysis.

228 In this case, the only other groups that could be said to be affirmatively benefiting from s. 43 are parents and teachers charged with assaulting a child and entitled to raise a s. 43 defence. It is difficult to see, however, how they, as a group, could be seen as more disadvantaged than children, as a group. Therefore, this factor does not apply and has only a neutral impact on the analysis. Arguments that s. 43 ameliorates the position of children facing family violence by avoiding conflict between the family and the criminal justice system is best considered under s. 1 as it deals with justifications for the section *vis-à-vis* the claimant group itself rather than a more disadvantaged group.

(4) Correspondence to Actual Needs, Capacities or Circumstances of the Claimant

229 The respondent argues that s. 43 is based on the inherent capacities and circumstances of childhood and thus cannot be discriminatory or harmful to human dignity. It argues that s. 43 is an age-appropriate response to the unique circumstances of children's psychological development and limitations and their basic need to live with their parents and to be subject to the responsibility mandated to parents to make decisions for a child's education and well-being.

230 This may be true for a more circumscribed defence limited to very minor or mild uses of force, such as restraining a child from running into the road or securing her or him into a car seat. However, as discussed, s. 43 as it currently stands permits a broader range of assaults to be justified by its terms. There is a general consensus among experts that the only benefit of mild to moderate uses of force, such as spanking, is short-term compliance. Anything more serious is not only not conducive to furthering the education of children, but also potentially harmful to their development and health (trial judge (2000), 49 O.R. (3d) 662 (Ont. S.C.J.), at para. 17). It cannot be seriously argued that children need corporal punishment to grow and learn. Indeed, their capacities and circumstances would generally point in the opposite direction — that they can learn through reason and example while feeling secure in their physical safety and bodily integrity.

231 By condoning assaults on children by their parents or teachers, s. 43 perpetuates the notion of children as property rather than human beings and sends the message that their bodily integrity and physical security is to be sacrificed to the will of their parents, however misguided. In the words of Dickson J. (as he then was) in *R. v. Ogg-Moss*, [1984] 2 S.C.R. 173 (S.C.C.), at p. 187, s. 43 creates a category of "second-class citizens" that must suffer a "consequent attenuation of [their] right to dignity and

physical security". Far from corresponding to the actual needs and circumstances of children, s. 43 compounds the pre-existing disadvantage of children as a vulnerable and often-powerless group whose access to legal redress is already restricted.

232 All of the above points to a finding of discriminatory treatment in purpose and effect. By justifying what would otherwise amount to criminal assault, s. 43 encourages a view of children as less worthy of protection and respect for their bodily integrity based on outdated notions of their inferior personhood. I will now proceed to discuss why this infringement of s. 15 is not justified as a reasonable limit under s. 1 of the *Charter*.

III. Section 1

233 The analysis under s. 1 determines whether the means chosen to fulfill a legislative objective constitutes a reasonable limit on a *Charter* right in a free and democratic society. Pursuant to the well-established *Oakes* test, this analysis consists of two broad inquiries: the first inquires into whether the objective is sufficiently pressing and substantial, and the second examines the proportionality between the objective sought and the means chosen (*R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), at pp. 138-39).

A. Pressing and Substantial Objective

234 The trial judge determined that the legislative objective behind s. 43 was as follows (at para. 47):

> Having regard to the history of the legislation, I conclude that Parliament's purpose in maintaining s. 43 is to recognize that parents and teachers require reasonable latitude in carrying out the responsibility imposed by law to provide for their children, to nurture them, and to educate them. That responsibility, Parliament has decided, cannot be carried out unless parents and teachers have a protected sphere of authority within which to fulfill their responsibilities.

Considering the important place of the family unit, both legally and socially, I accept that this is a pressing and substantial objective. The child developmental process is unique and the state should not intrude unnecessarily into the parental or supervisory role. It is understandable for Parliament to lend parents and caregivers a measure of flexibility in the private exercise of child-rearing.

235 The respondent also asserted that a central aspect of this objective is to protect children and families from the intrusion of the criminal law and the damaging effect of criminal sanctions in respect of conduct that the evidence demonstrates is not harmful. This line of argument seeks to impermissibly shift the nature of the legislative purpose from one of *parental rights* to one of *child protection*. This is not merely a shift in the emphasis of the legislative objective but a significant reclassification of it. At the time s. 43 was passed, the objective of affording parents and teachers reasonable latitude was based in traditional notions of children as property, capable of learning through physical violence, which was left to parents and teachers to mete out at their discretion. The heading in the *Code* under which s. 43 is placed — "Protection of Persons in Authority" — confirms that this justification was aimed at protecting parents and teachers from prosecution and not to protect children from the intrusion of the criminal law. This alternate objective put forth by the respondent attempts to portray a child-centred approach to s. 43, which was clearly never the original intent of the legislator. That being said, it may be that considerations such as the negative effect of the criminal justice system and the existence of alternatives for protecting children from abuse and harm will constitute part of the context in examining whether the means chosen are proportional to the objective.

B. Proportionality

(1) Rational Connection Between the Means Chosen and the Objective Sought

236 There does appear to be a rational connection between the objective of giving parents and teachers reasonable latitude in caring for children and limiting the application of the criminal law in the parent-child or teacher-pupil relationship. It is logical that providing parents and teachers with a sphere of immunity from criminal sanction will increase the domain of their authority in dealing with their children or students.

(2) Minimal Impairment

237 It is well established that Parliament need not always choose the absolutely least intrusive means to attain its objectives but must come within a range of means which impair *Charter* rights as little as is reasonably possible. On the one hand, a greater degree of deference may be afforded in this assessment when, as here, there are a number of competing interests, including the equality of the child, the privacy of the family unit, and the potential liberty consequences for an accused. On the other hand, a serious infringement to such a basic right as physical integrity against a vulnerable group such as children cannot be easily justified. When faced with these circumstances, the court should not be overly deferential in its approach.

238 Here it is clear that less intrusive means were available that would have been more appropriately tailored to the legislative objective. Section 43 could have been defined in such a way as to be limited only to very minor applications of force rather than being broad enough to capture more serious assaults on a child's body. Indeed, it could have been better tailored in terms of those to whom it applies (all children, including infants), those whom it protects (e.g., teachers are given the same latitude as parents), and the scope of conduct it justifies (i.e., spanking and other assaults that can entail pain or harm to the child).

239 The respondent argues s. 43 is merely indirect in its effect and is akin to an underinclusive application of the criminal law of assault. However, I would make the following comments in response. First, we are not dealing with a legislative omission here, but rather an explicit age-based distinction withdrawing the protection of a *Code* provision. Section 43 is the only justification in the *Code* whose purpose and effect is to create a distinction on an enumerated ground. Second, because of the fundamental nature of physical integrity and bodily autonomy for all persons, including children, any derogation, especially when based on an enumerated or analogous ground, should be regarded with suspicion.

240 It was also argued that this Court should acknowledge that provincial child protection legislation and federal education initiatives are in place to protect children from abuse in a way which is less disruptive to the family unit than the criminal law. This may have been a more important consideration at this stage if we were dealing with circumstances that were less clear. If the Court had been called upon to engage in a delicate balancing exercise between competing options and values open to the government, then the existence of less intrusive, parallel alternatives may have had a significant impact on the assessment of the constitutional validity of s. 43. However, the *Charter* infringement in this case is discriminatory at a very direct and basic level. It clearly impairs the equal rights of children to bodily integrity and security in a much more intrusive way than necessary to achieve a valid legislative objective. The provincial and policy mechanisms available do not change this effect.

(3) Proportionality Between the Salutary and Deleterious Effects

241 Although not strictly necessary to proceed to this part of the *Oakes* test, I will briefly consider the salutary and deleterious effects of the application of s. 43. This assessment also supports my conclusion. The deleterious effects impact upon such a core right of children as a vulnerable group that the salutary effects must be extremely compelling to be proportional. Although there is a benefit to parents, children, teachers and families to escape the unnecessary intrusion of the criminal law into the private realm of child-rearing, when there is harm to a child this is precisely the point where the disapprobation of the criminal law becomes necessary. It may not be necessary in a given set of circumstances for the full weight of the criminal justice system to be brought down on an accused who would otherwise be protected under s. 43, and that can be determined by child protection agencies, the police and the prosecutor, taking into account the best interests of the child. However, it is the discrimination represented by s. 43 that produces the most drastic effect; it sends the message that children, as a group, are less worthy of protection of their bodies than anyone else.

IV. Remedy

242 The striking down of s. 43 is the only appropriate remedy in this case. In other words, s. 43 should be severed from the rest of the *Code*. It does not measure up to *Charter* standards and, thus, must cede to the supremacy of the Constitution to the extent of any inconsistency (s. 52). In choosing a remedy, the Court must be guided not only by the purposes of the *Charter* but by the purposes of the legislation and considerations of the proper institutional division of labour between the courts and legislatures (see *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.); see also R.J. Sharpe, K.E. Swinton and K. Roach, *The Charter of Rights and Freedoms* (2nd ed. 2002), c. 17).

243 Although reading down s. 43, such that its scope would be similar to the "interpretation" proposed by the majority, would bring that provision in line with constitutional requirements, it is not the place of this Court to craft a new provision to replace the one intended to be created by Parliament. As noted, a restricted scope to s. 43 could have been one less intrusive means for minimally impairing the equality rights of children under this scheme. However, this is not to say that this was the only means open to Parliament nor that it would necessarily be free from all constitutional scrutiny if chosen. The balance to be struck between the number of competing interests at play requires a contextual approach be taken to the assessment of constitutional validity and the measurement of the "extent of the inconsistency". It is not the Court's role to deem where this balance must be struck. In this case, s. 43 as it stands clearly violates the *Charter* and must fall. Parliament can then choose how it wishes to respond to this result.

244 In some cases it is possible for the Court to delay the immediate effect of a declaration of invalidity. Generally, the Court should be wary of allowing or appearing to condone a continued state of affairs that violates *Charter* rights. Therefore, I would suggest temporary suspensions of invalidity should generally be confined to only those circumstances where it is required by the potential impact and consequences of an immediate declaration of invalidity. For instance, if the immediate nullification of the law could lead to chaos or serious threat to public safety, then there may be good justification for suspending the declaration (see *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.); *R. v. Swain*, [1991] 1 S.C.R. 933 (S.C.C.)). Similarly, it may be appropriate to temporarily suspend a declaration of invalidity where it would be less intrusive on the separation of powers to allow the legislature a stated period of time to reconsider its policy and budgetary choices in light of constitutional parameters (see e.g. *M v. H*, [1999] 2 S.C.R. 3 (S.C.C.)). In this case, the circumstances are not compelling enough to permit continued violations of the equality rights of children. There would be no immediate harm to the public nor budgetary consequences to the government to declare s. 43 of no force and effect.

V. Disposition

245 For these reasons, I would allow the appeal. Because I find that s. 43 violates the equality guarantees of children under s. 15(1) of the *Charter*, and it is not saved as a reasonable limit under s. 1, it is unnecessary for me to consider the other constitutional questions posed. The most appropriate and least intrusive remedy in this case is to strike down s. 43.

246 I would answer the constitutional questions as follows:

1. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

3. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 12 of the *Canadian Charter of Rights and Freedoms*?

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: Because of the answers to questions 5 and 6, it is unnecessary to decide this question.

5. Does s. 43 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe the rights of children under s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX A

***Criminal Code*, R.S.C. 1985,—c. C-46**	***Code criminel*, L.R.C. 1985,—ch. C-46**
—	—
43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.	*43*. Tout instituteur, père ou mère, ou toute personne qui remplace le père ou la mère, est fondé à employer la force pour corriger un élève ou un enfant, selon le cas, confié à ses soins, pourvu que la force ne dépasse pas la mesure raisonnable dans les circonstances.
—	—
265. (1) A person commits an assault when	*265*. (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas:
—	—
(*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;	*a*) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;
—	—
(*b*) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or	*b*) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;
—	—
(*c*) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.	*c*) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie.

Canadian Charter of Rights and Freedoms	***Charte canadienne des droits et libertés***
—	—
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	*7*. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
—	—
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	*12*. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.
—	—
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	*15*. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

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Most Negative Treatment: Distinguished
Most Recent Distinguished: Crouch v. Snell | 2015 NSSC 340, 2015 CarswellNS 995, 79 C.P.C. (7th) 249, 346 C.R.R. (2d) 273, 1157 A.P.R. 357, 367 N.S.R. (2d) 357, [2015] N.S.J. No. 536, 262 A.C.W.S. (3d) 627 | (N.S. S.C., Dec 10, 2015)

1992 CarswellNS 15
Supreme Court of Canada

Canada v. Pharmaceutical Society (Nova Scotia)

1992 CarswellNS 15, 1992 CarswellNS 353, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 15 C.R. (4th) 1, 16 W.C.B. (2d) 460, 313 A.P.R. 91, 34 A.C.W.S. (3d) 1092, 43 C.P.R. (3d) 1, 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36, J.E. 92-1019, EYB 1992-67391

NOVA SCOTIA PHARMACEUTICAL SOCIETY, PHARMACY ASSOCIATION OF NOVA SCOTIA, LAWTONS DRUG STORES LIMITED, WILLIAM H. RICHARDSON, EMPIRE DRUGSTORES LIMITED, WOODLAWN PHARMACY LIMITED, NOLAN PHARMACY LIMITED, CHRISTOPHER D.A. NOLAN, BLACKBURN HOLDINGS LIMITED, WILLIAM G. WILSON, WOODSIDE PHARMACY LIMITED and FRANK FORBES v. R.

ATTORNEY GENERAL FOR ONTARIO and ATTORNEY GENERAL FOR ALBERTA (Intervenors)

ASSOCIATION QUÉBÉCOISE DES PHARMACIENS PROPRIÉTAIRES, CUMBERLAND DRUGS (MERIVALE) LTD., KANE'S SUPER DRUGMART CORP. LTD., LES ENTREPRISES NORPHARM INC., ESCOMPTE CHEZ LAFORTUNE INC., FAMILI-PRIX INC., LE GROUPE JEAN COUTU (P.J.C.) INC., GROUPE PHARMACEUTIQUE FOCUS INC., LES MAGASINS KOFFLER DE L'EST INC., McMAHON ESSAIM INC., SUPER ESCOMPTE BROUILLET INC., B. MAYRAND INC., SUPERPHARM (MONTRÉAL) LTÉE, UNIPRIX INC., PIERRE BOSSÉ, FRANÇOIS-JEAN COUTU, CLAUDE GAGNON, GUY LANOUE, MICHEL LESIEUR, GUY-MARIE PAPILLON and JEAN-GUY PRUD'HOMME (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

Heard: December 4, 1991
Judgment: July 9, 1992
Docket: Doc. 22473

Counsel: *Joel Fichaud*, *Harry Wrathall, Q.C.* and *Catherine Walker*, for appellants.
Michael R. Dambrot, Q.C., *Calvin S. Goldman, Q.C.* and *John S. Tyhurst*, for the Crown.
M. Philip Tunley and *David B. Butt*, for intervenor Attorney General for Ontario.
Bart Rosborough, for intervenor Attorney General for Alberta.
Yves Bériault and *Madeleine Renaud*, for intervenor Association québécoise des pharmaciens et al.

Subject: Intellectual Property; Criminal; Property; Civil Practice and Procedure; Corporate and Commercial
Headnote
Practice --- Practice on appeal — Appeal to Supreme Court of Canada — Powers and duties of Supreme Court of Canada on appeal — Quashing appeal
Trade and Commerce --- Combines and competition legislation — Constitutional issues — Charter of Rights and Freedoms
Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Under s. 7 law cannot be too vague — Law having to give sufficient guidance for legal debate — Combines Investigation Act offence of conspiracy

to lessen competition unduly not violating s. 7 on grounds of vagueness — "Unduly" representing intelligible principle — Combines Investigation Act, R.S.C. 1970, c. C-23.

Charter of Rights and Freedoms — Demonstrably justified reasonable limit — Prescribed by law — Law having to be not too vague. .

Charter of Rights and Freedoms — Right to be informed of offence — Indictment for conspiracy to unduly lessen competition under Combines Investigation Act not violating s. 11(a) of Charter — Combines Investigation Act, R.S.C. 1970, c. C-23.

Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Fault — Objective requirement under Combines Investigation Act of reasonable knowledge that agreement likely to lessen competition not violating s. 7 — Combines Investigation Act, R.S.C. 1970, c. C-23.

The 12 accused were charged with two counts of conspiracy to prevent or lessen competition unduly, contrary to s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Both counts related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services. A judge of the Trial Division of the Nova Scotia Supreme Court granted the motion of the accused persons to quash the indictment on the basis that ss. 32(1)(*c*), 32(1.1) and 32(1.3) of the Act (now ss. 45(1)(*c*), 45(2) and 45(2.2) of the *Competition Act*, R.S.C. 1985, c. C-34) violated ss. 7, 11(*a*) and 11(*d*) of the *Charter of Rights and Freedoms*. The Appeal Division of the Nova Scotia Supreme Court allowed the Crown's appeal. The main issues on the accused's further appeal were whether s. 32(1)(*c*) of the Act infringed s. 7 of the *Charter* because of the vagueness arising from the use of the word "unduly" and whether that section violated s. 7 by reason of the mens rea required by the offence.

Held:

The appeal was dismissed.

Vagueness

Vagueness can be raised under s. 7 of the *Charter* since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter* in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test for s. 1. Vagueness, when raised under s. 7 or under s. 1 in limine, involves similar considerations and is a single concept. Vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth.

What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the state, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. References to a "doctrine of overbreadth" are superfluous.

The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion. Aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a subjective aspect, that is, an understanding that certain conduct is the subject of legal restrictions. The crux of the concern for limitation of enforcement discretion is that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state and reflects the prevailing argumentative, adversarial framework for the administration of justice. No higher requirement as to certainty can be imposed on law in our modern state. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. The threshold for finding a law vague is relatively high. Factors to be considered include the need for flexibility and the interpretive role of the court, the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and the possibility that many varying judicial interpretations of a given disposition may exist and perhaps co-exist.

Section 32(1)(*c*) of the Act and its companion interpretive provision s. 32(1.1) (now s. 45(2)) do not violate s. 7 of the *Charter* on grounds of vagueness. Section 32(1)(*c*) embodies a general standard which represents an intelligible principle, one that carries meaning and has conceptual force. The word "unduly" connotes seriousness. Considering further that s. 32(1)(*c*) of the Act is one of the oldest and most important parts of Canadian public policy in the economic field, and that it mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement, Parliament has sufficiently delineated the area

of risk and the terms of debate to meet the constitutional standard. Moreover, the rest of the Act and the case law have outlined a process of examination of market structure and behaviour, thus making the section even more precise.

For these reasons, the indictment did not infringe s. 11(*a*) of the *Charter*.

Mens Rea

The mens rea issue was properly before the court even though the appellant had only raised the vagueness issue as a ground of appeal. The respondent Crown could properly file a notice of intention, as it had, to request a variation of the Court of Appeal judgment on this issue, as long as it ultimately sought to uphold the disposition of the case in the Court of Appeal. Even without such a notice, the court would have retained complete discretion under R. 29(1) of the *Rules of the Supreme Court of Canada* to treat the whole case as open. A respondent may advance any argument to sustain the judgment below, and is not limited to the appellant's points of law.

The mens rea required by s. 32(1)(*c*) is not inconsistent with s. 7 of the *Charter*. Under s. 7, an element of fault must exist before punishment can be justified. However, a minimum fault requirement with respect to every criminal or regulatory offence satisfies the requirements of s. 7. Fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence. Here, s. 32(1)(*c*) required proof of two fault elements: one subjective, the other objective. To satisfy the subjective element of the offence, the Crown had to prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that was established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence to the contrary. In order to satisfy the objective element of the offence, the Crown had to establish that, on an objective view of the evidence, the accused intended to lessen competition unduly. This surely did not impose too high a burden on the Crown. In proving the actus reus that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

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s. 1

s. 2

s. 7

s. 8

s. 11(*a*)

s. 11(*d*)

s. 11(*h*)

s. 12

Combines Investigation Act, R.S.C. 1970, c. C-23 [R.S.C. 1985, c. C-34; retitled R.S.C. 1985, c. 19 (2nd Supp.), s. 19 (now the Competition Act)] —

s. 30(2) [R.S.C. 1985, c. C-34, s. 34(2)]

s. 32 [R.S.C. 1985, c. C-34, s. 45]

s. 32(1) [am. S.C. 1974-75-76, c. 76, s. 14(1)] [R.S.C. 1985, c. C-34, s. 45(1)]

s. 32(1)(*c*) [re-en. S.C. 1974-75-76, c. 76, s. 14(1)] [R.S.C. 1985, c. C-34, s. 45(1)(*c*)]

s. 32(1.1) [en. S.C. 1974-75-76, c. 76, s. 14(2)] [R.S.C. 1985, c. C-34, s. 45(2)]

s. 32(1.3) [en. S.C. 1986, c. 26, s. 30(3)] [R.S.C. 1985, c. C-34, s. 45(2.2); en. R.S.C. 1985, c. 19 (2nd Supp.), s. 30(3)]

s. 32(2) [R.S.C. 1985, c. C-34, s. 45(3)]

s. 32(3) [R.S.C. 1985, c. C-34, s. 45(4)]

s. 32(6) [en. S.C. 1974-75-76, c. 76, s. 14(7)] [R.S.C. 1985, c. C-34, s. 45(7)]

s. 32.01 [en. S.C. 1986, c. 26, s. 31] [R.S.C. 1985, c. C-34, s. 45.1; en. R.S.C. 1985, c. 19 (2nd Supp.), s. 31]

s. 51 [en. S.C. 1986, c. 26, s. 47] [R.S.C. 1985, c. C-34, s. 79; en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45]

s. 51(1)(*a*) [en. S.C. 1986, c. 26, s. 47] [R.S.C. 1985, c. C-34, s. 79(1)(*a*); en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45]

s. 51(7) [en. S.C. 1986, c. 26, s. 47] [R.S.C. 1985, c. C-34, s. 79(7); en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45]

s. 70 [en. S.C. 1986, c. 26, s. 47] [R.S.C. 1985, c. C-34, s. 98; en. R.S.C. 1985, c. 19 (2nd Supp.), s. 45]

Competition Act, R.S.C. 1985, c. C-34 [retitled R.S.C. 1985, c. 19 (2nd Supp.), s. 19 (formerly the Combines Investigation Act)] —

s. 19

s. 45(1)(*c*)

s. 45(2)

s. 45(2.2)

s. 79

s. 79(7)

s. 98

Consumer Protection Act, R.S.Q. c. P-40.1 —

s. 248

s. 249

Criminal Code, R.S.C. 1970, c. C-34 [R.S.C. 1985, c. C-46] —

s. 193 [R.S.C. 1985, c. C-46, s. 210]

s. 195.1(1)(*c*) [en. S.C. 1985, c. 50, s. 1] [R.S.C. 1985, c. C-46, s. 213(1)(*c*); en. R.S.C. 1985, c. 51 (1st Supp.), s. 1]

s. 251(4)(*c*) [R.S.C. 1985, c. C-46, s. 287(4)(*c*)]

Criminal Code, R.S.C. 1985, c. C-46 —

s. 19

s. 163(8)

s. 219

s. 319(2)

s. 319(3)

Prevention and Suppression of Combinations formed in restraint of Trade, Act for the, S.C. 1889, c. 41.

Public Service Employment Act, R.S.C. 1985, c. P-33 —

s. 33

Sherman Act, 15 U.S.C. §§ 1-7 (1890).

United States Constitution —

First Amendment

Fifth Amendment

Eighth Amendment

Fourteenth Amendment

Treaties and conventions considered:

European Convention on Human Rights, 1950, 213 U.N.T.S. 222 —

art. 8(2)

art. 9(2)

art. 10(2)

art. 11(2)

European Convention on Human Rights, Protocol No. 4, Europ. T.S. No. 46 —

art. 2(3)

Treaty of Rome, 1957, 298 U.N.T.S. 11 —

art. 85

Rules considered:

Civil Code of Lower Quebec —

art. 1053

Rules of the Supreme Court of Canada, SOR/83-74 —

R. 29(1) [re-en. SOR/88-247]

R. 29(2)

Regulations considered:

Department of Transport Act, R.S.C. 1970, c. T-15 —

Government Airport Concession Operations Regulations, SOR/79-373

s. 7

Merger Guidelines, 49 Fed. Reg. 26823 (1984).

Words and phrases considered:

DOCTRINE OF VAGUENESS

The "doctrine of vagueness" . . . is a principle of fundamental justice under s. 7 [of the *Charter*] and it is also a part of s. 1 in limine ("prescribed by law").

. . . . .

The doctrine of vagueness can . . . be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the law best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

LEGAL DEBATE

A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria . . . The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

OVERBREADTH

Overbreadth in American law is tied to the First Amendment. It is grounds to obtain what is termed "facial invalidation" of a statute, as opposed to a declaration that the statute is unconstitutional in the case of the particular plaintiff, which is the usual remedy. *Flipside v. Village of Hoffman Estates*, 455 U.S. 489(1982), indicates how overbreadth interacts with vagueness in First Amendment cases. The court wrote at pp. 494-495:

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all its applications.

Overbreadth ties in to the taxonomy of protected and unprotected conduct and expression developed by American courts under the First Amendment. Some conduct or expression received First Amendment protection and some does not, and to the extent that a statute substantially touches upon protected conduct and cannot be severed or read down, it will be declared void (see L.H. Tribe, American Constitutional Law, 2d ed. (Westbury, N.Y. . . . : Foundations Pr. Inc., 1987) at p. 1022).

. . . . .

The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in . . . *R. v. Zundel* (1987), 29 C.R.R. 349 . . . at p. 372 . . .

Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being so closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

. . . . .

What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. Overbreadth has no independent existence. References to a "doctrine of overbreadth" are superfluous.

PRESCRIBED BY LAW

I . . . note that the European Court of Human Rights (hereinafter "E.C.H.R.") has adopted the same approach to issues of vagueness [as that adopted in this case], in the course of treatment of words such as "prescribed by law", found in many limitation clauses of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 . . . such as arts. 8(2), 9(2), 10(2) [and] 11(2) . . . The E.C.H.R. gave this phrase a substantive content, which went beyond a mere inquiry as to whether a law existed or not.

The E.C.H.R. developed its conception of "prescribed by law" in the course of two famous cases, the *Sunday Times Case* (1979), Ser. A, No. 30, and the *Malone Case*, judgment of (August 2, 1984), Ser. A, No. 82. In the former, the E.C.H.R. drew attention to the two aspects of fair notice, namely formal notice ("accessibility") and substantive notice ("foreseeability"). It wrote at p. 31:

In the Court's opinion, the [above] are two of the requirements that flow from the expression "prescribed by law".

STANDARDLESS SWEEP

Lamer J. in the [*(Prostitution Reference, Committee for the Commonwealth of Canada)*] used the phrase "standardless sweep", first coined by the United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566(1974), at p. 575, to describe the limitation of enforcement discretion rationale for the doctrine of vagueness. It has become the prime concern in American constitutional law (*Kolender v. Lawson*, 461 U.S. 352at pp. 357-358). Indeed today it has become paramount, given the considerable expansion in the discretionary powers of enforcement agencies that has followed the creation of the modern welfare state.

UNDULY

The meaning of "unduly" [in the *Combines Investigation Act*, [title changed to *Competition Act*, 1986, c. 26, s. 19], R.S.C. 1970, c. C-23, s. 32(1)] has usually been described by reference to various synonyms. In [*Weidman v. Shragge* (1912), 46 S.C.R. 1] Anglin J. adopted the string of synonyms given in *R. v. Elliot* (1905), 9 C.C.C. 505 (Ont. C.A.), at p. 520 (improper, inordinate, excessive or oppressive) . . . I will adopt the reasons of Clarke C.J.N.S. in the instant case at p. 380 C.R.R., p. 157 C.C.C.:

While the word "unduly" is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree.

Clarke C.J.N.S. has touched upon the very nature of "unduly": while this word does not have a precise technical meaning, it does have a common meaning, and it expresses a notion of seriousness or significance.

VAGUE

"Flexibility and vagueness are not synonymous", wrote Beetz J. . . . [in *R. v. Morgentaler* (1988), 31 C.R.R. 1 at 59 (S.C.C.)].

. . . . .

. . . Sopinka J. . . . [in *Osborne v. Canada (Treasury Board)* (1991), 4 C.R.R. (2d) 30 (S.C.C.), stated] at pp. 45-46 . . . :

Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.

VAGUENESS

The doctrine of vagueness can . . . be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of

the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

Appeal from judgment reported at (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352 (C.A.), allowing Crown appeal of judgment quashing indictment under *Combines Investigation Act*, reported at (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, 98 N.S.R. (2d) 296, 263 A.P.R. 296 (T.D.).

The judgment of the court was delivered by *Gonthier J.*:

I. Facts And Proceedings

1 The 12 appellants were indicted on May 31, 1990, with two counts of conspiracy to prevent or lessen competition unduly, contrary to s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23. Both counts related to the sale and offering for sale of prescription drugs and pharmacists' dispensing services between January 1, 1974 and June 16, 1986, for the first, and between July 1, 1976 and June 16, 1986, for the second. The trial was set to begin in October 1990.

2 On August 21, 1990, the appellants made a motion for an order to quash the indictment, on the basis that ss. 32(1)(*c*), 32(1.1) and 32(1.3) of the Act violated ss. 7, 11(*a*) and 11(*d*) of the *Canadian Charter of Rights and Freedoms* and were therefore invalid. The arguments raised revolved essentially on the issues of vagueness and mens rea. On September 5, 1990, Roscoe J. of the Nova Scotia Supreme Court, Trial Division, allowed the motion and quashed the indictment: (sub nom. *R. v. Nova Scotia Pharmaceutical Society*) (1990), 59 C.C.C. (3d) 30, 73 D.L.R. (4th) 500, 32 C.P.R. (3d) 259, (sub nom. *R. v. Nova Scotia Pharmaceutical Society (No. 2))*) 98 N.S.R. (2d) 296, 263 A.P.R. 296. The respondent appealed to the Nova Scotia Supreme Court, Appeal Division. On April 24, 1991, a unanimous bench (Clarke C.J.N.S., Jones and Hallett JJ.A.) allowed the appeal: (sub nom. *R. v. Pharmaceutical Society (Nova Scotia))* (1991), 64 C.C.C. (3d) 129, 102 N.S.R. (2d) 222, 279 A.P.R. 222, 80 D.L.R. (4th) 206, 36 C.P.R. (3d) 173, 7 C.R.R. (2d) 352. A notice of appeal was filed in this court on May 22, 1991.

II. Relevant Statutory Provisions

Combines Investigation Act

3

> 32.(1) Every one who conspires, combines, agrees or arranges with another person
>
> . . . . .
>
> (*c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property,
>
> . . . . .
>
> is guilty of an indictable offence and is likely to imprisonment for five years or a fine of one million dollars or to both.

The Act was amended in 1976 by S.C. 1974-75-76, c.76, also known as "Stage I" of competition law reform. Section 32(1.1) was then added:

> (1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the conspiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

In 1986, in the course of "Stage II" of the reform, S.C. 1986, c.26, further added s. 32(1.3) to the Act (renamed the *Competition Act*):

> (1.3) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination,

agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

These sections are now respectively known as ss. 45(1)(*c*), 45(2) and 45(2.2) of the *Competition Act*, R.S.C. 1985, c. C-34.

III. Judgments Below

Nova Scotia Supreme Court, Trial Division (1990), 59 C.C.C. (3d) 30

4 On the mens rea issue, Roscoe J. reviewed the case law and concluded that s. 32(1)(*c*) of the Act requires the Crown to prove only that the accused intended to enter into an agreement, the effect of which, if carried out, would be to lessen competition, but not that it also intended to prevent or lessen competition unduly. Relying on *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 81 N.R. 115, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, she found that s. 32(1)(*c*) creates a truly criminal offence, and that the absence of a subjective mens rea requirement with respect to the lessening of competition leaves the possibility that the "morally innocent" be convicted. She therefore concluded that s. 32(1)(*c*) violates s. 7 of the *Charter*.

5 On the vagueness issue, Roscoe J., after having considered the *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123, 77 C.R. (3d) 1, 56 C.C.C. (3d) 65, [1990] 4 W.W.R. 481, 109 N.R. 81, 68 Man. R. (2d) 1, 48 C.R.R. 1 (hereinafter the *Prostitution Reference*), examined the case law interpreting the word "unduly" in s. 32(1)(*c*) of the Act. She was of the opinion that the only test that provided a sufficient degree of certainty to meet the standards of s. 7 was the "virtual elimination of competition" test enunciated by Cartwright J. in *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403, 26 C.R. 1, 118 C.C.C. 321, 8 D.L.R. (2d) 449. Since that test had been repealed by the enactment in 1976 of s. 32(1.1), Roscoe J. held that s. 32(1)(*c*) was too vague and violated s. 7 of the *Charter*. She also held the indictment too vague, on the basis that the mere repetition of the words of s. 32(1)(*c*) in the indictment could not give sufficient notice and information to the accused, and deprived them of their right to a full answer and defence under ss. 7, 11(*a*) and 11(*d*) of the *Charter*.

6 Roscoe J. considered that s. 1 of the *Charter* could not be applied to cure the violations of s. 7 flowing from the mens rea requirement, following the dictum of Lamer J. (as he then was) in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, 36 M.V.R. 240, [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 63 N.R. 266, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, *(*sub nom. *Constitutional Question Act, R.S.B.C. 1979, Chap. 63))* [1986] D.L.Q. 90 (headnote), as well as appellate pronouncements on the issue. She also considered that the vagueness of s. 32(1)(*c*) could not make it a limit "prescribed by law" within the meaning of s. 1 of the *Charter*, and thus that this violation of s. 7 could not be saved either. She declared ss. 32(1)(*c*) and 32(1.1) of the Act invalid and of no force and effect, and quashed the indictment.

Supreme Court of Nova Scotia, Appeal Division (1991), 64 C.C.C. (3d) 129

7 For the court, on the mens rea issue, Clarke C.J.N.S. viewed *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, [1980] 2 S.C.R. 644, 16 C.R. (3d) 128, 12 B.L.R. 171, 54 C.C.C. (2d) 373, 115 D.L.R. (3d) 21, 53 C.P.R. (2d) 1, 32 N.R. 562, as having effected a change in law. Following the decision of this court, he held that s. 32(1)(*c*) requires the Crown to prove that the accused intended unduly to lessen competition. Furthermore, Clarke C.J.N.S. characterized s. 32(1)(*c*) as a criminal offence, even though it is found in a regulatory statute, citing *Knox Contracting Ltd. v. R.*, [1990] 2 S.C.R. 338, 90 D.T.C. 6447, *(*sub nom. *Knox Contracting Ltd. v. Canada)* 110 N.R. 171, 58 C.C.C. (3d) 65, [1990] 2 C.T.C. 262, 73 D.L.R. (4th) 110, 106 N.B.R. (2d) 408, 265 A.P.R. 408, in support. In the light of *Vaillancourt* and *R. v. Nguyen*, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332, *(*sub nom. *R. v. Hess; R. v. Nguyen)* [1990] 6 W.W.R. 289, 50 C.R.R. 71, 119 N.R. 353, 46 O.A.C. 13, 73 Man. R. (2d) 1, 3 W.A.C. 1, 59 C.C.C. (3d) 161 , he held that "where a statutory provision creates an offence and imposes the possibility of imprisonment as a penalty upon conviction, some degree of mens rea must attach to each essential element of the offence if the provision is to comply with s. 7 of the Charter." (p. 146 [C.C.C.]). Given his conclusion on the substance of the section, there was no infringement of s. 7.

8 Clarke C.J.N.S. did not rule on the validity of s. 32(1.3) of the Act. Since it effected a substantive change in the law by removing the subjective mens rea requirement with respect to the lessening of competition, this section could not have a retroactive effect, and therefore it did not apply to the charges against the accused.

9 With respect to the vagueness argument, Clarke C.J.N.S. considered that the impugned provision must be assessed in light of the Act as a whole and of the relevant case law. First of all, in ss. 32(2) and 32(3), the Act enumerates subject-matters that will or will not attract the application of s. 32(1). Section 32(1.1) indicates that a virtual elimination of competition is not necessary to constitute the offence.

10 Secondly, case law has established that the inquiry must focus on the effect of the agreement on competition in the related market. A host of considerations then come into play, constituting a framework for decision. Clarke C.J.N.S. could not find s. 32(1)(*c*) vague, as it has been given meaning by the courts for a long period of time, leading to convictions and acquittals. The word "unduly" actually benefits the accused; even though it defies precise measurement, it is of common usage, and denotes a sense of seriousness. Parties to an impugned agreement were in the best position to assess the likely effect on competition.

11 Section 32(1)(*c*) was held by Clarke C.J.N.S. not to be unconstitutionally vague, and consequently the indictment was held not to violate ss. 7, 11(*a*) or 11(*d*) of the *Charter*. The appeal was allowed.

IV. Issues

12 The following constitutional questions were stated by the Chief Justice on July 11, 1991:

1. Is s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(1)(*c*) of the *Competition Act*, R.S.C. 1985, c. C-34) in whole or in part inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. Is s. 32(1.1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(2) of the *Competition Act*, R.S.C. 1985, c. C-34) inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to questions 1 or 2 is yes, is the infringement nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

13 Given the structure of the arguments presented by the parties, I propose to deal with the various issues as follows:

I. The alleged unconstitutional vagueness of ss. 32(1)(*c*) and 32(1.1) of the Act and of the indictment;

II. A. The mens rea required by s. 32(1)(*c*) of the Act; and

B. The constitutionality of the means rea requirement of s. 32(1)(*c*) of the Act.

14 In their notice of appeal, the appellants raised only the vagueness issue as a ground of appeal. By a notice of intention of June 20, 1991, the respondent indicated that it would seek a variation of the appeal judgment on the mens rea issue. The respondent asks this court to hold that s. 32(1)(*c*) does not require the Crown to prove intent to lessen competition, and that s. 32(1)(*c*) nevertheless does not violate the *Charter*. The appellants contend that the respondent was forbidden to raise the mens rea issue without having obtained prior leave from the court under R.29(2) of the *Rules of the Supreme Court of Canada*, SOR/83-74, since the respondent is indeed cross-appealing from the appeal judgment.

15 The respondent, through its notice of intention, is not in fact launching a cross-appeal from the decision of the Supreme Court of Nova Scotia, Appeal Division. It does not seek to modify the disposition of the case. It only aims at varying the reasons given for that disposition. This case falls plainly within R.29(1) of the *Rules of the Supreme Court*. R.29(2), dealing with cross-appeals, has no application here. Upon filing a notice of intention, the respondent could request a variation of the Court of Appeal judgment on the mens rea issue, as long as it ultimately upholds its disposition of the case. Even if the respondent had not filed a notice of intention, the court would have retained under R.29(1) complete discretion to treat the whole case as open,

as was done in *Perka v. R.*, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 55 N.R. 1, 14 C.C.C. (3d) 385, 13 D.L.R. (4th) 1, 28 B.C.L.R. (2d) 205. As Dickson J. (as he then was) wrote at p. 240 [S.C.R.], "it is open to a respondent to advance any argument to sustain the judgment below, and he is not limited to ap pellants' points of law."

16 The mens rea issue is therefore properly before this court.

V. Sections 32(1)(c) And 32(1.1) Of The Act And Vagueness Under S. 7 Of The Charter

17 Since vagueness is a central issue in this case, it is useful to review the relevant principles and their application before dealing with the merits of the case.

A. Vagueness under the Canadian Charter of Rights and Freedoms

18

1. The Case Law of this Court

19 So far eight cases have given rise to discussions of vagueness issues under the *Charter*. A review of them will show that, while the theme of vagueness and the related notion of overbreadth have appeared in many decisions of this court, giving rise to some questions as to the proper place of these concepts within *Charter* analysis, few statements have been made to substantiate the notion of vagueness, and its relationship with overbreadth.

20 Beetz J., in his opinion in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1, 82 N.R. 1, 26 O.A.C. 1, 44 D.L.R. (4th) 385, 31 C.R.R. 1, 37 C.C.C. (3d) 449, responded to the argument that s. 251(4)(*c*) of the *Criminal Code*, R.S.C. 1970, c. C-34, was vague and offended s. 7 of the *Charter*. This section made abortions conditional upon the obtention of a doctor's certificate to the effect that the life or health of the woman was in danger. Beetz J. held that the standard of "likely danger to health" was not unduly vague. Since the law contemplated that the danger to health would be assessed by a medical practitioner exercising a medical judgment, some measure of flexibility was acceptable. "Flexibility and vagueness are not synonymous.", wrote Beetz J. at p. 107 [S.C.R.].

21 In *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, 94 N.R. 167, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, it was submitted that ss. 248 and 249 of the Quebec *Consumer Protection Act*, R.S.Q. c. P-40.1, were too vague to constitute a limit prescribed by law. Sections 248 and 249 forbid commercial advertising directed at persons under 13 years of age. Section 249 lists three factors to be taken into account when determining whether an advertisement was so directed, the last of which is the time and place of the advertisement. Then s. 249 enunciates that the mere fact that the advertisement was printed or broadcast in circumstances where it was intended for persons 13 and over or for all persons does not create a presumption that the advertisement is not directed at persons under 13. It was argued that s. 249 was confusing and left too much scope for discretion. The majority of the court disagreed. It found that the text of the section could be given a sensible construction. On the issue of discretion, Dickson C.J.C., Lamer J. (as he then was) and Wilson J. wrote at p. 983 [S.C.R.]:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no 'limit prescribed by law'.

22 Then came the *Prostitution Reference*, supra, where it was alleged that ss. 193 and 195.1(1)(*c*) of the *Criminal Code*, R.S.C. 1970, c. C-34, were impermissibly vague under s. 7 of the *Charter*. Lamer J. (as he then was) devoted a long passage in his reasons to the "void for vagueness" doctrine. Lamer J. ascribed two rationales for the invalidation of vague laws under s. 7 of the *Charter* at p. 1152 [S.C.R.], that is the need (1) to give citizens fair notice of the consequences of their conduct, so that they may avoid liability and benefit from a full answer and defence should they be tried and (2) to limit law enforcement discretion. He then reviewed the distinction between vagueness and overbreadth. At p. 1155 [S.C.R.], Lamer J. pointed out that

vagueness has been argued both under s. 7 and s. 1 of the *Charter*. He made some remarks on the issue: the vagueness doctrine does not require absolute certainty of laws, the interpretative role of the courts must not be overlooked and the possibility of varying interpretations is not fatal (at pp. 1156-1157 [S.C.R.]). He then proceeded to consider the impugned sections of the Code and found them not in violation of s. 7 of the *Charter* on account of vagueness. For the majority, Dickson C.J.C. endorsed Lamer J.'s analysis. While in dissent, Wilson J. agreed with the majority on this point.

23 Lamer J. also stated that even if the section was not unconstitutionally vague, it could nevertheless be found overly broad under s. 1 analysis. The majority did not consider this to be the case, but WilsonJ. found the provisions too broad to meet the "minimal impairment" test. The *Prostitution Reference* established the doctrine of vagueness as one of the fundamental principles of justice under s. 7 of the *Charter*, and also differentiated vagueness and overbreadth.

24 This distinction came to the fore in *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1 C.R. (4th) 129, 77 Alta. L.R. (2d) 193, [1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1, 117 N.R. 1, 114 A.R. 81, 3 C.R.R. (2d) 193. This time the question was considered under the "minimal impairment" branch of the *Oakes* test (developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 65 N.R. 87, 53 O.R. (2d) 719 (headnote only), 24 C.C.C. (3d) 321, 14 O.A.C. 335, 26 D.L.R. (4th) 200, 19 C.R.R. 308). It had been argued that s. 319(2) of the *Criminal Code*, R.S.C. 1985, c. C-46, was too broad in its ambit ("wilfully promot[ing] hatred against any identifiable group"), and could include expression that bears no relationship with Parliament's objective in enacting the statute. Furthermore, the vagueness of s. 319(2) was also raised. For the majority, Dickson C.J.C. blended both concepts. After a careful analysis of the wording of s. 319(2) and of the defences open to the accused in s. 319(3), Dickson C.J.C. concluded that the subsection did pass the "minimal impairment" test. McLachlin J. in dissent focused more precisely on the overbreadth of the section in her reasons, even though she relied on the same elements as Dickson C.J.C. *Keegstra* does not bring anything new to the principles that had already been developed, and the majority opinion does not distinguish between vagueness and overbreadth quite as clearly as in the *Prostitution Reference*.

25 In *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 75 D.L.R. (4th) 577, 13 C.H.R.R. D/435, 3 C.R.R. (2d) 116, 117 N.R. 191, a companion case to *Keegstra*, McLachlin J. in dissent commented on the proper place of vagueness within *Charter* analysis. She wrote at p. 956 [S.C.R.]:

> [T]he difficulty in ascribing a constant and universal meaning to the terms used [in the impugned section] is a factor to be taken into account in assessing whether the law is 'demonstrably justified in a free and democratic society'. But I would be reluctant to circumvent the entire balancing analysis of the s. 1 test by finding that the words used were so vague as not to constitute a 'limit prescribed by law', unless the provision could truly be described as failing to offer an intelligible standard.

McLachlin J. seems to envision a relatively stringent standard for vagueness, if it is to cut short the s. 1 analysis through a finding that the disposition is not law within the meaning of "prescribed by law".

26 In *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 120 N.R. 241, 77 D.L.R. (4th) 385, 4 C.R.R. (2d) 60, L'Heureux-Dubé J. discussed the vagueness and overbreadth of s. 7 of the *Government Airport Concession Operations Regulations*, SOR/79-373. She was of the opinion that a statutory disposition, if too vague, would not constitute a limit "prescribed by law", while if overbroad, may not pass the *Oakes* test (at p. 208 [S.C.R.]). In her discussion of vagueness, she linked this concept with the rule of law, and restated the dual concerns of fair notice and limitation of enforcement discretion that had been formulated by Lamer J. in the *Prostitution Reference*. As for overbreadth, L'Heureux-Dubé J. considered that this doctrine was more or less subsumed within the "minimal impairment" branch of the *Oakes* test.

27 Further in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, 37 C.C.E.L. 135, 91 C.L.L.C. 14,026, 125 N.R. 241, 82 D.L.R. (4th) 321, 4 C.R.R. (2d) 30, the vagueness and overbreadth of s. 33 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, were at issue under the s. 1 analysis. For the majority, SopinkaJ. adopted the statements made by McLachlin J. in *Taylor* and added at pp. 94-95 [S.C.R.]:

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools. In these circumstances, there is no 'limit prescribed by law' and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

28 In its recent decision in *R. v. Butler*, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, [1992] 2 W.W.R. 577, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, this court followed its case law and found that the words "undue exploitation of sex" in s. 163(8) of the *Criminal Code*, R.S.C. 1985, c. C-46, constituted a limit prescribed by law within the meaning of s. 1 of the *Charter* and, as interpreted by the courts satisfied the minimum impairment branch of the s. 1 test.

29 The foregoing may be summarized by way of the following propositions:

1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter* in limine, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler, Irwin Toy, Prostitution Reference*).

2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference, Committee for the Commonwealth of Canada*).

3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor, Osborne*).

4. Vagueness, when raised under s. 7 or under s. 1 in limine, involves similar considerations (*Prostitution Reference, Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of overbreadth (*Committee for the Commonwealth of Canada, Osborne*).

5. The court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 in limine, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor, Osborne*).

30 In order to give a more complete picture of issues of vagueness under the *Charter*, I will examine in turn the proper place of the doctrine of vagueness in *Charter* analysis and its content.

2. The Proper Place of the Doctrine of Vagueness in Charter Adjudication

31 Vagueness is often mingled and confused with overbreadth, possibly because of the influence of American authorities. From a review of American law, it will appear that overbreadth is not an autonomous notion in Canadian law, and that, contrary to the position of U.S. constitutional law, vagueness should have a constant meaning in Canadian law.

32 Overbreadth in American law is tied to the First Amendment. It is grounds to obtain what is termed "facial invalidation" of a statute, as opposed to a declaration that the statute is unconstitutional in the case of the particular plaintiff, which is the usual remedy. *Flipside v. Village of Hoffman Estates*, 455 U.S. 489 (1982), indicates how overbreadth interacts with vagueness in First Amendment cases. The court wrote at pp. 494-495:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

Overbreadth ties in to the taxonomy of protected and unprotected conduct and expression developed by American courts under the First Amendment. Some conduct or expression receives First Amendment protection and some does not, and to the extent that a statute substantially touches upon protected conduct and cannot be severed or read down, it will be declared void (see L.H. Tribe, *American Constitutional Law*, 2d ed. (Westbury, N.Y.: Foundation Pr. Inc., 1987), at p. 1022).

33 This distinction between protected and unprotected conduct or expression is typical of American law, since the American Constitution does not contain a general balancing clause similar to s. 1 of the *Charter*. Balancing must be done within the First Amendment itself. In this respect, it can be seen that the doctrine of overbreadth in American law involves an element of balancing, since the aims and scope of the statute must be compared with the range of protection of the First Amendment. C. Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in R. J. Sharpe, *Charter Litigation* (Toronto: Butterworths, 1987) at pp. 261-262, traces this element of balancing to *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

34 This court has repeatedly emphasized the numerous differences which exist between the *Charter* and the American Constitution. In particular, in the interpretation of s. 2 of the *Charter*, this court has taken a route completely different from that of U.S. courts. In cases starting with *Irwin Toy* up to *Butler*, including the *Prostitution Reference* and *Keegstra*, this court has given a wide ambit to the freedoms guaranteed by s. 2 of the *Charter*, on the basis that balancing between the objectives of the state and the violation of a right or freedom should occur at the s. 1 stage. Other sections of the *Charter*, such as ss. 7 and 8, do however incorporate some element of balancing, as a limitation within the definition of the protected right, with respect to other notions such as principles of fundamental justice or reasonableness.

35 A notion tied to balancing such as overbreadth finds its proper place in sections of the *Charter* which involve a balancing process. Consequently, I cannot but agree with the opinion expressed by L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada* that overbreadth is subsumed under the "minimal impairment branch" of the *Oakes* test, under s. 1 of the *Charter*. This is also in accordance with the trend evidenced in *Osborne* and *Butler*. Furthermore, in determining whether s. 12 of the *Charter* has been infringed, for instance, a court, if it finds the punishment not grossly disproportionate for the accused, will typically examine reasonable hypotheses and assess whether the punishment is grossly disproportionate in these situations (*R. v. Smith*, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193, [1987] 5 W.W.R. 1, 75 N.R. 321, 15 B.C.L.R. (2d) 273, 34 C.C.C. (3d) 97, 40 D.L.R. (4th) 435, 31 C.R.R. 193, *R. v. Goltz*, [1991] 3 S.C.R. 485, 8 C.R. (4th) 82, 31 M.V.R. (2d) 137, 61 B.C.L.R. (2d) 145, 67 C.C.C. (3d) 481, 131 N.R. 1, 7 C.R.R. (2d) 1, 5 B.C.A.C. 161, 11 W.A.C. 161). This inquiry also resembles the sort of balancing process associated with the notion of overbreadth.

36 In all these cases, however, overbreadth remains no more than an analytical tool. The alleged overbreadth is always related to some limitation under the *Charter*. It is always established by comparing the ambit of the provision touching upon a protected right with such concepts as the objectives of the state, the principles of fundamental justice, the proportionality of punishment or the reasonableness of searches and seizures, to name a few. There is no such thing as overbreadth in the abstract. Overbreadth has no autonomous value under the *Charter*. As will be seen below, overbreadth is not at the heart of this case, although it has been invoked in argument.

37 The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in this oft-quoted passage from *R. v. Zundel* (1987), 56 C.R. (3d) 1, 18 O.A.C. 161, 58 O.R. (2d) 129, 31 C.C.C. (3d) 97, 35 D.L.R. 338, 29 C.R.R. 349, at pp. 157-158 [O.R.]:

> Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad.

> Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

I agree. A vague law may also constitute an excessive impairment of *Charter* rights under the *Oakes* test. This court recognized this, when it mentioned the two aspects of vagueness under s. 1 of the *Charter*, in *Osborne* and *Butler*.

38 For the sake of clarity, I would prefer to reserve the term "vagueness" for the most serious degree of vagueness, where a law is so vague as not to constitute a "limit prescribed by law" under s. 1 in limine. The other aspect of vagueness, being an instance of overbreadth, should be considered as such.

39 Moreover, in American constitutional law, "vagueness" has been given various contents, depending on whether it is considered under the First, Fifth (and Fourteenth) or even Eighth Amendment (for statutory conditions warranting the imposition of the death penalty). The scope of the inquiry and the reference group will change, as the United States Supreme Court stated in *Maynard v. Cartwright*, 486 U.S. 356 (1988), at p. 361.

40 Under the *Charter*, however, given the statements of Lamer J. in the *Prostitution Reference*, at p. 1155 [S.C.R.], I would consider that the "doctrine of vagueness" is a single concept, whether invoked as a principle of fundamental justice under s. 7 of the *Charter* or as part of s. 1 of the *Charter* in limine. Indeed from a practical point of view this makes little difference in the analysis, since a consideration of s. 1 in limine would follow immediately the determination of whether s. 7 has been violated. No intermediate step is lost. From a theoretical perspective, the justifications invoked for the doctrine of vagueness under both s. 7 and s. 1 are similar. A reading of the aforementioned cases shows that the rationales of fair notice to the citizen and limitation of enforcement discretion are put forward in every discussion of vagueness, irrespective of where it occurs in the *Charter* analysis. I see no ground for distinguishing them.

41 Vagueness may be raised under the substantive sections of the *Charter* whenever these sections comprise some internal limitation. For example, under s. 7, it may be that the limitation on life, liberty and security of the person would not otherwise be objectionable, but for the vagueness of the impugned law. The doctrine of vagueness would then rank among the principles of fundamental justice. Outside of these cases, the proper place of a vagueness argument is under s. 1 in limine.

42 I would therefore conclude that:

> 1. What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a *Charter* right. Overbreadth has no independent existence. References to a "doctrine of overbreadth" are superfluous.
>
> 2. The "doctrine of vagueness", the content of which will be developed shortly, is a principle of fundamental justice under s. 7 and it is also part of s. 1 in limine ("prescribed by law").

3. The Content of the "Doctrine of Vagueness"

43 As was said by this court in *Osborne* and *Butler*, the threshold for finding a law vague is relatively high. So far discussion of the content of the notion has evolved around intelligibility.

44 The two rationales of fair notice to the citizen and limitation of enforcement discretion have been adopted as the theoretical foundations of the doctrine of vagueness, here (*Prostitution Reference, Committee for the Commonwealth of Canada*) as well as in the United States (see *Grayned v. Rockford (City)*, 408 U.S. 104 (1972), at pp. 108-109) and in Europe, as will be seen later. These two rationales have been broadly linked with the corpus of principles of government known as the "rule of law", which lies at the core of our political and constitutional tradition.

Fair notice to the citizen

45 Fair notice to the citizen, as a guide to conduct and a contributing element to a full answer and defence, comprises two aspects.

46 First of all, there is the more formal aspect of notice, that is acquaintance with the actual text of a statute. In the criminal context, this concern has more or less been set aside by the common law maxim "Ignorance of the law is no excuse", embodied in s. 19 of the *Criminal Code* (see *R. v. MacDougall*, [1982] 2 S.C.R. 605, 31 C.R. (3d) 1, 18 M.V.R. 180, 1 C.C.C. (3d) 65, 54 N.S.R. (2d) 562, 112 A.P.R. 562, 142 D.L.R. (3d) 216, 44 N.R. 560). In the civil context, the maxim does not apply with equal force (see J.-L. Baudouin, *Les obligations*, 3d ed. (Cowansville, Que.: Yvon Blais, 1989) at p.122, and *Chitty on Contracts*, 25th ed. (London: Sweet & Maxwell, 1983), at paras. 314 and 353). Some authors have expressed the opinion that this maxim contradicts the rule of law, and should be revised in light of the growing quantity and complexity of penal legislation (see E. Colvin, "Criminal Law and The Rule of Law", in P. Fitzgerald, ed., *Crime, Justice & Codification* (Toronto: Carswell, 1986) 125 at p. 151, and J. C. Jeffries, Jr., "Legality, Vagueness, and the Construction of Penal Statutes" (1985) 71 Va. L. Rev. 189, at p. 209). Since this argument was not raised in this case, I will refrain from ruling on this issue. In any event, given that, as this court has already recognized, case law applying and interpreting a particular section is relevant in determining whether the section is vague, formal notice is not a central concern in a vagueness analysis.

47 As Lamer J. pointed out in *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, supra, principles of fundamental justice, such as the doctrine of vagueness, must have a substantive as well as procedural content. Indeed the idea of giving fair notice to citizens would be rather empty if the mere fact of bringing the text of the law to their attention was enough, especially when knowledge is presumed by law. There is also a substantive aspect to fair notice, which could be described as a notice, an understanding that some conduct comes under the law. Jeffries, supra, calls this the "core concept of notice" (at p. 211).

48 Let me take homicide as an example. The actual provisions of the *Criminal Code* dealing with homicide are numerous (comprising the core of ss. 222-240 and other related sections). When one completes the picture of the Code with case law, both substantive and constitutional, the result is a fairly intricate body of rules. Notwithstanding formal notice, it can hardly be expected of the average citizen that he know the law of homicide in detail. Yet no one would seriously argue that there is no substantive fair notice here, or that the law of homicide is vague. It can readily be seen why this is so. First of all, everyone (or sadly, should I say, almost everyone) has an inherent knowledge that taking the life of another human being is wrong. There is a deeply-rooted perception that homicide cannot be tolerated, whether one comes to this perception from a moral, religious or sociological stance. Therefore it is expected that homicide will be punished by the state. Secondly, homicide is indeed punished by the state, and homicide trials and sentences receive a great deal of publicity.

49 I used homicide as an example, because it lies so at the core of our criminal law and our shared values that substantive notice is easy to demonstrate. Similar demonstrations could be made, at greater length, for other legal provisions. The substantive aspect of fair notice is therefore a subjective understanding that the law touches upon some conduct, based on the substratum of values underlying the legal enactment and on the role that the legal enactment plays in the life of the society.

50 I do not wish to suggest that the state can only intervene through law when some non-legal basis for intervention exists. Many enactments are relatively narrow in scope and echo little of society at large; this is the case with many regulatory enactments. The weakness or the absence of substantive notice before the enactment can be compensated by bringing to the attention of the public the actual terms of the law, so that substantive notice will be achieved. Merit point and driving license revocation schemes are prime examples of this; through publicity and advertisement these schemes have been "digested" by society. A certain connection between the formal and substantive aspects of fair notice can be seen here.

51 Fair notice may not have been given when enactments are in somewhat general terms, in a way that does not readily permit citizens to be aware of their substance, when they do not relate to any element of the substratum of values held by society. It is no coincidence that these enactments are often found vague. For instance, the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), or the compulsory identification statute struck down in *Kolender v. Lawson*, 461 U.S. 352 (1983), fall in this group.

52 Hence, aside from a formal aspect which is in our current system often presumed, fair notice to the citizen comprises a substantive aspect, that is an understanding that certain conduct is the subject of legal restrictions.

Limitation of law enforcement discretion

53 Lamer J. in the *Prostitution Reference* used the phrase "standardless sweep", first coined by the United States Supreme Court in *Smith v. Goguen*, 415 U.S. 566 (1974), at p. 575, to describe the limitation of enforcement discretion rationale for the doctrine of vagueness. It has become the prime concern in American constitutional law (*Kolender*, at pp. 357-358). Indeed today it has become paramount, given the considerable expansion in the discretionary powers of enforcement agencies that has followed the creation of the modern welfare state.

54 A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

55 For instance, the wording of the vagrancy ordinance invalidated by the United States Supreme Court in *Papachristou* and quoted at length in the *Prostitution Reference* at pp. 1152-1153 [S.C.R.], was so general and so lacked precision in its content that a conviction would ensue every time the law enforcer decided to charge someone with the offence of vagrancy. The words of the ordinance had no substance to them, and they indicated no particular legislative purpose. They left the accused completely in the dark, with no possible way of defending himself before the court.

c. European Court of Human Rights case law

56 I would also note that the European Court of Human Rights (hereinafter "E.C.H.R.") has adopted the same approach to issues of vagueness, in the course of its treatment of words such as "prescribed by law", found in many limitation clauses of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (hereinafter the "convention"), such as arts. 8(2), 9(2), 10(2), 11(2) or art. 2(3) of Protocol No. 4 to the Convention, Europ. T.S. No. 46. The E.C.H.R. gave this phrase a substantive content, which went beyond a mere inquiry as to whether a law existed or not.

57 The E.C.H.R. developed its conception of "prescribed by law" in the course of two famous cases, the *Sunday Times Case* (1979), Ser.A, No. 30, and the *Malone Case*, judgment of (August 2, 1984), Ser.A, No. 82. In the former, the E.C.H.R. drew attention to the two aspects of fair notice, namely formal notice ("accessibility") and substantive notice ("foreseeability"). It wrote at p. 31:

> In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

In the latter, the E.C.H.R. added the limitation of enforcement discretion to the range of interests underpinning its interpretation of "prescribed by law" at p. 32:

> The phrase thus implies ... that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by paragraph 1 [of article 8 of the Convention].

(See also the *Kruslin Case*, judgment of (April 24, 1990), Ser. A, No. 176-A, at pp. 24-25, and the *Huvig Case*, judgment of (April 24, 1990), Ser. A, No. 176-B, at p. 56.)

58 In my opinion, the case law of the E.C.H.R. is a very valuable guide on this issue, and it will be relied on further below.

d. The scope of precision

59 This leads me to synthetize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.

60 Legal provisions by stating certain propositions outline certain permissible and impermissible areas, and they also provide some guidance to ascertain the boundaries of these areas. In his survey article "La teneur indécise du droit" (1991) 107 Rev. dr. publ. 1199, P. Amselek rightly underlines the etymological and metaphorical relationship between law and geometry and writes at pp. 1200-1201:

> [TRANSLATION]
>
> Legal rules are mental tools ... authoritatively introduced, given effect, by public authorities placed at the head of human communities to govern them: such rules are thought content with a specific purpose, to be used as a tool to guide conduct, thought content which determines the boundaries of possible action depending on the circumstances — for the Romans, these boundaries were the meaning of the very concept of *jus* in its earliest sense and are also reflected in our concept of 'law', implying the very idea of possibility, of latitude. These boundaries impose limits on the will of those to whom they apply, serving as a support, a yardstick enabling them to remain within the area of right conduct, of rectitude, within the parameters of conduct which the concept lays down and which it then gives effect to, setting the process in motion.

These rules, as Amselek later points out, are characterized by their unresolved nature, inasmuch as they are neither objective nor complete.

61 Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

62 By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.

63 Indeed no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The E.C.H.R. has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times*, supra, and especially the case of *Silver Case*, judgment of (March 25, 1983), Ser. A, No. 61, (sub nom. *Silver v. United Kingdom*) 3 E.H.R.R. 475, at pp. 33-34 [Ser. A, No. 61], and *Malone*, supra, at pp. 32-33.

64 A vague provision does not provide an adequate basis for legal debate, that is, for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

e. Vagueness and the rule of law

65 The criterion of absence of legal debate relates well to the rule of law principles that form the backbone of our polity. Here one must see the rule of law in the contemporary context. Continental European studies on the "État de droit" or "Rechtsstaat" are relevant (see L. C. Blaau, "The Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights" (1990) 107 S. Afr. L.J. 76, at pp. 88-92, for an exposition of the historical differences between these concepts).

66 J. P. Henry, "Vers la fin de l'État de droit?" (1977) 93 Rev. dr. publ. 1207, gives the following definition of the "État de droit" at p. 1208:

> [TRANSLATION]
>
> In theoretical terms, the *état de droit* is a system of organization in which all social and political relations are subject to the law. This means that relations between individuals and authority, as well as relations between individuals themselves, are part of a legal interchange involving rights and obligations.

See also J. Chevallier, "L'État de droit" (1988) 104 Rev. dr. publ. 313, at pp. 330-331, and R. Carré de Malberg, *Contribution à la théorie générale de l'État* (Paris: Sirey, 1920), vol. 1, at pp. 488-490. At the core of the "État de droit", as under the rule of law, lies the proposition that the relationship of the state to the individuals is regulated by law.

67 One must move away from the non-interventionist attitude that surrounded the development of the doctrine of the rule of law to a more global conception of the state as an entity bound by and acting through law. The modern state intervenes in almost every field of human endeavour, and it plays a role that goes far beyond collecting taxes and policing. The state has entered fields where the positions are not so clear-cut; in the realm of social or economic policy, interests diverge, and the state does not seek to enforce a definite and limited social interest in public order, for instance, against an individual. Often the state attempts to realize a series of social objectives, some of which must be balanced against one another, and which sometimes conflict with the interests of individuals. The modern state, while still acting as an enforcer, assumes more and more of an arbitration role.

68 This arbitration must be done according to law, but often it reaches such a level of complexity that the corresponding enactment will be framed in relatively general terms. In my opinion the generality of these terms may entail a greater role for the judiciary, but unlike some authors (see F. Neumann, *The Rule of Law* (New York: St. Martin, 1987), at pp. 238-239), I fail to see a difference in kind between general provisions where the judiciary would assume part of the legislative role and "mechanical" provisions where the judiciary would simply apply the law. The judiciary always has a mediating role in the actualization of law, although the extent of this role may vary.

69 Indeed, as the E.C.H.R. has recognized in *Sunday Times*, supra, and particularly in the *Barthold Case*, judgment of (March 25, 1985), Ser. A, No. 90, at p. 22, and in the case of *Müller Case*, judgment of (May 24, 1988), Ser. A, No. 133, at p. 20, laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern state intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

70 What becomes more problematic is not so much general terms conferring broad discretion, but terms failing to give direction as to how to exercise this discretion, so that this exercise may be controlled. Once more, an unpermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decisions must be reached, such as factors to be considered or determinative elements. In giving unfettered discretion, it will deprive the judiciary of means

of controlling the exercise of this discretion. The need to provide guidelines for the exercise of discretion was at the centre of the E.C.H.R. reasons in *Malone*, supra, at pp. 32-33, and the *Leander Case*, judgment of (March 26, 1987), Ser. A, No. 116, at p. 23.

71 Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the state abide by constitutional standards of precision whenever it enacts legal dispositions. In the criminal field, it may be thought that the terms of the legal debate should be outlined with special care by the state. In our opinion, however, once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the "minimal impairment" stage of s. 1 analysis.

72 The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern state, and it reflects the prevailing argumentative, adversarial framework for the administration of justice.

B. The Validity of s. 32(1)(c) of the Act

73 The offence created by s. 32(1)(*c*) comprises two material elements:

> 1. An agreement entered into by the accused ("Every one who conspires, combines, agrees or arranges with another person"); and
>
> 2. An undue prevention or lessening of competition flowing from this agreement ("to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property ...").

There is furthermore a mental element to this offence, which I will discuss in Part VI of these reasons.

74 The first element has given rise to some debate throughout the history of competition legislation in Canada, but it is not the prime concern of this appeal. The bulk of the argument before us has been on the second element of s. 32(1)(*c*), more precisely on the word "unduly". Only the intervenors Association québécoise des pharmaciens propriétaires et al. (hereinafter "A.Q.P.P.") presented submissions on other points, and I will deal with them briefly before concentrating on the word "unduly", that is to say, on the test for differentiating between agreements which fall under s. 32(1)(*c*) of the Act and others which do not.

75 First of all, the A.Q.P.P. has argued that the range of agreements covered by s. 32(1)(*c*) is too wide. This submission bears more on "overbreadth" than vagueness, and it shows the dangers of too great a reliance on this concept. In order to claim that s. 32(1)(*c*) covers too many types of agreements, some idea as to its proper scope must be explicitly or implicitly advanced. Section 32(1)(*c*) must be too broad in the light of some *Charter* right, if one is to find a *Charter* violation. Setting aside the vagueness issue, the A.Q.P.P. does not argue that s. 32(1)(*c*) imposes a grossly disproportionate punishment, jeopardizes the impartiality of the tribunal, or interferes with some other *Charter* right. The A.Q.P.P. might find that the scope of the section is too broad with respect to the objectives of the state in fostering free competition. Absent a violation of the *Charter*, though the mere fact that the state may have reached for more than its objectives might have warranted is no ground for constitutional redress. In effect, the A.Q.P.P. argument rests on an implicit assumption that some agreements or some persons are entitled to escape the application of competition law, presumably because of their smallness or their innocuity. Our constitution knows of no right to be shielded from economic regulation on such grounds. Claims of overbreadth should not be used to masquerade an absence of constitutional foundation. In the instant case any excess in the scope of s. 32(1)(*c*) would only be the result of the alleged vagueness of the word "unduly", and claims of overbreadth will succeed or fail accordingly.

76 Furthermore, the A.Q.P.P. has claimed that the Act, in giving enforcement authorities, under certain circumstances, a discretion between penal and civil recourses, leaves them with too much discretion. The source of this allegedly excessive discretion lies in the structure of the Act and not in s. 32(1)(*c*) of the Act itself. This claim lies beyond the lis of this case, but I will nevertheless address it. The A.Q.P.P. argues that the Act, because of the extent of overlap between its central provisions dealing with conspiracies, abuses of dominant position and mergers, confers on the Director of Investigation and Research an

excessive discretion to choose between so-called "civil" recourses before the Competition Tribunal and criminal recourses. The A.Q.P.P. further adds that s. 30(2) of the Act (now s. 34(2)) gives the Director a choice between a criminal prosecution and a prohibition order, when seeking relief before the criminal courts.

77 In the first place, what the A.Q.P.P. brands as an arbitrary power given to the Director does not correspond to the kind of excessive enforcement discretion leading to concerns about the vagueness of the law. It is not submitted that the law, because of its imprecision, essentially gives the Director a power to convict from the moment a prosecution is brought against a person under the Act. The choice between criminal and civil/administrative remedies is and remains the sole concern of the A.Q.P.P., and this concern does not relate to the doctrine of vagueness. The thrust of the A.Q.P.P. is more akin to double jeopardy. In this respect, it must be said that, except for s. 32(1)(*c*), the options open to the Director do not qualify for the application of s. 11(*h*), following *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193, [1988] 1 W.W.R. 193, 61 Sask. R. 105, 81 N.R. 161, 28 Admin. L.R. 294, 24 O.A.C. 321, 45 D.L.R. (4th) 235, 32 C.R.R. 219, 37 C.C.C. (3d) 385 , and *R. v. Shubley*, [1990] 1 S.C.R. 3, 74 C.R. (3d) 1, 104 N.R. 81, 52 C.C.C. (3d) 481, 42 Admin. L.R. 118, 65 D.L.R. (4th) 193, 37 O.A.C. 63, 46 C.R.R. 104. Moreover, the *Charter* does not prevent Parliament from creating offences that may overlap. The guarantees against double jeopardy found in s. 11(*h*) and perhaps also s. 7 of the *Charter* apply only to proceedings, not to legal enactments. Even then, it is apparent that Parliament has added ss. 32.01, 51(7) and 70 to the Act (now ss. 45.1, 79(7) and 98) precisely in order to prevent multiple proceedings against a person on the same or a similar factual basis.

78 The additional arguments of the A.Q.P.P. therefore fail, and I will now consider the alleged vagueness of s. 32(1)(*c*) of the Act.

1. "Unduly" in the Decisions of this Court

79 This court has already interpreted the word "unduly" on a number of occasions, namely in *Weidman v. Shragge* (1912), 46 S.C.R. 1, 2 W.W.R. 330, 20 C.C.C. 117, 2 D.L.R. 734; *Stinson-Reeb Builders Supply Co. v. R.*, [1929] S.C.R. 276, 52 C.C.C. 66, [1929] 3 D.L.R. 331; *R. v. Container Materials Ltd.*, [1942] S.C.R. 147, 77 C.C.C. 129, [1942] 1 D.L.R. 529; *R. v. Howard Smith Paper Mills Ltd.*, supra; *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731, 20 N.S.R. (2d) 565, 15 N.R. 117, 34 C.C.C. (2d) 157, 75 D.L.R. (3d) 332, 30 C.P.R. (2d) 193; and *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, supra. I will not proceed to a lengthy survey of these decisions (this has been done in *Aetna Insurance*).

80 The meaning of "unduly" has usually been described by reference to various synonyms. In *Weidman*, Anglin J. adopted the string of synonyms given in *R. v. Elliott* (1905), 9 O.L.R. 648, 9 C.C.C. 505 (Ont. C.A.), at p. 520 [C.C.C.] ("improper, inordinate, excessive or oppressive"). This string has been mentioned in all subsequent judgments of this court on the issue. In *Howard Smith*, Cartwright J. sought to restate the law and introduced what was branded as the "virtual elimination of competition" criterion. Cartwright J. was in minority in that case, and furthermore a close reading of his reasons reveals that he might not have intended to depart from the existing law (see the dissenting reasons of Laskin J.A. (as he then was) in *R. v. J.J. Beamish Construction Co.* (1967), [1968] 1 O.R. 5, [1968] 2 C.C.C. 5, 65 D.L.R. (2d) 260, 53 C.P.R. 43 (C.A.), at p. 285 [D.L.R.]). Nevertheless, given that a controversy had arisen, Parliament saw fit to add s. 32(1.1) to the Act, thus dispelling any doubt as to the state of the law. Anglin J.'s reasons in *Weidman* remain authoritative. Instead of adding to this string of synonyms, I will adopt the reasons of Clarke C.J.N.S. in the instant case at p. 157 [C.C.C.]:

> While the word unduly is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree.

Clarke C.J.N.S. has touched upon the very nature of "unduly": while this word does not have a precise technical meaning, it does have a common meaning, and it expresses a notion of seriousness or significance.

81 Nothing more will be gained by a semantic inquiry into the meaning of "unduly". Such an inquiry is a beginning, however, not an end. The appellants and the A.Q.P.P. were content with pointing out the generality of "unduly" and arguing that any other consideration pertaining to s. 32(1)(*c*) is a question of fact, following *Container Materials*. According to the appellants, since

the determination of whether the restriction on competition was undue is a question of fact, not subject to appellate review, no conclusion can be drawn from the case law. This argument rests on a mistaken perception of the distinction between questions of fact and questions of law.

82 In the context of s. 32(1)(*c*), the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of this process and these criteria, that is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact. The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here.

83 The legal content of s. 32(1)(*c*), however, is not exhausted by a search for the meaning of unduly. Section 32(1)(*c*) must not be taken in a vacuum. Its interpretation is conditioned, first of all, by the purposes of the Act. Furthermore, its content is enriched by the rest of the section in which it is found and by the mode of inquiry adopted by courts as they have ruled under it. These are matters of law, pertaining to the determination of undueness under s. 32(1)(*c*), and as such most relevant. I will look at each in turn.

2. The Act, s. 32(1)(c) and Canadian Public Policy

84 At the outset, it must be noted that the Act is central to Canadian public policy in the economic sector, and that s. 32 is itself one of the pillars of the Act.

85 The history of competition legislation in Canada dates back to 1889, with the *Act for the Prevention and Suppression of Combinations formed in restraint of Trade*, S.C. 1889, c. 41 (hereinafter the *1889 Act*). In fact, the *1889 Act* came into force before the American *Sherman Act*, c. 647, 26 Stat. 209 (1890), codified as amended at 15 U.S.C. §§ 1-7, generally seen as the primogenitor of competition law. The *1889 Act* created in s. 1 the offence of "combining for the purpose of unlawfully hindering competition", in substance the direct ancestor to s. 32(1) of the Act.

86 The *1889 Act* was perhaps the first major foray by Parliament in the realm of economic policy. As B. Dunlop, D. McQueen and M. Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987), point out at p. 42, the common law of restraint of trade was very much anchored within a private law framework, and was not concerned with broader interests in the proper functioning of the economy. The *1889 Act* introduced these interests in Canadian law (see *Container Materials*, supra, at p. 152, *per* Duff C.J.C.).

87 The content of the *1889 Act* was progressively enlarged, until it grew into the current Act. In *City National Leasing Ltd. v. General Motors of Canada Ltd.*, [1989] 1 S.C.R. 641, 43 B.L.R. 225, 24 C.P.R. (3d) 417, 58 D.L.R. (4th) 255, 93 N.R. 326, 32 O.A.C. 332, Dickson C.J.C. wrote for the court at p. 676 [S.C.R.]:

> From this overview of the *Combines Investigation Act* I have no difficulty in concluding that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition.

The Act can thus be seen as a central and established feature of Canadian economic policy.

88 Section 32(1)(*c*) of the Act moreover is its oldest provision. Even today, it remains at the core of the criminal part of the Act. The prohibition of conspiracies in restraint of trade is the epitome of competition law, finding its place in every competition law, from §1 of the *Sherman Act* to art. 85 of the *Treaty establishing the European Economic Community*, [1957, 298 U.N.T.S. 11] (hereinafter *Treaty of Rome*). Section 32(1)(*c*) of the Act is not just another regulatory provision. It definitely rests on a substratum of values, a finding which must be kept in mind in the course of the vagueness analysis.

89 This court has made numerous remarks on the public policy interests underlying s. 32(1)(*c*) of the Act. These remarks, found in *Weidman, Stinson-Reeb, Container Materials*, and *Aetna Insurance*, supra, are perhaps best summarized in this passage from the majority judgment in *Howard Smith*, supra, at p. 411 [S.C.R.]:

> The statute proceeds upon the footing that the preventing or lessening of competition is in itself an injury to the public. It is not concerned with public injury or public benefit from any other standpoint.

Considerations such as private gains by the parties to the agreement or counterbalancing efficiency gains by the public lie therefore outside of the inquiry under s. 32(1)(*c*). Competition is presumed by the Act to be in the public benefit. The only issue is whether the agreement impairs competition to the extent that it will attract liability.

90 The peculiar nature of the inquiry under s. 32(1)(*c*) of the Act becomes apparent when it is compared with § 1 of the *Sherman Act*. Since the inception of the *Sherman Act*, American antitrust law has developed the two paradigms of adjudication known as the "per se rule" and the "rule of reason". The former attaches consequences to precisely-defined acts, irrespective of surrounding circumstances, whereas the latter is more general and invites in-depth inquiry into the details of the operation. The distinction between the two is not airtight, as leading authors have shown (see P.E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 7 (Boston: Little, Brown & Co., 1987), at ¶ 1511, and P.E. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application (1990 Supplement)* (Boston: Little, Brown & Co., 1990).

91 Section 32(1)(*c*) of the Act lies somewhere on the continuum between a per se rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a per se rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since "unduly" in s. 32(1)(*c*) leads to a discussion of the seriousness of the competitive effects, but not of all relevant economic matters, one may say that this section creates a partial rule of reason.

92 The public policy objectives of s. 32(1)(*c*) of the Act already offer a clear idea of what is meant by "unduly" lessening competition, and what kind of inquiry is mandated. In fact, s. 32(1)(*c*) embodies a general standard, much like art. 1053 of the *Civil Code of Lower Canada* or s. 219 of the *Criminal Code*, for that matter. It represents an intelligible principle, one that carries meaning and that has conceptual force. In all its generality, however, it cannot readily be applied to a factual situation to yield an answer. Few legal norms are so.

93 The accused may actually be favoured by having a clear statement of principle, inasmuch as it contains the "spirit" as well as the letter of the law. Even when considered without the rest of the Act and case law, I would be inclined to say that s. 32(1)(*c*) of the Act is sufficiently precise to meet the constitutional standard. It outlines an area of risk, agreements that lessen or prevent competition, and imposes some boundaries on enforcement discretion, inasmuch as courts will scrutinize the impact of the agreement on competition to see if it runs against our public policy of free competition.

3. The Content of the Inquiry under s. 32(1)("c") of the Act

94 In addition, s. 32(1)(*c*) is made even more precise when one considers the content of the inquiry it mandates.

95 Since the few cases that have been considered by this court always involved agreements where the effects on competition were easily ascertainable, this court has never had the opportunity to consider the process whereby the undueness of the restriction on competition is assessed. In the context of this *Charter* inquiry into the alleged vagueness of s. 32(1)(*c*) of the Act, a survey of the rest of the section, together with lower court decisions and doctrinal writings, will show that adjudication under s. 32(1)(*c*) follows a definite process that eliminates any vagueness that might remain.

96 First of all, there are two major elements to this inquiry, that is (1) the structure of the market, and (2) the behaviour of the parties to the agreement. As a preliminary step, definition of the relevant market is required. Many decisions have explicitly adopted this approach (*J.W. Mills & Son Ltd. v. R.*, [1968] 2 Ex. C.R. 275, 56 C.P.R. 1, at p. 303 [Ex. C.R.]; *J.J. Beamish*, supra,

at pp. 271 and 273 [D.L.R.]; *R. v. Canadian Coat & Apron Supply Ltd.*, 2 C.R.N.S. 62, [1967] 2 Ex. C.R. 53, 52 C.P.R. 189, at p. 68 [Ex. C.R.]; *R. v. Anthes Business Forms Ltd.* (1975), 10 O.R. (2d) 153, 26 C.C.C. (2d) 349, 20 C.P.R. (2d) 1 (C.A.), at pp. 375-376 [C.C.C.]; *R. v. Canadian General Electric Co.* (1976), 15 O.R. (2d) 360, 29 C.P.R. (2d) 1, 34 C.C.C. (2d) 489, 75 D.L.R. (3d) 664 (H.C.), at p. 500 [C.C.C.]).

97 I will not venture into the intricacies of outlining the relevant market, other than to repeat that it comprises both geographical and produce or service aspects, as was stated in *J.W. Mills*, at p. 303 [Ex. C.R.]. Definition of the relevant market is a fairly circumscribed process, even though it may require considerable inquiry (see *R. v. Metropolitan Toronto Pharmacists' Assn.* (1984), 3 C.P.R. (3d) 233 (Ont. H.C.)).

98 The structure-behaviour framework of analysis remains merely a convenient way of approaching conspiracy problems, and it should not be seen as a rite of passage. Indeed, to a certain extent, the determination of whether an agreement unduly restricts competition involves an examination not only of market structure and firm behaviour separately, but also of the relationship between them, as Gibson J. remarked in *J.W. Mills*, at p. 309 [Ex. C.R.].

a. Market structure

99 The appellants and the A.Q.P.P. have devoted a substantial part of their argument to a demonstration that no clear market-share guideline can be found in the cases. They have brought to the attention of this court two works, W. T. Stanbury, *Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform* (National Conference on the Centenary of Competition Law and Policy in Canada, October 1989), cited with approval in *Assn québécoise des pharmaciens propriétaires c. Canada (Procureur général)* (1990), [1991] R.J.Q. 205 (C.S.), and W.T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More unto the Breach" (1981) 5 Can. Bus. L.J. 381, where the authors express doubts about the possibility of discerning a market-share threshold for liability in conspiracy cases. Indeed market share as such cannot suffice to conclude on the structure of the market, and s. 32(1)(*c*) would lose some of its effectiveness and would stray from its objectives if it incorporated a market-share threshold. Market share alone is not determinative, as was rightly pointed out in *Canadian General Electric*, at p. 501 [C.C.C.].

100 The aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement, as was said in *Canadian Coat & Apron Supply Ltd.*, at p. 64 [Ex. C.R.]. In this respect, many factors other than market share are relevant. Some were listed in *J. W. Mills*, at pp. 307-308 [Ex. C.R.]: (1) the number of competitors and the concentration of competition, (2) barriers to entry, (3) geographical distribution of buyers and sellers, (4) differences in the degree of integration among competitors, (5) product differentiation, (6) countervailing power and (7) cross-elasticity of demand (see also *Canadian General Electric*, supra). This list is not limitative: for instance, I note that in its Merger Guidelines, 49 Fed. Reg. 26823 (1984), the United States Department of Justice, Antitrust Division, proposed the ability to raise prices on a given product by five per cent over a year without losses as the yardstick for market power. This approach may or may not be appropriate in the context of s. 32(1)(*c*) of the Act.

101 Market power is the ability to behave relatively independently of the market. This is precisely what s. 32(1)(*c*) of the Act seeks to prevent. As this court has always held in its previous judgments, the aim of the Act is to secure for the Canadian public the benefit of free competition. Excessive market power runs against the objectives of the Act. When it occurs in the context of a conspiracy to restrict competition, s. 32(1)(*c*) will apply. It can be presumed that Parliament did not wish s. 32(1)(*c*) to apply in the absence of market power. Absent such power, agreements to restrict competition would either benefit the public by allowing small firms to consolidate their position and be more competitive, or dissolve under competitive pressures (see Dunlop, supra, at p. 114).

102 The level of market power necessary to trigger the application of s. 32(1)(*c*) is not necessarily the same as for other sections of the Act. For instance, s. 51 of the Act (now s. 79), prohibiting abuses of dominant position, contemplates at subs. (1)(*a*) that the holders of the dominant position "substantially or completely control, throughout Canada or any area thereof, a class or species of business". The required degree of market power under s. 51 of the Act comprises "control", and not simply the ability to behave independently of the market.

103 The application of s. 32(1)(*c*) of the Act does not presuppose such a degree of market power, as s. 32(1.1) clearly enunciates. Parties to the agreement need not have the capacity to influence the market. What is more relevant is the capacity to behave independently of the market, in a passive way. A moderate amount of market power is required to achieve this (see *R. v. Abitibi Power & Paper Co.* (1960), 36 C.R. 96, 36 C.P.R. 188, 131 C.C.C. 201 (Que.), at pp. 249-252 [C.C.C., pp. 146-149 C.R.]).

104 I note that the competition law of both the United States and the European Communities comprises an analogous requirement of minimal market power in cases of agreements to restrain competition.

105 In the United States, the nature of the impugned restraints will determine whether they are assessed according to a per se rule or a rule of reason. This operation has diverted much attention away from the substance of § 1 of the *Sherman Act* and, to correct this, the Supreme Court has to a certain extent blurred the distinction between the two approaches in *National Collegiate Athletic Assn. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984). There the United States Supreme Court held that naked restrictions on price and output did not require a finding of market power, for their unreasonableness could be presumed (at pp. 100-101, 109-110). The possibility of per se rules allows for a presumption of unreasonableness (Canadian law does not offer this possibility, since the word "undue" appears at s. 32(1)(*c*) of the Act), but otherwise some showing of market power is necessary to evidence a genuine adverse effect on competition (See *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), at pp. 460-461, and Areeda, supra, at ¶1503, pp. 376-377).

106 In the European Communities, the commission has given the *Notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community*, O.J.E.C., 12 September 1986, No. C231/2, and in addition the Court of Justice of the European Communities has long recognized that agreements which do not significantly affect the common market fall outside of the scope of art. 85 of the Treaty of Rome (*Völk v. Établissements J. Vervaecke S.p.r.l.*, [1969] E.C.R. 295, [1969] C.M.L.R. 273, and *S.A. Cadillon v. Firma Höss Maschinebau K.B.*, Case 1/71, [1971] E.C.R. 351).

b. Behaviour

107 The second part of the framework found in case law involves an examination of the behaviour of firms. In both *R. v. McGavin Bakeries Ltd. (No. 6)* (1951), 13 C.R. 63, 3 W.W.R. (N.S.) 289, 101 C.C.C. 22 (Alta.), at p. 303 [W.W.R. (N.S.)], and *Canadian General Electric*, supra, at pp. 531-532 [C.C.C.], the court considered which facet of competition was affected by the agreement (price, quality, service or other) and whether it was the prime concern of the buying public. The object of the agreement is without doubt the most important behaviourial element in the inquiry, but others may be relevant, such as the manner in which the agreement has been or will be carried out and, in general, any behaviour that tends to reduce competition or limit entry (see *J. W. Mills*, supra, at p. 309 [Ex. C.R.]).

108 The aim of the inquiry is the likely effect of the agreement. I can only quote from *R. v. Northern Electric Co.*, 21 C.R. 45, [1955] O.R. 431, 111 C.C.C. 241, 24 C.P.R. 1, [1955] 3 D.L.R. 449 (H.C.), at p. 469 [D.L.R.]:

> In considering whether the agreement or conspiracy comes within the statute, one does not judge the unlawfulness by what was done pursuant to the agreement (although this may be evidence of the agreement) but ... one examines the nature and scope of the agreement as proved and decides whether that agreement, if carried into effect, would prejudice the public interest in free competition to a degree that in fact would be undue.

See also *Aetna Insurance*, supra, at p. 747 [S.C.R.]. The agreement must be or must have been likely to injure competition, irrespective of any actual effect it may have had (although evidence of the effects offers good guidance as to the likely effects of the agreement). Some agreements do not constitute behaviour likely to injure competition, while others are highly injurious.

109 The Act itself gives some guidance as to which behaviour may or may not be injurious to competition. Section 32(2) contains a list of permissible fields, lying outside the scope of s. 32(1)(*c*). Section 32(3) lists impermissible fields, to which s. 32(1)(*c*) will apply even if the agreement relates to one of the fields enumerated in s. 32(2). These lists bear some conceptual

resemblance to the elaborate system of "black", "white" and "grey" clauses found in the regulations of the E.C. Commission exempting broad categories of agreements from art. 85 of the *Treaty of Rome* (see for instance *Commission Regulation (EEC) No. 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements*, O.J.E.C., 30 June 1983, No. L 173/1, at arts. 1, 2). Given the relative smallness of the Canadian market when compared with the European Community, though, one cannot expect Canadian legislation to provide as much detail as E.C. regulations. Section 32(6) adds an exception for agreements on standards of competence and integrity in the field of services.

110 Section 32(1)(*c*) therefore requires, in addition to some market power, some behaviour likely to injure competition. It is the combination of the two that makes a lessening of competition undue. Many combinations are possible. For one, market power may come from the agreement. The agreement could either have an "internal" effect, in consolidating the market power of the parties (as is the case with price-fixing) or have an "external" effect, in weakening competition and thus increasing the market power of the parties (as is the case with market-sharing). Market power may also exist independently of the agreement, in which case any anti-competitive effect of the agreement will be suspicious. A particularly injurious behaviour may also trigger liability even if market power is not so considerable. These are only examples of possible combinations of market power and behaviour likely to injure competition that will be "undue" under s. 32(1)(*c*) of the Act.

111 In summary, I find that s. 32(1)(*c*) of the Act and its companion interpretative provision s. 32(1.1) do not violate s. 7 of the *Charter* on grounds of vagueness. The word "unduly" as such carries a connotation of seriousness. Considering further that s. 32(1)(*c*) of the Act is one of the oldest and most important parts of Canadian public policy in the economic field, and that it mandates a partial rule of reason inquiry into the seriousness of the competitive effects of the agreement, Parliament has sufficiently delineated the area of risk and the terms of debate to meet the constitutional standard. Moreover, the rest of the Act and the case law have outlined a process of examination of market structure and behaviour under s. 32(1)(*c*) of the Act, thus making it even more precise. I note that the E.C.H.R. has also found a comparable competition statute to be "prescribed by law" in *Barthold*, supra.

112 This holding is also dispositive of the further argument of the appellants on the alleged unconstitutionality of the indictment with respect to s. 11(*a*) of the *Charter*.

VI. The Mental Element Of S. 32(1)(C) Of The Act And S. 7 Of The Charter

113 It may be helpful to set out once again the relevant provisions of the Act. Section 32(1) provides:

> 32.(1) Every one who conspires, combines, agrees or arranges with another person
>
> . . . . .
>
> *c*) to prevent, or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance upon persons or property,
>
> . . . . .
>
> is guilty of an indictable offence and is liable to imprisonment for five years or a fine of one million dollars or to both.

114 The Act was amended in 1976 by the addition of s. 32(1.1) which reads:

> (1.1) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in violation of subsection (1), it shall not be necessary to prove that the con spiracy, combination, agreement or arrangement, if carried into effect, would or would be likely to eliminate, completely or virtually, competition in the market to which it relates or that it was the object of any or all of the parties thereto to eliminate, completely or virtually, competition in that market.

115 In 1986, further amendments to the Act (renamed the *Competition Act*) were adopted, including s. 32(1.3):

> 1.3) For greater certainty, in establishing that a conspiracy, combination, agreement or arrangement is in contravention of subsection (1), it is necessary to prove that the parties thereto intended to and did enter into the conspiracy, combination, agreement or arrangement, but it is not necessary to prove that the parties intended that the conspiracy, combination, agreement or arrangement have an effect set out in subsection (1).

116 How then should those sections be interpreted in light of s. 7 of the *Charter*? The reasons of this court in *R. v. Vaillancourt*, supra, at p. 652 [S.C.R.], make it clear that the requirement of a mental element, sometimes referred to as an element of fault, has now been raised from an interpretative presumption to a constitutional guarantee. This reasoning was based upon the principle that the morally innocent should not be punished. An element of fault must exist before punishment can be justified.

117 From the reasons of this court in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 130 N.R. 1, 38 C.P.R. (3d) 451, 49 O.A.C. 161, 7 C.R.R. (2d) 36, it can be seen that a minimum fault requirement with respect to every criminal or regulatory offence satisfies the requirements of s. 7. That same case indicates, at p. 238 [S.C.R.]:

> That fault may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence. ...
>
> ... Mens rea focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness or wilful blindness. Negligence, on the other hand, measures the conduct of the accused on the basis of an objective standard, irrespective of the accused's subjective mental state.

118 The sections of the Act set out above require the proof of two fault elements: one subjective, the other objective.

119 To satisfy the subjective element, the Crown must prove that the accused had the intention to enter into the agreement and had knowledge of the terms of that agreement. Once that is established, it would ordinarily be reasonable to draw the inference that the accused intended to carry out the terms in the agreement, unless there was evidence that the accused did not intend to carry out the terms of the agreement.

120 In order to satisfy the objective element of the offence, the Crown must establish that on an objective view of the evidence adduced the accused intended to lessen competition unduly. This surely does not impose too high a burden on the Crown. Section 32(1)(*c*) requires that the Crown demonstrate that the effect of the agreement will be to prevent competition or to lessen it unduly. Once again, it would be a logical inference to draw that a reasonable business person who can be presumed to be familiar with the business in which he or she engages would or should have known that the likely effect of such an agreement would be to unduly lessen competition. Thus in proving the actus reus that the agreement was likely to lessen competition unduly, the Crown could, in most cases, establish the objective fault element that the accused as a reasonable business person would or should have known that this was the likely effect of the agreement.

121 It must be remembered that if there are two possible interpretations of a statutory provision, one of which embodies the *Charter* values and the other does not, that which embodies the *Charter* values should be adopted. (See *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, 88 C.L.L.C. 14,011, 30 Admin. L.R. 187, 84 N.R. 86, 48 D.L.R. (4th) 193.)

122 In summary then, the Crown must establish the subjective fault elements that the accused had the intention to enter into the agreement and was aware of its terms. As well, the Crown must demonstrate that the proof, viewed objectively (i.e., by a reasonable business person), establishes that the accused was aware or ought to have been aware that the effect of the agreement entered into by the accused would be to prevent or lessen competition unduly.

123 Section 32(1)(*c*) of the Act does not therefore violate s. 7 of the *Charter*.

VII. Answers

124 I would answer the constitutional questions as follows:

> 1. Is s. 32(1)(*c*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(1)(*c*) of the *Competition Act*, R.S.C. 1985, c. C-34) in whole or in part inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No.

2. Is s. 32(1.1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now s. 45(2) of the *Competition Act*, R.S.C. 1985, c. C-34) inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

3. If the answer to questions 1 or 2 is yes, is the infringement nevertheless justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is not necessary to answer this question.

VIII. Conclusion

125 I would dismiss the appeal.

Appeal dismissed.

1999 CarswellNWT 16
Northwest Territories Supreme Court

R. v. Peyton

1999 CarswellNWT 16, 41 W.C.B. (2d) 247

Her Majesty The Queen, Appellant and Jeffrey Ross Peyton, Respondent

Vertes J.

Heard: February 9, 1999
Judgment: February 18, 1999
Docket: Iqaluit CR 03580

Counsel: *Jim Marshall*, for the Crown (Appellant).
Susan T. Cooper, for the Respondent.

Subject: Criminal

Headnote

Criminal law --- Firearms and other offensive weapons — Restricted weapon registration certificates — General

In February 1992, respondent firearms collector purchased and properly registered fully automatic weapon converted to semi-automatic fire, classified as restricted weapon — In August 1992, Parliament amended definition of "prohibited weapon" in subsection 84(1), Criminal Code to include any weapon capable of conversion to fully-automatic fire — Converted weapons in possession of bona fide gun collectors prior to amendment retained restricted and registrable status upon new application for registration before statutory "cut-off" date — Amendments called for new applications for registration to include details of conversion from fully automatic firing capability — Respondent's pre-amendment registration expired after "cut-off" date and respondent attempted to re-register weapon on terms of original registration — Respondent's application for re-registration was denied, firearm classified prohibited and police seized firearm — Respondent brought application for declaration that firearm lawfully held of respondent — Application granted and Crown appealed — Appeal allowed and firearm forfeited — Language of Criminal Code amendments clearly called for re-registration on specific terms, details of conversion and compliance with "cut-off" date — Firearm reverted to prohibited status and respondent not complying with exception provisions — Criminal Code, R.S.C. 1985, c. C-46, s. 84(1).

Criminal law --- Firearms and other offensive weapons — Exemptions — Miscellaneous exemptions

In February 1992, respondent firearms collector purchased and properly registered fully automatic weapon converted to semi-automatic fire, classified as restricted weapon — In August 1992, Parliament amended definition of "prohibited weapon" in subsection 84(1), Criminal Code to include any weapon capable of conversion to fully-automatic fire — Converted weapons in possession of bona fide gun collectors prior to amendment retained restricted and registrable status upon new application for registration before statutory "cut-off" date — Amendments called for new applications for registration to include details of conversion from fully automatic firing capability — Respondent's pre-amendment registration expired after "cut-off" date and respondent attempted to re-register weapon on terms of original registration — Respondent's application for re-registration was denied, firearm classified prohibited and police seized firearm — Respondent brought application for declaration that firearm lawfully held of respondent — Application granted and Crown appealed — Appeal allowed and firearm forfeited — Language of Criminal Code amendments clearly called for re-registration on specific terms, details of conversion and compliance with "cut-off" date — Firearm reverted to prohibited status and respondent not complying with exception provisions — Criminal Code, R.S.C. 1985, c. C-46, s. 84(1).

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s. 84(1) "restricted weapon" (c.1)(iii) [en. 1991, c. 40, s. 2(4)] — considered

s. 84(1) "restricted weapon" (d) [en. 1991, c. 40, s. 2(4)] — considered

s. 102(3) — considered

s. 109(4.1) [en. 1991, c. 40, s. 21(4)] — considered

s. 109(4.1)(b) [en. 1991, c. 40, s. 21(4)] — considered

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Firearms Act, S.C. 1995, c. 39
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Interpretation Act, R.S.C. 1985, c. I-21
s. 12 — referred to

APPEAL by Crown from order declaring respondent in lawful possession of semi-automatic firearm capable of conversion to fully automatic fire.

***Vertes J.*:**

1 The Crown appeals a ruling by a Territorial Court Judge that the respondent is lawfully entitled to possession of a certain firearm. For the reasons that follow, I respectfully conclude that the judge erred in law and the decision must be reversed.

2 The respondent is a gun collector. In February 1992, he purchased a Thompson, model MIAI, submachine gun. The firearm was one manufactured as a fully automatic weapon but converted to a semi-automatic one. On February 3, 1992, he registered the firearm as a restricted weapon within the scope of the *Criminal Code* as it existed then. On August 1, 1992, the legislation was amended. In December 1993, the Royal Canadian Mounted Police took possession of the firearm since they were concerned that it was not validly registered. The concern was that the weapon, by reason of the new legislation, was a prohibited weapon. The respondent then completed an application to register that firearm, as a restricted weapon. He did not receive a new registration certificate.

3 In early 1998 the respondent brought proceedings pursuant to s.102(3) of the Code for an order returning the firearm to him. At the hearing, the Crown argued that the legislation enacted in 1992 required the respondent to re-register the firearm as a restricted weapon, or at least make an application to register, by October 1, 1992. His failure to do so meant that the firearm was no longer a registered restricted weapon. The result was, according to the Crown, that the firearm was now a prohibited weapon subject to forfeiture.

4 The learned trial judge held in favour of the respondent. In doing so she held that:

(a) the legislation enacted on August 1, 1992, did not change the classification of semi-automatic weapons so if the firearm here was registered as a restricted weapon prior to that then it remained a restricted weapon;

(b) if Parliament had intended to require re-registration of these types of firearms, it would have said so in clear language; and,

(c) the respondent acted with due diligence to comply with the legislation.

5 To analyze these conclusions, and the arguments advanced on this appeal, I must review in detail the admittedly complex scheme of firearms legislation in the *Criminal Code*. The issue before me is one of statutory interpretation. Was the learned trial judge correct in her interpretation of the relevant provisions?

6 The proper approach to statutory interpretation, according to the Supreme Court of Canada judgment in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), is based on two elements. The first is the methodology set forth in what Professor E.A. Driedger, in his *Construction of Statutes* (2nd ed., 1983), called the "modern principle" (at page 87):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The second element is the general directive to regard every enactment as remedial and to provide a fair, large and liberal construction in order to ensure the attainment of the object of the enactment according to its true intent and meaning: as per s.12 of the *Interpretation Act*, R.S.C. 1985, c.I-21.

7 Counsel on the appeal did an excellent job in taking me through the various permutations of the legislation. To understand the legislation before the trial judge requires an understanding of the evolution of that legislation. A thorough review of the legislative history is provided in *R. v. Barnes* (1996), 104 C.C.C. (3d) 374 (Ont. C.A.). As noted in that case, the history of the firearms legislation in the *Criminal Code* is indicative of a clear and continuing intention on the part of Parliament to impose evermore restrictive safeguards on the use and possession of firearms, in particular automatic firearms, so as to protect the public. The restrictions on use and possession of firearms have been progressively increased while, at the same time, attempting to minimize interference with rights acquired by genuine gun collectors prior to the imposition of each additional restriction.

8 The legislative history shows that, prior to 1968, automatic firearms were simply "firearms" subject to registration. The *Criminal Law Amendment Act* of 1968-69 introduced the distinction between "prohibited" weapons (which were banned completely) and "restricted" weapons (which had to be registered). Automatic firearms were restricted weapons. The *Criminal Law Amendment Act* of 1977 designated automatic firearms as prohibited weapons. However, if an automatic firearm was already registered as a restricted weapon and formed part of a *bona fide* gun collector's collection on the date that amendment came into force (January 1, 1978) then it was still a restricted weapon. This "grandfather" clause remained untouched until the recent amendments in Bill C-68 (the "*Firearms Act*") were proclaimed in force on December 1, 1998.

9 The definition of "prohibited weapon" in the 1977 amendment resulted in a curious situation. That definition included any firearm, not subject to the "grandfather" clause noted above, that is "capable" of firing bullets in rapid succession during one pressure of the trigger. In *R. v. Hasselwander* (1993), 81 C.C.C. (3d) 471 (S.C.C.), a majority of the Supreme Court held that the term "capable" was broad enough to capture converted semi-automatic firearms that could readily and quickly be reconverted to an automatic state. Therefore, a prohibited automatic weapon converted to a semi-automatic weapon still retained its status as a prohibited weapon if it can be easily reconverted to its original state. What this meant was that a genuine gun collector could still possess a semi-automatic firearm as a "restricted weapon" so long as the firearm could not be easily converted to an automatic firearm.

10 In 1992, Bill C-17 (now S.C. 1991, c.40) introduced further definitional amendments and restrictions. These were proclaimed in force on August 1, 1992, and were the provisions contained in the *Criminal Code* up until the amendments introduced by Bill C-68 came into force at the end of 1998.

11 Under Bill C-17, the definition of "prohibited weapon" found in s.84(1) of the Code was amended to include:

> (c) any firearm, not being a restricted weapon described in paragraph (c) or (c.1) of the definition of that expression in this subsection, that is capable of, or assembled or designed and manufactured with the capability of, firing projectiles in rapid succession during one pressure of the trigger, whether or not it has been altered to fire only one projectile with one such pressure.

Thus, by this amendment, all automatic weapons, whether converted to a semi-automatic state or not, were prohibited unless they were restricted weapons within the meaning of paragraphs (c) or (c.1) of the definition of "restricted weapon". Those paragraphs provided that the definition of "restricted weapon" included:

> (c) any firearm that is designed, altered or intended to fire bullets in rapid succession during one pressure of the trigger and that, on January 1, 1978, was registered as a restricted weapon and formed part of a gun collection in Canada of a genuine gun collector,
>
> (c.1) any firearm that is assembled or designed and manufactured with the capability of firing projectiles in rapid succession with one pressure of the trigger, to the extent that

(i) the firearm is altered to fire only one projectile with one such pressure,

(ii) on October 1, 1992, the firearm was registered as a restricted weapon, or an application for a registration certificate was made to a local registrar of firearms in respect of the firearm, and the firearm formed part of a gun collection in Canada of a genuine gun collector, and

(iii) subsections 109(4.1) and (4.2) were complied with in respect of that firearm...

Paragraph (c) was the "grandfather" clause carried over from the 1977 amendment. Paragraph (c. 1) was new. The respondent's firearm was thus captured by the new definition of prohibited weapon as well as the definition of restricted weapon (looking at only (c. 1)(i) of the new definition). To fully be classed as a restricted weapon, the respondent's firearm also had to meet the elements set forth in (c.1)(ii) and (iii).

12 Paragraph (c.1)(iii) referred to subsections 109(4.1) and (4.2) of the Code. These, along with a subsection (4.3), were also introduced by Bill C-17:

(4.1) A registration certificate may only be issued in respect of a restricted weapon described in paragraph (c.1) of the definition "restricted weapon" in subsection 84(1) where a local registrar of firearms, in addition to the matters referred to in subsection (3),

(a) indicates on the copy of the application that is sent to the Commissioner pursuant to subsection (5) that the restricted weapon will form part of a gun collection of the applicant who is a genuine gun collector whose collection includes one or more restricted weapons described in that paragraph; and

(b) describes on the copy referred to in paragraph (a) all alterations that have been made to the restricted weapon to enable it to fire only one projectile with one pressure of the trigger.

(4.2) Where the description of the alterations referred to in paragraph (4.1)(b) changes in respect of a restricted weapon, the restricted weapon registration certificate issued in respect of the weapon is automatically revoked and the holder of that certificate shall immediately apply for a new registration certificate in respect of the weapon.

(4.3) Notwithstanding anything in this Act, no registration certificate may be issued in respect of a restricted weapon described in paragraph (c. 1) of the definition "restricted weapon" in subsection 84(1) to a person who did not lawfully possess such a restricted weapon at the time of the coming into force of this subsection.

The requirements of subsection 109(4.1) clearly added new criteria for the issuance of a registration certificate for a restricted weapon caught by paragraph (c.1) of the definition. As noted in *Barnes* (at page 385):

...there can be no doubt that the 1992 amendments were intended to place further restrictions on the registration and possession of automatic firearms and no wider meaning should be attributed to the provisions exempting certain automatic weapons from the more stringent restrictions being imposed than is made absolutely necessary by the wording of the Act.

13 The learned trial judge stated in her reasons as follows:

By adding section 84(c) to the definition of prohibited weapons and (c.1) to the definitions of restricted weapons Parliament did widen the definitions of prohibited weapons to include semi-automatic guns not registered by October 1, 1992.

Section 109(4.1) provides for the formal recording of alterations required on the semi-automatic weapons. This section addresses a legitimate concern to inspect weapons that are to be registered as semi-automatic guns to insure that they have been properly altered and to record those alterations. However, Mr. Peyton's gun was already registered as semi-automatic when purchased, only months before the new registration regime became law...

> The legislation does not change the classification of semi-automatic weapons. If they are registered they remain as they were before, restricted weapons. If they are not registered, they are prohibited weapons. The amended Firearm Regulation do not change the classification of semi-automatic weapons except that they require registration by particular date October 1, 1992.

14 In my respectful opinion, the trial judge erred when she concluded that the legislation, meaning Bill C-17, did not change the classification of semi-automatic weapons. As I noted previously, because of the *Hasselwander* decision, some converted semi-automatic firearms were prohibited weapons. Others were restricted weapons. The distinction turned on how readily the firearm could be reconverted to its automatic state. But, pursuant to Bill C-17, all converted semi-automatic firearms were prohibited weapons. The exception (besides the ones subject to the "grandfather" clause) was a firearm that met the requirements of the new subsection (c. 1) of s. 84(1). Among those requirements were the additional criteria stipulated by the new subsection 109(4.1).

15 Pursuant to s.109(4.1)(b), a registration certificate could only be issued lawfully if all of the alterations made to the firearm were indicated on the copy of the application for registration. Therefore, as Crown counsel put it in his written brief, if such information was not contained in an application for a registration certificate issued prior to August 1, 1992, that earlier registration certificate could not be regarded as valid for a (c.1) restricted firearm as the certificate was not issued in compliance with clause (iii) of subsection (c.1). A new application for registration, one that complied with subsection 109(4.1), was therefore required. It seems to me that this is the precise reason why subsection (c.1)(ii) provided for an October 1, 1992, deadline to register the weapon or at least apply for registration. Because previous certificates were not in compliance with s.109(4.1)(b), the holders of such firearms were given between August 1, 1992, the date the new legislation came in force, and October 1, 1992, to comply with the additional requirements imposed by Bill C-17.

16 This compliance requirement is also implicit in s.109(4.2) which provides that, if the alterations specified on the application are changed, the certificate issued as a result of that application is automatically revoked. This provision would be futile and meaningless if there was no requirement to file an application that specified the alterations. Such an application, however, was not required until Bill C-17 came into force.

17 This interpretation is strengthened when one examines s.109(4.3). It says, in essence, that no registration certificate may be issued for a (c.1) restricted weapon to anyone who did not lawfully possess such weapon at the time Bill C-17 came into force (August 1, 1992). The only way for someone to lawfully possess a restricted weapon after was by having it registered. Therefore, if a pre-Bill C-17 registration was still valid after August 1, 1992, subsection (4.3) would also be meaningless since it clearly contemplates the issuance of a registration certificate to one who already has a registration certificate. In my opinion this too leads to the conclusion that Bill C-17 required the re-registration of a (c.1) restricted firearm prior to October 1, 1992, notwithstanding that the firearm may have been registered prior to Bill C-17 coming into force.

18 I think this interpretation accords with the statements of the federal Minister of Justice, as to the intended scope of paragraph (c.1) and the significance of the additional criteria of subsections 109(4.1) and (4.2), made before a legislative committee in 1991 (as quoted in *Barnes* at pages 387-388):

> Turning to converted fully automatic firearms, the legislative provision prohibiting converted fully automatic firearms is similar to the proposal contained in Bill C-80. All such guns became prohibited on a fixed date unless registered by a genuine gun collector. The registration process accomplishes three things. It ensures that the person registering the gun is in fact a genuine gun collector as required by the legislation. Inspection of the firearms ensures it has been properly converted, and a list of the actual conversion steps is recorded and kept so that the converted status can be checked later if the gun is transferred to another eligible owner.

19 The conclusion that Bill C-17 required re-registration of converted semi-automatic firearms is one that was reached by another Territorial Court judge in *R. v. Davies*, a decision rendered on (March 3, 1995), Bruser J. (N.W.T. Terr. Ct.). The same issue came up in that case. The trial judge in the case before me did not refer to *Davies* in her judgment although it was referred to in argument before her.

20 In *Davies* , His Honour Judge Bruser held that there was a requirement for re-registration. He also referred specifically to the registration deadline of October 1, 1992, contained in clause (ii) of subsection (c.1). He addressed the suggestion that the reference to registration by that date could encompass registration prior to Bill C-17 coming into force:

> Paragraph (c.1)(ii), can only apply to registration under the new scheme. It does not include registration under the old scheme. Although the words "was registered" are used, they have to be read in context. The overall context of the new scheme is that the past tense covers the period from August 1, 1992, when the law came into effect to October 1, 1992. Had Parliament intended pre-August 1, 1992, registration to be included, Parliament would not have used the October 21, 1992, date as the reference date. August 1, 1992 would have been used. The purpose of the statutory scheme was to allow registration to take place from August 1, 1992, to October 1, 1992 and as extended by amnesty.

I respectfully adopt these comments.

21 It seems clear to me that, having regard to the objective of Bill C-17, whereby all converted semi-automatic firearms were to be designated as prohibited weapons unless registered in accordance with the terms of subsection (c.1), the intent of Parliament was to require re-registration. The legal quality of these types of firearms was changed by Bill C-17. Therefore, it cannot be said that a prior registration must perforce continue to be valid.

22 The learned trial judge also referred to the lack of clear language used by Parliament to express its intention as cause to find in favour of the respondent. The trial judge wrote:

> I agree with the conclusion set out in the case of *Regina v. Berkitt*, a decision of the Ontario Court (Provincial Division), The Honourable Judge D.G. Scott, March 25, 1996. If Parliament had intended to require the re-registration of converted semi-automatic weapons they could have done that using clear language. An example of clear language appears to be section 109(4.2). Even this section becomes less clear as there is no registration procedure after October 1992 to register newly altered semi-automatic weapons that have been previously registered.

The judge in the *Berkitt* case [*R. v. Berkitt* (March 25, 1996), Scott J. (Ont. Prov. Div.)] (referred to in this extract) described this legislation as "a monumental piece of obscurity".

23 There is no question that criminal statutes must delineate understandable and ascertainable standards. It is a principle of fundamental justice (under s.7 of the *Charter of Rights and Freedoms*) that laws may not be too vague. So said the Supreme Court of Canada in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), and numerous other cases. One of the rationales for this doctrine of vagueness is "fair notice to the citizen", i.e., an understanding that certain conduct is the subject of legal restrictions. A law will be found to be unconstitutionally vague if it is lacks in precision as not to give sufficient guidance for legal debate as to its meaning. The question is: Can the law be given a sensible meaning? This is necessarily a relatively high test.

24 In my opinion, to say that this legislation could have been more clear or direct is not the test. Complexity of statutory interpretation or application is not the same thing as vagueness or uncertainty as to the intent of the statute. Here one is still able to reach a conclusion as to the statute's meaning by reasoned analysis and by applying legal criteria.

25 This argument, however, also raises the principle of "strict construction" of penal statutes. This principle has been defined as meaning that where the import of some enactment is inconclusive or ambiguous, the court may then properly lean in favour of an interpretation that will avoid the penalty or leaves private rights undisturbed: see Driedger, *op.cit.*, pages 204 and 207. Any uncertainty as to the meaning or scope of the law should be resolved in favour of the citizen. This principle of strict construction appears to conflict with the remedial interpretation required by s.12 of the *Interpretation Act*. This apparent conflict was discussed in the *Hasselwander* case where Cory J. wrote on behalf of the majority (at pages 477-478):

> The apparent conflict between a strict construction of a penal statute and the remedial interpretation required by s.12 of the *Interpretation Act* was resolved by according the rule of strict construction of penal statutes a subsidiary role. In *Belanger*

> *v. The Queen*, [1970] 2 C.C.C. 206, 10 D.L.R. (3d) 683, [1970] S.C.R. 567, Cartwright C.J.C. harmonized these opposing principles. In so doing he cited with approval the following words of Maxwell (*The Interpretation of Statutes*, 7th ed. (1929), p. 244 at p. 573:
>
> > Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself.
>
> . . . . .
>
> Thus, the rule of strict construction becomes applicable only when attempts at the neutral interpretation suggested by s.12 of the *Interpretation Act* still leave reasonable doubt as to the meaning or scope of the text of the statute. As Professor Côté has pointed out, this means that even with penal statutes, the real intention of the legislature must be sought, and the meaning compatible with its goals applied...

26 In my opinion this is not a situation calling for the application of the rule of strict construction. The firearms provisions, while complex, are not obscure. Nor are they so ambiguous that one is incapable of giving them a sensible meaning. I have come to the conclusion that the intent of Parliament can be discerned and delineated without resort to this rule of construction. The requirement to re-register the firearm in question as a restricted weapon is, in my view, beyond doubt when the entire scheme of the legislation is examined.

27 The final point made by the trial judge in her reasons was that the respondent did everything he could to comply with the legislation. I take this as a due diligence issue although I have doubt whether the concept can even apply to pure criminal law enactments. The short answer to this point is that the respondent did not do everything. He did not apply to re-register prior to October 1, 1992. His application for re-registration was not made until December of 1993. It is acknowledged that his application was on the wrong form but that is immaterial. It was too late to apply at all.

28 I accept that the respondent was not personally aware of the need to re-register (although there was some evidence in the *Davies* case as to the widespread publicity given to the provisions of Bill C-17). I would have thought that a genuine gun collector would make it a point to keep abreast of legislative changes. In any event, the response to this is the common law rule, codified in s.19 of the *Criminal Code*, that ignorance of the law is no excuse. This rule applies equally to ignorance of the existence of the law and a mistake as to its meaning, scope or application: *R. v. Molis* (1980), 55 C.C.C. (2d) 558 (S.C.C.).

29 Finally, the respondent's counsel made the argument that the firearm in question was not subject to the requirements of subsection (c.1) since that type of firearm was specifically designated as a restricted weapon pursuant to a Restricted Weapons Order issued in 1992. The definition of "restricted weapon" in s.84(1) includes:

> (d) a weapon of any kind, not being a prohibited weapon or a shotgun or rifle of a kind that, in the opinion of the Governor-in-Council, is reasonable for use in Canada for hunting or sporting purposes, that is declared by order of the Governor-in-Council to be a restricted weapon.

30 Counsel's point was that if a firearm is declared to be a restricted weapon then it is one regardless of the requirements of subsection (c.1). In my view, however, subsection (d) quoted above is merely another of several definition elements. It is not an overriding element. The Restricted Weapons Order itself contains a qualification. It states:

> 3. The following firearms, other than those described in paragraph (c) of the definition "prohibited weapon" and paragraphs (c) and (c.1) of the definition "restricted weapon" in subsection 84(1) of the *Criminal Code*, are hereby declared to be restricted weapons...

The exclusion of those weapons caught by subsection (c) of the definition of prohibited weapons would exclude the respondent's firearm. It seems to me that these Orders are meant as a safety net to catch all these types of firearms, even ones that may slip through any legislative loopholes or those that are not otherwise categorized by the definitional elements in s.84(1) of the Code.

31 The appeal is therefore allowed. The order made below is set aside. The firearm in question is hereby forfeited to the Crown.

Appeal allowed; firearm declared prohibited and forfeited to Crown.

2013 SCC 25
Supreme Court of Canada

R. v. Levkovic

2013 CarswellOnt 5132, 2013 CarswellOnt 5133, 2013 SCC 25, [2013] 2 S.C.R. 204, [2013] S.C.J. No. 25, 106 W.C.B. (2d) 51, 125 O.R. (3d) 320 (note), 1 C.R. (7th) 223, 282 C.R.R. (2d) 297, 296 C.C.C. (3d) 457, 305 O.A.C. 1, 359 D.L.R. (4th) 197, 444 N.R. 4, J.E. 2013-807, EYB 2013-221454

Ivana Levkovic, Appellant and Her Majesty The Queen, Respondent and Attorney General of Canada and Criminal Lawyers' Association of Ontario, Interveners

McLachlin C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver JJ.

Heard: October 10, 2012
Judgment: May 3, 2013
Docket: 34229

Proceedings: affirming *R. v. Levkovic* (2010), 103 O.R. (3d) 1, 271 O.A.C. 177, 81 C.R. (6th) 376, 264 C.C.C. (3d) 423, 223 C.R.R. (2d) 261, 2010 ONCA 830, 2010 CarswellOnt 9252 (Ont. C.A.)**Proceedings: reversing *R. v. Levkovic* (2008), 2008 CarswellOnt 5744, 235 C.C.C. (3d) 417, 178 C.R.R. (2d) 285 (Ont. S.C.J.)**

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***Fish J.*:**

I

1 Impermissibly vague laws mock the rule of law and scorn an ancient and well-established principle of fundamental justice: No one may be convicted or punished for an act or omission that is not clearly prohibited by a valid law. That principle is now enshrined in the *Canadian Charter of Rights and Freedoms*. This has been recognized by the Court since its earliest pronouncements on unconstitutional vagueness in the *Charter* era.

2 In *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), the Court cited with approval two decisions of the Supreme Court of the United States [1] holding that "impermissibly vague laws" violate "the first essential of due process of law" (p. 1151), and continued as follows:

> The principles expressed in these two citations are not new to our law. In fact they are based on the ancient Latin maxim *nullum crimen sine lege, nulla poena sine lege* — that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards . . . . This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law. [p. 1152]

3 And very recently, speaking for the Court in *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584 (S.C.C.), Chief Justice McLachlin reaffirmed the governing principle in these terms:

> It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done . . . . Condemning people for conduct that they could not have reasonably known was criminal is Kafkaesque and anathema to our notions of justice. After-the-fact condemnation violates the concept of liberty in s. 7 of the *Canadian Charter of Rights and Freedoms* and has no place in the Canadian legal system. [para. 14]

4 Our concern here is with s. 243 of the *Criminal Code*, R.S.C. 1985, c. C-46, which is said by the appellant to be impermissibly vague, at least in part. For that reason and to that extent, the appellant submits, s. 243 infringes her right to liberty and security of the person under s. 7 of the *Charter*. She submits as well that this infringement of s. 7 cannot be justified — or "saved" — under s. 1 of the *Charter*.

5 Section 243 makes it a crime in Canada to dispose of the dead body of a child with intent to conceal its delivery — whether the child died *before*, *during*, or *after* birth. The decisive issue on this appeal is whether s. 243 is impermissibly vague in its application to a child that died *before* birth.

6 The trial judge held that it is; the Ontario Court of Appeal held that it is not. With respect for the contrary conclusion of the trial judge, I agree with the Court of Appeal.

7 The appellant argues that s. 7 of the *Charter* must hold s. 243 to a more exacting standard of precision because it interferes with what in her view is a constitutionally protected personal autonomy and privacy interest: every woman's right not to disclose a naturally failed pregnancy.

8 In fact, however, the appellant's vagueness challenge does not rest ultimately — if at all — on a woman's constitutionally protected autonomy and privacy interests. On the contrary, the appellant expressly recognizes Parliament's right to criminalize the concealment by a woman of the fact that she was delivered of a child that died during, after and even *before* birth. More particularly, she concedes that Parliament may "enact legislation which has application to the concealment of a fetus at some stages of development prior to live birth". Her constitutional challenge relates exclusively to a woman's "inability to determine the conduct to which s. 243 applies in the context of a child that dies before birth": A.F., at para. 4.

9 It seems to me that the appellant's submission regarding a woman's right not to disclose a naturally failed pregnancy amounts to a challenge for vagueness in form but overbreadth in substance. A challenge for overbreadth would require the Court to balance the impact of s. 243 on the appellant's constitutionally protected interests against the impact necessary for s. 243 to achieve its justified legislative objectives. The appellant's arguments regarding this balance were rejected by both courts below. Moreover, there is no challenge for overbreadth on this appeal. And it is not open to the appellant, in characterizing her privacy interest submission as a vagueness challenge, to circumvent this balancing exercise that informs a proper constitutional challenge for overbreadth.

10 There is otherwise no dispute regarding the analytical framework for determining whether a statutory provision is void for vagueness. Nor is there any dispute as to the governing criteria: In a criminal context, the impugned provision must afford citizens fair notice of the consequences of their conduct and limit the discretion of those charged with its enforcement.

11 Whether the provision satisfies these essential requirements will be judicially determined by examination of both its text and context. Normally, in making that determination, the court will first consider the plain meaning of the words used by Parliament to define the essential elements of the offence. In this regard, the requirement of a specific intent, as in this case, will often shed light on the intelligibility of the terms used to describe the prohibited act or omission.

12 I shall later have more to say about these established rules of interpretation. As we shall see, their application here leads me to conclude that s. 243 of the *Criminal Code* is not impermissibly vague in its application to a child that dies before birth. Only that aspect of the provision is in issue on this appeal.

13 Any ambiguity as to this element of the offence is resolved in favour of the accused, as it must be, by restricting the pre-birth application of s. 243 to the delivery of a child that would likely have been born alive. By this I mean, here and throughout, a *child that has reached a stage of development where, but for some external event or circumstances, it would likely have been born alive*.

14 I recognize, of course, that provincial and territorial legislation requires reporting of *all* stillbirths, generally defined as "the complete expulsion or extraction from its mother of a product of conception either after the twentieth week of pregnancy or after the product of conception has attained the weight of 500 grams or more [without signs of life]", or words to this effect: see for example *Vital Statistics Act*, R.S.O. 1990, c. V. 4, s. 1.

15 The unchallenged constitutionality of these provisions may well negate the privacy and autonomy interests claimed by the appellant in this case. And they doubtless provide clear and specific standards for provincial reporting purposes. In my view, however, they cannot be invoked — by "harmonization", analogy, or otherwise — to expand by judicial fiat the meaning of child that "died before . . . birth" in s. 243 of the *Criminal Code*. Section 243, an enactment that falls squarely within federal jurisdiction, has a distinct legislative history and creates a crime for different legislative purposes.

16 Finally, a brief word regarding the fault element of s. 243 in its application to a child that died before birth. The Crown concedes, properly in my view, that the burden of proof would be on the prosecution to establish the accused's awareness that the child died at a time when it was likely to be born alive. Any doubt in this regard would require an acquittal. In addition, as in cases where the child dies at or after birth, the prosecution must prove that the accused disposed of its body "with intent to conceal the fact that [the child's] mother has been delivered of it".

17 For these reasons and the reasons that follow, I would dismiss the appellant's appeal to this Court, affirm the judgment of the Court of Appeal, and remit the matter for trial.

II

18 By agreement, the appellant's constitutional challenge to s. 243 was heard and decided by the trial judge before any evidence was called. Accordingly, the facts alleged by the Crown remain to this day unproven and are thus conditionally relevant here as a matter of context only.

19 For present purposes, the following summary will suffice.

20 While cleaning a recently vacated apartment, a building superintendent discovered on the balcony a bag containing the remains of a human baby. Postmortem examination revealed that the remains were of a female delivered "at or near full term": R.F., at para. 8. Due to the decomposition of the remains, the cause of death could not be determined and it was unknown whether there had been a live birth.

21 Following media reports of the superintendent's discovery, Ivana Levkovic, the appellant in this Court, attended at a police station and gave a statement to the police. She gave birth to the baby, she explained, after falling while alone in the apartment. She then placed the baby in a bag, deposited the bag on the balcony, and left the apartment. Nothing in her statement to the police suggests that the baby was alive at birth.

22 Ms. Levkovic was charged with concealing the body of a child under s. 243 of the *Criminal Code*. She pleaded not guilty and, before any evidence was called, challenged the constitutionality of s. 243 on the ground that it is impermissibly vague in its application to a *child that died before birth*. To this extent, she submitted, s. 243 violates s. 7 of the *Charter*.

23 The trial judge granted Ms. Levkovic's application: (2008), 235 C.C.C. (3d) 417 (Ont. S.C.J.). He concluded that the concept of a child that died before birth is unconstitutionally vague because he could not identify the moment on the gestational spectrum when a fetus becomes the body of a child within the meaning of s. 243.

24 To bring the provision into compliance with s. 7 of the *Charter*, the trial judge severed the word "before" from the text of the provision, thereby limiting its application to children that died either during or after birth.

25 The Crown elected to call no evidence and the trial judge acquitted the appellant.

26 The Court of Appeal allowed an appeal by the Crown, set aside the decision of the trial judge, restored the pre-birth application of s. 243, and ordered a new trial: 2010 ONCA 830, 103 O.R. (3d) 1 (Ont. C.A.).

27 The Court of Appeal concluded that the trial judge had erred by applying an overly demanding standard of vagueness and in failing to apply *R. v. Berriman* (1854), 6 Cox C.C. 388 (Eng. Assizes), to its interpretation of s. 243. Relying on *Berriman*, the Court of Appeal held that a fetus becomes a child for the purpose of s. 243 upon reaching a stage in its development when, but for some external event or other circumstances, it would likely have been born alive.

28 Ms. Levkovic now asks this Court to overrule the Court of Appeal and restore her acquittal. She raises two main grounds: (1) that the Court of Appeal erred in conducting an insufficiently contextual vagueness analysis, overlooking the full impact of s. 243 on her *Charter*-protected right to liberty and security; and (2) that the Court of Appeal erred in relying on the *chance of life* standard to uphold the constitutionality of s. 243.

III

29 Plainly, Ms. Levkovic's prosecution under s. 243 of the *Criminal Code* engages her liberty interest under s. 7 of the *Charter*, given the risk of her incarceration upon conviction: *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.), at para. 87.

30 It is therefore unnecessary at this stage to dispose of the appellant's submission that s. 243 *also* infringes her liberty and security under s. 7 of the *Charter* because it interferes with a decision of fundamental personal importance: whether and how to disclose the natural end of a failed pregnancy.

31 Accordingly, I now turn instead to consider whether s. 243, though it engages s. 7 of the *Charter*, nevertheless passes constitutional muster because it accords with the principles of fundamental justice.

IV

32 The doctrine against vagueness is founded on two rationales: a law must provide fair notice to citizens and it must limit enforcement discretion. Understood in light of its theoretical foundations, the doctrine against vagueness is a critical component of a society grounded in the rule of law: *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.), at pp. 626-27; *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 (S.C.C.), at para. 16.

33 Since long before the *Charter*, Canadian criminal law has adhered to the principle of certainty: prohibited conduct must be fixed and knowable in advance: M. Manning and P. Sankoff, *Manning, Mewett & Sankoff: Criminal Law* (4th ed. 2009), at p. 76. As Glanville Williams explained in *Criminal Law: The General Part* (2nd ed. 1961), at pp. 575-76 (cited in D. Stuart, *Canadian Criminal Law: A Treatise* (6th ed. 2011), at pp. 20-21):

> . . . *Nullum crimen sine lege, Nulla poena sine lege* — that there must be no crime or punishment except in accordance with fixed, predetermined law — this has been regarded by most thinkers as a self-evident principle of justice ever since the French Revolution. The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty . . . .
>
> . . . "Law" for this purpose means a body of fixed rules; and it excludes wide discretion even though that discretion be exercised by independent judges. The principle of legality involves rejecting "criminal equity" as a mode of extending the law.

34 This does not mean that an individual must know with certainty whether a particular course of conduct will ultimately result in a conviction of the crime that prohibits such conduct. What it does mean is that the essential elements of the crime must be ascertainable in advance. If an accused must wait "until a court decides what the contours and parameters of the offence are then the accused is being treated unfairly and contrary to the principles of fundamental justice": Manning, at pp. 75-76.

35 Individuals are nonetheless expected to refrain from conduct that tests the boundaries of criminal law lest they bear the consequences of the risk they have knowingly assumed: see *Canadian Foundation for Children*, at para. 42. Understandably, the appellant acknowledges that the constitution contemplates a necessary degree of imprecision in this regard. She submits, however, that such imprecision is unconstitutional if it requires individuals to refrain from constitutionally protected conduct.

36 The appellant argues that s. 243 must explicitly draw a dividing line between miscarriages and stillbirths lest a woman feel compelled by her uncertainty to give up more of her *Charter*-protected privacy than necessary. In effect, the appellant urges the Court to modify the well-established vagueness standard by introducing an additional factor into the vagueness analysis: the potential chilling impact of the impugned provision on *Charter*-protected interests. I would decline this invitation to vary the governing analytical framework established by the Court.

37 The rule against unconstitutional vagueness is primarily intended to assure the intelligibility of the criminal law to those who are subject to its sanctions and to those who are charged with its enforcement. As this Court stated in *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), at para. 82:

> In the context of vagueness, proportionality plays no role in the analysis. There is no need to compare the purpose of the law with its effects (as in overbreadth) . . . . A court is required to perform its interpretive function, in order to determine whether an impugned provision provides the basis for legal debate.

38 This does not mean that the impact of s. 243 on a woman's privacy interests is irrelevant to its constitutionality. However, it is important to maintain the analytical distinction between true vagueness and the additional vagueness concern raised by the appellant. The latter, in my view, is more appropriately considered an aspect of overbreadth and dealt with in that context. As the respondent rightly points out, failing to do so would create a "lopsided" analysis that "takes account of individual interests . . . without equal regard to the law's objectives": R.F., at para. 63.

39 As this Court held in *Nova Scotia Pharmaceutical*, "once the minimal general standard has been met, any further arguments as to the precision of the enactments should be considered at the 'minimal impairment' stage of s. 1 analysis" (p. 643). Or, in this case, where no *Charter* violation has yet been established and there is therefore no need to consider s. 1, additional precision-based arguments relating to the scope of the provision should be considered in an overbreadth analysis.

40 Where a law meets the minimum standard of precision required by the *Charter*, it may nevertheless by "[g]enerality and imprecision of language . . . fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth": *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.), at pp. 94-95.

41 Given that the appellant's overbreadth arguments were rejected by both courts below and not raised on this appeal, there is no proper basis to revisit the issue here.

42 I turn then to the question at the heart of this appeal: Does s. 243 sufficiently limit enforcement discretion and provide citizens with fair notice of the type of conduct that risks criminal sanction? As mentioned at the outset, I believe that it does.

V

43 Section 243 states:

> **243.** Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

44 A plain reading of its text makes clear that s. 243 is focused on the event of birth. The phrase "before, during or after birth" leaves no room for doubt in this regard. Indeed the parties agree that in its application to a *child that died before birth*, s. 243 applies only to stillbirths — not to miscarriages or abortions: see A.F., at paras. 3-4.

45 Despite this clear connection to the event of birth, the appellant argues that the word "before" renders s. 243 vague because it does not clearly distinguish a birth from a miscarriage. In other words, a woman may not know whether she has miscarried and is therefore outside the scope of s. 243, or has instead experienced a stillbirth and may therefore be caught by s. 243. From the appellant's perspective, the transition point between miscarriage and stillbirth is critical. It represents the moment when a fetus becomes a child and therefore delineates the boundary between permissible and criminal conduct: only the concealment of the body of a child is caught by s. 243.

46 Thus, the central vagueness question is whether s. 243 sufficiently identifies the moment on the gestational spectrum when a miscarriage becomes a stillbirth. The answer to this question does not lie entirely and exclusively in the text of s. 243.

47 A court can conclude that a law is unconstitutionally vague only after exhausting its interpretive function. The court "must first develop the full interpretive context surrounding an impugned provision": *Canadian Pacific*, at paras. 47 and 79.

48 To develop a provision's "full interpretive context", this Court has considered: (i) prior judicial interpretations; (ii) the legislative purpose; (iii) the subject matter and nature of the impugned provision; (iv) societal values; and (v) related legislative provisions: *Canadian Pacific*, at paras. 47 and 87.

49 Relevant jurisprudence as to the scope of this offence dates back over 150 years to the English case of *Berriman*. Ms. Berriman was charged with concealing the birth of her child. The police linked Ms. Berriman to the "half calcined" bones of a baby with a gestational age of seven to nine months. Erle J. instructed the jury not to convict if the fetus could have had no "chance of life":

> This offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth, that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the foetus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may, perhaps, be safely assumed that under seven months the great probably [sic] is that the child would not be born alive. [p. 390]

50 According to this test, an accused could only be convicted of child concealment if he or she, with the intent to conceal its birth, disposed of the body of a child that had reached a point of development where, "but for some accidental circumstances . . . it might have been born alive".

51 *Berriman* suggests that an unborn child of at least seven months is more likely than not to be born alive. By setting seven months as a guideline — rather than a bright line — the court in that case recognized that a child's chance of being born alive will generally increase along the gestational spectrum but is not necessarily predictable based on the gestational age of the fetus alone.

52 I would in any case hesitate to import into s. 243 a fixed threshold based on gestational age that Parliament has so far chosen to omit.

53 In my view, s. 243 is informed by *Berriman*.

54 However, where Erle J. found it sufficient in *Berriman* that the fetus "*might* have been born alive", I would adopt a *likelihood* requirement instead. I agree with the Court of Appeal that, for the purposes of s. 243, a fetus becomes a child when the fetus "has reached a stage in its development when, but for some external event or other circumstances, it would *likely* have been born alive" (para. 115 (my emphasis)).

55 This "likelihood" standard best comports with the late term focus of s. 243 and thus affords greater certainty in its application.

56 To support a conviction under s. 243, it must be shown that the "remains" disposed of were the remains of a child. In cases involving death before birth, the burden is therefore on the Crown to prove that the fetus would likely have been born alive.

57 This brings me to another important aspect of a full contextual interpretation of s. 243: its legislative purpose and context.

58 The parties agree that s. 243 is largely concerned with facilitating the investigation of homicides. In order to do so, s. 243 must cover potential victims of homicide.

59 Pursuant to s. 222(1), the homicide provisions of the *Criminal Code* apply only when the victim is a human being. And pursuant to s. 223(1) of the *Code*, a child becomes a human being "when it has completely proceeded, *in a living state*, from the body of its mother, whether or not (*a*) it has breathed; (*b*) it has an independent circulation; or (*c*) the navel string is severed".

60 In order to facilitate the investigation of homicides, s. 243 must therefore apply to children that were either born alive or were likely to be born alive and thus capable of satisfying the *Criminal Code* definition of a human being in s. 223(1). As the trial judge reasoned at para. 156:

> . . . allowing persons to conduct themselves as though pregnancy terminated in still-birth, and to say so if challenged, all without reliable government certification, amounts to an easy and unacceptable escape for those inclined to eliminate a new-born infant by killing it. Unchecked and unreviewable disposal of a still-born child effectively defeats the state's ability to verify that death preceded live birth.

61 Accordingly, a *likelihood* approach to s. 243 — that is, requiring evidence that the child would likely have been born alive — serves its goal of facilitating the investigation of potential homicides.

62 That said, to fully achieve its purpose, s. 243 must also facilitate the investigation of ss. 238 and 242, which both contemplate the death of a child that has not yet become a human being within the meaning of s. 223(1) of the *Criminal Code*.

63 Section 238 prohibits killing an unborn child in the act of birth and s. 242 proscribes the failure to obtain assistance in childbirth, resulting in permanent injury or death immediately before, during, or a short time after birth.

64 To facilitate the investigation of these offences, the pre-birth application of s. 243 is appropriately limited to fetuses that were likely to have been born alive — that is children, not fetuses that were miscarried.

65 This *likelihood* approach is also consistent with s. 662(4) of the *Criminal Code*, which, on a charge of murder or infanticide, permits a conviction under s. 243 where neither murder nor infanticide is made out, but the evidence proves the requisite elements of s. 243.

66 When considered in light of s. 662(4), it is clear that the pre-birth application of s. 243 is not intended to reach back beyond the delivery of a child that would likely have been born alive. Rather, its application to a child that died before birth simply ensures that the law can respond to criminal conduct against newly born infants in cases where the evidence does not establish that death occurred post-birth.

67 By facilitating the investigation of the offences discussed above, s. 243 ultimately serves to protect children born alive and a subset of children that died before birth. The parties agree that Parliament can properly legislate with respect to both. As we have seen, the appellant explicitly concedes that Parliament may "enact legislation which has application to the concealment of a fetus at some stages of development prior to live birth".

68 With regard to newly born children, the importance of s. 243 is clear. As expressed in the *Goudge Report*, vol. 1, at p. 4,[2] society is gravely concerned with investigating offences committed against society's youngest:

> For the community itself, the death of a child in criminally suspicious circumstances is deeply disturbing. Children are the community's most precious and most defenceless asset. The sense of outrage and the urgent need to understand what happened are overwhelming.

69 Bearing its purposes in mind, the pre-birth application of s. 243 is appropriately limited to fetuses that were likely to have been born alive. In the words of the respondent, the crime of concealment is "limited by the clear late term focus of the offences s. 243 is supporting": R.F., at para. 50.

70 The appellant argues, however, that even if we describe a *child that died before birth* as a fetus that would likely have been born alive, s. 243 remains vague because an accused is dependent on expert medical evidence to know whether a fetus was, in fact, likely to have been born alive.

71 Indeed, the doctrine against vagueness cannot be satisfied by inaccessible laws. It is not enough for laws to provide guidance to legal experts; laws, as judicially interpreted, must be sufficiently intelligible to guide ordinary citizens on how to conduct themselves within legal boundaries. As McLachlin C.J. explained in *Mabior* (in a passage more fully set out above): "It is a fundamental requirement of

72 Nonetheless, reliance on expert evidence is not necessarily fatal to the constitutionality of a provision. Section 243 is by no means the only offence that relies on expert evidence to determine whether an offence was committed. For example, without the benefit of a breathalyser, individuals may not know whether they have consumed an amount of alcohol that would bring them over the legal limit. Similarly, in some murder cases an accused may not know, without expert medical evidence, whether his or her conduct actually caused the victim's death.

73 Expert evidence cannot serve to define the elements of an offence, but only to help the court determine whether the elements are made out on the facts of a particular charge. In the case of s. 243, expert evidence can thus be relied on to establish as a matter of fact that the disposed-of remains were those of a child that was likely to be born alive — an essential element of the offence.

74 Even if s. 243 provided a detailed description of the precise moment on the gestational spectrum where a miscarriage becomes a stillbirth, as the appellant suggests it should, medical evidence would often be required in any event. For example, if s. 243 stated that the concealment offence only applies to a child that died before birth where the gestational age is over seven months, what additional certainty would that give a woman who was unsure of the date of conception? In such a case, expert medical evidence regarding gestational age would be required to ascertain whether s. 243 would capture a decision to keep a failed pregnancy private.

75 Similarly, if the word "before" were severed from s. 243 making it only applicable to a child that died during or after birth, a woman remains dependent on medical evidence to determine whether her conduct would fall within s. 243. As the trial judge noted: "A mother may not be in the best position to know whether her new-born is alive or dead . . . " (para. 83). He went on to explain, at para. 145:

> Where a woman who has given birth mistakenly believes the child to be dead and disposes of the body intending to conceal its birth as opposed to notifying the relevant authorities, there is no opportunity to correct the mother's "mistake" and save the child (see *R. v. Bryan* (1959), 123 C.C.C. 160 (Ont. C.A.) — mother erroneously believed child to be stillborn, disposed of body down garbage chute; baby subsequently dying in incinerator).

76 Accordingly, under the severed version adopted by the trial judge that would apply only to deaths that occur during or after birth, medical evidence would still be required; it would simply relate to the time of death instead of fetal development. Clearly, it is the subject matter, rather than the imprecision of the law, that gives rise to the need for expert medical evidence.

77 Finally, the state's interest in late-term failed pregnancies is both ascertainable and well established. Stillbirths are highly regulated by provincial and territorial legislation: see R.F., at Appendix D. The regulations in all provinces and territories impose

some kind of positive obligation to disclose failed pregnancies where the gestational age is 20 weeks or more or where the fetus weighs 500 grams or more: see for example *Vital Statistics Act*, ss. 1 and 9.1; and associated regulations under R.R.O. 1990, Reg. 1094, s. 20.

78 The foregoing contextual and purposive analysis persuades me that s. 243 meets the minimum standard of precision required by the *Charter*. In its application to a *child that died before birth*, s. 243 only captures the delivery of a child that was likely to be born alive.

79 And I recall in this context that a conviction would only lie where the Crown proves that the child, to the knowledge of the accused, would likely have been born alive.

VI

80 For all the foregoing reasons, I have concluded that s. 243 does not violate s. 7 of the *Charter*. Section 243 gives women — and men — fair notice that they risk prosecution and conviction if they dispose of the remains of a child born at or near full term with intent to conceal the fact that its mother had been delivered of it. And s. 243 limits with sufficient clarity the discretion of those charged with its enforcement. There is thus no need to conduct a s. 1 analysis.

81 I would therefore dismiss the appeal and affirm the order for a new trial.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 *Connally c. General Construction Co.*, 269 U.S. 385 (U.S. Sup. Ct. 1926), at p. 391; *Cline v. Frink Dairy Co.*, 274 U.S. 445 (U.S. Sup. Ct. 1927), at p. 465.

2 *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) (the "*Goudge Report*").

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Part II

Partie II

OTTAWA, WEDNESDAY, AUGUST 27, 2014

Statutory Instruments 2014

SOR/2014-195 to 198 and SI/2014-72 to 73

Pages 2328 to 2346

OTTAWA, LE MERCREDI 27 AOÛT 2014

Textes réglementaires 2014

DORS/2014-195 à 198 et TR/2014-72 à 73

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Registration
SOR/2014-195 August 6, 2014

SPECIAL ECONOMIC MEASURES ACT

Regulations Amending the Special Economic Measures (Russia) Regulations

P.C. 2014-905 August 6, 2014

Whereas the Governor in Council is of the opinion that the actions of the Russian Federation constitute a grave breach of international peace and security that has resulted or is likely to result in a serious international crisis;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, pursuant to subsections 4(1) to (3) of the *Special Economic Measures Act*[a], makes the annexed *Regulations Amending the Special Economic Measures (Russia) Regulations*.

REGULATIONS AMENDING THE SPECIAL ECONOMIC MEASURES (RUSSIA) REGULATIONS

AMENDMENTS

1. Part 1 of Schedule 1 to the *Special Economic Measures (Russia) Regulations*[1] is amended by adding the following after item 48:

49. Sergei Orestovoch BESEDA
50. Aleksandr Vasilievich BORTNIKOV
51. Mikhail Vladimirovich DEGTYAREV
52. Mikhail Efimovich FRADKOV
53. Boris Vyacheslavovich GRYZLOV
54. Ramzan Akhmadovitch KADYROV
55. Vladimir Georgyevich KULISHOV
56. Rashid Gumarovich NURGALIEV
57. Nikolai Platonovich PATRUSHEV
58. Igor SHCHEGOLEV
59. Alexander Nikolayevich TKACHYOV
60. Valerii Yuriovych TRAVKIN
61. Nikolay Terentievich SHAMALOV
62. Konstantin Valerevich MALOFEEV

2. Part 2 of Schedule 1 to the Regulations is amended by adding the following after item 26:

27. United Shipbuilding Corporation
28. Dobrolet (also known as Dobrolyot)
29. Russian National Commercial Bank

3. Schedule 2 to the Regulations is amended by adding the following after item 2:

3. VTB Bank OAO
4. Bank of Moscow
5. Russian Agricultural Bank (Rosselkhozbank)

[a] S.C. 1992, c. 17
[1] SOR/2014-58

Enregistrement
DORS/2014-195 Le 6 août 2014

LOI SUR LES MESURES ÉCONOMIQUES SPÉCIALES

Règlement modifiant le Règlement sur les mesures économiques spéciales visant la Russie

C.P. 2014-905 Le 6 août 2014

Attendu que le gouverneur en conseil juge que les actions de la Fédération de Russie constituent une rupture sérieuse de la paix et de la sécurité internationales qui a entraîné ou est susceptible d'entraîner une grave crise internationale,

À ces causes, sur recommandation du ministre des Affaires étrangères et en vertu des paragraphes 4(1) à (3) de la *Loi sur les mesures économiques spéciales*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement modifiant le Règlement sur les mesures économiques spéciales visant la Russie*, ci-après.

RÈGLEMENT MODIFIANT LE RÈGLEMENT SUR LES MESURES ÉCONOMIQUES SPÉCIALES VISANT LA RUSSIE

MODIFICATIONS

1. La partie 1 de l'annexe 1 du *Règlement sur les mesures économiques spéciales visant la Russie*[1] est modifiée par adjonction, après l'article 48, de ce qui suit :

49. Sergei Orestovoch BESEDA
50. Aleksandr Vasilievich BORTNIKOV
51. Mikhail Vladimirovich DEGTYAREV
52. Mikhail Efimovich FRADKOV
53. Boris Vyacheslavovich GRYZLOV
54. Ramzan Akhmadovitch KADYROV
55. Vladimir Georgyevich KULISHOV
56. Rashid Gumarovich NURGALIEV
57. Nikolai Platonovich PATRUSHEV
58. Igor SHCHEGOLEV
59. Alexander Nikolayevich TKACHYOV
60. Valerii Yuriovych TRAVKIN
61. Nikolay Terentievich SHAMALOV
62. Konstantin Valerevich MALOFEEV

2. La partie 2 de l'annexe 1 du même règlement est modifiée par adjonction, après l'article 26, de ce qui suit :

27. United Shipbuilding Corporation
28. Dobrolet (aussi connue sous le nom de Dobrolyot)
29. Russian National Commercial Bank

3. L'annexe 2 du même règlement est modifiée par adjonction, après l'article 2, de ce qui suit :

3. VTB Bank OAO
4. Bank of Moscow
5. Russian Agricultural Bank (Rosselkhozbank)

[a] L.C. 1992, ch. 17
[1] DORS/2014-58

APPLICATION PRIOR TO PUBLICATION

4. For the purpose of paragraph 11(2)(*a*) of the *Statutory Instruments Act*, these Regulations apply before they are published in the *Canada Gazette*.

COMING INTO FORCE

5. These Regulations come into force on the day on which they are registered.

ANTÉRIORITÉ DE LA PRISE D'EFFET

4. Pour l'application de l'alinéa 11(2)*a*) de la *Loi sur les textes réglementaires*, le présent règlement prend effet avant sa publication dans la *Gazette du Canada*.

ENTRÉE EN VIGUEUR

5. Le présent règlement entre en vigueur à la date de son enregistrement.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations*.)

ISSUES

The Russian Federation continues to violate the sovereignty and territorial integrity of Ukraine.

BACKGROUND

Acting in coordination with the United States and the European Union, the Governor in Council has found that the actions of the Russian Federation constitute a grave breach of international peace and security that has resulted or is likely to result in a serious international crisis. As a result, the *Special Economic Measures (Russia) Regulations* were approved on March 17, 2014. Amendments to these Regulations were made on March 19, 2014, March 21, 2014, April 28, 2014, May 4, 2014, May 12, 2014, June 21, 2014, and July 24, 2014.

In Berlin, on July 2, 2014, the Foreign Affairs ministers of Ukraine, Germany, France and Russia issued a joint declaration stressing the need for a sustainable ceasefire to be monitored by the Organization for Security and Cooperation in Europe (OSCE). Leaders agreed to work to bring about this ceasefire and called for continued talks between Kyiv and the Russian-backed insurgents. The joint declaration also signalled Russia's readiness to grant Ukrainian border guards access to Russian territory in order to participate in the control of border crossings, and called for the deployment of OSCE monitors to border checkpoints while a ceasefire is in place.

Despite these commitments and declarations, the Russian Federation has taken no meaningful steps to implement the July 2 declaration, and continues to violate Ukraine's sovereignty and territorial integrity through its continued occupation of Crimea, significant military presence along Ukraine's Eastern border, and support of insurgents in the provinces of Donetsk and Luhansk. Weapons and militants continue to flow across the border into Ukraine, and Russia has failed to call on militants to lay down their weapons and commit to peace.

Throughout June and July 2014, deadly clashes between Ukrainian security forces and pro-Russian separatists have continued. Armed militia groups and insurgents have occupied government buildings, opened fire on border guard posts, launched mortar attacks at military checkpoints, shot down a Ukrainian aircraft and taken hostages. To date, over 1 100 people have been killed,

RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(*Ce résumé ne fait pas partie du Règlement*.)

ENJEUX

La Fédération de Russie continue de violer la souveraineté et l'intégrité territoriale de l'Ukraine.

CONTEXTE

Agissant en coordination avec les États-Unis et l'Union européenne, le gouverneur en conseil a conclu que les agissements de la Fédération de Russie constituent une rupture sérieuse de la paix et de la sécurité internationales et sont susceptibles d'entraîner ou ont entraîné une grave crise internationale. Par conséquent, le *Règlement sur les mesures économiques spéciales visant la Russie* a été adopté le 17 mars 2014. Des modifications y ont été apportées le 19 mars 2014, le 21 mars 2014, le 28 avril 2014, le 4 mai 2014, le 12 mai 2014, le 21 juin 2014 et le 24 juillet 2014.

Le 2 juillet 2014, à Berlin, les ministres des Affaires étrangères de l'Ukraine, de l'Allemagne, de la France et de la Russie ont fait une déclaration commune dans laquelle ils insistaient sur la nécessité d'instaurer un cessez-le-feu durable, dont le respect serait assuré par l'Organisation pour la sécurité et la coopération en Europe (OSCE). Les dirigeants se sont mis d'accord pour travailler à la mise en place de ce cessez-le-feu et ont demandé la tenue de pourparlers entre Kiev et les insurgés appuyés par la Russie. La déclaration commune faisait également état de la volonté de la Russie d'accorder aux gardes-frontières ukrainiens un accès au territoire russe, pour qu'ils puissent participer au contrôle des mouvements transfrontaliers et elle préconisait le déploiement d'observateurs de l'OSCE aux postes frontaliers lorsqu'un cessez-le-feu serait en vigueur.

Malgré ces engagements, la Fédération de Russie n'a pas encore pris de mesures concrètes pour mettre en application la déclaration du 2 juillet et elle continue de violer la souveraineté et l'intégrité territoriale de l'Ukraine en poursuivant son occupation de la Crimée, en maintenant une présence militaire importante à la frontière est de l'Ukraine ainsi qu'en appuyant des insurgés dans les provinces de Donetsk et de Louhansk. Des armes et des militants continuent de franchir la frontière avec l'Ukraine, et la Russie n'a toujours pas appelé les militants à déposer leurs armes au profit de la paix.

Au cours des mois de juin et de juillet 2014, les affrontements meurtriers entre les forces de sécurité de l'Ukraine et les séparatistes pro-russes se sont poursuivis. Des milices armées et des insurgés ont occupé des édifices gouvernementaux, ont ouvert le feu sur des postes de gardes-frontières, ont lancé des attaques au moyen de mortiers contre des points de contrôle militaires, ont

3 400 wounded and another 200 000 have fled the region since the Russian-backed militants launched their violent campaign.

On July 17, 2014, a Malaysia Airlines flight carrying 298 passengers and crew crashed in eastern Ukraine, killing all on board. Evidence suggests the airliner was brought down by a surface-to-air missile fired from an area controlled by pro-Russian provocateurs. There is also evidence of an increased flow of heavy weaponry, including rocket launchers, into Ukraine from Russia in the weeks before the crash, and evidence that the Russian Federation provided training on air-defense systems to the fighters. In the immediate aftermath of the tragedy, pro-Russian militants in the region of the crash impeded investigative and forensic work by international and Ukrainian authorities, as well as efforts to recover the remains of the victims. International experts are still unable to reach the crash site due to severe security constraints related to heavy shelling and gunfire.

Russia continues to send heavy equipment across the border. According to international sources, Russia has also fired artillery and rockets into Ukraine, including during the week after the Malaysia Airlines crash. On July 23, 2014, two more Ukrainian warplanes were shot down from Russian territory. A recent report issued by the United Nations indicates that fighting in eastern Ukraine has intensified over the past weeks and Russian-backed separatist groups have been accused of committing multiple human rights abuses, including abductions, detention, torture and execution.

According to the United Nations, there has been a large buildup of heavy weapons in the Donetsk and Luhansk regions (including artillery, tanks, rockets and missiles) that are inflicting increasing casualties and damage to civilian infrastructure, including water, electricity and sewage plants, as well as medical facilities.

Canada, along with G7 nations, has indicated readiness to intensify targeted sanctions and to implement significant additional measures to impose further costs on Russia should events so require.

Objectives

The proposed *Regulations Amending the Special Economic Measures (Russia) Regulations* (the Regulations) amend the *Special Economic Measures (Russia) Regulations* (the Russia Regulations) by adding 14 individuals and 3 entities to Schedule 1, and 3 entities to Schedule 2.

Description

The proposed Regulations add 14 individuals and 3 entities to the list of designated persons in Schedule 1. It is prohibited for any person in Canada and any Canadian outside Canada to

- deal in any property, wherever situated, held by or on behalf of a designated person whose name is listed in Schedule 1;
- enter into or facilitate, directly or indirectly, any transaction related to such a dealing;
- provide any financial or related service in respect of such a dealing;

abattu un appareil ukrainien et ont pris des personnes en otage. À ce jour, depuis que des militants appuyés par la Russie ont lancé leur campagne de violence, plus de 1 100 personnes ont été tuées, 3 400 ont été blessées et 200 000 autres ont fui la région.

Le 17 juillet 2014, un avion de la Malaysia Airlines s'est écrasé dans l'Est de l'Ukraine, et les 298 passagers et membres d'équipage à son bord ont été tués. Des preuves laissent croire que l'avion aurait été abattu par un missile surface-air lancé d'une zone contrôlée par des provocateurs pro-russes. Des preuves démontrent également une augmentation du flot d'armes lourdes, y compris de lance-roquettes, arrivant en Ukraine en provenance de la Russie dans les semaines qui ont précédé l'écrasement. De même, la Fédération de Russie aurait montré aux combattants comment utiliser des systèmes de défense aérienne. Au lendemain de la tragédie, dans la région où a eu lieu l'écrasement, des militants pro-russes ont entravé l'enquête et le travail médico-légal des autorités internationales et ukrainiennes, de même que les efforts visant à retrouver les restes des victimes. Les experts internationaux ne sont pas encore parvenus à se rendre sur le lieu de l'écrasement en raison du durcissement des mesures de sécurité, notamment à la suite de bombardements et de tirs intenses.

La Russie continue d'acheminer du matériel lourd par la frontière. Selon des sources internationales, elle est également responsable de tirs d'artillerie et de roquettes en direction de l'Ukraine, y compris pendant la semaine qui a suivi l'écrasement de l'avion de la Malaysia Airlines. Le 23 juillet 2014, deux autres appareils militaires ukrainiens ont été abattus à partir du territoire russe. Selon un rapport récent des Nations Unies, les combats dans l'Est de l'Ukraine se seraient intensifiés au cours des dernières semaines. Des groupes séparatistes appuyés par la Russie sont également accusés d'avoir commis de nombreuses violations des droits de la personne, y compris des enlèvements, la détention de personnes, des actes de torture et des exécutions.

Selon les Nations Unies, on signale une concentration d'armes lourdes dans les régions de Donetsk et de Louhansk (y compris des pièces d'artillerie, des tanks, des roquettes et des missiles), qui font de plus en plus de victimes et qui endommagent les infrastructures civiles, y compris les usines d'épuration et de traitement des eaux usées, le réseau d'électricité et les installations médicales.

De concert avec les autres pays du G7, le Canada s'est dit prêt à durcir les sanctions ciblées contre la Russie et à adopter d'autres mesures importantes pour la pénaliser davantage, si nécessaire.

Objectifs

Le *Règlement modifiant le Règlement sur les mesures économiques spéciales visant la Russie* (le Règlement) proposé modifie le *Règlement sur les mesures économiques spéciales visant la Russie* en ajoutant 14 particuliers et 3 entités à l'annexe 1, et 3 entités à l'annexe 2.

Description

Le projet de règlement ajoute 14 particuliers et 3 entités à la liste de personnes désignées de l'annexe 1. Conformément aux dispositions de celle-ci, toute personne au Canada et tout Canadien à l'extérieur du Canada ne peuvent :

- effectuer une opération portant sur un bien, indépendamment de la situation de celui-ci, détenu par une personne désignée de l'annexe 1 ou en son nom;
- conclure, directement ou indirectement, une transaction relativement à une telle opération ou en faciliter, directement ou indirectement, la conclusion;

- make goods, wherever situated, available to a designated person listed in Schedule 1; and
- provide any financial or related service to or for the benefit of a designated person listed in Schedule 1.

Exceptions to the above-noted prohibitions are available for the following:

- Payments made by or on behalf of designated persons under Schedule 1 pursuant to contracts entered into prior to the coming into force of the Regulations, provided that the payments are not made to or for the benefit of a designated person;
- Pension payments to any person in Canada or any Canadian outside Canada;
- Transactions in respect of accounts at financial institutions held by diplomatic missions, provided that the transaction is required in order for the mission to fulfill its diplomatic functions under the Vienna Convention on Diplomatic Relations, or, transactions required in order to maintain the mission premises if the diplomatic mission has been temporarily or permanently recalled;
- Transactions by international organizations with diplomatic status, agencies of the United Nations, the International Red Cross and Red Crescent Movement, or Canadian non-governmental organizations that have entered into a grant or contribution agreement with the Department of Foreign Affairs, Trade and Development;
- Transactions necessary for a Canadian to transfer to a non-designated person any accounts funds or investments of a Canadian held by a designated person under Schedule 1 on the day on which that person became designated;
- Financial services required in order for a designated person under Schedule 1 to obtain legal services in Canada with respect to the application of any of the prohibitions in the Regulations;
- Dealings with a person listed in Schedule 1 required with respect to loan repayments made to any person in Canada or any Canadian abroad for loans entered into with any person not listed in Schedule 1, enforcement of security in respect of those loans, or payments by guarantors guaranteeing those loans; and
- Dealings with a person listed in Schedule 1 required with respect to loan repayments made to any person in Canada or any Canadian abroad for loans entered into with a person listed in Schedule 1 before the day on which the person was listed in Schedule 1, enforcement of security in respect of those loans, or payments by guarantors guaranteeing those loans.

The Regulations also add three entities to the list of designated persons in Schedule 2. It is prohibited for any person in Canada and any Canadian outside Canada to transact in, provide or otherwise deal in a loan, bond or debenture, of maturity longer than 90 days in relation to

- a designated person listed in Schedule 2;
- the property of a designated person listed in Schedule 2; or
- the interests or rights in property of a designated person listed in Schedule 2.

- fournir des services financiers ou des services connexes à l'égard d'une telle opération;
- mettre des marchandises, indépendamment de leur situation, à la disposition d'une personne désignée de l'annexe 1;
- fournir des services financiers ou des services connexes à toute personne désignée de l'annexe 1 ou pour son bénéfice.

Des exceptions aux interdictions ci-dessus s'appliquent aux cas suivants :

- des paiements effectués par une personne désignée de l'annexe 1 ou en son nom en vertu d'un contrat ayant été signé avant l'application du Règlement, sous réserve que les paiements ne s'adressent pas à une des personnes désignées;
- des paiements de pension destinés à une personne au Canada ou à un Canadien à l'étranger;
- les transactions se rapportant à des comptes dans des institutions financières détenus par des missions diplomatiques, pourvu que la transaction soit requise pour que la mission puisse remplir ses fonctions diplomatiques en vertu de la Convention de Vienne sur les relations diplomatiques ou les transactions requises pour préserver les installations de la mission, si la mission diplomatique a été rappelée de manière temporaire ou permanente;
- les transactions par des organisations internationales ayant un statut diplomatique, des organismes des Nations Unies, le Mouvement international de la Croix-Rouge et du Croissant-Rouge ou des organisations non gouvernementales canadiennes qui ont conclu un accord de subvention ou de contribution avec le ministère des Affaires étrangères, du Commerce et du Développement;
- toute transaction nécessaire pour qu'un Canadien transfère à une personne non désignée les comptes, fonds ou investissements de Canadiens qui sont détenus par une personne désignée de l'annexe 1 à la date où cette personne est devenue une personne désignée;
- des services financiers requis pour qu'une personne désignée de l'annexe 1 puisse obtenir des services juridiques au Canada relativement à l'application de toutes les interdictions prévues dans le Règlement;
- les transactions avec une personne inscrite à l'annexe 1 relativement au remboursement d'un emprunt à toute personne au Canada ou à tout Canadien à l'étranger dans le cas d'emprunts contractés avec une personne non inscrite à l'annexe 1, la réalisation des sûretés relatives à de tels emprunts ou les paiements effectués par leurs garants;
- les transactions avec une personne inscrite à l'annexe 1 relativement au remboursement d'un emprunt à toute personne au Canada ou à tout Canadien à l'étranger dans le cas d'emprunts contractés avec une personne inscrite à l'annexe 1 avant que son nom ait été ajouté à l'annexe 1, la réalisation des sûretés relatives à de tels emprunts ou les paiements effectués par leurs garants.

Le Règlement ajoute également trois entités à la liste des personnes désignées de l'annexe 2. Il est interdit à toute personne au Canada et à tout Canadien à l'étranger d'effectuer une transaction portant sur un emprunt, une obligation ou une débenture dont la durée dépasse quatre-vingt-dix jours, de fournir un tel emprunt, une telle obligation ou une telle débenture ou d'effectuer une autre opération portant sur un tel emprunt, une telle obligation ou une telle débenture si la transaction, la fourniture ou l'autre opération a trait :

- à une personne désignée dont le nom est inscrit sur la liste établie à l'annexe 2;

The prohibition noted above does not apply in respect of a loan that was made or a bond or debenture that was issued before the designated person was listed in Schedule 2.

It is also prohibited for any person in Canada and any Canadian outside Canada to transact in, provide or otherwise deal in capital funding through the transaction of shares in exchange for an ownership interest in relation to

- a designated person listed in Schedule 2;
- the property of a designated person listed in Schedule 2; or
- the interests or rights in property of a designated person listed in Schedule 2.

The prohibition noted above does not apply to capital funding that occurred before the designated person was listed in Schedule 2.

"One-for-One" Rule

The "One-for-One" Rule applies to this proposal, as there are minimal administrative costs to business, because of the reporting requirement. However, the administrative burden associated with these Regulations is carved out from the "One-for-One" Rule as they address unique, exceptional circumstances.

Small Business Lens

The small business lens does not apply to this proposal, as there are no costs (or insignificant costs) on small business, and small businesses would not be disproportionately affected.

Consultation

Foreign Affairs, Trade and Development Canada drafted the Regulations in consultation with the Department of Justice and Citizenship and Immigration Canada.

Rationale

The measures contained in the Regulations demonstrate Canada's concern about the continuing violation of Ukraine's sovereignty and territorial integrity.

Implementation, Enforcement and Service Standards

Canada's sanctions regulations are enforced by the Royal Canadian Mounted Police and the Canada Border Services Agency. In accordance with section 8 of the *Special Economic Measures Act*, every person who wilfully contravenes these Regulations is liable upon summary conviction to a fine of not more than $25,000 or to imprisonment for a term of not more than one year or to both, or upon conviction on indictment, to imprisonment for a term of not more than five years.

- aux biens d'une personne désignée dont le nom est inscrit sur la liste établie à l'annexe 2;
- aux droits ou aux intérêts sur les biens d'une personne désignée dont le nom est inscrit sur la liste établie à l'annexe 2.

L'interdiction ci-dessus ne s'applique pas à l'égard d'un emprunt contracté avant l'inscription de la personne désignée en cause sur la liste établie à l'annexe 2 ni à l'égard d'une obligation ou débenture émise avant l'inscription de la personne désignée en cause sur la liste établie à l'annexe 2.

Il est également interdit à toute personne au Canada ou à tout Canadien à l'étranger d'effectuer une transaction relative à une mise de fonds faite par le biais de la transaction d'actions en échange d'une participation, de fournir une telle mise de fonds ou d'effectuer une autre opération concernant une telle mise de fonds, si la transaction, la fourniture ou l'autre opération a trait :

- à une personne désignée dont le nom est inscrit sur la liste établie à l'annexe 2;
- aux biens d'une personne désignée dont le nom est inscrit sur la liste établie à l'annexe 2;
- aux droits ou aux intérêts sur les biens d'une personne désignée dont le nom est inscrit sur la liste établie à l'annexe 2.

L'interdiction ci-dessus ne s'applique pas à l'égard d'une mise de fonds effectuée avant l'inscription de la personne désignée en cause sur la liste établie à l'annexe 2.

Règle du « un pour un »

La règle du « un pour un » s'applique à cette proposition, étant donné qu'elle présente un minimum de coûts administratifs pour les entreprises, en raison des exigences de déclaration. Toutefois, le fardeau administratif associé à ce règlement est exempté de la règle du « un pour un », puisqu'il concerne des circonstances uniques et exceptionnelles.

Lentille des petites entreprises

Cette section ne s'applique pas, car l'impact de la présente proposition sera nul ou négligeable sur le plan des coûts pour les petites entreprises et ne touche pas ces dernières de manière disproportionnée.

Consultation

Affaires étrangères, Commerce et Développement Canada a rédigé le Règlement en consultation avec le ministère de la Justice et Citoyenneté et Immigration Canada.

Justification

Les mesures prévues dans le Règlement reflètent les préoccupations du Canada à l'égard de la violation continue de la souveraineté et de l'intégrité territoriale de l'Ukraine.

Mise en œuvre, application et normes de service

La Gendarmerie royale du Canada et l'Agence des services frontaliers du Canada sont chargées de l'application du règlement relatif aux sanctions. Conformément à l'article 8 de la *Loi sur les mesures économiques spéciales*, toute personne contrevenant au Règlement encourt, sur déclaration de culpabilité, une amende maximale de 25 000 $ ou un emprisonnement maximal d'un an, ou les deux; ou par mise en accusation, un emprisonnement maximal de cinq ans.

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Registration
SOR/2014-196 August 6, 2014

SPECIAL ECONOMIC MEASURES ACT

Regulations Amending the Special Economic Measures (Ukraine) Regulations

P.C. 2014-906 August 6, 2014

Whereas the Governor in Council is of the opinion that the situation in Ukraine constitutes a grave breach of international peace and security that has resulted or is likely to result in a serious international crisis;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Foreign Affairs, pursuant to subsections 4(1) to (3) of the *Special Economic Measures Act*[a], makes the annexed *Regulations Amending the Special Economic Measures (Ukraine) Regulations*.

REGULATIONS AMENDING THE SPECIAL ECONOMIC MEASURES (UKRAINE) REGULATIONS

AMENDMENTS

1. Part 1 of the Schedule to the *Special Economic Measures (Ukraine) Regulations*[1] is amended by adding the following after item 49:

50. Pavel Yurevich GUBAREV
51. Ekaterina Yurevna GUBAREVA
52. Oksana TCHIGRINA
53. Boris LITVINOV
54. Sergey ABISOV

2. Part 2 of the Schedule to the Regulations is amended by adding the following after item 4:

5. Federal State of Novorossiya
6. International Union of Public Associations “Great Don Army”
7. Sobol
8. Luhansk Guard
9. Army of the Southeast
10. Donbass People’s Militia
11. Vostok battalion
12. Kerch ferry
13. Sevastopol commercial seaport
14. Kerch commercial seaport
15. Universal-Avia
16. Resort “Nizhnyaya Oreanda”
17. Azov distillery plant
18. National Association of producers “Massandra”
19. Magarach of the national institute of wine
20. Factory of sparkling wine Novy Svet

[a] S.C. 1992, c. 17
[1] SOR/2014-60

Enregistrement
DORS/2014-196 Le 6 août 2014

LOI SUR LES MESURES ÉCONOMIQUES SPÉCIALES

Règlement modifiant le Règlement sur les mesures économiques spéciales visant l’Ukraine

C.P. 2014-906 Le 6 août 2014

Attendu que le gouverneur en conseil juge que la situation en Ukraine constitue une rupture sérieuse de la paix et de la sécurité internationales qui a entraîné ou qui est susceptible d’entraîner une grave crise internationale,

À ces causes, sur recommandation du ministre des Affaires étrangères et en vertu des paragraphes 4(1) à (3) de la *Loi sur les mesures économiques spéciales*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement modifiant le Règlement sur les mesures économiques spéciales visant l’Ukraine*, ci-après.

RÈGLEMENT MODIFIANT LE RÈGLEMENT SUR LES MESURES ÉCONOMIQUES SPÉCIALES VISANT L’UKRAINE

MODIFICATIONS

1. La partie 1 de l’annexe du *Règlement sur les mesures économiques spéciales visant l’Ukraine*[1] est modifiée par adjonction, après l’article 49, de ce qui suit :

50. Pavel Yurevich GUBAREV
51. Ekaterina Yurevna GUBAREVA
52. Oksana TCHIGRINA
53. Boris LITVINOV
54. Sergey ABISOV

2. La partie 2 de l’annexe du même règlement est modifiée par adjonction, après l’article 4, de ce qui suit :

5. État fédéral de Novorossiya
6. Union internationale des associations publiques « Grande armée du Don »
7. Sobol
8. Garde de Louhansk
9. Armée du Sud-Est
10. Milice populaire du Donbass
11. Bataillon Vostok
12. Kerch ferry
13. Sevastopol commercial seaport
14. Kerch commercial seaport
15. Universal-Avia
16. Complexe hôtelier « Nizhnyaya Oreanda »
17. Azov distillery plant
18. National Association of producers « Massandra »
19. Magarach of the national institute of wine
20. Factory of sparkling wine Novy Svet

[a] L.C. 1992, ch. 17
[1] DORS/2014-60

APPLICATION PRIOR TO PUBLICATION

3. For the purpose of paragraph 11(2)(*a*) of the *Statutory Instruments Act*, these Regulations apply before they are published in the *Canada Gazette*.

COMING INTO FORCE

4. These Regulations come into force on the day on which they are registered.

ANTÉRIORITÉ DE LA PRISE D'EFFET

3. Pour l'application de l'alinéa 11(2)*a*) de la *Loi sur les textes réglementaires*, le présent règlement prend effet avant sa publication dans la *Gazette du Canada*.

ENTRÉE EN VIGUEUR

4. Le présent règlement entre en vigueur à la date de son enregistrement.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations*.)

ISSUES

Pro-Russian separatists continue to destabilize eastern Ukraine and facilitate Russian military action against the Ukrainian government.

BACKGROUND

Acting in coordination with the United States and the European Union, the Governor in Council has found that the situation in Ukraine constitutes a grave breach of international peace and security that has resulted or is likely to result in a serious international crisis. As a result, the *Special Economic Measures (Ukraine) Regulations* were approved on March 17, 2014. Further amendments to these Regulations were made on March 19, 2014, April 12, 2014, May 12, 2014, June 21, 2014, July 11, 2014 and July 24, 2014.

At the G7 Summit in Brussels in June 2014, leaders of the G7 countries issued a declaration condemning the Russian Federation's continuing violation of the sovereignty and territorial integrity of Ukraine. Leaders reaffirmed the illegal nature of Russia's annexation of Crimea, and that actions to destabilize eastern Ukraine are unacceptable and must stop. Leaders also called on the Russian Federation to meet the commitments it made in the Geneva Joint Statement of April 17, 2014, and cooperate with the Government of Ukraine as it implements its plans for promoting peace, unity and reform. Canada, along with G7 nations, has indicated readiness to intensify targeted sanctions and to implement significant additional measures to impose further costs on Russia should events so require.

In Berlin on July 2, 2014, the Foreign Affairs ministers of Ukraine, Germany, France and Russia issued a joint declaration stressing the need for a sustainable ceasefire to be monitored by the Organization for Security and Cooperation in Europe (OSCE), agreeing to "use their influence on the concerned parties" to make such a ceasefire happen, calling for continued talks between Kyiv and Russian-backed insurgents, welcoming Russia's readiness to grant Ukrainian border guards access to Russian territory in order to participate in the control of border crossings, and calling for the deployment of OSCE monitors to border checkpoints while a ceasefire is in place.

Despite these international commitments and Ukraine's military efforts, including the recapturing of Sloviansk and Kramatorsk, the insurgency has intensified in Donetsk and Luhansk regions as

RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(*Ce résumé ne fait pas partie du Règlement*.)

ENJEUX

Les séparatistes pro-russes continuent à déstabiliser l'Est de l'Ukraine et à faciliter l'action militaire russe contre le gouvernement ukrainien.

CONTEXTE

Dans le cadre d'une action coordonnée avec les États-Unis et l'Union européenne, le gouverneur en conseil a jugé que la situation en Ukraine constitue une rupture sérieuse de la paix et de la sécurité internationales qui a entraîné ou qui est susceptible d'entraîner une grave crise internationale. Par conséquent, le *Règlement sur les mesures économiques spéciales visant l'Ukraine* a été approuvé le 17 mars 2014. Des modifications y ont été apportées le 19 mars 2014, le 12 avril 2014, le 12 mai 2014, le 21 juin 2014, le 11 juillet 2014 et le 24 juillet 2014.

Au Sommet du G7 à Bruxelles en juin 2014, les dirigeants ont publié une déclaration condamnant la violation continue de la souveraineté et de l'intégrité territoriale de l'Ukraine par la Fédération de Russie. Ils ont réaffirmé que l'annexion de la Crimée par la Russie était illégitime et que les manœuvres visant à déstabiliser l'Est de l'Ukraine étaient inacceptables et devaient cesser. Ils ont également demandé à la Fédération de Russie de respecter les engagements qu'elle a pris au titre de la Déclaration conjointe de Genève du 17 avril 2014 et d'aider le gouvernement de l'Ukraine à mettre en œuvre ses plans visant à instaurer des réformes et à promouvoir la paix et l'unité. Le Canada, conjointement avec les autres pays du G7, a indiqué qu'il était prêt à intensifier ses sanctions ciblées et, au besoin, à adopter d'importantes mesures supplémentaires afin d'imposer à la Russie des coûts additionnels.

À Berlin, le 2 juillet 2014, les ministres des Affaires étrangères de l'Ukraine, de l'Allemagne, de la France et de la Russie ont publié une déclaration conjointe insistant sur la nécessité d'établir un cessez-le-feu durable sous la supervision de l'Organisation pour la sécurité et la coopération en Europe (OSCE), ont convenu d'user de leur influence auprès des parties concernées, ont demandé la poursuite d'un dialogue entre Kiev et les insurgés soutenus par la Russie, ont salué la volonté de la Russie d'accorder aux gardes-frontières ukrainiens l'accès au territoire russe pour participer au contrôle des points de passage frontaliers et ont demandé le déploiement d'observateurs de l'OSCE aux postes de contrôle frontaliers après l'établissement d'un cessez-le-feu.

Malgré ces engagements internationaux et les opérations militaires de l'Ukraine, qui ont permis entre autres la reprise de Sloviansk et de Kramatorsk, l'insurrection s'est intensifiée dans les

government forces step up efforts to disrupt the actions of illegal separatist groups, and reclaim more territory. Throughout July 2014, deadly clashes between Ukrainian security forces and pro-Russian separatists continued in eastern Ukraine, including an increasing number of incidents involving hostage taking.

Armed militia groups and insurgents currently control large parts of the Donetsk and Luhansk regions, and are basing their operations in numerous government and public buildings. There are daily reports of heavy fighting and civilian casualties. These armed groups have reportedly shot down at least five Ukrainian helicopters, three transport planes and most recently on July 24, 2014, two Ukrainian ground-attack jets.

On July 17, 2014, Malaysia Airlines flight MH17 carrying 298 passengers and crew crashed in eastern Ukraine, killing all on board. Evidence suggests the airliner was brought down by a surface-to-air missile fired from an area controlled by pro-Russian provocateurs. In the immediate aftermath of the tragedy, pro-Russian militants in the region of the crash impeded investigative and forensic work by international and Ukrainian authorities, as well as efforts to recover the remains of the victims. International experts are still unable to reach the crash site due to severe security constraints related to heavy shelling and gunfire.

According to the United Nations (UN), pro-Russian insurgents have deliberately targeted public utilities such as water, electricity and sewage plants, and forced essential services, including hospitals and clinics, to shut down. The UN reports that as of July 26, 2014, over 1 100 people have been killed (not including the MH17 victims), and over 3 400 people have been wounded. Additionally, more than 800 people have been abducted or detained by the insurgents, with many of them having been tortured. Approximately 200 000 people are believed to have fled the region since the Russian-backed militants launched their violent campaign in April 2014. Other reports from Ukrainian authorities indicate that over 300 members of the Ukrainian security forces have died in the conflict to date, and over 1 000 have been wounded.

Objectives

The proposed *Regulations Amending the Special Economic Measures (Ukraine) Regulations* (the Regulations) add five individuals and 16 entities to the Schedule.

Description

The proposed Regulations add five individuals and 16 entities to the list of designated persons under the *Special Economic Measures (Ukraine) Regulations*.

Any person in Canada and any Canadian outside Canada are prohibited from

- dealing in any property, wherever situated, held by or on behalf of a designated person;
- entering into or facilitating, directly or indirectly, any transaction related to such a dealing;
- providing any financial or related service in respect of such a dealing;

régions de Donetsk et de Louhansk, où les forces gouvernementales ont intensifié leurs efforts en vue de perturber les activités des groupes séparatistes illégaux et de regagner davantage de territoire. Au cours du mois de juillet 2014, les affrontements meurtriers entre les forces de sécurité ukrainiennes et les séparatistes pro-russes se sont poursuivis dans l'Est de l'Ukraine et se sont caractérisés notamment par un nombre accru de prises d'otage.

Des milices armées et des insurgés contrôlent actuellement d'importants territoires dans les régions de Donetsk et de Louhansk et mènent leurs activités depuis nombreux immeubles gouvernementaux et publics. Des rapports font quotidiennement état de violents affrontements et de victimes civiles. Ces groupes armés auraient abattu au moins cinq hélicoptères ukrainiens, trois avions de transport et, le 24 juillet 2014, deux avions à réaction d'attaque au sol.

Le 17 juillet 2014, un avion de Malaysia Airlines (vol MH17) s'est écrasé dans l'Est de l'Ukraine, et les quelque 298 passagers et membres d'équipage à son bord ont été tués. Des preuves laissent croire que l'avion aurait été abattu par un missile surface-air lancé d'une zone contrôlée par des provocateurs pro-russes. Au lendemain de la tragédie, des militants pro-russes de la région où a eu lieu l'écrasement ont entravé l'enquête et le travail médico-légal des autorités internationales et ukrainiennes, de même que les efforts déployés pour retrouver les restes des victimes. Le site de l'écrasement demeure toujours inaccessible aux experts internationaux, en raison de contraintes sécuritaires liées aux nombreux bombardements et échanges de tirs.

Selon l'Organisation des Nations Unies (ONU), les insurgés pro-russes ont délibérément ciblé des services publics tels que l'eau, l'électricité et les égouts, et ont forcé la fermeture de services essentiels, tels que des hôpitaux et des cliniques. Des rapports de l'ONU signalent qu'en date du 26 juillet 2014, plus de 1 100 personnes avaient été tuées (sans compter les victimes du vol MH17), et plus de 3 400 personnes avaient été blessées. En outre, plus de 800 personnes ont été enlevées ou détenues par les insurgés, et un grand nombre d'entre elles ont été torturées. On estime qu'environ 200 000 personnes ont fui la région depuis que les militants soutenus par la Russie ont entamé leur campagne de violence en avril 2014. D'autres rapports des autorités ukrainiennes signalent qu'à ce jour, plus de 300 membres des forces de sécurité de l'Ukraine ont perdu la vie pendant le conflit et que plus de 1 000 d'entre eux ont été blessés.

Objectifs

Le *Règlement modifiant le Règlement sur les mesures économiques spéciales visant l'Ukraine* (le Règlement) ajoute le nom de cinq particuliers et de 16 entités à l'annexe.

Description

Le projet de règlement ajoute cinq particuliers et 16 entités à la liste des personnes désignées par le *Règlement sur les mesures économiques spéciales visant l'Ukraine*.

Le Règlement interdit aux personnes au Canada et aux Canadiens à l'étranger :

- d'effectuer une opération portant sur un bien, indépendamment de la situation de celui-ci, détenu par une personne désignée ou en son nom;
- de conclure, directement ou indirectement, une transaction relativement à une telle opération ou d'en faciliter, directement ou indirectement, la conclusion;

- making goods, wherever situated, available to a designated person; and
- providing any financial or related service to or for the benefit of a designated person.

Exceptions to the above-noted prohibitions are available for the following:

- Payments made by or on behalf of designated persons pursuant to contracts entered into prior to the coming into force of the Regulations, provided that the payments are not made to or for the benefit of a designated person;
- Pension payments to any person in Canada or any Canadian outside Canada;
- Transactions in respect of accounts at financial institutions held by diplomatic missions, provided that the transaction is required in order for the mission to fulfill its diplomatic functions under the Vienna Convention on Diplomatic Relations, or, transactions required in order to maintain the mission premises if the diplomatic mission has been temporarily or permanently recalled;
- Transactions by international organizations with diplomatic status, agencies of the United Nations, the International Red Cross and Red Crescent Movement, or Canadian non-governmental organizations that have entered into a grant or contribution agreement with the Department of Foreign Affairs, Trade and Development;
- Transactions necessary for a Canadian to transfer to a non-designated person any accounts funds or investments of a Canadian held by a designated person on the day on which that person became designated;
- Financial services required in order for a designated person to obtain legal services in Canada with respect to the application of any of the prohibitions in the Regulations; and
- Loan repayments made to any person in Canada or any Canadian abroad in respect of loans entered into before the coming into force of the Regulations, enforcement of security in respect of those loans, or payments by guarantors guaranteeing those loans.

- de fournir des services financiers ou des services connexes à l'égard d'une telle opération;
- de mettre des marchandises, indépendamment de leur situation, à la disposition d'une personne désignée;
- de fournir des services financiers ou des services connexes à toute personne désignée ou pour son bénéfice.

Des exceptions aux interdictions précédentes peuvent s'appliquer dans les cas suivants :

- tout paiement fait par une personne désignée ou en son nom, qui est exigible aux termes d'un contrat conclu avant qu'elle ne devienne une personne désignée, à la condition qu'il ne soit pas fait à une personne désignée ou pour son bénéfice;
- les versements de pensions à toute personne au Canada ou à tout Canadien à l'étranger;
- toute transaction relative à tout compte d'une mission diplomatique détenu dans une institution financière, à la condition que la transaction soit requise pour permettre à la mission de remplir ses fonctions diplomatiques en vertu de la Convention de Vienne sur les relations diplomatiques ou, si elle a été rappelée définitivement ou temporairement, pour lui permettre d'assurer l'entretien des locaux de la mission;
- toute transaction relative aux organisations internationales ayant un statut diplomatique, aux institutions des Nations Unies, au Mouvement international de la Croix-Rouge et du Croissant-Rouge, ou aux organisations non gouvernementales canadiennes qui ont conclu un accord de subvention ou de contribution avec le ministère des Affaires étrangères, du Commerce et du Développement;
- toute transaction nécessaire pour qu'un Canadien transfère à une personne non désignée les comptes, fonds ou investissements de Canadiens qui sont détenus par une personne désignée à la date où celle-ci est devenue une personne désignée;
- les services financiers requis pour qu'une personne désignée obtienne des services juridiques au Canada relativement à l'application de toute interdiction prévue par le présent règlement;
- le remboursement à toute personne au Canada ou à tout Canadien à l'étranger d'emprunts contractés avant l'entrée en vigueur du présent règlement, la réalisation des sûretés relatives à de tels emprunts ou les paiements effectués par leurs garants.

"One-for-One" Rule

The "One-for-One" Rule applies to this proposal, as there are minimal administrative costs to business, because of the reporting requirement. However, the administrative burden associated with these Regulations is carved out from the "One-for-One" Rule, as they address unique, exceptional circumstances.

Règle du « un pour un »

La règle du « un pour un » s'applique à cette proposition, étant donné les coûts administratifs minimes qu'entraînent, pour les entreprises, les exigences de déclaration. Toutefois, le fardeau administratif associé à ce règlement est exempté de la règle du « un pour un », puisqu'il concerne des circonstances uniques et exceptionnelles.

Small business lens

The small business lens does not apply to this proposal, as there are no costs (or insignificant costs) on small business, and small businesses would not be disproportionately affected.

Lentille des petites entreprises

L'impact de la présente proposition sera nul ou négligeable sur le plan des coûts pour les petites entreprises et ne requiert donc pas la prise de mesures particulières.

Consultation

Foreign Affairs, Trade and Development Canada drafted the Regulations in consultation with the Department of Justice and Citizenship and Immigration Canada.

Consultation

Affaires étrangères, Commerce et Développement Canada a rédigé le Règlement en consultation avec le ministère de la Justice et Citoyenneté et Immigration Canada.

Rationale

The measures contained in the Regulations demonstrate Canada's concern about the continuing violation of Ukraine's sovereignty and territorial integrity.

Implementation, enforcement and service standards

Canada's sanctions regulations are enforced by the Royal Canadian Mounted Police and the Canada Border Services Agency. In accordance with section 8 of the *Special Economic Measures Act*, every person who wilfully contravenes these Regulations is liable upon summary conviction to a fine of not more than $25,000 or to imprisonment for a term of not more than one year or to both, or upon conviction on indictment, to imprisonment for a term of not more than five years.

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Justification

Les mesures prévues dans le Règlement reflètent les préoccupations du Canada à l'égard de la violation continue de la souveraineté et de l'intégrité territoriale de l'Ukraine.

Mise en œuvre, application et normes de service

La Gendarmerie royale du Canada et l'Agence des services frontaliers du Canada sont chargées de l'application des sanctions. Conformément à l'article 8 de la *Loi sur les mesures économiques spéciales*, toute personne contrevenant au Règlement encourt, sur déclaration de culpabilité, une amende maximale de 25 000 $ ou un emprisonnement maximal d'un an, ou les deux; ou par mise en accusation, un emprisonnement maximal de cinq ans.

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Registration
SOR/2014-197 August 14, 2014

CRIMINAL CODE

Regulations Amending the Pari-Mutuel Betting Supervision Regulations

The Minister of Agriculture and Agri-Food, pursuant to subsection 204(9)[a] of the *Criminal Code*[b], makes the annexed *Regulations Amending the Pari-Mutuel Betting Supervision Regulations*.

Ottawa, August 14, 2014

GERRY RITZ
Minister of Agriculture and Agri-Food

REGULATIONS AMENDING THE PARI-MUTUEL BETTING SUPERVISION REGULATIONS

AMENDMENT

1. Paragraph 1(*d*) of the Schedule to the *Pari-Mutuel Betting Supervision Regulations*[1] is amended by adding the following in alphabetical order:

Telmisartan (*Telmisartan*)

COMING INTO FORCE

2. These Regulations come into force on the day on which they are registered.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations*.)

Description

The *Pari-Mutuel Betting Supervision Regulations* (the Regulations) are designed to protect the integrity of pari-mutuel betting on horse races authorized under section 204 of the *Criminal Code*. Drugs and medications administered to race horses could affect the outcome of a pari-mutuel race. Drugs that are veterinary medications approved for sale in Canada may be administered to a horse but, with few exceptions, including vitamins and some anti-parasitic and antimicrobial agents, must not be present in a horse's system when it races.

This amendment adds the drug Telmisartan to section 1 of the Schedule of drugs to the Regulations.

Alternatives

There are no appropriate alternatives.

[a] S.C. 1994, c. 38, par. 25(1)(*g*)
[b] R.S., c. C-46
[1] SOR/91-365

Enregistrement
DORS/2014-197 Le 14 août 2014

CODE CRIMINEL

Règlement modifiant le Règlement sur la surveillance du pari mutuel

En vertu du paragraphe 204(9)[a] du *Code criminel*[b], le ministre de l'Agriculture et de l'Agroalimentaire prend le *Règlement modifiant le Règlement sur la surveillance du pari mutuel*, ci-après.

Ottawa, le 14 août 2014

Le ministre de l'Agriculture et de l'Agroalimentaire
GERRY RITZ

RÈGLEMENT MODIFIANT LE RÈGLEMENT SUR LA SURVEILLANCE DU PARI MUTUEL

MODIFICATION

1. L'article 1*d*) de l'annexe du *Règlement sur la surveillance du pari mutuel*[1] est modifié par adjonction, selon l'ordre alphabétique, de ce qui suit :

Telmisartan (*Telmisartan*)

ENTRÉE EN VIGUEUR

2. Le présent règlement entre en vigueur à la date de son enregistrement.

RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(*Ce résumé ne fait pas partie du Règlement*.)

Description

Le *Règlement sur la surveillance du pari mutuel* (le Règlement) a pour but de protéger l'intégrité des paris sur les courses de chevaux autorisés en vertu de l'article 204 du *Code criminel*. Les drogues et les médicaments administrés aux chevaux de course pourraient influer sur les résultats d'une course. Les drogues qui sont des médicaments à usage vétérinaire dont la vente est approuvée au Canada peuvent être administrées aux chevaux mais, à quelques exceptions près, notamment les vitamines et certains agents antiparasitaires et antimicrobiens, ne doivent pas être présentes dans l'organisme des chevaux lorsqu'ils prennent part à une course.

La présente modification au Règlement vise à inscrire la drogue Telmisartan à l'article 1 de l'annexe, qui dresse la liste des drogues interdites.

Solutions envisagées

Il n'existe aucune solution de rechange appropriée.

[a] L.C. 1994, ch. 38, al. 25(1)*g*)
[b] L.R., ch. C-46
[1] DORS/91-365

Benefits and Costs

The impact of this amendment will be positive because the prohibition of a potentially performance-altering drug will continue to protect the bettor, the integrity of the racing industry, and the credibility of the Canadian Pari-Mutuel Agency's (CPMA) Equine Drug Control Program.

There are no significant costs or environmental impact associated with this regulatory amendment.

Consultation

The CPMA consults with the Federal Drug Advisory Committee, consisting of veterinarians, pharmacologists and chemists, when proposing to add a drug to the Schedule. The Committee supports this regulatory action.

Provincial racing commissions continue to endorse the CPMA's Equine Drug Control Program, including the maintenance of the Schedule of prohibited drugs.

Compliance and Enforcement

Information on additions to the Schedule is provided to all industry sectors, so that they know which substances to avoid when treating horses scheduled to race.

Compliance with the CPMA's Equine Drug Control Program is accomplished by the testing of post-race samples of urine or blood taken from race horses. Positive results are reported to the provincial racing commissions for appropriate action under their rules of racing.

This amendment will not increase the current requirements for compliance and enforcement activities.

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Avantages et coûts

La présente modification aura une incidence positive, car l'interdiction des drogues susceptibles de modifier la performance continuera à protéger les parieurs, l'intégrité de l'industrie des courses de chevaux et la crédibilité du Programme de contrôle des drogues équines de l'Agence canadienne du pari mutuel (ACPM).

La présente modification réglementaire n'a aucune incidence financière ou environnementale d'importance.

Consultation

L'Agence consulte régulièrement le Comité consultatif des drogues, un groupe composé de vétérinaires, de pharmacologistes et de chimistes de l'industrie des courses, lorsqu'elle se propose d'ajouter une drogue à l'annexe. Ce comité appuie la présente mesure réglementaire.

Les commissions provinciales des courses continuent d'approuver le Programme de contrôle des drogues équines de l'ACPM, y compris la tenue de l'annexe des drogues interdites.

Respect et exécution

L'information sur les ajouts à l'annexe est fournie à tous les secteurs de l'industrie pour qu'ils connaissent les substances à éviter pour soigner les chevaux avant les courses.

L'analyse d'échantillons d'urine ou de sang prélevés sur les chevaux après la course sert à garantir la conformité au Programme de contrôle des drogues équines de l'ACPM. Les résultats positifs sont signalés aux commissions provinciales des courses qui prennent ensuite les mesures appropriées en fonction de leurs propres règles de course.

La présente modification n'ajoutera rien aux exigences actuelles touchant les activités de conformité et d'application.

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Registration
SOR/2014-198 August 15, 2014

FIREARMS ACT

FIREARMS RECORDS REGULATIONS (CLASSIFICATION)

P.C. 2014-910 August 15, 2014

Whereas the Minister of Public Safety and Emergency Preparedness is of the opinion that the making of the annexed *Firearms Records Regulations (Classification)* is so urgent that section 118 of the *Firearms Act*[a] should not be applicable in the circumstances;

And whereas that Minister will, in accordance with subsection 119(4) of that Act, have a statement of the reasons why he formed that opinion laid before each House of Parliament;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Public Safety and Emergency Preparedness, pursuant to paragraph 117(*m*) of the *Firearms Act*[a], makes the annexed *Firearms Records Regulations (Classification)*.

FIREARMS RECORDS REGULATIONS (CLASSIFICATION)

Keeping and amendment of records

1. Only the Registrar may keep or amend records of determinations made under the *Firearms Act* that firearms of a particular type, make and model are prohibited firearms, restricted firearms or neither prohibited firearms nor restricted firearms.

Records of Registrar's determinations

2. The Registrar must keep a record of every determination referred to in section 1 that he or she makes.

Amendment or destruction of records prohibited

3. The records referred to in section 2 must not be amended more than one year after the day on which they are made and must not be destroyed.

Coming into force

4. These Regulations come into force on the day on which they are registered.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations*.)

ISSUES

On February 26, 2014, the Royal Canadian Mounted Police (RCMP) determined the Ceská Zbrojovka 858 Tactical 2 and 4 rifles (the CZ858) and the Swiss Arms Classic Green rifles and its variants (the Swiss Arms), previously imported and sold in Canada as

[a] S.C. 1995, c. 39

Enregistrement
DORS/2014-198 Le 15 août 2014

LOI SUR LES ARMES À FEU

RÈGLEMENT SUR LES REGISTRES ET LES FICHIERS D'ARMES À FEU (CLASSIFICATION)

C.P. 2014-910 Le 15 août 2014

Attendu que le ministre de la Sécurité publique et de la Protection civile estime que l'urgence de la situation justifie une dérogation à l'obligation de dépôt prévue à l'article 118 de la *Loi sur les armes à feu*[a] en ce qui concerne le *Règlement sur les registres et les fichiers d'armes à feu (classification)*, ci-après;

Attendu que, conformément au paragraphe 119(4) de cette loi, le ministre fera déposer devant chaque chambre du Parlement une déclaration énonçant les justificatifs sur lesquels il se fonde,

À ces causes, sur recommandation du ministre de la Sécurité publique et de la Protection civile et en vertu de l'alinéa 117*m*) de la *Loi sur les armes à feu*[a], Son Excellence le Gouverneur général en conseil prend le *Règlement sur les registres et les fichiers d'armes à feu (classification)*, ci-après.

RÈGLEMENT SUR LES REGISTRES ET LES FICHIERS D'ARMES À FEU (CLASSIFICATION)

Tenue et modification de registres ou de fichiers

1. Seul le directeur peut tenir ou modifier des registres ou des fichiers des décisions prises en vertu de la *Loi sur les armes à feu* selon lesquelles des armes à feu d'un type, d'une marque et d'un modèle particuliers sont des armes à feu prohibées ou des armes à feu à autorisation restreinte ou ne sont ni des armes à feu prohibées ni des armes à feu à autorisation restreinte.

Enregistrement des décisions du directeur

2. Le directeur enregistre chacune des décisions visées à l'article 1 qu'il prend.

Interdiction de modifier ou de supprimer les enregistrements

3. Il est interdit de modifier les enregistrements visés à l'article 2 plus d'un an après la date à laquelle ils ont été faits ou de les supprimer.

Entrée en vigueur

4. Le présent règlement entre en vigueur à la date de son enregistrement.

RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(*Ce résumé ne fait pas partie du Règlement*.)

ENJEUX

Le 26 février 2014, la Gendarmerie royale du Canada (GRC) a établi que les fusils Ceská Zbrojoka 858 Tactical 2 et 4 (CZ858), ainsi que les fusils Classic Green de la famille Swiss Arms et ses variantes, auparavant importés et vendus au Canada comme armes

[a] L.C. 1995, ch. 39

non-restricted and restricted firearms, are prohibited firearms pursuant to subsection 84(1) of the *Criminal Code*[1] (the Code) [http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html].

Such firearms classification redetermination decisions by the RCMP have far reaching legal implications for law abiding firearms owners, including the potential for loss of lawfully acquired property and criminal liability.

Building on the March 13, 2014, temporary amnesty to permit persons to do certain activities that otherwise would be an offence under the Code on July 22, 2014, the Government expanded the existing *Order Declaring an Amnesty Period (2014)*[2] [http://gazette.gc.ca/rp-pr/p2/2014/2014-03-26/pdf/g2-14807.pdf] to protect persons from criminal prosecution if they use the firearm for target practice at an approved shooting range and transport it for that purpose.

These Regulations will require the Registrar to keep a record of firearms classification determinations, while prohibiting amendments to such records after one year following the day on which the record is made.

BaCkGRoUND

There are three categories of firearms: non-restricted (ordinary hunting rifles and shot guns), restricted (most handguns and certain long guns prescribed as restricted) and prohibited (certain handguns, full and converted automatics and other firearms prescribed as prohibited). Part III of the Code and its associated regulations establish the legal framework governing the classification of firearms in Canada.

The RCMP Canadian Firearms Program (CFP) is responsible for the administration of the *Firearms Act*[3] (the Act) [http://laws-lois.justice.gc.ca/eng/acts/F-11.6/FullText.html]. The CFP also provides the technical expertise to interpret and determine the classification of firearms based on the criteria as set out in the Code and its supporting regulations.

Occasionally, it comes to the attention of the CFP that a firearm has been incorrectly described, or that a CFP record for a specific firearm describes an incorrect classification. Following physical inspection of the firearm by the CFP, the CFP may update its records to properly reflect the appropriate classification of the firearm based upon the established criteria in the Code.

On March 13, 2014, the Government implemented an *Order Declaring an Amnesty Period (2014)* — a two-year amnesty, valid until March 14, 2016, that protects persons in possession of a CZ858 or Swiss Arms family of rifles from criminal prosecution for possessing them. Specifically, the Amnesty permits affected persons to

- possess the firearm;
- deliver the firearm to a peace officer, firearms officer or chief firearms officer;
- sell or give the firearm to a business — including a museum — authorized to acquire and possess prohibited firearms; or

[1] R.S.C., 1985, c. C-46
[2] SOR/2014-56
[3] S.C. 1995, c. 39

à feu sans restriction ou à autorisation restreinte, sont des armes à feu prohibées en vertu du paragraphe 84(1) du *Code criminel*[1] (le Code) [http://laws-lois.justice.gc.ca/fra/lois/C-46/TexteComplet.html].

De telles décisions par lesquelles la GRC modifie la classification des armes à feu ont des conséquences juridiques considérables pour les propriétaires d'armes à feu respectueux de la loi, y compris la perte éventuelle de biens acquis légalement et le risque de faire l'objet de poursuites au criminel.

Faisant fond sur l'amnistie temporaire accordée le 13 mars 2014 pour permettre aux personnes de s'adonner à certaines activités qui constitueraient autrement des infractions au Code, le 22 juillet 2014, le gouvernement a élargi le *Décret fixant une période d'amnistie (2014)*[2] [http://gazette.gc.ca/rp-pr/p2/2014/2014-03-26/pdf/g2-14807.pdf] existant pour protéger les personnes contre les poursuites au criminel si elles se servent de ces armes à feu pour des exercices de tir dans un champ de tir approuvé et qu'elles les transportent à cette fin.

Le présent règlement obligera le directeur de l'enregistrement des armes à feu à tenir un registre des décisions sur la classification des armes à feu tout en interdisant la modification de ce registre un an après la date de sa création.

CoNtexte

Les armes à feu sont classées dans trois catégories : armes à feu sans restriction (carabines de chasse ordinaires et fusils de chasse); armes à feu à autorisation restreinte (la plupart des armes de poing et certaines armes d'épaule désignées comme étant des armes à feu à autorisation restreinte) et armes à feu prohibées (certaines armes de poing, armes à feu entièrement automatiques et armes à feu transformées en armes à feu automatiques et autres armes à feu désignées comme étant des armes à feu prohibées.) La partie III du Code et les règlements connexes définissent le cadre juridique régissant la classification des armes à feu au Canada.

Il incombe au Programme canadien des armes à feu (PCAF) de la GRC d'appliquer la *Loi sur les armes à feu*[3] (la Loi) [http://laws-lois.justice.gc.ca/fra/lois/F-11.6/TexteComplet.html]. Le PCAF fournit aussi l'expertise technique pour interpréter la classification des armes à feu et en décider, en fonction des critères énoncés dans le Code et dans les règlements connexes.

Il est parfois porté à l'attention du PCAF qu'une arme à feu a été mal décrite ou que le registre créé pour une arme à feu dans le PCAF fait état d'une classification incorrecte. Après avoir fait l'inspection matérielle de l'arme à feu, le PCAF peut mettre ses registres à jour pour rendre compte de la classification appropriée de l'arme à feu en fonction des critères établis dans le Code.

Le 13 mars 2014, le gouvernement a publié un *Décret fixant une période d'amnistie (2014)* — une amnistie de deux ans qui est valide jusqu'au 14 mars 2016 et qui protège contre les poursuites au criminel les personnes possédant des fusils de type CZ858 ou des armes à feu de la famille Swiss Arms. Plus précisément, l'amnistie permet aux personnes en question de :

- posséder une telle arme à feu;
- remettre l'arme à feu à un agent de la paix, à un préposé aux armes à feu ou à un contrôleur des armes à feu;
- vendre ou donner l'arme à feu à une entreprise — y compris un musée — autorisée à faire l'acquisition et à posséder des armes à feu prohibées;

[1] L.R., 1985, ch. C-46
[2] DORS/2014-56
[3] L.C. 1995, ch. 39

- transport the firearm for the purposes of delivering, selling, or giving it as provided for in the Order.

The Amnesty was expanded on July 23, 2014, to allow the use of these firearms at a shooting range and their transportation for such a purpose.

Objectives

The objective of these Regulations is to require the Registrar of Firearms to keep a record of every classification determination made by them, and to prohibit the amendment of those records one year after the day on which the records are made.

Description

The *Firearms Records Regulations (Classification)* will

- limit the keeping and amendment of records of classification determinations under the *Firearms Act* to the Registrar;
- require the Registrar of Firearms to keep a record of every firearms classification determination made by them;
- prohibit the destruction of any such record; and
- prohibit the amendment of any such record more than one year from the day on which the record is made.

"One-for-One" Rule

The "One-for-One" Rule does not apply to this proposal, as there is no change in administrative costs to businesses.

Small Business Lens

The small business lens does not apply to this proposal, as there are no costs on small businesses.

Rationale

The Government wants to prevent the Registrar of Firearms from making changes to records made by them referring to firearms classification determinations more than one year after an initial classification determination is made.

These Regulations are record-keeping regulations and do not affect the *Criminal Code* definitions.

There are no cost implications associated with these Regulations.

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- transporter l'arme à feu en vue de la céder, de la vendre ou de la donner comme il est prévu dans le Décret.

L'amnistie a été élargie le 23 juillet 2014 pour permettre aux personnes de se servir de ces armes à feu pour des exercices de tir dans un champ de tir approuvé et qu'elles les transportent à cette fin.

Objectifs

L'objectif du présent règlement est de demander au directeur de l'enregistrement des armes à feu de tenir un registre des décisions sur la classification des armes à feu tout en interdisant la modification de ce registre un an après la date de sa création.

Description

Le *Règlement sur les registres et les fichiers d'armes à feu (classification)* :

- prévoit que seul le directeur a le pouvoir de tenir ou de modifier des registres ou des fichiers des décisions en matière de classification d'armes à feu prises en vertu de loi;
- obligera le directeur de l'enregistrement à tenir un registre de chacune de ses décisions sur la classification des armes à feu;
- interdira la destruction des registres de ce genre;
- interdira la modification des registres de ce genre plus d'un an après la date de leur création.

Règle du « un pour un »

La règle du « un pour un » ne s'applique pas à cette proposition, car aucun changement n'est apporté aux frais administratifs des entreprises.

Lentille des petites entreprises

Le critère de la lentille des petites entreprises ne s'applique pas à la présente proposition, puisqu'il n'y a pas de frais pour ces entreprises.

Justification

Le gouvernement veut empêcher le directeur de l'enregistrement des armes à feu de modifier les registres qu'il a créés et qui concernent les décisions sur la classification des armes à feu après une période d'un an suivant la décision initiale sur la classification.

Ce règlement est un règlement en matière de tenue de dossier et ne vise pas les définitions du *Code criminel*.

Le présent règlement n'entraîne aucune répercussion d'ordre financier.

Personne-ressource

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Registration
SI/2014-72 August 27, 2014

ECONOMIC ACTION PLAN 2014 ACT, NO. 1

ORDER FIXING CERTAIN DATES AS THE DAYS ON WHICH CERTAIN SECTIONS OF THE ACT COME INTO FORCE

P.C. 2014-911 August 15, 2014

His Excellency the Governor General in Council, on the recommendation of the Prime Minister, pursuant to section 205 of the *Economic Action Plan 2014 Act, No. 1* ("the Act"), chapter 20 of the Statutes of Canada, 2014

(*a*) fixes August 29, 2014 as the day on which sections 193 to 199 of the Act come into force; and

(*b*) fixes September 30, 2014 as the day on which sections 200 to 204 of the Act come into force.

Enregistrement
TR/2014-72 Le 27 août 2014

LOI Nº 1 SUR LE PLAN D'ACTION ÉCONOMIQUE DE 2014

DÉCRET FIXANT CERTAINES DATES COMME DATES D'ENTRÉE EN VIGUEUR DE CERTAINS ARTICLES DE LA LOI

C.P. 2014-911 Le 15 août 2014

Sur recommandation du premier ministre et en vertu de l'article 205 de la *Loi nº 1 sur le plan d'action économique de 2014* (la « Loi »), chapitre 20 des Lois du Canada (2014), Son Excellence le Gouverneur général en conseil fixe :

a) au 29 août 2014 la date d'entrée en vigueur des articles 193 à 199 de la Loi;

b) au 30 septembre 2014 la date d'entrée en vigueur des articles 200 à 204 de la Loi.

Registration
SI/2014-73 August 27, 2014

PUBLIC SERVICE LABOUR RELATIONS AND EMPLOYMENT BOARD ACT

ORDER DESIGNATING the MINISTER of CANADIAN HERITAGE to be the MINISTER REFERRED to IN the ACT

P.C. 2014-912 August 15, 2014

His Excellency the Governor General in Council, on the recommendation of the Prime Minister, pursuant to section 3 of the *Public Service Labour Relations and Employment Board Act*[a], designates the Minister of Canadian Heritage, who is not a member of the Treasury Board, to be the Minister referred to in that Act.

Enregistrement
TR/2014-73 Le 27 août 2014

LOI SUR LA COMMISSION DES RELATIONS DE TRAVAIL ET DE L'EMPLOI DANS LA FONCTION PUBLIQUE

DÉCRET DÉSIGNANT la MINISTRE DU PATRIMOINE CANADIEN à TITRE DE MINISTRE VISÉ par CE TERME DANS la LOI

C.P. 2014-912 Le 15 août 2014

Sur recommandation du premier ministre et en vertu de l'article 3 de la *Loi sur la Commission des relations de travail et de l'emploi dans la fonction publique*[a], Son Excellence le Gouverneur général en conseil désigne la ministre du Patrimoine canadien, qui n'est pas membre du Conseil du Trésor, à titre de ministre visé par ce terme dans cette loi.

[a] S.C. 2013, c. 40, s. 365

[a] L.C. 2013, ch. 40, art. 365

Erratum:

Canada Gazette, Part II, Vol. 148, No. 14, July 2, 2014

SOR/2014-152

TRANSPORTATION OF DANGEROUS GOODS ACT, 1992

Regulations Amending the Transportation of Dangerous Goods Regulations (Update of Standards)

At page 1793

Following section 52 of the Regulations, special provision 91 of Schedule 2 **(f)**, *delete*:

(f) the words “Mobile Refuelling Tank – UCL/ORD-C142.13”;

Replace by:

(f) the words “Mobile Refuelling Tank – ULC/ORD-C142.13”;

TABLE OF CONTENTS **SOR: Statutory Instruments (Regulations)**
SI: Statutory Instruments (Other than Regulations) and Other Documents

INDEX **SOR:** **Statutory Instruments (Regulations)**
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Abbreviations: e — erratum
n — new
r — revises
x — revokes

TABLE DES MATIÈRES DORS : Textes réglementaires (règlements)
TR : Textes réglementaires (autres que les règlements) et autres documents

INDEX DORS : TEXTES RÉGLEMENTAIRES (RÈGLEMENTS)
TR : TEXTES RÉGLEMENTAIRES (AUTRES QUE LES RÈGLEMENTS) ET AUTRES DOCUMENTS

Abréviations : e — erratum
n — nouveau
r — révise
a — abroge

1996 CarswellBC 950
Supreme Court of Canada

R. v. Nikal

1996 CarswellBC 950F, 1996 CarswellBC 950, [1996] 1 S.C.R. 1013, [1996] 3 C.N.L.R. 178, [1996] 5 W.W.R. 305, [1996] S.C.J. No. 47, 105 C.C.C. (3d) 481, 121 W.A.C. 161, 133 D.L.R. (4th) 658, 196 N.R. 1, 19 B.C.L.R. (3d) 201, 30 W.C.B. (2d) 254, 35 C.R.R. (2d) 189, 74 B.C.A.C. 161, EYB 1996-67060

Jerry Benjamin Nikal (Appellant) v. Her Majesty the Queen (Respondent) and The Attorney General of British Columbia, the Attorney General for Alberta, the Alliance of Tribal Councils, Delgamuukw et al., the Fisheries Council of British Columbia, the Canadian National Railway Company, the BC Fisheries Survival Coalition and the BC Wildlife Federation (Interveners)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 30, 1995
Judgment: April 25, 1996
Docket: 23804

Proceedings: reversing 80 B.C.L.R. (2d) 245, [1993] 5 W.W.R. 629, 33 B.C.A.C. 18, 54 W.A.C. 18, [1993] 4 C.N.L.R. 117 (C.A.)

Counsel: *Peter R. Grant*, *David Paterson* and *Peter W. Hutchins*, for appellant.
S. David Frankel, Q.C., and *Cheryl J. Tobias*, for respondent.
Paul J. Pearlman, for intervener Attorney General of British Columbia.
Robert J. Normey, for intervener Attorney General for Alberta.
Arthur C. Pape, for intervener Alliance of Tribal Councils.
Michael Jackson, for interveners Delgamuukw et al.
J. Keith Lowes, for intervener Fisheries Council of British Columbia.
Patrick G. Foy, for intervener Canadian National Railway Company.
Christopher Harvey, Q.C., for interveners BC Fisheries Survival Coalition and BC Wildlife Federation.

***Cory J.* (*La Forest, Sopinka, Gonthier, Iacobucci* and *Major JJ.* concurring):**

1 The appellant is a Wet'suwet'en Indian of the Moricetown Band. He lives in the village of Moricetown which is within the boundaries of Moricetown Reserve No. 1. The reserve comprises lands on both sides of the Bulkley River. On July 20 and 23, 1986, officers of the Department of Fisheries and Oceans watched the appellant gaff salmon in the Bulkley River at Moricetown. When he was asked for his licence he stated that he did not have one. He was then charged with fishing without a licence contrary to s. 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248. The Regulation provided that Indian people were entitled to a free permit to fish for salmon in the manner they preferred.

2 The appellant took the position that the *Fisheries Act*, R.S.C., 1985, c. F-14, (formerly R.S.C. 1970, c. F-14), and Regulations did not apply to him as the licensing scheme infringed his aboriginal rights as provided in s. 35(1) of the *Constitution Act, 1982*. The section is found in Part II of that *Act*, entitled "Rights of the Aboriginal Peoples of Canada", and reads:

> *35.*(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The appellant further contended that the Bulkley River is, at this point, part of the Moricetown Reserve and that as a result he was bound solely by the Band by-law as it pertains to fishing in the river.

3 At trial on May 29, 1989, Smyth P.C.J. acquitted the appellant of the charges. On appeal, the Summary Conviction Appeal Justice Millward J. upheld the acquittals, but on different grounds. On further appeal to the British Columbia Court of Appeal, a majority of the court (Lambert and Hutcheon JJ.A. dissenting) set aside the acquittals and entered convictions on the charges.

Issues

4 By order of the Chief Justice the following constitutional question was stated:

> Is section 4(1) of the *British Columbia Fishery (General) Regulations*. SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force and effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

5 The appellant and respondent have agreed that two issues are raised in this appeal. The first is whether the fishing by-law of the Moricetown Band applies to the Bulkley River at Moricetown. The second is whether the licence requirement under s. 4(1) of the *British Columbia Fishery (General) Regulations* infringes the appellant's aboriginal rights, contrary to s. 35.

The Band By-Law

6 Section 81(o)of the *Indian Act*, R.S.C., 1985, c. I-5, as am. c. 32 (1st Supp.), s. 15(3) (formerly R.S.C. 1970, c. 1-6. as am. 1985, c. 27, s. 15(2)) provides:

> *81.*(1) The council of a band may make by-laws ... for any or all of the following purposes, namely,
>
> > (*o*) the preservation, protection and management of fur-bearing animals, fish and other game on the reserve;
> >
> > ...

7 Pursuant to that provision, the Moricetown Band Council passed a by-law which provided in part as follows:

Gitksan- Wet 'suwet' en Indian Fishing By-law, SOR/86-612

2. The following definitions apply in respect of this By-Law:

> r) "Waters of the Bands" means all water, waterways, rivers or streams which are located upon, or within boundaries of the reserves set aside for the use and benefit of the Moricetown Band,
>
> 3. This By-Law applies in respect and over all waters of the Band.
>
> 4. a) Gitksan-Wet'suwet'en persons are permitted to engage in fishing in waters of the Bands at any time and by any means.

Whether or not the by-law could be applied to the Bulkley River will depend on whether that river forms part of the Reserve.

Reasons of The Courts Below

Trial, [1989] C.N.L.R. 143

8 Smyth Prov. Ct. J. began by considering the band's by-law. He noted that the Crown had conceded that if the by-law applied to the Bulkley River, it would take priority over the *Fisheries Act* and the regulations. Section 81(1)(*o*) of the *Indian Act* authorized the band to make by-laws for the "preservation, protection and management of ... fish ... on the reserve". The key issue was therefore the interpretation of the expression "on the reserve". He held, at p. 146, that this expression authorized

the band to make by-laws not only in relation to fisheries which were a geographical part of the reserve, but also in relation to "waters that are merely touching, against or at the reserve". Since the Bulkley River touched the Moricetown Reserve, the band's by-law would apply to the river and the appellant could rely on the by-law as a defence to the charges against him. On this ground, Smyth Prov. Ct. J. acquitted the appellant.

Supreme Court of British Columbia (1990), 51 B.C.L.R. (2d) 247

9 Millward J. found that Smyth Prov. Ct. J. erred in his interpretation of the expression "on the reserve". He held that the expression could not be read so as to include land outside the boundaries of the reserve. Since the bed of the Bulkley River is not a geographic part of the Moricetown Reserve he found that the by-law did not apply to it, and thus the appellant could not rely upon it.

10 Millward J. then examined the food fishing licensing regime as a whole and concluded that it constituted a *prima facie* infringement of the appellant's aboriginal right. He then turned to the question of whether this infringement could be justified. He noted that the licensing regime was enacted pursuant to the valid legislative objectives of conservation and management. He observed that because salmon are particularly vulnerable to overfishing, the management of the salmon fishery must be directed by an objective, central organization. He found that the conservation and management concerns justified the imposition of a licensing scheme on all fishers including aboriginals.

11 Turning to the specific licensing scheme in question, Millward J. considered whether it was rationally connected to the goals of conservation and management. He noted that licences are free, do not restrict the amount of fish which may be caught and impose only minimal conditions on the manner of catching the fish. However, he found that in 1986 the salmon stocks near Moricetown were healthy and there was no need for any conservation steps to be taken in that year.

12 The Department of Fisheries and Oceans argued that the licensing system was important because it allowed them to exert some control over the fishery if conservation measures were required in the future. Millward J. found the licensing scheme to be lacking in several aspects. First he pointed out that since aboriginal peoples must be given priority in the allocation of salmon, conservation measures should be directed first at other users, such as sport fishers. Second, using licences only to keep track of those who can fish achieves little, and simply provides the Department with the number of people that are fishing with a licence. Third, the licensing scheme does not aid in determining the harvest rates of the fishery since it does not specify how many fish may be caught. Moreover, several alternatives to licensing are available to ensure that fishers receive information about the fishery (i.e., newspaper announcements). In short, the licensing scheme could not be justified either on the basis that it was necessary for information gathering or on the basis that it was necessary for information dissemination.

British Columbia Court of Appeal (1993), 80 B.C.L.R. (2d) 245

Macfarlane J.A. (Taggart J.A. concurring)

13 Macfarlane J.A. began by observing that the appellant was not simply asserting an aboriginal right to fish for food. Rather, he was asserting an aboriginal right of self-regulation in relation to the salmon fishery. In his view, the existence of the right of self-regulation would be inconsistent with the judgment in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, where it was recognized that the Crown could regulate aboriginal rights. Moreover, in *Sparrow* it was decided that not all regulations of an aboriginal right constituted *prima facie* infringement of that right. A regulation must constitute an unreasonable limitation or impose undue hardship in order for it to infringe an aboriginal right. Macfarlane J.A. concluded at p. 257:

> ... the requirement that an Indian hold a licence does not constitute a prima facie infringement of an aboriginal right. Licensing is a natural part of a centralized scheme to manage fisheries in order to ensure conservation and to achieve a proper allocation of the resource. It is a simple means of determining where and by whom fishing is done and it may provide data necessary to properly manage the resource. Licensing is reasonable and does not cause undue hardship. The licence is free, and available to all band members. It does not deny a right to fish: it is a small part of the regulation of fishing.

14 Macfarlane J.A. then considered whether the actual terms of the licence constituted a *prima facie* infringement of the aboriginal right. Although the licence limited fishing activities, Macfarlane J.A. could not characterize these limitations as unreasonable or unduly harsh. Had the appellant obtained a licence, he could have done exactly what he was doing when charged. In the circumstances, there was no *prima facie* infringement.

15 Macfarlane J.A. then rejected the appellant's argument that the band's by-law afforded him a defence. He found that the by-law had no application outside of the reserve and that the river was outside of the reserve. The appellant could not rely on the principle of *ad medium filum aquae* since in Macfarlane J.A.'s view, the Crown never intended to include the bed of the Bulkley River in the reseve allotted to the Moricetown Band. He found this was demonstrated by the acreage of the allotment and by the firm and consistent rejection by the province and Canada of native claims to foreshore rights.

16 Finally, the creation of the Moricetown Reserve did not involve a conveyance of land, nor did it result in title's being vested in the band. Therefore, a common law property concept which depends on ownership, such as *ad medium filum aquae*, has no relevance with respect to reserves.

Wallace J.A. (concurring in the result)

17 In Wallace J.A.'s view, the imposition of a licensing requirement is not, *per se*, an infringement of aboriginal fishing rights. The federal government has the constitutional power to regulate fisheries, and the elders of the Moricetown Band do not have an aboriginal right to excuse band members from complying with federal laws and regulations respecting fisheries. Wallace J.A. stated that he found himself in agreement with Macfarlane J.A.'s conclusion that licensing *per se* did not constitute a *prima facie* infringement of the right to fish for food, nor did the conditions of this particular licence.

18 Wallace J.A. then went on to reject the application of the *ad medium filum aquae* principle on the basis that the Bulkley River is navigable and that the principle has no application to navigable rivers. He found that the proper test for the navigability of a river requires a consideration of the river in its entirety.

Lambert J.A. (dissenting)

19 Lambert J.A. began his reasons by dealing with the band's by-law. He found that the Bulkley River was not within the geographic boundaries of the Moricetown Reserve, was therefore not "on the reserve", and *ad medium filum aquae* could not be used to extend the reserve boundaries to include the river. As a result, a defence based on the application of the band's by-law could not succeed.

20 He did, however, state that while the river was not within the reserve, the Moricetown Band nevertheless has an aboriginal title to the exclusive possession, use and enjoyment of the reserve land and to the Bulkley River fishery. Lambert J.A.. relying on his reasons in *Delgamuukw v. British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) found that the band had the right of self-government and self-regulation in relation to this fishery, but that this was an internal right and did not extend beyond the bounds of the reserve.

21 Lambert J.A. then considered whether the food fishing licensing requirement infringed the appellant's aboriginal right, and if so, whether it could be justified pursuant to the *Sparrow* test. He observed that the appellant was asserting an aboriginal right to fish which was not dependent on holding a licence. He found that licensing was an external imposition on the right. In his view, it was a *prima facie* interference with the appellant's fishing rights to require as a precondition to the exercise of these rights that he fill out forms, answer questions, and wail until a licence was granted.

22 On the question of justification, Lambert J.A. recognized the importance of having a single, central organization to coordinate the conservation and management of fish resources. The scheme administered by such an organization might well require licensing to ensure reporting and to enforce catch limitations. However, in 1986 the federal government did not recognize aboriginal fishing rights other than that related to food. There was no recognition of the right to sell salmon nor of the rights of self-regulation and self-government. In that context, the licensing system as it operated in 1986 was not consistent with the true

rights of the Moricetown Band. Regardless of the objectives of the scheme, the manner of putting it into effect and carrying it out without the cooperation of the Moricetown Band was contrary to the principles set out in *Sparrow, supra*. Lambert J.A. added that the requirement of holding a licence is not justified by conservation goals.

Hutcheon J.A. (dissenting)

23 Hutcheon J.A. observed that the conditions of the food fishing licences are not at issue in this case. The real issue is whether the requirement of a licence infringed the appellant's aboriginal right to fish. In Hutcheon J.A.'s view, it was implicit in *Sparrow* that a licensing requirement is not, *per se*, a violation of aboriginal fishing rights. *Sparrow* is, therefore, authority for the proposition that a licensing regime is within the legislative power of the federal government and is not itself an infringement of the aboriginal right to fish.

24 On the issue of the band's fishing by-law, Hutcheon J.A. agreed with Millward J. that the *Indian Act* only authorizes fishing by-laws related to waterways within the geographic boundaries of a reserve. Thus, the question is whether the Bulkley River is within the Moricetown reserve. He held that in this case, the principle of *ad medium filum aquae* created a presumption that the Bulkley River was within the reserve because it is non-tidal and non-navigable. This presumption was not rebutted, and the appellant could rely on the by-law as a defence.

Analysis

25 In order to determine whether the band by-law applies to the Bulkley River, it will be necessary to consider and resolve a number of questions. At the outset it must be emphasized that a consideration of the by-law raises the question of whether an exclusive right to fish in the Bulkley River at Moricetown was granted to the band. This is very different and distinct from the aboriginal right to fish for food and ceremonial purposes which is given constitutional recognition and protection by s. 35 of the *Constitution Act, 1982*. Obviously if an exclusive right to fish was granted to the band, the by-law would be valid and applicable to the Bulkley River in its passage through the reserve.

26 At the outset I would confirm that I have read and relied upon some of the historical documents filed by the intervener Canadian National Railway Company. The appellant objected to any use being made of these documents. I cannot accept that position. First, all parties have had an opportunity to review the documents and make submissions pertaining to them. Further these are all documents of a historical nature that can be found in the public archives. They are available for use by all members of the public. Lamer J. (as he than was) spoke of such documents in clear and convincing tones in *R. c. Sioui*, *(*sub nom. *R. v. Sioui)* [1990] 1 S.C.R. 1025. He wrote at p. 1050:

> I am of the view that all the documents to which I will refer, whether my attention was drawn to them by the intervener or as a result of my personal research, are documents of a historical nature which I am entitled to rely on pursuant to the concept of judicial knowledge.

Did the Crown intend to Include the Fishery in the Allotment of Moricetown Indian Reserve No. 1 to the Wet'suwet'en Band?

The General Policy of the Crown

27 In this case much has been said as to the general practice of the Crown in allocating reserves to native peoples. Evidence as to a general practice may be particularly helpful in determining the scope or extent of native rights. The relevant evidence is sometimes lost and that which remains must be carefully placed in context so that its true significance is neither distorted nor lost.

28 The historical evidence as to the standard practice of the Crown can be conveniently divided into pre- and post-Confederation periods. This evidence, taken from documents in the public archives, demonstrates that in both periods there was a clear and specific Crown policy of refusing to grant, *in perpetuity*, exclusive rights to fishing grounds. The Crown would, however, grant exclusive licences or leases over particular areas for a fixed period of time. Obviously this practice was far from an absolute assignment of a fishery right.

Pre-Confederation

29 There are numerous examples of statements by the Crown, both in British Columbia and in the Province of Canada, that the firm policy of the Crown was to treat Indians in the same manner as non-Indians with respect to the allocation of fishing grounds for commercial use. There are also clear statements that this policy involved a rejection of claims to exclusive use or control of any public waters for the purposes of fishing. An example is the statement of Governor Douglas made in 1860 during a major address concerning the Indians on the mainland of British Columbia. He stated:

> *I also explained to them that the magistrates had instructions to stake out, and reserve for their use and benefit, all their occupied village sites and cultivated fields and as much land in the vicinity of each as they could till, or was required for their support; and that they might freely exercise and enjoy the rights of fishing the lakes and rivers, and of hunting over all unoccupied Crown lands in the colony*; and then on their becoming registered free miners they might dig and search for gold, and hold mining claims on the same terms precisely as other miners; in short, I strove to make them conscious that they were recognized members of the commonwealth. .. [Emphasis by underlining added.]
>
> (Dispatch of Governor Douglas to the Secretary of State for the Colonies, cited in *Delgamuukw v. British Columbia*, [1991] 3 W.W.R. 97, at p. 255.)

30 An even earlier example of the same concept is expressed in a letter dated April 16, 1845 from W. H. Draper, Attorney General, Province of Canada to J. M. Higginson, Superintendent General of Indian Affairs, Province of Canada. The Attorney General wrote:

> Sir
>
> In reply to your reference of the 10th February last calling for my opinion whether a fishery in the waters of Lake Huron around and adjacent to certain islands which are within the British territory, but have not been formally ceded to the Crown by the Indians, is to be considered the property of the Crown or of these Indians, I have the honour to report my opinion, that *the right to fish in public navigable waters in Her Majesty's dominions is a common public right - not a regal franchise - and I do not understand any claim the Indians can have to its exclusive enjoyment*. [Emphasis added.]

31 These two passages indicate that the intention and policy of the Crown was to guarantee full public access to the fisheries, and to reject any exclusive claims to fishing grounds. The policy permitted the Indians to exercise their right to fish but did not accord them any special status.

32 In England, it has been accepted that since the *Magna Carta*, the Crown has no power apart from statute to grant a several or exclusive fishery to anyone. See Gerard V. La Forest, *Water Law in Canada - The Atlantic Provinces*, at p. 196. Thus in refusing to grant an exclusive fishery to the Indians, the federal government was following historical precedent.

33 An examination of the early Fisheries Acts of the Province of Canada and the first *Fisheries Act* of the new Dominion, the *Fisheries Act*, S.C. 1868, c. 60, confirms this same policy of exercising only limited powers. The Act gave the government the right to grant exclusive leases and licences to fishing grounds, but there was no provision in the Act for the permanent alienation of fishing rights to private parties.

34 This pre-Confederation policy is also set out in the 1866 opinion of James Cockburn. Solicitor General of the Province of Canada. He stated:

> With reference ... to the claim of the Indians to exclusive fishing rights, my opinion is that they have no other or larger rights over the public waters of this Province than those which belong at Common Law to Her Majesty's subjects in general.
>
> ... I should say that without an Act of Parliament ratifying such reservation, no exclusive right could thereby be gained by the Indians, as the Crown could not by any Treaty or act of its own (previous to the recent Statute) grant an exclusive privilege in favour of Individuals over public rights, such as this, in respect of which the Crown only holds as trustee for the general public.

(Memorandum *in re* 23 January, 1866 memorandum of W. F. Whitcher (Head of Fisheries Branch, Department of Crown Lands, Province of Canada), 8 March, 1866 in File No. 4/1866, Department of Justice, Ottawa, Ontario.)

Post-Confederation

35 The policy of refusing to grant exclusive fisheries was maintained in the post-Confederation period. It is clear that the same understanding of the policy which existed in the Provinces of Canada and British Columbia before Confederation continued subsequently. For example, on December 17, 1875, W. F. Whitcher. Dominion Commissioner of Fisheries, sent a Department of Marine and Fisheries Circular to Fishery Overseers which stated, in part that:

> Certain circumstances ... render it desirable to direct your attention to the exact legal status of Indians in respect of the Fishery Laws.
>
> Fisheries in all the public navigable waters of Canada belong *prima facie* to the public, and are administered by the Crown under Act of Parliament. ... Indians enjoy no special liberty as regards either the places, times, or methods of fishing. They are entitled only to the same freedom as whitemen, and are subject to precisely the same laws and regulations.
>
> . . . . .
>
> There seems to be an impression in some quarters, that exclusive control of fishings in connection with Indian properties belongs to the resident Indians, and that they are at liberty to remove the fishing gear of Whitemen who resort to these fisheries under leases or licences granted by the Crown.
>
> This impression is alike erroneous, mischievous and unfortunate. No such exceptional power exists. ...

It should be noted that this circular properly refers to the "administration" that is to say, the regulation by the Government of Canada of fisheries in navigable waters. The Bulkley River is a navigable waterway both above and below the Moricetown Reserve and, for the reasons which appear later, is therefore to be considered navigable at the Reserve.

36 The letter of W. F. Whitcher, Dominion Commissioner of Fisheries to E. A. Meredith, Deputy Minister of the Interior, of January 20, 1876 indicates that the situation in British Columbia was very much a concern of Federal officials. He wrote:

> Having submitted to the Minister the text of the correspondence which has taken place on the subject of fishing rights claimed by Indians. ... I am desired by him to acknowledge the prompt attention bestowed on this matter by the Department of the Interior, and the satisfactory settlement effected. This difficulty, thus fortunately concluded, was such as might at any moment have become extremely troublesome. It was more necessary therefore to deal with it decisively at its present stage, rather than to delay until its existence should produce further misapprehensions affecting these public properties, *particularly in the younger provinces of the Dominion*, inhabited largely by Indians and half-breeds, where the Government may soon be called upon to apply the fishery laws.
>
> ... it is believed that the cordial co-operation of the Departments in respect of the fishing *privileges* which exist in the vicinity of Indian Reserves, and the occupation of fishing stations connected therewith, under a uniform system of licence, will ensure to the Indians free and exclusive use of fishery grounds ample for their necessities. ... [Emphasis added.]

37 The younger provinces of the Dominion referred to were obviously the provinces of British Columbia, Manitoba, and Prince Edward Island, to which the *Fisheries Act* would be extended only a few months later: *An Act respecting the extension and application of The Fisheries Act to and in the Provinces of British Columbia, Prince Edward Island and Manitoba*, S.C. 1874, c. 28. Accordingly, when Reserve Commissioners were appointed a few months later with the mandate to allocate reserves in British Columbia, they were certainly not either specifically authorized or by inference empowered to grant exclusive rights in the fishery.

The mandate of the Reserve Commissioners

38 The appellant contended that the Reserve Commissioners, as representatives of the Crown, were given the authority to bind the Crown, and to assign fishing rights irrevocably and absolutely. This position is contrary to both the general policy statements made by the Crown and the specific instructions provided to Commissioners. In a letter from D. C. Scott, Deputy Superintendent General of Indian Affairs, to D. H. MacDowall, Commissioner, Royal Commission on Indian Affairs for the Province of British Columbia, dated May 2, 1916, it was stated:

> I do not think that former Commissioners could grant special fishing privileges as distinct from fishing stations and reserves. The Department has no record of confirmation of such by the Department of Marine and Fisheries.
>
> I cannot find that Mr. O'Reilly had power to grant any fishing privileges whatever.
>
> (National Archives of Canada, Record Group 10, Volume 3822, File No. 59335-1.)

39 Earlier statements confirm this view. For example, in 1890, Robert Sedgewick, Deputy Minister of Justice stated:

> . . . . .
>
> I have examined all the papers in connection with the matter. The Indian Reserve Commissioner appears to have power to mark out reserves, but it does not appear that the Governor in Council, or any other authority ever gave or purported to give him authority to deal with the right of fishery.
>
> . . . . .
>
> I have therefore to state that the Indian Reserve Commissioner has not the power to set apart for the exclusive use of the Indians any of the waters of British Columbia.
>
> (R. Sedgewick, Deputy Minister of Justice, to John Tilton, Deputy Minister of Fisheries, August 15, 1890 in National Archives of Canada, Record Group 10, Volume 3828, File No. 60926.)

And in 1897, J. D. McLean, Secretary, Department of Indian Affairs, stated:

> As to fishing rights in British Columbia it should be stated that under the arrangement come to with the Government of that Province in 1876, by which reserves were to be set aside for the Indians, no special mention was made of fishing privileges; but the Reserve Commissioner has from time to time allotted Indians certain fisheries, and the Department of Marine & Fisheries has been advised of these, and asked to confirm them; but, so far as the correspondence shows, that Department has not confirmed them, and has objected to exclusive fishing privileges being granted to Indians as against white people.
>
> (J. D. McLean, Secretary, Department of Indian Affairs. Memorandum, November 26, 1897, in National Archives of Canada, Record Group 10, Volume 3909, File No. 107297-3.)

40 It was argued by the appellant that these statements only represent the view of the Department of Marine and Fisheries. It was the appellant's position that the Department of Indian Affairs intended to grant exclusive fisheries to the Indians, but that this was overridden by the Department of Marine and Fisheries in what amounted to an inter-departmental dispute as to jurisdiction. This position, however, is not supported by the evidence.

41 The evidence does indicate that efforts were made by the Department of Indian Affairs to protect traditional Indian fishing grounds from being leased exclusively to non-native fishers. This is far different from assigning exclusive title to those fishing grounds to the Indians. The difference between these positions was consistently acknowledged by the Department of Indian Affairs.

42 This policy is reflected in a letter from Frank Pedley, Deputy Superintendent General of Indian Affairs, to the Indian Commissioner for Manitoba and the North West Territories, dated February 8, 1906:

> The Department has come to the conclusion that generally speaking, and unless under very exceptional circumstances *the proper policy to pursue will be to let the Indians stand on the same footing as the settlers* in so far as concerns the use of the waters, and to *confine its efforts to endeavouring, where considered necessary, to secure stations on land to afford access to the waters, a system which it may be remarked appears to work well in the Province of British Columbia*, and to resist efforts should any be made to compel the Indians to pay fees for licences to fish for domestic as distinguished from commercial purposes. [Emphasis added.]
>
> (National Archives of Canada, Record Group 10, Volume 6972, File No. 774/20-2 Part 1.)

The claim of the Indians to exclusive fishing grounds had been made on numerous occasions but had been consistently rejected. This was expressed in the letter of opinion of the Solicitor General of the Province of Canada in 1866, referred to earlier. In a letter dated April 5, 1898 from E. E. Prince, Dominion Commissioner of Fisheries, to the Minister of Marine and Fisheries, the Commissioner referred to this opinion as settling the issue of native legal claims to exclusive fisheries throughout the country. He specifically stated:

> With respect to the alleged differences between this Department and the Department of Indian Affairs respecting the claims urged by the Indians to fishery privileges it is necessary to recall the circumstances that 15 or 16 years ago a number of communications passed between the two Departments, *resulting in certain definite conclusions which appeared to finally decide and render unnecessary in the future any new inquiry. This Department has consistently adhered to the conclusions referred to, in its policy regarding Indian fishing*.
>
> In order to make the matter clear, I quote from a report dated July 11th 1876 by the late Mr. Whitcher, Commissioner of Fisheries: -
>
> ... After much inconvenience and many conflicting actions the disputed points were referred to the notice of the Law Officers of the Crown. Their decision, dated 8th March 1866 was adverse to the pretensions made on behalf of the Indians. A certified copy of said opinion was lodged with the Indian Bureau.
>
> . . . . .
>
> The position laid down by the Law Officers of the Crown has been consistently adhered to by this Department, and in a communication addressed to the Minister of the Interior on January 30th, 1882, the Minister of Marine and Fisheries (Hon. A. W. McLelan) once more set forth clearly and definitely the matter, stating that this Department acts on the legal advice of the Law Officers of the Crown as recorded in the Department "which is in effect that fishing rights in public waters cannot be made exclusive except under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as whitemen, subject to the Fisheries Act and Fishery Regulations. ..." [Emphasis added.]

The Specific Allotment of the Moricetown Reserve

44 The Crown policy against the granting of exclusive fisheries to the Indians had been forcefully stated and often repeated. The band argued alternatively that it was misled into believing that it was, in fact, being given an exclusive fishery. However, when the facts surrounding this particular grant are considered in light of the expressed general policy, they clearly indicate an intention to allot only the land of the reserve and not the river.

The Directions to Commissioner O'Reilly

45 In terms of the instructions Commissioner O'Reilly received, his duties were expressed as:

> ... ascertaining accurately the requirements of the Indian Bands in that Province [British Columbia], to whom *lands* have not been assigned by the late Commission, and allotting suitable *lands* to them for tillage and grazing purposes. [Emphasis added.]
>
> (Federal Order in Council of July 19, 1880, Canada. Privy Council. Order in Council No. 1334/1880 in National Archives of Canada, Record Group 2, Series 1.)

46 These instructions were later modified, but the principle that the ultimate decision as to the allocation of fishing grounds remained with the Department of Marine and Fisheries never changed. Thus, on December 20, 1881 the Superintendent General of Indian Affairs wrote to A. W. McLelan. Acting Minister of Marine and Fisheries and stated:

> I have the honour to inform you that Judge O'Reilly having been last year appointed Commr. for allotting lands as Reserves in British Columbia for occupation by the Indian Bands and Tribes of that Province I considered it expedient and proper to instruct him, while engaged in assigning these lands, to mark off the fishing grounds which should be kept for the exclusive use of the Indians and he is following those instructions.
>
> . . . . .
>
> It is desirable that the fisheries recommended for allotment to the Indians be not otherwise disposed of without the consent of this Department being first obtained.
>
> (National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

47 The instructions referred to were also given to Indian Commissioners in Manitoba, Keewatin and the Northwest Territories, and they state that the Commissioners are to ascertain what fishing grounds should be reserved *in order that application might be made* to the Department of Marine and Fisheries to have those areas secured for the use of the Indians. These instructions reveal that Commissioner O'Reilly was not given the authority to allot an exclusive fishery, and that the most he could do was make recommendations.

48 In response to being informed that Indian Commissioners were receiving such instructions, and making such recommendations, the Acting Minister of Marine and Fisheries made it clear that his department would not act on any such recommendation. He reiterated the position of his department and informed the Department of Indian Affairs that:

> ... fishing rights in public waters cannot be made exclusive excepting under the express sanction of Parliament, and that Indians are entitled to use the public fisheries only on the same conditions as white men, subject to the *Fisheries Act* and Fishery Regulation. The mere assignment of these fishery privileges by Indian Agents, or the abstention of this Department from otherwise disposing of them - which there was no intention to do pending careful consideration of all the circumstances of each case - could not legally exclude the public from fishing therein. ...
>
> (A. W. McLelan, Acting Minister of Marine and Fisheries, to Sir John A. Macdonald, Superintendent General of Indian Affairs, January 30, 1882, in National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

49 Accordingly, when assessing what Commissioner O'Reilly did, it is important to understand the existing limitations on what he could do. The powers of Commissioner O'Reilly and his instructions are perhaps best summarized in the following extract from a letter written by Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs, to Sir John A. Macdonald, who was then Superintendent General of Indian Affairs as well as Prime Minister. In the letter, dated February 27, 1882, the Deputy Superintendent states:

> With regard to the authority under which Mr. O'Reilly acted in designating fishing stations which it might be advisable to have reserved for Indian Bands in British Columbia ... the Reserve Commissioner had been instructed while engaged in assigning lands to Indian Bands in that Province, to mark off the fishing grounds which should be kept for their exclusive use, and the Acting Minister was informed that it would be desirable that the fisheries "*recommended*" for allotment to the Indians should not be otherwise disposed of without the consent of this Department having been first obtained. ... The designation of these fishing limits as being desirable for the exclusive use of Indian Bands, no more assigns the fishing grounds thus designated to them permanently, without the consent of the Government having been obtained, than does Mr. O'Reilly's allotment of Indian Reserve lands assign the latter to the same Indians without similar approval.
>
> . . . . .
>
> Mr. O'Reilly's allotments are only recommendatory; and may be curtailed or increased; as, after consultation and mature deliberation by the Officers of the Department of Marine and Fisheries and the Department of Indian Affairs, may be considered advisable. [Emphasis in original.]

(National Archives of Canada, Record Group 10, Volume 3766, File No. 32876.)

The Statements of Commissioner O'Reilly

50 Commissioner O'Reilly was clearly instructed that his role was limited to making recommendations. In light of these instructions it is apparent that his statements and actions do not disclose an attempt to grant control of the fishery. Rather, at most, they represent a recommendation that a fishery be allotted.

51 On the day before Commissioner O'Reilly recommended the allotment of Moricetown Indian Reserve No.1 (Lach-kal-tsap) he made the following statements to the band in a discussion concerning the allotment of the reserve:

> The Government is anxious land shd be set apart for you as it has been in the rest of B.C. A reserve when made protects the land from trespass by others, but the Indian still has the right to hunt, fish or gather berries *outside. The Gov. does not wish to confine you on the reserve*. ...

Later in the same discussion he stated that:

> I never make a promise without seeing the land I am reserving. The reserve will be for the tribe, not for individuals. Allotments may be made by the Agent. *Surveyors will be sent to define the exact boundaries, and plans will be sent to the Chiefs*. [Emphasis added.]
>
> (Transcript of meeting with Chief Le goul, two other Chiefs, Fr. Morris & Commissioner, September 18, 1891.]

52 These comments reveal that Commissioner O'Reilly made it apparent that he was not making the final decision with respect to the reserve boundaries, and that in any event he was concerned with reserving the land, not the fishery.

53 His position was made still clearer in his conversations with the neighbouring Indians of New Kitsegulka, about 30 miles downstream from Moricetown, less than two weeks after the allotment of the Moricetown Reserve, Commissioner O'Reilly stated:

> I hope you will not ask an unreasonable extent of country, but only for that which would be useful to you. It is not necessary that the berrying or hunting grounds shd be reserved. It *would be an impossibility to define them as you go over hundreds of miles. You will not be confined to the reserves, but can hunt, fish or gather berries where you will as heretofore*. [Emphasis added.]

He continued:

> You not only have good land, *you have a good salmon river at your door*, and good hunting and berrying mountains close at hand. When the reserves are defined the land belongs exclusively to the Indians. [Emphasis added.]

54 Commissioner O'Reilly certainly believed the reserve consisted of the land but not the river. His concern was to reserve a fishing station on the bank of the river and not with reserving control of the fishery itself. This is made clear later in the conversation, when in response to a request for the reservation of a portion of the stream, Commissioner O'Reilly stated:

> I cannot see the necessity of making such a large reserve. You cannot use it. It is necessary you shd have timber, and that I will give you, and your village and agricultural land, *but it is not necessary to give you seven miles of fishing ground*, that cannot be used by anyone else. [Emphasis added.]
>
> (Transcript of O'Reilly Commission Meeting at New Kitseguecla, September 30, 1891. Source: Public Archives of Canada, Ottawa: Indian Affairs, (RG 10, Volume 3571, File 126, pt. A); Provincial Archives of British Columbia microfilm reel B-274.)

Was an Exclusive Fishery Included in the Grant?

55 The Minutes of Decision of Commissioner O'Reilly, dated September 18, 1891 referred to the allotment of the Moricetown Reserve in the following terms:

> *Lach kal tsap*, a reserve of twelve hundred and ninety (1290) acres, situated on the Hagwilget river about thirty five miles southeast of Hazelton.
>
> Commencing on the right bank of the Hagwilget river at a Poplar tree marked Indian reserve and running East ninety (90) chains; thence North one hundred and twenty (120) chains; thence West one hundred and twenty (120) chains; thence South one hundred and twenty (120) chains; and thence East thirty (30) chains to the place of commencement.

56 The appellant urged that this metes and bounds description was clear and cogent evidence that Commissioner O'Reilly intended that the Reserve include the Hagwilget river and with it an exclusive fishery.

57 It is true that the metes and bounds description does not exclude the river. Yet, it must be remembered that the Commissioner had explained to the Indians, that this was only a rough allocation of land which would later be more accurately surveyed. More importantly, with regard to the alleged allotment of an exclusive fishery, it is certainly significant that the letter from Commissioner O'Reilly of January 21, 1892 forwarding the Minutes of Decision makes no mention of any fisheries being reserved for the Indians.

58 Commissioner O'Reilly did refer to a fishery adjacent to the proposed reserve in his report to the Superintendent General of Indian Affairs on March 26, 1892. When, on May 13, 1892, the Deputy Superintendent General of Indian Affairs sent a copy of the recommended allotment of the Moricetown Reserve and others to the Department of Marine and Fisheries, he *asked* that the fishing grounds adjacent to the reserves be reserved for the Indians who had been allocated the lands adjacent to those fishing grounds. This request confirms that Indian Affairs understood its powers and that of its Commissioners to be limited to the allocation of *land* to the Indians, and that any allocation of fishing grounds would have to be approved by the Department of Marine and Fisheries.

59 When the Department of Marine and Fisheries forwarded the request for fishing grounds to the Dominion Inspector of Fisheries in British Columbia for comment, that official stated:

> I beg to respectfully, but in the strongest way possible to recommend that no salmon fishing grounds be reserved for the use of Indians.
>
> . . . . .
>
> In my opinion the Dept. of Fisheries should not grant, or acknowledge any exclusive rights of Indians to any waters in British Columbia.
>
> (John McNab, Dominion Inspector of Fisheries, British Columbia, to William Smith, Deputy Minister of Marine and Fisheries, May 26, 1892 in Indian Lands Registry (Registry No. B-64648), Department of Indian and Northern Affairs, Hull, P.Q.)

60 This letter was in turn forwarded to Indian Affairs by the Department of Marine and Fisheries on June 4, 1892. In reply, R. Sinclair of the Department of Indian Affairs wrote the Minister of Marine and Fisheries to ask whether he concurred with the recommendation of the Inspector of Fisheries not to allocate salmon fishing grounds to the Indians. In this letter of June 9, 1892 he reiterated that the Department of Indian Affairs claimed no right to allot fishery reserves to the Indians, and that it was for the Department of Marine and Fisheries to decide whether any or all of the recommended allotments of fishing grounds was to be approved.

61 The clear reply of the Deputy Minister of Marine and Fisheries on July 14, 1892 was that his Department would not sanction any reservation of fishing grounds. He repeated the long-standing position of the Department that exclusive fisheries would not be granted, and suggested instead that:

> ... it would be far better to have such waters as you may deem to be necessary for the support and maintenance of these Indians, licensed to them under similar conditions as licences are issued to other Bands of Indians in Ontario. This would place them on a footing of equality with White fishermen, and enable them to dispose of their fish in the same manner as the latter do.
>
> (William Smith, Deputy Minister of Marine and Fisheries, to Deputy Superintendent General of Indian Affairs, July 14, 1892 in Indian Lands Registry (Registry No. B-64648), Department of Indian and Northern Affairs, Hull, P.Q.)

62 The only conclusion which can be reached on this evidence is that there was never any intention on the part of the Crown to allot an exclusive fishery for the Moricetown Band.

The Application of the Ad Medium Filum Aquae Presumption

63 The appellant argued that the intention of the Crown to allot fishery rights to the band as part of the reserve was to a large extent irrelevant in this case. The basis for the argument is that the Crown only intended to reserve the fishery in navigable waters, and that in non-navigable waters, which the appellant contends includes the Bulkley River at the Reserve, the presumption *ad medium filum aquae* applies, and accordingly the river surrounded, as it is on both sides by the reserve, would be presumptively part of the reserve.

64 Assuming without deciding that the doctrine of *ad medium filum aquae* should apply in Canada, it is not applicable in this case for three reasons. First, it must be remembered that the doctrine is only applicable in cases where the river forming the boundary is not navigable. The Bulkley River is navigable above and below the Moricetown gorge and should be considered a navigable river. This in itself is a sufficient basis for determining that the river did not form part of the Reserve and that the presumption of ownership to the middle of the river cannot arise. Secondly, at the time the reserve was created the English common law provided that the fishery was a right which was severable from the title to the river bed itself. Thus, even if the presumption *ad medium filum aquae* were to apply to pass title to the bed of the river to the band, the presumption has no effect on the fishery as the Crown specifically refused to allot an exclusive fishery to the band. It was the clear intention of the Crown to reserve all of the fishery to itself. It follows that any by-law with respect to fishing would therefore be beyond the band's authority as control of this riparian right remained with the Crown. Thirdly, if the presumption could possibly be said to apply it was rebutted in light of the evidence that the Crown never intended to grant nor did it grant the bed of the river to the band. It will be necessary to say a little more with regard to each of these aspects.

When Does the Ad Medium Filum Aquae Presumption Apply?

65 In British Columbia, the civil and criminal laws of England were adopted as at November 19, 1858 "so far as the same [were] not by local circumstances inapplicable": *The English Law Ordinance, 1867*, S.B.C., 1867, c. 70, s. 2 (now s. 2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2). Similar language also introduced the common law of England into Manitoba and Alberta, although in other provinces, such as Ontario, no allowance was made for "local circumstances".

66 As La Forest explained in his book *Water Law in Canada - The Atlantic Provinces, supra*, at pp. 241-42, the English rule was that:

> ... the owner of land through which a non-tidal stream flows owns the bed of the stream unless it has been expressly or impliedly reserved; and if the stream forms the boundary between lands owned by different persons, each proprietor owns the bed of the river *ad medium filum aquae* - to the centre thread of the stream.

67 While this rule expressed the common law as it existed in England, the courts in western Canada have not applied this rule to navigable rivers. Thus in the case of *Iverson v. Greater Winnipeg Water District* (1921), 57 D.L.R. 184 (Man. C.A.), Dennistoun J.A. wrote, at pp. 202-3:

> These references to the common law of England indicate clearly to my mind that they are not and never were applicable to conditions in this Province. Here the public right in navigable waters whether under the Hudson's Bay tenure or since

1869 under the title vested in the Crown, was prior to, and superseded all private rights acquired by grant or settlement, upon the banks of a navigable stream. In a country occupied from the earliest days by hunters, trappers, fishers and traders whose main and almost exclusive highways were the rivers and streams, such laws were contrary to the requirements and necessities of the whole community.

. . . . .

The applicability of the common law of England to navigable rivers in respect to the *ad medium* rule may be doubted when it is remembered that the importance of public rights in non-tidal navigable waters was not recognized in England when title to land upon their banks was acquired.

In this country the public right of navigation and of fishery in all navigable waters has always existed and been recognized.

68 Similarly, in the same year the Alberta Court of Appeal in the case of *Flewelling v. Johnston* (1921), 59 D.L.R. 419, held that the English common law presumption did not apply in the very different circumstances which existed in Canada. In short, the "local circumstances" which existed in Canada rendered the common law inapplicable with respect to navigable rivers. As Beck J.A. stated in his reasons at pp. 422-23:

In Barthel v. Scotten (1895), 24 Can. S.C.R. 367, it was held that a grant of land bounded by the bank of a navigable river or an international waterway does not extend ad medium filum aquae.

In re Provincial Fisheries (1896), 26 Can. S.C.R. 444, Gwynne, J., said that the rule that riparian proprietors own ad medium filum aquae does not apply to the great lakes or navigable rivers.

In Keewatin Power Co. v. Kenora (1906), 13 O.L.R. 237, Anglin J. held, as stated in the head note, that:-

> The restriction of the presumption of the common law, as administered in England, in favour of Crown ownership of the alveus of navigable waters, for the protection of public rights in navigation and fishery therein, to navigable tidal waters, is apparently due to the non-recognition in early times of the necessity of protecting such public rights in other navigable waters, and an acquiescence in the right of riparian owners of land bordering thereon to the bed of such waters ad medium filum aquae; whereas in this Province such public rights in all rivers navigable in fact have been deemed always existent in the Crown ex jure naturae, so that the title in the bed thereof remained in the Crown after it had made grants of land bordering upon the banks of such rivers, the doctrine of ad medium filum aquae not applying thereto.

This Court has declared in Rex v. Cyr (1917), 38 D.L.R. 601, 29 Can. Cr. Cas. 77, 12 Alta. L.R. 320 at p. 325, that where resort is to be had to the common law the applications of its principles are not necessarily to result in same decisions as have been or may be given by the English Courts, but that account must be taken of the different conditions prevailing in this country, not merely physical conditions but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question.

The decision of Anglin, J., was reversed by the Ontario Court of Appeal (1908), 16 O.L.R. 184, but explicitly on the ground of the precise wording of the statute of the Province, R.S.O. 1897, ch. 111, sec. 1, enacting that "In all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the said 15th of October, 1792, as the rule for the decision of the same. .... except so far as the said laws may have been repealed by any Act of the late Province of Upper Canada ..... still having the force of law in Ontario, or by these Revised Statutes."

69 Beck J.A. then went on to cite s. 11 of the *North West Territories Act*, R.S.C. 1886, c. 50, which is to the same effect as s. 2 of the British Columbia *English Law Ordinance Act*. He observed at p. 424:

The words which I have quoted do not appear in the Ontario Act. The quoted word "applicable" means "suitable", "properly adapted to the conditions of the country". Brand v. Griffin (1908) 1 Alta. L. R. 510, I accept then, for this Province at least, the view propounded by Anglin J. *In that view the doctrine that in non-tidal waters prima facie the title to the bordering*

> *lands runs ad medium filum aquae is not in force in this Province so far as to affect waters - lakes or rivers - which are in fact navigable*. [Emphasis added.]

70 I am in complete agreement with the reasoning and conclusions of the Manitoba and Alberta Courts of Appeal. The wording of the Manitoba, Alberta, and British Columbia statutes leads inexorably to the conclusion that the decisions of the Manitoba and Alberta Courts of Appeal are correct and applicable to British Columbia.

71 This conclusion is further supported by the statements of La Forest J. in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 54 where he said:

> The common law of England has long been that the public has a right to navigate in tidal waters, but though non-tidal waters may be navigable in fact the public has no right to navigate in them, subject to certain exceptions not material here. Except in the Atlantic provinces, where different considerations may well apply, in Canada the distinction between tidal and non-tidal waters was abandoned long ago; see *In Re Provincial Fisheries* (1896), 26 S.C.R. 444; for a summary of the cases, see my book on *Water Law in Canada* (1973), at pp. 178-80. Instead the rule is that if waters are navigable in fact, whether or not the waters are tidal or non-tidal, the public right of navigation exists. That is the case in Alberta where the Appellate Division of the Supreme Court, applying the *North-West Territories Act*, R.S.C. 1886, c. 50, rightly held in *Flewelling v. Johnston* (1921), 59 D.L.R. 419, that the English rule was not suitable to the conditions of the province. There is no issue between the parties that the Oldman River is in fact navigable.

What is the Correct Test for Navigability, and Is the Bulkley River a Navigable River?

72 It is clear that the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia. From the earliest times the Courts and legislatures of this country have refused to accept the application of a rule developed in England which is singularly unsuited to the vast non-tidal bodies of water in this country. It is therefore necessary to determine whether the Bulkley River can properly be considered to be a navigable river.

73 To assess navigability, the entire length of the river from its mouth to the point where its navigability terminates must be considered. On this issue I am in agreement with the reasoning and conclusions of Wallace J.A. in the Court of Appeal. In particular I would adopt the statements of Anglin J. (as he then was) in the case of *Keewatin Power Co. v. Kenora (Town)* (1906), 13 O.L.R. 237 (H.C.). There the navigability of the Winnipeg River was in question. It was a river not unlike the Bulkley River in that various falls and rapids necessitated numerous portages between stretches of good water. Anglin J. wrote at p. 263:

> But it is argued that in any event the *ad medium* rule should apply to such parts of navigable rivers as are in their natural state non-navigable owing to impediments such as falls or rapids. Such is not my opinion. Once the navigable character of the river is established, up to the point at which navigability *entirely* ceases the stream must be deemed a public highway, though above that point it is private property: *The Queen v. Robertson*, 6 S.C.R. 52.
>
> The inconvenience which would ensue were the soil of the bed of the same river in alternate stretches vested in the Crown, *juris publici*, and in the riparian owners, *juris privati*, affords strong ground for the belief that the law is not in a condition which would produce such results. Then again, though navigation at the falls in the east branch of the Winnipeg river is presently impossible, the engineers say that a canal to overcome the natural obstacle which the falls present is quite possible. Is not the stream even at this point navigable *in posse?* I think it is.
>
> There is judicial authority for the proposition that a natural interruption of navigation in a river, in its general character navigable, does not change its legal characteristics in that respect at the point of interruption, and that riparian owners are not at such point presumed to own the bed *ad medium filum: Re State Reservation at Niagara Falls* (1884), 16 Abbott's N.C. (N.Y.) 159, 187; 37 Hun 507, 547-8. [Emphasis added.]

Similarly, Henry J. in *Coleman v. Ontario (Attorney General)* (1983), 143 D.L.R. (3d) 608 (Ont H.C.), at pp. 613-15 (cited with approval by Wallace J.A. at the Court of Appeal) found that:

> ... Interruptions to navigation such as rapids on an otherwise navigable stream which may, by improvements such as canals be readily circumvented, do not render the river or stream non-navigable in law at those points.

Finally, La Forest in his book *Water Law in Canada - The Atlantic Provinces, supra*, states at p. 181:

> Thus the whole of a river or lake may be regarded as navigable even though at some point navigation may be impossible or possible only for small craft by reason of rapids or shoals.

74 The Bulkley River is navigable both above and below the Moricetown Canyon and should be considered a navigable river. The fact that it is not navigable at the Moricetown gorge cannot alter that conclusion. Since the *ad medium filum aquae* presumption has no application to navigable rivers in British Columbia, it has no application to the Bulkley River in its passage through the Moricetown Reserve. On this basis alone it can be concluded that reserve does not include the river.

The Fishery is Separate from Ownership of the Bed

75 The appellant contends that the *ad medium filum aquae* presumption became applicable in British Columbia on November 18, 1858, when the common law of England was explicitly adopted as the law except to the extent that it was inapplicable. Accordingly, it is argued that when the Crown granted land to the Indians it implicitly included the title to the river *ad medium filum aquae*. Where, as in this case, the river is bordered on both sides by the reserve, the principle would act to give title to the entire river bed to the reserve. Accordingly, the river would be "on" the reserve, subject only to the Crown's ability to demonstrate that such a grant was not intended. I cannot accept that position.

76 To understand why the presumption does not apply requires a review of the common law rules concerning water. H. J. W. Coulson and Urquhart Forbes in *The Law relating to Waters* (2nd ed. 1902), at p. 100, explain the application of the *ad medium filum aquae* presumption in the following terms:

> When the lands of two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is *prima facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aquae*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty .... Where the same person is the proprietor of the ground on both sides of the stream, he is *prima facie* the proprietor of the whole of the channel.
>
> The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, *usque ad medium filum*, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question, which negative the possibility of such having been the intention.

77 One of the rights that flow from this possession of the bed is the right to the fishery. This is explained by the authors, at p. 104, in the following terms:

> The right of fishery being a right of property, the presumption is that each owner of land abutting on a non-tidal stream has the right of fishing in front of his land, *usque ad medium filum aquae*; and where a man possesses land on both sides of the water, he has the sole right of fishing.

78 However, the authors go on to explain that this right of fishery is severable from the title, with the result that the right can be granted to another, or reserved from a grant. As Wightman J. stated in *Marshall v. Ulleswater Steam Navigation Co.* (1863) 3 B. & S. 732, 122 E.R. 274 (K.B.), at p. 742 and p. 278 respectively:

> ... it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishery therein, be specially appropriated to a third person, whether he has land or not on the borders thereof or adjacent thereto.

79 This point is explained very clearly by Forest in *Water Law in Canada - The Atlantic Provinces*, at p. 236, where he states:

> Though the right of fishing is usually enjoyed as an incident to the bed, it may of course be transferred to others by lease or licence. Moreover it can be granted, or reserved from a grant, and exist as a separate property right severed from the ownership of the soil.

80 Clearly the fishery, even where the *ad medium filum aquae* presumption otherwise applies, can be severed from the ownership of the river bed. The evidence presented clearly establishes that there was no intent on the part of the Crown to grant an exclusive fishery. As a result, any grants of title to land adjacent to rivers, navigable or otherwise, must be taken as excluding the fishery, even if it was accepted that the *ad medium filum aquae* presumption was otherwise applicable. The consequence for this appellant is obvious. Even if the *ad medium filum aquae* should make the soil of the river bed part of the reserve, the explicit reservation of the fishery from the grant makes any by-law with respect to the fishery *ultra vires* the band's authority.

The Presumption is Rebutted

81 Any intent to grant the bed of the river has been conclusively rebutted. It will be remembered that the acreage of the reservation indicates an intention to exclude the river. In addition, the retention of the fishery by the Crown leads to the presumption that the bed of the river was retained by the Crown. As Coulson and Forbes point out at p. 368 in *The Law relating to Waters, supra*, the cases of *Marshall v. Ulleswater Steam Navigation Co., supra.*, and *Holford v. Bailey* (1846). 8 Q.B. 1000, 115 E.R. 1150 (K.B.), (reversed in the Exchequer Chamber on other grounds (1850), 13 Q.B. 426, 116 E.R. 1325) stand for the proposition that:

> No doubt the allegation of a several fishery, *prima facie*, imports ownership of the soil, although they are not necessarily united.

82 As a result, it would appear that the common law as it existed at the time the reserve was allotted would lead to the conclusion that the presumption that the title to the bed of the river would pass with the allotment of the shore had been rebutted. There is no doubt that the Crown intended to keep the fishery in its own possession. Accordingly, the allotment of the shore cannot be presumed to have included the title to the bed of the river *ad medium filum aquae*. To the contrary, the presumption is that with the title to the fishery goes the title to the bed of the river. The appellant has failed to demonstrate any intention or action on the part of the Crown to rebut this presumption.

83 It may now be helpful to summarize what I consider to be the relevant evidence and the applicable principles of law which determine the first issue.

> 1. The Crown in all of its manifestations was consistently clear in its statements that no exclusive fishery should be granted to Indian bands in British Columbia. This is consistent with the fact that the Crown had no power to grant an exclusive fishery, and that after Confederation this would involve the grant of provincial property.
>
> 2. The correct test for an assessment of navigability is to consider the entire length of the river. A section of the river which is non-navigable in fact does not necessarily render either the river as a whole or that section non-navigable in law if it is found to be substantially navigable throughout. The Bulkley River is navigable both above and below the Moricetown Canyon, and is therefore a navigable river.
>
> 3. The presumption *ad medium filum aquae* does not apply on the facts of this case because:
>
> > a. Correctly considered the river is navigable, and the application of *ad medium filum aquae* to navigable rivers was not adopted into the common law of British Columbia since it was unsuited to local conditions.
> >
> > b. Fishing as a right can be the subject of a separate grant or reservation. On the facts of this case it is clear that the fishery was reserved from the allotment.

84 It follows that the band by-law does not apply to the Bulkley River.

85 It is now necessary to determine whether the appellant's s. 35 rights were infringed by the licensing requirement of the Department of Fisheries and Oceans. If they were not, it still must be considered whether the conditions of the licence infringe the s. 35 rights and if so whether they can be justified.

Was the Appellant's Section 35 Right to Fish for Food Violated by the Licensing Requirement of the Department of Fisheries and Oceans?

Does Licensing Constitute a Prima Facie Violation of Section 35?

86 The appellant contends that the mere requirement of a licence constitutes a *prima facie* infringement of his s. 35 aboriginal rights. This section of the *Constitution Act*, 1982, provides:

> *35.* (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

87 It was held in *R. v. Sparrow*, *supra*, at p. 1112, that the onus of establishing a *prima facie* infringement of an aboriginal right rests on the claimant of that right.

88 The first step in this process is to establish the existence and the extent of the aboriginal right. I am satisfied that the appellant has successfully demonstrated an aboriginal right to fish for food and ceremonial purposes. The Summary Conviction Appeal Judge, Millward J., specifically found in oral reasons from judgment, July 12, 1990, unreported, that:

> ... the aboriginal right includes the right to choose the period of time, whether early in the year when the ice is still in the river, or after the end of August, up to a date in September, when steelhead are normally taken, the right to select persons intended to be the recipients of the fish for ultimate consumption, the right to select the purpose for which the fish is to be used, that is, for food or ceremonial or religious purposes, and the method or manner of fishing. ...

89 This, based on the evidence, is an appropriate finding as to the scope of the aboriginal rights of the Wet'suwet'en people with respect to the fishery subject to one qualification. Specifically the selection of the ultimate recipients of the fish is not an unqualified right. Rather, the evidence adduced went no farther than establishing that the appellant as a Wet'suwet'en had the right to provide to other members of the band those fish that are necessary for their personal food and ceremonial needs. I take no position as to whether the right extends beyond that.

90 I cannot accept Millward J.'s finding that the appellant has a right not to comply with the directions of the Department of Fisheries and Oceans. This finding is not supported by the evidence, nor is it sustainable in law. Moreover, this conclusion, if not conceded, was not seriously contested by the respondent.

91 With respect to licensing, the appellant takes the position that once his rights have been established, anything which affects or interferes with the exercise of those rights, no matter how insignificant, constitutes a *prima facie* infringement. It is said that a licence by its very existence is an infringement of the aboriginal right since it infers that government permission is needed to exercise the right and that the appellant is not free to follow his own or his band's discretion in exercising that right.

92 This position cannot be correct. It has frequently been said that rights do not exist in a vacuum, and that the rights of one individual or group are necessarily limited by the rights of another. The ability to exercise personal or group rights are necessarily limited by the rights of others. The government must ultimately be able to determine and direct the way in which these rights should interact. Absolute freedom in the exercise of even a *Charter* or constitutionally guaranteed aboriginal right has never been accepted, nor was it intended. Section 1 of the *Canadian Charter of Rights and Freedoms* is perhaps the prime example of this principle. Absolute freedom without any restriction necessarily infers a freedom to live without any laws. Such a concept is not acceptable in our society. On this issue the reasons of Blair J.A. in *R. v. Agawa* (1988), 65 O.R. (2d) 505 (C.A.), at p. 524, are persuasive and convincing. He recognized the need for a balanced approach to limitations on treaty rights, stating:

> ... Indian treaty rights are like all other rights recognised by our legal system. The exercise of rights by an individual or group is limited by the rights of others. Rights do not exist in a vacuum and the exercise of any right involves a balancing

with the interests and values involved in the rights of others. This is recognized in s. 1 of the *Canadian Charter of Rights and Freedoms* which provides that limitation of Charter rights must be justified as reasonable in a free and democratic society.

93 This conclusion is consistent with the approach to interpreting s. 35 rights as set out in *Sparrow, supra*, at p. 1110:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While *it does not promise immunity from government regulation* in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. [Emphasis added.]

94 This case provides an example of the wisdom of the reasoning referred to in *Sparrow* and *Agawa*. Here, the aboriginal right to fish must be balanced against the need to conserve the fishery stock. The existence of an aboriginal right to fish cannot automatically deny the ability of the government to set up a licensing scheme or program since the exercise of the right itself is dependant on the continued existence of the resource. The very right to fish would in time become meaningless if the government could not enact a licensing scheme which could form the essential foundation of a conservation program.

95 It must also be remembered that aboriginal rights, by definition, can only be exercised by aboriginal peoples. Moreover, the nature and scope of aboriginal rights will frequently be dependant upon membership in particular bands who have established particular rights in specific localities. In this context, a licence may be the least intrusive way of establishing the existence of the aboriginal right for the aboriginal person as well as preventing those who are not aboriginals from exercising aboriginal rights.

96 The situation presented in this case pertaining to s. 35 aboriginal rights is analogous to the mobility rights guaranteed under s. 6(1) of the *Charter*. That section guarantees the right of every citizen of Canada to enter, remain in and leave Canada. This right, by definition, is limited to citizens of Canada, and its enforcement requires some means of identifying Canadian citizens. Accordingly, a requirement that citizens present a passport to enter Canada would not be an infringement of their mobility rights since the passport serves to identify those who can exercise the rights of Canadian citizens.

97 This is not to say that there are not conditions of the licence which could constitute infringements of s. 35 rights. Even a simple licence could constitute an infringement if it could only be obtained with great difficulty or expense. The test for this assessment has been set out clearly in *Sparrow*, beginning at p. 1111:

> The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a *prima facie* infringement of s. 35(1).

98 The questions which must be resolved in order to determine whether a *prima facie* infringement has occurred are set out at p. 1112:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation.

99 Applying these tests to the facts of this case reveals that the licence itself, as distinct from its conditions, does not constitute an infringement of s. 35(1). The simple requirement of a licence is not in itself unreasonable; rather, it is necessary for the exercise of the right itself. Accordingly the first question, is licensing unreasonable, must be answered in the negative.

100 The second question is whether the regulation imposes an undue hardship. The term "undue hardship" implies that a situation exists which imposes something more than mere inconvenience. It follows that a licence which is freely and readily available cannot be considered an undue hardship. The situation might be different if, for example, the licence could only be obtained at locations many kilometres away from the reserve and accessible only at great inconvenience or expense.

101 The final question is whether the right holder is denied the preferred means of exercising the right. The licence by itself, without its conditions, cannot affect the preferred means of exercising the right since at its most basic it is nothing more than a

form of identification. Requiring identification so as to assist fisheries officers in distinguishing rights holders from non-rights-holders cannot be an interference with the preferred means of exercising the right. It follows that the licence itself, without considering its conditions, cannot be said to constitute an infringement of the aboriginal right to fish. Thus the mere requirement of a licence in the circumstances of this case does not amount to an infringement of the appellant's s. 35 rights.

102 Indeed as a general rule it can be said that the simple requirement of a licence will seldom constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. If the salmon fishery is to survive, there must be some control exercised by a central authority. It is the federal government which will be required to manage the fishery and see to the improvement and the increase of the stock of that fishery. It is for the federal government to ensure that all users who are entitled to partake of the salmon harvest have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in *Sparrow*. Any system of control must commence with a licensing scheme. It is through the issuing of licences to the various type of users that the Department will be able to know at least the numbers of fishers and the categories of those that are fishing. This will provide the first rough basis from which the Department can make the estimates necessary to manage the fishery resource. The licence is the essential first step in the preservation and management of this fragile resource. This need to manage the stock goes far further then simply preventing of the elimination of the salmon. Management imports a duty to maintain and increase reasonably the resource. The licence assists this duty by providing a means of identification that helps to ensure that only those permitted to do so are fishing in the authorized areas. It serves as a means of control by eliminating those that do not have a licence from fishing.

The Specific Terms of this Licence

103 Although licensing by itself will not as a rule constitute a *prima facie* infringement of the aboriginal right to fish, the government will be required to justify those conditions of a licence which on their face infringe the s. 35 right to fish. The 1986 licence at issue in this case contains several conditions. Some of these printed on the licence itself are mandatory. Others are completed by the issuing fishery officer and are discretionary. Of the mandatory conditions printed on the face of the licence, some are clearly *prima facie* infringements of the aboriginal right of the appellant as properly found by the courts below. The infringing conditions are:

(i) the restriction of fishing to fishing for food only:

(ii) notes 4 and 5 of the licence, which provide:

> 4. Fishing Time Subject to Change by Public Notice
>
> 5. Indian Food Fishing before July 1st and after September 30th must be licenced by the Provincial Fish & Wildlife Conservation Officer;

(iii) the restriction to fishing for the fisher and his family only;

(iv) the restriction to fishing for salmon only.

104 These conditions are *prima facie* infringements of the appellant's aboriginal rights, which were specifically and correctly found to include:

(i) the right to determine who within the band will be the recipients of the fish for ultimate consumption;

(ii) the right to select the purpose for which the fish will be used, i.e. food, ceremonial, or religious purposes;

(iii) the right to fish for steelhead;

(iv) the right to choose the period of time to fish in the river.

Since those conditions of the licence set out above clearly impinge upon these aspects of the appellant's s. 35 rights, they must constitute *prima facie* infringements.

105 In addition, there are other terms of the licence which could be infringements if they contradicted the appellant's aboriginal rights. These terms provide for:

(i) the prescribed waters in which fishing can take place;

(ii) the type of gear which can be used;

(iii) the fishing times and days.

106 With respect to these conditions, whether they will constitute an infringement depends on whether the particular conditions written in by the fishery officer contradict the appellant's s. 35 rights. I would note that Millward J. did find that the appellant's aboriginal rights include the right to determine when fishing will occur and the method and manner of fishing. Accordingly, these conditions may, depending on their terms, infringe the appellant's aboriginal rights.

107 There was little or no argument directed to the other conditions attached to the licence. Accordingly, I have not reached any conclusions nor made any comments concerning them.

108 Before turning to the issue of justification, I must address the respondent's argument that these conditions are valid since they were not enforced. I cannot accept this argument. It has long been recognized that the holder of a constitutional right need not rely upon the exercise of prosecutorial discretion and restraint for the protection of the right. That submission cannot therefore be accepted. See for example *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4. Indeed, counsel for the respondent conceded that there might be some problems with the conditions that were attached to the 1986 licence and reserved his strongest submissions for the position that the requirement of a licence in itself did not constitute a *prima facie* infringement of the s. 35 aboriginal right to fish. In that submission he was correct.

Justification

109 In *Sparrow*, it was held, at p. 1113, that in considering whether an infringement of aboriginal or treaty rights could be justified, the following questions should be addressed sequentially:

> First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized.

At page 1114, the next step was set out in this way:

> If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin, supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

Finally, at p. 1119, it was noted that further questions might also arise depending on the circumstances of the inquiry:

> These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.
>
> We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

110 It can, I think, properly be inferred that the concept of reasonableness forms an integral part of the *Sparrow* test for justification. For example, in these last questions reasonableness will be a necessary aspect of the inquiry as to justification. For instance, when considering whether there has been as little infringement as possible, the infringement must be looked at in the context of the situation presented. So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test. The mere fact that there could possibly be other solutions that might be considered to be a lesser infringement should not, in itself, be the basis for automatically finding that there cannot be a justification for the infringement. So too in the aspects of information and consultation the concept of reasonableness must come into play. For example, the need for the dissemination of information and a request for consultations cannot simply be denied. So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement. This is no more than recognizing that regulations pertaining to conservation may have to be enacted expeditiously if a crisis is to be avoided. On occasion, strict and expeditious conservation measures will have to be taken if potentially catastrophic situations are to be avoided. The nature of the situation will have to be taken into account in assessing the conservation measures taken. The greater the urgency and the graver the situation the more reasonable strict measures may appear.

111 In the case at bar, the government did not adduce any evidence which might justify the conditions of the licence and accordingly has not met the onus which rests upon it. It follows that the government has failed to justify those conditions that I have referred to which infringe the appellant's aboriginal rights.

112 What then is the appropriate disposition of this appeal? It is clear that the federal government may validly require aboriginal people to obtain a fishery licence pursuant to s. 4(1) of the *British Columbia Fishery (General) Regulations*. It is also apparent that at least four of the mandatory conditions of the licence infringe the s. 35(1) rights of the appellant. The conditions make the 1986 licence invalid. They are an integral and essential part of the licence. They stipulate the conditions or terms upon which the licence is issued and the holder may use it. A licence holder is required to abide by the conditions. The licence is issued on that basis. The conditions are unconstitutional. As a result of the conditions the licence is invalid. It follows that there cannot be an offence created of fishing without a licence in 1986. The licence as issued in 1986 pursuant to s. 4(1) of the *British Columbia Fishery (General) Regulations* is as invalid as any other Act or Regulation which is found to be unconstitutional or *ultra vires*. It has always been held that an invalid act or regulation cannot create an offence. See for example *R. v. Sharma*, [1993] 1 S.C.R. 650, and *R. v. Bob* (1991), 88 Sask. R. 302 (C.A.). This dictates the result that there must be an acquittal.

113 The licence and its integral conditions are so inextricably bound together that they cannot be considered separately. They are part of an indivisible whole. If I am correct in this conclusion it is not necessary to consider whether the conditions are in fact severable. If I am in error, however, on this I would hold that the conditions were not severable. Section 52 of the *Constitution Act*, 1982 provides that:

> *52.* (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

114 In *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 697. Lamer C.J. interpreted the section as meaning:

> Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:
>
> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

115 In my view, when the purpose of this particular licence is considered together with the number of mandatory conditions which infringe the appellant's aboriginal rights, severability can be seen to be an unacceptable option. The invalid conditions are numerous. They are mandatory and form an integral part of the licence itself. The licence required that the conditions be met, which is to say that the holder of the licence was required to comply with its conditions. I cannot see that this licence can be severed from its invalid mandatory conditions. Further, from a practical point of view it is significant that the licences at issue were created and used before the government had the benefit of this Court's judgment in *Sparrow*. Crown counsel advised that as a result these particular licences are no longer in use. Accordingly, a declaration that the entire licence is invalid is appropriate both legally and practically.

116 There can be no question that an enactment that breaches the Constitution is invalid and cannot impose any enforceable duties. See for example *Norton v. Shelby County*, 118 U.S. 425 (1886), at p. 442; *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1195.

117 Accordingly, the appellant must be acquitted of the charge of fishing without a licence contrary to s. 4(1) since the licence conditions infringed his aboriginal rights and the licence was therefore unconstitutional.

Disposition

118 In the result, the appeal is allowed. The question as to whether the band's fishing bylaw applies to the Bulkley River at Moricetown must be answered in the negative. The question as to whether the licence requirement under s. 4(1) is an infringement of the appellant's aboriginal rights contrary to s. 35 must also be answered in the negative. As a result of my answer to these two questions, and for the reasons given above, the constitutional question must be answered as follows:

> Question Is section 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force and effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the Constitution Act, 1982, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act*, 1982, invoked by the appellant?
>
> Answer Section 4(1) of the *British Columbia Fishery (General) Regulations* is not invalid by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant. However, the mandatory conditions affixed to the 1986 licence infringe the appellant's aboriginal rights and are not severable and the licence is therefore invalid.

119 The order of the Court of Appeal of British Columbia convicting the appellant must be set aside and his acquittal restored. There will be no costs to either party.

***McLachlin J.* (dissenting) (*L'Heureux-Dubé J.* concurring):**

120 The issue in this case is whether the requirement that the appellant have a licence for fishing was *per se* unconstitutional. I agree with the majority of the Court of Appeal and with Justice Cory in this Court that the requirement of a licence did not constitute a *prima facie* infringement of the appellant's constitutionally protected right to fish for food.

121 This leaves the issue of whether the conditions attached to the licence are unconstitutional. In my view, this issue is not properly before us. The appellant was not charged with violation of the conditions of the licence, but with fishing without a licence. The trial proceeded on the basis that it was the licensing scheme as a whole which was invalid. The issue, as Hutcheon J.A. stated expressly in the Court of Appeal, was whether the act of licensing *per se* was unconstitutional, not the terms of the particular licence at issue.

122 This court, *per* Cory J., today endorses the view of the trial judge and the majority of the Court of Appeal below that the state is entitled to impose a licensing scheme on the aboriginal fishing and consequently require that the appellant obtain a licence as a condition of fishing. However, the majority goes on to conclude that because four of the conditions attached to

the licence infringe his aboriginal rights, the requirement for the particular licence in this case is unconstitutional and that the appellant's conviction for failure to have a licence must be set aside.

123 I do not share this conclusion. The fact that four of the conditions are invalid does not excuse the appellant on a charge of *fishing without a licence*. If the charge had been violation of one of the conditions of the licence, proof that the condition was unconstitutional would have afforded a defence to that charge. But the unconstitutionality of a condition of a licence does not, in my view, absolve the appellant from the need to obtain a licence at all.

124 Cory J. asserts that the invalidity of licence conditions excuses a person from obtaining the licence required by law, provided the condition is "integral" to the licence. I cannot accept this proposition. Can a chemical plant be excused from obtaining a licence to emit a polluting chemical merely because it can show that one or more of the conditions imposed by the licence are invalid? Can a person over a certain age be excused from obtaining a licence to drive a motor vehicle merely because he or she deems an age-related restriction to violate the provincial Human Rights Code? I think not. And if we say that the conditions are "integral" to the licence, does the situation change? Again I think not.

125 It is important, in my view, to distinguish between the charge of failing to obtain a licence required by a valid licensing scheme, and breach of one of the conditions of the licence. This appeal presents us with a quasi-criminal offence. The appellant has been charged with failing to obtain a licence required by law. His defence is that the state has no right to require him to obtain a licence. The trial judge, the majority of the Court of Appeal, and this Court unanimously have ruled that the state does have the right to require him to obtain a licence. That issue having been resolved against him, the appellant stands properly convicted of fishing without the required licence.

126 The situation would have been different had the appellant been charged with violating one of the conditions of the licence. It would then have been open to him to raise the defence that the condition he is alleged to have breached is unconstitutional. The constitutionality of the condition would have become the focus of the trial and of the appeals. In the event the condition was found to have been unconstitutional, it would fall. Severance would be automatic. The issue raised in *Schachter v. Canada*, [1992] 2 S.C.R. 679, of whether to strike out a portion or the whole of the licence would not arise. The licence would stand, together with such conditions as remain valid. The right of the state to require a licence for monitoring purposes would remain constitutional.

127 The position advocated by Cory J. has important practical consequences. Having ruled that the state is entitled to require persons engaged in fishing to obtain licences for the purpose of monitoring the fishery, he would deprive the state of the right to do so where conditions attached to the licence, not put in issue on the facts, fail to pass abstract constitutional scrutiny. Persons who object to conditions of a licence will be encouraged not to apply for a licence, thus undermining the monitoring function of the licensing scheme. The validity of state requirements for licences of all sorts may be called into question. These results are avoided if one confines the decision to the allegation contained in the charge — the failure to obtain a licence.

128 Jurisprudential considerations also support this approach. Courts determining guilt or innocence of an accused should confine themselves to the issues raised by the charge. The validity of conditions of a licence are better considered in the context of facts which raise them than in the abstract. Similarly, appeal courts reviewing trial decisions are generally well advised to confine themselves to the defences and issues raised in the decisions under review. In the case at bar, the only issue at trial and before the Court of Appeal was the right of the state to require the appellant to obtain a licence. Accordingly, I would prefer to confine this Court's decision to that issue.

129 In conclusion, the question before us, as before the courts below, is whether the obligation on the appellant to obtain a licence to fish, whatever its terms, is constitutional. The answer to that question is yes. The appellant freely admits that he did not have the licence that the law validly required. It follows that he was properly convicted of the charge. The issue of whether the conditions of the licence are valid should await a case where their validity arises.

130 The constitutional question stated by the Chief Justice was as follows:

Is section 4(1) of the *British Columbia Fishery (General) Regulations*, SOR/84-248, as it read in July of 1986, and licences issued thereunder, of no force and effect with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982*, invoked by the appellant?

131 I would answer the question as follows:

Section 4(1) of the *British Columbia Fishery (General) Regulations* and licences issued thereunder are not of no force and effect, with respect to the appellant in the circumstances of these proceedings, by virtue of s. 52 of the *Constitution Act, 1982*, by reason of the aboriginal rights within the meaning of s. 35 of the *Constitution Act, 1982* invoked by the appellant.

132 I would dismiss the appeal and affirm the conviction.

Appeal allowed.

1990 CarswellBC 105
Supreme Court of Canada

R. v. Sparrow

1990 CarswellBC 105, 1990 CarswellBC 756, [1990] 1 S.C.R. 1075, [1990] 3 C.N.L.R. 160, [1990] 4 W.W.R. 410, [1990] B.C.W.L.D. 1567, [1990] S.C.J. No. 49, 10 W.C.B. (2d) 194, 111 N.R. 241, 46 B.C.L.R. (2d) 1, 56 C.C.C. (3d) 263, 70 D.L.R. (4th) 385, J.E. 90-851, EYB 1990-68598

SPARROW v. R. et al.

Dickson C.J.C., McIntyre,* Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

Heard: November 3, 1988
Judgment: May 31, 1990
Docket: No. 20311

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R. Morin and *R. Décary, Q.C.*, for the intervener the Attorney General of Quebec.
E.R.A. Edwards, Q.C., and *H.R. Eddy*, for the intervener the Attorney General of British Columbia.
K.J. Tyler and *R.G. Richards*, for the intervener the Attorney General for Saskatchewan.
R.J. Normey, for the intervener the Attorney General for Alberta.
S.R. Stevenson, for the intervener the Attorney General of Newfoundland.

Headnote

Native Law --- Constitutional issues — Hunting and fishing — Fishing offences — Application of federal statutes

Native law — Aboriginal rights — Hunting, trapping and fishing — Indian fishing with net longer than permitted by band's Indian food fishing licence — Indian right to fish for food constituting existing aboriginal rights protected by s. 35(1) of Constitution Act, 1982 — Court setting out approach for assessing legitimacy of legislation restricting existing aboriginal rights — Party challenging legislation bearing onus of proving prima facie infringement of s. 35(1) — Crown then carrying burden of proving justification — Court affirming setting aside of conviction and ordering of new trial.

Fish and game — Legislation — Validity — Indian fishing with net longer than permitted by band's Indian food fishing licence — Indian right to fish for food constituting existing aboriginal rights protected by s. 35(1) of Constitution Act, 1982 — Court setting out approach for assessing legitimacy of legislation restricting existing aboriginal rights — Party challenging legislation bearing onus of proving prima facie infringement of s. 35(1) — Crown then carrying burden of proving justification — Court affirming setting aside of conviction and ordering of new trial.

Constitutional law — Judicial review of legislation — Principles of interpretation — Indian fishing with net longer than permitted by band's Indian food fishing licence — Indian right to fish for food constituting existing aboriginal rights protected by s. 35(1) of Constitution Act, 1982 — Court setting out approach for assessing legitimacy of legislation restricting existing aboriginal rights — Party challenging legislation bearing onus of proving prima facie infringement of s. 35(1) — Crown then carrying burden of proving justification — Court affirming setting aside of conviction and ordering of new trial.

The accused, a member of the Musqueam band, was charged under s. 61(1) of the Fisheries Act with fishing with a drift net that was longer than that permitted by the band's Indian food fishing licence. The accused contended that, because he had an

aboriginal right to fish, the net length restriction was inconsistent with s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing aboriginal and treaty rights. The accused appealed his conviction first to the County Court and then to the Court of Appeal. The Court of Appeal allowed the appeal and ordered a new trial. The accused appealed the court's holding that s. 35(1) protects the aboriginal right only when exercised for food purposes and in failing to find the net length restriction in the licence was inconsistent with s. 35(1). The Crown cross-appealed the finding that the aboriginal right had not been extinguished before the date of commencement of the Constitution Act, 1982, and argued, alternatively, that the court erred in its conclusions concerning the scope of the aboriginal right to fish for food. It maintained that a new trial should not have been directed because the accused failed to establish a prima facie case that the reduction in length of the net unreasonably interfered with his right.

Held:

Appeal and cross-appeal dismissed; setting aside of conviction affirmed; new trial ordered.

Section 35(1) of the Constitution Act, 1982 applies to those rights in existence when the Act came into effect. Extinguished rights are not revived by the Act. An existing aboriginal right cannot be read as incorporating the specific manner in which it was regulated before 1982. Indeed, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. The Court of Appeal's finding that at the relevant time the accused was exercising an existing aboriginal right was supported by the evidence and not to be disturbed. To show that an aboriginal right has been extinguished, the Sovereign's intention must be be clear and plain; here, the Crown failed to prove the aboriginal right to fish had been extinguished. Nothing in the Fisheries Act or its regulations demonstrates a clear and plain intention to extinguish the aboriginal right to fish. The issuance of individual permits for an extended period on a discretionary basis was a means of controlling the fisheries, not of defining underlying rights.

As to the scope of the right to fish, government regulations have only recognized the right to fish for food for over a hundred years. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right, government policy can regulate the exercise of that right but such regulation must be in keeping with s. 35(1), which is the culmination of a political and legal struggle for the constitutional recognition of aboriginal rights. The approach to be taken to interpreting s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights and the purposes behind the provision itself. The nature of s. 35(1) suggests that it be construed in a purposive way. Given that the provision affirms aboriginal rights, a generous, liberal interpretation of the words in the subsection is demanded. The fact that s. 35(1) is not subject to s. 1 of the Charter does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will be valid if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1). The government must bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

The first question to ask is whether the legislation in issue has the effect of interfering with an existing aboriginal right. If so, it represents a prima facie infringement of s. 35(1). The inquiry begins with a reference to the characteristics of the right at stake. As they develop an understanding of the sui generis nature of aboriginal rights, courts must carefully avoid applying traditional common law concepts of property. Sensitivity to the aboriginal perspective on the meaning of the right is crucial. To determine whether there has been a prima facie infringement certain questions must be asked. First, is the limitation reasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. If prima facie interference is found the analysis moves to the issue of justification. The first step is to determine whether there is a valid legislative objective, such as an objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource. If a valid legislative objective is found, the second step is to assess whether the legislation can be justified in light of the Crown's responsibility to and trust relationship with aboriginal peoples. The nature of the constitutional protection afforded by s. 35(1) demands that there be a link between the justification question and the allocation of priorities in the fishery. The constitutional nature of the Musqueam food fishing rights meant that any allocation of priorities after valid conservation measures have been implemented had to give top priority to Indian food fishing.

The justificatory standard to be met may place a heavy burden on the Crown. However, government policy regarding the British Columbia fishery already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is to guarantee that federal

conservation and management plans concerning the salmon fishery treat aboriginal peoples in a way ensuring that their rights are taken seriously.

The judgment of the court was delivered by *Dickson C.J.C.* and *La Forest J.*:

1 This appeal requires this court to explore for the first time the scope of s. 35(1) of the Constitution Act, 1982, and to indicate its strength as a promise to the aboriginal peoples of Canada. Section 35(1) is found in Pt. II of that Act, entitled "Rights of the Aboriginal Peoples of Canada", and provides as follows:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

2 The context of this appeal is the alleged violation of the terms of the Musqueam food fishing licence which are dictated by the Fisheries Act, R.S.C. 1970, c. F-14 [now R.S.C. 1985, c. F-14], and the regulations under that Act. The issue is whether Parliament's power to regulate fishing is now limited by s. 35(1) of the Constitutional Act, 1982, and, more specifically, whether the net length restriction in the licence is inconsistent with that provision.

Facts

3 The appellant, a member of the Musqueam Indian Band, was charged under s. 61(1) [now s. 79(1)] of the Fisheries Act of the offence of fishing with a drift net longer than that permitted by the terms of the band's Indian food fishing licence. The fishing which gave rise to the charge took place on 25th May 1984 in Canoe Passage, which is part of the area subject to the band's licence. The licence, which had been issued for a one-year period beginning 31st March 1984, set out a number of restrictions including one that drift nets were to be limited to 25 fathoms in length. The appellant was caught with a net which was 45 fathoms in length. He has throughout admitted the facts alleged to constitute the offence, but has defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the band's licence is inconsistent with s. 35(1) of the Constitution Act, 1982, and therefore invalid.

The Courts Below

4 Goulet Prov. J., who heard the case [20th March 1985 (unreported)], first referred to the very similar pre-Charter case of *R. v. Derriksan*, [1976] 6 W.W.R. 480, 31 C.C.C. (2d) 575, 71 D.L.R. (3d) 159 (S.C.C.) [B.C.], where this court held that the aboriginal right to fish was governed by the Fisheries Act and regulations. He then expressed the opinion that he was bound by *Calder v. A.G. B.C.* (1970), 74 W.W.R. 481, 13 D.L.R. (3d) 64 (B.C.C.A.), which held that a person could not claim an aboriginal right unless it was supported by a special treaty, proclamation, contract or other document, a position that was not disturbed because of the divided opinions of the members of this court on the appeal which affirmed that decision ([1973] S.C.R. 313, [1973] 4 W.W.R. 1, 34 D.L.R. (3d) 145 [B.C.]). Section 35(1) of the Constitution Act, 1982 thus had no application. The alleged right here was not based on any treaty or other document, but was said to have been one exercised by the Musqueam from time immemorial before European settlers came to this continent. He therefore convicted the appellant, finding it unnecessary to consider the evidence in support of an aboriginal right.

5 An appeal to Lamperson J. Co. Ct. of the County Court of Vancouver was dismissed for similar reasons ([1986] B.C.W.L.D. 599).

6 The British Columbia Court of Appeal, [1987] 2 W.W.R 577, 9 B.C.L.R. (2d) 300, 32 C.C.C. (3d) 65, [1987] 1 C.N.L.R. 145, 36 D.L.R. (4th) 246, found that the courts below had erred in deciding that they were bound by the Court of Appeal decision in *Calder*, supra, to hold that the appellant could not rely on an aboriginal right to fish. Since the pronouncement of the Supreme Court of Canada judgment, the Court of Appeal's decision has been binding on no one. The court also distinguished *Calder* on its facts.

7 The court then dealt with the other issues raised by the parties. On the basis of the trial judge's conclusion that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished "from time immemorial", it stated that, with the other circumstances, this should have led to the conclusion that Mr. Sparrow was exercising an existing aboriginal right. It rejected

the Crown's contention that the right was no longer existing by reason of its "extinguishment by regulation". An aboriginal right could continue, though regulated. The court also rejected textual arguments made to the effect that s. 35 was merely of a preambular character, and concluded that the right to fish asserted by the appellant was one entitled to constitutional protection.

8 The issue then became whether that protection extended so far as to preclude regulation (as contrasted with extinguishment, which did not arise in this case) of the exercise of that right. In its view, the general power to regulate the time, place and manner of all fishing, including fishing under an aboriginal right, remains. Parliament retained the power to regulate fisheries and to control Indian lands under s. 91(12) and (24) of the Constitution Act, 1867 respectively. Reasonable regulations were necessary to ensure the proper management and conservation of the resource, and the regulations under the Fisheries Act restrict the right of all persons including Indians. The court observed, at p. 330:

> Section 35(1) of the Constitution Act, 1982 does not purport to revoke the power of Parliament to act under Head 12 or 24. The power to regulate fisheries, including Indian access to the fisheries, continues, subject only to the new constitutional guarantee that the aboriginal rights existing on 17th April 1982 may not be taken away.

9 The court rejected arguments that the regulation of fishing was an inherent aspect of the aboriginal right to fish and that such regulation must be confined to necessary conservation measures. The right had always been and continued to be a regulated right. The court put it this way, at p. 331:

> The aboriginal right which the Musqueam had was, subject to conservation measures, the right to take fish for food and for the ceremonial purposes of the band. It was in the beginning a regulated, albeit self-regulated, right. It continued to be a regulated right, and on 17th April 1982, it was a regulated right. It has never been a fixed right, and it has always taken its form from the circumstances in which it has existed. If the interests of the Indians and other Canadians in the fishery are to be protected then reasonable regulations to ensure the proper management and conservation of the resource must be continued.

10 The court then went on to particularize the right still further. It was a right for a purpose, not one related to a particular method. Essentially, it was a right to fish for food and associated traditional band activities:

> The aboriginal right is not to take fish by any particular method or by a net of any particular length. It is to take fish for food purposes. The breadth of the right should be interpreted liberally in favour of the Indians. So "food purposes" should not be confined to subsistence. In particular, this is so because the Musqueam tradition and culture involves a consumption of salmon on ceremonial occasions and a broader use of fish than mere day-to-day domestic consumption.

That right, the court added, has not changed its nature since the enactment of the Constitution Act, 1982. What has changed is that the Indian food fishery right is now entitled to priority over the interests of other user groups, and that that right, by reason of s. 35(1), cannot be extinguished.

11 The Court of Appeal found that the trial judge's findings of facts were insufficient to lead to an acquittal. Observing that the conviction was based on an erroneous view of the law and could not stand, the court further remarked upon the existence of unresolved conflicts in the evidence, including the question whether a change in the fishing conditions was necessary to reduce the catch to a level sufficient to satisfy reasonable food requirements, as well as for conservation purposes.

The Appeal

12 Leave to appeal to this court was then sought and granted. On 24th November 1987, the following constitutional question was stated:

> Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated 30th March 1984, issued pursuant to the British Columbia Fishery (General) Regulations and the Fisheries Act, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the Constitution Act, 1982?

13 The appellant appealed on the ground that the Court of Appeal erred (1) in holding that s. 35(1) of the Constitution Act, 1982 protects the aboriginal right only when exercised for food purposes and permits restrictive regulation of such rights whenever "reasonably justified as being necessary for the proper management and conservation of the resource or in the public interest", and (2) in failing to find the net length restriction in the band's food fish licence was inconsistent with s. 35(1) of the Constitution Act, 1982.

14 The respondent Crown cross-appealed on the ground that the Court of Appeal erred in holding that the aboriginal right had not been extinguished before 17th April 1982, the date of commencement of the Constitution Act, 1982, and in particular in holding that, as a matter of fact and law, the appellant possessed the aboriginal right to fish for food. In the alternative, the respondent alleged, the Court of Appeal erred in its conclusions respecting the scope of the aboriginal right to fish for food and the extent to which it may be regulated, more particularly in holding that the aboriginal right included the right to take fish for the ceremonial purposes and societal needs of the band and that the band enjoyed a constitutionally protected priority over the rights of other people engaged in fishing. Section 35(1), the respondent maintained, did not invalidate legislation passed for the purpose of conservation and resource management, public health and safety and other overriding public interests such as the reasonable needs of other user groups. Finally, it maintained that the conviction ought not to have been set aside or a new trial directed because the appellant failed to establish a prima facie case that the reduction in the length of the net had unreasonably interfered with his right by preventing him from meeting his food fish requirements. According to the respondent, the Court of Appeal had erred in shifting the burden of proof to the Crown on the issue before the appellant had established a prima facie case.

15 The National Indian Brotherhood Assembly of First Nations intervened in support of the appellant. The Attorneys General of British Columbia, Ontario, Quebec, Saskatchewan, Alberta and Newfoundland supported the respondent, as did the British Columbia Wildlife Federation and others, the Fishery Council of British Columbia and the United Fishermen and Allied Workers Union.

The Regulatory Scheme

16 The Fisheries Act, s. 34 [now s. 43], confers on the Governor in Council broad powers to make regulations respecting the fisheries, the most relevant for our purposes being those set forth in the following paragraphs of that section:

> 34. ...
>
> (*a*) for the proper management and control of the seacoast and inland fisheries;
>
> (*b*) respecting the conservation and protection of fish;
>
> (*c*) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish ...
>
> (*e*) respecting the use of fishing gear and equipment;
>
> (*f*) respecting the issue, suspension and cancellation of licences and leases;
>
> (*g*) respecting the terms and conditions under which a lease or licence may be issued;

Contravention of the Act and the regulations is made an offence under s. 61(1) under which the appellant was charged.

17 Acting under its regulation-making powers, the Governor in Council enacted the British Columbia Fishery (General) Regulations, SOR/ 84-248. Under these regulations (s. 4), everyone is, inter alia, prohibited from fishing without a licence, and then only in areas and at the times and in the manner authorized by the Act or regulations. That provision also prohibits buying, selling, trading or bartering fish other than those lawfully caught under the authority of a commercial fishing licence. Section 4 reads:

4. (1) Unless otherwise provided in the Act or in any Regulations made thereunder in respect of the fisheries to which these Regulations apply or in the *Wildlife Act* (British Columbia), no person shall fish except under the authority of a licence or permit issued thereunder.

(2) No person shall fish for any species of fish in the Province or in Canadian fisheries waters of the Pacific Ocean except in areas and at times authorized by the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(3) No person who is the owner of a vessel shall operate that vessel or permit it to be operated in contravention of these Regulations.

(4) No person shall, without lawful excuse, have in his possession any fish caught or obtained contrary to the Act or any Regulations made thereunder in respect of the fisheries to which these Regulations apply.

(5) No person shall buy, sell, trade or barter or attempt to buy, sell, trade or barter fish or any portions thereof other than fish lawfully caught under the authority of a commercial fishing licence issued by the Minister or the Minister of Environment for British Columbia.

18 The regulations make provision for issuing licences to Indians or a band "for the sole purpose of obtaining food for that Indian and his family and for the band", and no one other than an Indian is permitted to be in possession of fish caught pursuant to such a licence. Subsections 27(1) and (4) of the regulations read:

27. (1) In this section "Indian food fish licence" means a licence issued by the Minister to an Indian or a band for the sole purpose of obtaining food for that Indian and his family or for the band ...

(4) No person other than an Indian shall have in his possession fish caught under the authority of an Indian food fish licence.

19 As in the case of other licences issued under the Act, such licences may, by s. 12 of the regulations, be subjected to restrictions regarding the species and quantity of fish that may be taken, the places and times when they may be taken, the manner in which they are to be marked and, most important here, the type of gear and equipment that may be used. Section 12 reads as follows:

12. (1) Subject to these Regulations and any regulations made under the Act in respect of the fisheries to which these Regulations apply and for the proper management and control of such fisheries, there may be specified in a licence issued under these Regulations

(*a*) the species of fish and quantity thereof that is permitted to be taken;

(*b*) the period during which and the waters in which fishing is permitted to be carried out;

(*c*) the type and quantity of fishing gear and equipment that is permitted to be used and the manner in which it is to be used;

(*d*) the manner in which fish caught and retained for educational or scientific purposes is to be held or displayed;

(*e*) the manner in which fish caught and retained is to be marked and transported; and

(*f*) the manner in which scientific or catch data is to be reported.

(2) No person fishing under the authority of a licence referred to in subsection (1) shall contravene or fail to comply with the terms of the licence.

20 Pursuant to these powers, the Musqueam Indian Band, on 31st March 1984, was issued an Indian food fishing licence as it had since 1978 "to fish for salmon for food for themselves and their family" in areas which included the place where the offence

charged occurred, the waters of Ladner Reach and Canoe Passage therein described. The licence contained time restrictions as well as the type of gear to be used, notably "One Drift net twenty-five (25) fathoms in length".

21 The appellant was found fishing in the waters described using a drift net in excess of 25 fathoms. He did not contest this, arguing instead that he had committed no offence because he was acting in the exercise of an existing aboriginal right which was recognized and affirmed by s. 35(1) of the Constitution Act, 1982.

Analysis

22 We will address first the meaning of "existing" aboriginal rights and the content and scope of the Musqueam right to fish. We will then turn to the meaning of "recognized and affirmed", and the impact of s. 35(1) on the regulatory power of Parliament.

"Existing"

23 The word "existing" makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982. A number of courts have taken the position that "existing" means being in actuality in 1982: *R. v. Eninew*, 7 C.C.C. (3d) 443 at 446, [1983] 2 C.N.L.R. 123, [1984] 2 C.N.L.R. 122, 8 C.R.R. 1, 1 D.L.R. (4th) 595, 28 Sask. R. 168, affirmed *(*sub nom. *R. v. Eninew; R. v. Bear)* 12 C.C.C. (3d) 365, [1984] 2 C.N.L.R. 126, 11 C.R.R. 189, 10 D.L.R. (4th) 137, 32 Sask. R. 237 (C.A.). See also *A.G. Ont. v. Bear Island Foundation*, 49 O.R. (2d) 353, [1985] 1 C.N.L.R. 1, 15 D.L.R. (4th) 321 (H.C.); *R. v. Hare*, 20 C.C.C. (3d) 1, [1985] 3 C.N.L.R. 139, 9 O.A.C. 161 (C.A.); *Steinhauer v. R.*, [1985] 3 C.N.L.R. 187, 15 C.R.R. 175, 63 A.R. 381 (Q.B.); *R. v. Martin* (1985), 17 C.R.R. 375, 65 N.B.R. (2d) 21, 167 A.P.R. 21 (Q.B.); *R. v. Agawa*, 65 O.R. (2d) 505, [1988] 3 C.N.L.R. 73, 43 C.C.C. (3d) 266, 53 D.L.R. (4th) 101, 28 O.A.C. 201 (C.A.) .

24 Further, an existing aboriginal right cannot be read so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations. Blair J.A. in *Agawa*, supra, had this to say about the matter, at p. 214:

> Some academic commentators have raised a further problem which cannot be ignored. The *Ontario Fishery Regulations* contain detailed rules which vary for different regions in the province. Among other things, the *Regulations* specify seasons and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable fisheries *Regulations* in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in s. 35(1) were those remaining after regulation at the time of the proclamation of the *Constitution Act, 1982*.

As noted by Blair J.A., academic commentary lends support to the conclusion that "existing" means "unextinguished" rather than exercisable at a certain time in history. Professor Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 726, at pp. 781-82, has observed the following about reading regulations into the rights:

> This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.

See also Professor McNeil, "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 Sup. Ct. L. Rev. 25, at p. 258 (q.v.); Pentney, "The Rights of the Aboriginal Peoples of Canada in the *Constitution Act, 1982*, Part II, Section 35: The Substantive Guarantee" (1987), 22 U.B.C. Law Rev. 207.

25 The arbitrariness of such an approach can be seen if one considers the recent history of the federal regulation in the context of the present case and the fishing industry. If the Constitution Act, 1982 had been enacted a few years earlier, any right held by the Musqueam band, on this approach, would have been constitutionally subjected to the restrictive regime of personal licences

that had existed since 1917. Under that regime, the Musqueam catch had by 1969 become minor or non-existent. In 1978 a system of band licences was introduced on an experimental basis which permitted the Musqueam to fish with a 75 fathom net for a greater number of days than other people. Under this regime, from 1977 to 1984, the number of band members who fished for food increased from 19 persons using 15 boats, to 64 persons using 38 boats, while 10 other members of the band fished under commercial licences. Before this regime, the band's food fish requirement had basically been provided by band members who were licensed for commercial fishing. Since the regime introduced in 1978 was in force in 1982, then, under this approach, the scope and content of an aboriginal right to fish would be determined by the details of the band's 1978 licence.

26 The unsuitability of the approach can also be seen from another perspective. 91 other tribes of Indians, comprising over 20,000 people (compared with 540 Musqueam on the reserve and 100 others off the reserve), obtain their food fish from the Fraser River. Some or all of these bands may have an aboriginal right to fish there. A constitutional patchwork quilt would be created if the constitutional right of these bands were to be determined by the specific regime available to each of those bands in 1982.

27 Far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time. To use Professor Slattery's expression, in "Understanding Aboriginal Rights", supra, at p. 782, the word "existing" suggests that those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate "frozen rights" must be rejected.

The Aboriginal Right

28 We turn now to the aboriginal right at stake in this appeal. The Musqueam Indian Reserve is located on the north shore of the Fraser River close to the mouth of that river and within the limits of the city of Vancouver. There has been a Musqueam village there for hundreds of years. This appeal does not directly concern the reserve or the adjacent waters, but arises out of the band's right to fish in another area of the Fraser River estuary known as Canoe Passage in the south arm of the river, some 16 kilometres (about 10 miles) from the reserve. The reserve and those waters are separated by the Vancouver International Airport and the municipality of Richmond.

29 The evidence reveals that the Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon was an integral part of their lives and remains so to this day. Much of the evidence of an aboriginal right to fish was given by Dr. Suttles, an anthropologist, supported by that of Mr. Grant, the band administrator. The Court of Appeal thus summarized Dr. Suttles' evidence, at pp. 307-308:

> Dr. Suttles was qualified as having particular qualifications in respect of the ethnography of the Coast Salish Indian people of which the Musqueams were one of several tribes. He thought that the Musqueam had lived in their historic territory, which includes the Fraser River estuary, for at least 1,500 years. That historic territory extended from the north shore of Burrard Inlet to the south shore of the main channel of the Fraser River, including the waters of the three channels by which that river reaches the ocean. As part of the Salish people, the Musqueam were part of a regional social network covering a much larger area but, as a tribe, were themselves an organized social group with their own name, territory and resources. Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others.
>
> Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times", established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Toward the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.

30 While the trial for a violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right, and the evidence was not extensive, the correctness of the finding of fact of the trial judge "that Mr. Sparrow was fishing in ancient tribal territory where his ancestors had fished from time immemorial in that part of the mouth of the Fraser River for salmon" is supported by the evidence and was not contested. The existence of the right, the Court of Appeal tells us, "was not the subject of serious dispute". It is not surprising, then, that, taken with other circumstances, that court should find that "the judgment appealed from was wrong in ... failing to hold that Sparrow at the relevant time was exercising an existing aboriginal right".

31 In this court, however, the respondent contested the Court of Appeal's finding, contending that the evidence was insufficient to discharge the appellant's burden of proof upon the issue. It is true that for the period from 1867 to 1961 the evidence is scanty. But the evidence was not disputed or contradicted in the courts below and there is evidence of sufficient continuity of the right to support the Court of Appeal's finding, and we would not disturb it.

32 What the Crown really insisted on, both in this court and the courts below, was that the Musqueam Band's aboriginal right to fish had been extinguished by regulations under the Fisheries Act.

33 The history of the regulation of fisheries in British Columbia is set out in *Jack v. R.*, [1980] 1 S.C.R. 294 at 308 et seq., [1979] 5 W.W.R. 364, [1979] 2 C.N.L.R. 25, 48 C.C.C. (2d) 246, 100 D.L.R. (3d) 193, 28 N.R. 162, and we need only summarize it here. Before the province's entry into Confederation in 1871, the fisheries were not regulated in any significant way, whether in respect of Indians or other people. The Indians were not only permitted but encouraged to continue fishing for their own food requirements. Commercial and sport fishing were not then of any great importance. The federal Fisheries Act was only proclaimed in force in the province in 1876 and the first Salmon Fishery Regulations for British Columbia were adopted in 1878 and were minimal.

34 The 1878 regulations were the first to mention Indians. They simply provided that the Indians were at all times at liberty, by any means other than drift nets or spearing, to fish for food for themselves, but not for sale or barter. The Indian right or liberty to fish was thereby restricted, and more stringent restrictions were added over the years. As noted in *Jack v. R.*, supra, at p. 310:

> The federal Regulations became increasingly strict in regard to the Indian fishery over time, as first the commercial fishery developed and then sport fishing became common. What we can see is an increasing subjection of the Indian fishery to regulatory control. First, the regulation of the use of drift nets, then the restriction of fishing to food purposes, then the requirement of permission from the Inspector and, ultimately, in 1917, the power to regulate even food fishing by means of conditions attached to the permit.

The 1917 regulations were intended to make still stronger the provisions against commercial fishing in the exercise of the Indian right to fish for food: see P.C. 2539 of 22nd September 1917. The Indian food fishing provisions remained essentially the same from 1917 to 1977. The regulations of 1977 retained the general principles of the previous 60 years. An Indian could fish for food under a "special licence" specifying method, locale and times of fishing. Following an experimental program to be discussed later, the 1981 regulations provided for the entirely new concept of a band food fishing licence, while retaining comprehensive specification of conditions for the exercise of licences.

35 It is this progressive restriction and detailed regulation of the fisheries which, respondent's counsel maintained, have had the effect of extinguishing any aboriginal right to fish. The extinguishment need not be express, he argued, but may take place where the sovereign authority is exercised in a manner "necessarily inconsistent" with the continued enjoyment of aboriginal rights. For this proposition, he particularly relied on *St. Catherine's Milling & Lumber Co. v. R.* (1888), 14 App. Cas. 46, 4 Cart. 107 (P.C.); *Calder v. A.G.B.C.*, supra [S.C.C.]; *Baker Lake v. Min. of Indian Affairs & Nor. Dev.*, [1980] 1 F.C. 518, [1980] 5 W.W.R. 193, 107 D.L.R. (3d) 513, [179] 3 C.N.L.R. 17 (T.D.); and *A.G. Ont. v. Bear Island Foundation*, supra. The consent to its extinguishment before the Constitution Act, 1982 was not required; the intent of the sovereign could be effected not only by statute but by valid regulations. Here, in his view, the regulations had entirely displaced any aboriginal right. There is, he submitted, a fundamental inconsistency between the communal right to fish embodied in the aboriginal right, and fishing under

a special licence or permit issued to individual Indians (as was the case until 1977) in the discretion of the minister and subject to terms and conditions which, if breached, may result in cancellation of the licence. The Fisheries Act and its regulations were, he argued, intended to constitute a complete code inconsistent with the continued existence of an aboriginal right.

36 At bottom, the respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished. The distinction to be drawn was carefully explained, in the context of federalism, in the first fisheries case, *A.G. Can. v. A.G. Ont. (Ref. re Prov. Fisheries)*, [1898] A.C. 700. There, the Privy Council had to deal with the interrelationship between, on the one hand, provincial property, which by s. 109 of the Constitution Act, 1867 is vested in the provinces (and so falls to be regulated qua property exclusively by the provinces) and, on the other hand, the federal power to legislate respecting the fisheries thereon under s. 91(12) of that Act. The Privy Council said the following in relation to the federal regulation (at pp. 712-13):

> ... the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected.

37 In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J. stated in *Baker Lake*, supra, at p. 568:

> Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as of any other common law right.

See also *A.G. Ont. v. Bear Island Foundation*, supra, at pp. 439-40. That in Judson J.'s view was what had occurred in *Calder*, supra, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 404) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be 'clear and plain'* " (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right.

38 There is nothing in the Fisheries Act or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining underlying rights.

39 We would conclude then that the Crown has failed to discharge its burden of proving extinguishment. In our opinion, the Court of Appeal made no mistake in holding that the Indians have an existing aboriginal right to fish in the area where Mr. Sparrow was fishing at the time of the charge. This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.

40 The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption

of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.

41 The British Columbia Court of Appeal in this case held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities. The Court of Appeal thereby defined the right as protecting the same interest as is reflected in the government's food fish policy. In limiting the right to food purposes, the Court of Appeal referred to the line of cases involving the interpretation of the natural resources agreements and the food purpose limitation placed on the protection of fishing and hunting rights by the Constitution Act, 1930 (see *R. v. Wesley*, [1932] 2 W.W.R. 337, 26 Alta. L.R. 433, 58 C.C.C. 269, [1932] 4 D.L.R. 774 (C.A.); *Prince v. R.*, [1964] S.C.R. 81, 46 W.W.R. 121, 41 C.R. 403, [1964] 3 C.C.C. 1 [Man.]; *R. v. Sutherland*, [1980] 2 S.C.R. 451, [1980] 5 W.W.R. 456, 53 C.C.C. (2d) 289, 113 D.L.R. (3d) 374, [1980] 3 C.N.L.R. 71, 7 Man. R. (2d) 359, 35 N.R. 361).

42 The Court of Appeal's position was attacked from both sides. The respondent for its part argued that, if an aboriginal right to fish does exist, it does not include the right to take fish for the ceremonial and social activities of the band. The appellant, on the other hand, attacked the Court of Appeal's restriction of the right to fish for food. He argued that the principle that the holders of aboriginal rights may exercise those rights according to their own discretion has been recognized by this court in the context of the protection of treaty hunting rights (*R. v. Simon*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153, 23 C.C.C. (3d) 238, 24 D.L.R. (4th) 390, 71 N.S.R. (2d) 15, 171 A.P.R. 15, 62 N.R. 366) and that it should be applied in this case such that the right is defined as a right to fish for any purpose and by any non-dangerous method.

43 In relation to this submission, it was contended before this court that the aboriginal right extends to commercial fishing. While no commercial fishery existed prior to the arrival of European settlers, it is contended that the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes. The presence of numerous interveners representing commercial fishing interests, and the suggestion on the facts that the net length restriction is at least in part related to the probable commercial use of fish caught under the Musqueam food fishing licence, indicate the possibility of conflict between aboriginal fishing and the competitive commercial fishery with respect to economically valuable fish such as salmon. We recognize the existence of this conflict and the probability of its intensification as fish availability drops, demand rises and tensions increase.

44 Government regulations governing the exercise of the Musqueam right to fish, as described above, have only recognized the right to fish *for food* for over a hundred years. This may have reflected the existing position. However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right. The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy *can*, however, regulate the exercise of that right, but such regulation must be in keeping with s. 35(1).

45 In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's *food fishing licence*. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.

"Recognized and Affirmed"

46 We now turn to the impact of s. 35(1) of the Constitution Act, 1982 on the regulatory power of Parliament and on the outcome of this appeal specifically.

47 Counsel for the appellant argued that the effect of s. 35(1) is to deny Parliament's power to restrictively regulate aboriginal fishing rights under s. 91(24) ("Indians and Lands Reserved for the Indians"), and s. 91(12) ("Sea Coast and Inland Fisheries"). The essence of this submission, supported by the intervener, the National Indian Brotherhood Assembly of First Nations, is that

the right to regulate is part of the right to use the resource in the band's discretion. Section 35(1) is not subject to s. 1 of the Charter, nor to legislative override under s. 33. The appellant submitted that, if the regulatory power continued, the limits on its extent are set by the word "inconsistent" in s. 52(1) of the Constitution Act, 1982 and the protective and remedial purposes of s. 35(1). This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1). Thus, counsel for the appellant speculated, "in certain circumstances, necessary and reasonable conservation measures *might* qualify" (emphasis added) — where for example such measures were necessary to prevent serious impairment of the aboriginal rights of present and future generations, where conservation could only be achieved by restricting the right and not by restricting fishing by other users, and where the aboriginal group concerned was unwilling to implement necessary conservation measures. The onus of proving a justification for restrictive regulations would lie with the government by analogy with s. 1 of the Charter.

48 In response to these submissions and in finding the appropriate interpretive framework for s. 35(1), we start by looking at the background of s. 35(1).

49 It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see *Johnson v. McIntosh* (1823), 21 U.S. (8 Wheat.) 543 (S.C.); see also the Royal Proclamation itself (R.S.C. 1985, App. II, No. 1, pp. 4-6); *Calder*, supra, per Judson J. at p. 328, Hall J. at pp. 383, 402. And there can be no doubt that over the years the rights of the Indians were often honoured in the breach (for one instance in a recent case in this court, see *C.P. Ltd. v. Paul*, [1988] 2 S.C.R. 654, [1989] 1 C.N.L.R. 47, 1 R.P.R. (2d) 105, 53 D.L.R. (4th) 487, 91 N.B.R. (2d) 43, 232 A.P.R. 43, 89 N.R. 325. As MacDonald J. stated in *Pasco v. C.N.R.*, 69 B.C.L.R. 76, [1986] 1 C.N.L.R. 35 at 37 (S.C.): "We cannot recount with much pride the treatment accorded to the native people of this country."

50 For many years, the rights of the Indians to their aboriginal lands — certainly as *legal* rights — were virtually ignored. The leading cases de fining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clement's The Law of the Canadian Constitution, 3rd ed. (1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus, the Statement of the Government of Canada on Indian Policy, 1969, although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community". In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the Quebec Boundary Extension Act, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.

51 In the light of its reassessment of Indian claims following *Calder*, the federal government on 8th August 1973 issued "a statement of policy" regarding Indian lands. By it, it sought to "signify the Government's *recognition and acceptance* of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians", which it regarded "as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country" (emphasis added). See Statement made by the Honourable Jean Chreacutetien, Minister of Indian Affairs and Northern Development, on Claims of Indian and Inuit People, 8th August 1973. The remarks about these lands were intended "as an expression of acknowledged responsibility". But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. "The Government", it stated, "is now ready to negotiate with authorized representatives of these

native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest."

52 It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position; see also Canada, Department of Indian Affairs and Northern Development, In All Fairness: A Native Claims Policy — Comprehensive Claims (1981), pp. 11-12; Slattery, "Understanding Aboriginal Rights", op. cit., at p. 730. As recently as *Guerin v. R.*, [1984] 2 S.C.R. 335, 59 B.C.L.R. 301, [1984] 6 W.W.R. 481, 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 20, 13 D.L.R. (4th) 321, 55 N.R. 161, the federal government argued in this court that any federal obligation was of a political character.

53 It is clear, then, that s. 35(1) of the Constitution Act, 1982, represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights. The strong representations of native associations and other groups concerned with the welfare of Canada's aboriginal peoples made the adoption of s. 35(1) possible and it is important to note that the provision applies to the Indians, the Inuit and the Meacutetis. Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place. It also affords aboriginal peoples constitutional protection against provincial legislative power. We are, of course, aware that this would, in any event, flow from the *Guerin* case, supra, but for a proper understanding of the situation, it is essential to remember that the *Guerin* case was decided after the commencement of the Constitution Act, 1982. In addition to its effect on aboriginal rights, s. 35(1) clarified other issues regarding the enforcement of treaty rights (see Sanders, "Pre-existing Rights: The Aboriginal Peoples of Canada", in Beaudoin and Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2nd ed., esp. at p. 730).

54 In our opinion, the significance of s. 35(1) extends beyond these fundamental effects. Professor Lyon in "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at 100, says the following about s. 35(1):

> ... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.

55 The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of "recognized and affirmed" that, in our opinion, gives appropriate weight to the constitutional nature of these words.

56 In *Ref. re Man. Language Rights*, [1985] 1 S.C.R. 721 at 745, *(*sub nom. *Ref. re Language Rights under s. 23 of Man. Act, 1870)* [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 35 Man. R. (2d) 83, 59 N.R. 321, this court said the following about the perspective to be adopted when interpreting a constitution:

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitutional Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

The nature of s. 35(1) itself suggests that it be construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded. When the Court of Appeal below was confronted with the submission that s. 35 has no effect on aboriginal or treaty rights and that it is merely a preamble to the parts of the Constitution Act, 1982 which deal with aboriginal rights, it said the following, at p. 322:

> This submission gives no meaning to s. 35. If accepted, it would result in denying its clear statement that existing rights are hereby recognized and affirmed, and would turn that into a mere promise to recognize and affirm those rights sometime

> in the future ... To so construe s. 35(1) would be to ignore its language and the principle that the Constitution should be interpreted in a liberal and remedial way. We cannot accept that that principle applies less strongly to aboriginal rights than to the rights guaranteed by the Charter, particularly having regard to the history and to the approach to interpreting treaties and statutes relating to Indians required by such cases as *Nowegijick v. R.*, [1983] 1 S.C.R. 29 ...

57 In *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36, [1983] C.T.C. 20, 83 D.T.C. 5041, [1983] 2 C.N.L.R. 89, 144 D.L.R. (3d) 193, 46 N.R. 41 [Fed.], the following principle that should govern the interpretation of Indian treaties and statutes was set out:

> ... treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.

58 In *R. v. Agawa*, supra, Blair J.A. stated that the above principle should apply to the interpretation of s. 35(1). He added the following principle to be equally applied, at pp. 215-16:

> The second principle was enunciated by the late Associate Chief Justice MacKinnon in *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. He emphasized the importance of Indian history and traditions as well as the perceived effect of a treaty at the time of its execution. He also cautioned against determining Indian right "in a vacuum". The honour of the Crown is involved in the interpretation of Indian treaties and, as a consequence, fairness to the Indians is a governing consideration. He said at p. 367:
>
> > The principles to be applied to the interpretation of Indian treaties have been much canvassed over the years. In approaching the terms of a treaty quite apart from the other considerations already noted the honour of the Crown is always involved and no appearance of 'sharp dealing' should be sanctioned.
>
> This view is reflected in recent judicial decisions which have emphasized the responsibility of Government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation: see *Guerin v. the Queen*, [1984] 2 S.C.R. 335, 55 N.R. 161, 13 D.L.R. (4th) 321.

59 In *Guerin*, supra, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the band at the surrender meeting. This court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The sui generis nature of Indian title and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor*, 34 O.R. (2d) 360, [1981] 3 C.N.L.R. 114, 62 C.C.C. (2d) 227 (C.A.), ground a general guiding principle for s. 35(1). That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

60 We agree with both the British Columbia Court of Appeal below and the Ontario Court of Appeal that the principles outlined above, derived from *Nowegijick, Taylor* and *Guerin*, should guide the interpretation of s. 35(1). As commentators have noted, s. 35(1) is a solemn commitment that must be given meaningful content (Lyon, op. cit.; Pentney, op. cit.; Schwartz, "Unstarted Business: Two Approaches to Defining s. 35 — 'What's in the Box?' and 'What Kind of Box?' ", c. XXIV, in First Principles, Second Thoughts (Montreal: Institute for Research on Public Policy, 1986); Slattery, op. cit.; and Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984), 32 Am. J. of Comp. Law 361).

61 In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the Charter, it is true that s. 35(1) is not subject to s. 1 of the Charter. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the Constitution Act, 1982. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

62 There is no explicit language in the provision that authorizes this court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet we find that the words "recognition and affirmation" incorporate

the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the Constitution Act, 1867. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, supra, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin*, supra.

63 We refer to Professor Slattery's "Understanding Aboriginal Rights", op. cit., with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

64 Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute de facto threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

65 The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the 20th century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

66 In these reasons, we will outline the appropriate analysis under s. 35(1) in the context of a regulation made pursuant to the Fisheries Act. We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

Section 35(1) and the Regulation of the Fisheries

67 Taking the above framework as guidance, we propose to set out the test for prima facie interference with an existing aboriginal right and for the justification of such an interference. With respect to the question of the regulation of the fisheries, the existence of s. 35(1) of the Constitution Act, 1982, renders the authority of *R. v. Derriksan*, supra, inapplicable. In that case, Laskin C.J.C., for this court, found that there was nothing to prevent the Fisheries Act and the regulations from subjecting the alleged aboriginal right to fish in a particular area to the controls thereby imposed. As the Court of Appeal in the case at bar noted, the *Derriksan* line of cases established that, before 17th April 1982, the aboriginal right to fish was subject to regulation by legislation and subject to extinguish ment. The new *constitutional* status of that right enshrined in s. 35(1) suggests that a different approach must be taken in deciding whether regulation of the fisheries might be out of keeping with constitutional protection.

68 The first question to be asked is whether the legislation in question has the effect of interfering with an existing aboriginal right. If it does have such an effect, it represents a prima facie infringement of s. 35(1). Parliament is not expected to act in a manner contrary to the rights and interests of aboriginals, and, indeed, may be barred from doing so by the second stage of s. 35(1) analysis. The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right

at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, supra, at p. 382, referred to as the "sui generis" nature of aboriginal rights. (See also Little Bear, "A Concept of Native Title", [1982] 5 Can. Legal Aid Bul. 99.)

69 While it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake. For example, it would be artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

70 To determine whether the fishing rights have been interfered with such as to constitute a prima facie infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a prima facie infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a prima facie interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

71 If a prima facie interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

72 The Court of Appeal below held, at p. 331, that regulations could be valid if reasonably justified as "necessary for the proper management and conservation of the resource *or in the public interest*" (emphasis added). We find the "public interest" justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.

73 The justification of conservation and resource management, on the other hand, is surely uncontroversial. In *Kruger v. R.*, [1978] 1 S.C.R. 104, [1977] 4 W.W.R. 300, 34 C.C.C. (2d) 377, 75 D.L.R. (3d) 434, 14 N.R. 495 [B.C.], the applicability of the B.C. Wildlife Act, S.B.C. 1966, c. 55, to the appellant members of the Penticton Indian band was considered by this court. In discussing that Act, the following was said about the objective of conservation (at p. 112):

> Game conservation laws have as their policy the maintenance of wildlife resources. It might be argued that without some conservation measures the ability of Indians or others to hunt for food would become a moot issue in consequence of the destruction of the resource. The presumption is for the validity of a legislative enactment and in this case the presumption has to mean that in the absence of evidence to the contrary the measures taken by the British Columbia Legislature were taken to maintain an effective resource in the Province for its citizens and not to oppose the interests of conservationists and Indians in such a way as to favour the claims of the former ...

74 While the "presumption" of validity is now outdated in view of the constitutional status of the aboriginal rights at stake, it is clear that the value of conservation purposes for government legislation and action has long been recognized. Further, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

75 If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor* and *Guerin*, supra. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

76 The problem that arises in assessing the legislation in light of its objective and the responsibility of the Crown is that the pursuit of conservation in a heavily used modern fishery inevitably blurs with the efficient allocation and management of this scarce and valued resource. The nature of the constitutional protection afforded by s. 35(1) in this context demands that there be a link between the question of justification and the allocation of priorities in the fishery. The constitutional recognition and affirmation of aboriginal rights may give rise to conflict with the interests of others, given the limited nature of the resource. There is a clear need for guidelines that will resolve the allocational problems that arise regarding the fisheries. We refer to the reasons of Dickson J. in *Jack v. R.*, supra, for such guidelines.

77 In *Jack*, the appellants' defence to a charge of fishing for salmon in certain rivers during a prohibited period was based on the alleged constitutional incapacity of Parliament to legislate such as to deny the Indians their right to fish for food. They argued that art. 13 of the British Columbia Terms of Union imposed a constitutional limitation on the federal power to regulate. While we recognize that the finding that such a limitation had been imposed was not adopted by the majority of this court, we point out that this case concerns a different constitutional promise that asks this court to give a meaningful interpretation to recognition and affirmation. That task requires equally meaningful guidelines responsive to the constitutional priority accorded aboriginal rights. We therefore repeat the following passage from *Jack*, at p. 313:

> Conservation is a valid legislative concern. The appellants concede as much. Their concern is in the allocation of the resource after reasonable and necessary conservation measures have been recognized and given effect to. They do not claim the right to pursue the last living salmon until it is caught. Their position, as I understand it, is one which would give effect to an order of priorities of this nature: (i) conservation; (ii) Indian fishing; (ii) non-Indian commercial fishing; or (iv) non-Indian sports fishing; the burden of conservation measures should not fall primarily upon the Indian fishery.
>
> I agree with the general tenor of this argument ... With respect to whatever salmon are to be caught, then priority ought to be given to the Indian fishermen, subject to the practical difficulties occasioned by international waters and the movement of the fish themselves. But any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery by art. 13, just as such conservation measures override other taking of fish.

78 The constitutional nature of the Musqueam food fishing rights means that any allocation of priorities after valid conservation measures have been implemented must give top priority to Indian food fishing. If the objective pertained to conservation, the conservation plan would be scrutinized to assess priorities. While the detailed allocation of maritime resources is a task that must be left to those having expertise in the area, the Indians' food requirements must be met first when that allocation is established. The significance of giving the aboriginal right to fish for food top priority can be described as follows. If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne by the practices of sport fishing and commercial fishing.

79 The decision of the Nova Scotia Court of Appeal in *R. v. Denny*, 5th March 1990 (not yet reported), addresses the constitutionality of the Nova Scotia Micmac Indians' right to fish in the waters of Indian Brook and the Afton River, and does so in a way that accords with our understanding of the constitutional nature of aboriginal rights and the link between allocation and justification required for government regulation of the exercise of the rights. Clarke C.J.N.S., for a unanimous court, found that the Nova Scotia Fishery Regulations enacted pursuant to the federal Fisheries Act were in part inconsistent with the constitutional rights of the appellant Micmac Indians. Section 35(1) of the Constitution Act, 1982, provided the appellants with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation

had been taken into account. With respect to the issue of the Indians' priority to a food fishery, Clarke C.J.N.S. noted that the official policy of the federal government recognizes that priority. He added the following, at pp. 22-23:

> I have no hesitation in concluding that factual as well as legislative and policy recognition must be given to the existence of an Indian food fishery in the waters of Indian Brook, adjacent to the Eskasoni Reserve, and the waters of the Afton River after the needs of conservation have been taken into account ...
>
> To afford user groups such as sports fishermen (anglers) a priority to fish over the legitimate food needs of the appellants and their families is simply not appropriate action on the part of the Federal government. It is inconsistent with the fact that the appellants have for many years, and continue to possess an aboriginal right to fish for food. The appellants have, to employ the words of their counsel, a "right to share in the available resource". This constitutional entitlement is second only to conservation measures that may be undertaken by federal legislation.

Further, Clarke C.J.N.S. found that s. 35(1) provided the constitutional recognition of the aboriginal priority with respect to the fishery, and that the regulations, in failing to guarantee that priority, were in violation of the constitutional provision. He said the following, at p. 25:

> Though it is crucial to appreciate that the rights afforded to the appellants by s. 35(1) are not absolute, the impugned regulatory scheme fails to recognize that this section provides the appellants with a priority of allocation and access to any surplus of the fisheries resource once the needs of conservation have been taken into account. Section 35(1), as applied to these appeals, provides the appellants with an entitlement to fish in the waters in issue to satisfy their food needs, where a surplus exists. To the extent that the regulatory scheme fails to recognize this, it is inconsistent with the Constitution. Section 52 mandates a finding that such regulations are of no force and effect.

80 In light of this approach, the argument that the cases of *R. v. Hare*, supra, and *R. v. Eninew; R. v. Bear*, 12 C.C.C. (3d) 365, [1984] 2 C.N.L.R. 126, 11 C.R.R. 189, 10 D.L.R. (4th) 137, 32 Sask. R. 237 (C.A.), stand for the proposition that s. 35(1) provides no basis for restricting the power to regulate must be rejected, as was done by the Court of Appeal below. In *Hare*, which addressed the issue of whether the Ontario Fishery Regulations, C.R.C. 1978, c. 849, applied to members of an Indian band entitled to the benefit of the Manitoulin Island Treaty which granted certain rights with respect to taking fish, Thorson J.A. emphasized the need for priority to be given to measures directed to the management and conservation of fish stocks with the following observation (at p. 17):

> Since 1867 and subject to the limitations thereon imposed by the Constitution, which of course now includes s. 35 of the *Constitution Act, 1982*, the constitutional authority and responsibility to make laws in relation to the fisheries has rested with Parliament. Central to Parliament's responsibility has been, and continues to be, the need to provide for the proper management and conservation of our fish stocks, and the need to ensure that they are not depleted or imperilled by deleterious practices or methods of fishing.
>
> The prohibitions found in ss. 12 and 20 of the Ontario regulations clearly serve this purpose. Accordingly it need not be ignored by our courts that while these prohibitions place limits on the rights of all persons, they are there to serve the larger interest which all persons share in the proper management and conservation of these important resources.

In *Eninew*, Hall J.A. found, at p. 368, that "the treaty rights can be limited by such regulations as are reasonable". As we have pointed out, management and conservation of resources is indeed an important and valid legislative objective. Yet, the fact that the objective is of a "reasonable" nature cannot suffice as constitutional recognition and affirmation of aboriginal rights. Rather, the regulations enforced pursuant to a conservation or management objective may be scrutinized according to the justificatory standard outlined above.

81 We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s. 35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective

of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.

82 Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. The aboriginal peoples, with their history of conservation-consciousness and interdependence with natural resources, would surely be expected, at the least, to be informed regarding the determination of an appropriate scheme for the regulation of the fisheries.

83 We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and, indeed, all Canadians.

Application To This Case — Is The Net Length Restriction Valid?

84 The Court of Appeal below found that there was not sufficient evidence in this case to proceed with an analysis of s. 35(1) with respect to the right to fish for food. In reviewing the competing expert evidence, and recognizing that fish stock management is an uncertain science, it decided that the issues at stake in this appeal were not well adapted to being resolved at the appellate court level.

85 Before the trial, defence counsel advised the Crown of the intended aboriginal rights defence and that the defence would take the position that the Crown was required to prove, as part of its case, that the net length restriction was justifiable as a necessary and reasonable conservation measure. The trial judge found s. 35(1) to be inapplicable to the appellant's defence, based on his finding that no aboriginal right had been established. He therefore found it inappropriate to make findings of fact with respect to either an infringement of the aboriginal right to fish or the justification of such an infringement. He did, however, find that the evidence called by the appellant:

> Casts some doubt as to whether the restriction was necessary as a conservation measure. More particularly, it suggests that there were more appropriate measures that could have been taken if necessary; measures that would not impose such a hardship on the Indians fishing for food. That case was not fully met by the Crown.

86 According to the Court of Appeal, the findings of fact were insufficient to lead to an acquittal. There was no more evidence before this court. We also would order a re-trial which would allow findings of fact according to the tests set out in these reasons.

87 The appellant would bear the burden of showing that the net length restriction constituted a prima facie infringement of the collective aboriginal right to fish for food. If an infringement were found, the onus would shift to the Crown which would have to demonstrate that the regulation is justifiable. To that end, the Crown would have to show that there is no underlying unconstitutional objective such as shifting more of the resource to a user group that ranks below the Musqueam. Further, it would have to show that the regulation sought to be imposed is required to accomplish the needed limitation. In trying to show that the restriction is necessary in the circumstances of the Fraser River fishery, the Crown could use facts pertaining to fishing by other Fraser River Indians.

88 In conclusion, we would dismiss the appeal and the cross-appeal and affirm the Court of Appeal's setting aside of the conviction. We would accordingly affirm the order for a new trial on the questions of infringement and whether any infringement is nonetheless consistent with s. 35(1), in accordance with the interpretation set out here.

89 For the reasons given above, the constitutional question must be answered as follows:

90 *Question:* Is the net length restriction contained in the Musqueam Indian Band Indian Food Fishing Licence dated 30th March 1984, issued pursuant to the British Columbia Fishery (General) Regulations and the Fisheries Act, R.S.C. 1970, c. F-14, inconsistent with s. 35(1) of the Constitution Act, 1982?

91 *Answer:* This question will have to be sent back to trial to be answered according to the analysis set out in these reasons.

Appeal and cross-appeal dismissed; new trial ordered.

Footnotes

* McIntyre J. took no part in the judgment.

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Roger William, on his own behalf, on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation, Appellant and Her Majesty The Queen in Right of the Province of British Columbia, Regional Manager of the Cariboo Forest Region and Attorney General of Canada, Respondents and Attorney General of Quebec, Attorney General of Manitoba, Attorney General for Saskatchewan, Attorney General of Alberta, Te'mexw Treaty Association, Business Council of British Columbia, Council of Forest Industries, Coast Forest Products Association, Mining Association of British Columbia, Association for Mineral Exploration British Columbia, Assembly of First Nations, Gitanyow Hereditary Chiefs of Gwass Hlaam, Gamlaxyeltxw, Malii, Gwinuu, Haizimsque, Watakhayetsxw, Luuxhon and Wii'litswx, on their own behalf and on behalf of all Gitanyow, Hul'qumi'num Treaty Group, Council of the Haida Nation, Office of the Wet'suwet'en Chiefs, Indigenous Bar Association in Canada, First Nations Summit, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation, Kwakiutl First Nation, Coalition of Union of British Columbia Indian Chiefs, Okanagan Nation Alliance, Shuswap Nation Tribal Council and their member communities, Okanagan, Adams Lake, Neskonlith and Splatsin Indian Bands, Amnesty International, Canadian Friends Service Committee, Gitxaala Nation, Chilko Resorts and Community Association and Council of Canadians, Interveners

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: November 7, 2013
Judgment: June 26, 2014
Docket: 34986

Proceedings: reversing *Xeni Gwet'in First Nations v. British Columbia* (2012), *(*sub nom. *William v. British Columbia)* 551 W.A.C. 214, 324 B.C.A.C. 214, [2012] 10 W.W.R. 639, 33 B.C.L.R. (5th) 260, [2012] B.C.J. No. 1302, 2012 CarswellBC 1860, 2012 BCCA 285, 26 R.P.R. (5th) 67, [2012] 3 C.N.L.R. 333, Groberman J.A., Levine J.A., Tysoe J.A. (B.C. C.A.); additional reasons at *Xeni Gwet'in First Nations v. British Columbia* (2013), *(*sub nom. *William v. British Columbia)* 571 W.A.C. 85, 333 B.C.A.C. 78, [2013] 3 W.W.R. 79, 2013 BCCA 1, 2013 CarswellBC 1, 33 C.P.C. (7th) 235, 38 B.C.L.R. (5th) 124, Groberman J.A., Levine J.A., Tysoe J.A. (B.C. C.A.); affirming *Xeni Gwet'in First Nations v. British Columbia* (2007), 2007 CarswellBC 2741, 2007 BCSC 1700, [2007] B.C.J. No. 2465, 65 R.P.R. (4th) 1, *(*sub nom. *Tsilhqot'in Nation v. British Columbia)* [2008] 1 C.N.L.R. 112, D.H. Vickers J. (B.C. S.C.)

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Headnote

Aboriginal and indigenous law --- Practice and procedure — Pleadings — Miscellaneous
Aboriginal band X, which was part of First Nation T, objected to province's grant of forest licence to cut trees in territory — Former chief of X, on behalf of himself, and members of X and T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that First Nation were in principle entitled to declaration of Aboriginal title to portion of claim area and small portion outside claim area — However, trial judge refused to make declaration of title, due to procedural reasons — First Nation, Federal Crown, and Provincial Crown's appeals were dismissed — Appellate court held that, given state of law and nature of this test case, First Nation could not be faulted for failing to include site-specific claims — Appellate court held that First Nation did not establish claim to title — First Nation appealed — Appeal allowed — Province no longer contended that claim should be barred because of defects in pleadings — Appellate court was right in concluding that functional approach should be taken to pleadings in Aboriginal cases — Where pleadings achieved aim of providing outline of material allegations and relief sought, minor defects should be overlooked, in absence of clear prejudice.
Aboriginal and indigenous law --- Land — Rights and title
Aboriginal band X, which was part of First Nation T, objected to province's grant of forest licence to cut trees in territory — Former chief of X, on behalf of himself, and members of X and T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that First Nation were in principle entitled to declaration of Aboriginal title to portion of claim area and small portion outside claim area, but refused to make declaration due to procedural reasons — Appellate court dismissed First Nation, Federal Crown, and Provincial Crown's appeals — Appellate court held that First

Nation did not establish claim to title on basis of legal proposition that regular use of territory could not ground Aboriginal title — Appellate court found that First Nation had Aboriginal rights to hunt, trap and harvest — First Nation appealed — Appeal allowed — Trial judge applied correct legal test of regular and exclusive use of land for Aboriginal title — Appellate court's view of regular use of territory was not supported by jurisprudence — There was no reason to disturb trial judge's findings that First Nation had continuously occupied claim area before and after sovereignty assertion and had treated land as exclusively theirs — Most of Provincial Crown's criticisms of trial judge's findings were rooted in its erroneous thesis that only specific, intensively occupied areas could support Aboriginal title.

Aboriginal and indigenous law --- Constitutional issues — Fiduciary duty of Crown

Aboriginal band X, which was part of First Nation T, objected to province's grant of forest licence to cut trees in territory — Former chief of X, on behalf of himself, and members of X and T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that First Nation were in principle entitled to declaration of Aboriginal title to portion of claim area and small portion outside claim area, but refused to make declaration due to procedural reasons — Appellate court dismissed First Nation, Federal Crown, and Provincial Crown's appeals — Appellate court held that First Nation did not establish claim to title — First Nation appealed — Appeal allowed — Trial judge applied correct legal test of regular and exclusive use of land for Aboriginal title — Appellate court's view of regular use of territory was not supported by jurisprudence — There was no reason to disturb trial judge's findings that First Nation had continuously occupied claim area before and after sovereignty assertion and had treated land as exclusively theirs — Most of Provincial Crown's criticisms of trial judge's findings were rooted in its erroneous thesis that only specific, intensively occupied areas could support Aboriginal title.

Aboriginal and indigenous law --- Land — Fiduciary duty

Duty to consult — Aboriginal band X, which was part of First Nation T, objected to province's grant of forest licence to cut trees in territory — Former chief of X, on behalf of himself, and members of X and T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that First Nation were in principle entitled to declaration of Aboriginal title to portion of claim area and small portion outside claim area, but refused to make declaration due to procedural reasons — Appellate court dismissed First Nation, Federal Crown, and Provincial Crown's appeals — Appellate court held that First Nation did not establish claim to title — First Nation appealed — Appeal allowed — Trial judge applied correct legal test of regular and exclusive use of land for Aboriginal title — Appellate court's view of regular use of territory was not supported by jurisprudence — There was no reason to disturb trial judge's findings that First Nation had continuously occupied claim area before and after sovereignty assertion and had treated land as exclusively theirs — Most of Provincial Crown's criticisms of trial judge's findings were rooted in its erroneous thesis that only specific, intensively occupied areas could support Aboriginal title.

Aboriginal and indigenous law --- Land — Application of provincial or territorial statutes

Province authorized timber harvesting in First Nation's traditional territory under authority of Forest Act — Plaintiff former chief of Aboriginal band X, on behalf of himself and members of X and First Nation T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that Forest Act did not apply to those areas that met test for Aboriginal title because, under Act, granting of rights to harvest timber was limited to Crown timber on Crown land — Trial judge held that, where Aboriginal title lands had been clearly defined, those lands were not "Crown lands" as defined by Forest Act — Trial judge held that, even if definition of "Crown timber" included timber situated on Aboriginal title lands, provisions of Forest Act did not apply to Aboriginal title land under doctrine of interjurisdictional immunity — First Nation, Federal Crown, and Provincial Crown's appeals were dismissed — Appellate court held that First Nation did not establish claim to title — First Nation appealed — Appeal allowed — Provincial laws of general application, including Forest Act, should apply to lands held under Aboriginal title, although they were subject to constitutional restrictions under s. 35 of Constitution Act, 1982 and sometimes federal power over "Indians, and Lands reserved for the Indians" under s. 91 — 24 of Constitution Act, 1867 — Legislature intended Forest Act to apply to lands under claims for Aboriginal title, up to time title was confirmed by agreement or court order, at which point lands were "vested" in Aboriginal group — Lands in question were "Crown land" under Forest Act at time forestry licences were issued, but now that title had been established, beneficial interest in land vested in Aboriginal group — Doctrine of interjurisdictional immunity should not be applied in cases where lands were held under Aboriginal title, as approach under s. 35 of Constitution Act, 1982 should govern.

Aboriginal and indigenous law --- Status — Status under Indian Act

Forest Act — Province authorized timber harvesting in First Nation's traditional territory under authority of Forest Act — Plaintiff former chief of Aboriginal band X, on behalf of himself and members of X and First Nation T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that Forest Act did not apply to those areas that met test for Aboriginal title because, under Act, granting of rights to harvest timber was limited to Crown timber on Crown land — Trial judge held that, where Aboriginal title lands had been clearly defined, those lands were not "Crown lands" as defined by Forest Act — First Nation, Federal Crown, and Provincial Crown's appeals were dismissed — Appellate court held that First Nation did not establish claim to title — First Nation appealed — Appeal allowed — Under Forest Act, Crown could only issue timber licences with respect to "Crown timber" — Legislature intended Forest Act to apply to lands under claims for Aboriginal title, up to time title was confirmed by agreement or court order — Once Aboriginal title was confirmed, lands were "vested" in Aboriginal group and were no longer Crown lands — Land in question was "Crown land" under Forest Act at time forestry licences were issued, but now that title had been established, beneficial interest in land vested in Aboriginal group.

Aboriginal and indigenous law --- Constitutional issues — Constitution Act, 1982

Province authorized timber harvesting in First Nation's traditional territory under authority of Forest Act — Plaintiff former chief of Aboriginal band X, on behalf of himself and members of X and First Nation T, (collectively, "First Nation") brought action for declaration of Aboriginal rights and Aboriginal title — Trial judge held that Forest Act did not apply to those areas that met test for Aboriginal title because, under Act, granting of rights to harvest timber was limited to Crown timber on Crown land — Trial judge held that, even if definition of "Crown timber" included timber situated on Aboriginal title lands, provisions of Forest Act did not apply to Aboriginal title land under doctrine of interjurisdictional immunity — First Nation, Federal Crown, and Provincial Crown's appeals were dismissed — Appellate court held that First Nation did not establish claim to title — First Nation appealed — Appeal allowed — Granting rights to third parties to harvest timber on First Nation's land was serious infringement that required compelling and substantial objective that was furthered by such harvesting, something that was not present in this case — Trial judge's holding that interjurisdictional immunity rendered Forest Act inapplicable to land held under Aboriginal title led to number of difficulties — Doctrine of interjurisdictional immunity should not be applied in cases where lands were held under Aboriginal title — Rather, approach under s. 35 of Constitution Act, 1982 should govern as it was fairer and more practical than blanket inapplicability imposed by doctrine of interjurisdictional immunity.

Droit autochtone --- Procédure — Actes de procédure — Divers

Bande autochtone X, une des bandes qui constituaient la Première Nation T, s'est opposée à ce que la province octroie un permis d'exploitation forestière permettant d'abattre des arbres dans un territoire — Ex-chef de X a sollicité, en son nom et au nom des membres de X et T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Première Nation avait droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une bonne partie du territoire revendiqué ainsi que sur un petit secteur situé à l'extérieur de ce territoire — Juge de première instance a toutefois refusé de rendre un jugement déclaratoire pour des raisons d'ordre procédural — Appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a conclu, compte tenu de l'état du droit et des circonstances de la présente affaire qui en faisaient un cas type, que l'on ne devrait pas reprocher à la Première Nation de ne pas avoir fait de revendications en lien spécifiquement avec le site visé — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre — Première Nation a formé un pourvoi — Pourvoi accueilli — Gouvernement provincial ne soutenait plus que la revendication devait être rejetée en raison de vices qui entachaient les actes de procédure — Cour d'appel avait eu raison de conclure qu'il fallait aborder les actes de procédure dans les affaires intéressant les Autochtones selon une approche fonctionnelle — Quand les actes de procédure visent à fournir un aperçu des allégations importantes et de la réparation sollicitée, en l'absence d'un préjudice évident, il ne fallait pas tenir compte des vices mineurs.

Droit autochtone --- Réserves et biens immobiliers — Droits et titres — Principes généraux

Bande autochtone X, une des bandes qui constituaient la Première Nation T, s'est opposée à ce que la province octroie un permis d'exploitation forestière permettant d'abattre des arbres dans un territoire — Ex-chef de X a sollicité, en son nom et au nom des membres de X et T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Première Nation avait droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une bonne partie du territoire revendiqué ainsi que sur un petit secteur situé à l'extérieur de ce territoire, mais a refusé de rendre un jugement déclaratoire pour des raisons d'ordre procédural — Appels interjetés par

la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre, mais n'avait pas écarté la possibilité d'établir plus tard l'existence d'un titre sur certains sites — Cour d'appel a conclu que la Première Nation jouissait des droits ancestraux de chasse, de piégeage et de récolte — Première Nation a formé un pourvoi — Pourvoi accueilli — Il a été question de critères permettant de reconnaître l'existence d'un titre ancestral, soit une occupation suffisante avant l'affirmation de la souveraineté, une occupation continue et une occupation historique exclusive — Titre ancestral conférait des droits de propriété semblables à ceux associés à la propriété en fief simple, y compris le droit de déterminer l'utilisation des terres, le droit de jouissance et d'occupation des terres, le droit de posséder les terres, le droit aux avantages économiques que procurent les terres et le droit d'utiliser et de gérer les terres de manière proactive — Titre ancestral comportait une restriction importante : il s'agissait d'un titre collectif détenu non seulement pour la génération actuelle, mais pour toutes les générations futures.

Droit autochtone --- Réserves et biens immobiliers — Droits et titres — Divers

Bande autochtone X, une des bandes qui constituaient la Première Nation T, s'est opposée à ce que la province octroie un permis d'exploitation forestière permettant d'abattre des arbres dans un territoire — Ex-chef de X a sollicité, en son nom et au nom des membres de X et T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Première Nation avait droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une bonne partie du territoire revendiqué ainsi que sur un petit secteur situé à l'extérieur de ce territoire, mais a refusé de rendre un jugement déclaratoire pour des raisons d'ordre procédural — Appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Décision de la Cour d'appel selon laquelle la Première Nation n'avait pas revendiqué de titre était fondée sur la proposition de droit selon laquelle l'utilisation régulière du territoire ne pouvait pas fonder le titre ancestral — Cour d'appel a conclu que la Première Nation jouissait des droits ancestraux de chasse, de piégeage et de récolte — Première Nation a formé un pourvoi — Pourvoi accueilli — Juge de première instance a appliqué le bon critère juridique au sujet du titre ancestral, soit celui fondé sur l'utilisation régulière et exclusive du territoire — Interprétation de la Cour d'appel de l'utilisation régulière du territoire ne trouvait pas d'appui dans la jurisprudence — Il n'y avait aucune raison d'intervenir dans les conclusions du juge de première instance selon lesquelles la Première Nation avait occupé le secteur revendiqué de façon continue avant et après l'affirmation de la souveraineté et croyait posséder les terres en exclusivité — Plupart des critiques de la province à l'égard des conclusions de fait du juge de première instance reposaient sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement.

Droit autochtone --- Questions d'ordre constitutionnel — Devoirs fiduciaires de la Couronne

Bande autochtone X, une des bandes qui constituaient la Première Nation T, s'est opposée à ce que la province octroie un permis d'exploitation forestière permettant d'abattre des arbres dans un territoire — Ex-chef de X a sollicité, en son nom et au nom des membres de X et T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Première Nation avait droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une bonne partie du territoire revendiqué ainsi que sur un petit secteur situé à l'extérieur de ce territoire, mais a refusé de rendre un jugement déclaratoire pour des raisons d'ordre procédural — Appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre — Première Nation a formé un pourvoi — Pourvoi accueilli — Juge de première instance a appliqué le bon critère juridique au sujet du titre ancestral, soit celui fondé sur l'utilisation régulière et exclusive du territoire — Interprétation de la Cour d'appel de l'utilisation régulière du territoire ne trouvait pas d'appui dans la jurisprudence — Il n'y avait aucune raison d'intervenir dans les conclusions du juge de première instance selon lesquelles la Première Nation avait occupé le secteur revendiqué de façon continue avant et après l'affirmation de la souveraineté et croyait posséder les terres en exclusivité — Plupart des critiques de la province à l'égard des conclusions de fait du juge de première instance reposaient sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement.

Droit autochtone --- Réserves et biens immobiliers — Obligation fiduciaire

Devoir de consulter — Bande autochtone X, une des bandes qui constituaient la Première Nation T, s'est opposée à ce que la province octroie un permis d'exploitation forestière permettant d'abattre des arbres dans un territoire — Ex-chef de X a sollicité, en son nom et au nom des membres de X et T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Première Nation avait droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une bonne partie du territoire revendiqué ainsi que sur un petit secteur situé à l'extérieur de ce territoire, mais a refusé de rendre un jugement déclaratoire pour des raisons d'ordre procédural — Appels

interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre — Première Nation a formé un pourvoi — Pourvoi accueilli — Juge de première instance a appliqué le bon critère juridique au sujet du titre ancestral, soit celui fondé sur l'utilisation régulière et exclusive du territoire — Interprétation de la Cour d'appel de l'utilisation régulière du territoire ne trouvait pas d'appui dans la jurisprudence — Il n'y avait aucune raison d'intervenir dans les conclusions du juge de première instance selon lesquelles la Première Nation avait occupé le secteur revendiqué de façon continue avant et après l'affirmation de la souveraineté et croyait posséder les terres en exclusivité — Plupart des critiques de la province à l'égard des conclusions de fait du juge de première instance reposaient sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement.

Droit autochtone --- Réserves et biens immobiliers — Application des lois provinciales ou territoriales

Province a accordé un permis en vue de la récolte de bois sur le territoire traditionnel d'une Première Nation en vertu de la Forest Act — Demandeur, un ex-chef de la bande X, a sollicité, en son nom et au nom des membres de X et la Première Nation T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Forest Act ne s'appliquait pas aux secteurs qui répondaient au critère relatif au titre ancestral puisqu'en vertu de cette loi, le pouvoir d'accorder le droit de récolter du bois était limité au bois des terres publiques se trouvant sur les terres publiques — Juge de première instance a estimé que dans les cas où les terres visées par un titre ancestral avaient été clairement définies, ces terres n'étaient pas des « terres publiques » au sens de la Forest Act — Juge de première instance a conclu que même si la définition de l'expression « bois des terres publiques » visait du bois situé sur des terres visées par un titre ancestral, les dispositions de la Forest Act ne s'appliquaient pas aux terres visées par un titre ancestral en vertu de la doctrine de l'exclusivité des compétences — Appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre — Première Nation a formé un pourvoi — Pourvoi accueilli — Lois provinciales d'application générale, y compris la Forest Act, devraient s'appliquer aux terres visées par un titre ancestral bien qu'elles soient assujetties aux restrictions constitutionnelles de l'art. 35 de la Loi constitutionnelle de 1982 et parfois à la compétence fédérale sur les « Indiens et les terres réservées aux Indiens », en vertu de l'art. 91 ¶ 24 de la Loi constitutionnelle de 1867 — Intention du législateur était que la Forest Act s'applique aux terres visées par une revendication de titre ancestral, jusqu'à ce que l'existence du titre soit confirmée par une entente ou une ordonnance judiciaire, les terres étant alors « dévolues » au groupe autochtone — Terres en question étaient des « terres publiques » aux termes de la Forest Act au moment où les permis d'exploitation forestière ont été émis; cependant, maintenant que l'existence du titre avait été établie, l'intérêt bénéficiaire sur les terres était dévolu au groupe autochtone — Doctrine de l'exclusivité des compétences ne devrait pas être appliquée dans les cas où les terres sont détenues en vertu d'un titre ancestral, mais l'approche fondée sur l'art. 35 de la Loi constitutionnelle de 1982 devrait être retenue.

Droit autochtone --- Droits des autochtones aux ressources naturelles — Statut en vertu de la législation

Forest Act — Province a accordé un permis en vue de la récolte de bois sur le territoire traditionnel d'une Première Nation en vertu de la Forest Act — Demandeur, un ex-chef de la bande X, a sollicité, en son nom et au nom des membres de X et la Première Nation T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Forest Act ne s'appliquait pas aux secteurs qui répondaient au critère relatif au titre ancestral puisqu'en vertu de cette loi, le pouvoir d'accorder le droit de récolter du bois était limité au bois des terres publiques se trouvant sur les terres publiques — Juge de première instance a estimé que dans les cas où les terres visées par un titre ancestral avaient été clairement définies, ces terres n'étaient pas des « terres publiques » au sens de la Forest Act — Appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre — Première Nation a formé un pourvoi — Pourvoi accueilli — Sous le régime de la Forest Act, le gouvernement ne pouvait émettre des permis de coupe que pour le « bois de terres publiques » — Intention du législateur était que la Forest Act s'applique aux terres visées par une revendication de titre ancestral, jusqu'à ce que l'existence du titre soit confirmée par une entente ou une ordonnance judiciaire — Une fois que le titre ancestral était confirmé, les terres étaient « dévolues » au groupe autochtone et n'étaient plus des terres publiques — Terres en question étaient des « terres publiques » aux termes de la Forest Act au moment où les permis d'exploitation forestière ont été émis; cependant, maintenant que l'existence du titre avait été établie, l'intérêt bénéficiaire sur les terres était dévolu au groupe autochtone.

Droit autochtone --- Questions d'ordre constitutionnel — Loi constitutionnelle de 1982

Province a accordé un permis en vue de la récolte de bois sur le territoire traditionnel d'une Première Nation en vertu de la Forest Act — Demandeur, un ex-chef de la bande X, a sollicité, en son nom et au nom des membres de X et la Première Nation T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral — Juge de première instance a estimé que la Forest Act ne s'appliquait pas aux secteurs qui répondaient au critère relatif au titre ancestral puisqu'en vertu de cette loi, le pouvoir d'accorder le droit de récolter du bois était limité au bois des terres publiques se trouvant sur les terres publiques — Juge de première instance a conclu que même si la définition de l'expression « bois des terres publiques » visait du bois situé sur des terres visées par un titre ancestral, les dispositions de la Forest Act ne s'appliquaient pas aux terres visées par un titre ancestral en vertu de la doctrine de l'exclusivité des compétences — Appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial ont été rejetés — Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre — Première Nation a formé un pourvoi — Pourvoi accueilli — Accorder à des tiers le droit de récolter du bois sur les terres de la Première Nation constituait une atteinte grave et, pour la justifier, il fallait établir que l'on poursuivait, par la récolte, un objectif impérieux et réel, ce qui n'avait pas été fait en l'espèce — Conclusion du juge de première instance selon laquelle l'exclusivité des compétences rendait les dispositions de la Forest Act inapplicables aux terres détenues en vertu d'un titre ancestral suscitait un certain nombre de difficultés — Doctrine de l'exclusivité des compétences ne devrait pas être appliquée dans les cas où les terres étaient détenues en vertu d'un titre ancestral — C'était plutôt la démarche axée sur le critère fondé sur l'art. 35 de la Loi constitutionnelle de 1982 qui devrait être retenue, puisqu'elle était plus équitable et pratique que l'inapplicabilité générale qu'imposait la doctrine de l'exclusivité des compétences.

The province granted a forest licence to cut trees pursuant to the Forest Act in a certain territory. Aboriginal band X, which was part of First Nation T, objected. The former chief of X, on behalf of himself and the members of X and T (collectively, the "First Nation"), brought an action for a declaration of Aboriginal rights and Aboriginal title.

The trial judge held that the T people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area and a small portion outside the claim area, but refused to make the declaration due to procedural reasons. The trial judge held that the Forest Act did not apply to those areas that met the test for Aboriginal title because, under the Act, granting of rights to harvest timber was limited to Crown timber on Crown land. Even if the definition of "Crown timber" included timber situated on Aboriginal title lands, the trial judge held that the provisions of the Forest Act did not apply to Aboriginal title land under the doctrine of interjurisdictional immunity.

The British Columbia Court of Appeal dismissed the appeals of the First Nation, Federal Crown, and Provincial Crown. The Court of Appeal held that, given the state of law and nature of this test case, the First Nation could not be faulted for failing to include site-specific claims. The Court of Appeal held that the First Nation did not establish claim to title, but left open the possibility to prove title to specific sites in the future.

The First Nation appealed.

Held: The appeal was allowed.

Per McLachlin C.J.C. (LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring): A declaration of Aboriginal title over the area at issue was granted. A declaration was also granted that the Provincial Crown breached its duty to consult through its land use planning and forestry authorizations.

Although the Provincial Crown no longer contended that the claim should be barred because of defects in the pleadings, the Court of Appeal was found to be right in concluding that a functional approach should be taken to pleadings in Aboriginal cases. Where the pleadings achieved the aim of providing an outline of material allegations and relief sought, minor defects should be overlooked, in the absence of clear prejudice.

The requirements for a finding of Aboriginal title were discussed. Aboriginal title flowed from occupation in the sense of regular and exclusive use of land. Aboriginal title conferred the right to use and control the land and to reap the benefits flowing from it, but came with an important restriction, in that it was a collective title held for present and future generations.

In this case, Aboriginal title was established over the area designated by the trial judge. The trial judge applied the correct legal test of regular and exclusive use of land for Aboriginal title, and was correct in his assessment that the First Nation's occupation was both sufficient and exclusive at time of sovereignty. The Court of Appeal's view of regular use of territory was not supported by the jurisprudence. Most of the Provincial Crown's criticisms of the trial judge's findings were rooted in its erroneous thesis that only specific, intensively occupied areas could support Aboriginal title.

The Crown's fiduciary duty in the context of the justification of infringements was discussed. Prior to the establishment of title by court declaration or agreement, the Crown was required to consult in good faith with any Aboriginal groups. After

Aboriginal title to land had been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown had discharged its duty to consult. During the time of the issuance of forestry licences, the First Nation held an interest in the land that was not legally recognized, so the Provincial Crown had a duty to consult and accommodate, which it did not do. The Provincial Crown breached its duty to consult when officials engaged in planning process for the removal of timber on Aboriginal title land without meaningful consultation with the First Nation.

The applicability of provincial legislation to lands held under Aboriginal title was discussed in detail, despite not being necessary to dispose of the appeal. The legislature intended the Forest Act to apply to lands under claims for Aboriginal title, up to the time title was confirmed by agreement or court order. Once Aboriginal title was confirmed, however, the lands were "vested" in the Aboriginal group and lands were no longer Crown lands. In this case, the land was "Crown land" under the Forest Act at the time the forestry licences were issued, but now that title had been established, the beneficial interest in the land vested in the First Nation. Provincial laws of general application, including the Forest Act, should apply to exercises of Aboriginal rights unless they were unreasonable, imposed hardship or denied title holders their preferred means of exercising their rights, and such restrictions could not be justified pursuant to the justification framework established under s. 35 of the Constitution Act, 1982. Granting rights to third parties to harvest timber on the First Nation's land was a serious infringement that required a compelling and substantial objective that was furthered by such harvesting, something that was not present in this case. The trial judge's holding that interjurisdictional immunity rendered the Forest Act inapplicable to land held under Aboriginal title led to a number of difficulties, and should not be applied in cases where lands were held under Aboriginal title. Rather, the justification framework established under s. 35 of the Constitution Act, 1982, should be applied.

La province a accordé un permis d'exploitation forestière en vertu de la Forest Act permettant d'abattre des arbres dans une partie d'un territoire. La bande autochtone X, une des bandes qui constituaient la Première Nation T, s'y est opposée. L'ex-chef de la bande X a sollicité, en son nom et au nom des membres de X et T (ci-après la « Première Nation »), un jugement déclaratoire relativement aux droits des Autochtones et du titre ancestral.

Le juge de première instance a estimé que les T avaient droit, en principe, à un jugement déclarant l'existence d'un titre ancestral sur une bonne partie du territoire revendiqué ainsi que sur un petit secteur situé à l'extérieur de ce territoire, mais a refusé de rendre un jugement déclaratoire pour des raisons d'ordre procédural. Le juge de première instance a estimé que la Forest Act ne s'appliquait pas aux secteurs qui répondaient au critère relatif au titre ancestral puisqu'en vertu de cette loi, le pouvoir d'accorder le droit de récolter du bois était limité au bois des terres publiques se trouvant sur les terres publiques. Même si le bois se trouvant sur des terres visées par un titre ancestral faisait partie de la définition de « bois des terres publiques », le juge de première instance a estimé que les dispositions de la Forest Act ne s'appliquaient pas aux terres visées par un titre ancestral en vertu de la doctrine de l'exclusivité des compétences.

La Cour d'appel de la Colombie-Britannique a rejeté les appels interjetés par la Première Nation, le gouvernement fédéral et le gouvernement provincial. La Cour d'appel a conclu, compte tenu de l'état du droit et des circonstances de la présente affaire qui en faisaient un cas type, que l'on ne devrait pas reprocher à la Première Nation de ne pas avoir fait de revendications spécifiquement en lien avec le site visé. La Cour d'appel a estimé que la Première Nation n'avait pas revendiqué de titre, mais n'avait pas écarté la possibilité d'établir plus tard l'existence d'un titre sur certains sites.

La Première Nation a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

McLachlin, J.C.C. (LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Un jugement déclarant l'existence d'un titre ancestral sur la région en question a été rendu. Un jugement déclarant que la province avait manqué à son obligation de consultation en raison du plan d'aménagement du territoire et des autorisations d'exploitation forestière a également été rendu.

Bien que le gouvernement provincial ne soutenait plus que la revendication devait être rejetée en raison de vices qui entachaient les actes de procédure, on a conclu que la Cour d'appel avait eu raison de conclure qu'il fallait aborder les actes de procédure dans les affaires intéressant les Autochtones selon une approche fonctionnelle. Quand les actes de procédure visent à fournir un aperçu des allégations importantes et de la réparation sollicitée, en l'absence d'un préjudice évident, il ne fallait pas tenir compte des vices mineurs.

Il a été question de critères permettant de reconnaître l'existence d'un titre ancestral. Le titre ancestral découle de l'occupation, c'est-à-dire d'une utilisation régulière et exclusive des terres. Le titre ancestral conférait le droit d'utiliser et de contrôler le

territoire et de tirer les avantages qui en découlaient, mais comportait une restriction importante : il s'agissait d'un titre collectif détenu non seulement pour la génération actuelle, mais pour toutes les générations futures.
Dans le présent dossier, l'existence d'un titre ancestral avait été établie à l'égard du territoire désigné par le juge de première instance. Le juge de première instance a appliqué le bon critère juridique au sujet du titre ancestral, soit celui fondé sur l'utilisation régulière et exclusive du territoire, et a eu raison de conclure que l'occupation était suffisante et exclusive au moment de l'affirmation de la souveraineté. L'interprétation de la Cour d'appel de l'utilisation régulière du territoire ne trouvait pas d'appui dans la jurisprudence. La plupart des critiques de la province à l'égard des conclusions de fait du juge de première instance reposaient sur la thèse erronée voulant que le titre ancestral s'attache uniquement à des secteurs spécifiques occupés intensivement.
Il a été question de l'obligation fiduciaire de la Couronne dans le contexte de la justification des atteintes. Avant que l'existence du titre soit établie par un jugement déclaratoire ou une entente, la Couronne était tenue de consulter de bonne foi les groupes autochtones. Une fois l'existence du titre ancestral sur des terres établie par un jugement déclaratoire ou une entente, le gouvernement devait demander le consentement du groupe autochtone titulaire du titre pour ses projets d'aménagement du territoire. En l'absence de consentement, le projet d'aménagement sur les terres assujetties au titre ne pouvait aller de l'avant si le gouvernement ne s'était pas acquitté de son obligation de consultation. Lors de l'émission des permis d'exploitation forestière, la Première Nation détenait sur les terres un intérêt qui n'était pas encore légalement reconnu, de sorte que la province avait l'obligation de consulter et de trouver des accommodements, mais n'a fait ni l'un ni l'autre. La province a manqué à son obligation de consultation quand ses représentants ont planifié l'enlèvement du bois sur les terres visées par un titre ancestral sans aucune consultation significative avec la Première Nation.
Il a été grandement question de l'application de la législation provinciale portant sur les terres visées par un titre ancestral, bien que cela ne fût pas nécessaire pour disposer du pourvoi. L'intention du législateur était que la Forest Act s'applique aux terres visées par une revendication de titre ancestral, jusqu'à ce que l'existence du titre soit confirmée par une entente ou une ordonnance judiciaire. Cependant, une fois que l'existence du titre ancestral était confirmée, les terres étaient « dévolues » au groupe autochtone et n'étaient plus des terres publiques. Dans le présent dossier, les terres en question étaient des « terres publiques » aux termes de la Forest Act au moment où les permis d'exploitation forestière ont été émis. Cependant, maintenant que l'existence du titre avait été établie, l'intérêt bénéficiaire sur les terres était dévolu à la Première Nation. Les lois provinciales d'application générale, y compris la Forest Act, devraient s'appliquer à l'exercice des droits ancestraux à moins qu'elles soient déraisonnables ou indûment rigoureuses ou qu'elles refusent aux titulaires du titre le recours à leur moyen préféré d'exercer leurs droits et que ces restrictions ne puissent pas être justifiées conformément au cadre d'analyse de la justification prévu à l'art. 35 de la Loi constitutionnelle de 1982. Accorder à des tiers le droit de récolter du bois sur les terres de la Première Nation constituait une atteinte grave et, pour la justifier, il fallait établir que l'on poursuivait, par la récolte, un objectif impérieux et réel, ce qui n'avait pas été fait en l'espèce. La conclusion du juge de première instance selon laquelle l'exclusivité des compétences rendait les dispositions de la Forest Act inapplicables aux terres détenues en vertu d'un titre ancestral suscitait un certain nombre de difficultés et ne devrait pas être appliquée dans les cas où les terres étaient détenues en vertu d'un titre ancestral. C'était plutôt la démarche axée sur le critère fondé sur l'art. 35 de la Loi constitutionnelle de 1982 qui devait être retenue.

McLachlin C.J.C. **(LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 What is the test for Aboriginal title to land? If title is established, what rights does it confer? Does the British Columbia *Forest Act*, R.S.B.C. 1996, c. 157, apply to land covered by Aboriginal title? What are the constitutional constraints on provincial regulation of land under Aboriginal title? Finally, how are broader public interests to be reconciled with the rights conferred by Aboriginal title? These are among the important questions raised by this appeal.

2 These reasons conclude:

- Aboriginal title flows from occupation in the sense of regular and exclusive use of land.

- In this case, Aboriginal title is established over the area designated by the trial judge.

• Aboriginal title confers the right to use and control the land and to reap the benefits flowing from it.

• Where title is asserted, but has not yet been established, s. 35 of the *Constitution Act, 1982* requires the Crown to consult with the group asserting title and, if appropriate, accommodate its interests.

• Once Aboriginal title is established, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group; for purposes of determining the validity of provincial legislative incursions on lands held under Aboriginal title, this framework displaces the doctrine of interjurisdictional immunity.

• In this case, the Province's land use planning and forestry authorizations were inconsistent with its duties owed to the Tsilhqot'in people.

II. The Historic Backdrop

3 For centuries, people of the Tsilhqot'in Nation — a grouping of six bands sharing common culture and history — have lived in a remote valley bounded by rivers and mountains in central British Columbia. They lived in villages, managed lands for the foraging of roots and herbs, hunted and trapped. They repelled invaders and set terms for the European traders who came onto their land. From the Tsilhqot'in perspective, the land has always been theirs.

4 Throughout most of Canada, the Crown entered into treaties whereby the indigenous peoples gave up their claim to land in exchange for reservations and other promises, but, with minor exceptions, this did not happen in British Columbia. The Tsilhqot'in Nation is one of hundreds of indigenous groups in British Columbia with unresolved land claims.

5 The issue of Tsilhqot'in title lay latent until 1983, when the Province granted Carrier Lumber Ltd. a forest licence to cut trees in part of the territory at issue. The Xeni Gwet'in First Nations government (one of the six bands that make up the Tsilhqot'in Nation) objected and sought a declaration prohibiting commercial logging on the land. The dispute led to the blockade of a bridge the forest company was upgrading. The blockade ceased when the Premier promised that there would be no further logging without the consent of the Xeni Gwet'in. Talks between the Ministry of Forests and the Xeni Gwet'in ensued, but reached an impasse over the Xeni Gwet'in claim to a right of first refusal to logging. In 1998, the original claim was amended to include a claim for Aboriginal title on behalf of all Tsilhqot'in people.

6 The claim is confined to approximately five percent of what the Tsilhqot'in — a total of about 3,000 people — regard as their traditional territory. The area in question is sparsely populated. About 200 Tsilhqot'in people live there, along with a handful of non-indigenous people who support the Tsilhqot'in claim to title. There are no adverse claims from other indigenous groups. The federal and provincial governments both oppose the title claim.

7 In 2002, the trial commenced before Vickers J. of the British Columbia Supreme Court, and continued for 339 days over a span of five years. The trial judge spent time in the claim area and heard extensive evidence from elders, historians and other experts. He found that the Tsilhqot'in people were in principle entitled to a declaration of Aboriginal title to a portion of the claim area as well as to a small area outside the claim area. However, for procedural reasons which are no longer relied on by the Province, he refused to make a declaration of title (2007 BCSC 1700, [2008] 1 C.N.L.R. 112 (B.C. S.C.)).

8 In 2012, the British Columbia Court of Appeal held that the Tsilhqot'in claim to title had not been established, but left open the possibility that in the future, the Tsilhqot'in might be able to prove title to specific sites within the area claimed. For the rest of the claimed territory, the Tsilhqot'in were confined to Aboriginal rights to hunt, trap and harvest (2012 BCCA 285, 33 B.C.L.R. (5th) 260 (B.C. C.A.)).

9 The Tsilhqot'in now ask this Court for a declaration of Aboriginal title over the area designated by the trial judge, with one exception. A small portion of the area designated by the trial judge consists of either privately owned or underwater lands and no declaration of Aboriginal title over these lands is sought before this Court. With respect to those areas designated by the trial judge that are not privately owned or submerged lands, the Tsilhqot'in ask this Court to restore the trial judge's finding,

affirm their title to the area he designated, and confirm that issuance of forestry licences on the land unjustifiably infringed their rights under that title.

III. The Jurisprudential Backdrop

10 In 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise: *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313 (S.C.C.). Although the majority in *Calder* divided on whether title had been extinguished, its affirmation of Aboriginal rights to land led the Government of Canada to begin treaty negotiations with First Nations without treaties — mainly in British Columbia — resuming a policy that had been abandoned in the 1920s: P. W. Hogg, "The Constitutional Basis of Aboriginal Rights", M. Morellato, ed., in *Aboriginal Law Since Delgamuukw* (2009), 3.

11 Almost a decade after *Calder*, the enactment of s. 35 of the *Constitution Act, 1982* "recognized and affirmed" existing Aboriginal rights, although it took some time for the meaning of this section to be fully fleshed out.

12 In *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), this Court confirmed the potential for Aboriginal title in ancestral lands. The actual dispute concerned government conduct with respect to reserve lands. The Court held that the government had breached a fiduciary duty to the Musqueam Indian Band. In a concurring opinion, Justice Dickson (later Chief Justice) addressed the theory underlying Aboriginal title. He held that the Crown acquired radical or underlying title to all the land in British Columbia at the time of sovereignty. However, this title was burdened by the "pre-existing legal right" of Aboriginal people based on their use and occupation of the land prior to European arrival (pp. 379-82). Dickson J. characterized this Aboriginal interest in the land as "an independent legal interest" (at p. 385), which gives rise to a *sui generis* fiduciary duty on the part of the Crown.

13 In 1990, this Court held that s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.). The Court held that under s. 35, legislation can infringe rights protected by s. 35 only if it passes a two-step justification analysis: the legislation must further a "compelling and substantial" purpose and account for the "priority" of the infringed Aboriginal interest under the fiduciary obligation imposed on the Crown (at pp. 1113-19).

14 The principles developed in *Calder*, *Guerin* and *Sparrow* were consolidated and applied in the context of a claim for Aboriginal title in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.). This Court confirmed the *sui generis* nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession *before* the assertion of British sovereignty, as distinguished from other estates such as fee simple that arise *afterward*. The dual perspectives of the common law and of the Aboriginal group bear equal weight in evaluating a claim for Aboriginal title.

15 The Court in *Delgamuukw* summarized the content of Aboriginal title by two propositions, one positive and one negative. Positively, "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures" (para. 117). Negatively, the "protected uses must not be irreconcilable with the nature of the group's attachment to that land" (ibid.) — that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land.

16 The Court in *Delgamuukw* confirmed that infringements of Aboriginal title can be justified under s. 35 of the *Constitution Act, 1982* pursuant to the *Sparrow* test and described this as a "necessary part of the reconciliation of [A]boriginal societies with the broader political community of which they are part" (at para. 161), quoting *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), at para. 73. While *Sparrow* had spoken of *priority* of Aboriginal rights infringed by regulations over non-aboriginal interests, *Delgamuukw* articulated the "different" (at para. 168) approach of involvement of Aboriginal peoples — varying depending on the severity of the infringement — in decisions taken with respect to their lands.

17 In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), the Court applied the *Delgamuukw* idea of involvement of the affected Aboriginal group in decisions about its land to the situation where development

is proposed on land over which Aboriginal title is asserted but has not yet been established. The Court affirmed a spectrum of consultation. The Crown's duty to consult and accommodate the asserted Aboriginal interest "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 24). Thus, the idea of proportionate balancing implicit in *Delgamuukw* reappears in *Haida.* The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation.

18 The jurisprudence just reviewed establishes a number of propositions that touch on the issues that arise in this case, including:

- Radical or underlying Crown title is subject to Aboriginal land interests where they are established.
- Aboriginal title gives the Aboriginal group the right to use and control the land and enjoy its benefits.
- Governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.
- Resource development on claimed land to which title has not been established requires the government to consult with the claimant Aboriginal group.
- Governments are under a legal duty to negotiate in good faith to resolve claims to ancestral lands.

Against this background, I turn to the issues raised in this appeal.

IV. Pleadings in Aboriginal Land Claims Cases

19 The Province, to its credit, no longer contends that the claim should be barred because of defects in the pleadings. However, it may be useful to address how to approach pleadings in land claims, in view of their importance to future land claims.

20 I agree with the Court of Appeal that a functional approach should be taken to pleadings in Aboriginal cases. The function of pleadings is to provide the parties and the court with an outline of the material allegations and relief sought. Where pleadings achieve this aim, minor defects should be overlooked, in the absence of clear prejudice. A number of considerations support this approach.

21 First, in a case such as this, the legal principles may be unclear at the outset, making it difficult to frame the claim with exactitude.

22 Second, in these cases, the evidence as to how the land was used may be uncertain at the outset. As the claim proceeds, elders will come forward and experts will be engaged. Through the course of the trial, the historic practices of the Aboriginal group in question will be expounded, tested and clarified. The Court of Appeal correctly recognized that determining whether Aboriginal title is made out over a pleaded area is not an "all or nothing" proposition (at para. 117):

> The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. ... [Therefore] requir[ing] proof of Aboriginal title precisely mirroring the claim would be too exacting. [para. 118]

23 Third, cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

V. Is Aboriginal Title Established?

A. The Test for Aboriginal Title

24 How should the courts determine whether a semi-nomadic indigenous group has title to lands? This Court has never directly answered this question. The courts below disagreed on the correct approach. We must now clarify the test.

25 As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.

26 The test was set out in *Delgamuukw*, *per* Lamer C.J., at para. 143:

> In order to make out a claim for [A]boriginal title, the [A]boriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

27 The trial judge in this case held that "occupation" was established for the purpose of proving title by showing regular and exclusive use of sites or territory. On this basis, he concluded that the Tsilhqot'in had established title not only to village sites and areas maintained for the harvesting of roots and berries, but to larger territories which their ancestors used regularly and exclusively for hunting, fishing and other activities.

28 The Court of Appeal disagreed and applied a narrower test for Aboriginal title — site-specific occupation. It held that to prove sufficient occupation for title to land, an Aboriginal group must prove that its ancestors *intensively* used a definite tract of land with reasonably defined boundaries at the time of European sovereignty.

29 For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.

30 Against this backdrop, I return to the requirements for Aboriginal title: sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

31 Should the three elements of the *Delgamuukw* test be considered independently, or as related aspects of a single concept? The High Court of Australia has expressed the view that there is little merit in considering aspects of occupancy separately. In *Western Australia v. Ward* (2002), 213 C.L.R. 1 (Australia H.C.), the court stated as follows, at para 89:

> The expression "possession, occupation, use and enjoyment ... to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land. To break the expression into its constituent elements is apt to mislead. In particular, to speak of "possession" of the land, as distinct from possession to the exclusion of all others, invites attention to the common law content of the concept of possession and whatever notions of control over access might be thought to be attached to it, rather than to the relevant task, which is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms.

32 In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.

1. Sufficiency of Occupation

33 The first requirement — and the one that lies at the heart of this appeal — is that the occupation be *sufficient* to ground Aboriginal title. It is clear from *Delgamuukw* that not every passing traverse or use grounds title. What then constitutes *sufficient* occupation to ground title?

34 The question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective (*Delgamuukw*, at para. 147); see also *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.).

35 The Aboriginal perspective focuses on laws, practices, customs and traditions of the group (*Delgamuukw*, at para. 148). In considering this perspective for the purpose of Aboriginal title, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": B. Slattery, "Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 758, quoted with approval in *Delgamuukw*, at para. 149.

36 The common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.

37 Sufficiency of occupation is a context-specific inquiry. "[O]ccupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (*Delgamuukw*, at para. 149). The intensity and frequency of the use may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted. Here, for example, the land, while extensive, was harsh and was capable of supporting only 100 to 1,000 people. The fact that the Aboriginal group was only about 400 people must be considered in the context of the carrying capacity of the land in determining whether regular use of definite tracts of land is made out.

38 To sufficiently occupy the land for purposes of title, the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.

39 In *R. v. Marshall*, 2003 NSCA 105, 218 N.S.R. (2d) 78 (N.S. C.A.), at paras. 135-38, Cromwell J.A (as he then was), in reasoning I adopt, likens the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law. A general occupant at common law is a person asserting possession of land over which no one else has a present interest or with respect to which title is uncertain. Cromwell J.A. cites (at para. 136) the following extract from K. McNeil, *Common Law Aboriginal Title* (1989), at pp. 198-200:

> What, then, did one have to do to acquire a title by occupancy? ... [I]t appears ... that ... a casual entry, such as riding over land to hunt or hawk, or travelling across it, did not make an occupant, such acts "being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider". There must, therefore, have been an actual entry, and some act or acts from which an intention to occupy the land could be inferred. Significantly, the acts and intention had to relate only to the occupation — it was quite unnecessary for a potential occupant to claim, or even wish to acquire, the vacant estate, for the law cast it upon him by virtue of his occupation alone....

> Further guidance on what constitutes occupation can be gained from cases involving land to which title is uncertain. Generally, any acts on or in relation to land that indicate an intention to hold or use it for one's own purposes are evidence of occupation. Apart from the obvious, such as enclosing, cultivating, mining, building upon, maintaining, and warning trespassers off land, any number of other acts, including cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon. The weight given to such acts depends partly on the nature of the land, and the purposes for which it can reasonably be used.
>
> [Emphasis added.]

40 Cromwell J.A. in *Marshall* went on to state that this standard is different from the doctrine of constructive possession. The goal is not to *attribute* possession in the absence of physical acts of occupation, but to define the quality of the physical acts of occupation that demonstrate possession at law (para. 137). He concluded:

> I would adopt, in general terms, Professor McNeil's analysis that the appropriate standard of occupation, from the common law perspective, is the middle ground between the minimal occupation which would permit a person to sue a wrong-doer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner.... Where, as here, we are dealing with a large expanse of territory which was not cultivated, acts such as continual, though changing, settlement and wide-ranging use for fishing, hunting and gathering should be given more weight than they would be if dealing with enclosed, cultivated land. Perhaps most significantly ... it is impossible to confine the evidence to the very precise spot on which the cutting was done: Pollock and Wright at p. 32. Instead, the question must be whether the acts of occupation in particular areas show that the whole area was occupied by the claimant. [para. 138]

41 In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.

42 There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.

43 The Province argues that this Court in *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220 (S.C.C.) [hereinafter referred to as *Marshall; Bernard*], rejected a territorial approach to title, relying on a comment by Professor K. McNeil that the Court there "appears to have rejected the territorial approach of the Court of Appeal" ("Aboriginal Title and the Supreme Court: What's Happening?" (2006), 69 *Sask. L. Rev.* 281, cited in British Columbia factum, para. 100). In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*.

44 The Court in *Marshall; Bernard* confirmed that nomadic and semi-nomadic groups could establish title to land, provided they establish sufficient physical possession, which is a question of fact. While "[n]ot every nomadic passage or use will ground title to land", the Court confirmed that *Delgamuukw* contemplates that "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" could suffice (para. 66). While the issue was framed in terms of whether the common law test for possession was met, the Court did not resile from the need to consider the perspective of the Aboriginal group in question; sufficient occupation is a "question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used" (*ibid.*).

2. Continuity of Occupation

45 Where present occupation is relied on as proof of occupation pre-sovereignty, a second requirement arises — continuity between present and pre-sovereignty occupation.

46 The concept of continuity does not require Aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact (*Van der Peet*, at para. 65). The same applies to Aboriginal title. Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times. This is a question for the trier of fact in each case.

3. Exclusivity of Occupation

47 The third requirement is *exclusive* occupation of the land at the time of sovereignty. The Aboriginal group must have had "the intention and capacity to retain exclusive control" over the lands (*Delgamuukw*, at para. 156, quoting McNeil, *Common Law Aboriginal Title*, at p. 204 (emphasis added)). Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive.

48 Exclusivity should be understood in the sense of intention and capacity to control the land. The fact that other groups or individuals were on the land does not necessarily negate exclusivity of occupation. Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question. Exclusivity can be established by proof that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group. The fact that permission was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land. Even the lack of challenges to occupancy may support an inference of an established group's intention and capacity to control.

49 As with sufficiency of occupation, the exclusivity requirement must be approached from both the common law and Aboriginal perspectives, and must take into account the context and characteristics of the Aboriginal society. The Court in *Delgamuukw* explained as follows, at para. 157:

> A consideration of the [A]boriginal perspective may also lead to the conclusion that trespass by other [A]boriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the [A]boriginal group asserting title. For example, the [A]boriginal group asserting the claim to [A]boriginal title may have trespass laws which are proof of exclusive occupation, such that the presence of trespassers does not count as evidence against exclusivity. As well, [A]boriginal laws under which permission may be granted to other [A]boriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the [A]boriginal nations in question, those treaties would also form part of the [A]boriginal perspective.

4. Summary

50 The claimant group bears the onus of establishing Aboriginal title. The task is to identify how pre-sovereignty rights and interests can properly find expression in modern common law terms. In asking whether Aboriginal title is established, the general requirements are: (1) "sufficient occupation" of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on; and (3) exclusive historic occupation. In determining what constitutes sufficient occupation, one looks to the Aboriginal culture and practices, and compares them in a culturally sensitive way with what was required at common law to establish title on the basis of occupation. Occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty.

B. Was Aboriginal Title Established in this Case?

51 The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.

52 Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.

53 I approach the question through the lenses of sufficiency, continuity and exclusivity discussed above.

54 I will not repeat my earlier comments on what is required to establish sufficiency of occupation. Regular use of the territory suffices to establish sufficiency; the concept is not confined to continuously occupied village sites. The question must be approached from the perspective of the Aboriginal group as well as the common law, bearing in mind the customs of the people and the nature of the land.

55 The evidence in this case supports the trial judge's conclusion of sufficient occupation. While the population was small, the trial judge found evidence that the parts of the land to which he found title were regularly used by the Tsilhqot'in. The Court of Appeal did not take serious issue with these findings.

56 Rather, the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.

57 This brings me to continuity. There is some reliance on present occupation for the title claim in this case, raising the question of continuity. The evidence adduced and later relied on in parts 5-7 of the trial judge's reasons speak of events that took place as late as 1999. The trial judge considered this direct evidence of more recent occupation alongside archeological evidence, historical evidence, and oral evidence from Aboriginal elders, all of which indicated a continuous Tsilhqot'in presence in the claim area. The geographic proximity between sites for which evidence of recent occupation was tendered, and those for which direct evidence of historic occupation existed, further supported an inference of continuous occupation. Paragraph 945 states, under the heading of "Continuity", that the "Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion". I see no reason to disturb this finding.

58 Finally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.

59 The Province goes on to argue that the trial judge's conclusions on how particular parts of the land were used cannot be sustained. The Province says:

- The boundaries drawn by the trial judge are arbitrary and contradicted by some of the evidence (factum, at paras. 141 and 142).

- The trial judge relied on a map the validity of which the Province disputes (para. 143).

- The Tsilhqot'in population, that the trial judge found to be 400 at the time of sovereignty assertion, could not have physically occupied the 1,900 sq. km of land over which title was found (para. 144).

- The trial judge failed to identify specific areas with adequate precision, instead relying on vague descriptions (para. 145).

- A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined the areas subject to Aboriginal title demonstrates the unreliability of his approach (para. 147).

60 Most of the Province's criticisms of the trial judge's findings on the facts are rooted in its erroneous thesis that only specific, intensively occupied areas can support Aboriginal title. The concern with the small size of the Tsilhqot'in population in 1846 makes sense only if one assumes a narrow test of intensive occupation and if one ignores the character of the land in question which was mountainous and could not have sustained a much larger population. The alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation. The other criticisms amount to pointing out conflicting evidence. It was the trial judge's task to sort out conflicting evidence and make findings of fact. The presence of conflicting evidence does not demonstrate palpable and overriding error.

61 The Province has not established that the conclusions of the trial judge are unsupported by the evidence or otherwise in error. Nor has it established his conclusions were arbitrary or insufficiently precise. The trial judge was faced with the herculean task of drawing conclusions from a huge body of evidence produced over 339 trial days spanning a five-year period. Much of the evidence was historic evidence and therefore by its nature sometimes imprecise. The trial judge spent long periods in the claim area with witnesses, hearing evidence about how particular parts of the area were used. Absent demonstrated error, his findings should not be disturbed.

62 This said, I have accepted the Province's invitation to review the maps and the evidence and evaluate the trial judge's conclusions as to which areas support a declaration of Aboriginal title. For ease of reference, I attach a map showing the various territories and how the trial judge treated them (Appendix; see Appellant's factum, "Appendix A"). The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence.

63 The trial judge divided the claim area into six regions and then considered a host of individual sites within each region. He examined expert archeological evidence, historical evidence and oral evidence from Aboriginal elders referring to these specific sites. At some of these sites, although the evidence did suggest a Tsilhqot'in presence, he found it insufficient to establish regular and exclusive occupancy. At other sites, he held that the evidence did establish regular and exclusive occupancy. By examining a large number of individual sites, the trial judge was able to infer the boundaries within which the Tsilhqot'in regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.

64 The Province also criticises the trial judge for offering his opinion on areas outside the claim area. This, the Province says, went beyond the mandate of a trial judge who should pronounce only on pleaded matters.

65 In my view, this criticism is misplaced. It is clear that no declaration of title could be made over areas outside those pleaded. The trial judge offered his comments on areas outside the claim area, not as binding rulings in the case, but to provide assistance in future land claims negotiations. Having canvassed the evidence and arrived at conclusions on it, it made economic and practical sense for the trial judge to give the parties the benefit of his views. Moreover, as I noted earlier in discussing the proper approach to pleadings in cases where Aboriginal title is at issue, these cases raise special considerations. Often, the ambit of a claim cannot be drawn with precision at the commencement of proceedings. The true state of affairs unfolds only gradually as the evidence emerges over what may be a lengthy period of time. If at the end of the process the boundaries of the initial claim and the boundaries suggested by the evidence are different, the trial judge should not be faulted for pointing that out.

66 I conclude that the trial judge was correct in his assessment that the Tsilhqot'in occupation was both sufficient and exclusive at the time of sovereignty. There was ample direct evidence of occupation at sovereignty, which was additionally buttressed by evidence of more recent continuous occupation.

VI. What Rights Does Aboriginal Title Confer?

67 As we have seen, *Delgamuukw* establishes that Aboriginal title "encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes" (at para. 117), including non-traditional purposes, provided these uses can be reconciled with the communal and ongoing nature of the group's attachment to the land. Subject to this inherent limit, the title-holding group has the right to choose the uses to which the land is put and to enjoy its economic fruits (para. 166).

68 I will first discuss the legal characterization of the Aboriginal title. I will then offer observations on what Aboriginal title provides to its holders and what limits it is subject to.

A. The Legal Characterization of Aboriginal Title

69 The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson's concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* (*1763*), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

70 The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land ... for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.

71 What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements — a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act*, 1982.

72 The characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question. It is this relationship that makes Aboriginal title *sui generis* or unique. Aboriginal title is what it is — the unique product of the historic relationship between the Crown and the Aboriginal group in question. Analogies to other forms of property ownership — for example, fee simple — may help us to understand aspects of Aboriginal title. But they cannot dictate precisely what it is or is not. As La Forest J. put it in *Delgamuukw*, at para. 190, Aboriginal title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts".

B. The Incidents of Aboriginal Title

73 Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.

74 Aboriginal title, however, comes with an important restriction — it is collective title held not only for the present generation but for all succeeding generations. This means it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land. Some changes — even permanent changes — to the land may be possible. Whether a particular use is irreconcilable with the ability of succeeding generations to benefit from the land will be a matter to be determined when the issue arises.

75 The rights and restrictions on Aboriginal title flow from the legal interest Aboriginal title confers, which in turn flows from the fact of Aboriginal occupancy at the time of European sovereignty which attached as a burden on the underlying title asserted by the Crown at sovereignty. Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses

and customs of pre-sovereignty times; like other land-owners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.

76 The right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders. If the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

C. Justification of Infringement

77 To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.

78 The duty to consult is a procedural duty that arises from the honour of the Crown prior to confirmation of title. Where the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title, and contemplates conduct that might adversely affect it, the Crown is obliged to consult with the group asserting Aboriginal title and, if appropriate, accommodate the Aboriginal right. The duty to consult must be discharged prior to carrying out the action that could adversely affect the right.

79 The degree of consultation and accommodation required lies on a spectrum as discussed in *Haida*. In general, the level of consultation and accommodation required is proportionate to the strength of the claim and to the seriousness of the adverse impact the contemplated governmental action would have on the claimed right. "A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties" (para. 37). The required level of consultation and accommodation is greatest where title has been established. Where consultation or accommodation is found to be inadequate, the government decision can be suspended or quashed.

80 Where Aboriginal title is unproven, the Crown owes a procedural duty imposed by the honour of the Crown to consult and, if appropriate, accommodate the unproven Aboriginal interest. By contrast, where title has been established, the Crown must not only comply with its procedural duties, but must also ensure that the proposed government action is substantively consistent with the requirements of s. 35 of the *Constitution Act, 1982*. This requires both a compelling and substantial governmental objective and that the government action is consistent with the fiduciary duty owed by the Crown to the Aboriginal group.

81 I agree with the Court of Appeal that the compelling and substantial objective of the government must be considered from the Aboriginal perspective as well as from the perspective of the broader public. As stated in *Gladstone*, at para. 72:

> [T]he objectives which can be said to be compelling and substantial will be those directed at either the recognition of the prior occupation of North America by [A]boriginal peoples or — and at the level of justification it is this purpose which may well be most relevant — at the reconciliation of [A]boriginal prior occupation with the assertion of the sovereignty of the Crown.
>
> [Emphasis added.]

82 As *Delgamuukw* explains, the process of reconciling Aboriginal interests with the broader interests of society as a whole is the *raison d'être* of the principle of justification. Aboriginals and non-Aboriginals are "all here to stay" and must of necessity move forward in a process of reconciliation (para. 186). To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.

83 What interests are potentially capable of justifying an incursion on Aboriginal title? In *Delgamuukw*, this Court, *per* Lamer C.J., offered this:

> In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of [A]boriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by [A]boriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive [A]boriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of [A]boriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; emphasis in original deleted; para 165]

84 If a compelling and substantial public purpose is established, the government must go on to show that the proposed incursion on the Aboriginal right is consistent with the Crown's fiduciary duty towards Aboriginal people.

85 The Crown's fiduciary duty in the context of justification merits further discussion. The Crown's underlying title in the land is held for the benefit of the Aboriginal group and constrained by the Crown's fiduciary or trust obligation to the group. This impacts the justification process in two ways.

86 First, the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.

87 Second, the Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact). The requirement of proportionality is inherent in the *Delgamuukw* process of reconciliation and was echoed in *Haida*'s insistence that the Crown's duty to consult and accommodate at the claims stage "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed" (para. 39).

88 In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group.

D. Remedies and Transition

89 Prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups. The level of consultation and accommodation required varies with the strength of the Aboriginal group's claim to the land and the seriousness of the potentially adverse effect upon the interest claimed. If the Crown fails to discharge its duty to consult, various remedies are available including injunctive relief, damages, or an order that consultation or accommodation be carried out: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 37.

90 After Aboriginal title to land has been established by court declaration or agreement, the Crown must seek the consent of the title-holding Aboriginal group to developments on the land. Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act,*

1982. The usual remedies that lie for breach of interests in land are available, adapted as may be necessary to reflect the special nature of Aboriginal title and the fiduciary obligation owed by the Crown to the holders of Aboriginal title.

91 The practical result may be a spectrum of duties applicable over time in a particular case. At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant to s. 35 of the *Constitution Act, 1982*.

92 Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.

E. What Duties Were Owed by the Crown at the Time of the Government Action?

93 Prior to the declaration of Aboriginal title, the Province had a duty to consult and accommodate the claimed Tsilhqot'in interest in the land. As the Tsilhqot'in had a strong *prima facie* claim to the land at the time of the impugned government action and the intrusion was significant, the duty to consult owed by the Crown fell at the high end of the spectrum described in *Haida* and required significant consultation and accommodation in order to preserve the Tsilhqot'in interest.

94 With the declaration of title, the Tsilhqot'in have now established Aboriginal title to the portion of the lands designated by the trial judge with the exception as set out in para. 9 of these reasons. This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.

VII. Breach of the Duty to Consult

95 The alleged breach in this case arises from the issuance by the Province of licences permitting third parties to conduct forestry activity and construct related infrastructure on the land in 1983 and onwards, before title was declared. During this time, the Tsilhqot'in held an interest in the land that was not yet legally recognized. The honour of the Crown required that the Province consult them on uses of the lands and accommodate their interests. The Province did neither and breached its duty owed to the Tsilhqot'in.

96 The Crown's duty to consult was breached when Crown officials engaged in the planning process for the removal of timber. The inclusion of timber on Aboriginal title land in a timber supply area, the approval of cut blocks on Aboriginal title land in a forest development plan, and the allocation of cutting permits all occurred without any meaningful consultation with the Tsilhqot'in.

97 I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

VIII. Provincial Laws and Aboriginal Title

98 As discussed, I have concluded that the Province breached its duty to consult and accommodate the Tsilhqot'in interest in the land. This is sufficient to dispose of the appeal.

99 However, the parties made extensive submissions on the application of the *Forest Act* to Aboriginal title land. This issue was dealt with by the courts below and is of pressing importance to the Tsilhqot'in people and other Aboriginal groups in British Columbia and elsewhere. It is therefore appropriate that we deal with it.

100 The following questions arise: (1) Do provincial laws of general application apply to land held under Aboriginal title and, if so, how?; (2) Does the British Columbia *Forest Act* on its face apply to land held under Aboriginal title?; and (3) If the *Forest Act* on its face applies, is its application ousted by the operation of the Constitution of Canada? I will discuss each of these questions in turn.

A. Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?

101 Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

102 As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act, 1867*, which gives the provinces the power to legislate with respect to property and civil rights in the province.

103 Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act*, 1982. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act, 1867*.

104 This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (at p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone:*

> Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [p.43]

105 It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. This said, when conflicts arise, the foregoing template serves to resolve them.

106 Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.

B. Does the Forest Act on its Face Apply to Aboriginal Title Land?

107 Whether a statute of general application such as the *Forest Act* was *intended* to apply to lands subject to Aboriginal title — the question at this point — is always a matter of statutory interpretation.

108 The basic rule of statutory interpretation is that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1.

109 Under the *Forest Act*, the Crown can only issue timber licences with respect to "Crown timber". "Crown timber" is defined as timber that is on "Crown land", and "Crown land" is defined as "land, whether or not it is covered by water, or an interest in land, vested in the Crown." (s. 1). The Crown is not empowered to issue timber licences on "private land", which is defined as anything that is not Crown land. The Act is silent on Aboriginal title land, meaning that there are three possibilities: (1) Aboriginal title land is "Crown land"; (2) Aboriginal title land is "private land"; or (3) the *Forest Act* does not apply to Aboriginal title land at all. For the purposes of this appeal, there is no practical difference between the latter two.

110 If Aboriginal title land is "vested in the Crown", then it falls within the definition of "Crown land" and the timber on it is "Crown timber".

111 What does it mean for a person or entity to be "vested" with property? In property law, an interest is vested when no condition or limitation stands in the way of enjoyment. Property can be vested in possession or in interest. Property is vested in possession where there is a present entitlement to enjoyment of the property. An example of this is a life estate. Property is vested in interest where there is a fixed right to taking possession in the future. A remainder interest is vested in interest but not in possession: B. Ziff, *Principles of Property Law* (5th ed. 2010), at p. 245; *Black's Law Dictionary*, (9th ed. 2009), *sub verbo* "vested".

112 Aboriginal title confers a right to the land itself and the Crown is obligated to justify any incursions on title. As explained above, the content of the Crown's underlying title is limited to the fiduciary duty owed and the right to encroach subject to justification. It would be hard to say that the Crown is presently entitled to enjoyment of the lands in the way property that is vested in possession would be. Similarly, although Aboriginal title can be alienated to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group.

113 The second consideration in statutory construction is more equivocal. Can the legislature have intended that the vast areas of the province that are potentially subject to Aboriginal title be immune from forestry regulation? And what about the long period of time during which land claims progress and ultimate Aboriginal title remains uncertain? During this period, Aboriginal groups have no legal right to manage the forest; their only right is to be consulted, and if appropriate, accommodated with respect to the land's use: *Haida.* At this stage, the Crown may continue to manage the resource in question, but the honour of the Crown requires it to respect the potential, but yet unproven claims.

114 It seems clear from the historical record and the record in this case that in this evolving context, the British Columbia legislature proceeded on the basis that lands under claim remain "Crown land" under the *Forest Act*, at least until Aboriginal title is recognized by a court or an agreement. To proceed otherwise would have left no one in charge of the forests that cover hundreds of thousands of hectares and represent a resource of enormous value. Looked at in this very particular historical context, it seems clear that the legislature must have intended the words "vested in the Crown" to cover at least lands to which Aboriginal title had not yet been confirmed.

115 I conclude that the legislature intended the *Forest Act* to apply to lands under claims for Aboriginal title, *up to the time title is confirmed by agreement or court order.* To hold otherwise would be to accept that the legislature intended the forests on such lands to be wholly unregulated, and would undercut the premise on which the duty to consult affirmed in *Haida* was based. Once Aboriginal title is confirmed, however, the lands are "vested" in the Aboriginal group and the lands are no longer Crown lands.

116 Applied to this case, this means that as a matter of statutory construction, the lands in question were "Crown land" under the *Forest Act* at the time the forestry licences were issued. Now that title has been established, however, the beneficial interest in the land vests in the Aboriginal group, not the Crown. The timber on it no longer falls within the definition of "Crown timber" and the *Forest Act* no longer applies. I add the obvious — it remains open to the legislature to amend the Act to cover lands held under Aboriginal title, provided it observes applicable constitutional restraints.

C. Is the Forest Act Ousted by the Constitution?

117 The next question is whether the provincial legislature lacks the constitutional power to legislate with respect to forests on Aboriginal title land. Currently, the *Forest Act* applies to lands under claim, but not to lands over which Aboriginal title has been confirmed. However, the provincial legislature could amend the Act so as to explicitly apply to lands over which title has been confirmed. This raises the question of whether provincial forestry legislation that on its face purports to apply to Aboriginal title lands is ousted by the Constitution.

1. Section 35 of the Constitution Act, 1982

118 Section 35 of the *Constitution Act, 1982* represents "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights" (*Sparrow*, at p. 1105). It protects Aboriginal rights against provincial and federal legislative power and provides a framework to facilitate negotiations and reconciliation of Aboriginal interests with those of the broader public.

119 Section 35(1) states that existing Aboriginal rights are hereby "recognized and affirmed". In *Sparrow*, this Court held that these words must be construed in a liberal and purposive manner. Recognition and affirmation of Aboriginal rights constitutionally entrenches the Crown's fiduciary obligations towards Aboriginal peoples. While rights that are recognized and affirmed are not absolute, s. 35 requires the Crown to reconcile its power with its duty. "[T]he best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights" (*Sparrow*, at p. 1109). Dickson C.J. and La Forest J. elaborated on this purpose as follows, at p. 1110:

> The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any [A]boriginal right protected under s.35(1).

120 Where legislation affects an Aboriginal right protected by s. 35 of the *Constitution Act, 1982*, two inquires are required. First, does the legislation interfere with or infringe the Aboriginal right (this was referred to as *prima facie* infringement in *Sparrow*)? Second, if so, can the infringement be justified?

121 A court must first examine the characteristics or incidents of the right at stake. In the case of Aboriginal title, three relevant incidents are: (1) the right to exclusive use and occupation of the land; (2) the right to determine the uses to which the land is put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of Aboriginal peoples; and (3) the right to enjoy the economic fruits of the land (*Delgamuukw*, at para. 166).

122 Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone*. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (at p. 1112).

123 General regulatory legislation, such as legislation aimed at managing the forests in a way that deals with pest invasions or prevents forest fires, will often pass the *Sparrow* test as it will be reasonable, not impose undue hardships, and not deny the holder of the right their preferred means of exercising it. In such cases, no infringement will result.

124 General regulatory legislation, which may affect the manner in which the Aboriginal right can be exercised, differs from legislation that assigns Aboriginal property rights to third parties. The issuance of timber licences on Aboriginal title land for example — a direct transfer of Aboriginal property rights to a third party — will plainly be a meaningful diminution in the Aboriginal group's ownership right and will amount to an infringement that must be justified in cases where it is done without Aboriginal consent.

125 As discussed earlier, to justify an infringement, the Crown must demonstrate that: (1) it complied with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework permits a principled reconciliation of Aboriginal rights with the interests of all Canadians.

126 While unnecessary for the disposition of this appeal, the issue of whether British Columbia possessed a compelling and substantial legislative objective in issuing the cutting permits in this case was addressed by the courts below, and I offer the following comments for the benefit of all parties going forward. I agree with the courts below that no compelling and substantial objective existed in this case. The trial judge found the two objectives put forward by the Province — the economic benefits that would be realized as a result of logging in the claim area and the need to prevent the spread of a mountain pine beetle infestation — were not supported by the evidence. After considering the expert evidence before him, he concluded that the proposed cutting sites were not economically viable and that they were not directed at preventing the spread of the mountain pine beetle.

127 Before the Court of Appeal, the Province no longer argued that the forestry activities were undertaken to combat the mountain pine beetle, but maintained the position that the trial judge's findings on economic viability were unreasonable, because unless logging was economically viable, it would not have taken place. The Court of Appeal rejected this argument on two grounds: (1) levels of logging must sometimes be maintained for a tenure holder to keep logging rights, even if logging is not economically viable; and (2) the focus is the economic value of logging compared to the detrimental effects it would have on Tsilhqot'in Aboriginal rights, not the economic viability of logging from the sole perspective of the tenure holder. In short, the Court of Appeal found no error in the trial judge's reasoning on this point. I would agree. Granting rights to third parties to harvest timber on Tsilhqot'in land is a serious infringement that will not lightly be justified. Should the government wish to grant such harvesting rights in the future, it will be required to establish that a compelling and substantial objective is furthered by such harvesting, something that was not present in this case.

2. The Division of Powers

128 The starting point, as noted, is that, as a general matter, the regulation of forestry within the Province falls under its power over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. To put it in constitutional terms, regulation of forestry is in "pith and substance" a provincial matter. Thus, the *Forest Act* is consistent with the division of powers unless it is ousted by a competing federal power, even though it may incidentally affect matters under federal jurisdiction.

129 "Indians, and Lands reserved for the Indians" falls under federal jurisdiction pursuant to s. 91(24) of the *Constitution Act, 1867*. As such, forestry on Aboriginal title land falls under both the provincial power over forestry in the province and the federal power over "Indians". Thus, for constitutional purposes, forestry on Aboriginal title land possesses a double aspect, with both levels of government enjoying concurrent jurisdiction. Normally, such concurrent legislative power creates no conflicts — federal and provincial governments cooperate productively in many areas of double aspect such as, for example, insolvency and child custody. However, in cases where jurisdictional disputes arise, two doctrines exist to resolve them.

130 First, the doctrine of paramountcy applies where there is conflict or inconsistency between provincial and federal law, in the sense of impossibility of dual compliance or frustration of federal purpose. In the case of such conflict or inconsistency, the federal law prevails. Therefore, if the application of valid provincial legislation, such as the *Forest Act*, conflicts with valid federal legislation enacted pursuant to Parliament's power over "Indians", the latter would trump the former. No such inconsistency is alleged in this case.

131 Second, the doctrine of interjurisdictional immunity applies where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government. Interjurisdictional immunity is premised on the idea that since federal and provincial legislative powers under ss. 91 and 92 of the *Constitution Act, 1867* are exclusive, each level of government enjoys a basic unassailable core of power on which the other level may not intrude. In considering whether provincial legislation such as the *Forest Act* is ousted pursuant to interjurisdictional immunity, the court must ask two questions:

first, does the provincial legislation touch on a protected core of federal power; and second, would application of the provincial law significantly trammel or impair the federal power: *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) ("*COPA*").

132 The trial judge held that interjurisdictional immunity rendered the provisions of the *Forest Act* inapplicable to land held under Aboriginal title because provisions authorizing management, acquisition, removal and sale of timber on such lands affect the core of the federal power over "Indians". He placed considerable reliance on *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915 (S.C.C.), in which this Court held that only Parliament has the power to derogate from rights conferred by a treaty because treaty rights are within the core of the federal power over "Indians". It follows, the trial judge reasoned, that, since Aboriginal rights are akin to treaty rights, the Province has no power to legislate with respect to forests on Aboriginal title land.

133 The reasoning accepted by the trial judge is essentially as follows. Aboriginal rights fall at the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. Interjurisdictional immunity applies to matters at the core of s. 91(24). Therefore, provincial governments are constitutionally prohibited from legislating in a way that limits Aboriginal rights. This reasoning leads to a number of difficulties.

134 The critical aspect of this reasoning is the proposition that Aboriginal rights fall at the core of federal regulatory jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

135 The jurisprudence on whether s. 35 rights fall at the core of the federal power to legislate with respect to "Indians" under s. 91(24) is somewhat mixed. While no case has held that Aboriginal rights, such as Aboriginal title to land, fall at the core of the federal power under s. 91(24), this has been stated in *obiter dicta.* However, this Court has also stated in *obiter dicta* that provincial governments are constitutionally permitted to infringe Aboriginal rights where such infringement is justified pursuant to s. 35 of the *Constitution Act, 1982* — this latter proposition being inconsistent with the reasoning accepted by the trial judge.

136 In *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), this Court suggested that interjurisdictional immunity did not apply where provincial legislation conflicted with treaty rights. Rather, the s. 35 *Sparrow* framework was the appropriate tool with which to resolve the conflict:

> [T]he federal and provincial governments [have the authority] within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives .... [para. 24]

137 More recently however, in *Morris*, this Court distinguished *Marshall* on the basis that the treaty right at issue in *Marshall* was a commercial right. The Court in *Morris* went on to hold that interjurisdictional immunity prohibited any provincial infringement of the non-commercial treaty right in that case, whether or not such an infringement could be justified under s. 35 of the *Constitution Act, 1982*.

138 Beyond this, the jurisprudence does not directly address the relationship between interjurisdictional immunity and s. 35 of the *Constitution Act, 1982*. The ambiguous state of the jurisprudence has created unpredictability. It is clear that where valid *federal* law interferes with an Aboriginal or treaty right, the s. 35 *Sparrow* framework governs the law's applicability. It is less clear, however, that it is so where valid *provincial* law interferes with an Aboriginal or treaty right. The jurisprudence leaves the following questions unanswered: does interjurisdictional immunity prevent provincial governments from ever limiting Aboriginal rights even if a particular infringement would be justified under the *Sparrow* framework?; is provincial interference with Aboriginal rights treated differently than treaty rights?; and, are commercial Aboriginal rights treated differently than non-commercial Aboriginal rights? No case has addressed these questions explicitly, as I propose to do now.

139 As discussed, s. 35 of the *Constitution Act, 1982* imposes limits on how both the federal and provincial governments can deal with land under Aboriginal title. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.

140 What role then is left for the application of the doctrine of interjurisdictional immunity and the idea that Aboriginal rights are at the core of the federal power over "Indians" under s. 91(24) of the *Constitution Act, 1867*? The answer is none.

141 The doctrine of interjurisdictional immunity is directed to ensuring that the two levels of government are able to operate without interference in their core areas of exclusive jurisdiction. This goal is not implicated in cases such as this. Aboriginal rights are a limit on both federal and provincial jurisdiction.

142 The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial. Part II Aboriginal rights, like Part I *Charter* rights, are held *against* government — they operate to *prohibit* certain types of regulation which governments could otherwise impose. These limits have nothing to do with whether something lies at the core of the federal government's powers.

143 An analogy with *Charter* jurisprudence may illustrate the point. Parliament enjoys exclusive jurisdiction over criminal law. However, its criminal law power is circumscribed by s. 11 of the *Charter* which guarantees the right to a fair criminal process. Just as Aboriginal rights are fundamental to Aboriginal law, the right to a fair criminal process is fundamental to criminal law. But we do not say that the right to a fair criminal process under s. 11 falls at the core of Parliament's criminal law jurisdiction. Rather, it is a *limit* on Parliament's criminal law jurisdiction. If s. 11 rights were held to be at the core of Parliament's criminal law jurisdiction such that interjurisdictional immunity applied, the result would be absurd: provincial breaches of s. 11 rights would be judged on a different standard than federal breaches, with only the latter capable of being saved under s. 1 of the *Charter*. This same absurdity would result if interjurisdictional immunity were applied to Aboriginal rights.

144 The doctrine of interjurisdictional immunity is designed to deal with conflicts between provincial powers and federal powers; it does so by carving out areas of exclusive jurisdiction for each level of government. But the problem in cases such as this is not competing provincial and federal powers, but rather tension between the right of the Aboriginal title holders to use their land as they choose and the province which seeks to regulate it, like all other land in the province.

145 Moreover, application of interjurisdictional immunity in this area would create serious practical difficulties.

146 First, application of interjurisdictional immunity would result in two different tests for assessing the constitutionality of provincial legislation affecting Aboriginal rights. Pursuant to *Sparrow*, provincial regulation is unconstitutional if it results in a meaningful diminution of an Aboriginal right that cannot be justified pursuant to s. 35 of the *Constitution Act, 1982*. Pursuant to interjurisdictional immunity, provincial regulation would be unconstitutional if it impaired an Aboriginal right, whether or not such limitation was reasonable or justifiable. The result would be dueling tests directed at answering the same question: how far can provincial governments go in regulating the exercise of s. 35 Aboriginal rights?

147 Second, in this case, applying the doctrine of interjurisdictional immunity to exclude provincial regulation of forests on Aboriginal title lands would produce uneven, undesirable results and may lead to legislative vacuums. The result would be patchwork regulation of forests — some areas of the province regulated under provincial legislation, and other areas under federal legislation or no legislation at all. This might make it difficult, if not impossible, to deal effectively with problems such as pests and fires, a situation desired by neither level of government.

148 Interjurisdictional immunity — premised on a notion that regulatory environments can be divided into watertight jurisdictional compartments — is often at odds with modern reality. Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. Interjurisdictional immunity, by contrast, may thwart such productive cooperation. In the case of forests on Aboriginal title land, courts would have to scrutinize provincial forestry legislation to ensure that it did not impair the core of federal jurisdiction over "Indians" and would also have to scrutinize any federal legislation to ensure that it did not impair the

core of the province's power to manage the forests. It would be no answer that, as in this case, both levels of government agree that the laws at issue should remain in force.

149 This Court has recently stressed the limits of interjurisdictional immunity. "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at paras. 24 and 37 (emphasis deleted)). Because of this, interjurisdictional immunity is of "limited application" and should be applied "with restraint" (paras. 67 and 77). These propositions have been confirmed in more recent decisions: *Newfoundland (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 (S.C.C.); *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, [2011] 3 S.C.R. 134 (S.C.C.).

150 *Morris*, on which the trial judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* and *COPA*, and so is of limited precedential value on this subject as a result (see *Marine Services*, at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw*, provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

151 For these reasons, I conclude that the doctrine of interjurisdictional immunity should not be applied in cases where lands are held under Aboriginal title. Rather, the s. 35 *Sparrow* approach should govern. Provincial laws of general application, including the *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above. The result is a balance that preserves the Aboriginal right while permitting effective regulation of forests by the province, as required by s. 35 of the *Constitution Act, 1982*.

152 The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. The appropriate constitutional lens through which to view the matter is s. 35 of the *Constitution Act, 1982*, which directly addresses the requirement that these interests must be respected by the government, unless the government can justify incursion on them for a compelling purpose and in conformity with its fiduciary duty to affected Aboriginal groups.

IX. Conclusion

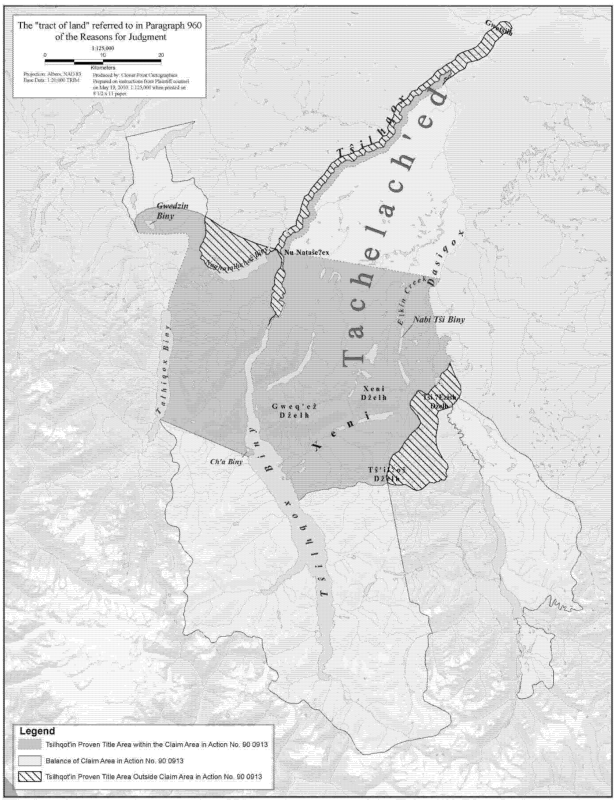
153 I would allow the appeal and grant a declaration of Aboriginal title over the area at issue, as requested by the Tsilhqot'in. I further declare that British Columbia breached its duty to consult owed to the Tsilhqot'in through its land use planning and forestry authorizations.

Appeal allowed.

Pourvoi accueilli.

Appendix

Proven Title Area — Visual Aid


The "tract of land" referred to in Paragraph 960 of the Reasons for Judgment
1:125,000
Kilometers
Tachelach'ed
Xeni
Gwedzin Biny
Nu Nutsle7ex
Nabi Tsi Biny
Xeni Dzeh
Gweq'ez Dzeh
Ch'a Biny
Legend
Tsilhqot'in Proven Title Area within the Claim Area in Action No. 90 0913
Balance of Claim Area in Action No. 90 0913
Tsilhqot'in Proven Title Area Outside Claim Area in Action No. 90 0913

2017 SCC 41, 2017 CSC 41
Supreme Court of Canada

Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.

2017 CarswellNat 3468, 2017 CarswellNat 3469, 2017 SCC 41, 2017 CSC 41, [2017] 1 S.C.R. 1099, [2017] 3 C.N.L.R. 45, [2017] S.C.J. No. 41, 10 C.E.L.R. (4th) 55, 22 Admin. L.R. (6th) 234, 280 A.C.W.S. (3d) 676, 411 D.L.R. (4th) 596

Chippewas of the Thames First Nation (Appellant) and Enbridge Pipelines Inc., National Energy Board and Attorney General of Canada (Respondents) and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Wildlife Management Board, Suncor Energy Marketing Inc., Mohawk Council of Kahnawà:ke, Mississaugas of the New Credit First Nation and Chiefs of Ontario (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 30, 2016
Judgment: July 26, 2017
Docket: 36776

Proceedings: affirming *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.* (2015), [2016] 1 C.N.L.R. 18, 2015 CarswellNat 10332, 2015 CAF 222, 479 N.R. 220, 390 D.L.R. (4th) 735, [2016] 3 F.C.R. 96, 2015 FCA 222, 2015 CarswellNat 5511, Donald J. Rennie J.A., Ryer J.A., Webb J.A. (F.C.A.)

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Headnote

Aboriginal and indigenous law --- Constitutional issues — Canadian Charter of Rights and Freedoms

Duty of Crown to consult — Pipeline which cut through C First Nations' traditional territory had been approved and built without consultation with C First Nation — E Inc. applied for approval of modification of pipeline — National Energy Board served notice of public hearing — Board approved application — Appeal by C First Nation was dismissed — C First Nation appealed — Appeal dismissed — Crown had obligation to consult with respect to E Inc.'s project application — Crown may rely on steps taken by administrative body to fulfill its duty to consult — Circumstances of this case made it sufficiently clear to C First Nation that board process was intended to constitute Crown consultation and accommodation — Board's statutory powers were capable of satisfying Crown's constitutional obligations — Board provided C First Nation with adequate opportunity to participate in decision-making process — Board sufficiently assessed potential impacts on rights of Indigenous groups, and found that risk of negative consequences was minimal, and could be mitigated — Board provided adequate accommodation through imposition of conditions on E Inc. — Board's written reasons were sufficient to satisfy Crown's obligation.

Natural resources --- Oil and gas — Constitutional issues — Pipelines

Pipeline which cut through C First Nations' traditional territory had been approved and built without consultation with C First Nation — E Inc. applied for approval of modification of pipeline — National Energy Board served notice of public hearing — Board approved application — Appeal by C First Nation was dismissed — C First Nation appealed — Appeal dismissed — Crown had obligation to consult with respect to E Inc.'s project application — Crown may rely on steps taken by administrative body to fulfill its duty to consult — Circumstances of this case made it sufficiently clear to C First Nation that board process was intended to constitute Crown consultation and accommodation — Board's statutory powers were capable of satisfying Crown's constitutional obligations — Board provided C First Nation with adequate opportunity to participate in decision-making process — Board sufficiently assessed potential impacts on rights of Indigenous groups, and found that risk of negative consequences was minimal, and could be mitigated — Board provided adequate accommodation through imposition of conditions on E Inc. — Board's written reasons were sufficient to satisfy Crown's obligation.

Droit autochtone --- Questions d'ordre constitutionnel — Charte canadienne des droits et libertés

Obligation de la Couronne de consulter — Canalisation traversant le territoire traditionnel du groupe autochtone C a été approuvée et construite sans que le groupe autochtone C ait été consulté — E inc. a demandé l'approbation d'une modification de la canalisation — Office national de l'énergie a envoyé un avis d'audience publique — Office a approuvé le projet — Appel interjeté par le groupe autochtone C a été rejeté — Groupe autochtone C a formé un pourvoi — Pourvoi rejeté — Couronne avait une obligation de consulter relativement à la demande d'E inc. — Couronne pouvait se fonder sur les mesures prises par un organisme administratif pour satisfaire à son obligation de consulter — Circonstances du présent dossier indiquaient de façon suffisamment claire au groupe autochtone C que le processus de l'Office avait pour but de constituer le processus de consultation et d'accommodement de la Couronne — Compte tenu des pouvoirs conférés par la loi à l'Office, ce dernier était en mesure de satisfaire aux obligations constitutionnelles de la Couronne — Office a fourni au groupe autochtone C une possibilité adéquate de participer au processus décisionnel — Office a suffisamment apprécié les effets potentiels du projet sur les droits des groupes autochtones, ce qui l'a amené à conclure que le risque d'effets préjudiciables était minime et pouvait être atténué — Office a pris des mesures d'accommodement appropriées en imposant des conditions à E inc. — Motifs écrits exposés par l'Office étaient suffisants et permettaient de satisfaire à l'obligation de la Couronne.

Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Canalisation

Canalisation traversant le territoire traditionnel du groupe autochtone C a été approuvée et construite sans que le groupe autochtone C ait été consulté — E inc. a demandé l'approbation d'une modification de la canalisation — Office national de l'énergie a envoyé un avis d'audience publique — Office a approuvé le projet — Appel interjeté par le groupe autochtone C a été rejeté — Groupe autochtone C a formé un pourvoi — Pourvoi rejeté — Couronne avait une obligation de consulter relativement à la demande d'E inc. — Couronne pouvait se fonder sur les mesures prises par un organisme administratif pour satisfaire à son obligation de consulter — Circonstances du présent dossier indiquaient de façon suffisamment claire au groupe autochtone C que le processus de l'Office avait pour but de constituer le processus de consultation et d'accommodement de la Couronne — Compte tenu des pouvoirs conférés par la loi à l'Office, ce dernier était en mesure de satisfaire aux obligations constitutionnelles de la Couronne — Office a fourni au groupe autochtone C une possibilité adéquate de participer au processus décisionnel — Office a suffisamment apprécié les effets potentiels du projet sur les droits des groupes autochtones, ce qui l'a amené à conclure que le risque d'effets préjudiciables était minime et pouvait être atténué — Office a pris des mesures d'accommodement appropriées en imposant des conditions à E inc. — Motifs écrits exposés par l'Office étaient suffisants et permettaient de satisfaire à l'obligation de la Couronne.

The respondent C First Nation had historically resided near the Thames River where its members carried out traditional activities that were central to their identity and way of life. In 1976, a pipeline was opened by E Inc. connecting Sarnia to Montreal with the purpose of transporting crude oil from western Canada to eastern refineries. The pipeline cut through C First Nation's traditional territory. The pipeline was approved and built without any consultation with C First Nation. In November 2012, E Inc. applied to the National Energy Board for approval of a modification of the pipeline, and for exemptions under s. 58 of the National Energy Board Act. Several months before the hearings, the board issued notice to 19 potentially affected Indigenous groups, including C First Nation. Prior to the hearing, the Chiefs of C First Nation and another First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development, describing the asserted Aboriginal and treaty rights of both groups, and the project's potential impact on them.

The C First Nation was granted funding to participate, filed evidence and delivered oral argument at the hearing delineating their concerns. After the hearing process had concluded, the Minister of Natural Resources responded to the letter, indicating that he would be relying solely on the board's process to fulfill the Crown's duty to consult Indigenous peoples on the project. The board approved the project, finding that it was in the public interest and consistent with the requirements in the Act. C First Nation appealed the board's decision to the Federal Court of Appeal pursuant to s. 22(1) of the Act. The majority of the Federal Court of Appeal dismissed the appeal, concluding that the board was not required to determine as a condition of undertaking its mandate with respect to E Inc.'s application whether the Crown had a duty to consult, and if so, whether the Crown had fulfilled this duty. The majority also concluded that the board did not have a duty to consult the respondent. C First Nation appealed.

Held: The appeal was dismissed.

Per Karakatsanis, Brown JJ. (McLachlin C.J.C., Abella, Moldaver, Wagner, Gascon, Côté and Rowe JJ. concurring): A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown had knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision. The board's contemplated decision on the project's approval would amount to Crown conduct. Because the authorized work could potentially adversely affect C First Nation's asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to E Inc.'s project application. The Crown may rely on steps taken by an administrative body to fulfill its duty to consult. While it was the Crown that owed a constitutional obligation to consult with potentially affected Indigenous peoples, the board was tasked with making legal decisions that complied with the Constitution. The regulatory tribunal's ability to assess the Crown's duty to consult did not depend on whether the government participated in the hearing process. The Crown's constitutional obligation did not disappear when the Crown acted to approve a project through a regulatory body such as the board. The duty to consult was not triggered by historical impacts, and it was not the vehicle to address historical grievances. That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 Canadian Charter of Rights and Freedoms rights without considering the larger context. Neither the Federal Court of Appeal nor the board discussed the degree of consultation required. The circumstances of this case made it sufficiently clear to C First Nation that the board process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met. The board's statutory powers were capable of satisfying the Crown's constitutional obligations. The process undertaken by the board was sufficient to satisfy the Crown's duty to consult. First, the board provided C First Nation with an adequate opportunity to participate in the decision-making process. Second, the board sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, the board provided adequate accommodation through the imposition of conditions on E Inc. The board's written reasons were sufficient to satisfy the Crown's obligation. The assertion that the board's reasons were insufficient to satisfy the Crown's duty to consult was rejected.

Le groupe autochtone intimé C vivait depuis longtemps près de la rivière Thames, où ses membres poursuivaient des activités traditionnelles qui étaient au coeur de leur identité et de leur mode de vie. Une canalisation reliant Sarnia à Montréal a été mise en service en 1976 par E inc. afin de transporter du pétrole brut de l'Ouest du Canada jusqu'aux raffineries de l'Est. Cette canalisation traversait le territoire traditionnel du groupe autochtone C. Elle a été approuvée et construite sans que le groupe autochtone C ait été consulté. En novembre 2012, E inc. a demandé à l'Office national de l'énergie d'approuver une modification de la canalisation et de bénéficier des exemptions prévues à l'art. 58 de la Loi sur l'Office national de l'énergie. Plusieurs mois avant les audiences, l'Office a envoyé un avis à 19 groupes autochtones susceptibles d'être touchés par le projet, y compris le groupe autochtone C. Avant le début de l'audience, les chefs du groupe autochtone C et un autre groupe autochtone ont écrit conjointement une lettre au Premier ministre, au ministre des Ressources naturelles et au ministre des Affaires autochtones et du Nord dans laquelle ils décrivaient les droits ancestraux et issus de traités invoqués par les deux groupes et les répercussions potentielles du projet sur ces droits.

Le groupe autochtone C a obtenu les fonds nécessaires pour participer à l'audience, déposé des éléments de preuve et présenté des observations orales décrivant leurs préoccupations. Une fois le processus d'audience terminé, le ministre des Ressources naturelles a répondu à la lettre en indiquant qu'il s'en remettait exclusivement au processus de l'Office pour satisfaire à l'obligation qui incombait à la Couronne de consulter les peuples autochtones au sujet du projet. L'Office a approuvé le projet, estimant qu'il était dans l'intérêt public et qu'il répondait aux exigences de la Loi. Le groupe autochtone C a interjeté appel à l'encontre de la décision de l'Office auprès de la Cour d'appel fédérale en vertu de l'art. 22(1) de la Loi. Les juges majoritaires de la Cour d'appel fédérale ont rejeté l'appel, concluant que l'Office n'avait pas à décider, pour remplir son mandat en ce qui

concernait la demande d'E inc., si la Couronne était tenue à une obligation de consulter et, le cas échéant, si la Couronne avait satisfait à cette obligation. Les juges majoritaires ont également conclu que l'Office n'était pas tenu de consulter l'intimé. Le groupe autochtone C a formé un pourvoi.

Arrêt: Le pourvoi a été rejeté.

Karakatsanis, Brown, JJ. (McLachlin, J.C.C., Abella, Moldaver, Wagner, Gascon, Côté, Rowe, JJ., souscrivant à leur opinion) : Une décision d'un tribunal administratif donnerait naissance à l'obligation de la Couronne de consulter lorsque celle-ci a connaissance, concrètement ou par imputation, de l'existence d'un droit ancestral ou issu d'un traité, potentiel ou reconnu, sur lequel la décision pourrait avoir un effet préjudiciable. La décision envisagée par l'Office relativement à l'approbation du projet pouvait être considérée comme une mesure de la Couronne. Comme les travaux autorisés étaient susceptibles de porter atteinte aux droits ancestraux et issus de traités invoqués par le groupe autochtone C, la Couronne avait une obligation de consulter relativement à la demande d'E inc. La Couronne pouvait se fonder sur les mesures prises par un organisme administratif pour satisfaire à son obligation de consulter. Bien que ce soit à la Couronne qu'incombait l'obligation constitutionnelle de consulter les peuples autochtones potentiellement touchés, l'Office était tenu de rendre des décisions juridiques conformes à la Constitution. Le pouvoir d'un tribunal administratif d'apprécier l'obligation de consulter de la Couronne n'était pas tributaire de la participation du gouvernement au processus d'audience. L'obligation constitutionnelle de la Couronne ne disparaissait pas lorsqu'elle s'engageait dans le processus d'approbation d'un projet par l'intermédiaire d'un organisme de réglementation tel que l'Office. Des conséquences d'ordre historique ne faisaient pas naître l'obligation de consulter et il ne s'agissait pas d'un moyen approprié de régler des griefs historiques. Cela dit, il peut se révéler impossible de bien saisir la gravité des effets d'un projet sur des droits visés à l'art. 35 de la Charte canadienne des droits et libertés si on ne tient pas compte du contexte plus large. Ni la Cour d'appel fédérale ni l'Office n'ont traité de l'étendue de la consultation requise.

Les circonstances du présent dossier indiquaient de façon suffisamment claire au groupe autochtone C que le processus de l'Office avait pour but de constituer le processus de consultation et d'accommodement de la Couronne. Malgré son défaut de donner un avis en temps utile, la Couronne a respecté son obligation de mener des consultations. Compte tenu des pouvoirs conférés par la loi à l'Office, ce dernier était en mesure de satisfaire aux obligations constitutionnelles de la Couronne. Le processus mené par l'Office était suffisant pour satisfaire à l'obligation de consulter qui incombait à la Couronne. Premièrement, l'Office a fourni au groupe autochtone C une possibilité adéquate de participer au processus décisionnel. Deuxièmement, l'Office a suffisamment apprécié les effets potentiels du projet sur les droits des groupes autochtones, ce qui l'a amené à conclure que le risque d'effets préjudiciables était minime et pouvait être atténué. Troisièmement, l'Office a pris des mesures d'accommodement appropriées en imposant des conditions à E inc. Les motifs écrits exposés par l'Office étaient suffisants et permettaient de satisfaire à l'obligation de la Couronne. L'argument selon lequel les motifs exposés par l'Office étaient insuffisants pour satisfaire à l'obligation de consulter incombant à la Couronne a été rejeté.

Karakatsanis, Brown JJ. **(McLachlin C.J.C. and Abella, Moldaver, Wagner, Gascon, Côté and Rowe JJ. concurring):**

I. Introduction

1 In this appeal and in its companion, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (S.C.C.), this Court must consider the Crown's duty to consult with Indigenous peoples prior to an independent regulatory agency's approval of a project that could impact their rights. As we explain in the companion case, the Crown may rely on regulatory processes to partially or completely fulfill its duty to consult.

2 These cases demonstrate that the duty to consult has meaningful content, but that it is limited in scope. The duty to consult is rooted in the need to avoid the impairment of asserted or recognized rights that flows from the implementation of the specific project at issue; it is not about resolving broader claims that transcend the scope of the proposed project. That said, the duty to consult requires an informed and meaningful opportunity for dialogue with Indigenous groups whose rights may be impacted.

3 The Chippewas of the Thames First Nation has historically resided near the Thames River in southwestern Ontario, where its members carry out traditional activities that are central to their identity and way of life. Enbridge Pipelines Inc.'s Line 9 pipeline crosses their traditional territory.

4 In November 2012, Enbridge applied to the National Energy Board (NEB) for approval of a modification of Line 9 that would reverse the flow of part of the pipeline, increase its capacity, and enable it to carry heavy crude. These changes would increase the assessed risk of spills along the pipeline. The Chippewas of the Thames requested Crown consultation before the NEB's approval, but the Crown signalled that it was relying on the NEB's public hearing process to address its duty to consult.

5 The NEB approved Enbridge's proposed modification. The Chippewas of the Thames then brought an appeal from that decision to the Federal Court of Appeal, arguing that the NEB had no jurisdiction to approve the Line 9 modification in the absence of Crown consultation. The majority of the Federal Court of Appeal dismissed the appeal, and the Chippewas of the Thames brought an appeal from that decision to this Court. For the reasons set out below, we would dismiss the appeal. The Crown is entitled to rely on the NEB's process to fulfill the duty to consult. In this case, in light of the scope of the project and the consultation process afforded to the Chippewas of the Thames by the NEB, the Crown's duty to consult and accommodate was fulfilled.

II. Background

A. The Chippewas of the Thames First Nation

6 The Chippewas of the Thames are the descendants of a part of the Anishinaabe Nation that lived along the shore of the Thames River in southwestern Ontario prior to the arrival of European settlers in the area at the beginning of the 18th century. Their ancestors' lifestyle involved hunting, fishing, trapping, gathering, growing corn and squash, performing ceremonies at sacred sites, and collecting animals, plants, minerals, maple sugar and oil in their traditional territory.

7 The Chippewas of the Thames assert that they have a treaty right guaranteeing their exclusive use and enjoyment of their reserve lands. They also assert Aboriginal harvesting rights as well as the right to access and preserve sacred sites in their traditional territory. Finally, they claim Aboriginal title to the bed of the Thames River, its airspace, and other lands throughout their traditional territory.

B. Legislative Scheme

8 The NEB is a federal administrative tribunal and regulatory agency established under s. 3 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*), whose functions include the approval and regulation of pipeline projects. The *NEB Act* prohibits the operation of a pipeline unless a certificate of public convenience and necessity has been issued for the project and the proponent has been given leave under Part III to open the pipeline (s. 30(1)).

9 The NEB occupies an advisory role with respect to the issuance of a certificate of public convenience and necessity. Under ss. 52(1) and 52(2), it can submit a report to the Minister of Natural Resources setting out: (i) its recommendation on whether a certificate should be issued based on its consideration of certain criteria; and (ii) the terms and conditions that it considers necessary or desirable in the public interest to be attached to the project should the certificate be issued. The Governor in Council may then direct the NEB either to issue the certificate or to dismiss the application (s. 54(1)).

10 Under s. 58 of the *NEB Act*, however, the NEB may make orders, on terms and conditions that it considers proper, exempting smaller pipeline projects or project modifications from various requirements that would otherwise apply under Part III, including the requirement for the issuance of a certificate of public convenience and necessity. Consequently, as in this case, smaller projects and amendments to existing facilities are commonly sought under s. 58. The NEB is the final decision maker on s. 58 exemptions.

C. The Line 9 Pipeline and the Project

11 The Line 9 pipeline, connecting Sarnia to Montreal, opened in 1976 with the purpose of transporting crude oil from western Canada to eastern refineries. Line 9 cuts through the Chippewas of the Thames' traditional territory and crosses the Thames River. It was approved and built without any consultation of the Chippewas of the Thames.

12 In 1999, following NEB approval, Line 9 was reversed to carry oil westward. In July 2012, the NEB approved an application from Enbridge, the current operator of Line 9, for the re-reversal (back to eastward flow) of the westernmost segment of Line 9, between Sarnia and North Westover, called "Line 9A".

13 In November 2012, Enbridge filed an application under Part III of the *NEB Act* for a modification to Line 9. The project would involve reversing the flow (to eastward) in the remaining 639-kilometre segment of Line 9, called "Line 9B", between North Westover and Montreal; increasing the annual capacity of Line 9 from 240,000 to 300,000 barrels per day; and allowing for the transportation of heavy crude. While the project involved a significant increase of Line 9's throughput, virtually all of the required construction would take place on previously disturbed lands owned by Enbridge and on Enbridge's right of way.

14 Enbridge also sought exemptions under s. 58 from various filing requirements which would otherwise apply under Part III of the *NEB Act*, the *Oil Pipeline Uniform Accounting Regulations*, C.R.C., c. 1058, and the NEB's Filing Manual. The most significant requested exemption was to dispense with the requirement for a certificate of public convenience and necessity, which as explained above is subject to the Governor in Council's final approval under s. 52 of the *NEB Act*. Without the need for a Governor in Council-approved certificate, the NEB would have the final word on the project's approval.

15 In December 2012, the NEB, having determined that Enbridge's application was complete enough to proceed to assessment, issued a hearing order, which established the process for the NEB's consideration of the project. This process culminated in a public hearing, the purpose of which was for the NEB to gather and review information that was relevant to the assessment of the project. Persons or organizations interested in the outcome of the project, or in possession of relevant information or expertise, could apply to participate in the hearing. The NEB accepted the participation of 60 interveners and 111 commenters.

D. Indigenous Consultation on the Project

16 In February 2013, after Enbridge filed its application and several months before the hearings, the NEB issued notice to 19 potentially affected Indigenous groups, including the Chippewas of the Thames, informing them of the project, the NEB's role, and the NEB's upcoming hearing process. Between April and July 2013, it also held information meetings in three communities upon their request.

17 In September 2013, prior to the NEB hearing, the Chiefs of the Chippewas of the Thames and the Aamjiwnaang First Nation wrote a joint letter to the Prime Minister, the Minister of Natural Resources, and the Minister of Aboriginal Affairs and Northern Development. The letter described the asserted Aboriginal and treaty rights of both groups and the project's potential impact on them. The Chiefs noted that no Crown consultation with any affected Indigenous groups had taken place with respect to the project's approval, and called on the Ministers to initiate Crown consultation. No response arrived until after the conclusion of the NEB hearing.

18 In the meantime, the NEB's process unfolded. The Chippewas of the Thames were granted funding to participate as an intervener, and they filed evidence and delivered oral argument at the hearing delineating their concerns that the project would increase the risk of pipeline ruptures and spills along Line 9, which could adversely impact their use of the land and the Thames River for traditional purposes.

19 In January 2014, after the NEB's hearing process had concluded, the Minister of Natural Resources responded to the September 2013 letter. The response acknowledged the Government of Canada's commitment to fulfilling its duty to consult where it exists, and stated that the "[NEB's] regulatory review process is where the Government's jurisdiction on a pipeline project is addressed. The Government relies on the NEB processes to address potential impacts to Aboriginal and treaty rights stemming from projects under its mandate" (A.R., vol. VI, at p. 47). In sum, the Minister indicated that he would be relying solely on the NEB's process to fulfill the Crown's duty to consult Indigenous peoples on the project.

III. The Decisions Below

A. The NEB's Decision, 2014 LNCNEB 4 (QL)

20 The NEB approved the project, finding that it was in the public interest and consistent with the requirements in the *NEB Act*. It explained that the approval "enables Enbridge to react to market forces and provide benefits to Canadians, while at the same time implementing the Project in a safe and environmentally sensitive manner" (para. 20). The NEB imposed conditions on the project related to pipeline integrity, safety, environmental protection, and the impact of the project on Indigenous communities.

21 In its discussion of Aboriginal Matters (Chapter 7 of the NEB's reasons), the NEB explained that it "interprets its responsibilities, including those outlined in section 58 of the NEB Act, in a manner consistent with the *Constitution Act, 1982*, including section 35" (para. 293). It noted that proponents are required to make reasonable efforts to consult with Indigenous groups, and that the NEB hearing process is part of the consultative process. In deciding whether a project is in the public interest, the NEB "considers all of the benefits and burdens associated with the project, balancing the interests and concerns of Aboriginal groups with other interests and factors" (para. 301).

22 The NEB noted that, in this case, the scope of the project was limited. It was not an assessment of the current operating Line 9, but rather of the modifications required to increase the capacity of Line 9, transport heavy crude on Line 9, and reverse the flow of Line 9B. Enbridge would not need to acquire any new permanent land rights for the project. Most work would take place within existing Enbridge facilities and its existing right of way. Given the limited scope of the project, the NEB was satisfied that potentially affected Indigenous groups had received adequate information about the project. It was also satisfied that potentially affected Indigenous groups had the opportunity to share their views about the project through the NEB hearing process and through discussions with Enbridge. The NEB expected that Enbridge would continue consultations after the project's approval.

23 While Enbridge acknowledged that the project would increase the assessed risk for some parts of Line 9, the NEB found that "any potential Project impacts on the rights and interests of Aboriginal groups are likely to be minimal and will be appropriately mitigated" (para. 343) given the project's limited scope, the commitments made by Enbridge, and the conditions imposed by the NEB. While the project would occur on lands used by Indigenous groups for traditional purposes, those lands are within Enbridge's existing right of way. The project was therefore unlikely to impact traditional land use. The NEB acknowledged that a spill on Line 9 could impact traditional land use, but it was satisfied that "Enbridge will continue to safely operate Line 9, protect the environment, and maintain comprehensive emergency response plans" (*ibid.*).

24 The NEB imposed three conditions on the project related to Indigenous communities. Condition 6 required Enbridge to file an Environmental Protection Plan for the project including an Archaeological Resource Contingency plan. Condition 24 required Enbridge to prepare an Ongoing Engagement Report providing details on its discussions with Indigenous groups going forward. Condition 26 "directs Enbridge to include Aboriginal groups in Enbridge's continuing education program (including emergency management exercises), liaison program and consultation activities on emergency preparedness and response" (*ibid.*).

B. Appeal to the Federal Court of Appeal, 2015 FCA 222, [2016] 3 F.C.R. 96 (F.C.A.)

25 The Chippewas of the Thames brought an appeal from the NEB's decision to the Federal Court of Appeal pursuant to s. 22(1) of the *NEB Act*. They argued that the decision should be quashed, as the NEB was "without jurisdiction to issue exemptions and authorizations to [Enbridge] prior to the Crown fulfilling its duty to consult and accommodate" (para. 2).

26 The majority of the Federal Court of Appeal (Ryer and Webb JJ.A.) dismissed the appeal. It concluded that the NEB was not required to determine, as a condition of undertaking its mandate with respect to Enbridge's application, whether the Crown had a duty to consult under *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 512 (S.C.C.), and, if so, whether the Crown had fulfilled this duty.

27 The majority also concluded that the NEB did not have a duty to consult the Chippewas of the Thames. It noted that while the NEB is required to carry out its mandate in a manner that respects s. 35(1) of the *Constitution Act, 1982*, the NEB had adhered to this obligation by requiring Enbridge to consult extensively with the Chippewas of the Thames and other First Nations.

28 Rennie J.A. dissented. He would have allowed the appeal. In his view, the NEB was required to determine whether the duty to consult had been triggered and fulfilled. Given that the NEB is the final decision maker for s. 58 applications, it must have the power and duty to assess whether consultation is adequate, and to refuse a s. 58 application where consultation is inadequate.

IV. Analysis

A. Crown Conduct Triggering the Duty to Consult

29 In the companion case to this appeal, *Clyde River (Hamlet)*, we outline the principles which apply when an independent regulatory agency such as the NEB is tasked with a decision that could impact Aboriginal or treaty rights. In these circumstances, the NEB's decision would itself be Crown conduct that implicates the Crown's duty to consult (*Clyde River (Hamlet)*, at para. 29). A decision by a regulatory tribunal would trigger the Crown's duty to consult when the Crown has knowledge, real or constructive, of a potential or recognized Aboriginal or treaty right that may be adversely affected by the tribunal's decision (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 31; *Clyde River (Hamlet)*, at para. 25).

30 We do not agree with the suggestion that because the Crown, in the form of a representative of the relevant federal department, was not a party before the NEB, there may have been no Crown conduct triggering the duty to consult (see C.A. reasons, at paras. 57 and 69-70).

31 As the respondents conceded before this Court, the NEB's contemplated decision on the project's approval would amount to Crown conduct. When the NEB grants an exemption under s. 58 of the *NEB Act* from the requirement for a certificate of public convenience and necessity, which otherwise would be subject to Governor in Council approval, the NEB effectively becomes the final decision maker on the entire application. As a statutory body with the delegated executive responsibility to make a decision that could adversely affect Aboriginal and treaty rights, the NEB acted on behalf of the Crown in approving Enbridge's application. Because the authorized work — the increase in flow capacity and change to heavy crude — could potentially adversely affect the Chippewas of the Thames' asserted Aboriginal and treaty rights, the Crown had an obligation to consult with respect to Enbridge's project application.

B. Crown Consultation Can Be Conducted Through a Regulatory Process

32 The Chippewas of the Thames argue that meaningful Crown consultation cannot be carried out wholly through a regulatory process. We disagree. As we conclude in *Clyde River (Hamlet)*, the Crown may rely on steps taken by an administrative body to fulfill its duty to consult (para. 30). The Crown may rely on a regulatory agency in this way so long as the agency possesses the statutory powers to do what the duty to consult requires in the particular circumstances (*Carrier Sekani Tribal Council*, at para. 60; *Clyde River (Hamlet)*, at para. 30). However, if the agency's statutory powers are insufficient in the circumstances or if the agency does not provide adequate consultation and accommodation, the Crown must provide further avenues for meaningful consultation and accommodation in order to fulfill the duty prior to project approval. Otherwise, the regulatory decision made on the basis of inadequate consultation will not satisfy constitutional standards and should be quashed on judicial review or appeal.

33 The majority of the Federal Court of Appeal in this case expressed concern that a tribunal like the NEB might be charged with both carrying out consultation on behalf of the Crown and then adjudicating on the adequacy of these consultations (para. 66). A similar concern was expressed in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159 (S.C.C.), where, in a pre-*Haida Nation* decision, the Court held that quasi-judicial tribunals like the NEB do not owe Indigenous peoples a heightened degree of procedural fairness. The Court reasoned that imposition of such an obligation would risk compromising the independence of quasi-judicial bodies like the NEB (pp. 183-84).

34 In our view, these concerns are answered by recalling that while it is the *Crown* that owes a constitutional obligation to consult with potentially affected Indigenous peoples, the NEB is tasked with making legal decisions that comply with the Constitution. When the NEB is called on to assess the adequacy of Crown consultation, it may consider what consultative steps were provided, but its obligation to remain a neutral arbitrator does not change. A tribunal is not compromised when it carries

out the functions Parliament has assigned to it under its Act and issues decisions that conform to the law and the Constitution. Regulatory agencies often carry out different, overlapping functions without giving rise to a reasonable apprehension of bias. Indeed this may be necessary for agencies to operate effectively and according to their intended roles (*Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.), at para. 41). Furthermore, the Court contemplated this very possibility in *Carrier Sekani Tribal Council*, when it reasoned that tribunals may be empowered with both the power to carry out the Crown's duty to consult and the ability to adjudicate on the sufficiency of consultation (para. 58).

C. The Role of a Regulatory Tribunal When the Crown Is Not a Party

35 At the Federal Court of Appeal, the majority and dissenting judges disagreed over whether the NEB was empowered to decide whether the Crown's consultation was adequate in the absence of the Crown participating in the NEB process as a party. The disagreement stems from differing interpretations of*Carrier Sekani Tribal Council* and whether it overruled *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500 (F.C.A.). In *Standing Buffalo Dakota First Nation*, the Federal Court of Appeal held that the NEB was not required to consider whether the Crown's duty to consult had been discharged before approving a s. 52 pipeline application when the Crown did not formally participate in the NEB's hearing process. The majority in this case held that the principle from *Standing Buffalo Dakota First Nation* applied here. Because the Crown (meaning, presumably, a relevant federal ministry or department) had not participated in the NEB's hearing process, the majority reasoned that the NEB was under no obligation to consider whether the Crown's duty to consult had been discharged before it approved Enbridge's s. 58 application (para. 59). In dissent, Rennie J.A. reasoned that *Standing Buffalo Dakota First Nation* had been overtaken by this Court's decision in *Carrier Sekani Tribal Council*. Even in the absence of the Crown's participation as a party before the NEB, he held that the NEB was *required* to consider the Crown's duty to consult before approving Enbridge's application (para. 112).

36 We agree with Rennie J.A. that a regulatory tribunal's ability to assess the Crown's duty to consult does not depend on whether the government participated in the NEB's hearing process. If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. The Crown's constitutional obligation does not disappear when the Crown acts to approve a project through a regulatory body such as the NEB. It must be discharged before the government proceeds with approval of a project that could adversely affect Aboriginal or treaty rights (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 (S.C.C.), at para. 78).

37 As the final decision maker on certain projects, the NEB is obliged to consider whether the Crown's consultation with respect to a project was adequate if the concern is raised before it (*Clyde River (Hamlet)*, at para. 36). The responsibility to ensure the honour of the Crown is upheld remains with the Crown (*Clyde River (Hamlet)*, at para. 22). However, administrative decision makers have both the obligation to decide necessary questions of law raised before them and an obligation to make their decisions within the contours of the state's constitutional obligations (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 77).

D. Scope of the Duty to Consult

38 The degree of consultation required depends on the strength of the Aboriginal claim, and the seriousness of the potential impact on the right (*Haida Nation*, at paras. 39 and 43-45).

39 Relying on *Carrier Sekani Tribal Council*, the Attorney General of Canada asserts that the duty to consult in this case "is limited to the [p]roject" and "does not arise in relation to claims for past infringement such as the construction of a pipeline under the Thames River in 1976" (R.F., vol. I, at para. 80).

40 While the Chippewas of the Thames identify new impacts associated with the s. 58 application that trigger the duty to consult and delimit its scope, they also note that "[t]he potential adverse impacts to [the asserted] Aboriginal rights and title resulting from approval of Enbridge's application for modifications to Line 9 are cumulative and serious and could even be catastrophic in the event of a pipeline spill" (A.F., at para. 57). Similarly, the Mississaugas of the New Credit First Nation,

an intervener, argued in the hearing that, because s. 58 is frequently applied to discrete pipeline expansion and redevelopment projects, there are no high-level strategic discussions or consultations about the broader impact of pipelines on the First Nations in southern Ontario.

41 The duty to consult is not triggered by historical impacts. It is not the vehicle to address historical grievances. In *Carrier Sekani Tribal Council*, this Court explained that the Crown is required to consult on "adverse impacts flowing from the specific Crown proposal at issue — not [on] larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration" (*Carrier Sekani Tribal Council*, at para. 53 (emphasis in original)). *Carrier Sekani Tribal Council* also clarified that "[a]n order compelling consultation is only appropriate where the proposed Crown conduct, immediate or prospective, may adversely impact on established or claimed rights" (para. 54).

42 That said, it may be impossible to understand the seriousness of the impact of a project on s. 35 rights without considering the larger context (J. Woodward, *Native Law* (loose-leaf), vol. 1, at pp. 5-107 to 5-108). Cumulative effects of an ongoing project, and historical context, may therefore inform the scope of the duty to consult (*West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, 18 B.C.L.R. (5th) 234 (B.C. C.A.), at para. 117). This is not "to attempt the redress of past wrongs. Rather, it is simply to recognize an existing state of affairs, and to address the consequences of what may result from" the project (*West Moberly First Nations*, at para. 119).

43 Neither the Federal Court of Appeal nor the NEB discussed the degree of consultation required. That said, and as we will explain below, even taking the strength of the Chippewas of the Thames' claim and the seriousness of the potential impact on the claimed rights at their highest, the consultation undertaken in this case was manifestly adequate.

E. Was There Adequate Notice That the Crown Was Relying on the NEB's Process in This Case?

44 As indicated in the companion case *Clyde River (Hamlet)* , the Crown may rely on a regulatory body such as the NEB to fulfill the duty to consult. However, where the Crown intends to do so, it should be made clear to the affected Indigenous group that the Crown is relying on the regulatory body's processes to fulfill its duty (*Clyde River (Hamlet)*, at para. 23). The Crown's constitutional obligation requires a meaningful consultation process that is carried out in good faith. Obviously, notice helps ensure the appropriate participation of Indigenous groups, because it makes clear to them that consultation is being carried out through the regulatory body's processes (*ibid.*).

45 In this case, the Chippewas of the Thames say they did not receive explicit notice from the Crown that it intended to rely on the NEB's process to satisfy the duty. In September 2013, the Chippewas of the Thames wrote to the Prime Minister, the Minister of Natural Resources and the Minister of Aboriginal Affairs and Northern Development requesting a formal Crown consultation process in relation to the project. It was not until January 2014, after the NEB's hearing process was complete, that the Minister of Natural Resources responded to the Chippewas of the Thames on behalf of the Crown advising them that it relied on the NEB's process. At the hearing before this Court, the Chippewas of the Thames conceded that the Crown may have been entitled to rely on the NEB to carry out the duty had they received the Minister's letter indicating the Crown's reliance prior to the NEB hearing (transcript, at pp. 34-35). However, having not received advance notice of the Crown's intention to do so, the Chippewas of the Thames maintain that consultation could not properly be carried out by the NEB.

46 In February 2013, the NEB contacted the Chippewas of the Thames and 18 other Indigenous groups to inform them of the project and of the NEB's role in relation to its approval. The Indigenous groups were given early notice of the hearing and were invited to participate in the NEB process. The Chippewas of the Thames accepted the invitation and appeared before the NEB as an intervener. In this role, they were aware that the NEB was the final decision maker under s. 58 of the *NEB Act*. Moreover, as is evidenced from their letter of September 2013, they understood that no other Crown entity was involved in the process for the purposes of carrying out consultation. In our view, the circumstances of this case made it sufficiently clear to the Chippewas of the Thames that the NEB process was intended to constitute Crown consultation and accommodation. Notwithstanding the Crown's failure to provide timely notice, its consultation obligation was met.

F. Was the Crown's Consultation Obligation Fulfilled?

47 When deep consultation is required, the duty to consult may be satisfied if there is "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida Nation*, at para. 44). As well, this Court has recognized that the Crown may wish to "adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers" (*ibid.*). This list is neither exhaustive nor mandatory. As we indicated above, neither the NEB nor the Federal Court of Appeal assessed the depth of consultation required in this case. However, the Attorney General of Canada submitted before this Court that the NEB's statutory powers were capable of satisfying the Crown's constitutional obligations in this case, accepting the rights as asserted by the Chippewas of the Thames and the potential adverse impact of a spill. With this, we agree.

48 As acknowledged in its reasons, the NEB, as a quasi-judicial decision maker, is required to carry out its responsibilities under s. 58 of the *NEB Act* in a manner consistent with s. 35 of the *Constitution Act, 1982*. In our view, this requires it to take the rights and interests of Indigenous groups into consideration before it makes a final decision that could impact them. Given the NEB's expertise in the supervision and approval of federally regulated pipeline projects, the NEB is particularly well positioned to assess the risks posed by such projects to Indigenous groups. Moreover, the NEB has broad jurisdiction to impose conditions on proponents to mitigate those risks. Additionally, its ongoing regulatory role in the enforcement of safety measures permits it to oversee long-term compliance with such conditions. Therefore, we conclude that the NEB's statutory powers under s. 58 are capable of satisfying the Crown's duty to consult in this case.

49 However, a finding that the NEB's statutory authority allowed for it to satisfy the duty to consult is not determinative of whether the Crown's constitutional obligations were upheld in this case. The Chippewas of the Thames maintain that the process carried out by the NEB was not an adequate substitute for Crown consultation. In particular, the Chippewas of the Thames argue that the NEB's regulatory process failed to engage affected Indigenous groups in a "meaningful way in order for adverse impacts to be understood and minimized" (A.F., at para. 110). They allege that the NEB's process did not "apprehend or address the seriousness" of the potential infringement of their treaty rights and title, nor did it "afford a genuine opportunity for accommodation by the Crown" (A.F., at para. 113). By minimizing the rights of the affected Indigenous groups and relying upon the proponent to mitigate potential impacts, they allege the process undertaken by the NEB allowed for nothing more than "blowing off steam" (*ibid.*).

50 Enbridge, on the other hand, argues not only that the NEB was capable of satisfying the Crown's duty to consult but that, in fact, it did so here. In support of its position, Enbridge points to the Chippewas of the Thames' early notice of, and participation in, the NEB's formal hearing process as well as the NEB's provision of written reasons. Moreover, Enbridge submits that far from failing to afford a genuine opportunity for accommodation by the Crown, the NEB's process provided "effective accommodation" through the imposition of conditions on Enbridge to mitigate the risk and effect of potential spills arising from the project (R.F., at para. 107).

51 In our view, the process undertaken by the NEB in this case was sufficient to satisfy the Crown's duty to consult. First, we find that the NEB provided the Chippewas of the Thames with an adequate opportunity to participate in the decision-making process. Second, we find that the NEB sufficiently assessed the potential impacts on the rights of Indigenous groups and found that the risk of negative consequences was minimal and could be mitigated. Third, we agree with Enbridge that, in order to mitigate potential risks to the rights of Indigenous groups, the NEB provided appropriate accommodation through the imposition of conditions on Enbridge.

52 First, unlike the Inuit in the companion case of *Clyde River (Hamlet)*, the Chippewas of the Thames were given a sufficient opportunity to make submissions to the NEB as part of its independent decision-making process (consistent with *Haida Nation*, at para. 44). Here, the NEB held an oral hearing. It provided early notice of the hearing process to affected Indigenous groups and sought their formal participation. As mentioned above, the Chippewas of the Thames participated as an intervener. The NEB provided the Chippewas of the Thames with participant funding which allowed them to prepare and tender evidence including an expertly prepared "preliminary" traditional land use study (C.A. reasons, at para. 14). Additionally, as an intervener, the

Chippewas of the Thames were able to pose formal information requests to Enbridge, to which they received written responses, and to make closing oral submissions to the NEB.

53 Contrary to the submissions of the Chippewas of the Thames, we do not find that the NEB minimized or failed to apprehend the importance of their asserted Aboriginal and treaty rights. Before the NEB, the Chippewas of the Thames asserted rights that had the potential to be impacted by the project: (a) Aboriginal harvesting and hunting rights; (b) the right to access and preserve sacred sites; (c) Aboriginal title to the bed of the Thames River and its related airspace or, in the alternative, an Aboriginal right to use the water, resources and airspace in the bed of the Thames River; and (d) the treaty right to the exclusive use of their reserve lands. In its written reasons, the NEB expressly recognized these rights. Moreover, in light of the rights asserted, the NEB went on to consider whether affected Indigenous groups had received adequate information regarding the project and a proper opportunity to express their concerns to Enbridge. It noted that the project was to occur within Enbridge's existing right of way on previously disturbed land. No additional Crown land was required. Given the scope of the project and its location, the NEB was satisfied that all Indigenous groups had been adequately consulted.

54 Second, the NEB considered the potential for negative impacts on the rights and interests of the Chippewas of the Thames. It identified potential consequences that could arise from either the construction required for the completion of the project or the increased risk of spill brought about by the continued operation of Line 9.

55 The NEB found that any potential negative impacts on the rights and interests of the Chippewas of the Thames from the modification of Line 9 were minimal and could be reasonably mitigated. The NEB found that it was unlikely that the completion of the project would have any impact on the traditional land use rights of Indigenous groups. Given the location of the project and its limited scope, as well as the conditions that the NEB imposed on Enbridge, the NEB was satisfied that the risk of negative impact through the completion of the project was negligible.

56 Similarly, the NEB assessed the increased risk of a spill or leak from Line 9 as a result of the project. It recognized the potential negative impacts that a spill could have on traditional land use, but found that the risk was low and could be adequately mitigated. Given Enbridge's commitment to safety and the conditions imposed upon it by the NEB, the NEB was confident that Line 9 would be operated in a safe manner throughout the term of the project. The risk to the rights asserted by the Chippewas of the Thames resulting from a potential spill or leak was therefore minimal.

57 Third, we do not agree with the Chippewas of the Thames that the NEB's process failed to provide an opportunity for adequate accommodation. Having enumerated the rights asserted by the Chippewas of the Thames and other Indigenous groups, the adequacy of information provided to the Indigenous groups from Enbridge in light of those rights, and the risks to those rights posed by the construction and ongoing operation of Line 9, the NEB imposed a number of accommodation measures that were designed to minimize risks and respond directly to the concerns posed by affected Indigenous groups. To facilitate ongoing communication between Enbridge and affected Indigenous groups regarding the project, the NEB imposed Condition 24. This accommodation measure required Enbridge to continue to consult with Indigenous groups and produce Ongoing Engagement Reports which were to be provided to the NEB. Similarly, Condition 29 required Enbridge to file a plan for continued engagement with persons and groups during the operation of Line 9. Therefore, we find that the NEB carried out a meaningful process of consultation including the imposition of appropriate accommodation measures where necessary.

58 Nonetheless, the Chippewas of the Thames argue that any putative consultation that occurred in this case was inadequate as the NEB "focused on balancing multiple interests" which resulted in the Chippewas of the Thames' "Aboriginal and treaty rights [being] weighed by the Board against a number of economic and public interest factors" (A.F., at paras. 95 and 104). This, the Chippewas of the Thames assert, is an inadequate means by which to assess Aboriginal and treaty rights that are constitutionally guaranteed by s. 35 of the *Constitution Act*, *1982*.

59 In *Carrier Sekani Tribal Council*, this Court recognized that "[t]he constitutional dimension of the duty to consult gives rise to a special public interest" which surpasses economic concerns (para. 70). A decision to authorize a project cannot be in the public interest if the Crown's duty to consult has not been met (*Clyde River (Hamlet)*, at para. 40; *Carrier Sekani Tribal Council*, at para. 70). Nevertheless, this does not mean that the interests of Indigenous groups cannot be balanced with other

interests at the accommodation stage. Indeed, it is for this reason that the duty to consult does not provide Indigenous groups with a "veto" over final Crown decisions (*Haida Nation*, at para. 48). Rather, proper accommodation "stress[es] the need to balance competing societal interests with Aboriginal and treaty rights" (*Haida Nation*, at para. 50).

60 Here, the NEB recognized that the impact of the project on the rights and interests of the Chippewas of the Thames was likely to be minimal. Nonetheless, it imposed conditions on Enbridge to accommodate the interests of the Chippewas of the Thames and to ensure ongoing consultation between the proponent and Indigenous groups. The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process (*Haida Nation*, at para. 50).

G. Were the NEB's Reasons Sufficient?

61 Finally, in the hearing before us, the Chippewas of the Thames raised the issue of the adequacy of the NEB's reasons regarding consultation with Indigenous groups. The Chippewas of the Thames asserted that the NEB's process could not have constituted consultation in part because of the NEB's failure to engage in a *Haida*-style analysis. In particular, the NEB did not identify the strength of the asserted Aboriginal and treaty rights, nor did it identify the depth of consultation required in relation to each Indigenous group. As a consequence, the Chippewas of the Thames submit that the NEB could not have fulfilled the Crown's duty to consult.

62 In *Haida Nation*, this Court found that where deep consultation is required, written reasons will often be necessary to permit Indigenous groups to determine whether their concerns were adequately considered and addressed (*Haida Nation*, at para. 44). In *Clyde River (Hamlet)*, we note that written reasons foster reconciliation (para. 41). Where Aboriginal and treaty rights are asserted, the provision of reasons denotes respect (*Kainaiwa/Blood Tribe v. Alberta*, 2017 ABQB 107 (Alta. Q.B.), at para. 117 (CanLII)) and encourages proper decision making (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 39).

63 We agree with the Chippewas of the Thames that this case required the NEB to provide written reasons. Additionally, as we recognized in the companion case *Clyde River (Hamlet)*, where affected Indigenous peoples have squarely raised concerns about Crown consultation with the NEB, the NEB must usually provide written reasons (*Clyde River*, at para. 41). However, this requirement does not necessitate a formulaic "*Haida* analysis" in all circumstances (para. 42). Instead, where deep consultation is required and the issue of Crown consultation is raised with the NEB, the NEB will be obliged to "explain how it considered and addressed" Indigenous concerns (*ibid.*). What is necessary is an indication that the NEB took the asserted Aboriginal and treaty rights into consideration and accommodated them where appropriate.

64 In our view, the NEB's written reasons are sufficient to satisfy the Crown's obligation. It is notable that, unlike the NEB's reasons in the companion case *Clyde River (Hamlet)*, the discussion of Aboriginal consultation in this case was not subsumed within an environmental assessment. The NEB reviewed the written and oral evidence of numerous Indigenous interveners and identified, in writing, the rights and interests at stake. It assessed the risks that the project posed to those rights and interests and concluded that the risks were minimal. Nonetheless, it provided written and binding conditions of accommodation to adequately address the potential for negative impacts on the asserted rights from the approval and completion of the project.

65 For these reasons, we reject the Chippewas of the Thames' assertion that the NEB's reasons were insufficient to satisfy the Crown's duty to consult.

V. Conclusion

66 We are of the view that the Crown's duty to consult was met. Accordingly, we would dismiss this appeal with costs to Enbridge.

Appeal dismissed.

Pourvoi rejeté.

1999 BCCA 163
British Columbia Court of Appeal

R. v. Seward

1999 CarswellBC 527, 1999 BCCA 163, [1999] 3 C.N.L.R. 299, [1999] B.C.J. No. 587, 119 B.C.A.C. 306, 133 C.C.C. (3d) 437, 171 D.L.R. (4th) 524, 194 W.A.C. 306, 41 W.C.B. (2d) 374, 66 B.C.L.R. (3d) 49

Regina, Respondent and Joseph L. Seward, Appellant

Regina, Respondent and Ken Thomas, Appellant

Regina, Respondent and Dean Thomas, Appellant

Finch, Ryan, Proudfoot JJ.A.

Heard: September 21, 1998
Judgment: March 16, 1999 *
Docket: Vancouver CA023680, CA023681, CA023682

Proceedings: affirming (1998), 3 C.N.L.R. 237 (B.C.S.C.)

Counsel: *Louise Mandell, Q.C.*, and *Stan Guenther*, for the Appellants.
Brian W. Rendell, for the Respondent.

Headnote

Native law --- Constitutional issues — Hunting and fishing — Hunting offences — Application of provincial statutes
Accused were members of aboriginal band — Accused were acquitted of hunting deer with firearm during prohibited hours and hunting with aid of light, contrary to ss. 27(1)(d) and (e) of Wildlife Act — Trial judge found that ss. 27(1)(d) and (e) violated aboriginal rights of accused — Summary conviction appeal court allowed appeal by Crown and entered convictions — Appeals by accused dismissed — Proper test for determining constitutional infringement is whether limitations on aboriginal rights created by ss. 27(1)(d) and (e) are unreasonable — While summary conviction appeal judge misstated test, he would have reached same conclusion had proper test been used — Aboriginal right is identified by crucial elements of practice, custom or tradition integral to distinctive culture of aboriginal group — Hunting deer for specific purposes was integral to culture, but method of hunting at night with light was not — Summary conviction appeal judge did not err in requiring accused to establish method as being "preferred means" of exercising right to hunt — Many hunting methods were in use by band — Hunting at night with light was established as preferred method — Safety concerns associated with method outweighed reasons given by accused for choosing it — Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35(1) — Wildlife Act, S.B.C. 1982, c. 57, ss. 27(1)(d), 27(1)(e).

The judgment of the court was delivered by *Ryan J.A.*:

Introduction

1 This is an appeal from the decision of a summary conviction appeal court justice allowing the appeal of the Crown and entering convictions against the three appellants for hunting deer with a firearm during prohibited hours contrary to s. 27(1)(d) of the *Wildlife Act*, S.B.C. 1982, c. 57 (now R.S.B.C. 1996, c. 488, s. 26(1)(d)), and hunting deer with the aid of an illuminating device contrary to s. 27(1)(e) (now s. 26(1)(e)) of the *Wildlife Act*.

2 Leave is required under s. 124(1) of the *Offence Act*, R.S.B.C. 1996, c. 338. It was unopposed by the Crown respondent. I would grant leave to appeal. Section 124(1) limits the appeal to questions of law alone.

3 The appellants are status Indians and members of the Penelekut Band on Vancouver Island. The underlying facts are undisputed. At issue is whether ss. 27(1)(d) and (e) of the *Wildlife Act* violate the appellants' aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*. The summary conviction appeal court justice reversed the finding of the trial court judge that the legislation in question violated the aboriginal rights of the appellants.

Relevant Legislation

4 Section 35(1) of the *Constitution Act, 1982* reads:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

5 The relevant portions of the *Wildlife Act* provide:

> 27. (1) A person commits an offence where he hunts, takes, traps, wounds or kills wildlife...
>
> (d) with a firearm or a bow during the prohibited hours,
>
> (e) by the use or with the aid of a light or illuminating device,

6 On March 28, 1993, s. 14(1) of *Hunting Regulation* 190/84 to the *Wildlife Act* read:

> Subject to exceptions noted in subsection (2), a person commits an offence where he hunts wildlife from one hour after sunset to one hour before sunrise.

It was amended on June 25, 1993 by B.C. Regulation 212/93 to read:

> Subject to exceptions noted in subsection (2), a person must not hunt wildlife from one hour after sunset to one hour before sunrise.

Factual Background

7 At about 2:45 a.m. on March 28, 1993 a conservation officer, responding to a telephone call, stopped the appellants, Joseph Seward, Ken Thomas and Dean Thomas as they drove down a dirt road known as the "power line road" about 3.2 kilometres from the headwaters of the Copper Canyon outside Chemainus on Vancouver Island.

8 In the box of the pick-up truck driven by Mr. Seward the conservation officer found four freshly killed black tail deer — two adult does, one of which was pregnant, one yearling male and another doe less than a year old.

9 The conservation officer seized two rifles from the vehicle. The first was a 30.06 calibre Ruger rifle, the second a .22 calibre Winchester magnum. One of the rifles had a range of up to 4,166 yards depending on the size of bullet, the other a range of up to 1,826 yards.

10 The officer also seized a powerful hand-held illuminating device and a hand-held camper's flashlight from the vehicle.

11 It is not here in dispute that the appellants shot the deer in the prohibited hours while using an illuminating device.

Evidence Relating to s. 35(1) of the Constitution Act, 1982

12 Joseph Seward told the conservation officer the deer had been taken within the hour further up the power line road back toward Ladysmith. At trial he testified he drove the truck slowly along the side of the road while Dean and Ken Thomas spotted deer with a lamp placed on top of the truck. Once a deer was located, one of the three would approach the animal with his rifle while the other two stayed behind holding the lamp. All of the deer were killed in the open clearing in the logged-off areas along the road. At trial Mr. Seward testified he shot the deer for food for his grandfather and for all of his family. He said he went hunting that night because Ken and Dean had asked him to take them. He could not go during that day because he was

working. He said he liked to hunt at night because it was less time consuming. He said if he went during the day he could ride around all day and not even see a deer.

13 Ken Thomas told the conservation officer he shot the deer for his grandfather and himself. He said he hunted at the end of March rather than later because "later when the fawns were born it wasn't good to shoot a mother or a doe; sometimes fawns are not with the doe so it was possible to shoot a doe and not see the fawn". Mr. Thomas said he thought it was safer to hunt at night than during daylight hours because there were fewer people out in the woods. He said he learned how to hunt at night from his cousins.

14 Dean Thomas testified he shot the deer for his grandmother's burning ceremony. He said his father had no time to do this for his grandmother so he, Dean Thomas, did it for her. He had to go hunting with Joe Seward because Mr. Seward was the only one with a four-by-four vehicle.

15 The appellants offered the evidence of Dr. Suttles, a respected anthropologist, for the purpose of establishing that the Penelekut Band constituted an organized society that traditionally hunted for food and ceremonial purposes in the area now known as the Copper Canyon. Dr. Suttles also gave evidence about the traditional hunting methods of the Penelekut people.

16 Dr. Suttles testified the Penelekut Band is a subgroup of the Coast Salish Indian Nation. He said there is no known archaeological work which targets the territory historically occupied by the Penelekut; however, the archaeological work which has been done in the general area suggests a continuity in the Coast Salish culture for at least two millennia. Dr. Suttles testified that hunting deer and elk was an important part of the regional and Penelekut economy. He said in the days before firearms the Penelekut hunted with bow and arrow, organized drives and used pitfalls. Deer were stalked by men in deer disguise but this was later abandoned because, Dr. Suttles believed, it became dangerous when firearms were introduced in the middle of the last century. Dr. Suttles testified that the Penelekut very probably also hunted in a canoe with a flare as other Coast Salish did. Dr. Suttles said:

> You have a hearth in the canoe and you build a fire, a pitch fire, and you paddle along. The deer are up on the hillside and I was told that it's not that the deer are attracted to the light but rather as you paddle the shadows of the trees behind them look like a whole crowd of people coming at them and they run down to the shore where if they swim they may be clubbed -- killed by clubbing. If they don't they just come to the shore and you may shoot them and that was the pretty usual way of hunting where you had a lake or a stream or something to hunt on, saltwater to hunt on.

17 Dr. Suttles testified that as pit miners' lamps became available they replaced the old pitch fires.

18 Benedict Thomas, an elder of the Penelekut Band, testified that as a young man he heard of hunters hunting at night. He said that they would use carbide lamps on their foreheads to look around. Although he hunted, he had never done it at night.

19 Dominick Thomas, an elder of the Penelekut Band said he had been told by his grandfather that hunters would "soak pitch on coal oil lamps and drape it on the end of sticks" to light their way at night. He said he sometimes hunted at night and he had seen his father hunt at night "a few times, but not all the time". He testified that most of his grandfather's generation used to hunt at night. He said they were able to see at night with the use of a coal miner's lamp. His evidence was unclear as to whether he had ever seen his grandfather hunt at night. Mr. Thomas said his grandchildren hunt for him now and as deer are scarce it is sometimes easier to hunt them at night.

20 The appellants called evidence that their traditions required them to respect the animals that they killed, to use most of the parts of the deer rather than waste them, to hunt only buck deer for conservation purposes, and to hunt in a safe manner. Each appellant testified that when they fired their rifles on the night in question they did so taking all precautions to ensure that no other animals or human beings were in their line of fire.

21 The Crown called evidence that hunting at night aided by illumination is inherently unsafe. Two conservation officers testified that the use of the light produces tunnel vision. The hunter is unable to see anything too much beyond either side of the light beam. A hunter could fail to see moving objects nearby such as people or animals. A hunter could miss fixed objects

such as rock bluffs which could cause a stray bullet to ricochet. A fundamental tenet of hunting is that when the hunter pulls the trigger the hunter should be able to see the target and beyond. This ability is significantly diminished when hunting at night, even with a light.

22 The Crown called evidence from a biologist with hunting experience who said conservation often requires that only full-grown buck deer be taken. Night hunting hinders conservation because of the difficulty it presents the hunter in distinguishing adult deer from young deer and females from males. It is also harder to determine species at night.

Determining a Breach of an Aboriginal Right

23 It was common ground that in determining whether an aboriginal right has been breached there are two main stages of analysis. First, the holder of the right must establish that there has been a *prima facie* breach. If it is shown that there is a *prima facie* breach, the analysis must move to the second step. At this stage the Crown bears the onus of proving that the breach was justified.

Prima Facie Breach

a. The definition of the right

24 In determining whether there has been a *prima facie* breach of an aboriginal right it must be first determined whether the party in question has an aboriginal right and that right must be defined. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), Dickson C.J.C. said this inquiry begins with a reference to the characteristics or incidents of the right at stake. At this point in the analysis it is crucial to be sensitive to the aboriginal perspective when determining the meaning of the rights at stake. As Dickson C.J.C. noted in *Sparrow* about fishing rights (p. 1112), it is artificial to try to create a hard distinction between the right to fish and the particular manner in which that right is exercised.

25 In *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), Lamer C.J.C. said this, at para. 44:

> In order to fulfil the purpose underlying s. 35(1) — i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions — the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those preexisting distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.
>
> [Emphasis added]

26 After discussing a passage from the *Sparrow* case, Lamer C.J.C. said this, at paras. 45-46:

> ...identifying those practices, customs and traditions that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of the Europeans.
>
> In light of the suggestion of *Sparrow, supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> [Emphasis added]

27 Lamer C.J.C. made it clear as well that in assessing a claim to an aboriginal right a court must first identify the *nature* of the right being claimed. The court must correctly determine what it is that is being claimed. The focus is the nature of the aboriginal community's practices, customs or traditions themselves. Lamer C.J.C. said at para. 52:

> The nature of an applicant's claim must be delineated in terms of the particular practice, custom or tradition under which it is claimed; the significance of the practice, custom or tradition to the aboriginal community is a factor to be considered in determining whether the practice, custom or tradition is integral to the distinctive culture, but the significance of a practice, custom or tradition cannot, itself, constitute an aboriginal right.
>
> [Emphasis added]

28 In determining whether a practice, custom or tradition is integral to a distinctive culture the claimant must satisfy the court that the practice, custom or tradition was one of the things that truly made the society what it was. On this point Lamer C.J.C. said at para. 55:

> To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, custom or tradition was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, custom or tradition was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, custom or tradition was one of the things which made the culture of the society distinctive — that it was one of the things that truly made the society what it was.
>
> [Emphasis in original]

29 In the case at bar there was agreement between the Crown and the appellants that the Penelekut people had an aboriginal right to hunt deer for sustenance and ceremony. The appellants asserted that the Penelekut characteristically hunted for deer at night by the use of illuminating devices and that this method of hunting was protected as part of the Penelekut's broader right to hunt deer for food.

30 The trial judge did not accept the characterization of the aboriginal right as suggested by the appellants. He noted that Dr. Suttles had referred to many ways the Penelekut people hunted deer. But as for hunting at night with the use of illumination, the trial judge said (at para. 22):

> On this particular point I am left in some doubt. It may be that pitch flares were used in order that the hunters might see where they were going at night or it may be that they used pitch flares to somehow entrap or [entice] the deer so they could more easily kill them. I do not know for certain, but in my view, it is unnecessary to determine that issue to resolve this case.

31 Instead, he concluded that the Penelekut people had an "unrestricted" aboriginal right to hunt for food and for ceremonial purposes. He said (at para. 38):

> I see nothing in the evidence to suggest that the aboriginal right to hunt deer was, in historical times, restricted according to season, time of day, weapon, or trap, within which latter characterization I include halogen lamps. This hunt was not undertaken for sporting purposes. It was undertaken for food and ceremonial purposes and nothing that I heard of the Penelakut culture precluded the practices of night hunting with lights. Indeed, the evidence I heard supported such practices.

32 By this I understand the trial judge to mean that the that the method of hunting at night with the use of light was not a practice integral to the Penelekut tradition of hunting for food and ceremony. This method of hunting may have taken place, but if it did, it was not in and of itself, integral to the culture. It was the securing by hunting of the animals for food and ceremonial purposes that was important. The Penelekut used many methods to hunt deer. Hunting deer for food and ceremonial purposes is what made the Penelekut who they were, not any particular method of hunting, or at least not hunting at night with the aid of illumination.

33 In this Court the appellants submitted that the trial judge concluded that the Penelekut possess an aboriginal right to hunt which encompasses the method of hunting at night with the aid of a light and that the Supreme Court justice erred in requiring the appellants to establish this method as a "preferred means" of exercising the right to hunt at the time of contact. (I will return to the concept of preferred means shortly.) I do not think the reasons for judgment of the trial judge bear the interpretation suggested by the appellants. The summary conviction appeal justice did not characterize the aboriginal right any differently than

the trial judge. On the evidence I cannot say the trial judge or the summary conviction appeal justice was wrong. The appellants fell short of establishing that hunting with a light at night was a crucial element of the distinctive culture of the Penelekut people. This method of hunting did not achieve constitutional status as an aboriginal right.

34 Both the trial judge and the appeal court judge recognized that this did not end the matter. They found that the Penelekut had traditionally enjoyed an "unrestricted" right to hunt deer for food and ceremonial purposes. In other words, they enjoyed a right to hunt for deer which did not exclude any particular method of hunting. The question was whether legislation which prohibited one method of hunting was a *prima facie* breach of the broader right to hunt.

b. Does the legislation interfere with the appellants' aboriginal right to hunt for food and ceremonial purposes?

35 The *Sparrow* case (at p. 1112) sets out a three-step process to determine whether an aboriginal right has been interfered with such as to constitute a *prima facie* infringement of s. 35(1). These questions must be addressed:

1. Is the limitation unreasonable?

2. Does the limitation impose undue hardship?

3. Does the regulation deny to the holders of the right their preferred means of exercising that right?

36 In *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), Lamer C.J.C. said this for the majority at para. 43:

> The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

37 From this passage it appears that the Court, in *Gladstone* understood the concept of *prima facie* infringement to mean any meaningful diminution of the appellants' rights. The three factors in *Sparrow* assist in gauging whether there has been a diminution.

38 In examining the factors set out in the *Sparrow* case the trial judge found that the legislation in question caused no "undue hardship". At this stage of the analysis the declined to examine the reasonableness of the limitations the legislation placed on hunting at night or with an illumination device. He found a *prima facie* breach solely on the basis that ss. 27(1)(d) and (e) of the *Wildlife Act* constituted a significant interference with the preferred means of exercising the appellants' aboriginal right to hunt deer. He concluded that the defendants were denied their preferred means of exercising their right because they were deprived of a method which was more convenient to them. He said (at para. 43):

> In summary, it was more convenient for them to hunt at night with the use of lights and it was easier for them to succeed in their hunt... The defendants were denied their preferred method of exercising their right.

39 The Supreme Court justice held that the trial judge misinterpreted the meaning of "preferred means". The Supreme Court justice held that "The definition of 'preferred' does not ... incorporate elements such as what the respondents chose to do because of the availability of a ride, or that they could kill deer faster." He said (at para. 71):

"Preferred" must be considered in the cultural context of the aboriginal right to hunt to which the Penelakuts were entitled. There is academic speculation that the Penelakuts might have followed the traditions of other coastal tribes. However, the evidence does not support any conclusion that night hunting was the Penelakuts preferred means of exercising the right to hunt. The most that can be taken from the evidence is, as noted by the trial judge, that night hunting with lights was not "precluded" as being a part of the Penelakut culture.

40 On this appeal the appellants accepted that the Supreme Court justice correctly identified the error of the trial judge in defining "preferred means" as an individual choice. The appellants accepted that "preferred means" are established at the community level (*R. v. Sampson* (1995), 67 B.C.A.C. 180 (B.C. C.A.) at p. 194). The appellants submitted that the Supreme Court justice was wrong however, in the meaning he gave to the phrase. The appellants submitted that he erred in looking only to the methods of hunting which existed at the time of contact rather than the customs and practices of the Penelekut people as they have evolved over time.

41 In my view the Supreme Court justice did not err in examining the methods the Penelekut used for hunting at the time of contact. In the passage I have quoted above the Supreme Court justice was simply pointing out that the appellants had not established that night hunting was ever a "preferred means". The appellants are right when they say that traditions evolve over time and that it must be present day practices that are examined. The point here is that the evidence established that Penelekut hunters were known to hunt at night on occasion but that such activity had never reached the level of a preferred means.

42 Having found that the trial judge erred in his assessment of the "preferred means" factor in the *Sparrow* test it fell to the Supreme Court justice to examine the other factors to determine whether it could be said that the trial judge erred in law in finding a *prima facie* breach of an aboriginal right in the case at bar.

43 The Supreme Court justice accepted the findings of the trial court judge that there was no undue hardship in this case.

44 Nothing that the trial judge had failed to consider the question of reasonableness in this part of the examination the Supreme Court justice concluded "on the evidence" that the impugned legislation is reasonable because it is legislation aimed at ensuring safety. He concluded that the evidence did not form a foundation upon which to conclude that the appellants suffered a *prima facie* infringement of their right to hunt by reason of the impugned legislation.

45 The appellants did not challenge the finding that the legislation in question was aimed at ensuring safety. They submitted that the question for the Supreme Court justice was not whether the *legislation* was unreasonable, it was whether the *limitation* it placed on the right of the appellants to hunt for food and ceremonial purposes was unreasonable.

46 I agree with the appellants that the proper formulation of the test is whether the limitation created by the legislation is an unreasonable infringement. Had the Supreme Court justice posed that question he would, in my view, have reached the same conclusion.

47 Dr. Suttles' descriptions of the hunting practices of the Penelekut people at the time of contact were descriptions of practices which contained a significant element of danger only to those involved in the hunt and to the animals being hunted. As the methods of hunting evolved and rifles were introduced, certain methods of hunting were abandoned. Some were forsaken as unsafe. As I mentioned earlier Dr. Suttles said that the use of deer disguises vanished with the introduction of rifles likely because it was dangerous. A man could be mistaken for a deer. The Penelekut hunting methods, from the descriptions offered at trial, were designed to be carried out in the safest manner possible. This tradition has been a constant feature of Penelekut hunting practices. There was evidence that the training of hunters today includes the safe handling and firing of guns. The introduction of rifles has significantly heightened the danger of hunting. Not just the hunters, but anyone within a mile radius of a hunter is at risk. This is especially so at night when the fact of darkness transforms a dangerous endeavour into a hazardous one. It does not matter that an individual might be able to hunt at night without injuring anyone, the fact is that the possibility of death or injury is increased when visibility is decreased and one or more hunters are in the woods.

48 When measured against the standard of safety which has been a tradition in Penelekut culture, I am not persuaded that legislation which forbids hunting at night with a rifle and with illumination can be said to be an unreasonable limitation on the Penelekut right to hunt for food or ceremonial purposes.

49 The appellants submitted however that the fact that the appellants had limited resources (Dean and Ken Thomas did not own vehicles to take hunting in the Copper Canyon) and limited time (Joe Seward's employment prevented him from hunting in the day, Dean and Ken Thomas needed food to feed their families and to offer in a burning ceremony) left it open to the trial judge to conclude that the impact of the restriction was sufficient to constitute a *prima facie* infringement of the right to hunt. In other words, although none of the factors in *Sparrow* have been met, the court ought to conclude that there was a *prima facie* infringement of the appellants' right to hunt for food. In my view these concerns fail to outweigh the more important value of safety. As a result I cannot say that the restrictions found in ss. 27(1)(d) and (e) of the *Wildlife Act* may be said to be a meaningful diminution of the right to hunt for food and ceremonial purpose such that it constitutes a *prima facie* breach of the appellants' rights under s. 35(1) of the *Constitution Act, 1982*.

Conclusion

50 I agree with the Supreme Court justice that the aboriginal rights of the appellants were not interfered with by ss. 27(1)(d) and (e) of the *Wildlife Act*. I would dismiss the appeal.

Appeals dismissed.

Footnotes

* A corrigendum was issued by the court on May 13, 1999; the changes have been incorporated herein.

Date: 20020115
Docket: CAC 169702

NOVA SCOTIA COURT OF APPEAL
[Cite as: R. v. Bernard, 2002 NSCA 5]

Roscoe, Flinn and Cromwell, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

ALLISON BERNARD, JR.

Respondent

REASONS FOR JUDGMENT

Counsel:	William D. Delaney/Kimberly Franklin for the Appellant Douglas E. Brown for the Respondent
Appeal Heard:	October 5, 2001
Judgment Delivered:	January 15, 2002

THE COURT: Leave to appeal is granted, the appeal is allowed, the decision of the Summary Conviction Appeal Court set aside and the conviction and sentence ordered by the trial judge restored as per reasons for judgment of Roscoe, J.A.; Flinn and Cromwell, JJ.A., concurring.

ROSCOE, J.A.:

I Introduction:

[1] The issue on this appeal is whether the prohibition of hunting at night with a light unjustifiably infringes the respondent's aboriginal right to hunt for food. The respondent, Allison Bernard, who is Mi'kmaq, was convicted by Provincial Court Judge Peter Ross of hunting wildlife with the assistance of a light contrary to s. 68 of the **Wildlife Act**, R.S.N.S. 1989, c. 504, as amended. (See: [2000] N.S.J. No. 58). Judge Ross acquitted the respondent of a charge of possessing an uncased firearm in a wildlife habitat contrary to s. 80(4) on the basis of the defence of officially induced error and there was no appeal in relation to that matter. The Crown now appeals from a decision of Associate Chief Justice Michael MacDonald who allowed the respondent's summary conviction appeal and entered an acquittal on the s. 68 charge. (See: (2001) 191 N.S.R. (2d) 353).

[2] At trial, the respondent took the position that the activity he engaged in was not "hunting", but if his actions were found to constitute the **actus reus** of the offence, that he was exempt from its operation on the basis that he was exercising an aboriginal right. There is, at this point, no longer any issue that the respondent was "hunting", as that word is defined in the **Wildlife Act**, with the assistance of a light on November 26, 1997. The issue is whether the respondent's aboriginal right to hunt for sustenance is exempted from the application of s. 68 of the **Wildlife Act** because it violates his aboriginal rights protected by s. 35(1) of the **Constitution Act**, 1982:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[3] The applicable sections of the **Wildlife Act** state:

> 3 (1) . . .
>
> (ad) "hunting" means chasing, driving, flushing, attracting, pursuing, worrying, following after or on the trail of, searching for, trapping, attempting to trap, snaring or attempting to snare, shooting at, stalking or lying in wait for any wildlife whether or not the wildlife is then or subsequently captured, killed, taken

> or wounded, but does not include stalking, attracting, searching for or lying in wait for any wildlife by an unarmed person solely for the purpose of watching or taking pictures of it;
>
> . . .
>
> 68 Except as provided in this Act or the regulations, every person is guilty of an offence who takes, hunts or kills or pursues with intent to take, hunt or kill wildlife by means of, or with the assistance of, a light or flambeau.

II **Facts**:

[4] The Summary Conviction Appeal Court judge summarized the pertinent facts as follows:

> ¶ 2 On November 27, 1997, Mr. Bernard, along with his brother and another friend, went rabbit hunting throughout various areas in rural Cape Breton. While driving along the Northside East Bay Highway, en route home, Mr. Bernard, was seated in the front passenger seat of their extended cab pick-up truck. He shone a high-powered flood light into a field adjacent to the highway. This field was part of what was known as the "MacGillivary" farm.
>
> ¶ 3 The trio was spotted by conservation officers and subsequently stopped. An unloaded but uncased 22 caliber rifle was seized from the rear floor of the truck along with two flood lights. Ammunition for the rifle was in the truck's console. All three men were charged with jacking deer and Mr. Bernard was charged with carrying an uncased firearm.
>
> ¶ 4 At trial before Judge Ross, Mr. Bernard's brother and friend were acquitted as non-parties to the venture. Mr. Bernard was acquitted of the uncased firearm charge but convicted of the more serious deer jacking charge . . .

III **The decision of the trial judge**:

[5] As will be developed later in these reasons, a significant issue in this case is whether safety objectives are served by s. 68 of the **Wildlife Act**. It is therefore helpful in reviewing the decision at trial to include some particulars of the evidence and the findings of fact of the trial judge relevant to that issue.

[6] The area where the respondent shone the high-powered flood lights was described as a rural residential area, with scattered farms and fields, houses and

seasonal dwellings. The beam of light shone by the respondent illuminated the entire field next to the MacGillivary barn for three to five seconds so as to reveal any wildlife that may have been present. The gun the respondent had was capable of killing wildlife, including deer, and the area in question was a wildlife habitat. The respondent characterized his activity as "scouting" for deer, not hunting. He testified that if he had seen any deer, he would have come back in the morning of the next day with a high-powered rifle. He also indicated that he had understood that a Nova Scotia Department of Natural Resources operational bulletin 74, dated October 1993, decreed that Mi'kmaq hunters would not be prosecuted for hunting in violation of any of the provisions of the **Wildlife Act**, unless safety issues were involved.

[7] Conservation Officer Bruce Nunn testified that s. 68 served both a safety and a conservation purpose. Conservation Officer Allistair Patterson noted that there had been a number of complaints from landowners of night hunting near their houses and he considered that hunting with a light was an inherently dangerous practice, principally because the hunter is unable to see things behind and to the side of the area illuminated. Conservation Officer Thomas Bennett was also of the opinion that hunting at night with a light was unsafe.

[8] John Mombourquette, the Director of the Enforcement Division of the Department of Natural Resources, testified that the department considered safety in a broad sense, including not only the general public, but also the safety of individual native hunters. He was of the view that s. 68 addressed safety concerns of rural residents and was aware of instances where people hunting at night with a light had been fired upon by homeowners. Hunting at night with a light, even in a remote area, he indicated, would be unsafe because of the possibilities that there could be campers or hikers in the same area. Another safety issue noted by Mr. Mombourquette, which arises from the use of high-powered lights on or near highways, is that shining the light into the eyes of an oncoming driver could temporarily blind the driver. He testified that although s. 68 also addresses conservation concerns, it is primarily a safety related provision.

[9] Mr. Mombourquette also provided evidence respecting his role in consultations with native groups regarding hunting safety and conservation issues. He indicated that it had never been departmental policy that aboriginal hunters would not be prosecuted for hunting with a light at night. As well, Mr. Mombourquette noted that as a result of a number of complaints received with

regard to aboriginal people hunting at night in residential areas, the operational bulletin relied on by the respondent had been amended in 1996. The revised policy indicates that provisions of the **Wildlife Act** relating to safety and conservation would be enforced against aboriginal hunters. The amendment was made after consultation with groups representing the aboriginal community of Nova Scotia concerning the use of lights for hunting. The departmental position was that safety was paramount.

[10] A witness for the defence, John Prosper, Co-Executive Director of the Mi'kmaq Fish and Wildlife Commission, a natural resource management body for the Mi'kmaq people, acknowledged that there had been periodic discussions between the Province and native groups regarding hunting with a light. He testified that night hunting by aboriginal people had always been a common practice.

[11] After reviewing the evidence in detail, Judge Ross thoroughly summarized the applicable principles from the relevant case law, including **R. v. Simon**, [1985] 2 S.C.R. 387; **R. v. Denny et al.** (1990), 55 C.C.C. (3d) 322 (N.S.C.A.); **R. v. Sparrow**, [1990] 1 S.C.R. 1075; **R. v. Myran**, [1976] 2 S.C.R. 137; **R. v. McCoy**, [1993] N.B.J. No. 597 (Q.L.)(N.B.C.A.); **R. v. Paul** (1998), 124 C.C.C. (3d) 1 (N.B.C.A.); **R. v. Badger**, [1996] 1 S.C.R. 771; **R. v. Gladstone**, [1996] 2 S.C.R. 723; **R. v. Adams**, [1996] 3 S.C.R. 101; **R. v. Seward** (1999), 133 C.C.C. (3d) 437 (B.C.C.A.); **R. v. Van der Peet**, [1996] 2 S.C.R. 507; and **R. v. Marshall**, [1999] S.C.J. No. 66 (Q.L.) (S.C.C.).

[12] Judge Ross also reviewed cases dealing with specific sections of the **Wildlife Act**, and the elements of the offences charged, and concluded that the respondent:

> . . . was purposefully and deliberately searching for game. Moreover, he possessed the tools - the lights, rifle and ammunition - which would have made possible a further prosecution of the hunt at that time. In other words, he had the present ability to take and kill any animal he may have spotted, should he have chosen to do so.

[13] Next, Judge Ross performed the analysis directed by **Sparrow**, that is, he examined whether ss. 68 and 80(4) of the **Wildlife Act** constituted a **prima facie** infringement of the respondent's aboriginal right to hunt for food constitutionally recognized by s. 35(1) by determining if the limitation on the right was

unreasonable, whether it imposed undue hardship and whether it denied a preferred means of exercising the right. The trial judge observed that the Supreme Court of Canada had recognized in **Badger** and **Simon** that aboriginal rights must be exercised with regard to public safety and then stated: [§62]

> . . . Safety appears to be such a basic and fundamental consideration that any law or regulation which advances important safety objectives is almost by definition (a) reasonable, (b) does not impose undue hardship, and (c) does not deny a preferred means of exercising the right. The defendant has not shown that a prohibition against hunting at night with a light significantly impinges on his ability to hunt for food. Obviously, the right may still be exercised during the day at which time the defendant and other Mi'kmaq are capable of taking game in a reasonably efficient manner. A reasonable safety limitation, such as s. 68, may be imposed on all hunters, whether they are Mi'kmaq hunting pursuant to their constitutional right, or others hunting pursuant to a license. Such a law need not take account of historical or ancestral differences. Rather, it takes account of similarities. A bullet is equally dangerous to Mi'kmaq and non-Mi'kmaq alike. At this stage the onus is on the defendant to show that the purpose or effect of the restriction unnecessarily infringes the interests protected by the right. I do not think that the defence has met that onus here.

[14] Judge Ross continued by indicating that if he was wrong in concluding that there was no **prima facie** infringement, that the Crown had justified the infringement. In this respect, the trial judge acknowledged that the Crown had to prove that there was a valid legislative objective and the law had to be consistent with the Crown's fiduciary duty towards aboriginal people. He found that s. 68 and s. 80(4) did not address conservation issues in "any significant way", but that public safety was a valid legislative directive. Furthermore, the restrictions imposed by the sections at issue were not overreaching, given the safety objective. Judge Ross concluded this section of the decision as follows:

> ¶ 67 While aboriginal and treaty rights are not "frozen" rights neither is the society in which they can be practiced. The area known now as Northside East Bay is very different than the land in which the Mi'kmaq hunted in the mid 1700's. There were then no highways, no motor vehicles, no farms or permanent dwellings, no rifles and bullets. The legitimate need to preserve the safety of the public must also be exercised and interpreted flexibly and proceed apace with the evolution of hunting methodologies. Hunters today using instruments with a much greater capability to inflict harm than a traditional bow and arrow. They hunt in areas occupied and utilized by many more people in a variety of ways. Mi'kmaq and others share much of the same space, use the same roads and

> methods of transportation, have access to the same weapons and are subject to the same dangers from misuse of such. While certain sections of the Wildlife Act appear to be aimed at preserving the "sport" aspect of hunting, it is equally clear that many are concerned primarily with safety, e.g. shooting from the highway, shooting from a vehicle, and shooting around houses. Even if certain techniques might be effective and efficient means to take game for food purposes, the government acts justifiably in regulating or prohibiting certain activities as inherently dangerous. A society in which all people feel safe and secure is conducive to the long term interests of Mi'kmaq and non-Mi'kmaq alike. Statements in Simon and Sparrow indicate that it is inherent in any treaty or aboriginal right that such be exercised safely. It is difficult to imagine that any traditional hunting method employed by Mi'kmaq in years gone by created a risk that instead of killing their prey, they killed one another. The evolution of methods and the flexible approach which should be taken must surely also carry along with it this basic tenet, namely, that the methodology not put other persons at undue risk. Today's high powered firearms and million candle-power Q-Beams are a long way from the bows and torches used by Mi'kmaq centuries ago.

[15] Although not particularly relevant to the issues on this appeal, as noted above, Judge Ross acquitted the respondent of the charge pursuant to s. 80(4), carrying an uncased firearm in a wildlife habitat at night, on the basis of officially induced error, based on the information contained in the departmental bulletin 74.

IV The decision of the Summary Conviction Appeal Court judge:

[16] After setting out the facts and issues, Associate Chief Justice MacDonald characterized the trial decision as having been founded on the determination that s. 68 of the **Wildlife Act** was a safety-based provision to which the respondent's aboriginal rights must yield [§ 8]. After summarizing the trial decision, MacDonald, A.C.J. defined his role as one of establishing ". . . the *legislative* objective behind s. 68" [§19].

[17] After noting that the **Wildlife Act** does not expressly mention safe hunting as an object, MacDonald, A.C.J. indicated that while he agreed with the trial judge that some sections of the **Act** were obviously safety-based, he did not share the opinion that s. 68 fell into that category. He considered that other legislative objectives such as conservation and preserving the sport of hunting could also be the purpose of prohibiting hunting with a light. Since there was no extrinsic evidence, such as the legislative debates, admitted into evidence, he found it necessary to analyse the legislative scheme, the legislative evolution of the

impugned section, and the principles of statutory interpretation in aboriginal matters, in order to draw inferences as to the legislative objective of s. 68.

[18] In the course of the analysis, MacDonald, A.C.J. pointed out that since there was a ". . . host of alternate safety provisions the case for s. 68 being safety-based becomes less compelling" [§ 39]. Furthermore, his review of the evolution of the section led him to conclude that it was clear that the prohibition of night hunting "... originated as a species-based initiative with conservation as opposed to safety as the goal" [§ 47]. After commenting that aboriginal rights are to be interpreted generously and liberally in favour of aboriginals [§ 48], and any ambiguities should be resolved in such a way as to enhance those rights [§ 49], he concluded at § 52:

> In light of all the above, I am not satisfied that safety is the primary object of s. 68. A review of the *Act* generally does nothing to advance a safety-based theory and is at best equivocal. The legislative history seems to support a conservation object. In any event, while its purpose is far from clear, I feel compelled to interpret this section in a manner that enhances (as opposed to restricts) aboriginal rights.

[19] Associate Chief Justice MacDonald determined that since Judge Ross had erred in law in concluding that s. 68 was safety-based, the appeal should be allowed. Rather than return the matter for a new trial, he proceeded to address the infringement and justification issues, finding that in the absence of safety considerations, there is a clear infringement of the aboriginal right to hunt and the infringement is unjustified. Accordingly, given that there would unlikely be additional evidence at a retrial, it was found expedient to enter an acquittal.

V Issues:

[20] The Crown raises the following issues:

1. Did the summary conviction appeal court Judge err in law in concluding that the primary legislative purpose of s.68 of the **Wildlife Act**, R.S.N.S. 1989, c.504, as amended, was not safety?

2. Did the summary conviction Appeal Court Judge err in law in ruling that s.68 of the **Wildlife Act**, R.S.N.S. 1989, c.504, as amended, constituted a **prima facie** infringement of the Respondent's aboriginal right to hunt for food?

3. Did the summary conviction Appeal Court Judge err in law in ruling that s.68 of the **Wildlife Act** was not a justified infringement of the Respondent's aboriginal right to hunt for food?

4. Did the summary conviction Appeal Court Judge err in law in holding that the actions of the accused in the circumstances of this case amounted to the exercise of a constitutionally protected aboriginal right?

VI Analysis:

(a) applicable legal principles:

[21] Before addressing the issues as framed by the appellant, it may be helpful to highlight the significant jurisprudence that will necessarily inform the analysis. The review should commence with an understanding of **Sparrow**, the first case in which the Supreme Court of Canada considered aboriginal rights in light of s. 35(1) of the **Constitution**. In **Sparrow**, commencing at p. 1094, the court developed the test for scrutinizing legislation to ensure appropriate affirmation and recognition of aboriginal rights in accordance with s. 35(1). The test can be conveniently divided into four stages, each involving a number of factors to consider:

1. Was the claimant acting pursuant to an aboriginal right?

    a. How should the aboriginal right be characterized?
    b. What is the contemporary manner in which it may be exercised?

2. Was that aboriginal right extinguished before the enactment of s. 35?

    a. Is the intention of the Legislature to extinguish the aboriginal right clear and plain?

3. Does the legislation interfere with an existing aboriginal right?

    a. Is the limitation on the exercise of the aboriginal right reasonable?
    b. Does the regulation impose undue hardship?

c. Does the legislation deny a preferred means of exercising the aboriginal right?

4. If there is **prima facie** interference, the investigation addresses whether there is justification for the infringement, which is determined by asking:

a. Is there a valid legislative objective?
b. If so, has the objective been implemented in a manner consistent with the honour of the Crown in dealing with aboriginal peoples?
c. Has there been minimal impairment of the aboriginal right?
d. If there has been an expropriation, has there been fair compensation?
e. Has there been consultation with the aboriginal people?

[22] The person challenging the legislation bears the onus at the first and third stages, that is, that there is an aboriginal right in issue, and that it has been infringed by the impugned legislation. If the Crown claims extinguishment, it bears the onus of proving it. If the claimant proves infringement of the right in the third part of the test, at the last stage, the Crown must meet the burden of proving justification.

[23] In **R. v. Badger**, the Supreme Court dealt with moose hunting in the context of a specifically recognized treaty right to hunt for food within a certain geographic area. Although a treaty case, the court acknowledged, in the majority decision of Cory, J., the similarities between treaty rights and aboriginal rights and that s. 35 supports a common approach to infringement [§77- §79]. In the consideration of whether the licensing provisions of the Alberta **Wildlife Act** constituted a **prima facie** infringement of the treaty right to hunt, the court noted that aboriginal and treaty rights ". . . must be exercised with due concern for public safety" [§ 88] and that while ". . . reasonable regulations aimed at ensuring safety do not infringe Aboriginal or treaty rights to hunt for food" [§ 89], the conservation component of the regulations does present an infringement [§ 90]. The matter of one of the aboriginal hunters was remitted for a new trial so that the Crown could present evidence respecting the justification issue.

[24] The next pair of cases relevant to the analysis required in this case are

Gladstone and **Van der Peet** released contemporaneously by the Supreme Court of Canada in 1996 with two other cases: **R. v. Nikal**, [1996] 1 S.C.R. 1013 and **R. v. N.T.C. Smokehouse Ltd.**, [1996] 2 S.C.R. 672. In this series of cases, the court expanded the framework of the **Sparrow** test. (See **Gladstone** § 21). Of particular application to the issues in this case, is the elaboration and clarification respecting proof of the existence of the right and the characterization of the aboriginal right.

[25] At § 46 of **Van der Peet**, Chief Justice Lamer, for the majority, determined that the test for establishing an aboriginal right protected by s. 35, was as follows:

> ...in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[26] The Chief Justice enumerated ten factors to be considered in the "integral to a distinctive culture test":

a. the perspective of the aboriginal peoples themselves
b. the precise characterization of the claim made
c. whether the practice is of central significance to the aboriginal society
d. whether the practice has continuity with the traditions that existed prior to European contact
e. evidentiary rules must be approached in light of the inherent difficulties
f. claims to aboriginal rights must be adjudicated on a specific rather than general basis
g. the practice or custom must be of independent significance to the aboriginal culture in which it exists
h. the influence of European culture will only be relevant if it is demonstrated that the custom is only integral because of the influence
i. both the relationship of the aboriginal peoples to the land and the distinctive societies and cultures must be taken into account.

[27] In elaborating upon the second factor at § 53, the Chief Justice provided three elements that should be considered at the characterization stage: the nature of the action which the appellant is claiming was done pursuant to an aboriginal right, the nature of the legislation said to infringe upon the right and the tradition being relied on to establish the right.

[28] In **Gladstone**, the court provided further clarification of the infringement aspect of the **Sparrow** test in the following passage at § 43:

> The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

[29] Further direction regarding the justification stage of the **Sparrow** test was also provided in **Gladstone**, particularly as it pertains to priority of aboriginal rights which are not subject to internal limitations and the relevance of conservation concerns to those aboriginal rights which are not so limited. (See § 58 et seq.). As well, the government objective factor of the justification part of the **Sparrow** test was further amplified commencing at § 69. Within that analysis, and in the context of a fishing rights case, the following statements pertinent to this case are found at § 73 to §75:

> ¶ 73 Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the

broader community as a whole, equally a necessary part of that reconciliation.

¶ 74 The recognition of conservation as a compelling and substantial goal demonstrates this point. Given the integral role the fishery has played in the distinctive cultures of many aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because conservation is of such overwhelming importance to Canadian society as a whole, including aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of aboriginal rights.

¶ 75 Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.*

[30] Other Supreme Court of Canada cases where the question of whether aboriginal rights might be subject to safety limitations include **R. v. Sutherland**, [1980] 2 S.C.R. 451where, Dickson, C.J., for the court said at p. 460:

> . . . The Province may deny access for hunting to Indians and non-Indians alike but if, as in the case at bar, limited hunting is allowed, then under para. 13, non-dangerous (*Myran et al. v. The Queen*) hunting for food is permitted to the Indians, regardless of provincial curbs on season, method or limit . . .

and **R. v. Sundown**, [1999] 1 S.C.R. 393 where at § 26 Cory, J., for the court commented:

> Meadow Lake Provincial Park is Crown land and members of the public can hunt in it during the specified season. The parties agree that Mr. Sundown has the right to hunt in the park. Like other adherents to Treaty No. 6 he is entitled to hunt for food. This he can do at any time so long as he does not endanger others and complies with the appropriate safety regulations and the conservation regulations, which are justifiable under *Sparrow* . . .

[31] Another decision important to the analysis in this case, especially given the similarity of facts, is **R. v. Seward** (1999), 133 C.C.C. (3d) 437 (B.C.C.A.) [application for leave to appeal to the Supreme Court of Canada dismissed on March 9, 2000; [1999] S.C.C.A. No. 238]. In **Seward**, members of the Penelakut Band were charged with hunting deer with a firearm during prohibited hours and hunting with the aid of a light contrary to sections of the British Columbia **Wildlife Act**. As in this case, it was not disputed that there was an aboriginal right to hunt for food. The evidence at trial from the conservation officers regarding the hazards of hunting at night with the aid of a light, which was summarized by Ryan, J.A., at §21, was, not surprisingly, remarkably similar to that offered in this case:

> ¶ 21 The Crown called evidence that hunting at night aided by illumination is inherently unsafe. Two conservation officers testified that the use of the light produces tunnel vision. The hunter is unable to see anything too much beyond either side of the light beam. A hunter could fail to see moving objects nearby such as people or animals. A hunter could miss fixed objects such as rock bluffs which could cause a stray bullet to ricochet. A fundamental tenet of hunting is that when the hunter pulls the trigger the hunter should be able to see the target and beyond. This ability is significantly diminished when hunting at night, even with a light.

[32] In the **Seward** case, in contrast to the case under appeal, there was abundant evidence presented by the accused from an anthropologist and Penelakut elders regarding the traditional hunting methods of the Band, which included hunting at night with torches and pitch fires. The accused, as in this case, claimed that their ancestors characteristically hunted at night with lights and that this method of hunting was protected as part of their broader right to hunt for food. The Court of Appeal agreed with the findings of the trial judge that although the Penelakut traditionally hunted with lights, the practice:

> ... was not in and of itself, integral to the culture. ... Hunting deer for food and ceremonial purposes is what made the Penelakut who they were, not any particular method of hunting, or at least not hunting at night with the aid of illumination.

[33] Accordingly, as the first part of the analysis, the court found that the method of hunting did not achieve constitutional status as an aboriginal right. At the second part of the **Sparrow** test, the court considered whether the legislation prohibiting a particular method of hunting infringed the broader unrestricted right

to hunt for food. The trial judge had found an infringement of the aboriginal right because the legislation interfered with a preferred means of exercising the right. The Court of Appeal agreed with the Summary Conviction Appeal Court judge who found that it had not been established, at a community level, that hunting at night was a preferred means.

[34] In the **Seward** case, unlike this case, the parties agreed that the legislation was aimed at ensuring safety. The court found that the evidence supported a finding that the Penelakut had a tradition of hunting in the safest manner possible and that modern training of their hunters included instruction on safe handling and firing of guns. At § 47 Ryan, J.A. concluded this point as follows:

> ...The introduction of rifles has significantly heightened the danger of hunting. Not just the hunters, but anyone within a mile radius of a hunter is at risk. This is especially so at night when the fact of darkness transforms a dangerous endeavour into a hazardous one. It does not matter that an individual might be able to hunt at night without injuring anyone, the fact is that the possibility of death or injury is increased when visibility is decreased and one or more hunters are in the woods.
>
> ¶ 48 When measured against the standard of safety which has been a tradition in Penelakut culture, I am not persuaded that legislation which forbids hunting at night with a rifle and with illumination can be said to be an unreasonable limitation on the Penelakut right to hunt for food or ceremonial purposes.

[35] A similar result with comparable reasoning was reached in **R. v. Paul**, [2000] 3 C.N.L.R. 262(Q.S.C.).

(b) application of the legal principles:

[36] The issues raised on this appeal must be addressed in light of this jurisprudence. Rather than in the order listed by the Crown in its factum, it is preferable to address the relevant issues in the sequence established by **Sparrow**, and as expanded in the subsequent authorities reviewed above:

i. Was the respondent acting pursuant to an aboriginal right?
i. Does s.68 of the **Wildlife Act** infringe the aboriginal right?
ii. If so, is the infringement justified?

i. the aboriginal right

[37] As mentioned above, there is no debate that the Mi'kmaq people have an aboriginal right to hunt for food in Nova Scotia. (See **R. v. Isaac** (1975), 13 N.S.R. (2d) 460 (C.A.); **R. v. Denny** (1990), 94 N.S.R. (2d) 253 (C.A.); and **R. v. Toney** (1993), 127 N.S.R. (2d) 322 (P.C.)). The question at this first stage is how should the right be characterized: is it simply the right to hunt for food, or is it the right to hunt at night with a light? Although the charge against the respondent is that he breached s. 68 of the **Wildlife Act** by shining a light in a field, the aboriginal right is not characterized by looking merely at the manner the respondent was claiming to exercise the right. Keeping in mind the direction found in **Van der Peet** noted above that the right should be general rather than specific, it is probably best to accept the trial judge's characterization with which the respondent and the appellant agree, that the right in issue here is the right to hunt for food. There was clearly insufficient evidence to establish that night hunting met the **Van der Peet** test, that is, that it was integral to the distinctive Mi'kmaq culture. I would agree with and apply the reasoning in **Seward** that the respondent has not established that the method of hunting, that is, with the aid of a light, is an aboriginal right which should receive the protection of s. 35(1) of the **Constitution**.

[38] Although the Crown agrees with the characterization as the right to hunt for food, it argues however that at this stage of the analysis, the court should find that the right is subject to inherent limitations, so that the characterization in effect becomes the right to hunt in a safe manner. While the respondent does not claim a right to hunt unsafely, it is better to leave the safety issue to subsequent steps in the analysis because safety is relevant to both **prima facie** infringement and justification. The focus should be on the legislation and its effect upon the established right to hunt for food, not whether in this specific instance the respondent was acting in a prudent manner. Therefore, the aboriginal right of hunting for food can be found to include the activity in which the respondent was engaged.

ii. infringement

[39] Since there is no suggestion that the right has been extinguished, I will move to the third step in the **Sparrow** analysis where the question of whether the aboriginal right has been infringed by the impugned legislation is determined by consideration of the reasonableness of the limitation imposed, the hardship caused

by the legislation and its impact on any preferred means of exercising the right. The onus of proving infringement lies on the claimant, the respondent in this case.

[40] The trial judge, relying on **Badger**, found that aboriginal rights must be exercised with due concern for public safety, and ". . . that reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food" [§ 62]. Furthermore, he said public safety can be an inherent limitation on an aboriginal right. In the passage quoted above at § 13, the trial judge found that since safety is such an important consideration, safety objectives are reasonable, they do not impose undue hardship, and do not deny a preferred means. Accordingly, the respondent had not satisfied him that a prohibition against hunting at night with a light significantly impinges on his ability to hunt for food.

[41] The Summary Conviction Appeal Court judge did not follow the step-by-step **Sparrow** analysis. Instead, at § 8 of his decision, he characterized the trial judge's decision as having ". . . found s. 68 to be a safety-based provision to which Mr. Bernard's *Charter* right must yield." The Summary Conviction Appeal Court judge then indicated that rather than dealing individually with the issues of infringement and justification and the sub-factors relevant to each, the grounds of appeal before him could be "synthesized into this one fundamental issue; that is, whether or not s. 68's purpose is safety". After a thorough analysis of the legislative objective, he concluded that the purpose was "far from clear" and he was compelled to interpret it in a manner that enhanced aboriginal rights, that is, that s. 68 was not safety-based. The trial judge had, in his view, erred by so finding. The Summary Conviction Appeal Court judge decided that "absent the safety consideration", infringement was clear and unjustified.

[42] With respect, the rolled-up approach to the summary conviction appeal led to error of law. While the legislative purpose was an important factor, it was not entirely dispositive of the issues of infringement and justification. The legislative purpose is only one of the relevant factors. As noted above at § 28 in **Gladstone**, the Supreme Court stated that the **Sparrow** infringement test does not define infringement, the questions relating to reasonableness, hardship and preferred means, are merely indicators of infringement, all three of which should be assessed.

[43] A misconception of the principles developed in **Badger** may have misled the Summary Conviction Appeal Court judge into the narrowly focused approach to

infringement and justification, an error which was possibly compounded by an over-extensive application of the **Nowegijick** ([1983] 1 S.C.R. 29) principle of statutory interpretation.

[44] As noted earlier, **Badger** was a treaty case in which the Supreme Court was concerned with licensing provisions of the Alberta **Wildlife Act** which had two components: public safety and conservation. While the parts aimed at public safety were readily found not to infringe treaty rights to hunt for food because they reasonably regulated safe hunting, the conservation components required a more extensive examination of the effects of the provisions. After finding that these sections denied the aboriginal people the very means of exercising their hunting rights, in direct conflict with the specified treaty right to hunt, the provisions were found to infringe the right and thus required the Crown to justify. A new trial was ordered for that purpose. There was no ruling by the Supreme Court that all conservation measures were obvious infringements which could never be justified.

[45] As well, in **Gladstone**, in the passage quoted above at § 29, the Supreme Court of Canada indicated that at the justification stage of the **Sparrow** test, objectives of compelling and substantial importance to the broader community may be sufficient to justify limitations of aboriginal rights. At least in the fisheries context, recognition of the significance of conservation of the resource was said to demonstrate the point.

[46] In his investigation of the legislative objective of s. 68, the Summary Conviction Appeal Court judge having found its purpose "far from clear", applied the **Nowegijick** principle of statutory interpretation by stating at § 49:

> Ambiguities are to be interpreted in favour of aboriginals and in such a way that enhance aboriginal rights.

With respect, I agree with the submission of the appellant that to apply this principle of statutory interpretation to determine the legislative objective of the **Wildlife Act**, an Act of general application, is unsound. The **Nowegijick** principle, as it is called, arises from the following statement made in that case by Dickson, J., (as he then was), at p. 36:

> It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians

> should be liberally construed and doubtful expressions resolved in favour of the Indians. If the statute contains language which can reasonably be construed to confer tax exemption that construction, in my view, is to be favoured over a more technical construction which might be available to deny exemption. In *Jones v. Meehan*, 175 U.S. 1 (1899), it was held that Indian treaties "must . . . be construed, not according to the technical meaning of [their] words . . . but in the sense in which they would naturally be understood by the Indians".
>
> [emphasis added]

[47] As noted later by LaForest, J. in **Mitchell v. Peguis Indian Band**, [1990] 2 S.C.R. 85, at § 118, the concept, at least as it relates to treaties, is founded on the fact that the Crown enjoyed a superior bargaining power when negotiating treaties with native peoples. Justice LaForest was not persuaded that it applied with equal strength to statutes relating to natives, such as the **Indian Act**, saying:

> At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.

[48] Returning then to the three factors that should have been considered at the infringement stage of the analysis, the first involves a determination of whether the limitation on the aboriginal right is reasonable. It has been established in **Seward** and **Badger** that if a provision is proven to be for the purpose of enhancing safety, that it will typically be found to be a reasonable limitation. In my view, based on **Badger**, depending on the nature and extent of the limitation, restrictions designed for the purpose of conservation of the wildlife resource could also be a reasonable limitation. Furthermore, also based on **Badger**, restrictions for a dual purpose of safety and conservation could also be found to be reasonable.

[49] The Summary Conviction Appeal Court judge inferred that since several other sections of the **Wildlife Act** were designed to ensure safe hunting, the case for s. 68 being safety related was "less compelling". He referred to those sections which prohibit hunting from a highway, hunting near dwellings and careless hunting. I agree with the submission of the Crown that none of these other sections address the most obvious danger inherent in hunting with a light which is that the hunter cannot see anything outside the beam of light, as explained in the testimony

of Mr. Patterson, and also described in **Seward** in the passage quoted herein at § 31, which is restated for both emphasis and ease of reference:

> ¶ 21 . . . The hunter is unable to see anything too much beyond either side of the light beam. A hunter could fail to see moving objects nearby such as people or animals. A hunter could miss fixed objects such as rock bluffs which could cause a stray bullet to ricochet. A fundamental tenet of hunting is that when the hunter pulls the trigger the hunter should be able to see the target and beyond. This ability is significantly diminished when hunting at night, even with a light.

[50] The Summary Conviction Appeal Court judge appears to have disregarded the evidence of Mr. Mombourquette which was accepted by the trial judge that hunting with a light was dangerous because there were too many unknowns - there could, for example, be a troop of boy scouts camping in the woods. None of the other safety related provisions of the **Wildlife Act** governs this type of danger. With respect, this evidence was relevant not only for proof of the fact that night hunting was dangerous but also to the legislative purpose of s. 68, in that it identified the mischief which is addressed by the section.

[51] Another basis relied upon by the Summary Conviction Appeal Court judge in reaching the conclusion that s. 68 was not a safety related provision was the legislative history of the provisions preventing night hunting with a light. He indicated that in 1927 the **Act** prohibited the hunting of moose at night and hunting for deer and moose with a light. Based on this background, he concluded:

> ¶ 45 This species-based approach is compelling evidence that the legislative goal (originally at least) was conservation and not safety. After all, if safety were the goal, then one would have expected a blanket ban on hunting with a light.

Another logical conclusion would be that since safety was or later became the goal, the Legislature subsequently did ban night hunting completely.

[52] Section 68 prohibits a practice which on the preponderance of the evidence and case authorities is inherently unsafe. That its legislative purpose is at least partially to prohibit unsafe hunting cannot be rationally challenged. In my view, even if conservation of wildlife was originally the purpose of the section, or if it remains one of its objectives, that does not diminish the significance of its safety-based objectives and effects. The section therefore is a reasonable limitation on the aboriginal right to hunt for food.

[53] Although the respondent led evidence that it was easier to hunt at night with a light, he has not proven that the Mi'kmaq peoples generally or his band or community specifically would suffer undue hardship if prohibited from night hunting with a light. There was no evidence, for example, that because of a scarcity of deer or other wildlife that it was necessary to travel great distances or spend a long period of time to find game, or that it was otherwise unduly burdensome to hunt in the daytime. Nor has the respondent proven that night hunting was a preferred means at a community level. Consequently, in my opinion, the limitation on the aboriginal right to hunt for food contained in s. 68 of the **Wildlife Act** is not unconstitutionally infringed.

iii. justification

[54] Having found no infringement of the aboriginal right to hunt for food, it is not necessary to deal with justification. If it were necessary, I would adopt the trial judge's logical and thorough reasons for concluding that the Crown has proven justification:

> ¶ 65 Justification involves a two-part test to be met by the Crown; first, there must be a valid legislative objective and second, the law or regulation must be consistent with the fiduciary duty of the Crown towards aboriginal people which involves asking whether there is as little infringement as possible, whether compensation has been made where there is expropriation, and whether there was appropriate prior consultation. Here again, it seems obvious that public safety is a valid legislative objective. Further, the prohibitions in sections 68 and 80(4) do not appear to deprive the Mi'kmaq of any priority they have over others. It appears on the evidence that the restrictions in these sections are not over reaching, given the safety objective. There have been consultations between the governments and the native community on these very issues. Of course, there is no expropriation requiring compensation in this case.
>
> ¶ 66 In a sense this case also calls in to play a consideration of the nature of laws and of law making in modern Nova Scotia society, a society which includes both Mi'kmaq and non-aboriginal components, where the government has both the right and the obligation to reconcile competing interests. Laws by their nature generally set an objective standard against which the conduct of each person is measured. Governance often involves an imposition of some sort on individual activity. One might ask: can a law which allows for a subjective determination of safety by the individual Mi'kmaq in the exercise of his or her rights be efficacious? Is it necessary to prohibit certain general practices in and of themselves as inherently or potentially dangerous even though this creates a

limitation of sorts on the rights of a specifically defined group who may be practicing an aspect of their constitutional rights?

¶ 67 While aboriginal and treaty rights are not "frozen" rights neither is the society in which they can be practiced. The area known now as Northside East Bay is very different than the land in which the Mi'kmaq hunted in the mid 1700's. There were then no highways, no motor vehicles, no farms or permanent dwellings, no rifles and bullets. The legitimate need to preserve the safety of the public must also be exercised and interpreted flexibly and proceed apace with the evolution of hunting methodologies. Hunters today using instruments with a much greater capability to inflict harm than a traditional bow and arrow. They hunt in areas occupied and utilized by many more people in a variety of ways. Mi'kmaq and others share much of the same space, use the same roads and methods of transportation, have access to the same weapons and are subject to the same dangers from misuse of such. While certain sections of the Wildlife Act appear to be aimed at preserving the "sport" aspect of hunting, it is equally clear that many are concerned primarily with safety, e.g. shooting from the highway, shooting from a vehicle, and shooting around houses. Even if certain techniques might be effective and efficient means to take game for food purposes, the government acts justifiably in regulating or prohibiting certain activities as inherently dangerous. A society in which all people feel safe and secure is conducive to the long term interests of Mi'kmaq and non-Mi'kmaq alike. Statements in Simon and Sparrow indicate that it is inherent in any treaty or aboriginal right that such be exercised safely. It is difficult to imagine that any traditional hunting method employed by Mi'kmaq in years gone by created a risk that instead of killing their prey, they killed one another. The evolution of methods and the flexible approach which should be taken must surely also carry along with it this basic tenet, namely, that the methodology not put other persons at undue risk. Today's high powered firearms and million candle-power Q-Beams are a long way from the bows and torches used by Mi'kmaq centuries ago.

VII Conclusion:

[55] It is not necessary to deal with the fourth ground of appeal.

[56] For these reasons, I find that s. 68 of the **Wildlife Act** does not violate the respondent’s aboriginal rights as protected by s. 35 of the **Constitution**. Leave to appeal should be granted, the appeal should be allowed, the decision of the Summary Conviction Appeal Court set aside and the conviction and sentence ordered by the trial judge restored.

Roscoe, J.A.

Concurred in:

Flinn, J.A.

Cromwell, J.A.

2018 NSCA 70
Nova Scotia Court of Appeal

R. v. Paul

2018 CarswellNS 621, 2018 NSCA 70, 150 W.C.B. (2d) 288

Aaron Paul and Charles Francis (Appellants) v. Her Majesty the Queen (Respondent)

Fichaud J.A., Bryson J.A., Van den Eynden J.A.

Heard: May 10, 2018
Judgment: August 28, 2018
Docket: C.A.C. 451531

Proceedings: affirming *R. v. Paul* (2016), [2016] N.S.J. No. 134, 2016 CarswellNS 297, 2016 NSSC 99, 372 N.S.R. (2d) 227, 1172 A.P.R. 227, Patrick J. Duncan J. (N.S. S.C.); affirming *R. v. Paul* (2013), 2013 NSPC 75, 2013 CarswellNS 814, 335 N.S.R. (2d) 216, 1060 A.P.R. 216, [2013] N.S.J. No. 555, David Ryan Prov. J. (N.S. Prov. Ct.)

Counsel: Douglas E. Brown, for Appellants
Timothy O'Leary, for Respondent

***Fichaud J.A.*:**

1 Messrs. Aaron Paul and Charles Francis are Mi'kmaq members of the Eskasoni First Nation. They have a constitutionally affirmed aboriginal right to hunt for food. May they hunt at night using a light despite the prohibition of that activity by Nova Scotia's *Wildlife Act*?

Background

2 On the evening of September 5, 2006, Messrs. Paul and Francis made their way to a gravel pit near Cheticamp in the Cape Breton Highlands. They had hunted in the area before. They drove in, unloaded their truck, made a fire and looked for moose. Mr. Paul said they used their truck headlights to sweep the open areas "to see if I can see eyes". The trial judge explained what happened next (2013 NSPC 75 (N.S. Prov. Ct.)):

> [4] ... After driving around, they pulled into a gravel pit and Mr. Paul thought he saw something, but not being sure what it was, they kept going. Shortly thereafter they returned to the gravel pit where he [Mr. Paul] "seen the eyes". Mr. Francis got out of the truck and about three or four seconds later took a shot at what he thought was a moose. In fact, it was a decoy mechanical "moose" set up by officers of the Department of Natural Resources. Those officers immediately proceeded to converge on the two young men with lights flashing, sirens blaring and with guns drawn. The Natural Resources officers had hidden themselves behind piles of gravel. The two young men were immediately arrested. Their rifles were seized — identical 300 Winchester Magnum rifles with tripods.
>
> . . . . .
>
> [6] In the Agreed Statement of Facts filed before this Court there was an acknowledgement that, on the date of the offence, Mr. Paul and Mr. Francis:
>
> . . . . .
>
> • at the time and place of the event, were hunting moose with the assistance of the "high" beams of a truck
>
> • and that Mr. Francis "shot" the decoy thinking it was a real moose.

3 Messrs. Paul and Francis were charged with an offence under s. 68 of the *Wildlife Act*, R.S.N.S. 1989, c. 504:

> 68 Except as provided in this Act or the regulations, every person is guilty of an offence who takes, hunts or kills or pursues with intent to take, hunt or kill wildlife by means of, or with the assistance of a light or flambeau.

4 The defence was that they were exempt from s. 68 because they were exercising their aboriginal right to hunt for food that is recognized by s. 35(1) of the *Constitution Act*, *1982*.

5 The trial took 13 days before Judge David Ryan in the Provincial Court. On August 20, 2013, the judge found Messrs. Paul and Francis guilty of contravening s. 68 (2013 NSPC 75 (N.S. Prov. Ct.)). Each was fined $362.41. Their firearms were returned. Paragraphs 8 and 9 of the trial decision chronicled the process from the charges to the trial decision.

6 On October 25, 2013, Messrs. Paul and Francis filed a notice of appeal to the Summary Conviction Appeal Court (SCAC). The SCAC judge, Justice Patrick Duncan, heard the matter over 6 days. On April 13, 2016, Justice Duncan issued a Decision that dismissed the appeal (2016 NSSC 99 (N.S. S.C.)). The SCAC Decision, paras. 4 to 12, set out the chronology of the summary conviction appeal.

7 The trial and SCAC judges agreed that Messrs. Paul and Francis had an aboriginal right whose features derive from the principles established by *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.).

8 Both judges rejected the defence's submission that the aboriginal right exempted Messrs. Paul and Francis from s. 68:

- The trial judge found that, based on the evidence, (1) hunting at night with a light is neither a traditional Mi'kmaq practice that pre-dated contact with the Europeans, nor a preferred method of hunting in the Mi'kmaq community, and (2) night-hunting in this well-frequented area of the Cape Breton Highlands was unsafe. Those findings were pivotal to the outcome. The SCAC held that the trial judge's findings were reasonable.

- The trial judge and SCAC followed this Court's ruling in *R. v. Bernard*, 2002 NSCA 5 (N.S. C.A.), application for leave to appeal dismissed [2002] S.C.C.A. No. 123 (S.C.C.). Like this case, *Bernard* involved a charge of night hunting with a light under s. 68 of the *Wildlife Act*.

- The trial judge's conclusions, upheld by the SCAC, were that, under the *Sparrow* principles: (1) Messrs. Paul and Francis had a constitutionally protected aboriginal right to hunt for food, but (2) s. 68 was not a *prima facie* interference with that right and, alternatively, (3) any *prima facie* interference would be justified for safety reasons.

9 On May 19, 2016, Messrs. Paul and Francis filed a notice of appeal to the Court of Appeal. On May 10, 2018, this Court heard the appeal and reserved.

Issues

10 The notice of appeal lists 18 grounds, a number of which overlap. The appellants' submissions did not follow each itemized ground. Rather, the written and oral submissions channeled the grounds into the following:

> **Issue #1**: Did the SCAC judge err in law by concluding that the trial judge had properly characterized the appellants' aboriginal right? In particular, did the judges use evidence that was irrelevant to the characterization?
>
> **Issue #2**: Did the SCAC judge err in law by affirming the trial judge's conclusion that there had been no *prima facie* infringement of the appellants' aboriginal right? In particular, did the judges err by following this Court's decision in *Bernard*?
>
> **Issue #3**: Did the SCAC judge err in law by affirming the trial judge's conclusion that, if there had been a *prima facie* infringement, the infringement was justified?

Issue #4: Did the SCAC judge err in law by affirming the trial judge's ruling that the expert evidence presented at trial was admissible?

11 The first three issues follow steps in the *Sparrow* test. The fourth relates to a pre-trial ruling by the trial judge.

Leave to Appeal

12 The appeal is under the *Criminal Code*, s. 839, which requires leave. In *R. v. Pottie*, 2013 NSCA 68 (N.S. C.A.), paras. 18-21, this Court applied *R. v. R. (R.)*, 2008 ONCA 497 (Ont. C.A.), where Doherty J.A. said:

> 37 In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables — the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

13 Whether s. 68 of the *Wildlife Act* unjustifiably infringes the appellants' constitutionally protected aboriginal right is significant to the administration of justice. The appellants' submissions are arguable. I would grant leave to appeal.

Standard of Review

14 Section 839(1) of the *Criminal Code* restricts an appeal to questions of law alone. In this case, the issues of law include the standards that establish and characterize the aboriginal right, assess whether it was infringed and justify any infringement, as well as the principles governing the admissibility of the expert evidence. The Court of Appeal applies correctness to determine whether the SCAC judge erred in the statement or application of the standard of review and legal principles that governed the SCAC judge's analysis of the trial judge's decision. *Pottie*, paras. 14-17, and authorities there cited.

15 The SCAC's standard to review the decision of the trial judge is whether the trial judge erred in law or the trial judge's findings cannot reasonably be supported by the evidence. The SCAC may not just substitute its view of the facts for that of the trial judge. The SCAC may re-weigh the evidence at trial, but only to determine whether the evidence reasonably supported the trial judge's findings or, as it is sometimes put, whether the finding resulted from a palpable and overriding error — *i.e.* a clear error that affected the outcome. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.), para. 81. *R. v. Nickerson*, 1999 NSCA 168 (N.S. C.A.), para. 6. *Pottie*, para. 16.

The Sparrow Principles

16 Section 35(1) of the *Constitution Act, 1982* says:

> 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

17 This case involves an aboriginal right not founded in a treaty. At the hearing in this Court, the appellants' counsel confirmed that the defence did not ask the trial judge to consider a treaty right.

18 In *Sparrow*, Chief Justice Dickson and Justice La Forest for the Court outlined the principles that govern aboriginal rights under s. 35(1):

- An "existing" aboriginal right is one that was "in existence when the *Constitution Act, 1982* came into effect". (para. 23).

- The word "existing" does not freeze "the specific manner in which it was regulated before 1982". "Existing" means "unextinguished", and contemplates the evolution of rights over time. (paras. 24-27).

• "[R]ecognized and affirmed" means the aboriginal right is subject to a "solemn commitment that must be given meaningful content" (para. 60). In particular, "[t]he words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power" (para. 62).

• Section 35(1) is not subject to s. 1 of the *Charter*. However:

> 61 In response to the appellant's submission that s. 35(1) rights are more securely protected than the rights guaranteed by the *Charter*, it is true that s. 35(1) is not subject to s. 1 of the *Charter*. In our opinion, this does not mean that any law or regulation affecting aboriginal rights will automatically be of no force or effect by the operation of s. 52 of the *Constitution Act, 1982*. Legislation that affects the exercise of aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under s. 35(1).

Consequently, the "[r]ights that are recognized and affirmed are not absolute" but "demand the justification of any government regulation that infringes upon or denies aboriginal rights" (para. 62). A regulation that affects aboriginal rights "must be enacted according to a valid objective", and "the way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples" (para. 64).

19 The Chief Justice and Justice La Forest then set out the methodology for the judicial analysis of aboriginal rights. They began with the preface:

> 66 ... We wish to emphasize the importance of context and a case-by-case approach to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard must be defined in the specific factual context of each case.

20 Then the methodology:

> 68 ... The inquiry with respect to interference begins with a reference to the characteristics or incidents of the right at stake. Our earlier observations regarding the scope of the aboriginal right to fish are relevant here. ...
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> . . . . .
>
> 70 To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. ... [T]he test involves asking whether either the purpose or the effect of the restriction ... unnecessarily infringes the interests protected by the ... right. ...
>
> 71 If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. ...
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> . . . . .
>
> 75 If a valid legislative objective is found, the analysis proceeds to the second part of the justification issue. Here, we refer back to the guiding interpretive principle derived from *Taylor* [*R. v. Taylor*, 34 O.R. (2d) 360, (C.A.) and *Guerin* [*Guerin v. R.*, [1984] 2 S.C.R. 335], *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government *vis-à-vis* aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.
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> . . . . .
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> 82 Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the

desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. ...

21 *Sparrow*'s approach remains the test for the appraisal of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*: *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R. 257 (S.C.C.), at para. 150, per McLachlin C.J.C. for the Court.

22 *Sparrow*'s test has four steps. First, does an aboriginal right exist and, if so, how is it characterized? Second, has the aboriginal right been extinguished? Third, if it is unextinguished, is there a *prima facie* infringement of the aboriginal right? Fourth, if there is a *prima facie* infringement, is there justification for the infringement? *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), at para. 20, per Lamer C.J.C. for the majority.

23 On this appeal, issue #1 addresses the first step. The second — extinguishment — does not arise. The third and fourth steps are the subjects of issues #2 and #3 respectively.

Issue #1 — Characterization of the Aboriginal Right

24 I will start with the rulings that have refined *Sparrow*'s first step — the establishment and characterization of the claimed aboriginal right.

25 *Supreme Court decisions after Sparrow:* In *Van der Peet*, Chief Justice Lamer for the majority wrote:

> 46 In light of the suggestion of *Sparrow*, *supra*, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

The Chief Justice (paras. 48-75) then expanded on the application of that test. His comments included ten directions:

> *Courts must take into account the perspective of aboriginal peoples themselves*
>
> 49 ... In *Sparrow*, *supra*, Dickson C.J. and La Forest J. held at p. 1112 that it is "crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake". It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure. ...
>
> . . . . .
>
> *Courts must identify precisely the nature of the claim being made in determining whether an aboriginal claimant has demonstrated the existence of an aboriginal right*
>
> 51 ... [I]n order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in significant part, on what, exactly, that evidence is being called to support.
>
> . . . . .
>
> *In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question*
>
> 55 To satisfy the integral to a distinctive culture test the aboriginal claimant must do more than demonstrate that a practice, tradition or custom was an aspect of, or took place in, the aboriginal society of which he or she is a part. The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*. [Chief Justice Lamer's italics]
>
> . . . . .
>
> *The practices, customs and traditions which constitute aboriginal rights are those which have continuity with the traditions, customs and practices that existed prior to contact*

60 The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. ...

. . . . .

62 That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. ...

63 ... It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

. . . . .

64 The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow*, *supra*, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. ...

. . . . .

Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims

68 ... The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

Claims to aboriginal rights must be adjudicated on a specific rather than general basis

69 ... Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

For a practice, tradition or custom to constitute an aboriginal right it must be of independent significance to the aboriginal culture in which it exists

70 ... The practice, custom or tradition cannot exist simply as an incident to another practice, custom or tradition but must rather be itself of integral significance to the aboriginal society. Where two customs exist, but one is merely incidental to the other, the custom which is integral to the aboriginal community in question will qualify as an aboriginal right, but the custom that is merely incidental will not. ...

The integral to a distinctive culture test requires that a practice, custom or tradition be distinctive; it does not require that the practice, custom or tradition be distinct

71 ... [A] culture that claims that a practice, custom or tradition is *distinctive* — "distinguishing characteristic" — makes a claim that is not relative; the claim is rather one about the culture's own practices, customs or traditions considered apart from the practices, customs or traditions of any other culture. It is a claim that this tradition or custom makes the culture *what it is*, not that the practice, custom or tradition is different from the practices, customs or traditions of another culture. ... [Chief Justice Lamer's italics]

The influence of European culture will only be relevant to the inquiry if it is demonstrated that the practice, custom or tradition is only integral because of that influence

73 ... If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with the Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

Courts must take into account both the relationship of aboriginal peoples to the land and the distinctive societies and cultures of aboriginal peoples

74 ... Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land *and* at the practices, customs and traditions arising from the claimant's distinctive culture and society. ... [Chief Justice Lamer's italics]

26 In *Gladstone*, Lamer C.J.C. summarized *Van der Peet*'s test:

23 The first step in applying the *Van der Peet* test is the determination of the precise nature of the claim being made, taking into account such factors as the nature of the action said to have been taken pursuant to an aboriginal right, the government regulation argued to infringe the right, and the tradition, custom or practice relied upon to establish the right. ...

. . . . .

25 The second step in the *Van der Peet* test requires the Court to determine whether the practice, tradition or custom claimed to be an aboriginal right was, prior to contact with Europeans, an integral part of the distinctive aboriginal society of the particular aboriginal people in question. ...

. . . . .

28 In *Van der Peet*, at para. 61, this Court held that a claimant to an aboriginal right need not provide direct evidence of pre-contact activities to support his or her claim, but need only provide evidence which is "directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, traditions and customs that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights". In *Van der Peet* this was described as the requirement of "continuity" — the requirement that a practice, tradition or custom which is integral to the aboriginal community now be shown to have continuity with the practices, traditions or customs which existed prior to contact. ...

27 In *Van der Peet*, para. 64, Chief Justice Lamer explained that aboriginal rights evolve over time. In *R. v. Marshall*, [2005] 2 S.C.R. 220 (S.C.C.), Chief Justice McLachlin expanded on the "logical evolution" test:

25 Of course, treaty rights are not frozen in time. Modern peoples do traditional things in modern ways. The question is whether the modern trading activity in question represents a logical evolution from the traditional trading activity at the time the treaty was made. *Marshall 2* [*R. v. Marshall*, [1999] 3 S.C.R. 533], at para. 20. Logical evolution means the same sort of activity, carried on in the modern economy by modern means. This prevents aboriginal rights from being unfairly confined simply by changes in the economy and technology. But the activity must be essentially the same. "While treaty rights are capable of evolution within limits, ... their subject matter ... cannot be wholly transformed. (*Marshall 2*, at para. 19)

28 Similarly, in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535 (S.C.C.), Justice Binnie for the Court discussed the ambit of "logical evolution":

7 ... The legal requirement for continuity between ancestral practices, customs and traditions and the modern claimed Aboriginal right incorporates, of course, an allowance for logical evolution within limits. This case, in part, is about where such limits should be drawn.

8 The Lax Kw'alaams live in the twenty-first century, not the eighteenth, and are entitled to the benefits (as well as the burdens) of changing times. However, allowance for natural evolution does not justify the award of a quantitatively and qualitatively different right. ...

29 In *R. v. Sappier*, [2006] 2 S.C.R. 686 (S.C.C.), Bastarache J. explained the significance of evidence on pre-contact practice to "logical evolution":

22 ... In an oft-quoted passage, Lamer C.J. acknowledged in *Van der Peet*, at para. 30, that, "the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries" (emphasis deleted [by Bastarache J.]). The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a *practice* that helps to define the distinctive way of life of the community as an aboriginal community [Bastarache J.'s italics]. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated. In the absence of such evidence, courts will find it difficult to relate the claimed right to the pre-contact way of life of the specific aboriginal people, so as to trigger s. 35 protection.

. . . . .

48 Although the nature of the *practice* which founds the aboriginal right claim must be considered in the context of the pre-contact distinctive culture of the particular aboriginal community, the nature of the *right* must be determined in light of present day circumstances. As McLachlin C.J. explained in *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 (S.C.C.), at para. 25, "[l]ogical evolution means the same sort of activity, carried on in the modern economy by modern means". It is the practice, along with its associated uses, which must be allowed to evolve. ... [Justice Bastarache's italics]

30 *Nova Scotia authority — Bernard:* The leading Nova Scotia decision is *Bernard*, which, like the present case, involved a charge of hunting at night with a light. This Court held that s. 68 of the *Wildlife Act* withstood a challenge under s. 35(1) of the *Constitution Act, 1982*. Justice Roscoe tabulated *Sparrow*'s four steps:

[21] ... In *Sparrow*, commencing at p. 1094, the court developed the test for scrutinizing legislation to ensure appropriate affirmation and recognition of aboriginal rights in accordance with s. 35(1). The test can be conveniently divided into four stages, each involving a number of factors to consider:

1. Was the claimant acting pursuant to an aboriginal right?

    a. How should the aboriginal right be characterized?

    b. What is the contemporary manner in which it may be exercised?

2. Was that aboriginal right extinguished before the enactment of s. 35?

    a. Is the intention of the Legislature to extinguish the aboriginal right clear and plain?

3. Does the legislation interfere with an existing aboriginal right?

    a. Is the limitation on the exercise of the aboriginal right reasonable?

    b. Does the regulation impose undue hardship?

    c. Does the legislation deny a preferred means of exercising an aboriginal right?

4. If there is *prima facie* interference, the investigation addresses whether there is justification for the infringement, which is determined by asking:

a. Is there a valid legislative objective?

b. If so, has the objective been implemented in a manner consistent with the honour of the Crown in dealing with aboriginal peoples?

c. Has there been minimal impairment of the aboriginal right?

d. If there has been an expropriation, has there been fair compensation?

e. Has there been consultation with the aboriginal people?

[22] The person challenging the legislation bears the onus at the first and third stages, that is, that there is an aboriginal right in issue, and that it has been infringed by the impugned legislation. If the Crown claims extinguishment, it bears the onus of proving it. If the claimant proves infringement of the right in the third part of the test, at the last stage, the Crown must meet the burden of proving justification.

31 Justice Roscoe concluded that "the Mi'kmaq people have an aboriginal right to hunt for food in Nova Scotia", but declined to characterize it as an "aboriginal right to hunt at night with a light":

37 ... The question at this first stage is how the right should be characterized: is it simply the right to hunt for food, or is it the right to hunt at night with a light? ... Keeping in mind the direction found in *Vanderpeet* noted above that the right should be general rather than specific, it is probably best to accept the trial judge's characterization with which the respondent and the appellant agree, that the right in issue here is the right to hunt for food. There was clearly insufficient evidence to establish that night hunting met the *Vanderpeet* test, that is, that it was integral to the distinctive Mi'kmaq culture. I would agree with and apply the reasoning in *Seward* [*R. v. Seward* (1999), 133 C.C.C. (3d) 437 (B.C.C.A.), leave to appeal denied [1999] S.C.C.A. No. 238] that the respondent has not established that the *method* of hunting, that is, with the aid of a light, is an aboriginal right which should receive the protection of s. 35(1) of the *Constitution*. [Justice Roscoe's italics]

32 Justice Roscoe considered the use of a light under *Sparrow*'s third and fourth steps, *prima facie* infringement and justification. She concluded that, based on safety considerations, s. 68 of the *Wildlife Act* was not a *prima facie* infringement and, if it had been, the infringement would have been justified (paras. 53 and 54). I will discuss these points later under Issues #2 and #3.

33 *The rulings in this case:* In the case of Messrs. Paul and Francis, the trial judge and SCAC reached conclusions similar to those in *Bernard*.

34 At the trial, the Crown submitted that the claimed aboriginal right should be characterized as a right "to hunt moose at night with the aid of illumination". Judge Ryan disagreed with the Crown:

[335] The Crown, however, contends (at para. 210 of its Closing Brief) that "the aboriginal right being claimed should be characterized as an exercise of an aboriginal right, to hunt moose at night with the aid of illumination." The Crown further contends that the characterization of the right as suggested by the Defence "would cast the court's inquiry at a level of excessive generality".

[336] I disagree with the Crown's assertion. There is no question that the Mi'kmaq people have an Aboriginal right to hunt for food and ceremonial purposes: [citations omitted]. That right has been recognized and affirmed by the Nova Scotia Court of Appeal in the *Bernard* decision and even prior to that as noted by the Court in the *Bernard* decision at para. 37. Such a recognition has been based upon ample evidence previously presented to the courts including the Court in the case at bar.

35 Later (para. 357), the trial judge cited the statements from para. 70 of *Van der Peet*, that the practice must be "independently significant to the aboriginal community", "cannot exist simply as an incident of another practice", and "must rather be itself of integral significance to the aboriginal society". Judge Ryan said that to characterize the claimed aboriginal right as "to hunt at night with the aid of illumination", as the Crown had asserted, would "be 'piggybacking' and providing constitutional protection to a method or practice of hunting that is not integral to either the Aboriginal community in question or the broader Aboriginal right to hunt for food" (para. 358).

36 Judge Ryan said he would "anchor my decision in the evidentiary record before me" (para. 359). He thoroughly considered the evidence of the three expert witnesses, Dr. Wicken, called by the defence, and Drs. Patterson and von Gernet, called by the Crown (paras. 35-215, 369-370), and made the following findings:

> [371] Based on that evidence [*i.e.* of Drs. Wicken, Patterson and von Gernet], I am of the opinion that the most that can be inferred from the evidence is that the Mi'kmaq hunted at night by moonlight. To extend it any farther to include use of a flambeau or torch is not warranted by the evidence and, in that regard, I respectfully disagree with Dr. Wicken.
>
> . . . . .
>
> [386] ... While the evidence shows and I accept that the Mi'kmaq did on occasion hunt for food at night, I am not satisfied the evidence establishes that night hunting with a light was a preferred method of hunting. They were, at the time of contact, primarily a society that lived and survived by products of the sea and rivers though they did hunt when the occasion presented itself. The evidence does not demonstrate that hunting at night (with a light) was an element of a practice, custom or tradition integral to their distinctive culture which made the culture of the Mi'kmaq society distinctive — *i.e.* one of the things that truly made the society what it was. It was at most a practice that was only incidental and occasional to the Mi'kmaq Society.

Under Issue #2, I will quote the trial judge's recitation of some of the evidence that supports these findings (below, paras. 96-97).

37 The trial judge concluded:

> **A. Are the accused Aboriginal rights holders?**
>
> [384] The accused are holders of an Aboriginal right to hunt for food and ceremonial purposes. This is not an issue in dispute.
>
> **B. Was the activity in which the accused were engaged on the night in question an exercise of their Aboriginal right to hunt for food?**
>
> [385] The accused in the case at bar were hunting by their own admission and as Aboriginal members of the Eskasoni Community they have a right to do so. However, I am of the opinion that the activity/method of hunting at night with a light or flambeau was not a legitimate exercise of this Aboriginal right to hunt for food and ceremonial purposes.

38 The SCAC judge declined to overturn the trial judge's findings and conclusions. Justice Duncan said:

> [89] The evidence and findings of fact material to Judge Ryan's determination that hunting at night with a light is not a practice that is integral to the Mi'kmaq culture, was founded in the evidence of Drs. Wicken, von Gernet and Patterson who were qualified to offer opinion evidence.
>
> . . . . .
>
> [92] The trial judge's summary of the testimony was thorough and supportable on the evidence. I note, in particular, Dr. Wicken's description of the manner in which moose were traditionally hunted. *See*, Decision at paras. 58 and 62; the reasons that Dr. Wicken offered that the practice was "integral", set out at para. 61; and his admission [as] set out at para. 81 that he was unaware of any references to hunting moose at night with flambeaus.
>
> [93] The evidence of Drs. von Gernet and Patterson, was similarly reviewed in detail by the judge and where it differed in material opinions from that of Dr. Wicken the trial judge preferred that of the Crown's witnesses.

> [94] Overall, I am satisfied that the findings made by the trial judge, and which he summarized in paragraphs 363-379 set out above, were reasonable and supported by the evidence. In summary, the evidence supported the conclusion that moose were hunted for food by the Mi'kmaq of Cape Breton and that they did so on occasion at night, but that there is no evidence it was carried out using a form of illumination. Based on the trial judge's findings it cannot be said that the appellants' use of a light was a modern day evolution from the traditional way in which the Mi'kmaq hunted moose in this locale of Nova Scotia at the time of contact.
>
> . . . . .
>
> [102] The defendant's position that "hunting at night with a light is a legitimate exercise of the broader Aboriginal right to hunt for food" is not sustainable in law. In my view, Judge Ryan's conclusion that the evidence did not support a finding that hunting at night with a light was integral to the distinctive culture of the Mi'kmaq was one that was consistent with the application of the law in other cases and was correct in law, having regard to the facts as he found them.
>
> [103] For the purposes of the infringement analysis the aboriginal right at stake is the "right to hunt for food". ...

39 *Analysis of the arguments on this appeal:* Messrs. Paul and Francis agree that their aboriginal right is to hunt for food and ceremonial purposes. But they submit that the trial judge and SCAC erred in law by using irrelevant historical evidence to narrow that aboriginal right during the characterization step. Their factum to the Court of Appeal puts it this way:

> 12. ... In the case at bar, historical evidence is irrelevant and unnecessary to such an analysis given the presumed existence of the right to hunt for food, social and ceremonial purposes in Nova Scotia.
>
> . . . . .
>
> 20. Therefore there is no need to embark on an historical inquiry at all. Hunting for the purpose of food with the aid of a light is a modern exercise. Again, the search in history for ancient corresponding methods of hunting (the asssitance of a light) that are employed contemporarily (the assistance of a light) is an application of the "frozen rights" theory. ...

40 To assess the appellants' submission, it is helpful to examine the arguments made to the trial judge.

41 As noted earlier, the Crown's closing trial brief said "the aboriginal right being claimed should be characterized as an exercise of an aboriginal right, to hunt moose at night with the aid of illumination".

42 The Trial Brief of Messrs. Paul and Francis, on the other hand, said the claim was simply an aboriginal "right to hunt for food", and the use of a light was a "'logical evolution' of the pre-contact practice of night-hunting with a light (torch)":

> **Summary of Issues Arising from Facts**
>
> What is the proper characterization of the right at stake in the case at bar? Was the activity the accused were engaged in, that is, hunting at night with the assistance of a light, a legitimate exercise of their broader Aboriginal right to hunt for food? If not, then the accused are offered no protection under s. 35(1) of the *Constitution Act, 1982* and must be convicted. If the answer is affirmative, however, then the inquiry becomes whether or not the application of s. 68 of the *Nova Scotia Wildlife Act* is a prima facie infringement of their uncontested Aboriginal right to hunt for food. ...
>
> **Summary of Expert Opinion Evidence**
>
> Expert opinion evidence adduced by both the Crown and the Defence confirm that night hunting for food (including Moose) was a pre-contact hunting practice of the Mi'kmaq. All three experts also agreed that pre-contact Mi'kmaq used a light (torch) to assist their night hunting as well. The essential difference between the defence expert opinion (William Wicken) and Crown expert opinion (Dr. Stephen Patterson and Dr. Alexander von Gernet) lies in whether the pre-contact Mi'kmaq hunted Moose specifically at night with the assistance of a light.
>
> On the one hand, the Crown experts stated that there was historical documentary evidence that proved the Mi'kmaq fished and fowled at night with the assistance of a light. However, they found no historical documentation that the Mi'kmaq used the assistance of a light to hunt the species of Moose at night prior to European contact. ...

. . . . .

The expert for the defence made the inference, given the importance of Moose to the Mi'kmaq, that the Mi'kmaq likely used a light to assist their night hunting of Moose, despite the absence of European accounts of the technique being used specifically and singularly upon Moose. ...

Even if the expert defence opinion evidence is disregarded as too far reaching, **the idea of a "logical evolution" of the pre-contact practice of night hunting with a light (torch) would likely extend** not only to the fact that bows and arrows evolved to high powered rifles, and **torches evolved to spotlights and headlights of vehicles;** but that **the species** upon which the method was used also **evolved from fish and fowl to include Moose** and Deer and any other species the Mi'kmaq decide to exploit as "food". [bolding added]

Characterizing the Aboriginal Right at Stake

One of the tasks that is asked of this court in this matter is to determine the proper characterization of the Aboriginal right at stake. The Defendant's [*sic*] submit that the proper characterization is simply the "right to hunt for food".

43 The Reply Brief of Messrs. Paul and Francis to the trial judge adopted Justice Roscoe's characterization from *Bernard*:

The Nova Scotia Court of Appeal Correctly Characterized the Claim

On characterizing the claim, the Nova Scotia Court of Appeal in *R. v. Bernard*, [2002] N.S.J. No. 15, gave the following direction to a similar right hunting case:

> 37 ... Keeping in mind the direction found in *Van der Peet* noted above that the right should be general rather than specific, it is probably best to accept the trial judge's characterization with which the respondent and the appellant agree, that the ***right in issue here is the right to hunt for food.*** [bolding in the Defendants' Reply Brief] There was clearly insufficient evidence to establish that night hunting met the *Van der Peet* test, that is, that it was integral to the distinctive Mi'kmaq culture. I would agree with and apply the reasoning in *Seward* that the respondent has not established that the method of hunting, that is, with the aid of a light, is an aboriginal right which should receive the protection of s. 35(1) of the Constitution.

. . . . .

44 In my respectful view, the trial judge merely addressed the submissions that were made to him on characterization and logical evolution, and applied the evidence that was relevant to those submissions.

45 As to characterization:

• Messrs. Paul and Francis submitted to the trial judge that the Aboriginal right was "a right to hunt for food" and ceremony, and that the Court of Appeal in *Bernard* had "correctly characterized the claim". The Crown proposed a different characterization.

• Judge Ryan disagreed with the Crown's characterization and explained why. He accepted the characterization of Messrs. Paul and Francis, saying:

> [384] The accused are holders of an Aboriginal right to hunt for food and ceremonial purposes. ...

• As proposed by the Rebuttal Brief of Messrs. Paul and Francis, the judge adopted the Nova Scotia Court of Appeal's characterization in *Bernard*, para. 37.

46 The judge made no error in his characterization of the aboriginal right.

47 As to "logical evolution":

• The Trial Brief of Messrs. Paul and Francis submitted that "a 'logical evolution' of the pre-contact practice of night hunting with a light (torch)" meant "torches evolved to spotlights and headlights of vehicles" and that "the species upon which the method was used also evolved from fish and fowl to include Moose". Messrs. Paul and Francis asked Judge Ryan to draw those inferences from their interpretation of the historical evidence related by the three experts.

• Judge Ryan disagreed with that suggested interpretation of the evidence and declined to draw the requested inferences. He found that historically the Mi'kmaq hunted at night by moonlight, but "[t]o extend it any farther to include use of a flambeau or torch is not warranted by the evidence" (para. 371). Judge Ryan's decision identified the historical evidence upon which he relied, and his findings are reasonably supported by that evidence (see below, para. 96).

• I disagree that the historical evidence was irrelevant. In *Sappier*, *supra*, Bastarache J. emphasized the significance of evidence of the pre-contact practice.

• Judge Ryan weighed the pre-contact evidence that Messrs. Paul and Francis asked him to consider. The issue, posed by their written submission, was whether hunting with a light is a "logical evolution" of a "pre-contact practice". In *R. v. Marshall*, in *Lax Kw'alaams* and in *Sappier*, the Supreme Court defined "logical evolution" as "the same sort of activity, carried on in the modern economy by modern means", provided the modern version is not "quantitatively and qualitatively different" than the pre-contact activity. To similar effect: *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 (S.C.C.), paras. 13 and 29, per McLachlin C.J.C. for the majority.

Consequently, evidence of whether the pre-contact activity was "the same sort" or, on the other hand, "quantitatively and qualitatively different" is relevant. The judge made no error of law by considering that evidence.

48 The SCAC accepted the trial judge's characterization of the aboriginal right — *i.e.* that of Messrs. Paul and Francis — as "the right to hunt for food". The SCAC correctly determined that the trial judge's handling of the Defence submission involved no use of irrelevant evidence, and reflected neither a legal error nor an unreasonable finding from the evidence.

49 I would dismiss the grounds of appeal that represented by this issue.

Issue #2: Prima Facie Infringement

50 In *Bernard*, paras. 39-53, this Court determined that s. 68 of the *Wildlife Act* was not a *prima facie* infringement of the aboriginal right to hunt for food. Justice Roscoe said:

[48] Returning then to the three factors that should have been considered at the infringement stage of the analysis, the first involves a determination of whether the limitation on the aboriginal right is reasonable. It has been established in *Seward* [*R. v. Seward* (1999), 133 C.C.C. (3d) 437 (B.C.C.A.), leave to appeal denied [1999] S.C.C.A. No. 238] and *Badger* [*R. v. Badger*, [1996] 1 S.C.R. 771] that if a provision is proven to be for the purpose of enhancing safety, that it will typically be found to be a reasonable limitation. In my view, based on *Badger*, depending on the nature and extent of the limitation, restrictions designed for the purpose of conservation of the wildlife resource could also be a reasonable limitation. Furthermore, also based on *Badger*, restrictions for a dual purpose of safety and conservation could also be found to be reasonable.

Justice Roscoe, para. 49, adopted para. 21 from the British Columbia Court of Appeal's decision in *R. v. Seward*, 1999 CarswellBC 527 (B.C. C.A.):

21 ... The hunter is unable to see anything too much beyond either side of the light beam. A hunter could fail to see moving objects nearby such as people or animals. A hunter could miss fixed objects such as rock bluffs which could cause a stray bullet to ricochet. A fundamental tenet of hunting is that when the hunter pulls the trigger the hunter should be able to see the target and beyond. This ability is significantly diminished when hunting at night, even with a light.

Justice Roscoe concluded:

[52] Section 68 prohibits a practice which on the preponderance of the evidence and case authorities is inherently unsafe. That its legislative purpose is at least partially to prohibit unsafe hunting cannot be rationally challenged. In my view, even if conservation of wildlife was originally the purpose of the section, or if it remains one of its objectives, that does not diminish the significance of its safety-based objectives and effects. The section therefore is a reasonable limitation on the aboriginal right to hunt for food.

[53] Although the respondent led evidence that it was easier to hunt at night with a light, he has not proven that the Mi'kmaq peoples generally or his band or community specifically would suffer undue hardship if prohibited from night hunting with a light. There was no evidence, for example, that because of a scarcity of deer or other wildlife that it was necessary to travel great distances or spend a long period of time to find game, or that it was otherwise unduly burdensome to hunt in the daytime. Nor has the respondent proven that night hunting was a preferred means at a community level. Consequently, in my opinion, the limitation on the aboriginal right to hunt for food contained in s. 68 of the *Wildlife Act* is not unconstitutionally infringed.

51 In this case, as in *Bernard*, the issue is whether s. 68 of the *Wildlife Act* infringes the aboriginal right to hunt for food. The trial judge's findings here are materially the same as the facts in *Bernard*. If *Bernard* remains the law, then Justice Roscoe's decision would be a compelling precedent.

52 *Effect of Morris on Bernard:* Messrs. Paul and Francis address *Bernard* by saying *R. v. Morris*, [2006] 2 S.C.R. 915 (S.C.C.) overruled it.

53 In *Morris*, Messrs. Morris and Olsen were members of the Tsartlip Indian Band of the Saanich Nation. In 1852, the Governor of the Colony of Vancouver Island, representing the Crown, signed a treaty that the Saanich Nation would be at liberty to fish and hunt "as formerly". Messrs. Morris and Olsen were charged with several offences including hunting at night with the aid of a light, contrary to ss. 27(1)(d) and (e) of British Columbia's *Wildlife Act*.

54 Justices Deschamps and Abella for the majority held that ss. 27(1)(d) and (e) infringed a treaty right that was protected by s. 35(1) of the *Constitution Act, 1982*, and were inapplicable to Messrs. Morris and Olsen.

55 Justices Deschamps and Abella reasoned as follows.

• The issue "entails characterizing the scope of the treaty right claimed by Morris and Olsen and delineating any limits on that right" (para. 14).

• The treaty guaranteed the right to "hunt ... as formerly" (para. 28).

• The treaty's guarantee applied to "the full panoply of hunting practices in which the Tsartlip people had engaged before they agreed to relinquish control over their lands on Vancouver Island" (para. 25).

• One of those pre-treaty practices was night hunting with the aid of a light. In this respect, Justices Deschamps and Abella accepted the trial judge's finding that: "night hunting with illumination was one of the various methods employed by the Tsartlip [people] from time immemorial" (para. 26). They cited evidence to that effect (paras. 10, 27, 32).

• Consequently, the treaty guaranteed night hunting with a light:

> 29 ... the language of the treaty supports the view that the right to hunt "as formerly" means the right to hunt according to the methods used by the Tsartlip at the time of and before the Treaty. This would obviously include those methods the Tsartlip have used in hunting "from time immemorial". ...
>
> . . . . .
>
> 33 ... But changes in method do not change the essential character of the practice, namely, night hunting with illumination. What was preserved by the Treaty and brought within its protection was hunting at night with illuminating devices, not hunting at night with a particular *kind* of weapon and source of illumination [italics in S.C.C.

> reasons]. This conclusion is dictated by the common intentions of the parties to the Treaty, as distilled from the context in which the Treaty was entered into. ...

• Justices Deschamps and Abella acknowledged that "there is no treaty right to hunt dangerously" (para. 14). They reconciled the treaty with safety by interpreting the treaty to exclude what they found, in British Columbia's circumstances, to be an overbroad provision that extended beyond safety:

> 35 We agree, as stated earlier, that it could not have been within the common intention of the parties that the Tsartlip would be granted a right to hunt dangerously, since no treaty confers on its beneficiaries a right to put human lives in danger. This limitation on the treaty right flows from the interest of all British Columbians in personal safety. It is also confirmed by the language of the Treaty itself, which restricts hunting to "unoccupied lands", away from any town or settlement. British Columbia is a very large province, and it cannot plausibly be said that a night hunt with illumination is unsafe everywhere and in all circumstances, even within the treaty area at issue in this case.
>
> . . . . .
>
> 37 ... Individual statutory provisions have to be evaluated to determine whether, based on the available historical evidence, they are consistent with the common intention of the parties to the treaty.
>
> 38 In our view, the best reconciliation of the parties' intentions is one that preserves as much as possible the ancient practices the Tsartlip would have understood as forming part of their "liberty to hunt" under the Treaty, subject only to the limit that they do not have a right to put lives or property at risk. Thus, at the very least, the safety limitation in the Treaty should not be drawn so broadly as to exclude *all* night hunting [italics in S.C.C. decision]. It could not have been within the common intention of the parties to completely ban night hunting, which was a long-accepted method of hunting for food.
>
> . . . . .
>
> 40 The blanket prohibition of s. 27(1)(d) and (e) applies, of course, throughout British Columbia, including the vast regions of the interior. Much of the north of the province is uninhabited except by aboriginal people, and there are areas where even they are seen only occasionally. To conclude that night hunting with illumination is dangerous everywhere in the province does not accord with reality and is not, with respect, a sound basis for limiting the treaty right.
>
> . . . . .
>
> 56 There is no treaty right to hunt dangerously. ...
>
> 57 However, based on an understanding of the common intention of the parties to the Treaty, the Tsartlip's treaty right includes the right to hunt at night with illumination, with the modern incarnation of their ancestral method, namely the use of firearms.
>
> 58 The legislative prohibition set out in s. 27(1)(d) and (e) of the *Wildlife Act* is absolute, and it applies without exception to the whole province, including the most northern regions where hours of daylight are limited in the winter months and populated areas are few and far between. The Legislature has made no attempt to prohibit only those specific aspects or geographic areas of night hunting that are unsafe by, for example, banning hunting within a specified distance from a highway or from residences. The impugned provisions are overbroad, inconsistent with the common intention of the parties to the treaties, and completely eliminate a chosen method of exercising their treaty right.
>
> . . . . .
>
> 60 ... Although provincial laws of general application that are inapplicable to aboriginal people can be incorporated into federal law under s. 88 of the *Indian Act*, this cannot happen where the effect would be to infringe treaty rights. Because paras. (d) and (e) of s. 27(1) of the *Wildlife Act* constitute a *prima facie* infringement, they cannot be incorporated under s. 88 of the *Indian Act*.

56 The ruling in *Morris* was the basis of a remittal by the Supreme Court of Canada, and the subsequent decision of the New Brunswick Court of Appeal in *R. v. Polches*, 2008 NBCA 1 (N.B. C.A.).

57 Messrs. Paul and Francis submit that *Bernard* is irreconcilable with the majority's reasons in *Morris*.

58 Judge Ryan and Justice Duncan concluded that *Morris* had not overruled *Bernard*'s conclusion on s. 68 of Nova Scotia's *Wildlife Act*. I hold the same view. My reasons are these.

59 In *Morris*, Justices Deschamps and Abella did not mention *Bernard*. So the issue is whether their reasons impliedly overturned *Bernard*.

60 In *Sparrow*, para. 66, Chief Justice Dickson and Justice La Forest said "[w]e wish to emphasize the importance of context and the case-by-case approach to s. 35(1)" and "the contours of a justificatory standard must be defined in the specific factual context of each case". To similar effect: *Gladstone*, at para. 65, *Van der Peet*, para. 69, per Lamer C.J.C. for the majority, and *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), at para. 95, all noting the fact-specific application of the *Sparrow* principles.

61 The majority's ruling in *Morris*, on the other hand, applied an all-or-nothing approach, based on a form of interjurisdictional immunity. The outcome was a categorical province-wide exclusion of a provincial statutory provision.

62 In *Tsilhqot'in Nation*, paras. 118-49, Chief Justice McLachlin for the Court reviewed the tests for assessing aboriginal rights, then re-affirmed *Sparrow*'s approach over that of the majority in *Morris*:

> [150] *Morris*, on which the trial Judge relied, was decided prior to this Court's articulation of the modern approach to interjurisdictional immunity in *Canadian Western Bank* [*Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3] and *Canadian Pilots Association* [*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, [2010] 2 S.C.R. 536], and so is of limited precedential value on this subject as a result (see *Marine Services* [*Marine Services International Ltd. v. Ryan Estate*, [2013] 3 S.C.R. 53], at para. 64). To the extent that *Morris* stands for the proposition that provincial governments are categorically barred from regulating the exercise of Aboriginal rights, it should no longer be followed. I find that, consistent with the statements in *Sparrow* and *Delgamuukw* [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010], provincial regulation of general application will apply to exercises of aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework. This carefully calibrated test attempts to reconcile general legislation with Aboriginal rights in a sensitive way as required by s. 35 of the *Constitution Act, 1982* and is fairer and more practical from a policy perspective than the blanket inapplicability imposed by the doctrine of interjurisdictional immunity.

63 Consequently, to determine whether *Morris* impliedly overturned *Bernard*, one must compare the context that prevailed in *Morris* to that in *Bernard* and this case. There are three telling differences.

64 First, in *Morris*, the majority's reasons expressly rely on the treaty. In *Bernard*, and in this case, there is no treaty.

65 In *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.), at para. 75, Justice Cory said that, though *Sparrow* involved aboriginal rights, *Sparrow*'s criteria "should, in most cases, apply equally to the infringement of treaty rights". Cory J. then explained the differences of origin and structure between treaty and aboriginal rights:

> 76 There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder* [*Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313], at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

66 Those differences in origin and structure are germane to the comparative contexts of *Morris* and the Nova Scotia cases. In *Morris*, the treaty guaranteed the right to "hunt ... as formerly". Justices Deschamps and Abella interpreted the treaty's expressed

mutual intent to exclude a provincial safety provision that would apply to unoccupied lands where there was no safety risk and which had been night hunted with lights since time immemorial. Then Justices Deschamps and Abella cited the *Indian Act*, s. 88, which said "[s]ubject to the terms of any treaty ... all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province ...". These treaty-sourced factors were absent in *Bernard* and in this case.

67 Second, in *Morris*, there was evidence, accepted by the trial judge, that the Tsartlip Nation had night hunted with a light since "time immemorial".

68 In this case, the trial judge found, based on the three experts' evidence, that the Mi'kmaq historically had hunted by moonlight, but had not used a light, torch or flambeau (trial decision, paras. 371 and 386; see above, para. 36 and below, para. 96).

69 Third, in *Morris*, there was evidence and findings that British Columbia had vast tracts that were largely unoccupied except by aboriginal peoples, aboriginal peoples had night hunted with lights without safety incident and there was no safety risk at the occasion for which Messrs. Morris and Olsen were charged. The absence of a safety risk was critical to the majority's ruling.

70 In this case, the trial judge found there was a significant safety risk, and the finding was amply supported by evidence. Judge Ryan's decision included:

> [365] There was ample evidence before me on the issue of safety and the impugned provisions of the *Wildlife Act* (N.S.); see, for example, the testimony of Crown witnesses John Momborquette, Director of Enforcement Division of the Department of Natural Resources; Gary Lowe, Aboriginal Conservation Liaison Officer; and Benedict Toney, Conservation Officer with the Department of Natural Resources. I accept the evidence of these and the other witnesses that "safety" is and should be a primary concern of the impugned provisions of the *Wildlife Act*. ...

71 Earlier in his reasons Judge Ryan recited the evidence of these witnesses on the safety issue. I will quote his summary of Mr. Momborquette's testimony:

> [237] He was very familiar with the area in question having patrolled that area as a conservation officer the first 15 years of his employment with the department. The area was highly used, and not only by hunters. The department statistics reveal high usage at all times of the year for fishing, camping, recreating. In winter because of high snow accumulations it was very popular with snowmobilers. On one two-day patrol (with RCMP) he had occasion to check over 400 snowmobilers.
>
> [238] Mr. Momborquette emphasized the nature of the usage of the general area where this matter before the Court occurred:
>
> > "A. Yeah. We have the whole gambit. We have people that are out there utilizing our resources in a commercial operation, whether they're harvesting, berry picking, people recreating, camping, fishing, hiking, particularly in the Cape Breton Highlands where we see it year round. It's a high use area at all times of the year. It basically runs the whole gambit. We'd see as many fishermen out there or as many campers out there on any given day in that particular area of the province.
> >
> > Q. You say in a "particular area". What are you referring to?
> >
> > A. The Cape Breton Highlands, the area relative to where this offence occurred." (Transcript, July 23, 2009, pp. 468, 469)
>
> [239] In regard to the issue of night hunting with a light, the department put much emphasis on enforcement because of the safety issues associated with such practice. The Hunter's Mountain area was the source of more complaints regarding night hunting than any other area in the Province. As a safety issue, with the discharge of a high powered firearm at night, there are many variables that come into play. The line of sight, a very limited knowledge of the background, the lack of knowledge of movement or traffic activity in the area, these are some of those variables that impact on safety. He had seen sheds that were hit by gunfire, mailboxes, vehicles — all hit by stray bullets. He has had one occasion where a frustrated landowner actually returned gunfire, striking a motor vehicle and wounding an occupant (not in the Hunters Mountain area).

[240] He testified that when it came to the issue of hunting at night, other than the safety issue — "I don't have concerns." (Transcript July 23, 2009, p. 467)

[241] The area has an extensive road system all publicly accessible, owned by the Crown but built and maintained by the forest industry. Concerning the main road proceeding from the entrance at Hunter's Mountain to the Wreck Cove Power Generating Facility, "... it's got posted speed limit signs and road signs on it" (Transcript July 23, 2009, p. 474)

[242] He was the recipient of a complaint from the then owner of the forestry rights in that area (Stora Forest Industries) relating to nighttime firearm discharges near their working operations. Nighttime firearm discharges was the source of the most complaints in that area:

> "It would be one of the highest number of complaints that we would receive relative to unsafe activities whether it be discharge in close proximity to woods operations, people out there hiking, camping at nighttime and daytime." (Transcript July 23, 2009, p. 476)

[243] The forest industry carried out operations there on a 24/7 basis with workers harvesting, setting up camps, repairing or servicing equipment and engaging in other operational activities. He had one complaint just a few months prior to testifying of:

> "... the camp being struck recently by a high-powered rifle. ... a trailer was struck by a high-powered rifle in the Hunter's Mountain area." (Transcript July 23, 2009, p. 476)

[244] Thus, as a result, his Department had put considerable focus on responding to public complaints, and:

> "... dealing with the public safety issue is the reason that we're out there." (Transcript July 23, 2009, p. 477)

72 In this case, the SCAC judge reviewed this evidence and the trial judge's findings, then concluded:

[116] I am satisfied that the evidence supports the judge's conclusion that the public safety is put at risk when armed people hunt at night with a light. ...

73 The SCAC judge referred to British Columbia's vast unoccupied territory that diffused the safety risk in *Morris*, then said:

[123] There was no evidence before the trial court in this case that showed that there are areas of Nova Scotia that are so sparsely populated or in such low usage by humans that hunting at night with or without a light can be carried out safely.

[124] In both *Bernard*, and the case at bar, the evidence showed the opposite to be true. The areas where the offences were committed, being Northside East Bay and the Cape Breton Highlands, were found by the trial courts to be inhabited and in regular use by humans for a wide variety of activities — recreational, institutional and commercial. ...

[125] Permitting hunting of any species at night in a populated area is dangerous. ...

74 In *Morris* the majority rejected the presumption that night hunting with a light was inherently unsafe. That presumption was inconsistent with the evidence in *Morris*. In this case, the trial judge made a finding, well-supported by the evidence, that night hunting in the Cape Breton Highlands is unsafe.

75 It is *Sparrow*'s "carefully calibrated test", as the Chief Justice termed it in *Tsilhqot'in Nation*, that governs the appraisal of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. *Sparrow*'s test is fact-specific and context-driven. As was the case in *Bernard*, the context that underlies s. 68 of Nova Scotia's *Wildlife Act* reasonably supports the trial judge's finding, upheld by the SCAC, that the appellants' night hunting with a light in this area of the Cape Breton Highlands posed a significant safety risk.

76 I respectfully reject the appellants' submission that *Morris* has overturned *Bernard*'s ruling on the effect of s. 68 in Nova Scotia's *Wildlife Act*.

77 *Prima facie infringement:* With the assistance of *Bernard*, I will turn to the test for *prima facie* infringement. In *Tsilhqot'in Nation*, McLachlin C.J.C. reiterated *Sparrow*'s three questions:

> [122] Next, in order to determine whether the right is infringed by legislation, a court must ask whether the legislation results in a meaningful diminution of the right: *Gladstone* [*R. v. Gladstone*, [1996] 2 S.C.R. 723]. As discussed, in *Sparrow*, the Court suggested that the following three factors will aid in determining whether such an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112).

78 Whether there has been a "meaningful diminution" of the aboriginal right is the ultimate issue to which the three questions pertain: *Gladstone*, para. 43; *Morris*, para. 53; *Seward*, para. 37.

79 First, is the limitation in s. 68 unreasonable?

80 In *Badger*, Cory J. wrote:

> 88 ... It has been held on a number of occasions that aboriginal or treaty rights must be exercised with due concern for public safety. ...

Cory J. para. 88, quoted *R. v. Myran* (1975), [1976] 2 S.C.R. 137 (S.C.C.), pages 141, per Dickson J. as he then was, for the Court. Justice Cory continued:

> 89 That decision was subsequently affirmed by this Court in *Sutherland* [*R. v. Sutherland*, [1980] 2 S.C.R. 451, p. 460] and *Moosehunter* [*R. v. Moosehunter*, [1981] 1 S.C.R. 282]. To the same effect *R. v. Napoleon*, [1986] 1 C.N.L.R. 86 (B.C.C.A.), and *R. v. Fox*, [1994] 3 C.N.L.R. 132 (Ont. C.A.). Accordingly, it can be seen that reasonable regulations aimed at ensuring safety do not infringe aboriginal or treaty rights to hunt for food. Similarly, these regulations do not infringe the hunting rights guaranteed by Treaty No. 8 as modified by the *NRTA*.

Cory J. held (para. 90) that the safety provisions of the provincial *Wildlife Act* do not constitute a *prima facie* infringement under the *Sparrow* test. To similar effect: *R. v. Sundown*, [1999] 1 S.C.R. 393 (S.C.C.), para. 26, per Cory J. for the Court; *Seward*, paras. 47-48; *R. v. Jacob*, 2009 ONCA 73 (Ont. C.A.), para. 42; *Québec (Procureur général) c. Paul* (1999), [2000] 3 C.N.L.R. 262 (C.S. Que.), paras. 38-40; *R. v. Ice*, [2000] O.J. No. 5857 (Ont. C.J.), paras. 6-12; *R. v. Pitawanakwat*, [2004] O.J. No. 2075 (Ont. C.J.), para. 44.

81 An example of the danger from night hunting with a light appeared in *R. v. Fontaine*, 2014 MBQB 119 (Man. Q.B.), a sentencing decision. The facts were:

> 6 On the day in question Mr. Fontaine and some friends went moose hunting about midnight. They travelled just outside their community of Sagkeeng on the road leading to Happy Lake. This was on property owned by the local mill. They were hunting to provide food for their families.
>
> 7 Unbeknownst to them, Mr. Fontaine's good friend Jason Guimond had been in that precise area earlier that day. Although he was there to gather firewood, he came across two moose, and shot them. He also intended the moose as food for his family.
>
> 8 Mr. Guimond left the moose there so he could take his firewood back and return with help to retrieve the carcasses. Unfortunately, his truck had a flat tire which caused him some considerable delay, but eventually he was able to return to the site with his two friends. He was wearing a baseball cap that had small LED lights on its peak.
>
> 9 The area he was in was only several hundred feet from the road. There were no trees or bushes of any substantial size between his location and the road.

10 Mr. Fontaine and his friends had parked their truck on the road, some distance from Mr. Guimond's truck, which they did not see. One of the individuals had a spotlight. As he shone the light, Mr. Fontaine thought he saw the eyes of a moose reflecting the light back. He immediately fired his gun. It turned out that he was seeing the LED lights on Jason Guimond's hat. Mr. Guimond was shot in the eye and killed instantly.

82 I will turn to Nova Scotia's s. 68. In *Bernard*, Justice Roscoe said:

[52] Section 68 prohibits a practice which on the preponderance of the evidence and case authorities is inherently unsafe. That its legislative purpose is at least partially to prohibit unsafe hunting cannot be rationally challenged. In my view, even if conservation of wildlife was originally the purpose of the section, or if it remains one of its objectives, that does not diminish the significance of its safety-based objectives and effects. The section therefore is a reasonable limitation on the aboriginal right to hunt for food.

83 In the case of Messrs. Paul and Francis, the evidence of a safety risk was more pronounced than in *Bernard*. Judge Ryan found there were significant safety concerns. He concluded:

[367] Like the courts in *Seward* (at para. 48), *Bernard* (at para. 52), and *Badger* (at para. 89), I find that measured against the standard of public safety, s. 68 of the *Wildlife Act* which prohibits hunting with a light is not in my opinion an unreasonable limitation on the Mi'kmaq right to hunt for food or ceremonial purposes.

84 The SCAC judge accepted that finding.

85 Earlier (paras. 70-73), I outlined some of the evidence that supports the finding of a safety risk in this case. As this Court held in *Bernard*, safety is one of the purposes of s. 68. The courts below did not err by concluding that s. 68 is a reasonable limitation on the aboriginal right to hunt for food.

86 Second, does the limitation impose undue hardship?

87 In *Sparrow*, p. 1112, Lamer C.J.C. said:

Fishing rights are not traditional property rights. They are rights held by a collective and are in keeping with the culture and existence of that group. ...

88 Consequently, the "enquiry should be focused on the collective right of the Band, and whether members of the Band, not the individual appellants, suffered undue hardship by reason of the regulation": *R. v. Sampson*, [1995] B.C.J. No. 2634 (B.C. C.A.), para. 62.

89 In *Nikal*, Justice Cory for the majority explained "undue hardship":

100 The second question is whether the regulation imposes an undue hardship. The term "undue hardship" implies that a situation exists which imposes something more than mere inconvenience. It follows that a license which is freely and readily available cannot be considered an undue hardship. The situation might be different if, for example, the license could only be obtained at locations many kilometres away from the reserve and accessible only at great inconvenience and expense.

90 In *Bernard*, Justice Roscoe said, of the evidence in that case:

[53] Although the respondent led evidence that it was easier to hunt at night with a light, he has not proven that the Mi'kmaq peoples generally or his band or community specifically would suffer undue hardship if prohibited from night hunting with a light. ...

91 In this case, Judge Ryan found:

> [368] As in *Bernard*, there is nothing before me to support the contention that the Mi'kmaq community would suffer undue hardship if prohibited from hunting with a light. In fact, the evidence of Anthony Nette, manager of the Wildlife Division of the Nova Scotia Department of Natural Resources indicates (at paras. 225-226 herein) a "success" rate of between 90% and 100% in the Cape Breton Highlands for non-aboriginal hunters during the one week of the year they — approximately 350 permits — are allowed to hunt for moose. Aboriginal hunters, whose numbers are far less than that and who are entitled to hunt for moose 52 weeks of the year, would seem to me capable of achieving a commensurate success rate. Keep in mind Mr. Nette's comment that a "successful" hunt rate is in the 30% range for the areas of Alberta and the Yukon where he was previously employed.

92 The SCAC judge held:

> [131] Other evidence of Mr. Nette described the moose population in the Cape Breton Highlands as being in good health and that there is a significant number of moose. This would provide an ample supply for food hunters. There was, as the judge indicated, nothing in the evidence which would suggest that aboriginal hunters seeking food would be the subject of any undue hardship, by the reduced hours of hunting necessitated by section 68.
>
> [132] In my view, the trial judge correctly recited the evidence. His conclusion is both reasonable and supported by this evidence.

93 I agree with Justice Duncan that the trial judge's findings were reasonable and supported by the evidence. This record contains no evidence of undue hardship, as that term is defined by the authorities, and no basis to overturn the trial judge's findings as unreasonable.

94 Third, does s. 68 deny the rights holders a preferred means of exercising their aboriginal right?

95 Hunting is a collective right of the aboriginal community, not individual property. Accordingly, whether Messrs. Paul and Francis personally preferred to hunt at night with a light is not determinative. The issue is whether that practice is a preferred method of hunting by their community. *Sparrow*, p. 1112; *Sampson*, para. 65; *Seward*, paras. 39-41.

96 The evidence on this point derived largely from the three experts — Drs. Patterson, and von Gernet, called by the Crown, and Dr. Wicken, called by the defence. The trial judge (paras. 35-215) set out their evidence. On the issue of preferred method, Judge Ryan said:

> **Does the legislation deny a preferred method of exercising the aboriginal right?**
>
> [369] The evidence provided by the three expert witnesses (Dr. Wicken, Dr. Patterson and Dr. von Gernet) is consistent in that they all agree there is no oral evidence (obviously!), oral tradition evidence, or historical written evidence that the Mi'kmaq hunted at night with a light. They all agree that the Mi'kmaq hunted at night during the Fall rut in late September and October of each year. They all agree that they did so by moonlight and used various stratagems to lure the moose. Dr. Wicken alone is of the opinion that one can come to the conclusion that the Mi'kmaq hunted at night and used a flambeau in doing so. He was reluctant, however, to say that hunting at night was a preferred method by which the Mi'kmaq hunted. Both Dr. Patterson and Dr. von Gernet are of the opinion that night hunting with a light or flambeau was not a practice carried out by the Mi'kmaq as there was no evidence of any form from which one could come to such a conclusion.
>
> [370] Dr. Wicken's evidence (Transcript, July 20, 2009, at pp. 322-24) sets out his opinion and how he came to that conclusion:
>
> > **MR. CLARKE:** No. I have just one more question, I believe, Your Honour. I guess, Dr. Wicken, after a review of your report and the documents that you have provided with your report and your testimony, would it be or is it your opinion based on your report and documents provided that hunting big game at night with a flambeau was a preferred method of hunting game at the time of contact?

A. Was it a preferred method?

Q. Yes.

A. I would say it was one method that was used.

Q. But not a preferred method.

A. I wouldn't say that it was the preferred method. I'd say it's possible that if they were hunting at night they would do so with moonlight, because certainly it would be easier. But I would say it would be one method they would have used.

Q. But there's no historical record or oral tradition of that, is there?

A. No, there's not.

Q. So your conclusion, then, that they would is based on supposition and speculation.

A. It's based upon a reading of ... a general understanding of Mi'kmaq society, something about their hunting and subsistence practices, and the consistency with ... they live by hunting over this time period from 1600 to 1850. It declines after that. But it's a conclusion that I think is reasonable to make based upon all these factors.

[371] Based on that evidence, I am of the opinion that the most that can be inferred from the evidence is that the Mi'kmaq hunted at night by moonlight. To extend it any farther to include a flambeau or torch is not warranted by the evidence and, in that regard, I respectfully disagree with Dr. Wicken.

[372] I do note that Dr. Wicken, as part of his evidence, tendered Exhibit No. 7 which contains many excerpts of historical writings. Among those writings is that of Francis Duncan, M.A. (Exhibit No. 7, Tab 19, pg. 63) published in London in 1861. Mr. Duncan refers to the Mi'kmaq hunting moose at night by moonlight. Mr. Duncan's personal account, in the present tense, makes no mention of the use of a torch or flambeau in the moose hunt. If the Mi'kmaq had used torches or flambeaux as suggested by Dr. Wicken, surely such a practice would have continued and have been noted by either an earlier historical chronicler or someone writing as late as Mr. Duncan who was writing two hundred and fifty years after the initial written records were inscribed.

97 Judge Ryan also cited the pointed testimony of Mr. Bernie Syliboy:

[280] Bernie Syliboy was an employee of the Department of Natural Resources and had been for almost 20 years as a conservation officer.

[281] Mr. Syliboy is an aboriginal Mi'kmaq and a member of the Indian Brook First Nation in central Nova Scotia. He indicated that along with his duties as an enforcement officer in the East Hants District Office in Shubenacadie, he often dealt with matters that crossed his desk dealing with aboriginal people and the Department of Natural Resources. ...

[282] Among his duties was enforcing the provisions of the *Wildlife Act* of the province of Nova Scotia. His duties might take him anywhere within the Province of Nova Scotia.

[283] ... He was asked specifically about the issue of night hunting to which he replied:

> "Night hunting is pretty much frowned upon in non-aboriginal and aboriginal communities ... poaching ... poaching animals is you now [*sic*] ... or night hunting is not well accepted in ... white communities and non-white communities. (Transcript Nov. 5, 2009, p. 19)

[284] He went on to indicate that a few members of the aboriginal community do it for the thrill of it and for monetary gain.

> "... most of the elders and people that I've talked to, you know, don't see the reasoning behind night hunting or, you know, the unsafe practice of night hunting." (Transcript, Nov. 5, 2009, p. 19, 20)

> [285] He referred to native focus groups he and his two native enforcement officers attended. Among issues discussed was the general aspect of safety. Another was the issue of night hunting. On the latter issue the "majority" were against it — it was unsafe, it caused undue stress to the animals by not allowing them to rest and eat property [*sic*].

98 Judge Ryan concluded:

> [386] I find that s. 68 of the *Wildlife Act* did not amount to a *prima facie* infringement of their Aboriginal right to hunt for food. It did not amount to any meaningful diminution of their Aboriginal right. While the evidence shows and I accept that the Mi'kmaq did on occasion hunt for food at night, I am not satisfied that the evidence establishes that night hunting with a light was a preferred method of hunting. ...

99 The SCAC (para. 143) held that the trial judge's "findings of fact were reasonable and supported by the evidence before the court". I agree with that assessment.

100 Neither the trial judge nor the SCAC erred by concluding there was no meaningful diminution of the appellants' aboriginal right to hunt for food or ceremonial purposes.

101 I would dismiss the grounds of appeal that relate to the issue of *prima facie* infringement.

Issue #3 — Justification

102 As the trial judge found there was no *prima facie* infringement, it was unnecessary that he consider justification under *Sparrow*'s fourth step. Nonetheless, Judge Ryan said:

> [381] In light of the principles governing the justification stage of the analysis — had it been necessary — I cannot improve upon the Nova Scotia Court of Appeal's response to the question of justification in *Bernard* (at para. 54) ....

103 In *Bernard*, Justice Roscoe said:

> [54] Having found no infringement of the aboriginal right to hunt for food, it is not necessary to deal with justification. If it were necessary, I would adopt the trial judge's logical and thorough reasons for concluding that the Crown has proven justification:

104 The trial judge in *Bernard* was Judge Peter Ross. Judge Ross' reasons, quoted and adopted by para. 54 of Roscoe J.A.'s decision, said that: (1) public safety was a valid legislative objective, (2) s. 68 did not deprive the Mi'kmaq of any priority they enjoyed over others, (3) s. 68 did not over-reach, given the safety objective, (4) there had been consultations between the government and native community on the issues, (5) there was no expropriation requiring compensation, and (6) concluded with:

> 68. ... The legitimate need to preserve the safety of the public must also be exercised and interpreted flexibly and proceed apace with the evolution of hunting methodologies. Hunters today [are] using instruments with a much greater capability to inflict harm than a traditional bow and arrow. They hunt in areas occupied and utilized by many more people in a variety of ways. Mi'kmaq and others share much of the same space, use the same roads and methods of transportation, have access to the same weapons and are subject to the same dangers from misuse of such. While certain sections of the *Wildlife Act* appear to be aimed at preserving the "sport" aspect of hunting, it is equally clear that many are concerned primarily with safety, *e.g.* shooting from the highway, shooting from a vehicle, and shooting around houses. Even if certain techniques might be effective and efficient means to take game for food purposes, the government acts justifiably in regulating or prohibiting certain activities as inherently dangerous. A society in which all people feel safe and secure is conducive to the long term interests of Mi'kmaq and non-Mi'kmaq alike. Statements in *Simon* and *Sparrow* indicate that it is inherent in any treaty or aboriginal right that such be exercised safely. It is difficult to imagine that any traditional hunting method employed

> by Mi'kmaq in years gone by created a risk that instead of killing their prey, they killed one another. The evolution of methods and the flexible approach which should be taken must surely also carry along with it this basic tenet, namely, that the methodology not put other persons at undue risk. Today's high powered firearms and million candle-power Q-Beams are a long way from the bows and torches used by Mi'kmaq centuries ago.

105 In the present case, Justice Duncan said, of justification:

> [152] Judge Ryan made findings of fact that showed that the concerns of Judge Ross were no less valid in the case at bar. ...
>
> [153] I have previously reviewed in detail ... the evidence and findings based on that evidence which underpins the conclusion that there are significant public safety concerns created by hunting at night (with or without a light) in Nova Scotia and in particular in the Cape Breton Highlands. It is unnecessary to repeat it. Judge Ryan made it clear that in his mind, based on the evidence and the concerns expressed by Judge Ross, and adopted by the Court of Appeal in *Bernard*, that the safety concerns outweighed the concerns expressed by the appellants.
>
> [154] There was also testimony, in the case on appeal, from various witnesses that spoke to the ongoing consultations that exist as between the government and the aboriginal community with respect to the regulation of hunting and other activities that the *Wildlife Act* regulates. This testimony supports the position of the respondent.
>
> [155] I find that the review of evidence set out by Judge Ryan in his decision is accurate and that his findings of fact based on that evidence are reasonable. I conclude that if it was necessary to consider the "justification" argument, that the learned trial [judge] did not err in concluding that section 68 is a justifiable infringement of the appellant's aboriginal right.

106 In *Sparrow*, Chief Justice Dickson and Justice La Forest, discussing justification, said:

> 71 ... Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves ....

107 See also the authorities cited above, paras. 80-82, for the proposition that safety measures are reasonable under *Sparrow*'s test for *prima facie* infringement.

108 I agree with the trial and SCAC judges that s. 68 minimally impairs the aboriginal right to hunt for food. Judge Ryan (para. 368) found that the non-aboriginal hunters, who may hunt one week per year and in compliance with s. 68, have a "success" rate of 90-100%. Aboriginal hunters, whose numbers are much fewer, may hunt 52 weeks per year. From this Judge Ryan inferred, reasonably in my view, that aboriginal hunting for food would not suffer from the restriction on night hunting with a light.

109 There was evidence of consultation between the government and aboriginal groups. There is no basis to conclude that the implementation of s. 68 for a safety purpose has impugned the honour of the Crown.

110 I would dismiss the grounds of appeal that challenge the conclusion of the SCAC respecting justification for an infringement.

Issue #4 — Admissibility of Expert Evidence

111 Before the trial in the Provincial Court, Messrs. Paul and Francis applied for rulings to exclude the Crown's expert evidence as irrelevant, and to dismiss the charges or direct acquittals. Their motion sought to exclude the expert evidence because "that evidence that the Mi'kmaq did or did not hunt at night is logically irrelevant to the determination of the issues raised in the case at bar" (Notice of Motion, para. 13).

112 Judge Ryan dismissed the motion. His Decision after trial outlined his reasons. The judge (paras. 22-24) cited the directions in *Sparrow*, para. 66, *Gladstone*, para. 65, and *Van der Peet*, para. 69, that a claim for an aboriginal right is determined from its factual context. Judge Ryan concluded:

> [25] That direction from the Supreme Court of Canada cannot be ignored by this Court and I am unable to find any contrary direction in the more recent *Morris (2006)* decision of the Supreme Court of Canada. It was incumbent upon this Court to hear expert evidence that would inform and be the basis of its analysis of the Aboriginal rights question now in issue — is hunting with a light a legitimate exercise of the Aboriginal right to hunt for food?

113 The SCAC judge upheld the trial judge's ruling. Justice Duncan said:

> [65] I find that the evidence of the expert witnesses who testified as to the hunting practices, customs and traditions of the Mi'kmaq community of Eskasoni was relevant and admissible, and necessary to the positions of all the parties in the trial.
>
> [66] I conclude that the trial judge committed no error in admitting this evidence and in deciding to dismiss the preliminary application of the appellants.

114 In the Court of Appeal, Messrs. Paul and Francis say the trial judge erred by admitting the expert evidence, and the SCAC erred by affirming the trial judge's ruling. They submit that: (1) *Bernard*'s ruling on the "right to hunt for food" has settled the characterization issue, meaning the only live issue is infringement; (2) the majority's ruling in *Morris* negates the unfavorable aspects of Justice Roscoe's ruling in *Bernard*; and (3) for the infringement analysis, the "preferred means" connotes the current preference, to which historical practice is irrelevant.

115 I respectfully disagree with several aspects of this submission.

116 Earlier (paras. 25, 27-29 and 47) I referred to the passages from the Supreme Court's rulings in *Van der Peet*, *R. v. Marshall*, *Lax Kw'alaams* and *Sappier* that speak to the need for historical evidence to characterize the current practice as a logical evolution of a pre-contact practice.

117 As discussed, *Morris* has not overruled *Bernard*'s conclusions on s. 68 of Nova Scotia's *Wildlife Act*.

118 As to *prima facie* infringement, historical evidence may assist the analysis of whether, or how, the practice has become a current preferred means within the aboriginal community. The current community preference may be the outcome of a tradition that developed over time. The historical evidence is admissible and it is for the trial judge to assess its impact. In this respect, in *Seward*, Ryan J.A. said:

> 40 On this appeal the appellants accepted that the Supreme Court justice correctly identified the error of the trial judge in defining "preferred means" as an individual choice. The appellants accepted that "preferred means" are established at the community level (*R. v. Sampson* (1995), 67 B.C.A.C. 180 (B.C.C.A.) at p. 194). The appellants submitted that the Supreme Court justice was wrong however, in the meaning he gave to the phrase. The appellants submitted that he erred in looking only to the methods of hunting which existed at the time of contact rather than the customs and practices of the Penelekut people as they have evolved over time.
>
> 41 In my view the Supreme Court justice did not err in examining the methods the Penelekut used for hunting at the time of contact. In the passage I have quoted above the Supreme Court justice was simply pointing out that the appellants had not established that night hunting was ever a "preferred means". The appellants are right when they say that traditions evolve over time and that it must be present day practices that are examined. The point here is that the evidence established that Penelekut hunters were known to hunt at night on occasion but that such activity had never reached the level of a preferred means.

119 In *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 (S.C.C.), McLachlin C.J.C. for the majority commended the flexible application of the rules of evidence to aboriginal claims:

> **(a) Admissibility of Evidence in Aboriginal Right Claims**

29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* [*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010] affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied by s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, *supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, *supra*).

120 In this case, Dr. von Gernet's report said:

... The evidence suggests that when they did hunt this species, it was at all times of the year using a variety of strategies and technologies which varied depending on the season. The preference appears to have been to hunt during daylight hours in the winter, although moose were also hunted during the day in the summer. ... Only during the rut was a nocturnal moose hunt undertaken. While the latter allowed the Mi'kmaq to draw their prey near, the moose were attracted by sound, not illumination. Hence, unlike the fishery, the hunt was conducted without torches.

As I understand it, the modern method of illuminating a moose with a strong light is intended to "freeze" the animal and create eyeshine, thereby rendering the head both an immobile and identifiable target even at a significant distance. Of course, this is entirely different from attracting a moose to the hunter's position in the dark using sounds and then dispatching the animal at close range. I have found no evidence for a logical evolution between these disparate hunting methods. ...

121 Dr. Patterson wrote:

... Most significantly, the Mi'kmaq took what they needed, no more. And significantly, given the matters now before the court, Denys says nothing whatever about the use of torches or lights in night hunting. To the contrary, he points out that hunting by water required the darkest night possible, and that in using the tracking method, they would follow a wounded animal by day, camping near it overnight, and then resume their tracking in the morning. The Mi'kmaq, as Denys knew them, did not use lights in hunting moose. Far from being something that he might have overlooked, Denys was explicit in reporting the Mi'kmaq use of torches in fishing salmon and sea trout (or salmon trout, as he called them). And he reported that in certain areas, they used troches in hunting birds [footnote omitted]. Most importantly, his various descriptions of Mi'kmaq hunting practices underline the fact that they used different methods for different species. There was no such thing as a general hunting method, but rather, the Mi'kmaq had devised strategies that were appropriate for the species being sought, the time of year, their location, and the various conditions in which their quarry might be found.

122 This evidence was relevant to the trial judge's task and occupied the flexible ambit approved by *Mitchell*. I would dismiss the ground of appeal that challenges the admissibility of the expert evidence.

Conclusion

123 I would dismiss the appeal.

Appeal dismissed.

2004 SCC 73, 2004 CSC 73
Supreme Court of Canada

Haida Nation v. British Columbia (Minister of Forests)

2004 CarswellBC 2656, 2004 CarswellBC 2657, 2004 SCC 73, 2004 CSC 73, [2004] 3 S.C.R. 511, [2004] S.C.J. No. 70, [2005] 1 C.N.L.R. 72, [2005] 3 W.W.R. 419, 11 C.E.L.R. (3d) 1, 135 A.C.W.S. (3d) 2, 19 Admin. L.R. (4th) 195, 206 B.C.A.C. 52, 245 D.L.R. (4th) 33, 26 R.P.R. (4th) 1, 327 N.R. 53, 338 W.A.C. 52, 36 B.C.L.R. (4th) 282, J.E. 2004-2156, REJB 2004-80383

Minister of Forests and Attorney General of British Columbia on behalf of Her Majesty the Queen in Right of the Province of British Columbia (Appellants) v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation (Respondents)

Weyerhaeuser Company Limited (Appellant) v. Council of the Haida Nation and Guujaaw, on their own behalf and on behalf of all members of the Haida Nation (Respondents) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General for Saskatchewan, Attorney General of Alberta, Squamish Indian Band and Lax-kw'alaams Indian Band, Haisla Nation, First Nations Summit, Dene Tha' First Nation, Tenimgyet, aka Art Matthews, Gitxsan Hereditary Chief, Business Council of British Columbia, Aggregate Producers Association of British Columbia, British Columbia and Yukon Chamber of Mines, British Columbia Chamber of Commerce, Council of Forest Industries, Mining Association of British Columbia, British Columbia Cattlemen's Association and Village of Port Clements (Interveners)

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: March 24, 2004
Judgment: November 18, 2004
Docket: 29419

Proceedings: reversing in part *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 147, 2002 CarswellBC 329, 99 B.C.L.R. (3d) 209, [2002] 2 C.N.L.R. 121, [2002] 6 W.W.R. 243, 44 C.E.L.R. (N.S.) 1, 164 B.C.A.C. 217, 268 W.A.C. 217 (B.C. C.A.); additional reasons at *Haida Nation v. British Columbia (Minister of Forests)* (2002), 2002 BCCA 462, 2002 CarswellBC 2067, 216 D.L.R. (4th) 1, 5 B.C.L.R. (4th) 33, [2002] 10 W.W.R. 587, [2002] 4 C.N.L.R. 117, 172 B.C.A.C. 75, 282 W.A.C. 75 (B.C. C.A.); reversing *Haida Nation v. British Columbia (Minister of Forests)* (2000), 2000 BCSC 1280, 2000 CarswellBC 2434, 36 C.E.L.R. (N.S.) 155, [2001] 2 C.N.L.R. 83 (B.C. S.C.)

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Headnote

Timber --- Timber licences — Judicial review
Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.
Crown --- Crown property — Grants of Crown lands — General
Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.
Aboriginal law --- Reserves and real property — Transfer or disposition — General principles
Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted.
Injunctions --- Injunctions involving Crown — Miscellaneous injunctions
Crown has duty to consult and, where appropriate, accommodate Indian bands on relevant matters where possibility of aboriginal title has been asserted — Band not required to seek injunction in order to exercise remedy.
Bois d'oeuvre --- Permis de coupe de bois — Contrôle judiciaire
Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.
Couronne --- Propriété de la Couronne — Concession des terres de la Couronne — En général
Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.
Droit autochtone --- Réserves et biens-fonds — Transfert ou disposition — Principes généraux
Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication.
Injonctions --- Injonctions impliquant la Couronne — Injonctions diverses
Lorsqu'une bande indienne revendique l'existence d'un titre ancestral, l'État a l'obligation de la consulter et, si cela est possible, de lui trouver un accommodement à l'égard des questions pertinentes à la revendication — Bandes ne sont pas obligées de demander une injonction pour exercer leur recours.
An aboriginal band lived on an island in British Columbia, where it had harvested cedar timber for many generations. The band claimed title to the island, but the claim had not been recognized at the time of the proceedings. The Province issued a tree farm licence and replaced the licence on three occasions.
The band's application to set aside the licence and replacements was dismissed. The trial judge found that no legal duty existed to negotiate with the band, although a moral duty existed.
The band's appeal was allowed. The appellate court found that the Government and the logging company had a legal duty to negotiate with the band regarding the timber licence.
The Government and the logging company appealed.
Held: The Government's appeal was dismissed and the logging company's appeal was allowed.
The honour of the Crown requires that the Government consult on relevant issues with Indian bands when their assertion of aboriginal rights is sufficiently strong. In appropriate circumstances, a duty to accommodate may also arise. The fact that the rights claimed had not yet been proven did not negate the duty to consult. Knowledge of a credible but unproven claim is sufficient to trigger the duty to consult and possibly accommodate. The scope of the duty is proportionate to a preliminary

assessment of the strength of the band's case, and the potentially adverse effects of the impugned activity on the aboriginal title. The duty does not rest exclusively with the federal Government but extends to the provincial Government as well.
In the case at bar, the Province failed in its duty to consult the native band. The Province had knowledge of potential aboriginal title. Red cedar was integral to the Indian band's culture, and the logging licence covered a large amount of the island.
The logging company did not have a duty to consult or accommodate. The honour of the Crown cannot be delegated to a third party. The doctrine of "knowing receipt" was not applicable. The fact that a third party is not required to consult or accommodate native interests does not preclude findings of liability.
The band was not required to seek an interlocutory injunction rather than bring the current proceedings. The current proceedings did not prevent an application for an injunction.
Une bande indienne vivait sur une île de la Colombie-Britannique et elle coupait depuis plusieurs générations le cèdre qui y poussait. La bande a revendiqué le titre de l'île, mais sa revendication n'avait toujours pas été reconnue au moment des procédures. La province a délivré un permis, appelé concession de ferme forestière, et l'a remplacé à trois reprises.
La demande de la bande en annulation du permis et des remplacements a été rejetée. Le premier juge a conclu que seule une obligation morale, et non légale, existait de négocier avec la bande.
Le pourvoi de la bande a été accueilli. La Cour d'appel a conclu que le gouvernement et la compagnie d'exploitation du bois avaient une obligation légale de négocier avec la bande indienne relativement au permis d'exploitation du bois.
Le gouvernement et la compagnie ont interjeté appel.
Arrêt: Le pourvoi du gouvernement a été rejeté et le pourvoi de la compagnie a été accueilli.
L'honneur de l'État exige que le gouvernement consulte les bandes indiennes au sujet des questions pertinentes lorsque leurs revendications de titres ancestraux sont assez solides. Une obligation d'accommodement peut également naître dans des circonstances appropriées. Le fait que les droits revendiqués n'avaient pas encore été prouvés n'enlevait pas l'obligation de consulter. La connaissance d'une revendication crédible mais non prouvée suffit pour donner naissance à l'obligation de consulter et aussi, possiblement, à celle de trouver un accommodement. L'étendue de l'obligation est proportionnelle à l'évaluation préliminaire de la force de la preuve de la bande et de l'impact potentiellement négatif de l'activité contestée sur le titre ancestral.
L'obligation n'appartient pas exclusivement au gouvernement fédéral; elle s'applique également au gouvernement provincial.
En l'espèce, la province a manqué à son obligation de consulter la bande indienne. La province connaissait l'existence possible d'un titre ancestral. Le cèdre rouge faisait partie intégrante de la culture de la bande indienne, et le permis de couper du bois couvrait une large partie de l'île.
La compagnie n'avait aucune obligation de consulter ou de trouver un accommodement. L'honneur de l'État ne peut être délégué à un tiers. La doctrine de la « réception en connaissance de cause » ne trouvait pas application ici. Le fait qu'un tiers n'était pas obligé de consulter les autochtones vis-à-vis leurs intérêts ou de trouver un accommodement pour ceux-ci n'empêchait cependant pas de tirer une conclusion de responsabilité.
La bande n'était pas obligée de demander une injonction au lieu des procédures actuelles. Celles-ci n'empêchaient par ailleurs pas une demande d'injonction.

***McLachlin C.J.C.*:**

I. Introduction

1 To the west of the mainland of British Columbia lie the Queen Charlotte Islands, the traditional homeland of the Haida people. Haida Gwaii, as the inhabitants call it, consists of two large islands and a number of smaller islands. For more than 100 years, the Haida people have claimed title to all the lands of the Haida Gwaii and the waters surrounding it. That title is still in the claims process and has not yet been legally recognized.

2 The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.

3 The forests of Haida Gwaii have been logged since before the First World War. Portions of the island have been logged off. Other portions bear second-growth forest. In some areas, old-growth forests can still be found.

4 The Province of British Columbia continues to issue licences to cut trees on Haida Gwaii to forestry companies. The modern name for these licenses are Tree Farm Licences, or T.F.L.S. Such a licence is at the heart of this litigation. A large forestry firm, MacMillan Bloedel Limited acquired T.F.L. 39 in 1961, permitting it to harvest trees in an area designated as Block 6. In 1981, 1995 and 2000, the Minister replaced T.F.L. 39 pursuant to procedures set out in the *Forest Act*, R.S.B.C. 1996, c. 157. In 1999, the Minister approved a transfer of T.F.L. 39 to Weyerhaeuser Company Limited ("Weyerhaeuser"). The Haida people challenged these replacements and the transfer, which were made without their consent and, since at least 1994, over their objections. Nevertheless, T.F.L. 39 continued.

5 In January of 2000, the Haida people launched a lawsuit objecting to the three replacement decisions and the transfer of T.F.L. 39 to Weyerhaeuser and asking that they be set aside. They argued legal encumbrance, equitable encumbrance and breach of fiduciary duty, all grounded in their assertion of Aboriginal title.

6 This brings us to the issue before this Court. The government holds legal title to the land. Exercising that legal title, it has granted Weyerhaeuser the right to harvest the forests in Block 6 of the land. But the Haida people also claim title to the land — title which they are in the process of trying to prove — and object to the harvesting of the forests on Block 6 as proposed in T.F.L. 39. In this situation, what duty if any does the government owe the Haida people? More concretely, is the government required to consult with them about decisions to harvest the forests and to accommodate their concerns about what if any forest in Block 6 should be harvested before they have proven their title to land and their Aboriginal rights?

7 The stakes are huge. The Haida argue that absent consultation and accommodation, they will win their title but find themselves deprived of forests that are vital to their economy and their culture. Forests take generations to mature, they point out, and old-growth forests can never be replaced. The Haida's claim to title to Haida Gwaii is strong, as found by the chambers judge. But it is also complex and will take many years to prove. In the meantime, the Haida argue, their heritage will be irretrievably despoiled.

8 The government, in turn, argues that it has the right and responsibility to manage the forest resource for the good of all British Columbians, and that until the Haida people formally prove their claim, they have no legal right to be consulted or have their needs and interests accommodated.

9 The chambers judge found that the government has a moral, but not a legal, duty to negotiate with the Haida people: (2000), [2001] 2 C.N.L.R. 83, 2000 BCSC 1280 (B.C. S.C.). The British Columbia Court of Appeal reversed this decision, holding that both the government and Weyerhaeuser have a duty to consult with and accommodate the Haida people with respect to harvesting timber from Block 6: (2002), 99 B.C.L.R. (3d) 209, 2002 BCCA 147 (B.C. C.A.), with supplementary reasons (2002), 5 B.C.L.R. (4th) 33, 2002 BCCA 462 (B.C. C.A.).

10 I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations. It follows that I would dismiss the Crown's appeal and allow the appeal of Weyerhaeuser.

11 This case is the first of its kind to reach this Court. Our task is the modest one of establishing a general framework for the duty to consult and accommodate, where indicated, before Aboriginal title or rights claims have been decided. As this framework is applied, courts, in the age-old tradition of the common law, will be called on to fill in the details of the duty to consult and accommodate.

II. Analysis

A. Does the Law of Injunctions Govern this Situation?

12 It is argued that the Haida's proper remedy is to apply for an interlocutory injunction against the government and Weyerhaeuser, and that therefore it is unnecessary to consider a duty to consult or accommodate. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the requirements for obtaining an interlocutory injunction were reviewed. The plaintiff must establish: (1) a serious issue to be tried; (2) that irreparable harm will be suffered if the injunction is not granted; and (3) that the balance of convenience favours the injunction.

13 It is open to plaintiffs like the Haida to seek an interlocutory injunction. However, it does not follow that they are confined to that remedy. If plaintiffs can prove a special obligation giving rise to a duty to consult or accommodate, they are free to pursue these remedies. Here the Haida rely on the obligation flowing from the honour of the Crown toward Aboriginal peoples.

14 Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. By contrast, the alleged duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations, as set out in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at para. 31, and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at para. 186. Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns: J.J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (June 2000). Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. While Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests. For all these reasons, interlocutory injunctions may fail to adequately take account of Aboriginal interests prior to their final determination.

15 I conclude that the remedy of interlocutory injunction does not preclude the Haida's claim. We must go further and see whether the special relationship with the Crown upon which the Haida rely gives rise to a duty to consult and, if appropriate, accommodate. In what follows, I discuss the source of the duty, when the duty arises, the scope and content of the duty, whether the duty extends to third parties, and whether it applies to the provincial government and not exclusively the federal government. I then apply the conclusions flowing from this discussion to the facts of this case.

B. The Source of a Duty to Consult and Accommodate

16 The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.), at para. 41; *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.). It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

17 The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra*, at para. 186, quoting *Vanderpeet*, *supra*, at para. 31.

18 The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty: *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), at para. 79. The content of the fiduciary duty may vary to take into account the Crown's other, broader obligations. However, the duty's fulfilment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. As explained in *Roberts*,

at para. 81, the term "fiduciary duty" does not connote a universal trust relationship encompassing all aspects of the relationship between the Crown and Aboriginal peoples:

> ..."fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship .... overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests.

Here, Aboriginal rights and title have been asserted but have not been defined or proven. The Aboriginal interest in question is insufficiently specific for the honour of the Crown to mandate that the Crown act in the Aboriginal group's best interest, as a fiduciary, in exercising discretionary control over the subject of the right or title.

19 The honour of the Crown also infuses the processes of treaty making and treaty interpretation. In making and applying treaties, the Crown must act with honour and integrity, avoiding even the appearance of "sharp dealing" (*Badger*, at para. 41). Thus in *Marshall*, *supra*, at para. 4, the majority of this Court supported its interpretation of a treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship...".

20 Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.), at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.

21 This duty to consult is recognized and discussed in the jurisprudence. In *Sparrow*, *supra*, at p. 1119, this Court affirmed a duty to consult with west-coast Salish asserting an unresolved right to fish. Dickson C.J. and La Forest J. wrote that one of the factors in determining whether limits on the right were justified is "whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented".

22 The Court affirmed the duty to consult regarding resources to which Aboriginal peoples make claim a few years later in *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), where Cory J. wrote: "So long as every reasonable effort is made to inform and to consult, such efforts would suffice to meet the justification requirement" (para. 110).

23 In the companion case of *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), Lamer C.J. referred to the need for "consultation and compensation", and to consider "how the government has accommodated different aboriginal rights in a particular fishery ... how important the fishery is to the economic and material well-being of the band in question, and the criteria taken into account by the government in, for example, allocating commercial licences amongst different users" (para. 64).

24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation..." on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

25 Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.

C. When the Duty to Consult and Accommodate Arises

26 Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights. But proving rights may take time, sometimes a very long time. In the meantime, how are the interests under discussion to be treated? Underlying this question is the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty. Is the Crown, under the aegis of its asserted sovereignty, entitled to use the resources at issue as it chooses, pending proof and resolution of the Aboriginal claim? Or must it adjust its conduct to reflect the as yet unresolved rights claimed by the Aboriginal claimants?

27 The answer, once again, lies in the honour of the Crown. The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, discussed more fully below, the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.

28 The government argues that it is under no duty to consult and accommodate prior to final determination of the scope and content of the right. Prior to proof of the right, it is argued, there exists only a broad, common law "duty of fairness", based on the general rule that an administrative decision that affects the "rights, privileges or interests of an individual" triggers application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), at p. 653; *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 20. The government asserts that, beyond general administrative law obligations, a duty to consult and accommodate arises only where the government has taken on the obligation of protecting a specific Aboriginal interest or is seeking to limit an established Aboriginal interest. In the result, the government submits that there is no legal duty to consult and accommodate Haida interests at this stage, although it concedes there may be "sound practical and policy reasons" to do so.

29 The government cites both authority and policy in support of its position. It relies on *Sparrow*, *supra*, at pp. 1110-13 and 1119, where the scope and content of the right were determined and infringement established, prior to consideration of whether infringement was justified. The government argues that its position also finds support in the perspective of the Ontario Court of Appeal in *TransCanada Pipelines Ltd. v. Beardmore (Township)* (2000), 186 D.L.R. (4th) 403 (Ont. C.A.), which held that "what triggers a consideration of the Crown's duty to consult is a showing by the First Nation of a violation of an existing Aboriginal or treaty right recognized and affirmed by s. 35(1)..." (para. 120).

30 As for policy, the government points to practical difficulties in the enforcement of a duty to consult or accommodate unproven claims. If the duty to consult varies with the circumstances from a "mere" duty to notify and listen at one end of the spectrum to a requirement of Aboriginal consent at the other end, how, the government asks, are the parties to agree which level is appropriate in the face of contested claims and rights? And if they cannot agree, how are courts or tribunals to determine this? The government also suggests that it is impractical and unfair to require consultation before final claims determination because this amounts to giving a remedy before issues of infringement and justification are decided.

31 The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right.

32 The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land

and resources that were formerly in the control of that people. As stated in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 2001 SCC 33 (S.C.C.), at para. 9, "[w]ith this assertion [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation..." (emphasis added).

33 To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of the "meaningful content" mandated by the "solemn commitment" made by the Crown in recognizing and affirming Aboriginal rights and title: *Sparrow*, *supra*, at p. 1108. It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.

34 The existence of a legal duty to consult prior to proof of claims is necessary to understand the language of cases like *Sparrow*, *Nikal*, and *Gladstone*, *supra*, where confirmation of the right and justification of an alleged infringement were litigated at the same time. For example, the reference in *Sparrow* to Crown behaviour in determining if any infringements were justified, is to behaviour before determination of the right. This negates the contention that a proven right is the trigger for a legal duty to consult and if appropriate accommodate even in the context of justification.

35 But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation, suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. See *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C. S.C.), at p. 71, *per* Dorgan J.

36 This leaves the practical argument. It is said that before claims are resolved, the Crown cannot know that the rights exist, and hence can have no duty to consult or accommodate. This difficulty should not be denied or minimized. As I stated (dissenting) in *Marshall*, *supra*, at para. 112, one cannot "meaningfully discuss accommodation or justification of a right unless one has some idea of the core of that right and its modern scope". However, it will frequently be possible to reach an idea of the asserted rights and of their strength sufficient to trigger an obligation to consult and accommodate, short of final judicial determination or settlement. To facilitate this determination, claimants should outline their claims with clarity, focussing on the scope and nature of the Aboriginal rights they assert and on the alleged infringements. This is what happened here, where the chambers judge made a preliminary evidence-based assessment of the strength of the Haida claims to the lands and resources of Haida Gwaii, particularly Block 6.

37 There is a distinction between knowledge sufficient to trigger a duty to consult and, if appropriate, accommodate, and the content or scope of the duty in a particular case. Knowledge of a credible but unproven claim suffices to trigger a duty to consult and accommodate. The content of the duty, however, varies with the circumstances, as discussed more fully below. A dubious or peripheral claim may attract a mere duty of notice, while a stronger claim may attract more stringent duties. The law is capable of differentiating between tenuous claims, claims possessing a strong *prima facie* case, and established claims. Parties can assess these matters, and if they cannot agree, tribunals and courts can assist. Difficulties associated with the absence of proof and definition of claims are addressed by assigning appropriate content to the duty, not by denying the existence of a duty.

38 I conclude that consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation: see S. Lawrence and P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000), 79 *Can. Bar Rev.* 252, at p. 262. Precisely what is required of the government may vary with the strength of the claim and the circumstances. But at a minimum, it must be consistent with the honour of the Crown.

D. The Scope and Content of the Duty to Consult and Accommodate

39 The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

40 In *Delgamuukw*, *supra*, at para. 168, the Court considered the duty to consult and accommodate in the context of established claims. Lamer C.J. wrote:

> The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.

41 Transposing this passage to pre-proof claims, one may venture the following. While it is not useful to classify situations into watertight compartments, different situations requiring different responses can be identified. In all cases, the honour of the Crown requires that the Crown act with good faith to provide meaningful consultation appropriate to the circumstances. In discharging this duty, regard may be had to the procedural safeguards of natural justice mandated by administrative law.

42 At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1 (B.C. C.A.), at p. 44; *Heiltsuk Tribal Council v. British Columbia (Minister of Sustainable Resource Management)* (2003), 19 B.C.L.R. (4th) 107 (B.C. S.C.). Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.

43 Against this background, I turn to the kind of duties that may arise in different situations. In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. "'[C]onsultation' in its least technical definition is talking together for mutual understanding": T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61.

44 At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.

45 Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

46 Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations. The New Zealand Ministry of Justice's *Guide for Consultation with Mäori* (1998) provides insight:

> Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed ... (at s. 2.0 of Executive Summary)
>
> ...genuine consultation means a process that involves...:
>
> • gathering information to test policy proposals
>
> • putting forward proposals that are not yet finalized
>
> • seeking Mäori opinion on those proposals
>
> • informing Mäori of all relevant information upon which those proposals are based
>
> • not promoting but listening with an open mind to what Mäori have to say
>
> • being prepared to alter the original proposal
>
> • providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding)

47 When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), at para. 22: "...the process of accommodation of the treaty right may best be resolved by consultation and negotiation".

48 This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

49 This flows from the meaning of "accommodate". The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" ... "an adjustment or adaptation to suit a special or different purpose ... a convenient arrangement; a settlement or compromise": *The Concise Oxford Dictionary of Current English* 9th ed. 1995) at p. 9. The accommodation that may result from pre-proof consultation is just this — seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.

50 The Court's decisions confirm this vision of accommodation. The Court in *Sparrow* raised the concept of accommodation, stressing the need to balance competing societal interests with Aboriginal and treaty rights. In *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), at p. 1072, the Court stated that the Crown bears the burden of proving that its occupancy of lands "cannot be accommodated to reasonable exercise of the Hurons' rights". And *R. c. Côté*, [1996] 3 S.C.R. 139 (S.C.C.), at para. 81, the Court spoke of whether restrictions on Aboriginal rights "can be accommodated with the Crown's special fiduciary relationship with First Nations". Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.

51 It is open to governments to set up regulatory schemes to address the procedural requirements appropriate to different problems at different stages, thereby strengthening the reconciliation process and reducing recourse to the courts. As noted in *R. c. Adams*, [1996] 3 S.C.R. 101 (S.C.C.), at para. 54, the government "may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance". It should be observed that, since October 2002, British Columbia has had a Provincial Policy for Consultation with First Nations to direct the terms of provincial ministries' and agencies' operational guidelines. Such a policy, while falling short of a regulatory scheme, may guard against unstructured discretion and provide a guide for decision makers.

E. Do Third Parties Owe a Duty to Consult and Accommodate?

52 The Court of Appeal found that Weyerhaeuser, the forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and accommodate. With respect, I cannot agree.

53 It is suggested (*per* Lambert J.A) that a third party's obligation to consult Aboriginal peoples may arise from the ability of the third party to rely on justification as a defence against infringement. However, the duty to consult and accommodate, as discussed above, flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group. This theory provides no support for an obligation on third parties to consult or accommodate. The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. Similarly, the terms of T.F.L. 39 mandated Weyerhaeuser to specify measures that it would take to identify and consult with "aboriginal people claiming an aboriginal interest in or to the area" (Tree Farm Licence No. 39, Haida Tree Farm Licence, para. 2.09(g)(ii). However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.

54 It is also suggested (*per* Lambert J.A) that third parties might have a duty to consult and accommodate on the basis of the trust law doctrine of "knowing receipt". However, as discussed above, while the Crown's fiduciary obligations and its duty to consult and accommodate share roots in the principle that the Crown's honour is engaged in its relationship with Aboriginal peoples, the duty to consult is distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests. As noted earlier, the Court cautioned in *Roberts* against assuming that a general trust or fiduciary obligation governs all aspects of relations between the Crown and Aboriginal peoples. Furthermore, this Court in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), made it clear that the "trust-like" relationship between the Crown and Aboriginal peoples is not a true "trust", noting that "[t]he law of trusts is a highly developed, specialized branch of the law" (p. 386). There is no reason to graft the doctrine of knowing receipt onto the special relationship between the Crown and Aboriginal peoples. It is also questionable whether businesses acting on licence from the Crown can be analogized to persons who knowingly turn trust funds to their own ends.

55 Finally, it is suggested (*per* Finch C.J.B.C.) that third parties should be held to the duty in order to provide an effective remedy. The first difficulty with this suggestion is that remedies do not dictate liability. Once liability is found, the question of remedy arises. But the remedy tail cannot wag the liability dog. We cannot sue a rich person, simply because the person has deep pockets or can provide a desired result. The second problem is that it is not clear that the government lacks sufficient remedies to achieve meaningful consultation and accommodation. In this case, Part 10 of T.F.L. 39 provided that the Ministry of Forests could vary any permit granted to Weyerhaeuser to be consistent with a court's determination of Aboriginal rights or title. The government may also require Weyerhaeuser to amend its management plan if the Chief Forester considers that interference with an Aboriginal right has rendered the management plan inadequate (para. 2.38(d). Finally, the government can control by legislation, as it did when it introduced the *Forestry Revitalization Act*, S.B.C. 2003, c. 17, which claws back 20 percent of all licensees' harvesting rights, in part to make land available for Aboriginal peoples. The government's legislative authority over provincial natural resources gives it a powerful tool with which to respond to its legal obligations. This, with respect, renders questionable the statement by Finch C.J.B.C. that the government "has no capacity to allocate any part of that timber to the Haida without Weyerhaeuser's consent or co-operation" (2002), 5 B.C.L.R. (4th) 33 (B.C. C.A.), at para. 119). Failure to hold Weyerhaeuser to a duty to consult and accommodate does not make the remedy "hollow or illusory".

56 The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.

F. The Province's Duty

57 The Province of British Columbia argues that any duty to consult or accommodate rests solely with the federal government. I cannot accept this argument.

58 The Province's argument rests on s. 109 of the *Constitution Act, 1867*, which provides that "[a]ll Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada ... at the Union ... shall belong to the several Provinces...". The Province argues that this gives it exclusive right to the land at issue. This right, it argues, cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*. To do so, it argues, would "undermine the balance of federalism" (Crown's factum, at para. 96).

59 The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same". The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catharines Milling & Lumber Co. v. R.* (1888), (1889) L.R. 14 App. Cas. 46 (Canada P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p.59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw*, *supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catharines Milling & Lumber Co.*, *supra*. There is therefore no foundation to the Province's argument on this point.

G. Administrative Review

60 Where the government's conduct is challenged on the basis of allegations that it failed to discharge its duty to consult and accommodate pending claims resolution, the matter may go to the courts for review. To date, the Province has established no process for this purpose. The question of what standard of review the court should apply in judging the adequacy of the government's efforts cannot be answered in the absence of such a process. General principles of administrative law, however, suggest the following.

61 On questions of law, a decision-maker must generally be correct: for example, *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, 2003 SCC 55 (S.C.C.). On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker. The existence or extent of the duty to consult or accommodate is a legal question in the sense that it defines a legal duty. However, it is typically premised on an assessment of the facts. It follows that a degree of deference to the findings of fact of the initial adjudicator may be appropriate. The need for deference and its degree will depend on the nature of the question the tribunal was addressing and the extent to which the facts were within the expertise of the tribunal: *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.); *Paul*, *supra*. Absent error on legal issues, the tribunal may be in a better position to evaluate the issue than the reviewing court, and some degree of deference may be required. In such a case, the standard of review is likely to be reasonableness. To the extent that the issue is one of pure law, and can be isolated from the issues of fact, the standard is correctness. However, where the two are inextricably entwined, the standard will likely be reasonableness: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.).

62 The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal right in question": *Gladstone*, *supra*, at para. 170. What is required is not perfection, but reasonableness. As stated in *Nikal*, *supra*, at para. 110, "in ... information and consultation the concept of reasonableness must come into play.... So long as every

reasonable effort is made to inform and to consult, such efforts would suffice...". The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.

63 Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome, but on the process of consultation and accommodation.

H. Application to the Facts

(1) Existence of the Duty

64 The question is whether the Province had knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplated conduct that might adversely affect them. On the evidence before the Court in this matter, the answer must unequivocally be "yes".

65 The Haida have claimed title to all of Haida Gwaii for at least 100 years. The chambers judge found that they had expressed objections to the Province for a number of years regarding the rate of logging of old-growth forests, methods of logging, and the environmental effects of logging. Further, the Province was aware since at least 1994 that the Haida objected to replacement of T.F.L. 39 without their consent and without accommodation with respect to their title claims. As found by the chambers judge, the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 "[s]ince 1994, and probably much earlier". The Province has had available to it evidence of the importance of red cedar to the Haida culture since before 1846 (the assertion of British sovereignty).

66 The Province raises concerns over the breadth of the Haida's claims, observing that "[i]n a separate action the Haida claim aboriginal title to all of the Queen Charlotte Islands, the surrounding waters, and the air space.... The Haida claim includes the right to the exclusive use, occupation and benefit of the land, inland waters, seabed, archipelagic waters and air space" (Crown's factum, at para. 35). However, consideration of the duty to consult and accommodate prior to proof of a right does not amount to a prior determination of the case on its merits. Indeed, it should be noted that, prior to the chambers judge's decision in this case, the Province had successfully moved to sever the question of the existence and infringement of Haida title and rights from issues involving the duty to consult and accommodate. The issues were clearly separate in the proceedings, at the Province's instigation.

67 The chambers judge ascertained that the Province knew that the potential Aboriginal right and title applied to Block 6, and could be affected by the decision to replace T.F.L. 39. On this basis, the honour of the Crown mandated consultation prior to making a decision that might adversely affect the claimed Aboriginal title and rights.

(2) Scope of the Duty

68 As discussed above, the scope of the consultation required will be proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

(i) Strength of the case

69 On the basis of evidence described as "voluminous," the chambers judge found, at para. 25, a number of conclusions to be "inescapable" regarding the Haida's claims. He found that the Haida had inhabited Haida Gwaii continuously since at least 1774, that they had never been conquered, never surrendered their rights by treaty, and that their rights had not been extinguished by federal legislation. Their culture has utilized red cedar from old-growth forests on both coastal and inland areas of what is now Block 6 of T.F.L. 39 since at least 1846.

70 The chambers judge's thorough assessment of the evidence distinguishes between the various Haida claims relevant to Block 6. On the basis of a thorough survey of the evidence, he found, at para. 47:

> (1) a "reasonable probability" that the Haida may establish title to "at least some parts" of the coastal and inland areas of Haida Gwaii, including coastal areas of Block 6. There appears to be a "reasonable possibility" that these areas will include inland areas of Block 6;
>
> (2) a "substantial probability" that the Haida will be able to establish an aboriginal right to harvest old-growth red cedar trees from both coastal and inland areas of Block 6.

The chambers judge acknowledged that a final resolution would require a great deal of further evidence, but said he thought it "fair to say that the Haida claim goes far beyond the mere 'assertion' of Aboriginal title" (para. 50).

71 The chambers judge's findings grounded the Court of Appeal's conclusion that the Haida claims to title and Aboriginal rights were "supported by a good *prima facie* case" (para. 49 (c)). The strength of the case goes to the extent of the duty that the Province was required to fulfill. In this case the evidence clearly supports a conclusion that, pending a final resolution, there was a *prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar.

(ii) Seriousness of the potential impact

72 The evidence before the chambers judge indicated that red cedar has long been integral to Haida culture. The chambers judge considered that there was a "reasonable probability" that the Haida would be able to establish infringement of an Aboriginal right to harvest red cedar "by proof that old-growth cedar has been and will continue to be logged on Block 6, and that it is of limited supply" (para. 48). The prospect of continued logging of a resource in limited supply points to the potential impact on an Aboriginal right of the decision to replace T.F.L. 39.

73 Tree Farm Licences are exclusive, long-term licences. T.F.L. 39 grants exclusive rights to Weyerhaeuser to harvest timber within an area constituting almost one quarter of the total land of Haida Gwaii. The chambers judge observed that "it [is] apparent that large areas of Block 6 have been logged off" (para. 59(b)). This points to the potential impact on Aboriginal rights of the decision to replace T.F.L. 39.

74 To the Province's credit, the terms of T.F.L. 39 impose requirements on Weyerhaeuser with respect to Aboriginal peoples. However, more was required. Where the government has knowledge of an asserted Aboriginal right or title, it must consult the Aboriginal peoples on how exploitation of the land should proceed.

75 The next question is when does the duty to consult arise? Does it arise at the stage of granting a Tree Farm Licence (T.F.L.), or only at the stage of granting cutting permits? The T.F.L. replacement does not itself authorize timber harvesting, which occurs only pursuant to cutting permits. T.F.L. replacements occur periodically, and a particular T.F.L. replacement decision may not result in the substance of the asserted right being destroyed. The Province argues that, although it did not consult the Haida prior to replacing the T.F.L., it "has consulted, and continues to consult with the Haida prior to authorizing any cutting permits or other operational plans" (Crown's factum, at para. 64).

76 I conclude that the Province has a duty to consult and perhaps accommodate on T.F.L. decisions. The T.F.L. decision reflects the strategic planning for utilization of the resource. Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title. The holder of T.F.L. 39 must submit a management plan to the Chief Forester every five years, to include inventories of the licence area's resources, a timber supply analysis, and a "20-Year Plan" setting out a hypothetical sequence of cutblocks. The inventories and the timber supply analysis form the basis of the determination of the allowable annual cut (A.A.C.) for the licence. The licensee thus develops the technical information based upon which the A.A.C. is calculated. Consultation at the operational level thus has little effect on the quantity of the annual allowable cut, which in turn determines cutting permit terms. If consultation is to be meaningful, it must take place at the stage of granting or renewing Tree Farm Licences.

77 The last issue is whether the Crown's duty went beyond consultation on T.F.L. decisions, to accommodation. We cannot know, on the facts here, whether consultation would have led to a need for accommodation. However, the strength of the case for

both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims.

(3) Did the Crown Fulfill its Duty?

78 The Province did not consult with the Haida on the replacement of T.F.L. 39. The chambers judge found, at para. 42:

> [O]n the evidence presented, it is apparent that the Minister refused to consult with the Haida about replacing T.F.L. 39 in 1995 and 2000, on the grounds that he was not required by law to consult, and that such consultation could not affect his statutory duty to replace T.F.L. 39.

In both this Court and the courts below, the Province points to various measures and policies taken to address Aboriginal interests. At this Court, the Province argued that "[t]he Haida were and are consulted with respect to forest development plans and cutting permits.... Through past consultations with the Haida, the Province has taken various steps to mitigate the effects of harvesting..." (Crown's factum, at para. 75). However, these measures and policies do not amount to and cannot substitute for consultation with respect to the decision to replace T.F.L. 39 and the setting of the licence's terms and conditions.

79 It follows, therefore, that the Province failed to meet its duty to engage in something significantly deeper than mere consultation. It failed to engage in any meaningful consultation at all.

III. Conclusion

80 The Crown's appeal is dismissed and Weyerhaeuser's appeal is allowed. The British Columbia Court of Appeal's order is varied so that the Crown's obligation to consult does not extend to Weyerhaeuser. The Crown has agreed to pay the costs of the respondents regarding the application for leave to appeal and the appeal. Weyerhaeuser shall be relieved of any obligation to pay the costs of the Haida in the courts below. It is not necessary to answer the constitutional question stated in this appeal.

Order accordingly.

Ordonnance en conséquence.

2017 SCC 40, 2017 CSC 40
Supreme Court of Canada

Clyde River (Hamlet) v. Petroleum Geo-Services Inc.

2017 CarswellNat 3470, 2017 CarswellNat 3471, 2017 SCC 40, 2017 CSC 40, [2017] 1 S.C.R. 1069, [2017] 3 C.N.L.R. 65, [2017] S.C.J. No. 40, 10 C.E.L.R. (4th) 1, 22 Admin. L.R. (6th) 181, 281 A.C.W.S. (3d) 4, 411 D.L.R. (4th) 571

Hamlet of Clyde River, Nammautaq Hunters & Trappers Organization - Clyde River and Jerry Natanine (Appellants) and Petroleum Geo-Services Inc. (PGS), Multi Klient Invest As (MKI), TGS-Nopec Geophysical Company ASA (TGS) and Attorney General of Canada (Respondents) and Attorney General of Ontario, Attorney General of Saskatchewan, Nunavut Tunngavik Incorporated, Makivik Corporation, Nunavut Wildlife Management Board, Inuvialuit Regional Corporation and Chiefs of Ontario (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 30, 2016
Judgment: July 26, 2017
Docket: 36692

Proceedings: reversing *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA* (2015), 94 C.E.L.R. (3d) 1, 2015 FCA 179, 2015 CarswellNat 3750, 2015 CarswellNat 12196, [2016] 3 F.C.R. 167, 2015 CAF 179, [2015] F.C.J. No. 991, 474 N.R. 96, Eleanor R. Dawson J.A., M. Nadon J.A., Richard Boivin J.A. (F.C.A.)

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David Schulze (written), Nicholas Dodd (written), for the intervener, Makivik Corporation
Marie-France Major, Thomas Slade, for Intervener, Nunavut Wildlife Management Board.
Kate Darling, Lorraine Land, Matt McPherson, Krista Nerland, for Intervener, Inuvialuit Regional Corporation
Maxime Faille, Jaimie Lickers, Guy Régimbald, for Intervener, Chiefs of Ontario

Headnote

Aboriginal and indigenous law --- Constitutional issues — Treaty rights

Majority of residents of hamlet located on Baffin Island were Inuit — Residents relied upon harvest of marine mammals for their food security and their economic, cultural and spiritual well-being — Respondents were companies interested in finding oil and gas resources (proponents) — Proponents applied to National Energy Board (NEB) for authorization under s. 5(1)(b) of Canada Oil and Gas Operations Act to conduct seismic testing adjacent to area where Inuit have treaty rights to harvest marine mammals — After consultation and environmental assessment, NEB concluded that project was not likely to result in significant adverse environmental effects and granted authorization — Hamlet, its mayor and trappers' organization (appellants) applied to Federal Court of Appeal for judicial review of NEB's decision to grant authorization — Application for judicial review was dismissed — Appellants appealed — Appeal allowed — Duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and Crown — Any decision affecting Aboriginal or treaty rights made on basis of

inadequate consultation will not be in compliance with duty to consult, which is constitutional imperative — Where challenged, it should be quashed on judicial review — Adequate Crown consultation before project approval is always preferable to judicial remonstration following adversarial process — No consideration was given in NEB's environmental assessment to source, in treaty, of appellants' rights to harvest marine mammals, nor to impact of proposed testing on those rights — Process provided by NEB did not fulfill Crown's duty to conduct deep consultation — Limited opportunities for participation and consultation were made available to appellants — No mutual understanding on core issue of potential impact on treaty rights and possible accommodations could possibly have emerged from process — NEB's authorization was quashed.

Constitutional law --- Status of Crown — Miscellaneous

Majority of residents of hamlet located on Baffin Island were Inuit — Residents relied upon harvest of marine mammals for their food security and their economic, cultural and spiritual well-being — Respondents were companies interested in finding oil and gas resources (proponents) — Proponents applied to National Energy Board (NEB) for authorization under s. 5(1)(b) of Canada Oil and Gas Operations Act to conduct seismic testing adjacent to area where Inuit have treaty rights to harvest marine mammals — After consultation and environmental assessment, NEB concluded that project was not likely to result in significant adverse environmental effects and granted authorization — Hamlet, its mayor and trappers' organization (appellants) applied to Federal Court of Appeal for judicial review of NEB's decision to grant authorization — Application for judicial review was dismissed — Appellants appealed — Appeal allowed — While Crown may rely on steps undertaken by regulatory agency to fulfill its duty to consult, Crown always holds ultimate responsibility for ensuring that consultation was adequate — Where regulatory process being relied upon does not achieve adequate consultation or accommodation, Crown must take further measures to meet its duty — NEB found that proposed testing was not likely to cause significant adverse environmental effects — However, consultative inquiry was not properly into environmental effects but inquired into impact on right — No consideration was given in NEB's environmental assessment to source, in treaty, of appellants' rights to harvest marine mammals, nor to impact of proposed testing on those rights — Process provided by NEB did not fulfill Crown's duty to conduct deep consultation — Limited opportunities for participation and consultation were made available to appellants — No mutual understanding on core issue of potential impact on treaty rights and possible accommodations could possibly have emerged from process — NEB's authorization was quashed.

Environmental law --- Statutory protection of environment — Environmental assessment — Aboriginal interests

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applied to Federal Court of Appeal for judicial review of NEB's decision to grant authorization — Court found that Crown was entitled to rely on NEB to undertake such consultation — Court concluded that Crown's duty to consult had been satisfied by nature and scope of NEB's processes — Application for judicial review was dismissed — Appellants appealed — Appeal allowed — NEB's environmental assessment concluded that project could increase mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use — NEB found that proposed testing was not likely to cause significant adverse environmental effects — However, consultative inquiry was not properly into environmental effects but inquired into impact on right — No consideration was given in NEB's environmental assessment to source, in treaty, of appellants' rights to harvest marine mammals, nor to impact of proposed testing on those rights — Process provided by NEB did not fulfill Crown's duty to conduct deep consultation — NEB's authorization was quashed.

Droit autochtone --- Questions d'ordre constitutionnel — Droits en vertu d'un traité

Plupart des résidents d'un hameau situé sur l'île de Baffin étaient des Inuits — Résidents comptaient sur la récolte de mammifères marins pour leur sécurité alimentaire et leur bien-être économique, culturel et spirituel — Intimés étaient des compagnies cherchant à découvrir des ressources pétrolières et gazières (les promoteurs) — Ces derniers ont demandé à l'Office national de l'énergie l'autorisation, en vertu de l'art. 5(1)b) de la Loi sur les opérations pétrolières au Canada, de mener des essais sismiques dans des lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins — Au terme d'une consultation et d'une évaluation environnementale, l'Office a conclu que le projet n'était pas susceptible de causer des effets environnementaux négatifs et importants et a accordé l'autorisation — Hameau, son maire et une organisation de trappeurs (les appelants) ont déposé une requête devant la Cour d'appel fédérale en vue d'obtenir le contrôle judiciaire de la décision de l'Office d'accorder l'autorisation — Requête en contrôle judiciaire a été rejetée — Appelants ont formé un pourvoi — Pourvoi accueilli — Obligation de consulter vise la protection des droits ancestraux et issus de traités tout en favorisant la réconciliation entre les peuples autochtones et la Couronne — Toute décision touchant des droits ancestraux ou issus de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter, laquelle est un impératif constitutionnel — En cas de contestation, la décision devrait être annulée à l'issue d'un contrôle judiciaire — Consultation adéquate par la Couronne avant que le projet ne soit approuvé est toujours préférable à des remontrances judiciaires formulées au terme d'une procédure contradictoire — Office n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins ni l'incidence des essais proposés sur ces droits — Processus de l'Office n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie — Appelants n'ont bénéficié que de très peu de possibilités de participation et de consultation — Aucune compréhension mutuelle sur les points fondamentaux, à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements, n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire — Autorisation accordée par l'Office a été annulée.

Droit constitutionnel --- Statut de la Couronne — Divers

Plupart des résidents d'un hameau situé sur l'île de Baffin étaient des Inuits — Résidents comptaient sur la récolte de mammifères marins pour leur sécurité alimentaire et leur bien-être économique, culturel et spirituel — Intimés étaient des compagnies cherchant à découvrir des ressources pétrolières et gazières (les promoteurs) — Ces derniers ont demandé à l'Office national de l'énergie l'autorisation, en vertu de l'art. 5(1)b) de la Loi sur les opérations pétrolières au Canada, de mener des essais sismiques dans des lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins — Au terme d'une consultation et d'une évaluation environnementale, l'Office a conclu que le projet n'était pas susceptible de causer des effets environnementaux négatifs et importants et a accordé l'autorisation — Hameau, son maire et une organisation de trappeurs (les appelants) ont déposé une requête devant la Cour d'appel fédérale en vue d'obtenir le contrôle judiciaire de la décision de l'Office d'accorder l'autorisation — Requête en contrôle judiciaire a été rejetée — Appelants ont formé un pourvoi — Pourvoi accueilli — Bien que la Couronne puisse s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire à son obligation de consulter, c'est toujours à elle qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation — Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire — Office a conclu que les essais proposés n'étaient pas susceptibles d'avoir des effets environnementaux négatifs importants — Toutefois, le processus consultatif ne visait pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le droit — Office n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins ni l'incidence des essais proposés sur ces droits — Processus de l'Office n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie — Appelants n'ont bénéficié que de très peu de possibilités

de participation et de consultation — Aucune compréhension mutuelle sur les points fondamentaux, à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements, n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire — Autorisation accordée par l'Office a été annulée.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Évaluation environnementale — Intérêts autochtones

Plupart des résidents d'un hameau situé sur l'île de Baffin étaient des Inuits — Résidents comptaient sur la récolte de mammifères marins pour leur sécurité alimentaire et leur bien-être économique, culturel et spirituel — Intimés étaient des compagnies cherchant à découvrir des ressources pétrolières et gazières (les promoteurs) — Ces derniers ont demandé à l'Office national de l'énergie l'autorisation, en vertu de l'art. 5(1)b) de la Loi sur les opérations pétrolières au Canada, de mener des essais sismiques dans des lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins — Au terme d'une consultation et d'une évaluation environnementale, l'Office a conclu que le projet n'était pas susceptible de causer des effets environnementaux négatifs et importants et a accordé l'autorisation — Hameau, son maire et une organisation de trappeurs (les appelants) ont déposé une requête devant la Cour d'appel fédérale en vue d'obtenir le contrôle judiciaire de la décision de l'Office d'accorder l'autorisation — Requête en contrôle judiciaire a été rejetée — Appelants ont formé un pourvoi — Pourvoi accueilli — Appelants possédaient des droits issus de traités établis leur permettant de chasser et de récolter des mammifères marins — Incapacité de récolter des mammifères marins aurait des répercussions sur le régime alimentaire de la communauté et sa tradition culturelle — Droit des Inuits qui était en jeu était d'une grande importance, d'où la nécessité d'une consultation approfondie et de mesures d'accommodement substantielles — Toute décision touchant des droits ancestraux ou issus de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter, laquelle est un impératif constitutionnel — Office n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins ni l'incidence des essais proposés sur ces droits — Processus de l'Office n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie — Appelants n'ont bénéficié que de très peu de possibilités de participation et de consultation — Aucune compréhension mutuelle sur les points fondamentaux, à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements, n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire — Autorisation accordée par l'Office a été annulée.

Droit de l'environnement --- Protection accordée par la loi à l'environnement — Évaluation environnementale — Divers

Plupart des résidents d'un hameau situé sur l'île de Baffin étaient des Inuits — Résidents comptaient sur la récolte de mammifères marins pour leur sécurité alimentaire et leur bien-être économique, culturel et spirituel — Intimés étaient des compagnies cherchant à découvrir des ressources pétrolières et gazières (les promoteurs) — Ces derniers ont demandé à l'Office national de l'énergie l'autorisation, en vertu de l'art. 5(1)b) de la Loi sur les opérations pétrolières au Canada, de mener des essais sismiques dans des lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins — Au terme d'une consultation et d'une évaluation environnementale, l'Office a conclu que le projet n'était pas susceptible de causer des effets environnementaux négatifs et importants et a accordé l'autorisation — Hameau, son maire et une organisation de trappeurs (les appelants) ont déposé une requête devant la Cour d'appel fédérale en vue d'obtenir le contrôle judiciaire de la décision de l'Office d'accorder l'autorisation — Cour a conclu que la Couronne pouvait s'en remettre à l'Office pour que celui-ci procède à une telle consultation — Cour a conclu que, du fait de la nature et de l'étendue des processus de l'Office, il avait été satisfait à l'obligation de consulter incombant à la Couronne — Requête en contrôle judiciaire a été rejetée — Appelants ont formé un pourvoi — Pourvoi accueilli — Selon l'évaluation environnementale de l'Office, ce projet était susceptible d'accroître le risque de mortalité chez les mammifères marins, de causer des dommages permanents à leur ouïe et de modifier leurs routes migratoires, situation qui aurait en conséquence une incidence sur l'utilisation des ressources traditionnelles — Office a conclu que les essais proposés n'étaient pas susceptibles d'avoir des effets environnementaux négatifs importants — Toutefois, le processus consultatif ne visait pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le droit — Office n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins ni l'incidence des essais proposés sur ces droits — Processus de l'Office n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie — Autorisation accordée par l'Office a été annulée.

In the hamlet of Clyde River, on the northeast coast of Baffin Island, in Nunavut, most residents are Inuit. Under the Nunavut Land Claims Agreement (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

The respondents, companies interested in finding oil and gas resources (the proponents), applied to the National Energy Board (NEB) for an authorization under s. 5(1)(b) of Canada Oil and Gas Operations Act (COGOA) to conduct seismic testing adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship to produce underwater sound waves, intended to find and measure underwater geological resources. The testing was to run from July through November, for five successive years. It was undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River.

The NEB is a federal administrative tribunal and regulatory agency and is the final decision maker for issuing an authorization under s. 5(1)(b) of COGOA. The NEB launched an environmental assessment of the project and, after a period of consultation, the NEB granted the requested authorization.

Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

In its environmental assessment report, the NEB concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised" and that Aboriginal groups had an adequate opportunity to participate in the process. It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality but concluded that the testing was unlikely to cause significant adverse environmental effects, given the mitigation measures that the proponents would implement.

The hamlet, its mayor and a trappers' organization (the appellants) applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. The court found that the duty to consult had been triggered and characterized the degree of consultation owed in the circumstances as deep. The court found that the Crown was entitled to rely on the NEB to undertake such consultation and also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The application for judicial review was dismissed.

The appellants appealed.

Held: The appeal was allowed.

Per Karakatsanis and Brown JJ. (McLachlin C.J.C., Abella, Moldaver, Wagner, Gascon, Côté, and Rowe JJ.concurring): The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown. While the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. Where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner. Any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. Adequate Crown consultation before project approval is always preferable to after-the-fact judicial remonstration following an adversarial process.

Under COGOA, the NEB has a significant array of powers that permit extensive consultation. In the case of designated projects, it can also conduct environmental assessments, and establish participant funding programs to facilitate public participation. The NEB has the procedural powers necessary to implement consultation and the remedial powers to accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

Action taken by the NEB in furtherance of its powers under s. 5(1)(b) of COGOA to make final decisions is itself Crown conduct, which triggers the duty to consult. A decision maker may then only proceed to approve a project if Crown consultation is adequate. Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under COGOA remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question.

The Crown acknowledged that deep consultation was required in this case; the appellants had established treaty rights to hunt and harvest marine mammals. The inability to harvest marine mammals would impact the diet and cultural traditions of the

community, including participation in the hunt of marine mammals. The Inuit right at stake was of high significance; a significant level of consultation and accommodation was required.

The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use.

While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, the consultative inquiry was not properly into environmental effects per se. Rather, it inquired into the impact on the right. No consideration was given in the NEB's environmental assessment to the source, in a treaty, of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights. Furthermore, it was not made clear to the Inuit that the Crown relied on the processes of the NEB as fulfilling its duty to consult. Finally, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Despite the NEB's broad powers under COGOA to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. During the NEB meetings, the proponents were unable to answer basic questions about the effect of the proposed testing on marine mammals. When they did eventually respond to these questions, they did so in an enormous and largely inaccessible document, only a fraction of which was translated into Inuktitut. This was not true consultation. No mutual understanding on the core issue of the potential impact on treaty rights and possible accommodations could possibly have emerged from what occurred.

The NEB's environmental assessment report noted changes made to the project as a result of consultation, as well as the proponents' commitment to installing passive acoustic monitoring These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it was a required practice.

In view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, the consultation process was significantly flawed. The Crown breached its duty to consult the appellants in respect of the proposed testing. The NEB's authorization was quashed.

Dans le hameau de Clyde River, situé sur la côte nord-est de l'île de Baffin, au Nunavut, la plupart des résidents sont des Inuits. Aux termes de l'Accord sur les revendications territoriales du Nunavut (1993), les Inuits de Clyde River ont cédé l'ensemble de leurs revendications, droits, titres et intérêts ancestraux dans la région du Nunavut, qui comprend Clyde River, contre des droits définis par traité, notamment le droit de récolter des mammifères marins.

Les intimés, des compagnies cherchant à découvrir des ressources pétrolières et gazières (les promoteurs), ont demandé à l'Office national de l'énergie l'autorisation, en vertu de l'art. 5(1)b) de la Loi sur les opérations pétrolières au Canada (LOPC), de mener des essais sismiques dans des lieux adjacents à la région où les Inuits peuvent, conformément à des droits issus de traités, récolter des mammifères marins. Les essais proposés prévoyaient que des canons à air seraient remorqués par navire afin de produire des ondes sonores sous-marines permettant de trouver et de mesurer les ressources géologiques sous-marines. Les essais devaient avoir lieu de juillet à novembre, pendant cinq années consécutives. Nul ne contestait que ces essais pourraient avoir des incidences négatives sur les droits de récolte des Inuits de Clyde River.

L'Office est un tribunal administratif fédéral et un organisme de réglementation et c'est lui qui prend en dernier ressort la décision d'accorder ou non l'autorisation prévue à l'art. 5(1)b) de la LOPC. L'Office a procédé à une évaluation environnementale du projet et, au terme d'une période de consultation, l'Office a accordé l'autorisation recherchée.

Tout au long du processus d'évaluation environnementale, Clyde River et diverses organisations inuites ont déposé auprès de l'Office des lettres de commentaires dans lesquelles ils affirmaient que la consultation était inadéquate et ils exprimaient leurs inquiétudes au sujet des essais.

Dans son rapport d'évaluation environnementale, l'Office a conclu que les promoteurs « ont déployé suffisamment d'efforts pour consulter les groupes autochtones susceptibles d'être touchés et pour répondre aux préoccupations qu'ils ont soulevées », et que les groupes autochtones avaient eu une possibilité adéquate de participer au processus. L'Office a également conclu que les essais pouvaient modifier les routes migratoires des mammifères marins et augmenter le risque de mortalité chez ces animaux, mais a toutefois conclu que les essais n'étaient pas susceptibles de causer des effets environnementaux négatifs et importants compte tenu des mesures d'atténuation que les promoteurs mettraient en oeuvre.

Le hameau, son maire et une organisation de trappeurs (les appelants) ont déposé une requête devant la Cour d'appel fédérale en vue d'obtenir le contrôle judiciaire de la décision de l'Office d'accorder l'autorisation. La Cour d'appel fédérale a conclu que l'obligation de consulter avait pris naissance et a considéré que les circonstances requéraient une consultation approfondie. La

Cour d'appel fédérale a conclu que la Couronne pouvait s'en remettre à l'Office pour que celui-ci procède à une telle consultation et a également conclu que, du fait de la nature et de l'étendue des processus de l'Office, il avait été satisfait à l'obligation de consulter incombant à la Couronne. La requête en contrôle judiciaire a été rejetée.

Les appelants ont formé un pourvoi.

Arrêt: Le pourvoi a été accueilli.

Karakatsanis, Brown, JJ. (McLachlin, J.C.C., Abella, Moldaver, Wagner, Gascon, Côté, Rowe, JJ., souscrivant à leur opinion) :

L'obligation de consulter vise la protection des droits ancestraux et issus de traités tout en favorisant la réconciliation entre les peuples autochtones et la Couronne. Bien que la Couronne puisse s'en remettre aux mesures prises par un organisme de réglementation pour satisfaire, en tout ou en partie, à son obligation de consulter et, lorsque cela se justifie, à son obligation d'accommoder, c'est toujours à elle qu'incombe la responsabilité ultime de veiller au caractère adéquat de la consultation. Lorsque le processus réglementaire auquel s'en remet la Couronne ne lui permet pas de satisfaire adéquatement à son obligation de consulter ou d'accommoder, elle doit prendre des mesures supplémentaires pour ce faire. Lorsque la Couronne s'en remet aux processus d'un organisme de réglementation pour satisfaire en tout ou en partie à son obligation, il doit être clairement indiqué aux groupes autochtones touchés que la Couronne s'en remet à un tel processus. Les peuples autochtones doivent être avisés de la forme que prendra le processus de consultation, afin de savoir comment les consultations se dérouleront, de pouvoir y participer activement et, au besoin, d'être en mesure de soulever en temps opportun leurs préoccupations au sujet de la forme des consultations proposées.

Toute décision touchant des droits ancestraux ou issus de traités prise sur la base d'une consultation inadéquate ne respectera pas l'obligation de consulter, laquelle est un impératif constitutionnel. En cas de contestation, la décision devrait être annulée à l'issue d'un contrôle judiciaire. Une consultation adéquate par la Couronne avant que le projet ne soit approuvé est toujours préférable à des remontrances judiciaires formulées après le fait, au terme d'une procédure contradictoire.

En vertu de la LOPC, l'Office dispose d'un large éventail de pouvoirs qui permettent une consultation étendue. Dans le cas de projets désignés, il peut aussi réaliser des évaluations environnementales et créer un programme d'aide financière pour faciliter la participation du public. L'Office dispose des pouvoirs procéduraux nécessaires pour mener des consultations, ainsi que des pouvoirs de réparation lui permettant de prendre des mesures d'accommodement à l'égard des revendications autochtones ou des droits ancestraux ou issus de traités touchés. La Couronne peut donc s'en remettre au processus de l'Office pour satisfaire, en tout ou en partie, à l'obligation de consulter qui lui incombe.

Les mesures prises par l'Office en application de son pouvoir de rendre des décisions définitives en vertu de l'art. 5(1)b) de la LOPC sont elles-mêmes des mesures prises par la Couronne donnant naissance à l'obligation de consulter. Un décideur ne peut ensuite approuver un projet que si la consultation incombant à la Couronne est adéquate. En conséquence, lorsque la Couronne n'a pas satisfait à son obligation de consulter les groupes autochtones touchés par un projet visé par la LOPC, l'Office doit refuser d'approuver le projet. S'il l'approuve, sa décision devrait être annulée à l'issue d'un contrôle judiciaire, puisque l'obligation de consulter doit être respectée avant la prise de mesures susceptibles d'avoir des effets préjudiciables sur le droit en question.

La Couronne reconnaissait qu'une consultation approfondie était requise dans le présent dossier; les appelants possédaient des droits issus de traités établis leur permettant de chasser et de récolter des mammifères marins. L'incapacité de récolter des mammifères marins aurait des répercussions sur le régime alimentaire de la communauté et sa tradition culturelle, y compris la possibilité de participer à la chasse aux mammifères marins. Le droit des Inuits qui était en jeu était d'une grande importance, d'où la nécessité d'une consultation approfondie et de mesures d'accommodement substantielles.

Les essais proposés comportaient également des risques importants pour ces droits issus de traités. Selon l'évaluation environnementale de l'Office, ce projet était susceptible d'accroître le risque de mortalité chez les mammifères marins, de causer des dommages permanents à leur ouïe et de modifier leurs routes migratoires, situation qui aurait en conséquence une incidence sur l'utilisation des ressources traditionnelles.

Bien que l'Office ait conclu que les essais proposés n'étaient pas susceptibles d'avoir des effets environnementaux négatifs importants, le processus consultatif ne visait pas vraiment les effets environnementaux en tant que tels, mais plutôt les effets sur le droit. L'Office n'a pas pris en considération la source — un traité — des droits des appelants de récolter des mammifères marins ni l'incidence des essais proposés sur ces droits. De plus, il n'a pas été indiqué clairement aux Inuits que la Couronne s'en remettait aux processus de l'Office pour satisfaire à son obligation de consulter. Enfin, le processus de l'Office n'a pas permis de satisfaire à l'obligation de la Couronne de mener une consultation approfondie. Malgré les vastes pouvoirs que la LOPC confère à l'Office pour offrir de telles mesures avantageuses, les appelants n'ont bénéficié que de très peu de possibilités

de participation et de consultation. Lors des rencontres organisées par l'Office, les promoteurs ont été incapables de répondre à de nombreuses questions, y compris des questions de base sur les effets des essais proposés sur les mammifères marins. Lorsque les promoteurs ont finalement répondu à ces questions, ils l'ont fait dans un document énorme et très difficilement accessible, dont une partie seulement a été traduite en inuktitut. On ne peut pas vraiment parler d'une véritable consultation. Aucune compréhension mutuelle sur les points fondamentaux, à savoir les effets potentiels sur les droits issus de traités et les possibles accommodements, n'aurait pu vraiment aboutir de ce qui s'est déroulé dans la présente affaire.
Le rapport d'évaluation environnementale de l'Office faisait état des changements apportés au projet par suite de la consultation et de l'engagement pris par les promoteurs à installer des appareils de surveillance acoustique passive. Cependant, ces changements ne représentaient que des concessions négligeables au regard de l'atteinte potentielle aux droits issus de traités des Inuits. En outre, la surveillance acoustique passive ne constituait aucunement une concession, puisqu'elle était exigée.
Compte tenu des droits issus de traités établis que possédaient les Inuits et des risques que posaient pour ces droits les essais proposés, le processus de consultation comportait d'importantes lacunes. La Couronne a manqué à son obligation de consulter les appelants au sujet des essais proposés. L'autorisation de l'Office a été annulée.

Karakatsanis, Brown JJ. **(McLachlin C.J.C. and Abella, Moldaver, Wagner, Gascon, Côté and Rowe JJ. concurring):**

I. Introduction

1 This Court has on several occasions affirmed the role of the duty to consult in fostering reconciliation between Canada's Indigenous peoples and the Crown. In this appeal, and its companion *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (S.C.C.), we consider the Crown's duty to consult with Indigenous peoples before an independent regulatory agency authorizes a project which could impact upon their rights. The Court's jurisprudence shows that the substance of the duty does not change when a regulatory agency holds final decision-making authority in respect of a project. While the Crown always owes the duty to consult, regulatory processes can partially or completely fulfill this duty.

2 The Hamlet of Clyde River lies on the northeast coast of Baffin Island, in Nunavut. The community is situated on a flood plain between Patricia Bay and the Arctic Cordillera. Most residents of Clyde River are Inuit, who rely on marine mammals for food and for their economic, cultural, and spiritual well-being. They have harvested marine mammals for generations. The bowhead whale, the narwhal, the ringed, bearded, and harp seals, and the polar bear are of particular importance to them. Under the *Nunavut Land Claims Agreement* (1993), the Inuit of Clyde River ceded all Aboriginal claims, rights, title, and interests in the Nunavut Settlement Area, including Clyde River, in exchange for defined treaty rights, including the right to harvest marine mammals.

3 In 2011, the respondents TGS-NOPEC Geophysical Company ASA, Multi Klient Invest As and Petroleum Geo-Services Inc. (the proponents) applied to the National Energy Board (NEB) to conduct offshore seismic testing for oil and gas resources. It is undisputed that this testing could negatively affect the harvesting rights of the Inuit of Clyde River. After a period of consultation among the project proponents, the NEB, and affected Inuit communities, the NEB granted the requested authorization.

4 While the Crown may rely on the NEB's process to fulfill its duty to consult, considering the importance of the established treaty rights at stake and the potential impact of the seismic testing on those rights, we agree with the appellants that the consultation and accommodation efforts in this case were inadequate. For the reasons set out below, we would therefore allow the appeal and quash the NEB's authorization.

II. Background

A. Legislative Framework

5 The *Canada Oil and Gas Operations Act*, R.S.C. 1985, c. O-7 (*COGOA*), aims, in part, to promote responsible exploration for and exploitation of oil and gas resources (s. 2.1). It applies to exploration and drilling for the production, conservation, processing, and transportation of oil and gas in certain designated areas, including Nunavut (s. 3). Engaging in such activities is prohibited without an operating licence under s. 5(1)(a) or an authorization under s. 5(1)(b).

6 The NEB is a federal administrative tribunal and regulatory agency established by the *National Energy Board Act*, R.S.C. 1985, c. N-7 (*NEB Act*). In this case, it is the final decision maker for issuing an authorization under s. 5(1)(b) of *COGOA*. The NEB has broad discretion to impose requirements for authorization under s. 5(4), and can ask parties to provide any information it deems necessary to comply with its statutory mandate (s. 5.31).

B. The Seismic Testing Authorization

7 In May 2011, the proponents applied to the NEB for an authorization under s. 5(1)(b) of *COGOA* to conduct seismic testing in Baffin Bay and Davis Strait, adjacent to the area where the Inuit have treaty rights to harvest marine mammals. The proposed testing contemplated towing airguns by ship through a project area. These airguns produce underwater sound waves, which are intended to find and measure underwater geological resources such as petroleum. The testing was to run from July through November, for five successive years.

8 The NEB launched an environmental assessment of the project. [1]

9 Clyde River opposed the seismic testing, and filed a petition against it with the NEB in May 2011. In 2012, the proponents responded to requests for further information from the NEB. They held meetings in communities that would be affected by the testing, including Clyde River.

10 In April and May 2013, the NEB held meetings in Pond Inlet, Clyde River, Qikiqtarjuaq, and Iqaluit to collect comments from the public on the project. Representatives of the proponents attended these meetings. Community members asked basic questions about the effects of the survey on marine mammals in the region, but the proponents were unable to answer many of them. For example, in Pond Inlet, a community member asked the proponents which marine mammals would be affected by the survey. The proponents answered: "That's a very difficult question to answer because we're not the core experts" (A.R., vol. III, at p. 541). Similarly, in Clyde River, a community member asked how the testing would affect marine mammals. The proponents answered:

> ... a lot of work has been done with seismic surveys in other places and a lot of that information is used in doing the environmental assessment, the document that has been submitted by the companies to the National Energy Board for the approval process. It has a section on, you know, marine mammals and the effects on marine mammals.
>
> (A.R., vol. III, at p. 651)

11 These are but two examples of multiple instances of the proponents' failure to offer substantive answers to basic questions about the impacts of the proposed seismic testing. That failure led the NEB, in May 2013, to suspend its assessment. In August 2013, the proponents filed a 3,926-page document with the NEB, purporting to answer those questions. This document was posted on the NEB website and delivered to the hamlet offices. The vast majority of this document was not translated into Inuktitut. No further efforts were made to determine whether this document was accessible to the communities, and whether their questions were answered. After this document was filed, the NEB resumed its assessment.

12 Throughout the environmental assessment process, Clyde River and various Inuit organizations filed letters of comment with the NEB, noting the inadequacy of consultation and expressing concerns about the testing.

13 In April 2014, organizations representing the appellants and Inuit in other communities wrote to the Minister of Aboriginal Affairs and Northern Development and to the NEB, stating their view that the duty to consult had not been fulfilled in relation to the testing. This could be remedied, they said, by completing a strategic environmental assessment [2] before authorizing any seismic testing. In May, the Nunavut Marine Council also wrote to the NEB, with a copy to the Minister, asking that any regulatory decisions affecting the Nunavut Settlement Area's marine environment be postponed until completion of the strategic environmental assessment. This assessment was necessary, in the Council's view, to understand the baseline conditions in the marine environment and to ensure that seismic tests are properly regulated.

14 In June 2014, the Minister responded to both letters, "disagree[ing] with the view that seismic exploration of the region should be put on hold until the completion of a strategic environmental assessment" (A.R., vol. IV, at p. 967). A Geophysical Operations Authorization letter from the NEB soon followed, advising that the environmental assessment report was completed and that the authorization had been granted.

15 In its environmental assessment (EA) report, the NEB discussed consultation with, and the participation of, Aboriginal groups in the NEB process. It concluded that the proponents "made sufficient efforts to consult with potentially-impacted Aboriginal groups and to address concerns raised" and that "Aboriginal groups had an adequate opportunity to participate in the NEB's [environmental assessment] process" (A.R., vol. I, at p. 24). It also determined that the testing could change the migration routes of marine mammals and increase their risk of mortality, thereby affecting traditional harvesting of marine mammals including bowhead whales and narwhals, which are both identified as being of "Special Concern" by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC). The NEB concluded, however, that the testing was unlikely to cause significant adverse environmental effects given the mitigation measures that the proponents would implement.

C. The Judicial Review Proceedings

16 Clyde River applied to the Federal Court of Appeal for judicial review of the NEB's decision to grant the authorization. Dawson J.A. (Nadon and Boivin JJ.A. concurring) found that the duty to consult had been triggered because the NEB could not grant the authorization without the minister's approval (or waiver of the requirement for approval) of a benefits plan for the project, pursuant to s. 5.2(2) of *COGOA* (2015 FCA 179, [2016] 3 F.C.R. 167 (F.C.A.)). The Federal Court of Appeal characterized the degree of consultation owed in the circumstances as deep, as that concept was discussed in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.), at para. 44, and found that the Crown was entitled to rely on the NEB to undertake such consultation.

17 The Court of Appeal also concluded that the Crown's duty to consult had been satisfied by the nature and scope of the NEB's processes. The conditions upon which the authorization had been granted showed that the interests of the Inuit had been sufficiently considered and that further consultation would be expected to occur were the proposed testing to be followed by further development activities. In the circumstances, a strategic environmental assessment report was not required.

III. Analysis

18 The following issues arise in this appeal:

1. Can an NEB approval process trigger the duty to consult?

2. Can the Crown rely on the NEB's process to fulfill the duty to consult?

3. What is the NEB's role in considering Crown consultation before approval?

4. Was the consultation adequate in this case?

A. The Duty to Consult — General Principles

19 The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.), at para. 34). It has both a constitutional and a legal dimension (*R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 (S.C.C.), at para. 6; *Carrier Sekani Tribal Council*, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (*Kapp*, at para. 6). This principle is in turn enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights (*Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (S.C.C.), at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (*Haida Nation*, at para. 53).

20 The content of the duty, once triggered, falls along a spectrum ranging from limited to deep consultation, depending upon the strength of the Aboriginal claim, and the seriousness of the potential impact on the right. Each case must be considered individually. Flexibility is required, as the depth of consultation required may change as the process advances and new information comes to light (*Haida Nation*, at paras. 39 and 43-45).

21 This Court has affirmed that it is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult (*Carrier Sekani Tribal Council*, at para. 56; *Haida Nation*, at para. 51). The appellants argue that a regulatory process alone cannot fulfill the duty to consult because at least some direct engagement between "the Crown" and the affected Indigenous community is necessary.

22 In our view, while the Crown may rely on steps undertaken by a regulatory agency to fulfill its duty to consult in whole or in part and, where appropriate, accommodate, the Crown always holds ultimate responsibility for ensuring consultation is adequate. Practically speaking, this does not mean that a minister of the Crown must give explicit consideration in every case to whether the duty to consult has been satisfied, or must directly participate in the process of consultation. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures to meet its duty. This might entail filling any gaps on a case-by-case basis or more systemically through legislative or regulatory amendments (see e.g. *Ross River Dena Council v. Yukon*, 2012 YKCA 14, 358 D.L.R. (4th) 100 (Y.T. C.A.)). Or, it might require making submissions to the regulatory body, requesting reconsideration of a decision, or seeking a postponement in order to carry out further consultation in a separate process before the decision is rendered. And, if an affected Indigenous group is (like the Inuit of Nunavut) a party to a modern treaty and perceives the process to be deficient, it should, as it did here, request such direct Crown engagement in a timely manner (since parties to treaties are obliged to act diligently to advance their respective interests) (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103 (S.C.C.), at para. 12).

23 Further, because the honour of the Crown requires a meaningful, good faith consultation process (*Haida Nation*, at para. 41), where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. Guidance about the form of the consultation process should be provided so that Indigenous peoples know how consultation will be carried out to allow for their effective participation and, if necessary, to permit them to raise concerns with the proposed form of the consultations in a timely manner.

24 Above all, and irrespective of the process by which consultation is undertaken, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult, which is a constitutional imperative. Where challenged, it should be quashed on judicial review. That said, judicial review is no substitute for adequate consultation. True reconciliation is rarely, if ever, achieved in courtrooms. Judicial remedies may seek to undo past infringements of Aboriginal and treaty rights, but adequate Crown consultation *before* project approval is always preferable to after-the-fact judicial remonstration following an adversarial process. Consultation is, after all, "[c]oncerned with an ethic of ongoing relationships" (*Carrier Sekani Tribal Council*, at para. 38, quoting D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), at p. 21). As the Court noted in *Haida Nation*, "[w]hile Aboriginal claims can be and are pursued through litigation, negotiation is a preferable way of reconciling state and Aboriginal interests" (para. 14). No one benefits — not project proponents, not Indigenous peoples, and not non-Indigenous members of affected communities — when projects are prematurely approved only to be subjected to litigation.

B. Can an NEB Approval Process Trigger the Duty to Consult?

25 The duty to consult is triggered when the Crown has actual or constructive knowledge of a potential Aboriginal claim or Aboriginal or treaty rights that might be adversely affected by Crown conduct (*Haida Nation*, at para. 35; *Carrier Sekani Tribal Council*, at para. 31). Crown conduct which would trigger the duty is not restricted to the exercise by or on behalf of the Crown of statutory powers or of the royal prerogative, nor is it limited to decisions that have an immediate impact on lands and resources. The concern is for adverse impacts, however made, upon Aboriginal and treaty rights and, indeed, a goal of consultation is to identify, minimize and address adverse impacts where possible (*Carrier Sekani Tribal Council*, at paras. 45-46).

26 In this appeal, all parties agreed that the Crown's duty to consult was triggered, although agreement on *just what* Crown conduct triggered the duty has proven elusive. The Federal Court of Appeal saw the trigger in *COGOA*'s requirement for ministerial approval (or waiver of the requirement for approval) of a benefits plan for the testing. In the companion appeal of *Chippewas of the Thames First Nation*, the majority of the Federal Court of Appeal concluded that it was not necessary to decide whether the duty to consult was triggered since the Crown was not a party before the NEB, but suggested the only Crown action involved might have been the 1959 enactment of the *NEB Act*[3] (*Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2015 FCA 222, [2016] 3 F.C.R. 96 (F.C.A.)). In short, the Federal Court of Appeal in both cases was of the view that only action by a minister of the Crown or a government department, or a Crown corporation, can constitute Crown conduct triggering the duty to consult. And, before this Court in *Chippewas of the Thames First Nation*, the Attorney General of Canada argued that the duty was triggered by the NEB's approval of the pipeline project, because it was state action with the potential to affect Aboriginal or treaty rights.

27 Contrary to the Federal Court of Appeal's conclusions on this point, we agree that the NEB's approval process, in this case, as in *Chippewas of the Thames First Nation*, triggered the duty to consult.

28 It bears reiterating that the duty to consult is owed by the Crown. In one sense, the "Crown" refers to the personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority (*McAteer v. Canada (Attorney General)*, 2014 ONCA 578, 121 O.R. (3d) 1 (Ont. C.A.), at para. 51; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 11-12; but see *Carrier Sekani Tribal Council*, at para. 44). For this reason, the term "Crown" is commonly used to symbolize and denote executive power. This was described by Lord Simon of Glaisdale in *Town Investments Ltd. v. Department of Environment* (1977), [1978] A.C. 359 (U.K. H.L.), at p. 397:

> The crown as an object is a piece of jewelled headgear under guard at the Tower of London. But it symbolises the powers of government which were formerly wielded by the wearer of the crown; so that by the 13th century crimes were committed not only against the king's peace but also against "his crown and dignity": *Pollock and Maitland, History of English Law*, 2nd ed. (1898), vol. I, p. 525. The term "the Crown" is therefore used in constitutional law to denote the collection of such of those powers as remain extant (the royal prerogative), together with such other powers as have been expressly conferred by statute on "the Crown."

29 By this understanding, the NEB is not, strictly speaking, "the Crown". Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown's ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of *COGOA*, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court's interchangeable references in *Carrier Sekani Tribal Council* to "government action" and "Crown conduct" (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in *Chippewas of the Thames First Nation*, "[t]he duty, like the honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet" (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of *COGOA* to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action.

C. Can the Crown Rely on the NEB's Process to Fulfill the Duty to Consult?

30 As we have said, while ultimate responsibility for ensuring the adequacy of consultation remains with the Crown, the Crown may rely on steps undertaken by a regulatory agency to fulfill the duty to consult. Whether, however, the Crown is capable of doing so, in whole or in part, depends on whether the agency's statutory duties and powers enable it to do what the

duty requires in the particular circumstances (*Carrier Sekani Tribal Council*, at paras. 55 and 60). In the NEB's case, therefore, the question is whether the NEB is able, to the extent it is being relied on, to provide an appropriate level of consultation and, where necessary, accommodation to the Inuit of Clyde River in respect of the proposed testing.

31 We note that the NEB and *COGOA* each predate judicial recognition of the duty to consult. However, given the flexible nature of the duty, a process that was originally designed for a different purpose may be relied on by the Crown so long as it affords an appropriate level of consultation to the affected Indigenous group (*Beckman*, at para. 39; *Taku River Tlingit First Nation*, at para. 22). Under *COGOA*, the NEB has a significant array of powers that permit extensive consultation. It may conduct hearings, and has broad discretion to make orders or elicit information in furtherance of *COGOA* and the public interest (ss. 5.331, s. 5.31(1) and s. 5.32). It can also require studies to be undertaken and impose preconditions to approval (s. 5(4)). In the case of designated projects, it can also (as here) conduct environmental assessments, and establish participant funding programs to facilitate public participation (s. 5.002).

32 *COGOA* also grants the NEB broad powers to accommodate the concerns of Indigenous groups where necessary. The NEB can attach any terms and conditions it sees fit to an authorization issued under s. 5(1)(b), and can make such authorization contingent on their performance (ss. 5(4) and 5.36(1)). Most importantly, the NEB may require accommodation by exercising its discretion to deny an authorization or by reserving its decision pending further proceedings (ss. 5(1)(b), s. 5(5) and s. 5.36(2)).

33 The NEB has also developed considerable institutional expertise, both in conducting consultations and in assessing the environmental impacts of proposed projects. Where the effects of a proposed project on Aboriginal or treaty rights substantially overlap with the project's potential environmental impact, the NEB is well situated to oversee consultations which seek to address these effects, and to use its technical expertise to assess what forms of accommodation might be available.

34 In sum, the NEB has (1) the procedural powers necessary to implement consultation; and (2) the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult. Whether the NEB's process did so in this case, we consider below.

D. What Is the NEB's Role in Considering Crown Consultation Before Approval?

35 The appellants argue that, as a tribunal empowered to decide questions of law, the NEB *must* exercise its decision-making authority in accordance with s. 35(1) of the *Constitution Act, 1982* by evaluating the adequacy of consultation before issuing an authorization for seismic testing. In contrast, the proponents submit that there is no basis in this Court's jurisprudence for imposing this obligation on the NEB. Although the Attorney General of Canada agrees with the appellants that the NEB has the legal capacity to decide constitutional questions when doing so is necessary to its decision-making powers, she argues that the NEB's environmental assessment decision in this case appropriately considered the adequacy of the proponents' consultation efforts.

36 Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal "to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power" (*Carrier Sekani Tribal Council*, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (*R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.), at para. 77). It follows that they must ensure their decisions comply with s. 35 of the *Constitution Act, 1982* (*Carrier Sekani Tribal Council*, at para. 72).

37 The NEB has broad powers under both the *NEB Act* and *COGOA* to hear and determine all relevant matters of fact and law (*NEB Act*, s. 12(2); *COGOA*, s. 5.31(2)). No provision in either statute suggests an intention to withhold from the NEB the power to decide the adequacy of consultation. And, in *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1

S.C.R. 159 (S.C.C.), this Court concluded that NEB decisions must conform to s. 35(1) of the *Constitution Act, 1982*. It follows that the NEB can determine whether the Crown's duty to consult has been fulfilled.

38 We note that the majority at the Federal Court of Appeal in *Chippewas of the Thames First Nation* considered that this issue was not properly before the NEB. It distinguished*Carrier Sekani Tribal Council* on the basis that the Crown was not a party to the NEB hearing in *Chippewas of the Thames First Nation*, while the Crown (in the form of B.C. Hydro, a Crown corporation) was a party in the utilities commission proceedings in *Carrier Sekani Tribal Council*. Based on the authority of *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500 (F.C.A.), the majority of the Federal Court of Appeal in *Chippewas of the Thames First Nation* reasoned that the NEB is not required to evaluate whether the Crown's duty to consult had been triggered (or whether it was satisfied) before granting a resource project authorization, except where the Crown is a party before the NEB.

39 The difficulty with this view, however, is that — as we have explained — action taken by the NEB in furtherance of its powers under s. 5(1)(b) of *COGOA* to make final decisions is *itself* Crown conduct which triggers the duty to consult. Nor, respectfully, can we agree with the majority of the Federal Court of Appeal in *Chippewas of the Thames First Nation* that an NEB decision will comply with s. 35(1) of the *Constitution Act, 1982* so long as the NEB ensures the proponents engage in a "dialogue" with potentially affected Indigenous groups (para. 62). If the Crown's duty to consult has been triggered, a decision maker may only proceed to approve a project if Crown consultation is adequate. Although in many cases the Crown will be able to rely on the NEB's processes as meeting the duty to consult, because the NEB is the final decision maker, the key question is whether the duty is fulfilled prior to project approval (*Haida Nation*, at para. 67). Accordingly, where the Crown's duty to consult an affected Indigenous group with respect to a project under *COGOA* remains unfulfilled, the NEB must withhold project approval. And, where the NEB fails to do so, its approval decision should (as we have already said) be quashed on judicial review, since the duty to consult must be fulfilled prior to the action that could adversely affect the right in question (*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 257 (S.C.C.), at para. 78).

40 Some commentators have suggested that the NEB, in view of its mandate to decide issues in the public interest, cannot effectively account for Aboriginal and treaty rights and assess the Crown's duty to consult (see R. Freedman and S. Hansen, "Aboriginal Rights vs. The Public Interest", prepared for Pacific Business & Law Institute Conference, Vancouver, B.C. (February 26-27, 2009) (online), at pp. 4 and 14). We do not, however, see the public interest and the duty to consult as operating in conflict. As this Court explained in *Carrier Sekani Tribal Council*, the duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest (para. 70). A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest (*ibid.*).

41 This leaves the question of what a regulatory agency must do where the adequacy of Crown consultation is raised before it. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons, particularly in respect of project applications requiring deep consultation. Engagement of the honour of the Crown does not predispose a certain outcome, but promotes reconciliation by imposing obligations on the manner and approach of government (*Haida Nation*, at paras. 49 and 63). Written reasons foster reconciliation by showing affected Indigenous peoples that their rights were considered and addressed (*Haida Nation*, at para. 44). Reasons are "a sign of respect [which] displays the requisite comity and courtesy becoming the Crown as Sovereign toward a prior occupying nation" (*Kainaiwa/Blood Tribe v. Alberta*, 2017 ABQB 107 (Alta. Q.B.), at para. 117 (CanLII)). Written reasons also promote better decision making (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 39).

42 This does not mean, however, that the NEB is always required to review the adequacy of Crown consultation by applying a formulaic "*Haida* analysis", as the appellants suggest. Nor will explicit reasons be required in every case. The degree of consideration that is appropriate will depend on the circumstances of each case. But where deep consultation is required and the affected Indigenous peoples have made their concerns known, the honour of the Crown will usually oblige the NEB, where its approval process triggers the duty to consult, to explain how it considered and addressed these concerns.

E. Was the Consultation Adequate in This Case?

43 The Crown acknowledges that deep consultation was required in this case, and we agree. As this Court explained in *Haida Nation*, deep consultation is required "where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high" (para. 44). Here, the appellants had *established treaty rights* to hunt and harvest marine mammals. These rights were acknowledged at the Federal Court of Appeal as being extremely important to the appellants for their economic, cultural, and spiritual well-being (para. 2). Jerry Natanine, the former mayor of Clyde River, explained that hunting marine mammals "provides us with nutritious food; enables us to take part in practices we have maintained for generations; and enables us to maintain close relationships with each other through the sharing of what we call 'country food'" (A.R., vol. II, at p. 197). The importance of these rights was also recently recognized by the Nunavut Court of Justice:

> The Inuit right which is of concern in this matter is the right to harvest marine mammals. Many Inuit in Nunavut rely on country food for the majority of their diet. Food costs are very high and many would be unable to purchase food to replace country food if country food were unavailable. Country food is recognized as being of higher nutritional value than purchased food. But the inability to harvest marine mammals would impact more than ... just the diet of Inuit. The cultural tradition of sharing country food with others in the community would be lost. The opportunity to make traditional clothing would be impacted. The opportunity to participate in the hunt, an activity which is fundamental to being Inuk, would be lost. The Inuit right which is at stake is of high significance. This suggests a significant level of consultation and accommodation is required.
>
> (*Qikiqtani Inuit Assn. v. Canada (Minister of Natural Resources)*, 2010 NUCJ 12, 54 C.E.L.R. (3d) 263 (Nun. C.J.), at para. 25)

44 The risks posed by the proposed testing to these treaty rights were also high. The NEB's environmental assessment concluded that the project could increase the mortality risk of marine mammals, cause permanent hearing damage, and change their migration routes, thereby affecting traditional resource use. Given the importance of the rights at stake, the significance of the potential impact, and the risk of non-compensable damage, the duty owed in this case falls at the highest end of the spectrum.

45 Bearing this in mind, the consultation that occurred here fell short in several respects. First, the inquiry was misdirected. While the NEB found that the proposed testing was not likely to cause significant adverse environmental effects, and that any effects on traditional resource use could be addressed by mitigation measures, the consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the *right*. No consideration was given in the NEB's environmental assessment to the source — in a treaty — of the appellants' rights to harvest marine mammals, nor to the impact of the proposed testing on those rights.

46 Furthermore, although the Crown relies on the processes of the NEB as fulfilling its duty to consult, that was not made clear to the Inuit. The significance of the process was not adequately explained to them.

47 Finally, and most importantly, the process provided by the NEB did not fulfill the Crown's duty to conduct deep consultation. Deep consultation "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision" (*Haida Nation*, at para. 44). Despite the NEB's broad powers under *COGOA* to afford those advantages, limited opportunities for participation and consultation were made available to the appellants. Unlike many NEB proceedings, including the proceedings in *Chippewas of the Thames First Nation*, there were no oral hearings. Although the appellants submitted scientific evidence to the NEB, this was done without participant funding. Again, this stands in contrast to *Chippewas of the Thames First Nation*, where the consultation process was far more robust. In that case, the NEB held oral hearings, the appellants received funding to participate in the hearings, and they had the opportunity to present evidence and a final argument. While these procedural protections are characteristic of an adversarial process, they may be required for meaningful consultation (*Haida Nation*, at para. 41) and do not transform its underlying objective: fostering reconciliation by promoting an ongoing relationship (*Carrier Sekani Tribal Council*, at para. 38).

48 The consultation in this case also stands in contrast to *Taku River Tlingit First Nation* where, despite its entitlement to consultation falling only at the midrange of the spectrum (para. 32), the Taku River Tlingit First Nation, with financial assistance (para. 37), fully participated in the assessment process as a member of the project committee, which was "the primary engine driving the assessment process" (paras. 3, 8 and 40).

49 While these procedural safeguards are not always necessary, their absence in this case significantly impaired the quality of consultation. Although the appellants had the opportunity to question the proponents about the project during the NEB meetings in the spring of 2013, the proponents were unable to answer many questions, including basic questions about the effect of the proposed testing on marine mammals. The proponents did eventually respond to these questions; however, they did so in a 3,926 page document which they submitted to the NEB. This document was posted on the NEB website and delivered to the hamlet offices in Pond Inlet, Clyde River, Qikiqtajuak and Iqaluit. Internet speed is slow in Nunavut, however, and bandwidth is expensive. The former mayor of Clyde River deposed that he was unable to download this document because it was too large. Furthermore, only a fraction of this enormous document was translated into Inuktitut. To put it mildly, furnishing answers to questions that went to the heart of the treaty rights at stake in the form of a practically inaccessible document dump months after the questions were initially asked in person is not true consultation. "'[C]onsultation' in its least technical definition is talking together for mutual understanding" (T. Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 *Alta. L. Rev.* 49, at p. 61). No mutual understanding on the core issues — the potential impact on treaty rights, and possible accommodations — could possibly have emerged from what occurred here.

50 The fruits of the Inuit's limited participation in the assessment process here are plain in considering the accommodations recorded by the NEB's environmental assessment report. It noted changes made to the project as a result of consultation, such as a commitment to ongoing consultation, the placement of community liaison officers in affected communities, and the design of an Inuit Qaujimajatuqangit (Inuit traditional knowledge) study. The proponents also committed to installing passive acoustic monitoring on the ship to be used in the proposed testing to avoid collisions with marine mammals.

51 These changes were, however, insignificant concessions in light of the potential impairment of the Inuit's treaty rights. Further, passive acoustic monitoring was no concession at all, since it is a requirement of the Statement of Canadian Practice With Respect to the Mitigation of Seismic Sound in the Marine Environment which provides "minimum standards, which will apply in all non-ice covered marine waters in Canada" (A.R., vol. I, at p. 40), and which would be included in virtually all seismic testing projects. None of these putative concessions, nor the NEB's reasons themselves, gave the Inuit any reasonable assurance that their constitutionally protected treaty rights were considered as *rights*, rather than as an afterthought to the assessment of environmental concerns.

52 The consultation process here was, in view of the Inuit's established treaty rights and the risk posed by the proposed testing to those rights, significantly flawed. Had the appellants had the resources to submit their own scientific evidence, and the opportunity to test the evidence of the proponents, the result of the environmental assessment could have been very different. Nor were the Inuit given meaningful responses to their questions regarding the impact of the testing on marine life. While the NEB considered potential impacts of the project on marine mammals and on Inuit traditional resource use, its report does not acknowledge, or even mention, the Inuit treaty rights to harvest wildlife in the Nunavut Settlement Area, or that deep consultation was required.

IV. Conclusion

53 For the foregoing reasons, we conclude that the Crown breached its duty to consult the appellants in respect of the proposed testing. We would allow the appeal with costs to the appellants, and quash the NEB's authorization.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 This assessment was initially required under the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Since its repeal and replacement by the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the NEB has continued to conduct environmental assessments in relation to proposed projects, taking the position that it is still empowered to do so under *COGOA*.

2 At the time, the Department of Aboriginal Affairs and Northern Development was preparing a strategic environmental assessment — specifically, the "Eastern Arctic Strategic Environmental Assessment" — for Baffin Bay and Davis Strait, meant to examine "all aspects of future oil and gas development." Once complete, it would "inform policy decisions around if, when, and where oil and gas companies may be invited to bid on parcels of land for exploration drilling rights in Baffin Bay/Davis Strait" (Letter to Cathy Towtongie et al. from the Honourable Bernard Valcourt, A.R., vol. IV, at pp. 966-67).

3 *National Energy Board Act*, S.C. 1959, c. 46.

2002 SCC 13, 2002 CSC 13
Supreme Court of Canada

Mackin v. New Brunswick (Minister of Justice)

2002 CarswellNB 59, 2002 CarswellNB 60, 2002 SCC 13, 2002 CSC 13, [2002] 1 S.C.R. 405, [2002] S.C.J. No. 13, 112 A.C.W.S. (3d) 57, 17 C.P.C. (5th) 1, 209 D.L.R. (4th) 564, 245 N.B.R. (2d) 299, 282 N.R. 201, 31 C.C.P.B. 55, 636 A.P.R. 299, 91 C.R.R. (2d) 1, J.E. 2002-351, REJB 2002-27928

Her Majesty The Queen in Right of the Province of New Brunswick as represented by the Minister of Finance, Appellant v. Ian P. Mackin, Respondent

Her Majesty The Queen in Right of the Province of New Brunswick as represented by the Minister of Finance, Appellant v. Douglas E. Rice, Respondent and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Canadian Judges Conference and the Canadian Association of Provincial Court Judges, Interveners

L'Heureux-Dubé, Gonthier, Iacobucci, Major, Binnie, Arbour, LeBel JJ.

Judgment: February 14, 2002
Heard: May 23, 2001
Docket: 27722

Proceedings: reversing in part (1999), 23 C.C.P.B. 1 (N.B.C.A.); and reversing in part (1999), 22 C.C.P.B. 249 (N.B.C.A.)

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The judgment of L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ. was delivered by *Gonthier J.*:

I. Introduction

1 This appeal primarily raises the issue of whether the abolition by the legislature of the position of supernumerary judge of the Provincial Court of New Brunswick contravenes the constitutional guarantees of judicial independence in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms* and in the Preamble to the *Constitution Act, 1867*. The incidental issues that arise are whether the respondent judges should be awarded damages and whether costs should be ordered on a solicitor- client-basis.

II. Facts

2 The Provincial Court of New Brunswick was established in 1973 by the *Provincial Court Act*, R.S.N.B. 1973, c. P-21. Section 8(1) of the Act provides that" [e]ach judge is hereby constituted a court of record and, throughout the Province, has all the powers, authority, criminal jurisdiction and quasi-criminal jurisdiction vested in a police magistrate or in two or more justices of the peace sitting and acting together, under any law or statute in force in the Province". It accordingly has substantial criminal jurisdiction. The Court is also the youth court designated by the Province for the purposes of the *Young Offenders Act*, R.S.C. 1985, c. Y-1. Section 6 provides that a "judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties". Section 4.2 provides that a "judge shall retire at the age of seventy-five years". Finally, s. 3.1 states that "a judge shall have the same protection and privileges as are conferred upon judges of The Court of Queen's Bench of New Brunswick, for any act done or omitted in the execution of his or her duty".

3 On January 1, 1988, the *Act to Amend the Provincial Court Act*, S.N.B. 1987, c. 45, the purpose of which was to create the office of supernumerary judge and to eliminate that of deputy judge, came into force. A judge of the Provincial Court could thereby elect to sit as a supernumerary judge if he or she met the following conditions: (i) he or she had reached the age of 65 years and had accumulated 15 years of service; or (ii) he or she had reached the age of 60 years and had accumulated 25 years of service; or, finally, (iii) he or she had reached the age of 70 years and had accumulated 10 years of service. Thus, as the conditions of eligibility for the office of supernumerary judge fully reflected the conditions of eligibility for payment of a retirement pension equivalent to 60 percent of the full salary, an additional choice was given to the judges of the Provincial Court who satisfied these conditions. They could then: retire and receive their pension; continue to sit as a full-time judge; or sit as a supernumerary judge. Section 4.1(5) of the *Provincial Court Act* provided that a supernumerary judge was to remain available in order to perform the duties assigned to him or her "from time to time" by the Chief Judge. It was understood by everyone, however, that while a supernumerary judge of the Provincial Court received a salary and fringe benefits equivalent to those given to judges sitting full time, he or she was in practice asked to take on only about 40 percent of the usual workload of a full-time judge.

4 On April 1, 1995, ss. 1 through 8 of the *Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 (also called "Bill 7"), came into force. Section 2 provided for the straight abolition of the system of supernumerary judges and s. 3 provided for its replacement by a panel of retired judges sitting at the request of the Chief Judge or the Associate Chief Judge and paid on a *per diem* basis. Also, the supernumerary judges then in office were faced with a choice of retiring or beginning to sit full time again (s. 9(1)). They were required to give notice to the government of their decision before April 1, 1995. The legislation did not contain a so-called "grandfather" clause that would have allowed the supernumerary judges in office at that time as well as the other judges of the Provincial Court appointed before Bill 7 came into force to retain the privileges conferred upon them by law. According to the appellant, the government's decision to abolish the position of supernumerary judge was made for reasons of efficiency and flexibility as well as for economic and financial reasons. Thus, in its plea, it stated that "[t]he repeal of the supernumerary provisions by *Bill 7* was a legislative initiative undertaken in the context of overall public fiscal restraint and a reasonable attempt to improve the utilization of resources and cost effectiveness in the administration of the Provincial Court".

5 The respondent Judge Douglas E. Rice joined the provincial judiciary on August 16, 1971. On July 2, 1992, upon reaching the age of 65 years and after sitting for more than 15 years, he was entitled to retire and to receive his pension. Rather than doing so, he decided to exercise his right to sit as a supernumerary judge, which he did starting on April 30, 1993. On April 2, 1995, after Bill 7 became law, he was forced, against his will, to return to a full-time judicial office. He finally retired on October 15, 1997 and asked to be placed on the new panel of judges paid on a *per diem* basis starting on December 4 of that year. In his written submissions, Judge Rice mentioned that he had organized his financial and personal affairs in light of the conditions applying to his duties as a supernumerary judge.

6 The respondent Judge Ian P. Mackin joined the provincial judiciary on October 17, 1962. On October 17, 1987, upon reaching the age of 60 years and after accumulating more than 25 years of service, he acquired the right to receive his pension. Nevertheless, on August 15, 1988, he decided, like Judge Rice, to sit as a supernumerary judge. It appears that this reorganization of his judicial duties enabled him to plan the use of his time in such a way that he was able to spend several winters in Australia. Since he did not express his intentions following the enactment of Bill 7, Judge Mackin was deemed, in accordance with s. 9(1) of the Act, to have resumed his duties as a full-time judge. He still held this office as at the date of the hearing before this Court.

7 Following the coming into force of Bill 7, the two respondents instituted separate proceedings in the New Brunswick courts. Judge Mackin officially informed the government of his intention to bring legal proceedings on April 25, 1995, while Judge Rice submitted his written pleadings on June 24, 1997. The respondents challenged the constitutionality of the legislation abolishing the position of supernumerary judge, arguing that it affected the components of tenure and financial security that form part of judicial independence. Damages and payment of solicitor-client costs were also claimed. In this Court, both cases were joined and argued at the same time.

III. Judgments under Appeal

A. New Brunswick Court of Queen's Bench

(1) Mackin v. New Brunswick (Minister of Finance) (1998), 202 N.B.R. (2d) 324 (N.B. Q.B.)

8 Deschênes J. began by noting the three essential conditions (financial security, security of tenure and administrative independence) and the two dimensions (individual and institutional) of judicial independence as set out by this Court in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), and in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) ("*Provincial Court Judges Reference*"), in particular. He also mentioned that whether the judges appointed before or after the creation of the position of supernumerary judge had definitely developed certain expectations because of the existence of the position. Thus, they were able to plan their professional and financial future accordingly and the facts show that some of them acted in this way. He therefore concluded that, like their pension plan, the existence of the position of supernumerary judge constituted a genuine financial benefit for the judges of the Provincial Court.

9 On the other hand, he was of the opinion that the office of supernumerary judge also had elements that related to the condition of security of tenure, especially in the sense that a supernumerary judge continued to enjoy the same financial benefits as a full-time judge and was forced to take mandatory retirement at the age of 75. On the basis of the test developed in *Valente (No. 2)*, *supra*, at p. 698 — namely that security of tenure requires" tenure ... that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner" — , Deschênes J. considered, however, that the legislative abolition of the position of supernumerary judge was not equivalent, strictly speaking, to a dismissal of the supernumerary judges then in office. Consequently, the individual dimension of the condition of security of tenure had not been infringed. However, he added that in terms of both security of tenure and financial security, the issue was institutional in nature rather than individual. Thus, it is not so much the content of the impugned legislation as the process surrounding its enactment that was constitutionally dubious.

10 Starting with the finding that the office of supernumerary judge constituted a financial benefit for the judges of the Provincial Court, Deschênes J. was of the view that the Legislative Assembly of New Brunswick should have submitted its decision to abolish this position to an independent, effective and objective commission in accordance with what was prescribed in the *Provincial Court Judges Reference*. In fact, the decision was political in nature in two respects. First, it was informed by classic objectives of general public policy: spending cuts and a more efficient administration of justice. It also raised the spectre of interference by the legislative branch in the independence of the judiciary by means of financial manipulation. As a result, approval by a commission became necessary in order to ensure that the judiciary would not let itself — or appear to let itself — be dragged onto the political stage and at the same time jeopardize its independence. In fact, if the situation were otherwise, a reasonable person informed of all the circumstances would conclude that there was an insufficient degree of independence.

11 Moreover, Deschênes J. was of the opinion that this violation of the constitutional guarantees of independence could not be justified under s. 1 of the *Charter*. Because the violation consisted of a failure to refer the matter to an independent, effective and objective commission, this failure itself must be demonstrably justified. The government merely raised a defence of the reasonably justified nature of the legislation. Whether the legislation was justified or not, Deschênes J. felt that the amendment had been made arbitrarily without any real consultation with the judges affected. Finally, he mentioned that the lack of a grandfather clause was unfair to the judges of the Provincial Court generally, on the one hand, and even more unfair to those judges who sat as supernumeraries, on the other.

12 Consequently, Deschênes J. declared that s. 2 of the *Act to Amend the Provincial Court Act* was unconstitutional, ordered that the question of the abolition of the office of supernumerary judge be referred immediately to the existing salary commission and suspended the declaration of unconstitutionality until the commission had issued a report on the question.

13 On the other hand, Deschênes J. refused to award damages to Judge Mackin for the violation of judicial independence by the provincial legislature. First, he noted that s. 24(1) of the *Charter* did not apply because Judge Mackin had not been the victim of a violation or infringement of his rights or freedoms protected by the *Charter*. Second, the general rule of public law, as set out in *Guimond c. Québec (Procureur général)*, [1996] 3 S.C.R. 347 (S.C.C.), states that damages will not be awarded for the enactment of legislation that is subsequently declared to be unconstitutional, except in the event of bad faith or other wrongful conduct on the part of government institutions.

14 Finally, on the question of costs, Deschênes J. stated that notwithstanding the use of disputed means, Judge Mackin was advancing the legitimate cause of protecting the independence of the judiciary and that he had been partially vindicated in this regard. He accordingly ordered that he be reimbursed for his costs on a party and party basis.

(2) Rice v. New Brunswick, [1998] N.B.J., No. 226 (QL)

15 Deschênes J. applied the same reasoning to the situation of Judge Rice. He also rejected Judge Rice's arguments to the effect that the legislation abolishing the office of supernumerary had been enacted for ulterior or wrongful reasons.

B. New Brunswick Court of Appeal

(1) Rice v. New Brunswick (1999), 235 N.B.R. (2d) 1 (N.B. C.A.)

(a) Ryan J.A.

16 Ryan J.A. viewed the actions of the provincial government as a violation of the concept of judicial independence. He began by finding that the office of supernumerary judge was a genuinely separate judicial office as opposed to a mere status or position. He then expressed the view that the elimination of the position of supernumerary judge had violated both the condition of financial security and that of security of tenure.

17 According to Ryan J.A., financial security was violated in both its individual and institutional dimensions. With respect to judges who were performing supernumerary duties at the time, their financial security was affected in its individual dimension whereas in respect of the other judges of the Provincial Court, it was affected in its institutional dimension. He also concluded that there was in fact political interference as a result of financial manipulation. By contrast, he asserted that the guarantee of security of tenure was affected only in its individual dimension because, for the supernumerary judges in office at that time, the abolition of their positions was equivalent to an arbitrary and premature removal.

18 Since there was a violation of financial security, Ryan J.A. agreed with the trial judge in stating that the case should at the very least have been submitted to an independent, effective and objective commission. However, given his further findings concerning the violation of the condition of security of tenure, he felt that a referral to the existing commission would not be sufficient and that the Act quite simply had to be declared invalid. In any event, he added that the jurisdiction of this commission — which was limited to examining salaries, pension, vacation and sick leave benefits (s. 22.03(1) of the *Provincial Court Act*) — did not extend to the question of the abolition of the position of supernumerary judge.

19 Moreover, Ryan J.A. felt that the legislation could not be justified under s. 1. First, he maintained that judicial independence went beyond the provisions of the *Charter* and that an attack on an institution that was so fundamental to the Canadian constitutional system was well and truly unjustifiable. He then referred to the arbitrary and unfair nature of the government's actions. Finally, he noted that the lack of a grandfather clause for the benefit of the supernumerary judges and the other judges of the Provincial Court precluded any claim that the violation of judicial independence was minimal.

20 Concerning the awarding of damages, Ryan J.A. noted that the case related to an exceptional situation involving a veritable attack by the legislative and executive branches against the judiciary. The government of the time could not have been oblivious to what it was doing and must have been aware of the effects its decision would have on the independence of the judiciary. He concluded accordingly that it was necessary to set aside the principle of qualified government immunity referred to in *Guimond*, *supra*. Consequently, neither negligence nor bad faith necessarily had to be established. Furthermore, there was a direct causal link between the violation of the rights of judges and the harm sustained. Thus, damages could be awarded under s. 24(1) of the *Charter*, or because of the duty of mutual respect owed by the different branches of government to one another. In the alternative, Ryan J.A. considered that the failure of the then-Minister of Justice to keep the promise made to the provincial judges to refer the legislation eliminating the office of supernumerary judge to the Law Amendments Committee constituted sufficient evidence of bad faith justifying the award of damages. However, he decided to refer the question of determining the appropriate amount back to the trial judge.

21 Finally, Ryan J.A. ordered that Judge Rice be paid his legal costs on a solicitor-client basis.

(b) Drapeau J.A.

22 Drapeau J.A. concurred with Ryan J.A. He nevertheless made a number of comments of his own on the question of damages. He began by expressing his agreement with Ryan J.A. that evidence of bad faith was not required in order for damages to be awarded in this case. The individual dimension of judicial independence was at issue and both the public and the supernumerary judges personally bore the cost of the provincial government's decision unilaterally to abolish the office of supernumerary judge. He added that the legislation was enacted despite a clear awareness of its effects on the independence of the judiciary and on the supernumerary judges. He accordingly concurred with Ryan J.A. in finding that the traditional rules concerning the award of damages in constitutional proceedings should be set aside. Damages should be awarded not only to compensate the supernumerary judges but also to discourage any other attempt at legislative interference with judicial independence.

(c) Daigle C.J.N.B., dissenting

23 Daigle C.J.N.B. examined each of the first two conditions of judicial independence in order to determine whether they were violated by the enactment of Bill 7. His analysis focused first on the question of financial security. In his opinion, it was compromised in that the abolition of the office of supernumerary judge was likely to affect the judges' planning of the conditions for their retirement. Thus, although the situation did not involve a reduction as such in their net salary — since they retained the possibility of earning the equivalent of a full-time salary — the fact remained that the judges of the Provincial Court could legitimately rely on the existence of such a position in order to make certain plans of an economic and financial nature.

24 According to Daigle C.J.N.B., however, the guarantee of financial security was affected only in its institutional dimension. According to the principles set out in *Provincial Court Judges Reference, supra*, the Legislative Assembly of New Bunswick had a duty to refer the question of the elimination of the office of supernumerary judge to an independent, effective and objective commission. However, he noted that there was no evidence in the case to suggest that there might have been any attempt at economic interference on the part of the legislature at the expense of the judges of the Provincial Court.

25 Daigle C.J.N.B. was, moreover, of the view that the constitutional guarantees of security of tenure were not infringed since it was possible for the supernumerary judges to resume their duties full time. An analysis of the *Provincial Court Act* supported him in this conclusion. First, he noted that s. 1 of the Act defined "judge" as including both a judge and a supernumerary judge. He added that s. 6 provided that a judge should hold office during good behaviour and could be removed from office only for misconduct, neglect of duty or inability to perform his duties. He also noted that a judge did not have to retire in order to become supernumerary. Rather, a supernumerary judge continued to exercise his duties as a judge of the Provincial Court until retiring. In short, Daigle C.J.N.B. found that there was no separate judicial office relating to the office of supernumerary judge. Consequently, the abolition of this position was of no consequence in terms of the security of tenure of the judges of the Provincial Court.

26 He was of the opinion, moreover, that the violation of the institutional guarantees of financial security was not justified under s. 1 of the *Charter*, since the government did not direct its argument to the legitimacy of its decision to ignore its duty to refer the question to an independent, effective and objective commission.

27 On the subject of damages, Daigle C.J.N.B. proceeded to apply the general rules governing the liability in tort of government institutions for enacting legislation that is subsequently declared unconstitutional. Thus, he was of the view that in such cases, damages would be awarded only in very rare instances, including where an act was passed in bad faith or for unworthy reasons. A bare allegation of unconstitutionality could not, on the other hand, justify an award of damages. In this case, not only was the refusal of the Minister of Justice to honour his promise to submit the legislative amendments to the Law Amendments Committee not alleged in the pleadings but, moreover, it does not support a finding of bad faith.

28 Daigle C.J.N.B. added that any relief under s. 24(1) of the *Charter* constituted a personal right that could be exercised only by a person whose fundamental rights had been violated. In this situation, only the institutional dimension of judicial independence was at issue. Furthermore, judicial independence exists for the benefit of the litigants and not for that of the judges. Finally, and in any event, he was of the opinion that a claim for damages could not succeed because the province enacted the legislation in good faith and in accordance with the constitutional teachings of the time. In fact, when Bill 7 came into force, the decision in *Provincial Court Judges Reference, supra*, had not yet been rendered.

29 Because of the infringement of the institutional dimension of financial security, Daigle C.J.N.B. declared Bill 7 to be unconstitutional. However, he ordered a suspension of this declaration for a period of six months to allow the province to correct its approach. He refrained from referring the matter to the existing salary commission since the province could rectify the problem by other means.

30 Finally, he agreed with the trial judge's opinion that the award of costs as between solicitor and client was quite simply not appropriate in this case. As far as the appeal proceedings were concerned, since each party should, in his view, be successful in part, he would have ordered that they pay their own costs.

(2) Mackin v. New Brunswick (Minister of Justice) (1999), 40 C.P.C. (4th) 107 (N.B. C.A.)

31 All three judges in the Court of Appeal adopted their reasoning in *Rice* for the decision in *Mackin*.

IV. Relevant Statutory Provisions

32 *Provincial Court Act*, R.S.N.B. 1973, c. P-21 (as of March 30, 1995)

> **4.1**(1) A judge appointed under subsection 2(1) may elect to become a supernumerary judge upon meeting the requirements under this Act.
>
> **4.1**(2) Where a judge appointed under subsection 2(1) intends to become a supernumerary, the judge shall give notice to the Minister of election two months prior to the effective date specified in the notice, being a day on which the judge will be eligible to so elect, and the judge shall, effective on that day, be deemed to have elected and given notice on that day.
>
> **4.1**(3) Where a judge appointed under subsection 2(1) has notified the Minister of the judge's election to give up regular judicial duties and hold office only as a supernumerary judge, the judge shall upon the effective date hold the office of supernumerary judge and shall be paid the salary annexed to the office until the judge ceases to hold office.
>
> **4.1**(4) A judge appointed under subsection 2(1) may elect to hold office as a supernumerary judge upon
>
> (*a*) attaining the age of sixty-five years and having continued in judicial office for at least fifteen years,
>
> (*a.1*) attaining the age of sixty years and having continued in judicial office for at least twenty-five years, or
>
> (*b*) attaining the age of seventy years and having continued in judicial office for at least ten years.

4.1(5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

6. Subject to this Act, a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties.

An Act to Amend the Provincial Court Act, S.N.B. 1995, c. 6

1 Subsection 1(1) of the Provincial Court Act, chapter P-21 of the Revised Statutes, 1973, is amended in the definition of "judge" by striking out "and a supernumerary judge".

2 Section 4.1 of the Act is repealed.

. . . . .

9(1) A judge who is a supernumerary judge under the Provincial Court Act immediately before the commencement of this section shall elect, before April 1, 1995, whether to resume the duties of judicial office on a full-time basis or to retire.

(2) An election by a judge under subsection (1) shall be in writing to the Minister of Justice and shall be effective as of April 1, 1995, if no date is specified in the election, or upon the date specified in the election, whichever is the earlier.

(3) If a judge fails to make an election under subsection (1) or if the Minister of Justice fails to receive a notice in writing before April 1, 1995, from a judge pursuant to subsection (2), the judge shall be deemed to have resumed the duties of judicial office on a full-time basis in accordance with the Provincial Court Act, effective April 1, 1995.

VI. Issues

33 On December 12, 2000, the following constitutional questions were stated:

1. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, interfere with the judicial tenure and financial security of members of the Provincial Court and thereby violate in whole or in part the principle of judicial independence as guaranteed by

(a) the preamble of the *Constitution Act, 1867*, or

(b) s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. Does *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6, which repealed the supernumerary scheme for Provincial Court judges in New Brunswick, and which was enacted without reference to an independent remuneration commission, thereby violate in whole or in part the principle of judicial independence as guaranteed by:

(a) the preamble of the *Constitution Act, 1867*, or

(b) s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

3. If the answer to question 1(b) or question 2(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

VI. Analysis

A. Constitutional Questions

(1) Introduction: Judicial Independence

34 Judicial independence is essential to the achievement and proper functioning of a free, just and democratic society based on the principles of constitutionalism and the rule of law. Within the Canadian Constitution, this fundamental value has its

source in s. 11(*d*) of the *Charter* and in the Preamble to the *Constitution Act, 1867*, which states that the Constitution of Canada shall be "similar in Principle to that of the United Kingdom". It was in *Provincial Court Judges Reference, supra*, at paras. 82 *et seq.*, that this Court explained in detail the constitutional foundations and scope of judicial independence.

35 Generally speaking, the expanded role of the judge as an adjudicator of disputes, interpreter of the law and guardian of the Constitution requires that he or she be completely independent of any other entity in the performance of his or her judicial functions. Such a view of the concept of independence may be found in art. 2.02 of the Universal Declaration on the Independence of Justice (reproduced in S. Shetreet and J. Deschênes, ed., *Judicial Independence: The Contemporary Debate* (1985), 447, at p. 450), which states:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. [Emphasis added.]

The adoption of a broad definition of judicial independence by this Court was confirmed, moreover, in *Provincial Court Judges Reference, supra*, at para. 130, where Lamer C.J., for the majority, stated the following:

> Finally, although I have chosen to emphasize that judicial independence flows as a consequence of the separation of powers, because these appeals concern the proper constitutional relationship among the three branches of government in the context of judicial remuneration, I do not wish to overlook the fact that judicial independence also operates to insulate the courts from interference by parties to litigation and the public generally: *Lippé, supra*, at pp. 152 *et seq., per* Gonthier J. [Emphasis added.]

36 On the other hand, in order for a judge to remain as far as possible sheltered from pressure and interference from all sources, he or she "should be removed from financial or business entanglement likely to affect or rather to seem to affect him in the exercise of his judicial functions" (S. Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", in Shetreet and Deschênes, *op. cit.*, 590, at p. 599).

37 The concept of independence accordingly refers essentially to the nature of the relationship between a court and others. This relationship must be marked by a form of intellectual separation that allows the judge to render decisions based solely on the requirements of the law and justice. The legal standards governing judicial independence, which are the sources governing the creation and protection of the independent *status* of judges and the courts, serve to institutionalize this separation. Moreover, the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter* give them a fundamental status by placing them at the highest level of the legal hierarchy.

38 The general test for the presence or absence of independence consists in asking whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent *status* (*Valente (No. 2)*, *supra*, at p. 689, *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.)). Emphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably *seen* to be independent. The independence of the judiciary is essential in maintaining the confidence of litigants in the administration of justice. Without this confidence, the Canadian judicial system cannot truly claim any legitimacy or command the respect and acceptance that are essential to it. In order for such confidence to be established and maintained, it is important that the independence of the court be openly "communicated" to the public. Consequently, in order for independence in the constitutional sense to exist, a reasonable and well-informed person should not only conclude that there is independence in fact, but also find that the conditions are present to provide a reasonable perception of independence. Only objective legal guarantees are capable of meeting this double requirement.

39 As was explained in *Valente (No. 2)*, *supra*, at p. 687, and in the *Provincial Court Judges Reference, supra*, at paras. 118 *et seq.*, the independence of a particular court includes an individual dimension and an institutional dimension. The former relates especially to the person of the judge and involves his or her independence from any other entity, whereas the latter relates to the court to which the judge belongs and involves its independence from the executive and legislative branches of the government.

The rules relating to these dimensions result from somewhat different imperatives. Individual independence relates to the purely adjudicative functions of judges — the independence of a court is necessary for a given dispute to be decided in a manner that is just and equitable — whereas institutional independence relates more to the status of the judiciary as an institution that is the guardian of the Constitution and thereby reflects a profound commitment to the constitutional theory of the separation of powers. Nevertheless, in each of its dimensions, independence is designed to prevent any undue interference in the judicial decision-making process, which must be based solely on the requirements of law and justice.

40 Within these two dimensions will be found the three essential characteristics of judicial independence set out in *Valente (No. 2)*, *supra*, namely financial security, security of tenure and administrative independence. Together, these characteristics create the relationship of independence that must exist between a court and any other entity. Their maintenance also contributes to the general *perception* of the court's independence. Moreover, these three characteristics must also be *seen* to be protected. In short, the constitutional protection of judicial independence requires both the existence in fact of these essential characteristics and the maintenance of the perception that they exist. Thus, each of them must be institutionalized through appropriate legal mechanisms.

41 This being the case, it remains for me to determine whether the elimination of the office of supernumerary judge in the Provincial Court of New Brunswick violates judicial independence by breaching one or more of its essential characteristics in either of its dimensions.

(2) Elimination of the Office of Supernumerary Judge and Judicial Independence

(a) Security of Tenure

42 In *Valente (No. 2)*, *supra*, at p. 695-696, it was found that in its individual dimension, the security of tenure provided for provincial court judges in Canada generally required that they may not be dismissed by the executive before the age of retirement except for misconduct or disability, following a judicial inquiry. Similarly, in New Brunswick, s. 4.2 of the *Provincial Court Act* provides that a judge shall retire at the age of 75 and ss. 6.1 to 6.13 provide that a judicial inquiry shall be held in order to adjudicate on the merits of a recommendation that a judge be removed from office.

43 It was stated further that, in order for the individual dimension of security of tenure to be constitutionally protected, it was sufficient that a judge could be removed from office only for a reason relating to his or her capacity to perform his or her judicial duties (*Valente (No. 2)*, *supra*, at p. 697). Any arbitrary removal is accordingly prohibited. In this context, s. 6 of the *Provincial Court Act* seems to create adequate protection for judges of the Provincial Court of New Brunswick by indicating that "a judge holds office during good behaviour and may be removed from office only for misconduct, neglect of duty or inability to perform his duties".

44 In the first place, therefore, it is necessary to determine whether the elimination of the office of supernumerary judge constituted an arbitrary removal of the respondent judges from office. To this end, the nature of their office must be examined and defined on the basis of the relevant legislation.

45 In order to find that there was a removal from office, the judges in the majority in the Court of Appeal relied first on the proposition that the functions of the supernumerary judge constituted a genuine separate judicial office, as opposed to a mere status. Therefore, according to Ryan J.A., the characteristic of security of tenure would apply separately to this office and consequently, a supernumerary judge could not be removed from office otherwise than for a reason linked to his or her ability to perform the duties of that office and following a judicial inquiry. Since the respondents had their offices as supernumerary judges abolished by legislation with no reason given that related to their ability to perform their duties and without any form of inquiry, not only was there a removal from office but this removal was arbitrary and unconstitutional in nature.

46 With the greatest respect, it is my opinion that this reasoning is ill-founded to the extent that the interpretation of the relevant legislation as a whole does not support its essential premise. In my judgment, there was simply no removal from the judicial office held by the respondent judges in this case.

47 First, s. 1 of the *Provincial Court Act* defined "judge" as including both a judge and a supernumerary judge. This means that, in electing to become a supernumerary, a judge nevertheless remained a judge of the Provincial Court. This finding is supported by the fact that a judge did not previously have to retire in order to become supernumerary. Rather, the judge decided to exercise his or her duties as a judge of the Provincial Court under different terms until he or she retired. Finally, it must be borne in mind that s. 9(1) of Bill 7 gave the supernumerary judges the possibility of resuming their duties full time. Obviously, therefore, there simply was no separate office linked to the position of supernumerary judge. Essentially, this position merely involved a reorganization of the workload of a judge of the Provincial Court. Consequently, there never was a real removal from office in this case and Judges Mackin and Rice at all times retained their security of tenure as judges of the Provincial Court.

48 Moreover, it was suggested that the possibility of sitting as a supernumerary judge was an integral part of the office of Provincial Court judge so that the elimination of this position could affect its integrity. The security of tenure of all provincial judges appointed before Bill 7 came into force would therefore have been infringed since the conditions applying to their office would have been fundamentally altered. Here again, I cannot accept such an argument. It seems to me to be a clear exaggeration to suggest that the possibility that a judge of the Provincial Court can sit as a supernumerary is an integral part of his main office and that the elimination of this possibility is therefore equivalent to removal from office. As I noted earlier, I view the definition of the duties of a supernumerary judge as pertaining to the office of a judge of the Provincial Court and not to a separate judicial office. The question as to whether, in certain circumstances, the conditions applying to a particular judicial office can be changed to the point where they are equivalent to a removal from office does not therefore arise in this case.

49 Finally, it was argued that the elimination of the position of supernumerary judge was contrary to security of tenure in that a judge able to perform 40 percent of the usual duties but unable to work full time could be forced to take early retirement. In my opinion, such a possibility should be classified as an inability to perform the duties of a Provincial Court judge rather than as a removal of that judge from office. Security of tenure within the meaning of the Constitution is therefore not affected. In short, the elimination of the duties of supernumerary judges affects first and foremost the definition of the duties of Provincial Court judges and must accordingly be treated as a question relating to the protection of financial security rather than security of tenure.

(b) Financial Security

(i) Overview

50 In *Valente (No. 2)*, *supra*, only the individual dimension of financial security was considered in connection with the determination of salaries by the executive branch. It was determined at that time that the constitutional requirements in this regard were limited to ensuring that the judges' salaries were provided for by law and that the executive could not arbitrarily encroach upon this right in a manner that affected the independence of the courts. In *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.), it was confirmed that this obligation also applied to the legislative branch.

51 In the *Provincial Court Judges Reference, supra*, at para 121, it was clearly indicated that the financial security of provincial court judges also had an institutional dimension, shaping the relationships between the judiciary, on the one hand, and the executive and legislative branches, on the other.

52 Although it is a creation of the legislature, the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act, 1982*; provide relief for violations of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act, 1982*. In short, given the position occupied by the provincial courts within the Canadian legal system, the Constitution requires them to remain financially independent of the other political branches (*Provincial Court Judges Reference, supra*, at paras. 124-30).

53 We are here dealing with a situation in which the New Brunswick legislature decided to make changes in the organization of its judiciary by means of a statute applying to all the judges of the Provincial Court. Such an exercise of power affects interactions of a purely institutional nature between the legislative and judicial branches and is accordingly likely to be subject

to the requirements of the institutional dimension of financial security. A violation of the institutional aspect of financial security will, furthermore, have a concrete impact on the financial security of all judges of the Provincial Court.

54 As was stated in *Provincial Court Judges Reference, supra*, at paras. 131, each of the elements of financial independence at the institutional level results from the constitutional imperative that, as far as possible, the relationship between the judiciary and the other two branches of government should be *depoliticized*. This imperative makes it necessary for the judiciary to be protected against political interference from the other branches through financial manipulation and for it to be *seen* to be so protected. Furthermore, one must ensure that it does not become involved in political debates concerning the remuneration of persons paid out of public funds. In fact, the judge's role as a constitutional adjudicator requires that it be isolated therefrom and be seen to be so.

55 On the other hand, one must seek to enhance the impartiality of judges as well as the perception of such impartiality by minimizing their involvement in questions concerning their own remuneration while preventing the other branches of government from using their control of public funds in order to interfere with their adjudicative independence.

56 In the *Provincial Court Judges Reference, supra*, at paras. 133-35, three elements or principles were found to be essential to the institutional dimension of financial security.

57 First, the salaries of provincial court judges may generally be reduced, increased or frozen but in order to do this, governments must resort to a body (usually called a "salary commission") that is *independent, effective and objective*, and that will make recommendations. The provincial governments have a constitutional duty to make use of this process. The existence of such a body makes it possible for the legislative or executive branch to determine the level of remuneration while allaying the possibility of interference by way of financial manipulation or the perception that such a possibility of interference exists. The recommendations of this commission are not binding on the executive or the legislature. However, they may not be ignored lightly. If a decision is made to ignore them, the decision must be justified, if necessary, in a court of law on the basis of a simple rationality test. Such a process accordingly promotes the impartiality of the judiciary and its appearance by ensuring that the financial security of judges will not be at the mercy of political meddling.

58 Further, any negotiation — in the sense of trade-offs — concerning the salaries of the judges between a member or representative of the judiciary, on the one hand, and a member or representative of the executive or legislative branch, on the other hand, is prohibited. Such negotiations are fundamentally inconsistent with the independence of the judiciary. First, they are inevitably political as a result of the intrinsic nature of the question of salaries paid from the public purse. Second, the holding of such negotiations would undermine the perception of the independence of the judiciary since the jurisdiction of the provincial courts entails that the government is frequently a party to disputes before those courts and salary negotiations are likely to give rise to certain obvious fears concerning the independence of the judiciary arising from the attitude of the parties to these negotiations.

59 Finally, reductions in the salaries of judges must not result in lowering these below the minimum required by the office of judge. Public trust in the independence of the judiciary would be weakened if the salaries paid to judges were so low that they led people to think that the judges were vulnerable to political or other pressures through financial manipulation. In order to counter the possibility that government inaction could function as a means of financial manipulation because the salaries of judges in constant dollars would be allowed to decline as a result of inflation and also to counter the possibility that these salaries would fall below the minimum required to ensure the independence of the judiciary, the salary commission must convene when a specified period has passed since its last report was submitted in order to examine the adequacy of the judges' salaries in light of the cost of living and other relevant factors.

60 Thus, the need to ensure that the process is depoliticized imposes negative and positive obligations on the legislative and executive branches because not only must they refrain from using their financial powers to influence judges in the performance of their duties, but they must also actively protect the independence of the judiciary by enacting appropriate legislative and institutional instruments.

61 The *Provincial Court Judges Reference, supra*, at para. 136, also indicates that these principles apply to the pensions *and other benefits* given to judges. Hence, any measure taken by government that affects any aspect of the remuneration conditions of judges will automatically trigger the application of the principles relating to the institutional dimension of financial security.

62 It is now necessary to examine whether the functions of supernumerary judges and their abolition have an impact on the financial security of judges of the Provincial Court.

(ii) Application to the Instant Case

1. Does the Elimination of the Office of Supernumerary Judge Violate the Financial Security of the Judges of the Provincial Court?

63 It appears that when it was created, the office of supernumerary judge was thought to provide a certain flexibility within the organization of the provincial judicial system. On the other hand, it enabled the government to benefit from the expertise of experienced judges while paying only the difference between a full salary and the pension that would in any event have been paid to a judge who had elected to retire. Hence, the conditions of eligibility for the office of supernumerary judge have always accurately reflected those of eligibility for a retirement pension. Moreover, these duties have already been described as creating a "*useful* bridge towards retirement" (M. L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at p. 46 (emphasis added)).

64 For a judge of the Provincial Court of New Brunswick who had met certain conditions of age and seniority, the possibility of becoming a supernumerary judge was added to those of retiring and receiving a pension, on the one hand, and continuing to sit full time, on the other hand. Clearly, the only way to make such a position attractive was to offer conditions that were more advantageous than those linked to retirement or full-time duties.

65 Normally, a judge of the Provincial Court of New Brunswick who became a supernumerary judge enjoyed a substantial reduction in his or her workload while receiving a full salary. However, the *Provincial Court Act* was silent concerning the relative size of this reduction and, in s. 4.1(5), merely left this decision to the Chief Judge of the Court. In theory, therefore, this reduction could have been minimal or even non-existent. That was, in fact, what happened in the case of Judge Rice, who had to sit full time despite his supernumerary status because of the shortage of judges. However, if such a practice had been widespread, it would almost certainly have eliminated access to the office of supernumerary judge as a reasonable choice for a judge who met the conditions of eligibility. The government of New Brunswick would then have been deprived of the benefits of flexibility and expertise contemplated when it created this office. Consequently, I do not believe that it is possible to examine the nature of the office of supernumerary judge on the basis of such an abstract reading of s. 4.1(5) of the Act that we end up completely ignoring the factual and legal contexts in which this provision was enacted. Moreover, by its very wording, which indicates that a supernumerary judge "shall be available to perform such judicial duties as may be assigned to the judge *from time to time* by the Chief Judge or Associate Chief Judge", the Act appears to suggest a reduced workload (emphasis added).

66 In my opinion, therefore, it is necessary to take into account the uncontradicted evidence showing that it was understood by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court. The retirement pension received by a judge of the Provincial Court was equivalent to 60 percent of the full salary. The reasoning behind this understanding was accordingly that it was logical for a judge who was eligible for a pension equivalent to 60 percent of his or her full salary to be given an opportunity to perform 40 percent of his or her former duties in return for a full salary.

67 In light of what has been said above, it is my view that the system of supernumerary judges constituted an undeniable economic benefit for all the judges of the Provincial Court appointed before Bill 7 came into force and for eventual candidates for the position of judge in the court. In other words, this type of benefit was certainly taken into consideration both by sitting judges and by candidates for the office of judge in planning their economic and financial affairs. Thus, it seems to me to be wrong to suggest that the abolition of the office of supernumerary judge did not violate the collective dimension of the financial security of the Provincial Court of New Brunswick. At the very least, this office provided a right to a potential benefit of reduced

workload, the extent of which was established by the chief judge, that is by judicial authority independent of the Executive or other government authority. Its abolition constituted a change in the conditions of office which were advantageous to the judges by denying them the option of being eligible for a less demanding workload to be determined in a manner respectful of the institutional independence of the court. This benefit was likely to be substantial, impacting the quality and style of life of judges in their latter years. The issue here is not whether this benefit is a sufficient guarantee of financial security or judicial independence, as was the issue in *Valente (No. 2)* to which my colleague Binnie J. refers, but whether the supernumerary status provided a substantial benefit pertaining to financial security likely to give rise to negotiation and politicization.

68 In my opinion, there is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit. Both give rise to the political aspects mentioned in the *Provincial Court Judges Reference, supra*, that is to say they raise controversial questions of public policy and resource allocation and raise the possibility of interference by the other branches of government in the independence of the judiciary by means of financial manipulation. Indeed, as my colleague Binnie J. states, supernumerary status was adopted in New Brunswick after lengthy discussions between the government and the Provincial Court Judges. Thus, the elimination of the office of supernumerary judge violates the institutional dimension of the financial security of judges of the Provincial Court of New Brunswick. A similar conclusion was drawn, moreover, by Parrett J. in *British Columbia (Provincial Court Judge) v. British Columbia* (1997), 40 B.C.L.R. (3d) 289 (B.C. S.C.), at pp. 314-15.

69 In short, I consider that the opinion stated by this Court in the *Provincial Court Judges Reference, supra*, requires that any change made to the remuneration conditions of judges at any given time must necessarily pass through the *institutional filter* of an independent, effective and objective body so that the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other, remain depoliticized as far as possible. That is a structural requirement of the Canadian Constitution resulting from the separation of powers and the rule of law. By failing to refer the question of the elimination of the office of supernumerary judge to such a body, the government of New Brunswick breached this fundamental duty. The lack of a grandfather clause in favour of the supernumerary judges in office and the judges of the Provincial Court appointed before Bill 7 came into force also aggravates this initial violation. Consequently, Bill 7 must be declared invalid.

70 However, the foregoing reasoning must not be interpreted as negating or ossifying the exercise by the provinces of their legislative jurisdiction under s. 92(14) of the *Constitution Act, 1867*. While the provincial legislative assemblies have exclusive jurisdiction over "the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction", that jurisdiction must nevertheless be exercised in accordance with the structural principles of the Canadian Constitution, including the independence of the judiciary. In other words, the New Brunswick government was pursuing a perfectly legitimate purpose in trying to make certain changes to the organization of its judiciary for reasons of efficiency, flexibility and cost savings. In light of the impact of the elimination of the position of supernumerary judge on the financial security of Provincial Court judges, it should however have exercised its legislative jurisdiction while complying with the process of review by an independent, effective and objective body prescribed by the Constitution.

2. Justification and Section 1 of the Charter

71 As I indicated at the beginning of my analysis, judicial independence is protected by both the Preamble to the *Constitution Act, 1867* and s. 11(*d*) of the *Charter*. Thus, not only is it a right enjoyed by a party subject to the threat of criminal proceedings but it is also a fundamental element underlying the very operations of the administration of justice. In other words, judicial independence functions as a prerequisite for giving effect to a litigant's rights including the fundamental rights guaranteed in the *Charter*.

72 Given the vital role played by judicial independence within the Canadian constitutional structure, the standard application of s. 1 of the *Charter* could not alone justify an infringement of that independence. A more demanding onus lies on the government. Thus, in the *Provincial Court Judges Reference, supra*, at para. 137, it was indicated that the elements of the institutional dimension of financial security did not have to be followed in cases of dire and exceptional financial emergencies caused by extraordinary circumstances such as the outbreak of war or imminent bankruptcy. In this case, it is clear that such

circumstances did not exist in New Brunswick at the time when Bill 7 was passed. Moreover, no arguments were made by the appellant in this regard.

73 Since it had been decided in the *Provincial Court Judges Reference, supra*, to resolve the questions in dispute solely on the basis of s. 11(*d*) of the *Charter*, the question as to whether the violation of this provision could be justified under s. 1 was examined (paras. 277 *et seq.*). In this process, it was stated: (i) that the government had to adduce evidence to justify the violation; and (ii) that it was the fact that the independent, effective and objective process had been circumvented that had to be justified and not the content of the government measures. Although in my opinion a s. 1 analysis alone is not adequate to resolve the question as to whether the violation is justified, these principles remain applicable to the more demanding analysis required by the fundamental nature of judicial independence. In this case, the appellant did not adduce any evidence tending to show that its constitutional shortcomings were justified. Furthermore, in my judgment, the lack of a grandfather clause in Bill 7 aggravates the violation of judicial independence.

3. Appropriate Relief

74 Some of the intervenors suggested that the appellant did not breach its constitutional obligations set out in the *Provincial Court Judges Reference, supra*, simply because under the directives issued by this Court on the rehearing in *R. v. Campbell*, [1998] 1 S.C.R. 3 (S.C.C.), these obligations did not acquire their full effect until September 18, 1998 while Bill 7 came into force on April 1, 1995.

75 It is true that in order to ensure continuity in the proper administration of justice, the Court decided in the rehearing of the *Provincial Court Judges Reference*, to suspend all aspects of the requirement relating to the judges' salary commission, including any reimbursement for past salary reductions for one year following the date of the judgment in the first reference (para. 18). This order was designed to permit the courts whose independence was at issue to function nevertheless, while the governments proceeded to establish and implement the process of review by a commission required by the first *Provincial Court Judges Reference*. According to the order, the requirement relating to the judges' salary commission applied for the future, effective September 18, 1998. Lamer C.J. added at para. 20:

> I note that the prospectiveness of the judicial compensation requirement does not change the retroactivity of the declarations of invalidity made in this case. ... In the rare cases in which this Court makes a prospective ruling, it has always allowed the party bringing the case to take advantage of the finding of unconstitutionality. [Emphasis added].

76 A similar solution is appropriate in this case. The respondents instituted their legal proceedings before the *Provincial Court of Judges Reference, supra*, was rendered. An injustice would be perpetuated if they were not allowed to take advantage of the finding of unconstitutionality in the same way as the parties to the *Provincial Court Judges Reference, supra*, solely on the basis of this sequence of events. As I indicated in the preceding paragraph, the suspension of the requirement for a commission was ordered solely on the basis of necessity, in order to permit the provincial courts to operate in the meantime in the absence of the required level of independence. However, it was certainly not a case of a blanket suspension of the constitutional obligations explained in the *Reference re Remuneration of Judges of the Provincial Court of P.E.I.*, supra (see *Newfoundland Assn. of Provincial Court Judges v. Newfoundland* (2000), 191 D.L.R. (4th) 225 (Nfld. C.A.), at pp. 266-80 (*per* Green J.A.)). Also, in all fairness, I consider that the declaration of invalidity must benefit the respondents who are, for all practical purposes, in the same position as the successful parties in the *Provincial Court Judges Reference, supra*.

77 Moreover, this declaration applies to both the elimination of the office of supernumerary judge and its replacement by a new panel of part-time judges paid on a *per diem* basis since it is impossible for all practical purposes to dissociate both these aspects of Bill 7 (*Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), at pp. 710-11; *Reference re Alberta Bill of Rights Act*, [1947] A.C. 503 (Alberta P.C.), at p. 518). However, in order to fill the legal vacuum that would be created by a simple declaration of invalidity, the declaration will initially be suspended *erga omnes* for a period of six months to allow the government of New Brunswick to provide a solution that meets its constitutional obligations (*Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.)). However, it is not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the

government's task to determine which approach it prefers. It is also the responsibility of the government to decide whether the existing judges' salary commission established by ss. 22.01 *et seq.* of the *Provincial Court Act* may validly consider the question of the abolition of the office of supernumerary judge.

B. Other Questions

(1) Damages

78 According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)* (1970), [1971] S.C.R. 957 (S.C.C.); *Central Canada Potash Co. v. Saskatchewan (Attorney General)* (1978), [1979] 1 S.C.R. 42 (S.C.C.)). In other words" [i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, Administrative Law Treatise, vol. 3, 1958, p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy *limited immunity* against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:

> In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation.

79 However, as I stated in *Guimond c. Québec (Procureur général)*, *supra*, since the adoption of the *Charter*, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charter*. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).

80 Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter*, *supra*, at p. 720:

> An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. [Emphasis added.]

81 In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

82 Applying these principles to the situation before us, it is clear that the respondents are not entitled to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the

government of New Brunswick acted negligently, in bad faith or by abusing its powers. Its knowledge of the unconstitutionality of eliminating the office of supernumerary judge has never been established. On the contrary, Bill 7 came into force on April 1, 1995, more than two years before this Court expressed its opinion in the *Provincial Court Judges Reference, supra*, which, it must be recognized, substantially altered the situation in terms of the institutional independence of the judiciary. Consequently, it may not reasonably be suggested that the government of New Brunswick displayed negligence, bad faith or wilful blindness with respect to its constitutional obligations at that time.

83 Furthermore, I cannot accept the statement of Ryan J.A. of the Court of Appeal that the failure of the Minister of Justice to keep his promise to refer Bill 7 to the Law Amendments Committee was an instance of bad faith that justified the awards of damages. Even if admitted to be true, such evidence is far from establishing a negligent or unreasonable attitude on the part of government. In fact, it has no probative value as to whether, in the circumstances, the legislation was enacted wrongly, for ulterior motives or with knowledge of its unconstitutionality.

84 The claim of the respondent judges for damages is accordingly dismissed.

(2) Costs

85 Although the appeal is allowed in part, the fact remains that the respondents are successful on the principal issue, namely the constitutional invalidity of the legislation in question. I would accordingly award their costs throughout.

86 At trial, the respondents were awarded party-and-party costs. In the Court of Appeal, this decision was reversed and it was decided that the government's conduct justified the award of solicitor-client costs. It is established that the question of costs is left to the discretion of the trial judge. The general rule in this regard is that solicitor-client costs are awarded only on very rare occasions, for example when a party has displayed reprehensible, scandalous or outrageous conduct (*Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), at p. 134). Reasons of public interest may also justify the making of such an order (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at p. 80).

87 Although judicial independence is a noble cause that deserves to be firmly defended, it is not appropriate in my opinion to grant such a form of costs to the respondents in this case. I would accordingly award them their costs on a party-and-party basis.

VII. Disposition

88 The appeal is allowed in part. The *Act to Amend the Provincial Court Act* (Bill 7) is declared unconstitutional because it violates the institutional guarantees of judicial independence contained in s. 11(*d*) of the *Charter* and the Preamble to the *Constitution Act, 1867*. Except with respect to the respondents, however, this declaration of unconstitutionality is suspended for a period of six months from the date of this judgment to allow the government of New Brunswick to rectify the situation in accordance with its constitutional obligations as described in this decision and in the *Provincial Court Judges Reference, supra*. Accordingly, the constitutional questions are answered as follows:

Answer to question 1: Yes, with respect to financial security.

Answer to question 2: Yes.

Answer to question 3: No.

89 The respondents' claim for damages is dismissed.

90 However, since the respondents were successful on the main issue, they are entitled to their costs throughout.

The reasons of Binnie and Lebel JJ. were delivered by*Binnie J.* (dissenting):

91 I have had the benefit of reading the reasons of my colleague Gonthier J. I agree with his statement of the broad principles of judicial independence but, with respect, I do not agree that supernumerary status as defined in the New Brunswick *Provincial*

Court Act, R.S.N.B. 1973, c. P-21, constituted an economic benefit protected by the Constitution. The respondents' expectation that they would work only 40 percent of the time for 100 percent of the pay of a full-time judge was neither spelled out in the Act nor otherwise put in a legally enforceable form.

92 My colleague notes "the uncontradicted evidence showing that it was *understood* by everyone that a supernumerary judge had to perform approximately 40 percent of the usual workload of a judge of the Provincial Court" (para. 66 (emphasis added)). I do not doubt it. It seems clear that it was thus understood by both judges and government officials. The question, however, is whether the doctrine of judicial independence protects "understandings" about specific financial benefits that are pointedly *not* written into the governing legislation.

93 My colleague says that judicial independence must be protected by "objective legal guarantees" (para. 38). I agree. What we have here, however, is neither objective nor a guarantee. As my colleague notes (para. 65) the repealed provision of the New Brunswick *Provincial Court Act* defined the workload of a supernumerary judge only in terms of being "available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge" (s. 4.1(5)). The problem is not simply that the *extent* of the discretionary benefit was not specified in the Act. The more fundamental problem is that, as I read it, the legislation *guaranteed* no benefit at all.

94 We are not dealing here with the broad unwritten principles of the Constitution. There is no general constitutional entitlement for judges to work 40 percent of the time for a 100 percent salary. What is at issue is the claim to a particular supernumerary benefit said to be voluntarily conferred by the legislature in the 1988 Act, and thereafter unconstitutionally withdrawn in 1995. The argument is that once conferred, a benefit becomes wrapped in constitutional protection and beyond legislative recall except in accordance with the independent, objective and effective procedure mandated by the *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) ("*Provincial Court Judges Reference*").

95 In this case, however, the New Brunswick legislature refused to make a reduced workload commitment in framing the supernumerary provisions of the 1988 amendments. (No one argues that such refusal was itself contrary to unwritten constitutional guarantees.) The omission of any guarantee of a reduced workload in the original 1988 amendments was plain for all to see from the outset. The legislature thereafter refused to make sufficient funds available to fund a number of new judicial appointments to permit the supernumerary scheme to work as the judges had anticipated. The budget allocation fell well short of the earlier expectations raised by government officials, but it was consistent with the legislature's refusal throughout to provide any sort of a legislated guarantee of a reduced workload. The result was that, while a judge on supernumerary status was required by law to do whatever judicial duties were assigned by the Chief Judge, the Chief Judge was prevented by a shortage of judges from giving effect in most cases to the expectations of the judges who elected supernumerary status.

96 As the provincial court judges were given no guarantee in the Act, it follows that the anticipated reduced workload attaching to supernumerary status contended for by the respondents formed no part of the constitutional guarantee of judicial independence of the court of which they were members. The repeal of a potential benefit voluntarily conferred by the legislature, that was wholly discretionary as to whether in practice it produced any benefit at all, could not and in my view did not undermine their institutional independence. I would therefore allow the appeal.

Facts

97 Supernumerary status was introduced in New Brunswick by the 1987 amendments to the Act, which came into force January 1, 1988. From then until its repeal seven years later, six provincial court judges elected supernumerary status. Their varied work histories illustrate the basic flaw in the respondents' legal argument, namely the absence of *any* guaranteed benefit — let alone a 40 percent workload benefit — attaching to supernumerary status under the legislative scheme.

98 The respondent, Judge Douglas Rice, elected supernumerary status on April 30, 1993 after more than 21 years on the bench. His workload was not reduced to 40 percent of what it had been. It seems not to have been reduced significantly between 1993 and his eventual retirement.

99 In the companion case the respondent, Judge Ian Mackin elected to become supernumerary on August 15, 1988 after 25 years on the bench. In the initial period his workload did not reduce appreciably either but thereafter he eased off, travelled extensively, and for at least five years prior to 1995 was able to winter for six months or so in Australia while drawing 100 percent of the salary of a provincial court judge on regular status.

100 Judge James D. Harper, one of the other judges who elected supernumerary status continued, like Judge Rice, more or less at full throttle. Some of the supernumerary judges he thought did "little or no work", i.e., much less than a 40 percent workload. Others he thought worked "very hard indeed". On November 7, 1994 Judge Harper wrote to Chief Judge Hazen Strange:

> Naturally, I have been well aware that many of the supernumeraries had not been pulling their weight and were receiving full pay for little or no work. As you well know, however, there are at least two such Judges who work very hard indeed.

101 The uneven workload was caused by many factors, including both the receptiveness and/or professionalism of supernumerary judges and, more importantly, the severe resource constraints confronting the provincial court as a whole. There were only six supernumerary judges and, as stated, the government failed to appoint judges to replace at least two of them, namely Judge Rice and Judge Harper. As the Chief Judge explained in his testimony:

> A. The most difficult administrative responsibility and the one that took the most time was assigning judges around the Province. At some stages we had more courts sitting on a given day, almost, than we had judges, and we had a number of satellite courts — I think at one stage 21 — I think we had at one stage 24 permanent courts and we only had something like 23 judges. So the most difficult part of my job, really, was to assign judges to courts so that they wouldn't go empty.
>
> Q. Okay.
>
> A. And that was true for ten years.

102 The administrative troubles of the Chief Judge did not end on March 3, 1995, when royal assent was given to *An Act to Amend the Provincial Court Act*, S.N.B. 1995, c. 6 repealing the provisions permitting supernumerary status. By law, each of the six incumbent judges on supernumerary status was required to elect by April 1, 1995 whether to retire or to work full-time as a member of the court. Each of them did so except the respondent Judge Mackin who refused to elect one way or the other, apparently taking the view that to make an election would be to give the 1995 repeal undeserved credibility. In his view the repeal was unlawful, and on April 25, 1995, he gave notice to the Crown of his intention to challenge in court its constitutionality.

103 The following day, April 26, 1995, without waiting for his constitutional challenge to proceed, Judge Mackin entered a courtroom that was not in session in the provincial courthouse at Moncton and in the presence of a couple of Crown attorneys and other members of the bar declared that he would no longer "sit, hear and decide cases under the duress of these amendments".

104 By letter dated May 17, 1995 he was ordered back to work by his Chief Judge. Judge Mackin declined to comply. In his view he could no longer be considered" independent" within the meaning of s. 11(*d*) of the *Charter*.

105 On June 16, 1995 Judge Mackin's application for an injunction to restrain the Chief Judge from "assigning, designating or otherwise requiring [him] to perform judicial ... duties" was dismissed by Mr. Justice Russell of the Court of Queen's Bench.

106 The Chief Judge took the view that Judge Mackin's constitutional objection had been overruled by a superior court, and that public confidence in the judiciary would suffer unless Judge Mackin accepted that legal result unless and until it was overturned by a higher court. Thus, on July 19, 1995, although he appeared to share Judge Mackin's view of the invalidity of the legislation repealing supernumerary status, the Chief Judge wrote to Judge Mackin to say" I believe you have had sufficient time to study the decision by Justice RUSSELL". He then reiterated his insistence that Judge Mackin return to work. Judge Mackin's response was to declare himself on sick leave. This was eventually supported by a one-sentence "report" from a Dr. Paul Doucet dated August 2, 1995 advising that Judge Mackin would not be returning to work for "an undetermined period of time because of medical reasons". When asked by the Chief Judge for an explanation from Dr. Doucet of the "medical reasons",

Judge Mackin had his lawyers respond that it was "entirely possible" that the Chief Judge's request for an explanation was in contravention of the provincial *Human Rights Act*. The legal basis for such a curious suggestion was not disclosed.

107 Eventually a pattern developed whereby Judge Mackin, when he worked at all, would go into court and frequently either adjourn matters for lengthy periods of time or enter a stay of proceedings. As Chief Judge Strange testified:

> What was happening — there was one case, particularly — it was a rather terrible one where the alleged victim was a young person, a sexual assault — that was just put over for a month or two or three or four. Witnesses were showing up; the Crown was bringing witnesses in, sometimes from far away, sometimes from right there. It would just be adjourned, adjourned, adjourned, and it was making a farce of the situation; it wasn't fair to the accused; it wasn't fair to the prosecutors; it wasn't fair to the witnesses, and simply nothing was going ahead in his court. ...

108 On November 14, 1995, the Chief Judge obtained from the Court of Queen's Bench a *mandamus* order requiring Judge Mackin "to hold sittings at the places and on the days designated by the Chief Judge of the Provincial Court of New Brunswick to hear and determine cases properly brought before him during such sittings". Judge Mackin's appeal from this order was dismissed (with a variation in costs) on April 12, 1996.

109 In the meantime Judge Mackin had continued with his policy of granting a stay of proceedings to any accused who requested it. This had the effect of preventing the further prosecution of some quite serious criminal charges. In *R. v. McCully* on February 13, 1996, for example, the following exchange took place in Judge Mackin's court:

> [Crown Attorney]: ... I wish the record to indicate clearly that the Crown was prepared to proceed. Our witnesses, who are present, we had nothing to give notice of any motion [i.e. for a stay of proceedings].
>
> [Court]: Yeah, so the — this case is stayed due to the non-structural independence of the Provincial Court.
>
> [Crown Attorney]: Might I presume, Your Honour, that in all cases in which you're going to be sitting, you'll be staying proceedings?
>
> [Court]: If anybody requests it.
>
> [Crown Attorney]: As long as someone makes the request?
>
> [Court]: Yeah.
>
> [Crown Attorney]: Okay.
>
> [Court]: Well, that's my decision.

110 As regularly as Judge Mackin granted a stay of proceedings in these cases his decision was reversed by the New Brunswick Court of Appeal. On June 26, 1996 it reversed Judge Mackin in *R. v. Woods* (1996), 179 N.B.R. (2d) 153 (N.B. C.A.). On February 12, 1997 he was again corrected in *R. v. Lapointe*, [1997] N.B.J. No. 57 (N.B. C.A.). On June 23, 1997 the Court of Appeal had to repeat again its disapproval of the entry of a stay of proceedings in similar circumstances in *Canada v. LeBlanc* (1997), 190 N.B.R. (2d) 70 (N.B. C.A.).

111 On April 10, 1996 the New Brunswick Minister of Justice complained about Judge Mackin's conduct to the Judicial Council of New Brunswick. About a week later, on April 19, 1996 Judge Mackin retaliated with a letter to the provincial Solicitor General requesting that contempt proceedings be brought against the provincial Minister of Justice. The province eventually rejected Judge Mackin's demand based on an opinion from the Deputy Attorney General of Alberta.

112 On June 5, 1996 the Judicial Council took the view that it ought not to take action in Judge Mackin's case until the various court proceedings had been" finally dealt with" and concluded that "the present complaint is premature".

113 Those who were required to appear in Judge Mackin's court bore the brunt of the difficulties. A number of extracts from the testimony of Chief Judge Strange (who, as stated, continued to express support for the constitutional challenge itself) gives the flavour of the situation in which members of the public found themselves:

> This was causing a terrible situation. We had witnesses showing up, sometimes on relatively serious matters, sometimes from a great distance, and lawyers showing up, prosecutors showing up and so on, and matters were simply being stayed or more likely adjourned over to a lengthy date. And it was reaching the stage where it was simply upsetting the whole court system down there.
>
> . . . . .
>
> [Judge Mackin's] going to the courtroom and he's adjourning cases in 90 percent of the time. I was getting calls constantly that he wouldn't do any cases. He would adjourn them, adjourn them, and this has continued right up until — well, as recently I know is last December [1997] when there were 112 charges adjourned to one afternoon on December 15th. I mean that was not conducive to putting cases properly through the court and it was not conducive to treating people properly.

114 In these circumstances, the Chief Judge and his colleagues ultimately decided not to ask Judge Mackin to take on cases of any importance, as the Chief Judge explained in evidence:

> I didn't want, as Chief Judge, any big cases where the victims would be humbled or hurt or witnesses would show up and be sent home. I didn't want anything like that going in there. We'd had enough of that and it was wrong.

115 The respondent Judge Douglas Rice carried his full work load through to the date of his retirement on October 15, 1997. No replacement judge was named until after his departure. Judge Harper died in office. No replacement judge was named until after his death. The respondent Judge Ian Mackin reached mandatory retirement age on April 7, 2000.

Analysis

116 Judicial independence is a cornerstone of constitutional government. Financial security is one of the essential conditions of judicial independence. Yet, unless these principles are interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts.

117 In *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), this Court made the fundamental point that the guarantee of judicial independence was for the benefit of the judged, not the judges. It's purpose was not only to ensure that justice is done in individual cases, but to ensure public confidence in the court system as a whole. Le Dain J. stated at p. 689:

> Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.

118 A similar note was struck by Lamer C.J. in *Lippé c. Charest* (1990), [1991] 2 S.C.R. 114 (S.C.C.), at p. 139:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a" means" to this "end". If judges could be perceived as" impartial" without judicial "independence", the requirement of "independence" would be unnecessary. However, judicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality.

It should be stated that neither Judge Rice nor Judge Mackin suggest that the 1995 repeal affected in any way their impartiality. Nor, I think can the repeal be said to have undermined their individual independence because their full salary and security of tenure were not affected. Their argument is that it undermined the *institutional* independence of the court of which they were members.

119 In the *Provincial Court Judges Reference, supra*, Lamer C.J. returned to the need for a purposive interpretation of the guarantee of judicial independence at para. 156 where he adopted this proposition:

> Financial security is an essential condition of judicial independence. It must not, however, be considered abstractly. It must be considered in relation to its purpose, which is, ultimately, to protect the judiciary from economic manipulation by the legislature or executive.

120 Lamer C.J. emphasized the point again at para. 193:

> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs". ...

121 The solution mandated in the *Provincial Court Judges Reference, supra*, was to erect an institutional barrier (an "independent, effective and objective process") between the legislature and executive on the one hand and the judiciary on the other to deal with matters related to the judges' financial security. The constitutional requirement was to "depoliticize" the relationship. This appeal does not put in issue the merits of the solution. It does put in issue the boundaries of what may fairly be described as matters related to the guarantee of financial security.

122 The need for a purposive approach was acknowledged by the New Brunswick Court of Appeal in these cases, *per* Ryan J.A.:

> The *Re Provincial Court Judges* case focussed on the independence of the judiciary, a concept frequently misunderstood because its purpose is a protection to the public, not a benefit to judges. [Emphasis added.]
>
> ((1999), 235 N.B.R. (2d) 1, at para. 25.)

In light of the history of this litigation it would not be surprising if the witnesses and parties and members of the public in Judge Mackin's court from 1995 onwards "misunderstood" the concept of judicial independence in so far as it is said to be for their benefit, and not for the benefit of the judges.

123 The legislature *could* have provided (but didn't) that a supernumerary judge was obliged to work no more than 100 of the 251 court sitting days per year. In that event, I would have agreed with my colleague Gonthier J. that legislative repeal of such a significant fixed benefit without a prior review by an independent, effective and objective process (such as a remuneration commission) would be unconstitutional. Nothing in these reasons should be read as dissenting in any way from the process mandated in the *Provincial Court Judges Reference* to depoliticize the adjustment of judicial compensation.

124 My disagreement with my colleague is therefore quite narrow, and proceeds in the following steps:

> (i) the essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law;
>
> (ii) provincial court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured;
>
> (iii) provincial court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured;
>
> (iv) provincial court judges on supernumerary status were not guaranteed a 40 percent workload in exchange for full pay, or indeed any reduction in workload of an enforceable nature;
>
> (v) a constitutional rule that provided that any decrease or increase in an undefined judicial workload could only be initiated through a remuneration commission would be unworkable;
>
> (vi) the existence (or repeal) of discretionary benefits does not threaten judicial independence;

(vii) the disappointed expectations of the provincial court judges, however understandable, do not justify a finding of unconstitutionality.

I propose to deal with each of these points in turn.

(i) The essentials of judicial independence, including financial security, necessarily reside in objective and enforceable guarantees established in the governing law.

125 The bedrock of judicial independence, whether in relation to the individual judge or to the court of which he or she is a member, is the requirement of objective non-discretionary guarantees. Thus in *Valente (No. 2)*, Le Dain J. referred at p. 688 to the test adopted in that case by the Ontario Court of Appeal, namely whether the alleged deficiencies in "the status of [the judges of the Ontario Provincial Court] gave rise to a reasonable apprehension that the tribunal lacked the capacity to adjudicate in an independent manner". Le Dain J. added, "[t]his I take to be more clearly a reference to the *objective status or relationship* of judicial independence, which in my opinion is the primary meaning to be given to the word "independent" in s. 11(*d*)" (emphasis added). Thus, he concluded, "judicial independence is a status or relationship resting on objective conditions or guarantees" (p. 689).

126 The essential guarantees of judicial independence (both individual and constitutional) are security of tenure, financial security and administrative independence in relation to adjudicative matters.

127 For present purposes, the discussion in *Valente (No. 2)* of financial security is instructive. According to Le Dain J., the salaries of superior court judges," fixed" in a federal statute pursuant to s. 100 of the *Constitution Act, 1867*, represent "the highest degree of constitutional guarantee of security of tenure and security of salary and pension" (p. 693), but this is not essential. While Ontario Provincial Court judges' salaries were not" fixed" by legislation, they were guaranteed by regulation. "The essential point," Le Dain J. said, "is that the right to salary of a provincial court judge is established by law, and there is no way in which the Executive could interfere with that right in a manner to affect the independence of the individual judge" (p. 706).

128 The situation here is very different. There were no guarantees of reduced workload in the Act. As the respondent Judge Rice testified, "If the Chief Judge asked me to do something, I did it". The rule that security of tenure, financial security and administrative independence in relation to adjudicative matters must be guaranteed in the law in *explicit non-discretionary terms*, was endorsed in *R. v. Beauregard*, [1986] 2 S.C.R. 56 (S.C.C.), at p. 75, and *Charest*, at p. 143. Thus, if a measure is essential to judicial independence it cannot be left up in the air as a matter of discretion.

129 In the *Provincial Court Judges Reference*, Lamer C.J. pointed out at para. 112 that "the objective guarantees *define* th[e] status" of independence (emphasis in original). In that case statutory provisions that lacked concrete guarantees were held insufficient to ensure judicial independence. Thus an Alberta statutory provision that said the government *may* set judicial salaries for provincial judges was declared unconstitutional even though a regulation subsequently made under the same Act made it mandatory (paras. 221-22). A Manitoba statutory provision withdrawing provincial court staff as a cost cutting measure on specific days ("Filmon Fridays") was declared unconstitutional because the Court refused to "read down" the legislation to eliminate the objection. Lamer C.J. stated that "to read down the legislation to its proper [i.e. constitutional] scope would amount to reading in those objective conditions and guarantees" (para. 276). This, he said, was not permissible.

130 In this case we are asked to read specific guarantees of workload reduction into the *Provincial Court Act* in order that we can declare their repeal to be unconstitutional.

131 It is only by reading in such guarantees that repeal of the statutory provisions could be said to require recourse to a remuneration commission. If, as I believe, there is no guarantee in the legislation of workload reduction, there is nothing to repeal that could be said to entail one of the objective guarantees that "define" the status of judicial independence (*Provincial Court Judges Reference, supra*, at para. 112).

132 Perhaps the closest analogy to the case now before us is provided by one of the provisions struck down in *Valente (No. 2)*, *supra*. It authorized the reappointment of retired Ontario provincial court judges to sit "at pleasure" (p. 699). The evidence accepted by the court was that by *tradition* these appointments were as secure as the tenure of regular provincial court judges who held office during good behaviour. The existence and strength of this tradition was accepted by the Ontario Court of Appeal as sufficient to guarantee judicial independence. Le Dain J. noted that "Howland C.J.O. placed considerable emphasis on the role of tradition as an objective condition or safeguard of judicial independence" (p. 699). Howland C.J.O. had cited, *inter alia*, P. W. Hogg, *Constitutional Law of Canada* (1977), at p. 120:

> The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed.

133 This Court disagreed. The "fine analysis of the language of the provisions" was thought to be very important indeed. Le Dain J., speaking for a unanimous Court, ruled that traditions and expectations, however strongly observed, "cannot supply essential conditions of independence for which *specific* provision of law is necessary" (p. 702 (emphasis added)). This is particularly the case where the terms of the law are at odds with the alleged expectation. The Ontario law provided, contrary to the alleged tradition, that retired judges would on reappointment hold office "at pleasure" (p. 699). Here the law simply provided that the judge on supernumerary status would be available to perform whatever judicial duties were assigned. To read a specific workload limitation into such a provision would be to amend the legislation.

134 In my view, with respect, there must be a specific provision of law to guarantee a judge full-time pay for part-time work if it is sought (as here) to make that guarantee part of the bulwark of judicial independence.

135 The lesson from these cases is that traditions and expectations, however widely shared, do not constitute "objective conditions" for the purposes of defining the judicial independence required by s. 11(*d*) of the *Charter*. The Court cannot amend the legislation by reading in expectations, however widely shared, (as in the anticipation of a 40 percent workload of supernumerary judges in New Brunswick) or expectation based on longstanding tradition (as in the tenure of post-retirement appointees to the Ontario provincial bench).

136 I do not underestimate the importance of the unwritten customs and traditions that support the institutional independence of the courts. I say only that a particular workload benefit, which never rose to the level of being specified let alone guaranteed in law, does not constitute part of the "objective guarantees" that define the status of judicial independence and which thereby attract constitutional protection.

137 If the legislative provision is so imprecise as not to be capable of constituting part of the guarantee of financial security (or, more broadly, of judicial independence), its existence is not essential to the constitutionality of the court, and its repeal is not therefore constitutionally prohibited.

(ii) Provincial court judges on supernumerary status in New Brunswick were guaranteed a full-time salary. The guarantee was honoured.

138 In *Valente, Beauregard, Lippé*, and the *Provincial Court Judges Reference*, the Court established "the essential" guarantees of judicial independence. One of these is financial security. No objection is taken to the statutory guarantee of a fixed salary to provincial court judges on regular status (s. 14(2)). The judges on supernumerary status were guaranteed the same salary by their inclusion in the definition of "judge" in s. 2(1) of the Act. When the respondents returned to regular status on April 1, 1995, there was no change in either the amount of their pay or its protected status.

(iii) Provincial court judges on supernumerary status were guaranteed security of tenure. The guarantee was honoured.

139 The respondents Mackin and Rice continued to enjoy the same security of tenure as provincial court judges on regular status. As mentioned, they were included in the definition of "judge". I agree with my colleague Gonthier J. (para. 47) that their supernumerary status did not give rise to any special tenure. Those who elected to become supernumerary were not "appointed"

or "re-appointed". The original appointment continued in effect with the *potential* of a reduction in workload of an indeterminate amount at an indeterminate time. As the respondent Judge Rice wrote in his letter of February 17, 1993 to the Minister electing supernumerary status:

> This election is not, in any way, to be considered as my resignation from my appointment as a Judge of the Provincial Court.

140 In the New Brunswick Court of Appeal, Ryan J.A. argued that the use of the word "office" in s. 4.1(3) implied a separate and distinct tenure that was wiped out by the 1995 amendments. It is true that the word "office" has a special connotation in law, but it is not associated with any particular security of tenure: *Ridge v. Baldwin* (1963), [1964] A.C. 40 (U.K. H.L.), *per* Lord Reed, at p. 65. In *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.), the "office" holder was a probationary police constable whose tenure was at pleasure. If Ryan J.A. were correct that use of the word" office" connoted a distinct and separate tenure from that of the provincial court judges on regular status, the result would have been an office without clear legislative definition. The holders of the allegedly distinct office of supernumerary judge would have lacked from the outset the objective guarantees of judicial independence. Such a judicial" office" would have been unconstitutional. As pointed out by Lamer C.J. in the extract from the *Provincial Court Judges Reference* previously cited at para. 39, it would not be for the Court to read into the word "office" the necessary guarantees of tenure to make up for the legislative deficiency.

(iv) Provincial court judges on supernumerary status were not guaranteed a 40 percent workload or any other reduction.

141 Supernumerary status was adopted in New Brunswick in 1988 after lengthy discussions between the government and the provincial court judges which had commenced in about 1981.

142 The theory underlying the 40 percent workload expectation was that to be eligible for supernumerary status a provincial court judge must meet all the conditions for retirement except the desire to retire. If he or she elected to retire the state would be required to pay a pension equivalent to 60 percent of the average of specified years of judicial earnings. There would be no further judicial work. If he or she elected supernumerary status, however, the judge could make up the 40 percent loss of income occasioned by retirement by continuing to work 40 percent of the time. This expectation of a greatly reduced workload was widely shared by Ministers, judges, civil servants and others in New Brunswick. But it was not written into the *Provincial Court Act*.

143 To be clear, the respondent Rice, as a provincial court judge with supernumerary status, was *not* a retired person with a part-time job. He was eligible to retire but he had elected not to. He was not drawing a pension "topped up" by 40 percent pay for 40 percent workload. He was receiving a full-time salary and all the benefits of a judge on regular status. He continued to receive medical coverage. His life insurance continued to be subsidized to the extent (at the date of his retirement) of over $2,000 per month. Any increase in annual salary would translate into a higher base on which his pension would eventually be calculated (albeit, as with judges on regular status, he was required to continue pension contributions in the interim). The respondent Mackin was in a similar position. In exchange for these benefits they continued to hold themselves available for work as assigned by the Chief Judge. In a province short on judicial resources, the assignments in some cases amounted more or less to full-time employment. If the assignments proved unexpectedly onerous, either one of them could have elected to retire on full pension at any time.

144 The key provision, as stated, is s. 4.1(5) of the *Provincial Court Act*, which said:

> **4.1** (5) A judge appointed under subsection 2(1) who has elected to hold the office of supernumerary judge shall be available to perform such judicial duties as may be assigned to the judge from time to time by the chief judge or associate chief judge.

145 If "full" workload for a provincial court judge is taken to be plus or minus 251 court days a year (which is the assumption on which the repealing legislation is based), 40 percent of that is plus or minus 100 days a year. The legislation establishing supernumerary status obviously could have specified a precise figure but just as obviously it did not do so. Instead the obligation was to do the judicial work assigned by the Chief Judge, whatever and whenever it might be.

146 My colleague Gonthier J., in para. 65, places emphasis on the words "time to time" in s. 4.1(5). It was not, of course, contemplated that the first assignment by the Chief Judge would necessarily be the last. It was to be expected that from "time to time" the assignments would change. In my view that phrase indicates a multiplicity of assignments, not a reduction in workload. With respect, an *increase* in overall workload would be equally consistent with the statutory language (such as, for example, a transfer to a busier court).

147 When the respondent, Judge Rice, who at the time was a judge of over 20 years experience, was considering whether to elect supernumerary status in 1992, he sought a number of clarifications from the Minister of Justice. He asked for information as follows:

> (3) WORK ASSIGNMENTS. Supernumerary Judges are required to sit a minimum of 40% of working days each year, as assigned by the Chief Judge, the Associate Chief Judge, or a Judge designated for the purposes of assigning Judges in a Judicial District. [Emphasis in original.]

This was confirmed by the Minister in writing on March 16, 1992:

> A supernumerary judge is required to sit the equivalent of a minimum of 40% of a full-time judge's work year. The Chief Judge, or the Associate Chief Judge, is responsible to assign sittings. [Emphasis added.]

148 Neither the respondent, Judge Rice, nor the Minister suggested that there existed a *maximum* workload short of 100 percent of the workload of a judge on regular status. Having regard to the varied work experiences of Judge Rice, Judge Harper and Judge Mackin, I do not think, with respect, that the evidence supports my colleague's conclusion, at para. 65, that "[n]ormally" a judge on supernumerary status "enjoyed a substantial reduction in his or her workload". The experience was too mixed to permit any generalization in that regard, in my opinion.

149 The assignment responsibility rested with the Chief Judge, but the reality was that he could only work within the resources the province provided. The respondents' position is, in truth, not only that the 40 percent workload should be read into the Act, but that the province had a constitutional responsibility to provide enough judges to make the 40 percent workload achievable. This, with respect, is too much to "read into" a statute that simply says a judge is to do the work assigned by the Chief Judge.

(v) A constitutional rule that provided that any decrease or increase in an undefined workload could only be initiated through a remuneration commission would be unworkable.

150 The judgments on appeal state that the 1995 repeal of supernumerary status was unconstitutional because it did not receive prior review by an independent, effective and objective process (e.g. a remuneration commission). Quite apart from the fact the constitutional requirement of an independent, effective and objective process was not elaborated by this Court until the *Provincial Court Judges Reference* in 1997, two years after the amendments in issue here, I cannot accept this argument.

151 It is useful to reiterate that the respondents received the same salary after the repeal of the supernumerary status as they did beforehand.

152 In oral argument it was suggested that if a supernumerary judge were required to do more work for the same amount of money, his hourly rate, if it may be so conceived, was reduced. Instead of earning a full salary for a 40 percent workload he had to work a full year for the same amount of money. However, once the debate is properly focussed on workload, and the so-called workload guarantee is related to the process mandated by the *Provincial Court Judges Reference*, the question arises as to how a remuneration commission would be supposed to give *prior* effective review to increases or decreases in judicial workload across the province.

153 The evidence shows that in 1990-91 each judge in the provincial court at Fredericton disposed of 2,714 cases a year. In Campbellton the equivalent per year was 1,775 cases and in St. John it was 2,729 cases. The busiest provincial court was Moncton where each of the judges disposed of about 5,335 cases per year. In each instance the provincial court judge on regular

status received the same salary. If the statistics are to be believed, judges in different regions therefore had a very different workload and, because each earned the same salary, a very different "hourly" rate.

154 The Chief Judge testified that the statistics were simplistic and failed to take into account many factors, including the nature of the cases. I agree with his criticism, but even making a generous allowance for the crudity of the statistics, the workload variation is impressive. In these circumstances how many hours a year constitutes a 100 percent workload on which the 40 percent workload is to be calculated? Are we to take a provincial average or is a judge entitled to look at the historical average for his or her region? Or his or her personal history? This again provides unevenly moving targets. The statistics show that whereas the workload in Moncton was expected to grow by 17 percent in 1991-92, the increase in St. John was only 2 percent. In Campbellton the expected growth was 66 percent.

155 The constitutional requirement is for *prior* reference of a change in benefits to the Remuneration Commission. Unless the Legislature was prepared to fix a specific number of work days per year (and, as stated, 100 days would be 40 percent of a notional 251 days a year sat by provincial court judges on regular status), I do not understand how "workload" as an abstract statistic can be fixed in advance. The bare concept of a *reduced* workload is too elastic to provide a manageable standard. The legislature, as stated, was clearly not prepared to guarantee any fixed and defined benefit, or indeed any benefit at all.

156 The bottom line is that the 1995 New Brunswick legislation established a *potential* benefit of wholly indeterminate value. It offered the possibility of less work for the same amount of pay, but the possibility of achieving this expectation was always subject to the exigencies of each court location and the resources available to the Chief Judge to get done the judicial work that had to be done. The *Provincial Court Judges Reference* established the requirement of an independent, effective and objective process to deal with financial security. The salary of supernumerary judges was secure. Each supernumerary judge received full pay. An extension of the remuneration commission process to an undefined "reduced" workload is neither sensible nor required. Yet it is the repeal of the workload benefit supposedly guaranteed by supernumerary status that is said to be unconstitutional because the province did not first go through a remuneration commission process.

(vi) The existence (or repeal) of discretionary benefits does not threaten judicial independence.

157 The potential advantages of supernumerary status lay either in the discretion of the Chief Judge or his delegate who was responsible for assigning the work (or assigning a specific courtroom) to the supernumerary judge or, alternatively in the discretion of the provincial government in its overall budgetary allocation for the provincial court and its willingness to appoint new judges to replace supernumerary judges to help to deal with the expanding workload.

158 In my view the culprit here, if culprit there be, is the provincial government's refusal to allocate adequate resources to the court. Chief Judge Strange was clearly willing to exercise his discretion to allow very significant workload reductions to supernumerary judges, but his priority was to staff the courts on a week-to-week basis, and the lack of adequate resources left him unable to accomplish both objectives. As between the public interest in seeing the courts operate on a full-time basis and the private interest of some of the judges on supernumerary status in realizing their expected benefits, he chose correctly, and inevitably, the public interest. The issue, therefore, is really about the government's exercise of its discretion over the provincial court budget.

159 In *Valente (No. 2)* it was contended that government control over such discretionary matters as post-retirement reappointment, or leaves of absence with or without pay, or permission to engage in extra-judicial employment, violated judicial independence. This argument was rejected. Le Dain J. stated at p. 714:

> While it may well be desirable that such discretionary benefits of advantages, to the extent that they should exist at all, should be under the control of the judiciary rather than the Executive, as recommended by the Deschênes report and others, I do not think that their control by the Executive touches what must be considered to be one of the essential conditions of judicial independence for purposes of s. 11(*d*) of the *Charter*. In so far as the subjective aspect is concerned, I agree with the Court of Appeal that it would not be reasonable to apprehend that a provincial court judge would be influenced by the possible desire for one of these benefits or advantages to be less than independent in his or her adjudication.

160 When a similar objection was raised in the *Provincial Court Judges Reference* in relation to the discretion of the Government of Prince Edward Island over judges' sabbatical leave, Lamer C.J. simply cited the above passage from *Valente (No. 2)* and added, "To my mind the same reasoning applies here" (para. 207).

161 Even if one were to assume (as I do) that the variable benefits of supernumerary status were a function of the government's budget control rather than within the gift of the Chief Judge, I do not think either the existence of these benefits or their ultimate repeal in 1995 violated the "objective guarantees" of judicial independence. As noted by Lamer C.J. in the *Provincial Court Judges Reference* at para. 113, the question is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and other relevant facts, after viewing the matter realistically and practically, would conclude that the tribunal or court was independent. In my view such persons would not regard the creation, continuation or ultimate repeal of the discretionary workload benefit associated with supernumerary status as compromising judicial independence. They would hold, I believe, a loftier view of their judges.

(vii) The disappointed expectations of provincial court judges, however understandable, do not justify a finding of unconstitutionality.

162 In the end this appeal comes down to the fact that the respondents formed a quite legitimate expectation of a substantially reduced workload if they elected supernumerary status and their expectation was not honoured. A reduction to roughly 40 percent of a notional workload was permitted, but not required, by the *Provincial Court Act*. The evidence does not clearly source this expectation in the Minister's office (i.e., the Minister's letter talked about a *minimum* of 40 percent), but even if the respondent could establish all of the elements of the administrative law doctrine of legitimate expectation as set out in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.), and *Baker v. Canada (Minister of Citizenship& Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), it would not assist the respondents' attack on the repealing legislation. As Sopinka J. pointed out in *Canada Assistance Plan*, at p. 558, the doctrine does not apply "to a body exercising purely legislative functions". Nor can it operate to entitle the respondents to a substantive as opposed to procedural remedy. In some ways the respondents' effort to use their disappointed expectations to attack the validity of the legislative amendments in this case parallels the unsuccessful effort of the Government of British Columbia to use expectations created by federal-provincial funding arrangements to attack the validity of amendments to the Canada Assistance Plan in that case. The attempt was rejected there and it should be rejected here as well.

163 In summary, the 1988 amendments to the *Provincial Court Act* enacted a form of supernumerary status that created expectations but not guarantees. Its repeal, as high-handed and offensive as it may have appeared to the respondents, did not undermine the judicial independence of the provincial court judges or the court of which they were members. The repeal was undertaken in a period of budgetary cuts which impacted all the residents of New Brunswick. Supernumerary benefits for judges competed with the closure of hospital beds and the reduction or elimination of crucial public expenditures in other areas. The New Brunswick legislature sought to change a system (which had so unevenly benefited Judge Rice, Judge Harper and Judge Mackin) to a pay-for-work system in which a retired judge who in fact works about 100 days a year (i.e., 40 percent of a notional 251 court days) while drawing a full pension (i.e., equivalent to 60 percent of a full salary) would receive "top up" *per diem* payments equivalent to the remaining 40 percent of the full salary. The new system, according to the evidence, was designed to allow judges on supernumerary status to get the same financial benefits as under the 1988-95 scheme but by means of a method of payment that tied rewards to actual work. It appears that all retired provincial court judges are eligible for *per diem* work if they want it. Work assignments are still made by the Chief Judge within an overall budget. Whether the new system is better or fairer than the old system is not for us to judge. The only question before us is whether the change is unconstitutional. In my view, for the reasons discussed, the repeal of the former system of supernumerary status, as much as the original enactment, was within the legislative competence of the Province of New Brunswick in relation to "[t]he Administration of Justice within the Province, including the Constitution, Maintenance, and Organization of Provincial Courts" under s. 92(14) of the *Constitution Act, 1867*.

Conclusion

164 I would allow the appeal with costs. I would therefore answer the first two constitutional questions in the negative and, in light of that conclusion, the third constitutional question does not arise.

Appeal allowed in part.

Pourvoi accueilli en partie.

2011 ABCA 171
Alberta Court of Appeal

Pendosi Holdings Ltd. v. Forzani Group Ltd.

2011 CarswellAlta 972, 2011 ABCA 171, [2011] A.W.L.D. 3050, [2011] A.W.L.D. 3051, 204 A.C.W.S. (3d) 385, 505 A.R. 354, 522 W.A.C. 354, 93 C.P.R. (4th) 335

Pendosi Holdings Ltd., Respondent (Plaintiff) and The Forzani Group Ltd., Appellant (Defendant)

Carole Conrad J.A., J.D. Bruce McDonald J.A., Ronald Berger J.A.

Heard: May 9, 2011
Judgment: June 15, 2011
Docket: Calgary Appeal 1101-0011-AC

Counsel: M.C. Kwiatkowski, G. Smith, for Respondent
M.A. Morrison, M.R. Gaston, for Appellant

Per curiam:

1 The appellant, the Forzani Group Ltd. (Forzani), appeals an interlocutory order enjoining it from terminating a trademark/service mark sub-licence agreement with the respondent, Pendosi Holdings Ltd. (Pendosi).

2 On or about April 5, 2004, Pendosi entered into an agreement with Nevada Bob's International Inc. which granted Pendosi the exclusive use of certain registered trademarks and other unregistered trademarks associated with the Nevada Bob's Golf brand within a defined area in Victoria, British Columbia (the Pendosi Agreement). Pendosi has one retail store in Victoria. In December 2004, Forzani purchased the name and trademark of Nevada Bob's in Canada and became successor as licensor in the Pendosi Agreement.

3 Forzani uses the name Nevada Bob's Golf to sell golf-related equipment in many retail locations throughout Canada, primarily through its Sport Chek locations. The Pendosi Agreement restricts Forzani's use of the Nevada Bob's trademarks in Victoria and, as a result, Forzani uses the name "Golf Experts" in its two Sport Chek stores in Victoria. Pendosi argues that, but for the name, even the golf departments of those stores have been designed to look exactly like the Nevada Bob's golf departments in the other Sport Chek locations.

4 The Pendosi Agreement stood in the way of Forzani's intention to implement a national advertising and promotion campaign to support the Nevada Bob's Golf name in its stores. As a result, Forzani purported to terminate the Pendosi Agreement effective November 30, 2010 in order to proceed with its nationwide marketing campaign.

5 Pendosi first issued a statement of claim in British Columbia, but was required by Forzani to issue in Alberta in accordance with the Pendosi Agreement. In its statement of claim Pendosi seeks a permanent injunction prohibiting Forzani from terminating the Pendosi Agreement on the basis the termination breaches the terms of the Agreement as well as damages for breach of contract and passing off. In its claim Pendosi alleges further that Forzani has breached its fiduciary duty and duty of good faith by using insider information respecting Pendosi's business to compete in the Victoria market. Pendosi seeks damages and an injunction prohibiting Forzani from selling golf merchandise in Victoria.

6 Pendosi brought an application for an interlocutory injunction prohibiting Forzani from terminating the Pendosi Agreement which allows Pendosi the use of the Nevada Bob's Golf name and trademarks in Victoria, British Columbia. Forzani cross-applied for security for costs.

I. Decision of the Chambers Judge

7 The chambers judge dealt with the injunction and left the security for costs to be determined separately. He applied the tripartite test for an interlocutory injunction set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.).

8 In determining the first issue, the chambers judge referenced Article 6 of the Pendosi Agreement which provides that the agreement shall have a term which shall terminate upon the happening of the earlier of:

> (a) the Licensee (Pendosi) signing a Franchise Agreement; or
>
> (b) Fourteen (14) days following notice of termination being given by Licensor if Licensee is in breach of its obligations under Clause 2.7 hereof, subject to earlier termination in accordance with Article 7.

9 Article 2.7 provides for the parties to negotiate in good faith and acting reasonably for a franchise agreement, which would end the licence agreement. Failing agreement to arrive at terms under 2.7, the parties could submit unresolved differences to arbitration.

10 Forzani does not allege that Pendosi has breached any of its obligations. Moreover, no franchise agreement has been negotiated, and there are no allegations Pendosi refused to negotiate in good faith. Forzani's only basis for termination of the Pendosi Agreement is that it has an implied right at law to terminate on reasonable notice.

11 The chambers judge found that it was very clear that Pendosi raises an arguable issue to be tried, thereby satisfying the first criterion of the tripartite test, noting that the Pendosi Agreement does not permit termination at will by the appellant, and there was no allegation that the respondent had breached any of its obligations.

12 The chambers judge was also satisfied that Pendosi had met the second criterion for the tripartite test — irreparable harm. In arriving at this decision, the chambers judge noted that irreparable harm is harm that cannot be quantified or cured monetarily, and that mere difficulty in calculating the damage was not sufficient. There is no suggestion that he erred in his statement of the law.

13 The chambers judge found that, without an injunction, Forzani would move the Nevada Bob's brand into its Victoria stores and begin a national marketing program. He accepted Pendosi's position that this would have the effect of putting Pendosi out of business as it could not continue as a retail golf outlet. He concluded that should Pendosi succeed at trial and regain the Nevada Bob's brand, the market confusion and customer uncertainty would make it very difficult for it to regain its market share.

14 Dealing with balance of convenience, the third requirement of the tripartite test, the chambers judge found the potential harm to Pendosi to be much greater. The status quo would allow Pendosi to continue to operate its one store in Victoria while Forzani could operate its many stores across Canada, including the two Sport Chek stores in Victoria.

15 The chambers judge granted an interim injunction refraining Forzani from terminating the Agreement, thereby allowing Pendosi continued exclusive use of the Nevada Bob's name and trademarks in Victoria, British Columbia. He declined to fortify the undertaking of Pendosi by the posting of some security.

II. Issues

16 The issues here are whether the chambers judge erred in finding irreparable harm; or alternatively, in refusing to order fortification of Pendosi's undertaking.

III. Analysis

17 On appeal, an interlocutory injunction is a discretionary remedy and entitled to deference unless the chambers judge proceeded arbitrarily or on wrong legal principles: *Victoria Oil & Gas Plc v. Alhambra Resources Ltd*, 2009 ABCA 64 (Alta. C.A.) at para 8, (2009), 448 A.R. 374 (Alta. C.A.).

18 The appellant takes no issue with the first part of the tripartite test, but submits that the chambers judge erred in finding irreparable harm. Forzani says that the chambers judge considered speculative factors such as the loss of Pendosi's investments in local advertising and sponsorship, and in finding that Pendosi would not open another retail outlet. Forzani also submits that the chambers judge engaged in speculation when he rejected the opinion of Forzani's expert that damages could be calculated.

19 In *RJR-MacDonald Inc.* the Supreme Court of Canada made the following comments at para 64:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); ...

20 In our view, the chambers judge did not err in finding irreparable harm. He did not arbitrarily grant the injunction. There was evidence that Pendosi could not continue as a retail golf outlet if Forzani operated the Nevada Bob's brand in its two existing stores in Victoria and included Victoria in a large scale national advertising campaign. The chambers judge found that result logical, given Pendosi's current profit levels. He accepted that, absent the injunction, Pendosi would have to close its doors. That is a decision he is entitled to make.

21 Further, the chambers judge did not err in concluding that if the brand is lost, then regained after a successful trial, market confusion and customer uncertainty would make it very difficult for Pendosi to regain its market share.

22 The chambers judge was entitled to reject Forzani's expert evidence that damages could be calculated. He noted that where a litigant will be put out of business a contrary expert opinion as to lost value could be provided. He noted that profit projections factor in so many variables and some, such as weather and economic conditions, are notoriously difficult to predict. In so doing, he was not engaged in speculation but considering and weighing the evidence before him in determining whether damages could be calculated here. As stated by this court in *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABCA 95, 346 A.R. 356 (Alta. C.A.) at para 15: "Harm difficult to compute in money is traditionally recognized as a form of irreparable harm."

23 The appellant has failed to demonstrate that the chambers judge proceeded arbitrarily or on wrong legal principles, and his decision on this issue is owed deference.

24 On the issue of fortification of the undertaking, we note the remarks of Côté JA in *Lac La Biche (Town) v. Alberta* (1993), 135 A.R. 352, 9 Alta. L.R. (3d) 225 (Alta. C.A.), affirmed at para 26 that an undertaking as to damages is an integral part of the balance of convenience; as such, the matter is discretionary. Similarly, as stated in *Victoria Oil & Gas* at para 15, the amount of the undertaking is an exercise of discretion which is entitled to appellate deference.

25 A party requesting fortification of an undertaking must establish a likelihood of significant loss arising as a result of the injunction and a sound basis for the belief that the undertaking will be insufficient. Even then, fortification remains a discretionary order.

26 The chambers judge was not satisfied that the appellant had proven a significant loss would result from the injunction. In addition, he was not satisfied that Pendosi was without assets. Although Pendosi's profit and loss statement was before the chambers judge, the financial statements were not. Forzani says the chambers judge erred by failing to consider the evidence of Forzani's accountant who testified that the financial statements show liabilities in excess of book value of the assets. Forzani admits that although the accountant had the financial statements, those statements were not introduced into evidence, nor was any other evidence of Pendosi's assets. In our view, the chambers judge did not err in finding it did not have evidence of the

assets. The reference to the balance sheet referred to book value of assets and there was no evidence of updated asset value. Even if the chambers judge overlooked the accountant's evidence, fortification remains discretionary: *McCaffery Group Inc. v. Bradlee* (1997), 204 A.R. 334 (Alta. Q.B.) at para 25, (1997), 10 C.P.C. (4th) 294 (Alta. Q.B.).

27 Another factor that might be considered when determining whether to grant fortification is the relative strength of a case. Where a case barely meets the threshold of having a serious issue to be tried there might be more inclination to exercise that discretion in favour of granting an order of fortification. But that is not this case. Here, as the chambers judge noted, there is clearly an issue to be tried. The Pendosi Agreement exists. There is no allegation of a breach of a term of that agreement by the licensee, and the licensor relies solely upon an implied term in a document prepared by its predecessor. In our view, there is no basis to interfere with the chambers judge's decision declining to fortify the undertaking.

IV. Conclusion

28 The appeal is dismissed.

Appeal dismissed.

1995 ABCA 461
Alberta Court of Appeal

Vue Weekly v. See Magazine Inc. (Receiver of)

1995 CarswellAlta 751, 1995 ABCA 461, [1995] A.W.L.D. 1127, [1995] A.J. No. 993, [1996] 2 W.W.R. 585, 102 W.A.C. 277, 174 A.R. 277, 35 Alta. L.R. (3d) 111, 58 A.C.W.S. (3d) 851

VUE WEEKLY, also known as VUE MAGAZINE, RONALD GEORGE GARTH, 662812 ALBERTA LTD. and MAUREEN FLEMING v. PEAT MARWICK THORNE INC. (Receiver and Manager of SEE MAGAZINE INC.)

Fraser C.J.A., Côté and Russell JJ.A.

Heard: October 20, 1995
Judgment: November 1, 1995
Docket: Doc. Edmonton Appeal 9503-0692-AC

Counsel: *B.J. Willis*, for appellants/defendants.
B.J. Kickham and *C. Plante*, for respondents/plaintiffs.

***Per curiam* (Written memorandum of judgment):**

1 On October 20, 1995 a special panel of this Court heard an emergency appeal from an interlocutory injunction granted four days earlier. The injunction barred publication of a weekly newspaper. Thanks to hard work and organization by both counsel, in those four days we got bound volumes containing a transcript of the revised and edited reasons of the chambers judge, all the evidence (neatly tabbed and indexed), and written arguments or factums from both sides. It is amazing how much work good counsel can do in a short time. The arguments which we heard were very thoughtful and helpful, even impressive. We are very indebted to counsel.

2 We must add a caveat before describing the facts. The evidence now before us suggests that the conduct of the defendants here was discreditable in the early stages. Whether there was any partial justification for it will be decided at trial. We do not mean to whitewash the defendants' early conduct, nor to prejudice the trial by any of our remarks below. Indeed counsel for the defendants very fairly conceded that his clients' early "self-help measures" had been "ill advised", and he did not try to justify them. He said the early steps were taken without legal advice.

3 We make our decision without going into all of that, for the issue before us is whether the injunction should continue.

4 At issue here are some Edmonton weekly tabloid newspapers. They feature the entertainment scene, are distributed free off wire racks, and get all their revenue from advertising. Most Canadian cities have one or more of these newspapers. They come and go quickly, and all copy each other's format closely. Garth, one of the defendants, has run a number of the Edmonton ones.

5 He ran an Edmonton tabloid called See, through his one-man company. Two of the employees lent him some money. These papers are prepared on a small computer with over-the-counter software costing under a thousand dollars. Gazette is an unrelated large and solvent company. It did the actual printing, and is the plaintiff in one of the two actions involved here. By agreement, Gazette also did a good deal of See's bookkeeping, money handling, and record keeping. See fell behind in paying its printing bills to Gazette, which had registered P.P.S.A. security over all of See's assets, including its goodwill.

6 There is evidence (not disputed yet) that Gazette formed a plan to use a receiver to take over See and eliminate most of the employees and other creditors despite earlier promises to give equity to the lender-employees. But no trial has occurred yet, and there may well be another side to that story. In any event, Gazette and Garth agreed on a brief moratorium, and the debt

was not brought into line within that time. Gazette then gave notice that it would sue and seek a receiver. It did so, and Garth did not oppose the appointment. The court appointed a receiver of the property of the company which published See. It was a very broad order, giving the receiver the powers which an experienced insolvency lawyer would ask for.

7 The receiver arrived at See's premises to find only bare walls. The birds had flown. Some six or seven days before, Garth had met with the staff at a private residence, and they had agreed to start a new competing newspaper under a new company. Indeed, they actually did so, and distributed it on the streets the day *before* the receivership order was made. The new newspaper was called Vue.

8 We stress that the steps taken to publish the first issue of Vue cannot be a breach of the receivership order, for the order did not yet exist then. Maybe those steps breached fiduciary duty, but we understand that that has not yet been pleaded.

9 The regular issue of See scheduled for that week did not appear. However, within five days of his appointment, the receiver succeeded in publishing the next issue of See on time, and has continued to do so weekly ever since. Doubtless the receiver and Gazette worked closely together, using the experience and records of See which Gazette held all along.

10 During argument of the appeal, by agreement counsel handed to us numerous copies of both publications, and we examined them. We cannot say that the issues of See published by the receiver are feeble, unattractive, jejeune, or wanting in big paying advertisements. See continues to publish regularly, and there is no evidence to suggest that it is unprofitable, or not viable, or that two such newspapers cannot exist in Edmonton. Indeed we notice that some advertisers now advertise in both newspapers. The evidence is that some advertisers went over from See to Vue, but that a major national agency did not.

11 How was the first issue of Vue published the day before the receivership order? By using some physical assets which the old company either owned or leased. That was also true of the next issue of Vue, published about six days after the receivership order. However, later issues of Vue used little or no tangible assets of See, which had been virtually all returned to See by then. Of course we only recite the evidence before us; other evidence may emerge at trial.

12 The parties clash on whether Vue used other intangible assets or goodwill belonging to See or its receiver to publish any edition of Vue after the receiver was appointed. The trial judge will decide that finally. It seems quite likely that the plaintiffs may recover damages at trial, and nothing in this Memorandum is intended to discourage that. For purposes of this interlocutory injunction, we must decide on the evidence before us now. That alleged use of goodwill is relevant to every test for an interlocutory injunction: arguable case, irreparable harm, and balance of inconvenience. It appears to us on the evidence now before us that Vue did use the plaintiffs' goodwill in the early stages, but has by now clearly ceased doing so. (The trial judge will be free to find otherwise on fuller evidence.)

13 We so conclude for this reason. It is arguable that the goodwill encompassed all the arrangements and advantages of business which See had in place when the receiver was appointed. We pick that day, for it was the receiver which moved for and got the injunction now appealed, not the creditor Gazette. It is arguable that lack of firm contracts with staff, advertisers, readers, or contributors, does not remove them from the scope of goodwill. Only one advertiser had an ongoing contract, and it stayed with See and the receiver. Nevertheless, it seems to us that lack of such contracts severely limits the extent, length, and value of the goodwill, when those people are few in number and easily found. It is obvious from the evidence that the defendants could have started up Vue without using any of the underhanded methods which they used. And they could have done so within two weeks, thus "missing" only one issue. There were no non-competition agreements. The advertisers and contributors were well known: any reader could pick up a free copy of See and see who they were. The evidence shows there were no secret contacts or lists, and the advertisers were easy to locate. The chambers judge said if clarity were desired, he would bar the defendants from soliciting former advertisers for six months. We see no evidence whatever to justify that. Obviously it was easy to find another printer, to buy or lease a computer, and to buy ordinary publishing software.

14 The same is true of the employees. Furthermore, the evidence before us makes it very doubtful that the receiver had any interest in keeping most of the staff or contributors of See or Vue.

15 We do not say that acts like the defendants' acts are not theft of goodwill. We say that the extent and duration of that goodwill depends on the precise facts.

16 At first no one sought to enjoin publication of Vue or any other newspaper. At first, the plaintiffs' only motion was to prevent passing off. A narrow earlier consent injunction dealt successfully with that. All the steps called for in it were accomplished (leaving aside some paperboys' temporary errors in delivery). There is no longer any suggestion of ongoing passing off.

17 The injunction now under appeal was first sought by a notice of motion filed October 2 and returnable October 3. That was 12 days after the first issue of Vue, and five days after the second. It was ultimately heard October 16. The evidence now before us indicates that by October 2, the tangible assets of See were no longer used or possessed by the defendants, with possible trivial exceptions. And as noted, by then the defendants would have been able to publish Vue even if they had acted properly and done nothing illegal. That is even more true by October 16 when the injunction was given, and still more so by October 20 when we heard the appeal.

18 Therefore, it seems to us that by the time that we heard the appeal (and probably earlier), the only evidence before the court must be characterized this way:

19 1. Any tortious activity (passing off) had ceased, and was not pled, and the consent order prohibiting such activity was never violated (with one possible minor exception since ended).

20 2. Any other invasion of property had ceased.

21 3. Any infringement of the order appointing the receiver had ceased.

22 4. Any loss or harm still accruing to the creditor or to the receiver was probably now flowing from open legal competition.

23 5. The advertisers in each newspaper were openly displayed permanently in each issue for all the world to see, so the revenues derived from each could be readily calculated.

24 6. Both parties keep records, and the creditor and the receiver have and always had all the financial records of See (with the possible exception of a few days just before the receiver was appointed).

25 7. The injunction prohibits the publication of Vue, or a newspaper similar in content, and that would shut down Vue. A significant gap in publication by such a newspaper will kill it, as all the witnesses agree.

26 8. Denying the injunction will not kill See. Indeed, See keeps running a large ad saying it is here to stay, whatever happens.

27 9. All the tangible property taken from See has been returned to its receiver.

28 It is elementary law that an injunction is not intended to punish. A perpetual injunction after trial may be designed to undo harm. This is not such an injunction, and there is here no present harm to undo, save for paying money. An injunction cannot be used to do what money will properly do. An injunction, whether interlocutory or perpetual after trial, may be used to prevent future harm from illegal acts. But no future harm from illegal acts is here threatened.

29 It seems to us that the only motive for getting this injunction, the only good that it would do anyone, is to kill off the defendants' business and so remove competition. It was expressed to us as "levelling the playing field", but that appears to us to mean having the court do a new wrong now in return for an old wrong done by the defendants. Two wrongs do not make a right. No authority was cited for such a novel use of injunctions, and we know of none. An injunction is to be used to prevent irreparable harm, not to create it. Ending a going business is always presumed to work irreparable harm.

30 Therefore, we answer the three usual tests for interlocutory injunctions as follows:

31 (a) There may be arguable causes of action, but they are no longer germane to what is going on now.

32 (b) No irreparable harm is now being caused or threatened by any illegal act.

33 (c) The injunction would kill the defendant but not help the receiver or the creditor (save by ending legitimate competition). Therefore, the balance of inconvenience is completely one-sided, against any injunction.

34 In addition, the injunction finally given was incapable of logical expression of its limits. If limited to the wrongs done, it had no scope, or was impossible to understand and comply with. If not so limited, it plainly would go beyond what the law allows. The continuing inability to define it on October 16 and later is symptomatic.

35 Therefore, we do not need to consider arguments about freedom of the press, freedom to earn a livelihood, or the public interest.

36 We wish to add one comment about the undertaking as to damages. Only the receiver sought the injunction, not the creditor Gazette. The receiver induced the chambers judge to limit its undertaking to the assets under administration, on the grounds that the receiver was the court's officer. Yet the evidence showed that (apart from the cause of action sued on) the assets were of dubious value. Even more curious is that the whole litigation is for the benefit of a large solvent creditor, who uses the same lawyers as does the receiver. The receiver was appointed because of Gazette's P.P.S.A. security, not because of any dispute over title or possession, and not for a number of creditors. A meaningful undertaking as to damages is a vital part of the balance of inconvenience; without it, an interlocutory injunction may well work irreparable harm, not prevent it. If the receiver could not be expected to give a meaningful undertaking, then the creditor or someone else should have volunteered one. If no one was willing to do so, then it is doubtful that an interlocutory injunction should have been given. A lot of urgent litigation boils down to the unwillingness of either side to take any risk or be answerable for what it proposes; this suit has elements of that.

37 At the end of oral argument we considered the matter. Then we allowed the appeal and dissolved the interlocutory injunction at once, with reasons to follow. Those reasons are found above.

38 Along with the motion for an interlocutory injunction, the chambers judge heard one for contempt, and found it proved, but gave no other relief (beyond the injunction). It seems to us that the evidence of contempt is conflicting and uncertain. We repeat that much of the underhanded work of the defendants seems to have been done before the court made any orders at all. It may well be that there were some breaches of the receivership order, but how many, when, to what extent, and precisely by whom, are most unclear. The chambers judge thought that publishing Vue on October 5 and 12 was contempt, but did not really say why. We think that proposition is unclear, even doubtful. Nor do we understand contravening "the spirit of the" receivership order. As it seems to us highly unlikely that there is now any large ongoing contempt, there is no urgency in deciding that. And we lack the material to do so. One cannot weigh conflicting affidavits, and whether one can rely on hearsay is doubtful. Counsel suggested that clarification of the original receivership order would be helpful, but we cannot produce a declaratory judgment in four days, still less on this record. Therefore, from the bench we also upset the finding of contempt, and directed that it be tried before the trial judge. It may well be best to do so on the basis of all the trial evidence, but the trial judge can set the procedure which seems to him most just and convenient.

39 After more argument, we gave the appellant defendants one set of costs of this appeal in any event on col. 5, plus disbursements. They had almost total success on the issues appealed, and the trial cannot affect the main one, the interlocutory injunction. The appellants' counsel suggested that costs in chambers should remain in the cause, and the respondents' counsel did not object.

Appeal allowed.

2014 FC 280, 2014 CF 280
Federal Court

Allard v. Canada

2014 CarswellNat 1277, 2014 CarswellNat 1278, 2014 FC 280, 2014 CF 280,
[2014] A.C.F. No. 412, [2014] F.C.J. No. 412, 240 A.C.W.S. (3d) 446, 451 F.T.R. 45

Neil Allard Tanya Beemish David Hebert Shawn Davey, Applicants/Plaintiffs and Her Majesty the Queen in Right of Canada, Respondent/Defendant

Michael D. Manson J.

Heard: March 18, 2014
Judgment: March 21, 2014
Docket: T-2030-13

Counsel: John W. Conroy, Q.C., Tonia Grace, for Applicants / Plaintiffs
Jan Brongers, BJ Wray, for Respondent / Defendant

***Michael D. Manson J.*:**

Introduction

1 This is a motion for an interlocutory injunction or an interlocutory constitutional exemption together with an order in the nature of *mandamus* pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Charter], and Rule 373(1) of the *Federal Court Rules* [the Rules]. The moving parties [the Applicants] are the Plaintiffs in this action.

2 The action underlying the motion at issue is for various declarations pursuant to subsections 24(1) and 52(1) of the Charter. The declarations sought rely on section 7 of the Charter to invalidate recent changes to a regulatory scheme enacted by the federal government, which dictate the circumstances in which medically-approved patients may obtain and possess marihuana. These changes, contained in the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [the MMPR], repeal the *Marihuana Medical Access Regulations*, SOR/2001-227 [the MMAR] in their entirety by March 31, 2014.

3 The relief sought by the Applicants would preserve the provisions of the MMAR and limit the applicability of certain provisions of the MMPR, pending a final resolution of the merits of their claims. This motion was filed with the Court on January 31, 2014.

4 For the reasons that follow, I grant limited relief to the Applicants by preserving certain rights under the MMAR as of September 30, 2013. The motion is otherwise dismissed.

A. Legislative Scheme

I. Introduction

5 The requirement of the government to provide reasonable access to marihuana for medical purposes was recognized by *R. v. Parker*, [2000] O.J. No. 2787 (Ont. C.A.) [*Parker*] and affirmed in *R. v. Mernagh*, 2013 ONCA 67 (Ont. C.A.), among others. In brief, *Parker* held that a failure to provide a viable medical exemption from the provisions of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA] violated the liberty and security of the person guarantees under section 7 of the Charter, in a manner that was inconsistent with the principles of fundamental justice, by forcing certain individuals to choose

between their liberty and their health. This direction from the Ontario Court of Appeal led first to exemptions from the CDSA pursuant to section 56 of that act, and then to the establishment of the MMAR.

6 Today, the consumption and distribution of medical marihuana in Canada is governed by three sets of regulations: the *Narcotic Control Regulations*, CRC, c 1041 [the NCR], the MMAR and the MMPR. The NCR allows medical practitioners to prescribe marihuana despite the provisions of the CDSA. The MMAR was, until June 6, 2013, the primary regulatory mechanism which dictated the circumstances under which this exemption can be exercised. As of June 6, 2013, the MMPR began to take effect. These regulations made changes to the NCR and the MMAR and will run concurrent with the MMAR until March 31, 2014, when the MMAR is scheduled to be repealed in its entirety.

II. Narcotic Control Regulations

7 As of the changes made by the MMPR on June 6, 2013, subsection 53(5) of the NCR provides that a medical practitioner may prescribe, transfer or administer dried marihuana to a person under their professional treatment if that dried marihuana is required for the condition being treated.

8 Prior to June 6, 2013, section 53 of the NCR was not limited to "dried" marihuana.

III. Marihuana Medical Access Regulations

9 While portions of the MMPR have taken effect, the MMAR is effectively the current regulatory regime for possession and production of marihuana for medicinal uses. As of March 31, 2014, it will be repealed in its entirety.

10 The MMAR provides for a licence scheme whereby eligible persons who are prescribed marihuana by a medical practitioner are issued an Authorization to Possess [ATP] marihuana pursuant to section 11. A valid ATP authorizes the holder to possess up to 30 times the amount of marihuana they are prescribed to consume daily.

11 The MMAR also provides for three ways by which a person may obtain marihuana. Two are relevant to this motion. They may either produce marihuana themselves under a Personal-use Production Licence [PPL], pursuant to section 24, or have a designated person produce marihuana for them under a Designated-person Production Licence [DPL], pursuant to section 34. These licences dictate both the maximum number of plants that can be grown simultaneously and the maximum quantity of dried marihuana that can be stored on a production site at any time.

12 Production of marihuana in accordance with a PPL or DPL must be conducted only on the site designated on that PPL or DPL. This site may be indoors or outdoors, but not both simultaneously. There are no restrictions as to the location of the production facility beyond the fact that if outdoors, it must not be adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons less than 18 years of age. Production in a dwelling-place is allowed.

13 On June 7, 2013, the MMAR was amended to prohibit the issuance of PPLs and DPLs after September 30, 2013, unless the application for such a licence was received prior to September 30, 2013. This amendment was made in anticipation of the regulatory changes brought by the MMPR.

IV. Marihuana for Medical Purposes Regulations

14 The MMPR makes substantial changes to the production scheme for medical marihuana in Canada. Notably, all PPLs and DPLs are no longer valid as of the repeal of the MMAR, and the amount that an individual is authorized to posses may be lowered in some cases.

15 The MMPR mandates that dried marihuana be produced by a Licensed Producer [LP], pursuant to section 12 of the MMPR. Individuals who formerly were or could be issued an ATP must register the prescription of a medical practitioner with an LP to obtain dried marihuana. If they do so, section 3 authorizes them to obtain and possess marihuana produced by that LP. The amount authorized for possession under section 5 is lower than under the MMAR: either 150 grams or 30 times the amount prescribed for daily consumption by the individual's medical practitioner, whichever is less.

16 An LP is required to meet various quality and security measures as per sections 12-101. This includes provisions in sections 13 and 14 which state that the production site may not be outdoors or in a dwelling-place.

B. The Applicants

17 The Applicants all hold or held an ATP and/or a PPL or DPL. Their affidavits outline their concerns that the repeal of the MMAR and the regulatory changes introduced in the MMPR will bring them increased costs and decrease the safety and quality of the marihuana they consume.

I. Neil Allard

18 Mr. Allard is 59 years of age and is a resident of Nanaimo, British Columbia. He was employed as a counsellor with Veteran's Affairs Canada until 1995, when myalgic encephalomyelitis (commonly known as Chronic Fatigue Syndrome) [CFS] caused him to leave work. He was granted permanent medical retirement in 1999 and has been living on a combination of pensions since that time. These pensions currently provide him with a net income of $2,700 per month. At age 65 his income will drop to $2,000 per month.

19 Mr. Allard states that he began using marihuana to treat his CFS symptoms after he realized he was sensitive to pharmaceutical medication. In 1998, he was referred to the British Columbia Compassion Club Society with a note of support from his physician. By 2001 it cost him approximately $500 per month to obtain marihuana through the Society. As a result of this cost, he took steps to obtain an ATP and a PPL. He currently holds a PPL to produce up to 98 plants and store 4,410 grams indoors. He also holds an ATP which authorizes him to possess up to 600 grams on his person at any time. Both expire on March 31, 2014.

20 In 2004, he received his first PPL and began cultivating marihuana at his residence. Since that time he has moved twice and claims to have spent thousands of dollars to renovate his current basement to accommodate the cultivation of marihuana indoors. This included professional wiring, insulation, venting, painting, plumbing and the purchase of growing equipment to facilitate the production of marihuana. In addition, he has purchased motion detectors, carbon dioxide and smoke alarms, and has a tall fence at his property line.

21 Mr. Allard ingests his marihuana through various means. Based on his current means of production, this rate of consumption costs approximately $200-$300 per month. In addition, he estimates that the financial cost of setting up the production sites at his three residences to be approximately $35,000.

22 Mr. Allard estimates that to maintain his current dosage through an LP at a cost of $8-10 per gram would cost approximately $6,000 per month, and $3,000 at a cost of $5 per gram. In either event, it is more than his monthly income either now or upon his retirement, and these costs are not eligible for assistance under any health care plan. Given these increased costs, Mr. Allard fears that he may have to risk imprisonment by continuing to produce marihuana or procuring it through the illicit market.

23 Mr. Allard further notes that he has been able to identify strains of marihuana which are specific to his medical needs and continues to experiment with other strains that alleviate his symptoms in an effective way, as some strains exacerbate his symptoms. He states that the strains he requires may not be available through an LP, and if he needed to resort to the black market, he would have no guarantees as to the quality or safety of the product.

II. Tanya Beemish and David Hebert

24 Ms. Beemish and Mr. Hebert are a common law couple who reside in Surrey, British Columbia. Ms. Beemish is 27 years old and Mr. Hebert is 32. Ms. Beemish was employed as a barista until June, 2012, when she went on sick leave. Since December, 2012, she has received a Canada Pension Plan disability pension of $596.73 monthly. She suffers from type one diabetes and gastroparesis.

25 On January 4, 2013, Ms. Beemish received an ATP to alleviate her symptoms of extreme nausea, vomiting, pain, lack of appetite, and insomnia. She uses a daily dose of 2-10 grams which she ingests via smoking or vaporizing. Her ATP, which authorized her to possess 150 grams, expired on January 4, 2014.

26 Mr. Hebert is the Health Canada approved designated grower for Ms. Beemish. He is employed as an Environmental Protection Officer. His DPL allowed him to produce 25 plants indoors and store 1125 grams of marihuana at the production site. He produced the marihuana for Ms. Beemish in a secure room attached to their townhouse garage, which was ventilated, and had mold controls and fire alarms. While his DPL expired on January 4, 2014, he was unable to legally produce marihuana as of October 30, 2013, when he moved residences and was unable to renew his DPL.

27 Mr. Hebert estimates that the cost to produce the marihuana was approximately $0.50 per gram, exclusive of capital costs to create his production facility. Both Mr. Hebert and Ms. Beemish state that costs of $8-12 dollars for marihuana produced by an LP is beyond what is affordable, noting that even a cost of $5 per gram is a tenfold increase in what it costs Mr. Hebert to produce marihuana for Ms. Beemish. They fear that they will have to turn to the black market to find affordable marihuana, with no guarantees as to the quality and safety of the product.

III. Shawn Davey

28 Mr. Davey is 37 years old and resides in Abbotsford, British Columbia. Mr. Davey was employed building custom vehicles until June 16, 2000, when he was involved in a motor vehicle accident in which he suffered a serious brain injury. As a result of an insurance settlement and his Canada Pension Plan Disability pension, his monthly income is approximately $5,000.

29 Following his accident, Mr. Davey was prescribed various medications for the next six years to deal with chronic pain as a result of his accident. These medications cost him $3,000 per month. He began using marihuana and found it effectively dealt with his symptoms and allowed him to stop using other medications. Starting in 2007, he began receiving marihuana through a designated grower. However, this grower was unable to consistently provide a safe supply of high quality. After switching designated growers and encountering similar problems, he decided to produce his own marihuana. He currently possesses an ATP, which authorizes him to possess 750 grams at any time. He also possess a PPL, which authorizes him to produce 122 plants indoors and store 5,490 grams at the site of production. These licences expire on March 31, 2014.

30 His production facility is on an outbuilding on his property. He can produce his marihuana at a cost between $1 and $2 per gram, and he uses approximately 25 grams per day, for a cost of between $750 and $1,500 per month, less than the $3,000 he spent on pharmaceutical medications prior to when he began using medical marihuana.

31 Mr. Davey is concerned about the effectiveness and quality of the marihuana produced by an LP, given his negative experience with previous designated growers and because his marihuana needs require a 12-18% tetrahydrocannabinol [THC] content to alleviate his symptoms. He also is worried about the increased cost, given that, at his current rate of consumption, he would consume approximately $6,000 per month at a price of $8 per gram. He worries about having to resort to the black market as a result of these regulatory changes.

C. Supporting Affidavit Evidence

I. Applicants' Supporting Affidavits

(1) Zachary Walsh

32 Dr. Walsh is an Assistant Professor in the Department of Psychology at the University of British Columbia.

33 Dr. Walsh details his research relating to access to and reasons for the therapeutic use of marihuana in Canada. He includes two articles that he has prepared for the *International Journal of Drug Policy*; one published, and one awaiting publication.

34 Dr. Walsh notes that approximately 1 million Canadians reported using marihuana to treat self-defined medical conditions. However, as of December, 2012, only 28,115 Canadians had a valid ATP.

35 Dr. Walsh also refers to research showing that more than half of respondents in studies stated that financial considerations impacted whether they were able to buy a sufficient amount of marihuana to address their therapeutic needs. For example, 54% of respondents reported they were sometimes, or never, able to afford to buy sufficient quantities of marihuana to relieve their symptoms. Approximately one-third reported that they often or always choose between marihuana and other necessities, such as food or other medicines, because of a lack of money. In his opinion, this demonstrates that the affordability of marihuana for therapeutic purposes remains a significant barrier for many Canadians and especially the most seriously ill.

36 Dr. Walsh concludes by arguing that the MMPR, even by the government's cost-benefit analysis, will involve a significant price increase which will impact the ability of patients to obtain marihuana for therapeutic purposes.

(2) Susan Boyd

37 Dr. Susan Boyd is a Professor in the Faculty of Human and Social Development at the University of Victoria. Her areas of study include drug law and policy, and she is the co-author of the book "Killer Weed: Marihuana Grow Ops, Media and Justice."

38 Dr. Boyd notes that the overall crime rate in 2010 has fallen in both its volume and severity since the 1970s. She also criticizes a review study by Darryl Plecas of the University of the Fraser Valley [Plecas report]. She notes that while that report purports to link grow operations with violence, 89% of the grow operations referred to did not have firearms or other weapons or hazards present. Only 6% had firearms on site — only slightly higher than the 5.5% of the Canadian population who hold such licences.

39 Dr. Boyd also criticizes the risk of fire from indoor marihuana grow operations as stated in the Plecas report. She claims that the proportion of fires relating to grow operations was exaggerated. In contrast to the 3.5% in 2001, 3.7% in 2002, and 4.7% in 2003, only 1.21%, 1.02% and 1.3%, respectively, were reported in the *Annual Statistical Fire Report*. Similarly, the Plecas report's claims about the dangers in booby-trapped grow operations were exaggerated: only 2.1% of grow operations contained such hazards.

40 Dr. Boyd argues that safety of PPL and DPL sites can be corrected by having better guidelines, education and monitoring of marihuana production facilities, something that Health Canada has failed to do.

41 Dr. Boyd concludes that newspaper coverage has created a persistent link between mold, fire and other property damage in a way that is not supported by any statistical reality.

II. Respondent's Supporting Affidavits

(1) Cpl. Shane Holmquist

42 Corporal Holmquist (acting) has been a member of the RCMP since April, 2005. He is seconded to the Federal Serious Organized Crime Section on the Coordinated Marihuana Enforcement Team, which investigates marihuana grow operations, among other tasks. He has also provided training to Health Canada Inspectors, Drug Investigators in Canada, and law enforcement personnel in the United States regarding the production and trafficking of marihuana. In addition, he is the Provincial RCMP MMPR Coordinator for British Columbia, which involves him in the application process for approving LPs.

43 Cpl. Holmquist noted that as of October, 2013, there were 25,809 PPLs and 4,231 DPLs validly held in Canada.

44 Cpl. Holmquist has attended numerous MMAR grow operations where "monster plants" are grown and more marihuana is produced than the licences allow. While this excess marihuana is supposed to be destroyed, Cpl. Holmquist expressed his opinion that this rarely happens.

45 He also has seen that MMAR licences are used to disguise commercial-scale grow-operations. He gave an example from 2013, when he discovered a barn which had a licence under the MMAR, but 25 individuals were involved in packaging marihuana in preparation for trafficking. He supports this example with reference to an April, 2009, RCMP Criminal Intelligence Brief entitled "A Review of Cases Related to the Medical Marihuana Access Regulations," which found 70 licensing violations and 40 instances where those violations involved trafficking excess marihuana for profit. He opines that the sale of excess marihuana is necessitated by the high cost of electricity that the indoor production of marihuana entails. Cpl. Holmquist suggests that selling this excess marihuana often involves collaboration with organized crime.

46 Cpl. Holmquist also expresses concerns about the terms of an individual's ATP. In particular, he notes that trafficking may be facilitated by the fact that an ATP can authorize a 30-day supply of marihuana on the holder's person. This can effectively shield a trafficker, holding a valid ATP, from police scrutiny.

47 With regard to health and safety, Cpl. Holmquist has witnessed the presence of mold and other chemical contaminations at marihuana grow operations. Further, he notes that a residence which includes a marihuana grow operation has a 24 times greater risk of a fire than one without, given the extensive lighting systems needed to grow marihuana indoors, the use of carbon dioxide generators, and the extraction process involved in producing marihuana oil. Because of the concealed and controlled nature of many grow operations, it makes it difficult for individuals to escape in the event of fire, or for emergency workers to adequately and safely respond in the event of an emergency. He also notes that injuries can occur to marihuana growers from touching lighting systems and slipping on excess water.

48 Cpl. Holmquist pointed to an RCMP Criminal Intelligence Brief entitled "Marihuana Grow Operations and Related Violence in Canada," dated April, 2012, which states that "grow-rips," or theft of medical marihuana, is becoming increasingly common. These grow-rips often are violent and involve the use of weapons. To prevent grow-rips, growers may arm themselves, thereby increasing the risk of injury to bystanders.

49 Cpl. Holmquist also gives his opinion that various marihuana-products, such as marihuana-infused candy suckers, could be ingested by children living at a grow operation location.

50 Cpl. Holmquist contrasts the above with his experience being involved with MMPR applications, which have strict growing, security, and packaging standards that serve to address his concerns with the MMAR.

(2) Paul Grootendorst

51 Dr. Grootendorst is an Associate Professor in the Faculty of Pharmacy at the University of Toronto. His research focuses on health economics. He has provided an expert report with respect to projected marketplace trends under the MMPR and the impacts on LPs if medical marihuana users were not required to purchase medical marihuana from an LP or Health Canada.

52 Dr. Grootendorst's opinion with respect to the first issue is that the price of legal, commercially-sourced medical marihuana will decline over time, so long as the market of users grows sufficiently large over time. Dr. Grootendorst opines that it will.

53 With regard to the second issue, Dr. Grootendorst opines that if medical marihuana users are exempt from the requirement to purchase their marihuana from LPs or Health Canada, then the size of the medical marihuana market will be smaller. He hypothesizes that three possible scenarios will result. The first is that prices of marihuana will decline, but at a slower rate than they would if users were required to buy from LPs. The second is that prices of medical marihuana will increase over time. The third is that eventually no LPs will exist to produce medical marihuana. Dr. Grootendorst does not express an opinion as to the likelihood of these three scenarios.

(3) Jeannine Ritchot

54 Ms. Ritchot is the former Director of Medical Marihuana Regulatory Reform from 2011-2013 at Health Canada. Prior to that, she was the Director of the Bureau of Medical Cannabis, Office of Controlled Substances, Controlled Substances and

Tobacco Directorate, at Health Canada from 2010-2011. Through these positions she oversaw the administration of the MMAR and conducted policy development of the MMPR.

55 Ms. Ritchot notes that the goals of the MMAR regime were to strike a balance between providing legal access to marihuana for medical purposes while controlling access to a controlled substance, to respect existing federal legislation such as the CDSA, and to protect the individual and public health, security and safety of all Canadians. She opines that the rapid expansion of those licensed to possess marihuana under the MMAR, from 477 in 2002 to 37,884 in January, 2014, has compromised the initial goals of the program. In addition, she notes that as of December 3, 2013, the average number of plants licensed for indoor growth was 101, the average number of plants licensed for outdoor growth was 11, and the average daily dosage is 17.7 grams per day. Despite this, the average amount of marihuana used by those being supplied by Health Canada was between 1 and 3 grams.

56 Some of the consequences of the rapid expansion of the program has meant that a large amount of marihuana is being produced in private residences and that Health Canada does not have the resources necessary to conduct compliance and enforcement activities. In addition, Health Canada's program to supply marihuana to patients cost $16.8 million for the three years ending on March 31, 2013. Finally, Health Canada has received solicited and unsolicited feedback from municipalities and first responders, homeowners, and program participants about unanticipated problems with the MMAR regime. These include violence, presence of firearms, diversion to the illicit market, production over the limits authorized, the presence of mold, fire and electrical hazards, toxic chemicals, the emission of noxious odours, and various risks to children living in or near the residential growing operations.

57 Ms. Ritchot also describes the consultations which took place with regard to the MMPR and in particular, law enforcement representatives who submitted feedback were unanimous that the use of PPLs and DPLs should be discontinued.

58 Ms. Ritchot describes the purposes of the new MMPR as including: increasing individual and public health, safety and security; treating marihuana as much like other medicinal drugs as possible; facilitating access to multiple strains; returning Health Canada to its traditional role as regulator; and creating a stricter regulated business environment for the production of marihuana.

(4) Todd Cain

59 Mr. Cain is the Executive Director of Market Development for the Healthy Environments and Consumer Safety Branch of Health Canada. His responsibilities include supporting the transition from the MMAR to the MMPR and resolving issues in the development of a stable supply base for medical marihuana by LPs.

60 Mr. Cain states that as part of the transition strategy to the MMPR, Health Canada has been developing means by which a stable and continuous supply of marihuana can be assured. One of the key mechanisms to do so has been a publicity campaign to encourage applications from potential LPs. This included partnerships with the private sector, such as the Ontario Greenhouse Vegetable Growers, Flowers Canada Growers, and various provinces and other federal government ministries. This strategy also included preparing guidance documents for the application process and operating a call centre for staff to answer questions from potential applicants.

61 Mr. Cain notes that as of February 4, 2014, Health Canada has received 454 LP applications, 8 of which have been issued, 10 have been withdrawn, 24 have been refused, and the rest are in various stages of review or screening. Mr. Cain estimates that approximately 25 new applications are received each week.

62 As of January 30, 2014, six of the eight approved LPs are ready to register clients. Mr. Cain indicates that the prices range from $5 to $12 per gram, and a number of LPs are offering discounts to as low as $3.00 per gram for low income users. Mr. Cain indicates that LPs have stated that approximately 850kg of marihuana will be available for medicinal use as of March 31, 2014. In addition, Health Canada has stockpiled between 400-500kg of marihuana from its previous production facility, and has approved import from the Netherlands of over 100kg of marihuana in the case of supply shortfalls. Mr. Cain also indicates that Health Canada took steps to forecast consumer demand in a manner that was risk-adjusted for unforeseen circumstances.

63 Based on these forecasts and the steps taken to manage supply and demand, Mr. Cain states that Health Canada has taken significant steps to ensure reasonable access to quality dried marihuana through the transition period and into the future.

D. Relief Sought at Trial

64 The relief sought by the Applicants at trial can be summarized as follows:

1. A declaration pursuant to subsection 52(1) of the Charter that a constitutionally viable exemption to enable the medical use, by medically approved persons, of cannabis, in any of its effective forms, includes the right of the patient (or a person designated as responsible for the patient), to not only possess and use Cannabis in any of its forms, but also to cultivate or produce and possess Cannabis in any form that is effective for the treatment of the patient's medical condition.

2. A declaration pursuant to subsection 52(1) of the Charter that the MMPR is unconstitutional only to the extent that it unreasonably restricts the section 7 Charter rights of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply, by failing to allow for continued personal or designated production of marihuana, and cannot be saved by section 1.

3. Constitutional declarations pursuant to subsection 52(1) that would address the limitations:

A. On "dried" marihuana in the NCR, MMAR and MMPR;

B. The prohibitions on LPs from producing outdoors or in a dwelling-house; and

C. The 150 gram maximum on the amount a patient may possess and an LP may ship.

4. An Order under subsection 24(1) of the Charter granting a permanent injunction or a permanent constitutional exemption of the same form sought in the interim in this motion, which is described below.

Order Requested

65 An Order under section 24(1) of the Charter is sought in the nature of:

1. An interim constitutional exemption from ss.4, 5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* C.R.C., c. 1041 *(NCR)*, the *MMAR* or the *MMPR*, including those patients who have a caregiver 'person responsible' for them designated to produce for them, including an exemption for that caregiver 'person responsible' designated producer, pending trial of the merits of the action or such further Order of the court as may be necessary;

or, alternatively

2. An interlocutory exemption/injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage, by a patient or designated caregiver 'person responsible for the patient' and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s. 7 constitutional right under the *Charter* pending the decision of this Court on the merits of this action.

Or alternatively, and together with

3. An interim/interlocutory order in the nature of *mandamus* to compel the Defendant to process all applications, renewals and modifications to any licences pursuant to the *MMAR* in accordance with all of its provisions (other than those challenged as unconstitutional herein), notwithstanding ss.230, 233-234, 237-238, 240-243 of the *MMPR* relating to applications under the *MMAR* after September 30th, 2013 as reflected in the amended *MMAR* sections 41-48.

And such further and other relief as the court deems appropriate and just in all of the circumstances.

Issues

66 The issues are as follows:

A. Have the Applicants met the requirements for an interlocutory injunction?

B. Given the Applicants meet the requirements for an interlocutory injunction, what is the appropriate relief to grant?

i. Should the Applicants be granted either an interim constitutional exemption from the CDSA, or alternatively an interlocutory exemption/injunction preserving the MMAR, together with an Order in the nature of *mandamus* to compel continuation of the program, pending trial?

ii. Ought the Applicants be exempt from the undertaking requirement in subsection 373(2) of the Rules?

Analysis

A. Have the Applicants Met the Requirements for an Interlocutory Injunction?

67 The parties agree that the test for obtaining injunctive relief is the tri-partite test established in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at paras 33-36 [*Metropolitan* Stores] and affirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para 43 [*RJR-MacDonald*].

68 The Applicants argue that it is well-established that this test may apply in the context of constitutional litigation. In particular, the Applicants notes that there is no presumption that legislation is constitutional, and for a court to insist that all legislation is enforced until it is struck down might undermine the spirit of the Charter and encourage a government to unduly prolong final resolution of the dispute at issue (*RJR-MacDonald* at para 39). In addition, the Applicants specify that injunctions are available to rectify invalid legislation, as is the case here, not just for prohibited conduct (*Khadr (Next Friend of) v. Canada*, 2005 FC 1076 (F.C.)).

69 The Respondent argues that courts have held that interlocutory injunctive relief against the crown should be exercised sparingly (*Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205 (B.C. S.C.) at para 69), as it effectively usurps the legislative and executive roles of government.

I. Is There a Serious Issue to be Tried?

70 Based on the evidence before me, I find that the Applicants have established a serious issue to be tried.

71 The decision in *RJR-MacDonald*, describes the first step of the tri-partite test at paras 49-50:

> 49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case (...)
>
> 50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

72 *RJR-MacDonald* at para 48 points out the particular difficulty in conducting a detailed analysis at the interlocutory stage of Charter litigation:

> ...Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted (...)

73 The Respondent concedes that the Applicants have satisfied this prong of the test. However, the Respondent reserves the right to contest the merits of the Applicants' claims at trial — in particular, the Respondent argues that there is no right to a particular drug of choice where reasonable alternatives are available, nor any economic right to low cost or subsidized medication (*Gosselin c. Québec (Procureur général)*, [2002] 4 S.C.R. 429 (S.C.C.) at paras 82-83).

Analysis

74 The Applicants' affidavits establish that the section 7 liberty interests of the Applicants may be infringed given the possession offences of the CDSA, should they continue to produce marihuana as per *Parker* at para 92. Their liberty interest may also be infringed by virtue of their right to make fundamental life choices regarding their health (*Parker* at para 92), as several of the affiants testified to their concern regarding the effectiveness and safety of the marihuana offered by LPs. The Court in *Parker* at para 107 also held that the state action which has the likely effect of impairing a person's health by forcing them to chose between healthcare and imprisonment, engages the section 7 right to security of the person. Here, several affiants testified to a similar effect. While these claims may not succeed at trial, they are not frivolous or vexatious. Similarly, the Applicants have a basis to claim that there is a serious issue in that the risk to their security and/or liberty interest is not in accordance with the principles of fundamental justice.

II. Are the Applicants likely to suffer irreparable harm?

75 The Applicants rely on *RJR-MacDonald*, at paras 58-59, to define the second stage of the tri-partite test (para 58 affirmed in *Human Rights Institute of Canada v. Goldie* (1999), [2000] 1 F.C. 475 (Fed. T.D.) at para 13):

> 58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> 59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other (...)

76 In *El-Timani v. Canada Life Assurance Co.*, [2001] O.J. No. 2648 (Ont. S.C.J.) at para 9, the court recognized that "impoverishment, social stigma and the loss of dignity associated with severe poverty can constitute irreparable harm...the loss of enjoyment of life resulting from a subsistence level existence pending trial is not calculable in money." In *Simon v. Canada (Attorney General)*, 2012 FC 387 (F.C.) at para 79 [*Elsipogtog* (FC)], (upheld on appeal in *Simon v. Canada (Attorney General)*, 2012 FCA 312 (F.C.A.) at paras 37-38) [*Elsipogtog* (FCA)]) the court also held that sudden poverty could lead to emotional and psychological stress that could amount to irreparable harm for some individuals, and also that harm of this nature should not be taken lightly. Similarly, in *Ausman v. Equitable Life Insurance Co. of Canada*, [2002] O.J. No. 3066 (Ont. S.C.J.) at para 52 [*Ausman*], the court found that "The long term effect of the loss of security and the impoverished lifestyle constitutes more than the loss of money. It constitutes irreparable harm."

77 In this case, the Applicants argues that they will suffer irreparable harm in the form of loss of enjoyment of life and avoidable suffering because of the failure of the MMPR to accommodate individual patients of meagre means who:

> A. Cannot afford the rate charged by licensed providers;
>
> B. Will no longer be able to produce their own medicine at an affordable cost;
>
> C. Will be unable to ensure a sufficient supply of safe, high-quality product of the most suitable type for each patient's needs; and

D. Will no longer be able to purchase forms of marihuana other than "dried marihuana" which have proven most effective at treating their respective particular illnesses.

78 It is conceded that an increase in the cost of marihuana alone is not a basis to find irreparable harm. Rather, the cost of marihuana must be such that it puts the Applicants in a position where they are either unable to reasonably access the marihuana necessary to meet their medical needs, be otherwise severely impoverished, or endanger their liberty by forcing them to rely on the illicit market or continue personal production.

79 The Applicants also argue that harm is more "irreparable" in Charter cases because of the particular difficulty of receiving damages in Charter cases (*Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405 (S.C.C.) at paras 78-80 [*Mackin*]; *143471 Canada Inc. c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.)).

80 The Respondent argues that the Applicants have failed to establish that they will suffer irreparable harm because they have only offered speculative evidence as to the impact of the MMPR (*D. (P.) v. British Columbia*, 2010 BCSC 290 (B.C. S.C.) at para 130). Irreparable harm must not simply be "likely" to occur (*Canada (Attorney General) v. United States Steel Corp.*, 2010 FCA 200 (F.C.A.) at para 7; *I.L.W.U. v. Canada (Attorney General)*, 2008 FCA 3 (F.C.A.) at para 25 [*International Longshore*]), nor can general assertions establish irreparable harm (*Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 (F.C.A.) at paras 15, 18). The Respondent argues that this requirement arises in the context of constitutional litigation as well (*International Longshore*; *Groupe Archambault Inc. c. CMRRA/SODRAC Inc.*, 2005 FCA 330 (F.C.A.) at paras 15-16).

81 The Respondent states that the harm alleged by the Applicants is speculative for three reasons:

i. Speculation about the Inability to Afford Marihuana for Medical Purposes

82 The Respondent states that the Applicants' assertions that they cannot afford marihuana are unsupported, as the Applicants do not provide specific evidence regarding their current financial situations, nor do they explain why they apparently can afford to produce marihuana but not to buy it. The Respondent highlights qualifying language used in the affidavits of the Applicants, such as "estimated" and "approximately," to demonstrate the speculative nature of the Applicants' claims of irreparable harm.

83 The Respondent refers to the evidence of Dr. Grootendorst, who states that the cost of purchasing marihuana from an LP will decline over time due to the normal operation of the marketplace and a presumed growth in the number of medical marihuana users. Furthermore, the Respondent argues that the evidence submitted shows that black market prices are higher than LP prices, and that Dr. Grootendorst has suggested that the federal government will likely subsidize the cost of medical marihuana in the future.

ii. Speculation about a Lack of Supply

84 The Respondent also disputes the argument by the Applicants that they will not have access to appropriate marihuana strains or that the strains available will be of low quality. The Respondent argues that this is speculation, as Dr. Grootendorst's affidavit suggests that the MMPR will facilitate the development of a wide variety of strains.

85 Further, the Respondent notes that there is no scientific basis to support the Applicants' claims that they need a particular strain or THC content to meet their medical needs, or that they have sampled marihuana from an LP and deemed it unacceptable.

iii. Speculation about the Effect of Limits on Personal Production

86 The Respondent also argues that the Applicants' concerns regarding the limits on personal possession under the MMPR are unfounded. The new limit of 150 grams limit was based on an average use of 1-3 grams per day of medicinal marihuana by those being supplied by Health Canada and reflects appropriate dosage amounts identified in scientific literature.

Analysis

87 As stated above, the harm alleged must not be hypothetical or speculative. It cannot be comprised of generalized assertions, unsupported by evidence and it must be real and substantial. However, harm that will occur in the future does not necessarily mean the harm is speculative. Instead, it is "...the likelihood of harm, not its futurity, which is the touchstone" (*Horii v. R.*, [1991] F.C.J. No. 984 (Fed. C.A.) at para 13).

88 Paragraph 59 in *RJR-MacDonald* also alludes to a wrinkle in interlocutory injunctions in the context of this motion. The ability to compensate in damages, a traditional measure of what constitutes reparable harm, is complicated in constitutional cases, as damages are presumptively unavailable against the government for enacting unconstitutional legislation in the absence of bad faith or an abuse of power (*Mackin* at paras 78-80). I consider the Applicants' citation of *RJR-MacDonald* at para 61 to be apt:

> ...it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

89 Turning to the evidence, I agree with the Respondent that there is inadequate evidence to show that there will be an insufficient supply of marihuana under the MMPR. Mr. Cain details in his affidavit the steps that Health Canada has taken to forecast consumer demand and the various contingencies put in place to deal with a shortfall, including stockpiling marihuana and arranging for imports, if necessary. The Applicants' argument with regard to supply amount to nothing more than speculative assertions.

90 I am also not convinced that the Applicants have met their burden with regard to whether LPs will offer the particular strains necessary to meet their medical needs. While I am sympathetic to the trial and error approach to growing various strains that have apparently served the health interests of medical marihuana users, their affidavits do not provide sufficient evidence that the strains offered by the approved LPs thus far will be inappropriate for their medical needs. I agree with the Respondent that their claims amount to a speculative argument, albeit perhaps a well-founded one.

91 The Applicants also have failed to prove that the 150 gram personal possession limit imposed by the MMPR would constitute irreparable harm.

92 However, I find that the Applicants have provided sufficient evidence to show that they will be unable to afford marihuana produced by LPs as of March 31, 2014, and that this inability will likely affect either their health, endanger their liberty, or severely impoverish them.

93 All the Applicants save for Mr. Hebert gave evidence of their monthly income and the amount necessary to produce marihuana for their medical needs. I accept the evidence of the Applicants that they are producing marihuana at a cost of between $0.50 and $2.00 per gram, as well as the evidence of their monthly incomes. I find that under the MMAR, their cost of production in conjunction with their daily rate of consumption and their monthly income, allows them to live within their means.

94 The Applicants argue that they will be faced with typical costs somewhere between $8-12 per gram under the MMPR. Mr. Davey and Mr. Allard gave examples of how, at their daily rate of consumption, the cost of obtaining sufficient marihuana would exceed their current incomes. While Mr. Cain states that as of January 30, 2014, prices offered by LPs range from $5-$12 per gram, with some discounts offered to $3 per gram, I find the preponderance of the evidence shows that a price between $8 and $12 per gram will more realistically be the norm. Given this evidence, and the evidence of their monthly incomes, the cost to the Applicants of obtaining marihuana from an LP would exceed their incomes or consume an unacceptably large portion of it. I find that this would either leave them unable to legally access marihuana for medical purposes in accordance with their physician's authorization, or without the financial means to provide for themselves otherwise.

95 The Respondent argues that the Applicants' reliance on the LP prices is speculation. I do not agree. It is the only evidence available on what the price of marihuana from an LP will be as of March 31, 2014, and given its source I consider it to be reliable. The Respondent also argues that the evidence of Dr. Grootendorst establishes that the price of marihuana will decline over time as a result of increased competition and growth in the number of registered clients. This may well be. However, it is far

from certain and it is a long-term forecast. Likewise, any argument that the government may at some point in the future develop a subsidy program to assist low-income users is mere conjecture. Indeed, it is telling that the government's own *Regulatory Impact Analysis Statement* for the MMPR acknowledges a substantial price impact on consumers of medical marihuana:

> The main economic cost associated with the MMPR will arise from the loss to consumers who may have to pay a higher price for dried marihuana. The analysis assumes a price increase from an estimated $1.80/g to $5.00/g in the status quo to about $7.60/g in 2014, rising to about $8.80/g, with a corresponding average annualized loss to consumers (in consumer surplus terms) due to higher prices of approximately — $166.1M per year for 10 years.

96 Given the difficulties in receiving damages in constitutional cases as described in *Mackin* and *RJR-MacDonald* and the findings of irreparable harm in *Ausman*, *El-Timani* and *Elsipogtog* (FC and FCA), which were based on the effects of severe and immediate financial hardship to the applicants, I find that the Applicants in the instant motion would suffer irreparable harm that could not be remedied if this injunction were not granted.

III. Does the Balance of Convenience lie with the Applicants?

97 As a preliminary matter, the balance of convenience test has often been cited in relation to the desirability of maintaining the status quo with respect to the issues underlying the conflict between the parties. However, this concept has less merit in the context of Charter cases, given that the purpose of Charter litigation is often to disrupt the status quo (*RJR-MacDonald* at para 75). Additionally, the fluidity of the status quo in many cases leads to imprecision in defining it at any point in time. This is evident in this case by the fact that both the Applicants and Respondents make arguments advocating that their respective versions of what constitutes the status quo deserve to be maintained. Accordingly, the notion of the status quo is not determinative in assessing the balance of convenience, though it does inform the selection of a remedy.

98 Rather, as per *Metropolitan Stores* at para 56, the court in constitutional cases should focus its balance of convenience analysis on what is in the public interest. *RJR-MacDonald* offers guidance at paras 65-66:

> 65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
>
> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public' in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
>
> 66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

99 *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.) at para 9 [*Harper*], clarifies and expands on *RJR-MacDonald*:

> Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

100 It follows from the above guidance in *Metropolitan Stores*, *RJR-MacDonald* and *Harper*, that there is a strong presumption in favour of legislation enacted by Parliament being in the public interest, but that this presumption is rebuttable if the Applicants can show their injunctive relief would serve a public interest greater than that served by maintaining the challenged legislation. Furthermore, in conducting this analysis, it is not for the court on an interlocutory motion to assess the actual benefits of specific terms of the legislation (*RJR-MacDonald* at para 92; *Harper* at para 10).

101 The Applicants' position is that the Respondent has not offered any concrete evidence of anything more than a possible risk to the health and safety of the public if the full coming into force of the MMPR is delayed. In contrast, the Applicants argue that their position reflects the regulatory status quo, and that this warrants the balance of convenience lying with the Applicants (*Elsipogtog* (FC) at para 80).

102 Moreover, the Applicants also argue that the distinction between "suspension" of and "exemption" from regulations is not material. As in *RJR-MacDonald* at para 33, it is argued that the distinction is irrelevant.

103 The Respondent replies that the public interest in ensuring the applicability and enforceability of validly enacted federal law weighs heavily in assessing the balance of convenience. Only in exceptional cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (*Harper* at para 9). Courts should not order laws passed by a democratically-elected Parliament to be inoperable in advance of a complete constitutional review (*Harper at para 9; RJR-MacDonald* at para 48).

104 Further, the onus on the government to demonstrate harm to the public interest is less than what is required of a private applicant (*RJR-MacDonald* at paras 68, 71 and 80). When assessing the public interest, a court need not assess the actual benefits that would result from the specific terms of the legislation at issue at the motions stage; rather, the party challenging the legislation must prove a more compelling interest (*RJR-MacDonald* at para 92; *Harper* at para 9).

105 Moreover, the Respondent submits that the Minister of Health is charged with promoting and protecting the public interest, including public health and safety, and the MMPR was enacted pursuant to this duty. According to the Respondent, the Applicants' request for an injunction would harm the public interest in three ways:

i. An Injunction Would Pose Serious Harms to the Public Interest

106 The Respondent criticizes the evidence of Dr. Boyd, arguing that it is selectively criticizes evidence which supports the Respondent and does not serve to undermine the extensive consultations conducted by Health Canada in creating this policy, which indicates that PPLs and DPLs have had substantial impacts on the lives of Canadians, nor does it undermine RCMP reports and Criminal Intelligence Briefs on the MMAR that are before this Court. Moreover, Cpl. Holmquist has given evidence based on his firsthand experience with grow operations in his role with the RCMP.

107 The Respondent notes six negative effects of the MMAR regime:

(1) Diversion

108 Police investigations have revealed numerous criminal abuses of the MMAR program, including production over the legal limit, the production and trafficking of marihuana for personal gain by those with an ATP or PPL/DPL, and the exploitation of this scheme by organized crime. These issues have been highlighted by several law enforcement agencies.

(2) Home Invasion and Theft

109 Those authorized to produce marihuana under the MMAR expose residents and their neighbours to the risk of violent grow-rips by criminals who become aware of the grow operations within. Grow-rips have occurred with increasing frequency; from two in 2007 to eighteen in 2010. Correspondence from the public speaks to the fear and stress of neighbours to individuals licensed to produce under the MMAR. In *Hitzig v. R.*, [2003] O.J. No. 12 (Ont. S.C.J.) at para 167, Mr. Hitzig, who was authorized to produce marihuana, feared grow-rips himself.

(3) Fires and Electrical Hazards

110 Evidence also demonstrates that MMAR grow operations are at a higher risk of fire than a residence without a marihuana grow operation, given that marihuana growing operations require high-powered lights. RCMP research from 2010 noted that the risk of fire was 24 times greater for a marihuana grow operation than for a regular home. Further, Cpl. Holmquist gave evidence that he has seen poor wiring and other fire hazards at MMAR grow operations in the past.

(4) Mold and Toxic Chemicals

111 The presence of marihuana grow operations in residential dwellings also increases the risk of mold due to improper ventilation and other chemical contamination in the home and surrounding neighbourhoods. This is supported by the RCMP reports as well as the evidence of Cpl. Holmquist's experience with grow operations.

(5) Noxious Odours

112 Correspondence was received by Health Canada that criticizes the skunk-like odour emanating from some residences with grow operations.

(6) Risks to Children

113 The RCMP reports that children may live in residences with grow-operations under the current MMAR scheme, and this situation increases access to the drug, potential exposure to illegal activities and the health and safety issues associated with that environment. This is also supported by the affidavit of Cpl. Holmquist.

ii. An Injunction Would Divert Scarce Resources from the MMPR and other Health Canada Programs

114 The Respondent states that the fluidity of what constitutes the "status quo" suggests that it is a meaningless concept with regard to tipping the balance of convenience (*Telus Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 581 (B.C. C.A.) at paras 69-71). Regardless, the Respondent argues that the relief sought by the Applicants would have the effect of requiring Health Canada to hire new employees and otherwise expend resources, as its MMAR-related operations have been wound down. This would divert its resources away from other programs within the mandate of Health Canada.

iii. An Injunction Would Negatively Impact the Newly Created Marketplace

115 The Respondent also notes that the preservation of the MMAR would reduce the size of the market for LPs because the pool of potential customers would be reduced. This could negatively affect the commercial viability of LPs and undermine the implementation of the MMPR.

116 Moreover, the Respondent states that the Applicants have not demonstrated that the public interest would be served by their injunction (*RJR-MacDonald* at para 80). In particular, they have not adduced any evidence to show how the public interest, as opposed to their individual interest, would be served by this court granting the relief sought.

Analysis

117 The Applicants are representative of an identifiable group: medically-approved patients under the MMAR regime. I accept that this group reflects a public interest as was described in *Parker* at para 97: that patients should have legal access to medication reasonably required for the treatment of a medical condition. As discussed above, this group will be irreparably harmed by the effects of the MMPR. For the Respondent, the public interest is embodied by the strong presumption that the MMPR regime will increase individual and public health, safety, and security by reducing abuses and problems associated with the MMAR. This interest includes any negative impact an injunction would have on LPs by reducing the size of their market, and any expenditure necessitated by Health Canada as a result of this injunction.

118 Underlying these competing public interests is a more fundamental question, and one that is the basis for the precedent in *Harper*: the appropriate role of the court in ensuring the rule of law while respecting the role of Parliament to legislate in the public interest.

119 I find that the nature of the irreparable harm that the Applicants will suffer under the MMPR constitutes a "clear case," which outweighs the public interest in wholly maintaining the enacted regulations which are presumed to, among other things, increase the health, safety and security of the public. Likewise, while LPs may be impacted by a diminished customer base prior to a decision in this case being rendered, this evidence is speculative and there is no certainty in terms of time or effect for start-up businesses in a novel market.

120 Accordingly, I find that the balance of convenience lies with the Applicants, in the limited sense that they should have access to medical marihuana through the previous MMAR regime with respect to possession and production in terms that follow.

121 In coming to this conclusion on the balance the convenience, I have considered the nature of the remedy and its proportionality to the irreparable harm suffered by the Applicants. As agreed to by the parties, the period of time until trial is in the range of nine to twelve months, a limited and finite time, and the parties have indicated their amenability to scheduling a trial on the merits as early as possible. This will ensure a speedy resolution of the issues for both parties, and not unduly impact the viability of the MMPR scheme. Furthermore, in crafting the terms of this Order, I have considered the least drastic means available to protect the rights of the Applicants while preserving the will of Parliament.

B. Given the Applicants meet the requirements for an interlocutory injunction, what is the appropriate relief to grant?

I. Should the Applicants be granted either an interim constitutional exemption from the CDSA, or alternatively an interlocutory exemption/injunction preserving the MMAR, together with an Order in the nature of Mandamus to compel continuation of the program, pending trial?

122 The Applicants seek either a constitutional exemption from the provisions of section 4, 5 and 7 of the CDSA for all medically-approved patients and their growers and or an interim injunction preserving the provisions of the MMAR relating to personal production, possession, production location, and storage and suspending the conflicting provisions of the MMPR. In addition to either of these options, they seek a mandatory order in the nature of *mandamus* to compel the Respondent to continue processing licence applications under the MMAR scheme. While it is an issue for trial, the Applicants have not sought relief through this motion with respect to the fact that the form of marihuana in the MMPR and NCR is limited to "dried marihuana."

123 The Respondent's position is that the relief sought by the Applicants is inappropriate, as it would disrupt a transition process from the MMAR to the MMPR as enacted by the government, involve complex legislative redrafting, and usurp the role of Parliament in drafting legislation (*Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42 (S.C.C.) at para 28).

Analysis

124 The first form of relief requested by the Applicants is inappropriate. It would exempt medically-approved patients and their designates from the possession, trafficking, and possession for the purposes of production provisions in the CDSA without

qualification. This is not the intent of the MMAR, which defined the circumstances under which medically-approved patients could possess and grow marihuana and in what quantities. The relief sought would grant them exemption from the provisions of the CDSA without limitation.

125 Likewise, I do not think that granting an order in the nature of *mandamus* is appropriate. While a mandatory order may be more appropriate in an interim setting than declaratory relief, a mandatory order can be imprecise. Furthermore, it is assumed that the government will carry out their duties in a manner consistent with the law, however the law may be impacted by a court order.

126 In effect, the Applicants seek the regulatory scheme as it was under the MMAR and do not object to the provisions of the MMPR that relate to private growers. The way in which this can be accomplished in a manner least intrusive to the legislative sphere is to exempt those who currently hold a valid ATP, who held a valid DPL or PPL as of September 30, 2013, or hold a valid amended or new DPL or PPL that was issued after September 30, 2013, from the repeal of the MMAR and any provisions of the MMPR which are inconsistent with the relevant provisions of the MMAR, pending an expeditious trial and a decision of this case on its merits.

127 In other words, those individuals who are authorized to possess or produce marihuana, as of the relevant dates, may continue to do after March 31, 2014, until their constitutional rights with respect to the MMPR are decided at trial.

128 The terms by which these individuals are so authorized to produce or possess dried marihuana are the terms authorized by their licence, notwithstanding its date of expiry, except that the 150 gram personal possession limit as imposed by section 5(c) of the MMPR shall apply with respect to applicable licences, as I was unconvinced that the Applicants would suffer irreparable harm as a result of the imposition of this limit until trial.

129 I am cognizant that this remedy may, for a limited period of time, have an affect on the size of the market available for LPs. However, this remedy is short in duration, and as such I am convinced that it will not unduly affect the regulations passed by Parliament, while protecting the rights of the Applicants.

II. Ought the Applicants be exempt from the undertaking requirement in subsection 373(2) of the Rules?

130 The Applicants also request an order that they not be bound to the undertaking requirement in section 373(2) of the Rules, on the grounds that they are of modest financial means and bring this motion on a matter of public interest.

131 I think the Applicants ought not to be forced to sign an undertaking with respect to damages in the event they succeed on this motion yet are unsuccessful at trial. While an undertaking in Charter cases was held to be an important consideration in the balance of convenience test in *Lac La Biche (Town) v. Alberta*, [1993] A.J. No. 263 (Alta. C.A.), I do not believe that it would be appropriate to require an undertaking in this case.

Order

THIS COURT ORDERS that

1. The Applicants who, as of the date of this Order, hold a valid Authorization to Possess pursuant to section 11 of the *Marihuana Medical Access Regulations*, are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which are inconsistent with the operation of the *Marihuana Medical Access Regulations*, to the extent that such an Authorization to Possess shall remain valid until such time as a decision in this case is rendered and subject to the terms in paragraph 2 of this Order;

2. The terms of the exemption for the Applicants holding a valid Authorization to Possess pursuant to section 11 of the *Marihuana Medical Access Regulations* shall be in accordance with the terms of the valid Authorization to Possess held by that Applicant as of the date of this Order, notwithstanding the expiry date stated on that Authorization to Possess, except that the maximum quantity of dried marihuana authorized for possession shall be that which is specified by their licence or 150 grams, whichever is less;

3. The Applicants who held, as of September 30, 2013, or were issued thereafter a valid Personal-use Production Licence pursuant to section 24 of the *Marihuana Medical Access Regulations*, or a Designated-person Production Licence pursuant to section 34 of the *Marihuana Medical Access Regulations*, are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which is inconsistent with the operation of the *Marihuana Medical Access Regulations*, to the extent that the Designated-person Production Licence or Personal-use Production Licence held by the Applicant shall remain valid until such time as a decision in this case is rendered at trial and subject to the terms of paragraph 4 of this Order;

4. The terms of the exemption for an Applicant who held, as of September 30, 2013, or was issued thereafter a valid Personal-use Production Licence pursuant to section 24 of the *Marihuana Medical Access Regulations* or a Designated-person Production Licence pursuant to section 34 of the *Marihuana Medical Access Regulations*, shall be in accordance with the terms of their licence, notwithstanding the expiry date stated on that licence;

5. Scheduling directions shall be issued after consultation with counsel for the parties with the view of fixing a trial date as soon as practicable;

6. The Applicants are not bound by an undertaking pursuant to r 373(2) of the *Federal Court Rules;* and

7. The parties shall bear their own costs.

Motion granted in part.

Annex A — Relevant Legislation

Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Marihuana for Medical Access Regulations, SOR/2001-227

11. (1) Subject to section 12, if the requirements of sections 4 to 10 are met, the Minister shall issue to the applicant an authorization to possess for the medical purpose mentioned in the application, and shall provide notice of the authorization to the medical practitioner who made the medical declaration under paragraph 4(2)(*b*).

(2) The authorization shall indicate

(a) the name, date of birth and gender of the holder of the authorization;

(b) the full address of the place where the holder ordinarily resides;

(c) the authorization number;

(d) the name of the medical practitioner who made the medical declaration under paragraph 4(2)(*b*);

(e) the maximum quantity of dried marihuana, in grams, that the holder may possess at any time;

(f) the date of issue;

(g) the date of expiry; and

(h) the reference date referred to in section 13.1.

(3) The maximum quantity of dried marihuana referred to in paragraph (2)(*e*) or resulting from an amendment under subsection 20(1) is the amount determined according to the following formula:

A × 30

where A

is the daily amount of dried marihuana, in grams, stated under paragraph 6(1)(*c*) or subparagraph 19(2)(*d*)(i), whichever applies.

24. The holder of a personal-use production licence is authorized to produce and keep marihuana, in accordance with the licence, for the medical purpose of the holder.

25. (1) Subject to subsection (2), a person is eligible to be issued a personal-use production licence only if the person is an individual who ordinarily resides in Canada and who has reached 18 years of age.

(2) If a personal-use production licence is revoked under paragraph 63(2)(*b*), the person who was the holder of the licence is ineligible to be issued another personal-use production licence during the period of 10 years after the revocation, SOR/2007-207, s. 4(E).

40. (1) Subject to section 41, if the requirements of sections 37 to 39 are met, the Minister shall issue a designated-person production licence to the designated person.

(2) The licence shall indicate

(a) the name, date of birth and gender of the holder of the licence;

(b) the name, date of birth and gender of the person for whom the holder of the licence is authorized to produce marihuana and the full address of that person's place of ordinary residence;

(c) the full address of the place where the holder of the licence ordinarily resides;

(d) the licence number;

(e) the full address of the site where the production of marihuana is authorized;

(f) the authorized production area;

(g) the maximum number of marihuana plants that may be under production at the production site at any time;

(h) the full address of the site where the dried marihuana may be kept;

(i) the maximum quantity of dried marihuana, in grams, that may be kept at the site authorized under paragraph (*h*) at any time;

(j) the date of issue; and

(k) the date of expiry.

34. (1) The holder of a designated-person production licence is authorized, in accordance with the licence,

(a) to produce marihuana for the medical purpose of the person who applied for the licence;

(b) to possess and keep, for the purpose mentioned in paragraph (*a*), a quantity of dried marihuana not exceeding the maximum quantity specified in the licence;

(c) if the production site specified in the licence is different from the site where dried marihuana may be kept, to transport directly from the first to the second site a quantity of dried marihuana not exceeding the maximum quantity that may be kept under the licence;

(d) subject to subsection (1.1), if the site specified in the licence where dried marihuana may be kept is different from the place where the person who applied for the licence ordinarily resides, to send or transport directly from that site to the place of residence a quantity of dried marihuana not exceeding the maximum quantity specified in the authorization to possess on the basis of which the licence was issued; and

(e) to provide or deliver to the person who applied for the licence a quantity of dried marihuana not exceeding the maximum quantity specified in the authorization to possess on the basis of which the licence was issued.

(1.1) A holder of a designated-person production licence sending dried marihuana under paragraph (1)(*d*) shall

(a) securely pack the marihuana in a package that

(i) will not open or permit the escape of its contents during handling and transportation,

(ii) is sealed so that the package cannot be opened without the seal being broken,

(iii) prevents the escape of odour associated with the marihuana, and

(iv) prevents the contents from being identified without the package being opened; and

(b) use a method of sending that involves

(i) a means of tracking the package during transit,

(ii) obtaining a signed acknowledgment of receipt, and

(iii) safekeeping of the package during transit.

53. If the production area for a licence to produce permits the production of marihuana entirely outdoors or partly indoors and partly outdoors, the holder shall not produce marihuana outdoors if the production site is adjacent to a school, public playground, day care facility or other public place frequented mainly by persons under 18 years of age.

Narcotic Control Regulations, CRC, c 1041

53. (1) No practitioner shall administer a narcotic to a person or animal, or prescribe, sell or provide a narcotic for a person or animal, except as authorized under this section, the *Marihuana Medical Access Regulations* or the *Marihuana for Medical Purposes Regulations*.

(2) Subject to subsections (3) and (4), a practitioner may administer a narcotic other than dried marihuana to a person or animal, or prescribe, sell or provide it for a person or animal, if

(a) the person or animal is a patient under their professional treatment; and

(b) the narcotic is required for the condition for which the person or animal is receiving treatment.

(3) No practitioner shall administer methadone to a person or animal, or prescribe, sell or provide methadone for a person or animal, unless the practitioner is exempted under section 56 of the Act with respect to methadone.

(4) A practitioner of medicine, dentistry or veterinary medicine shall not administer diacetylmorphine (heroin) to an animal or to a person who is not an in-patient or out-patient of a hospital providing care or treatment to persons, and shall not prescribe, sell or provide diacetylmorphine (heroin) for an animal or such a person.

(5) A health care practitioner may administer dried marihuana to a person or prescribe or transfer it for a person if

(a) the person is a patient under their professional treatment; and

(b) the dried marihuana is required for the condition for which the person is receiving treatment

Marihuana for Medical Purposes Regulations, SOR/2013-119

3(2) The following persons may possess dried marihuana:

(a) a person who has obtained the dried marihuana for their own medical purposes or for those of another person for whom they are responsible

(i) from a licensed producer, in accordance with a medical document,

(ii) from a health care practitioner in the course of treatment for a medical condition, or

(iii) from a hospital, under subsection 65(2.1) of the *Narcotic Control Regulations*;

(b) a person who requires dried marihuana for the practice of their profession as a health care practitioner in the province in which they have that possession; or

(c) a hospital employee, if they possess the dried marihuana for the purposes of and in connection with their employment.

5. An individual who obtains dried marihuana for their own medical purposes or for those of another individual for whom they are responsible must not possess a quantity of dried marihuana that exceeds the least of the following amounts:

(a) in the case of dried marihuana obtained from a licensed producer, 30 times the daily quantity referred to in paragraph 129(1)(*d*);

(b) in the case of dried marihuana obtained from a hospital by or for an out-patient, 30 times the daily quantity referred to in subparagraph 65.2(*c*)(iii) of the *Narcotic Control Regulations*; and

(c) 150 g.

12. (1) Subject to subsections (2) to (7) and to the other provisions of these Regulations, a licensed producer may

(a) possess, produce, sell, provide, ship, deliver, transport and destroy marihuana;

(b) possess and produce cannabis, other than marihuana, solely for the purpose of conducting in vitro testing that is necessary to determine the percentages of cannabinoids in dried marihuana; and

(c) sell, provide, ship, deliver, transport and destroy cannabis, other than marihuana, that was obtained or produced solely for the purpose of conducting the in vitro testing referred to in paragraph (*b*).

13. A licensed producer must not conduct any activity referred to in section 12 at a dwelling place.

14. A licensed producer must produce, package or label marihuana only indoors and at the producer's site.

Annex B — Provisions at Issue

MMPR Provision	*Section of MMAR changed*	*Effect*
230	5(1)(e) of the MMAR	Section 230 changes paragraph 5(1)(e) of the MMAR to reflect the fact that new PPLs/DPLs will not be issued after September 30, 2013.
233	21(2) of the MMAR	Section 233 changes subsection 21(2) of the MMAR to reflect the fact that new PPLs/DPLs will not be issued after September 30, 2013.
234	26(1) of the MMAR	Section 234 changes subsection 26(1) of the MMAR to reflect the fact that no applications for PPLs will be accepted after September 30, 2013.
237	36(1) of the MMAR	Section 237 changes subsection 36(1) of the MMAR to reflect the fact that no applications for DPLs will be accepted after September 30, 2013.
238	41 of the MMAR	Section 238 changes subsection 41 to reflect the fact that the a DPL will be refused by the Minister if it is submitted after September 30, 2013.
240	45 of the MMAR	Section 240 changes section 45 of the MMAR to introduce new provisions which relate to the circumstances under which a PPL or DPL are renewed, with reference to the September 30, 2013 deadline.
241	45 of the MMAR	Section 241 adds additional provisions to section 45 of the MMAR which specify that the location of a production site cannot be changed after December 15, 2013, and only under specific circumstances.
242	46 of the MMAR	Section 242 changes section 46 of the MMAR to reflect the fact that a change in location of the production site will not be granted unless the request is filed on or before September 30, 2013.
243	47 and 48 of the MMAR	Section 243 changes sections 47 and 48 of the MMAR to reflect the fact that the government shall not change the location of a production site, regardless of when it was submitted.

2010 CAF 200, 2010 FCA 200
Federal Court of Appeal

Canada (Attorney General) v. United States Steel Corp.

2010 CarswellNat 2483, 2010 CarswellNat 3104, 2010 CAF 200, 2010 FCA 200, [2010] F.C.J. No. 902, 191 A.C.W.S. (3d) 707, 406 N.R. 297

United States Steel Corporation and U.S. Steel Canada, Appellants and Attorney General of Canada, Respondent

Carolyn Layden-Stevenson J.A.

Heard: July 21, 2010
Judgment: July 23, 2010
Docket: A-242-10

Counsel: Michael Barrack, Marie Henein, Ronald Podolny, for Appellants
John L. Syme, Jeffrey G. Johnston, for Respondent
David Wilson, for Intervener, Lakeside Steel
Paula Turtle, for Intervener, United Steelworkers

***Carolyn Layden-Stevenson J.A.*:**

1 The Attorney General (the Crown) filed an application in the Federal Court (Court File No. T-1162-09) (the T-1162 application) under section 40 of the *Investment Canada Act*, R.S.C. 1985, c. 28 (1st Supp.) (ICA) alleging that United States Steel Corporation and U.S. Steel Canada Inc. (U.S. Steel) had failed to comply with certain undertakings given to the Minister of Industry in connection with U.S. Steel's acquisition of Stelco Inc..

2 U.S. Steel moved to challenge the validity of sections 39 and 40 of the ICA on the basis that they contravened section 11(d) of the *Canadian Charter of Rights and Freedoms* (the Charter) and paragraph 2(e) of the *Canadian Bill of Rights*, R.S.C. 1985 (the Bill of Rights). The T-1162 application was held in abeyance pending the disposition of U.S. Steel's motion.

3 On June 14, 2010 [*Canada (Attorney General) v. United States Steel Corp.*, 2010 CarswellNat 1617 (F.C.)], the Federal Court dismissed U.S. Steel's motion (the validity order). On June 24, 2010, U.S. Steel filed a notice of appeal from the validity order. U.S. Steel now seeks to stay the T-1162 application in the Federal Court pending this Court's disposition of the appeal from the validity order. For the reasons that follow, I conclude that U.S. Steel's motion should be dismissed.

Stay of Proceeding

4 To obtain a stay, U.S. Steel must satisfy all three components of the tri-partite test articulated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) (*RJR*). That is, U.S. Steel must demonstrate that:

(i) a serious issue exists;

(ii) it would suffer irreparable harm is the stay is not granted; and

(iii) the balance of convenience favours the granting of the stay.

Serious Issue

5 The serious issue component imposes a low threshold. It requires only a preliminary assessment of the merits to ensure that the appeal is neither frivolous nor vexatious: *RJR*, pp. 337-338. The Crown conceded that U.S. Steel's appeal of the validity order is not frivolous or vexatious and therefore meets the low threshold. I agree that U.S. Steel's appeal cannot be characterized as frivolous or vexatious, therefore it meets the requisite threshold to establish the existence of a serious issue.

Irreparable Harm

6 *RJR* described the central question regarding irreparable harm as "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": para. 63. Irreparable harm refers to the nature of the harm, not the magnitude. The nature of the harm must be such that it cannot be quantified in monetary terms or cannot be cured: para. 64.

7 The jurisprudence of this Court holds that the party seeking the stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion for a stay is denied. It is not sufficient to demonstrate that irreparable harm is "likely" to be suffered. The alleged irreparable harm may not be simply based on assertions: *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129, 126 N.R. 114 (Fed. C.A.), leave to appeal refused (1991), 39 C.P.R. (3d) v (note), 137 N.R. 391 (note) (S.C.C.); *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34 (Fed. C.A.); *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (Fed. C.A.).

8 U.S. Steel's written memorandum of fact and law focussed on the serious nature of the remedies at issue in the T-1162 application as the basis for the irreparable harm. It submitted that it will be deprived of its right of appeal from the validity order if the stay is not granted. More specifically, it asserted that if the stay is not granted, the validity appeal will be moot because the hearing of the T-1162 application will have proceeded on the basis of a provision and process that is unconstitutional and inconsistent with the Bill of Rights. It also alleged that it will incur significant pecuniary loss and waste considerable legal resources. The last assertion was not pursued at the hearing and I will say no more about it.

9 At the hearing of the motion, U.S. Steel centered its argument on the process, arguing that if it has to proceed on the T-1162 application and produce evidence (which will be required within seven days of the denial of the stay), its constitutional rights will be irreparably harmed. It relies, by analogy, on cases where the production of documents was held to constitute irreparable harm because the right to be accorded protection was one of privacy or confidentiality: *Bisaillon c. R.* (1999), 251 N.R. 225, 99 D.T.C. 5517 (Fr.) (Fed. C.A.) (*Bisaillon*) and *Bining v. R.*, 2003 FCA 286, 4 C.T.C. 165 (Fed. C.A.) (*Bining*).

10 More particularly, U.S. Steel claims that the process under section 40 of the ICA violates the right to know the case it has to meet and to make full answer and defence. It must respond to the Crown's case without having had any opportunity to cross-examine the Crown's witnesses. As U.S. Steel's counsel put it, if a stay of the T-1162 application is not granted, the egg will have already been scrambled.

11 Turning to the evidence, U.S. Steel relied upon the affidavit of its Executive Vice President and Chief Operating Officer, John H. Goodish, sworn June 29, 2010. In addressing the issue of irreparable harm at paragraphs 18 and 19 of his affidavit, Mr. Goodish attested as follows:

> If the relief sought in the pending appeal is granted in whole or in part, it will either dispose of this Application or fundamentally alter the manner in which it proceeds. However, in the absence of a stay, by the time the pending appeal of the [validity] order is decided, the substantive hearing will be nearly, or fully completed. The pending appeal will then be moot. Accordingly, in the absence of a stay, [U.S. Steel] will be effectively deprived of its right to appeal the [validity] order, thus suffering irreparable harm through the loss of an appeal granted as of right under the *Rules*.
>
> In light of the expected deadlines under which the present application will proceed in the absence of a stay, by the time the appeal of the [validity] order is resolved, the issues at its core will become moot.

12 These paragraphs, in my view, constitute a combination of opinion and argument. There is no factual foundation to support the bare and conclusive assertions. There is no specificity regarding the application process, no disclosure as to known or anticipated timelines and no information regarding any expedited deadline. There are no facts contained within the affidavit as it pertains to irreparable harm.

13 Absent evidence of irreparable harm, the second component of *RJR* is not met. Even accepting the submissions of U.S. Steel's counsel (which are not evidence) as to the application process prescribed by the *Federal Courts Rules*, S.O.R/98-106, (the Rules), there is no basis for a finding of irreparable harm. Counsel complained that U.S. Steel does not know the case it has to meet and cannot cross-examine the Crown's witnesses before it has to respond. The Crown's application (filed July 17, 2009) must be supported by an affidavit. U.S. Steel advanced neither evidence nor argument that the Crown's documentation was deficient to the extent that U.S. Steel did not know the case it had to meet, or at all. If such deficiency exists, U.S. Steel ought to have addressed it on this motion.

14 As to cross-examination, it is correct that, under the Rules, in matters proceeding as applications, cross-examination is conducted after the affidavit evidence has been served. Again, there was neither evidence nor argument regarding the nature of the irreparable harm that would result because of this process. Even if this were a situation where irreparable harm was self-evident (and it is not), it must be stated as such.

15 In relation to the allegation of mootness, U.S. Steel's position is that, if the very procedure that is the subject of the appeal is implemented (in the T-1162 application), the appeal as to process is rendered moot. This, it is said, renders any remedy this Court could grant nugatory and accordingly, constitutes irreparable harm.

16 The first difficulty in this respect is, as discussed above, U.S. Steel's failure to explain on this motion what deficiencies exist with respect to the procedure. While counsel spoke of a right to full answer and defence and a right of full disclosure, there was no disclosure of the perceived frailties of the impugned procedure.

17 Second, even if, for the purposes of this motion, I were to accept U.S. Steel's position as correct, it assumes that an appeal rendered moot automatically gives rise to a finding of irreparable harm. That is not so. As Rothstein J.A. (as he then was) explained in *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76 (Fed. C.A.), if such a proposition were adopted, it would apply to virtually all circumstances in which a stay is sought and would essentially deprive the court of the discretion to decide questions of irreparable harm on the facts of each case.

18 Third, I am not persuaded, if the T-1162 application continues and the application is determined before the disposition of the appeal from the validity order (which is speculative at this point) that this Court could not fashion an appropriate remedy. It is not insignificant that U.S. Steel sought declaratory relief in the Federal Court. Specifically, as noted earlier, with respect to section 40 of the ICA, it sought a declaration of invalidity on the basis that it contravened section 11(d) of the Charter and paragraph 2(e) of the Bill of Rights. If U.S. Steel were to succeed on appeal (which is speculative at this point), it would be open to this Court to grant a declaration of invalidity. If that were to occur, and U.S. Steel had been unsuccessful in the T-1162 application (which is speculative at this point), the declaration of invalidity would constitute grounds upon which to set aside the judgment in the T-1162 application.

19 Further, the Crown's point that U.S. Steel's validity attack is premised on only two of the seven options enumerated in paragraph 40(2)(a) of the ICA is well-taken. The prospect exists, if U.S. Steel's appeal were successful (which is speculative at this point) that this Court would sever the offensive elements in which case the Federal Court could still utilize the remaining options, if U.S. Steel were unsuccessful in the T-1162 application (which is speculative at this point).

20 All of which is to say, the only remedy that would be unavailable to this Court would be to retroactively alter the process in the T-1162 application. However, it does not necessarily follow that an appeal from the validity order would be moot. In my view, sufficient options would remain available to this Court to remedy any harm sustained by U.S. Steel. That was not the situation in *Bisaillon* and *Bining* where private information would become public and the breach would be irreversible.

21 U.S. Steel has not established that it would suffer irreparable harm.

Balance of Convenience

22 U.S. Steel argued that the balance of convenience favours it because the constitutional issues are of significant importance and widespread impact and there is no prejudice to the Crown. It claimed that it is in the public interest to have the issues determined with finality and it would be expedient and efficient to do so. Last, it asserted that the violations of the Charter and the Bill of Rights would be perpetrated if a stay is not granted.

23 At the hearing, there was debate as to whether the ICA is a public interest statute. I need not make a determination as to whether it is or is not. It is apparent, on its face, that it has a public interest dimension because it is aimed at encouraging investment, economic growth and employment opportunities for the benefit of Canadians. Additionally, it is aimed at ensuring that proposed investments will not be injurious to national security. This is sufficient, in my view, to bring it within the purview of the comments of the Chief Justice in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.) (*Harper*) that the motions judge must proceed on the basis that the law is directed to the public good and serves a valid public purpose. The assumption of the public interest in enforcing the law weighs heavily in the balance. The statement at paragraph 9 of *Harper*, reproduced below, is apt.

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on ground of alleged unconstitutionality succeed.

24 To delay the commencement of the T-1162 application would effectively suspend the application of the legislation. U.S. Steel has not persuaded me that such an approach would itself provide a public benefit. The balance of convenience favours the Crown.

25 The motion will be dismissed with costs.

Postscript

26 Counsel for the parties indicated at the hearing that they have agreed to an abridged schedule in relation to the appeal from the validity order. Counsel for U.S. Steel undertook to file a formal motion to expedite the hearing of the appeal. I am confident that the motion will be filed, on consent, forthwith.

Motion dismissed.

2020 FC 378, 2020 CF 378
Federal Court

VisionWerx Investment Properties Inc. v. Strong Industries, Inc.

2020 CarswellNat 3039, 2020 CarswellNat 921, 2020 FC 378, 2020 CF 378, 176 C.P.R. (4th) 43, 317 A.C.W.S. (3d) 668

VISIONWERX INVESTMENT PROPERTIES, INC. (Plaintiff / Moving Party) and STRONG INDUSTRIES, INC. COSTCO WHOLESALE CANADA LTD. (Defendants / Responding Party)

STRONG INDUSTRIES, INC. (Plaintiff By Counterclaim) and VISIONWERX INVESTMENT PROPERTIES, INC. (Defendant By Counterclaim)

Catherine M. Kane J.

Heard: February 17, 2020
Judgment: March 19, 2020
Docket: T-342-19

Counsel: Mr. Zul Verjee, Mr. Nicholas McIlhargey, for Plaintiff
Mr. Scott Miller, Ms Deborah Meltzer, for Defendants

***Catherine M. Kane J.*:**

1 This is a motion for an interlocutory injunction by the Plaintiff, VisionWerx Investment Properties Inc. [the Plaintiff/ VisionWerx] in an action for infringement of a distinguishing guise pursuant to section 7(b) of the *Trademarks Act*, RSC 1985, c T-13. VisionWerx seeks to prevent the Defendants, Strong Industries Inc. [Strong Industries], from manufacturing, marketing and selling, and Costco Wholesale Canada Ltd [Costco Canada] [together, the Defendants] from marketing and selling the Solstice model two-person hot tub which VisionWerx claims resembles its Spaberry 5.0 two-person hot tub.

2 More particularly, VisionWerx seeks an interlocutory injunction restraining the Defendants (and their officers, licensees, successors and others) from marketing, selling, manufacturing, advertising or offering for sale the Solstice or any product with a design which is confusingly similar to the Spaberry distinguishing guise. VisionWerx also seeks an interlocutory injunction to: restrain the Defendants (and their officers, licensees, successors and others) from, among other things, using, offering for sale, selling and manufacturing in merchandise bearing the Spaberry distinguishing guise; directing public attention with the wares, service and business in such a way as to cause confusion with the wares, service and business of VisionWerx by use of the Spaberry distinguishing guise; and, passing off its wares and services as the wares and services of VisionWerx by use of the Spaberry distinguishing guise.

3 For the reasons elaborated on below, the motion is dismissed. The Plaintiff has not established the three-part test for an injunction established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 46 A.C.W.S. (3d) 40 (S.C.C.) [*RJR*]. Contrary to the Defendants' submissions, the Plaintiff need only establish a serious issue that is neither frivolous nor vexatious. The Plaintiff has established one or more serious issues, including whether its distinguishing guise can be protected under the *Trademarks Act* and whether there is confusion with the Defendants' product. However, the Plaintiff has not established with clear and convincing evidence that it will suffer irreparable harm between now and the determination of the Plaintiff's action that could not be quantified and compensated in monetary damages if the Plaintiff is successful in its action. Although the balance of convenience need not be determined given the finding that irreparable harm has not been established, there would

inevitably be an impact on the Defendant if the injunction were granted and similarly, there will be an impact on the Plaintiff as the result of the injunction being refused. The balance of convenience would be divided.

I. Background

4 VisionWerx designs, manufactures, and sells Spaberry hot tubs in Canada and the United States [US]. The majority of its products are sold at trade shows, through its website, and through promotions with third parties. The Spaberry 5.0 is the two-person hot tub at issue that is part of VisionWerx's product line.

5 Strong Industries is an American company that designs, manufactures, and sells the Evolution brand hot tubs in the US, the two-person model of which is marketed as the "Solstice" hot tub in Canada. Costco Canada is the sole distributor of the Solstice hot tub in Canada.

6 The underlying dispute between the Plaintiff and the Defendants is about whether the Plaintiff's two-person hot tub, the Spaberry 5.0, is being passed off as the same two-person hot tub, or a "knock off", at a lesser cost by the Defendants. The parties take very different views of all the relevant facts and related issues, including whether the Plaintiff has any intellectual property rights that are entitled to protection, whether the two hot tubs look similar, whether confusion to the consumer has occurred, and whether there has been any damage to the goodwill of the Plaintiff. The only issue on this motion is whether the Defendants should be enjoined from continuing to manufacture, market and sell their two-person hot tub until the Plaintiff's action alleging passing off and seeking a permanent injunction and other relief is finally disposed of.

7 The Plaintiff recounts that in November 2017, it became aware that Strong Industries was selling a hot tub named the "Ellipse" in the US market with design features that were, according to the Plaintiff, indistinguishable from the Spaberry 5.0. The Plaintiff recounts that it sent a cease and desist letter, *via* its US counsel, to Strong Industries, informing it that the Ellipse infringed VisionWerx's intellectual property rights and demanding that Strong Industries refrain from any further sale of the Ellipse. The Plaintiff claims that Strong Industries then ceased to distribute, market, or offer for sale the Ellipse in the US.

8 The Defendants dispute these events. The Defendants state that the Plaintiff sent its cease and desist letter, *via* its Canadian counsel, to Mattress Firm Inc., a US retailer of Strong Industries. Mattress Firm responded that it would not stop selling the Ellipse, noting that there was no factual basis for the Plaintiff's intellectual property claim. The Defendants state that the Ellipse continues to be offered for sale in the US.

9 The Plaintiff recounts that in January 2019, it became aware that Strong Industries was selling the Ellipse hot tub in Canada through Costco Canada as the "Solstice." Ms. Sylvie Duplessis, a representative for Costco Canada, confirmed on cross-examination that Costco Canada began offering the Solstice on its website on November 23, 2018.

10 The Plaintiff claims that during January 2019, two of its officers, Mr. Jeff Knight and Mr. Al McNeil, were approached at trade shows by several potential customers who had confused the Spaberry 5.0 with the Solstice. The Plaintiff adds that one of its distributors reported that potential customers confused the products and cancelled orders for the Spaberry 5.0 thinking that they could buy the same hot tub at Costco Canada for a lower price.

11 On January 17, 2019, the Plaintiff sent Costco Canada a cease and desist letter, demanding that it remove the Solstice from its website and stores. Costco Canada continued to offer the Solstice for sale.

12 On February 21, 2019, the Plaintiff served the Defendants with a Statement of Claim alleging infringement of the Spaberry distinguishing guise contrary to section 7 of the (then) *Trade-Marks Act* and seeking a permanent injunction restraining the Defendants from further marketing and selling the Solstice.

13 The Plaintiff also filed this motion for an interlocutory injunction on February 21, 2019.

14 On April 16 and 17, 2019, cross-examinations were conducted by video conference.

15 The Plaintiff filed an Amended Statement of Claim in late October 2019. The Defendant subsequently filed an Amended Statement of Defence and Counterclaim in November. The Plaintiff filed an Amended Reply to the Counterclaim in December 2019.

II. The Plaintiff's Overall position

16 The Plaintiff submits that it meets the *RJR* test for an interlocutory injunction. The Plaintiff submits that although this is a three-part test, the strength of one prong of the test can offset any weaknesses in the other prongs, (relying on *Corus Radio Inc. v. Harvard Broadcasting Inc.*, 2019 ABQB 880 (Alta. Q.B.) at para 21, (2019), 312 A.C.W.S. (3d) 620 (Alta. Q.B.) [*Corus*]).

17 The Plaintiff submits that the interlocutory injunction is necessary to preserve its business until the trial of its action. The Plaintiff submits that the threshold for the serious issue prong of the test is low and that it has raised several serious issues. The Plaintiff also submits that it will suffer irreparable harm, which cannot be quantified because of the impossibility of unscrambling its losses due to the Defendants' actions from other market forces.

18 The Plaintiff acknowledges that it does not have a registered trademark for its distinguishing guise but submits that section 7 of the *Trademarks Act* applies to both registered and unregistered trademarks. The Plaintiff submits that its distinguishing guise is not simply functional, but is distinctive.

19 The Plaintiff submits that the Spaberry 5.0 has several unique and distinctive features in its distinguishing guise, which are not purely functional, in particular: a front access panel at the centre of the hot tub in a hemispherical shape with a pattern of bolt heads; sweeping, curved lines indented into the surface of the hot tub; and, a configuration of raised nodules inside the tub.

20 The Plaintiff states that it has promoted and advertised the Spaberry distinguishing guise through interactive online media and promotional materials, and at conventions and expositions across Canada since 2014. The Plaintiff asserts that its hot tubs have widespread brand recognition among consumers of spa-related goods.

21 The Plaintiff argues that its distinguishing guise is not simply functional and that it has met all three components of a passing off action: goodwill in the distinctiveness of the product; misrepresentation to the public by the Defendants; and damage to the Plaintiff (*Kirkbi AG v. Ritvik Holdings Inc. / Gestions Ritvik Inc.*, 2005 SCC 65 (S.C.C.) at paras 67-68, [2005] 3 S.C.R. 302 (S.C.C.) [*Kirkbi*]).

22 The Plaintiff alleges that the Defendants' marketing and sale of its Solstice hot tub is causing the Plaintiff irreparable harm because of the confusion between the two products and the resulting lost sales of the Spaberry 5.0, due to the cheaper price of the Solstice, as well as depreciation of the goodwill of Spaberry 5.0.

23 The Plaintiff relies on the evidence of Mr. Knight, who recounts his experience with customers and potential customers that have confused the Solstice with the Spaberry 5.0 and claims that this has resulted in a loss in the distinctiveness of the Spaberry distinguishing guise and in lost sales.

24 The Plaintiff argues that once a consumer thinks that he or she has been ripped off, there is no way for the Plaintiff to recover the damage to goodwill or reputation. The Plaintiff also argues that once distinctiveness is lost, damage to goodwill follows and monetary damages are an inadequate remedy — only an interlocutory injunction will prevent further loss.

III. The Defendants' Overall Position

25 The Defendants argue that the Court should not consider the Plaintiff's motion for an interlocutory injunction because the Plaintiff's distinguishing guise is not a registered trademark. The Defendants argue that there can be no confusion and no action for passing off without a valid trademark.

26 The Defendants also submit that the Plaintiff's alleged distinguishing guise could not be a registered trademark because the majority of the features are functional, while others are purely ornamental (*Kirkbi* at paras 43, 60; *Remington Rand Corp. v. Philips Electronics N.V.*, [1995] F.C.J. No. 1660 (Fed. C.A.) at para 14, (1995), 104 F.T.R. 160 (Fed. C.A.)).

27 The Defendants argue that the Plaintiff's motion for the injunction is vexatious. The Defendants submit that the Plaintiff's action and this motion cannot succeed because the Plaintiff has no intellectual property rights and is pursuing this only to sustain some market share.

28 The Defendants allege that the Plaintiff defined the Spaberry distinguishing guise retrospectively, after comparison with the Solstice and tailored the guise, identifying only the features that were common to both the Solstice and Spaberry 5.0.

29 The Defendants submit that if the Court entertains the Plaintiff's motion at all, the Plaintiff should be held to the exceptional higher standard to establish a serious issue — to show a strong *prima facie* case. The Defendants submit that the Plaintiff has not shown a strong *prima facie* case, nor has it established that it will suffer irreparable harm.

30 The Defendants also submit that the Plaintiff has failed to establish a serious issue even on the low threshold. The Defendants repeatedly argue that the Plaintiff's action is vexatious, based on their position that the Plaintiff has no intellectual property rights in the Spaberry and that it has used cease and desist letters, its action and this injunction to thwart the Defendants' business.

31 The Defendants argue that the Plaintiff has not met the test for a passing off action: the plaintiff has not established that it has any goodwill in the alleged trademark; the Defendants have not deceived the public by misrepresentation; and, the Plaintiff has not suffered any actual or potential damage as a result of the Defendants' actions. (*Kirkbi* at paras 67-68).

32 The Defendants submit that the Plaintiff relies only on hearsay to support its argument that the claimed distinguishing guise is distinctive and that there is goodwill in the product and brand.

33 The Defendants further submit that there is no evidence that they have misrepresented their own product to the public. The Defendants submit that their Solstice hot tub is only advertised and marketed as an Evolution Spa, Solstice.

34 The Defendants also dispute that the Plaintiff has any evidence of actual or potential damages arising from the Defendants' sale of their own hot tubs. The Defendants again argue that the Plaintiff relies on hearsay evidence of confusion as recounted by Mr. Knight. In addition, the Defendants note that there is no evidence that anyone ordered a Solstice tub believing it to be a Spaberry tub.

IV. Statutory Provisions

35 The Plaintiff's action was launched in February 2019 in accordance with the *Trade-marks Act* in force at that time. The Act was subsequently amended. The parties have not argued that the former *Trade-marks Act* does not apply to this proceeding. The relevant provisions of the former Act are set out below.

> **Definitions**
>
> **2** In this Act,
>
> [...]
>
> ***distinguishing guise*** means
>
> (a) a shaping of goods or their containers, or
>
> (b) a mode of wrapping or packaging goods

the appearance of which is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others; (signe distinctif)

[...]

trade-mark means

(a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,

(b) a certification mark,

(c) a distinguishing guise, or

(d) a proposed trade-mark; (marque de commerce)

[...]

7 No person shall [...]

(b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his goods,

[...]

13(2)

(2) No registration of a distinguishing guise interferes with the use of any utilitarian feature embodied in the distinguishing guise.

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

[...]

signe distinctif Selon le cas:

a) façonnement de produits ou de leurs contenants;

b) mode d'envelopper ou empaqueter des produits,

dont la présentation est employée par une personne afin de distinguer, ou de façon à distinguer, les produits fabriqués, vendus, donnés à bail ou loués ou les services loués ou exécutés, par elle, des produits fabriqués, vendus, donnés à bail ou loués ou des services loués ou exécutés, par d'autres. (distinguishing guise)

[...]

marque de commerce Selon le cas:

a) marque employée par une personne pour distinguer, ou de façon à distinguer, les produits fabriqués, vendus, donnés à bail ou loués ou les services loués ou exécutés, par elle, des produits fabriqués, vendus, donnés à bail ou loués ou des services loués ou exécutés, par d'autres;

b) marque de certification;

c) signe distinctif;

d) marque de commerce projetée. (trade-mark)

[...]

7 Nul ne peut: [...]

b) appeler l'attention du public sur ses produits, ses services ou son entreprise de manière à causer ou à vraisemblablement causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses produits, ses services ou son entreprise et ceux d'un autre;

[...]

13(2)

(2) Aucun enregistrement d'un signe distinctif ne gêne l'emploi de toute particularité utilitaire incorporée dans le signe distinctif.

V. The Test for an Injunction

36 The three-pronged test for an injunction established by the Supreme Court of Canada in *RJR* - that there is a serious issue to be tried, that the party seeking the injunction would suffer irreparable harm, and that the balance of convenience favors the party seeking the injunction - has been consistently applied. In *RJR*, the Supreme Court of Canada reiterated the test established in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 3 A.C.W.S. (3d) 390 (S.C.C.) [*Metropolitan Stores*], and provided additional guidance with respect to each part of the test. In *RJR*, the Court noted at para 48:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

37 With respect to the establishment of a serious issue, the Court held that "[t]here are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case." The Court added that once the court considering the motion finds that the application is not frivolous or vexatious, even if it is of the view that the plaintiff will not be successful at trial, the court should move on to consider whether the plaintiff has established irreparable harm and where the balance of convenience lies. The Court emphasized that in assessing the serious issue prong "[a] prolonged examination of the merits is generally neither necessary nor desirable."

38 In *RJR*, the Court noted two exceptions to the generally low threshold to establish a serious issue: where the grant or refusal of the injunction will amount to a final determination of the action (which is a rare exception); and, where a question of constitutionality is raised as a question of law. Where the determination of the motion for the injunction will effectively amount to a final disposition, the Court must conduct a more extensive view of the merits of the case. In such cases, the party seeking the injunction must establish a strong *prima facie* case.

39 In *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104 (F.C.A.) at paras 23-25, (2015), 253 A.C.W.S. (3d) 191 (F.C.A.) [*Reckitt*], the Federal Court of Appeal reiterated the *RJR* test and emphasized that the threshold to establish

a serious issue is low. The Court noted determining whether a serious issue has been raised should be based on an extremely limited review of the case.

40 With respect to the establishment of irreparable harm, in *RJR*, the Supreme Court of Canada explained that it is only the harm to the party seeking the injunction that should be considered at this stage. The issue is whether the harm could be remedied in the determination of the decision on the merits.

41 The Court noted the nature of irreparable harm and provided some examples at para 64:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

42 With respect to the balance of convenience, in *RJR* the Supreme Court of Canada adopted the description from *Metropolitan Stores* (at 129) of "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". The SCC noted that the factors to be considered will vary from case to case.

VI. The Preliminary Issue — Can the Plaintiff Seek An Injunction?

43 The Defendants argue that the Court cannot entertain the Plaintiff's motion for an injunction because the Plaintiff has not registered or sought to register a trademark or an industrial design for the alleged Spaberry distinguishing guise.

44 The Defendants submit that the Plaintiff cannot resort to section 7 of the *Trade-marks Act* for its action of passing off. The Defendants argue that the unregistered trademark of Spaberry, consisting of its evolving distinguishing guise, cannot be the basis for a registered trademark because the features relied on by the Plaintiff are functional.

45 The Defendants point to evidence on the record, including pictures and screen shots of the two products to argue that the features of the Spaberry that the Plaintiff relies on as distinguishing are either functional or ornamental. The Defendants submit that other features of the Spaberry, which differ from the Solstice, have not been identified as part of the alleged distinguishing guise. The Defendants argue that the Plaintiff changed its description of its distinguishing guise, including after launching its Statement of Claim, by identifying the features that were similar to those of the Solstice and not those that differ.

46 The Defendants also argue that, although distinguishing guises do not evolve, the Plaintiff added a feature to the alleged Spaberry distinguishing guise when it amended its Statement of Claim in October 2019.

47 As noted above, the Plaintiff acknowledges that the name Spaberry is not a registered trademark, but submits that the *Trade-marks Act* protects both registered and unregistered trademarks. The Plaintiff disputes that its distinguishing guise is functional.

48 In *Kirkbi*, the Supreme Court of Canada confirmed that the common law recognizes unregistered trademarks (including distinguishing guises), that such trademarks are protected by the common law tort of passing off, and that paragraph 7(b) of the *Trade-marks Act* codifies this tort. However, the Court also confirmed that a trademark cannot consist of utilitarian features — i.e. cannot be protected. (*Kirkbi* at paras 23, 25, 30, 56-58.) The Court upheld the finding of the Federal Court and the Federal Court of Appeal that the doctrine of functionality barred the claim of infringement under paragraph 7(b).

49 In *Kirkbi*, the Court also confirmed that the doctrine of functionality applies to both registered and unregistered trademarks, noting at para 58:

58 As Sexton J.A. found for the majority in the Court of Appeal, this argument has no basis in law. Registration does not change the nature of the mark; it grants more effective rights against third parties. Nevertheless, registered or not, marks share common legal attributes. They grant exclusive rights to the use of a distinctive designation or guise (*Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120, at p. 134; Gill and Jolliffe, at pp. 4-13 and 4-14). Indeed, the *Trade-marks Act*, by allowing for the assignment of unregistered trade-marks, recognizes the existence of goodwill created by these marks as well as the property interests in them. Registration just facilitates proof of title (Sexton J.A., at paras. 76, 77 and 81). Sexton J.A. rightly pointed out that the argument of Kirkbi appears to rest on a misreading of a 19th century judgment of the House of Lords, *Singer Manufacturing Co. v. Loog* (1882), 8 App. Cas. 15, aff'g (1880), 18 Ch. D. 395 (C.A.). This judgment stands only for the proposition that an unregistered trade-mark could be mentioned by competitors in comparative advertising, not that it failed to create exclusive rights to the name for the purpose of distinguishing the products. The functionality doctrine remains relevant, as the legal nature of the marks remains the same.

50 The Court, at para 60, endorsed the reasons provided by Justice Sexton in the Federal Court of Appeal, including:

> Thus a distinguishing guise which is primarily functional provides no rights to exclusive use and hence no trade-mark protection. In other words the fact that the distinguishing guise is primarily functional means that it cannot be a trade-mark.

51 The Supreme Court of Canada also set out the elements of the tort of passing off as it has developed in Canadian law, noting at para 66:

> Our Court appears to have adopted the tripartite classification in *Ciba-Geigy*. In that case, our Court allowed a passing-off action in respect of the get-up of a prescription drug. Gonthier J. reviewed some of the earlier jurisprudence and stated that claimants had to establish three elements in order to succeed in a passing-off action:
>
> > The three necessary components of a passing-off action are thus: the existence of goodwill, deception of the public due to a misrepresentation and actual or potential damage to the plaintiff. [p. 132]

52 In *BMW Canada Inc. v. Nissan Canada Inc.*, 2007 FCA 255, 159 A.C.W.S. (3d) 275 (F.C.A.), the Federal Court of Appeal characterized paragraph 7(b) with reference to *Kirkbi*, at para 14:

> Paragraph 7(b) of the Act prohibits a person from directing public attention to his wares, services or business in such a way as to cause or be likely to cause confusion, at the time he commenced the activity in question, with the wares, services or business of another. As stated by this Court in *Kirkbi AG v. Ritvik Holdings Inc.*, [2004] 2 F.C.R. 241 at page 245, (2003) FCA 297, aff'd [2005] 3 S.C.R. 302, paragraph 7(b) is the equivalent statutory expression of the common law tort of passing off with one exception: for resort to that paragraph, a plaintiff must prove possession of a valid and enforceable trade-mark, whether registered or unregistered.
>
> [My emphasis]

53 The doctrine of functionality is not in dispute. The Plaintiff can pursue an action for passing off of its unregistered trademark - i.e., the distinguishing guise of the Spaberry 5.0, but only if the distinguishing guise is distinguishing and not purely functional.

54 Although the Defendants submit that the Plaintiff's action and motion are vexatious based on their argument that the Plaintiff's distinguishing guise cannot be a valid trademark, I am not prepared to make any such conclusion on a motion for an interlocutory injunction. Whether the distinguishing guise is functional is an issue to be determined at trial. It is not the Court's role to delve into the merits and all the evidence at this stage.

55 In *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824 (S.C.C.) [*Equustek*], the Supreme Court of Canada noted that injunctions are equitable remedies and the powers of a court with equitable jurisdiction are, subject to relevant statutory limitations, unlimited (at para 23). At para 24, the Supreme Court noted:

> Interlocutory injunctions seek to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits (Jeffrey Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 24-25).

56 In *Equustek*, the Supreme Court referred to the *RJR* test, noting at para 25 that "[t]he fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific."

57 In the present case, whether the injunction is just and equitable should be assessed in accordance with the three-part *RJR* test. The Defendants' arguments regarding whether an injunction can be considered with respect to the Plaintiff's unregistered trademark will be considered under the serious issue branch of the test.

VII. Has the Plaintiff established a Serious Issue?

A. The general low threshold applies

58 The Defendants submit that the exception to the low threshold to establish a serious issue applies. The Defendants assert that granting the Plaintiff's motion will amount to a determination of the main action and, therefore, the Court must undertake a more extensive review of the merits to determine whether the Plaintiff's action is likely to succeed. The Defendants have pointed the Court to evidence in support of their position that the Plaintiff's action will not succeed.

59 The Defendants argue that if the Court grants the injunction, Strong Industries and Costco Canada will not continue to offer the Solstice for sale in Canada. The Defendants point to the statements made by Mr. Wade Spicer (President of Strong Industries) and Ms. Sylvie Duplessis (a buyer for Costco Canada), attesting that if the injunction is granted, Costco Canada will "*never again*" offer the Solstice hot tub for sale. The Defendants state that they will not participate in a costly trial that would divert their attention from their business. The Defendants submit that because they will not pursue this litigation post injunction, the Plaintiff will, in effect, get the permanent injunction it seeks.

60 I do not agree that the elevated threshold applies.

61 The Defendants cannot rely on their own intentions and business choices to raise the legal burden for granting an interlocutory injunction based on statements made by two of their own representatives that Costco Canada will cease selling the Solstice if this injunction is granted. This is their choice - which they could have made before now or could make in the future, regardless of the outcome of this motion.

62 The Plaintiff seeks wider relief in the main action in addition to the permanent injunction, including a declaration that the Defendants have passed off their product as a Spaberry and have infringed Spaberry's distinguishing guise and an award of damages.

63 In addition, Mr. Spicer's and Ms. Duplessis' statements about their intention to not sell the Solstice if this injunction is granted focus only on one model of hot tub out of many models that Strong Industries manufactures, markets and sells, and that Costco Canada markets and sells.

64 The Defendants' position on this motion and their efforts to have the Court focus on the evidence is difficult to reconcile with their submission that they will not defend the action if the injunction is granted. However, this will be the Defendants' choice, not a forced outcome.

65 As the Supreme Court of Canada noted in *RJR*, the exception to the low threshold to establish a serious issue is rare. The exception does not contemplate a scenario where the party opposing the injunction can make assertions to bring themselves within the exception and put the moving party to the higher standard of establishing a *prima facie* case.

66 In the present circumstances, the Plaintiff need only meet the general, low threshold to establish a serious issue; i.e., whether there is an arguable issue that is neither frivolous nor vexatious. The Court will not delve into the merits of the case,

despite the large record placed before the Court on this motion, and the arguments made by both the Plaintiff and the Defendants regarding the merits.

67 The Defendants have argued that the Federal Court of Appeal's guidance in *Reckitt* at para 23 - that the judge should not delve into the merits of the underlying action to determine whether a serious issue exists — can be distinguished because in *Reckitt* the serious issue was conceded. I disagree. In *Reckitt*, the issue before the Court of Appeal was whether the judge's assessment of the merits, in determining that a serious issue had been raised, had influenced his assessments of the other parts of the *RJR* test.

68 The Court of Appeal noted at para 25:

> [25] I accept that the Federal Court judge went too far in assessing the merits of Reckitt's case. As a general rule, the question whether a serious issue exists should be answered on the basis of no more than an "extremely limited review of the case" (*RJR-McDonald* at para. 55). In an interlocutory matter such as this one, the underlying dispute remains to be decided, and judges sitting on such matters should generally avoid wading any further into that underlying dispute than is strictly necessary to deal with the matter before them. In particular, the finding that "Jamieson is a likely trade-mark infringer marketing a likely confusing product", although made in the context of the balance of convenience analysis, goes beyond the bounds of necessity (reasons at para. 67).
>
> [My emphasis]

69 The Federal Court of Appeal's guidance is clear. Given that the low threshold applies in the present case, the Court would err if it conducted more than an "extremely limited review" of the merits of the case.

B. A serious issue has been raised

70 As noted above, the Supreme Court of Canada explained in *RJR* at para 55, that in determining whether a serious issue has been raised, the court need only be satisfied that the application is neither frivolous nor vexatious. Even if the court is of the opinion that the plaintiff is unlikely to succeed at trial, the Court should move on to consider the other two parts of the test.

71 Whether the Plaintiff has a distinguishing guise that is more than functional or utilitarian is an issue to be determined by the trial judge, along with other relevant questions regarding the evolution of the features of the distinguishing guise and whether the distinguishing guise can be the subject of an action based on passing off and whether the elements of passing off have been established.

72 As noted above, in the discussion of the preliminary issue, having an unregistered trademark is not, on its own, a bar to bringing a passing off action under section 7 of the *Trade-marks Act*.

73 The Plaintiff submits it has an unregistered distinguishing guise, with particular features that appear at least similar to the features of Strong Industries' product. The Plaintiff has pointed to evidence seeking to support its arguments with respect to the three elements of the passing off test. These issues are neither frivolous nor vexatious. The Court will not delve further into the merits of the action at this stage (*RJR* at para 55; *Reckitt* at paras 23-25).

VIII. Has the Plaintiff Established Irreparable Harm?

A. The Plaintiff's Submissions

74 The Plaintiff submits that if the interlocutory injunction is not granted, it would suffer irreparable harm due to depreciating goodwill, loss of distinctiveness resulting from the confusion between the Spaberry 5.0 and the Solstice, and lost sales. The Plaintiff argues that it would be impossible to "unscramble" its business losses due to confusion with the Solstice from other factors. The Plaintiff adds that the inability to quantify the damage to its goodwill and the value of its trademark renders these harms irreparable (relying on *Sleep Country Canada Inc. v. Sears Canada Inc.*, 2017 FC 148 (F.C.) at 112-115, 121, (2017), 279 A.C.W.S. (3d) 821 (F.C.) [*Sleep Country*]; *Reckitt* at paras 53-54).

75 The Plaintiff submits that the similarity between the Spaberry and the Solstice meets the test for confusion established in *Veuve Clicquot Ponsardin c. Boutiques Cliquot Ltée*, 2006 SCC 23 (S.C.C.) at para 20, [2006] 1 S.C.R. 824 (S.C.C.); i.e., that a "casual consumer, in a hurry, with an imperfect recollection of the Spaberry 5.0" would confuse it with the Solstice. The Plaintiff points to the evidence of Mr. Knight who recounted that consumers confused the Solstice for the Spaberry 5.0. The Plaintiff argues that this represents only a small sampling of potential hot tub customers. The Plaintiff adds that while Costco Canada disclosed that four Solstice hot tubs were sold between November 2018 and April 2019, it has not disclosed the sales since that period.

76 The Plaintiff also points to the evidence of Mr. Knight, who recounts that some customers refrained from purchasing the Spaberry 5.0, thinking that they could purchase the same tub at Costco Canada for a lower price. The Plaintiff submits that this confusion has resulted in a loss of Spaberry's distinctiveness, goodwill and trust in Spaberry.

77 The Plaintiff argues that its losses will be impossible to quantify and, as a result, the injunction is essential.

78 The Plaintiff also argues that the harm it will suffer is irreparable because it will be unable to collect damages from Strong Industries, an American company based in Pennsylvania, with no assets in Canada. The Plaintiff notes that the inability to collect damages was specifically noted in *RJR* as a possible basis for finding irreparable harm.

B. The Defendants' Submissions

79 The Defendants dispute that there is any goodwill in the Spaberry 5.0. Alternatively, the Defendants argue that if there is goodwill, there has not been any depreciation of goodwill or any lost sales of the Spaberry 5.0. The Defendants add that if there were lost sales, they could be easily quantified. The Defendants note that, if the Plaintiff is correct that the purchase of the Solstice by a confused customer represents a corresponding loss of business to the Plaintiff, this can certainly be quantified given that both Strong Industries and Costco Canada record their sales.

80 The Defendants dismiss as ridiculous the Plaintiff's concern that if the Plaintiff were ultimately successful that it would be unable to collect damages from the Defendant, Strong Industries.

C. There is no clear and convincing evidence of irreparable harm

81 In *RJR*, at para 64, the Supreme Court of Canada described irreparable harm as harm which "cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

82 In *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 (F.C.A.) at para 31, [2012] F.C.J. No. 1661 (F.C.A.) [*Glooscap*], the Federal Court of Appeal noted the need for clear and convincing evidence of unavoidable harm, noting that speculation and assertions are not sufficient. This guidance reflects the earlier statement of the Court of Appeal in *Centre Ice Ltd. v. National Hockey League*, [1994] F.C.J. No. 68, 46 A.C.W.S. (3d) 519 (Fed. C.A.) [*Centre Ice*].

83 In *Centre Ice* at para 7, the Court of Appeal held that evidence of irreparable harm must be "clear and not speculative." With respect to establishing irreparable harm resulting from alleged confusion of a trademark, the Court explained at para 9:

> Likewise, I believe that the learned Motions Judge erred in the passage quoted *supra*, when, in effect, he *inferred* a loss of goodwill not compensable in damages from the fact that confusion had been proven. This view of the matter runs contrary to this Court's jurisprudence to the effect that confusion does not, *per se*, result in a loss of goodwill and a loss of goodwill does not, *per se*, establish irreparable harm not compensable in damages. The loss of goodwill and the resulting irreparable harm cannot be inferred it must be established by "clear evidence". On this record, there is a notable absence of such evidence.
>
> [Emphasis in the original]

84 In the present case, if there is confusion between the Solstice and the Spaberry, this alone will not establish loss of distinctiveness or loss of any goodwill that the Plaintiff may have.

85 Contrary to the Plaintiff's submission, a finding of confusion does not necessarily lead to a loss of goodwill for which the plaintiff cannot be compensated. There must be evidence of loss of goodwill and evidence of irreparable harm. In *Centre Ice*, the Court noted that, on the record before it there was only the affiant's statement of his belief that irreparable harm would result if the injunction were not granted, with no evidence to support the assertion. Like *Centre Ice*, the Plaintiff relies primarily on the statements of Mr. Knight and other assumptions that irreparable harm will result between now and the determination of the action. The evidence to establish loss of distinctiveness and loss of goodwill is lacking.

86 I agree with the Defendants that the Plaintiff cannot rely on *Sleep Country* or *Reckitt* in support of its argument that confusion results in loss of distinctiveness and goodwill resulting in damages that cannot be quantified because they cannot be "unscrambled". In both *Sleep Country* and *Reckitt*, there was sufficient evidence and the facts are quite distinct.

87 In *Reckitt*, the trademark owner, or licensee, began to market MEGARED krill oil capsules, in Canada in December 2013-January 2014. Jamieson had previously launched OMEGARED in June 2013. Reckitt did not have any opportunity to establish sales or profits before Jamieson's OMEGARED entered the market. This was a key consideration in finding that Reckitt's losses due to the alleged infringing conduct were not quantifiable.

88 The Federal Court stated, at para 55 (*Reckitt Benckiser LLC v. Jamieson Laboratories Ltd.*, 2015 FC 215, 253 A.C.W.S. (3d) 692 (F.C.)):

> In my view, where use of a confusing mark will cause the Plaintiffs' mark to lose its distinctiveness, that is, its ability to act as a distinctive and unique signifier of the Plaintiffs' wares or business, such damage to goodwill and the value of the mark is impossible to calculate in monetary terms. The courts have found that distinctiveness is lost when the infringer engages in national marketing which repeatedly emphasizes the confusing mark to the Canadian public. In my view, the evidence of confusion and my findings in relation to confusion provide clear and sufficient support to find irreparable loss of the MEGARED "name" goodwill and reputation if Jamieson's conduct is not enjoined.
>
> [My emphasis]

89 The Federal Court did not find that confusion will *automatically* result in loss of distinctiveness. Rather, the Court found that if there is evidence that confusion will result in a loss of distinctiveness, damage to goodwill is impossible to calculate.

90 The Federal Court considered the jurisprudence, including *Centre Ice*, and found that based on the evidence on the record, it was not possible to quantify Reckitt's damages, and as a result, the harm would be irreparable. The Federal Court of Appeal agreed (*Reckitt* at para 2).

91 In *Sleep Country* the issue was a slogan, used as a jingle that had enjoyed years of familiarity in the public and was associated with the Plaintiff's products. There was clear evidence of confusion and loss of distinctiveness. I noted at para 114:

> As I have found, Sleep Country established, on a balance of probabilities, both confusion and loss of distinctiveness. Sleep Country is not relying on inferences from confusion, but rather on evidence of depreciation of goodwill and loss of distinctiveness.

92 In the present case, the Plaintiff's evidence of loss of goodwill is based only on Mr. Knight's accounts of customer confusion. The Plaintiff has not provided clear and non-speculative evidence of loss of goodwill. The Plaintiff's argument that customers thought that the Solstice was a Spaberry produced for Costco Canada or that they could purchase the same hot tub for a cheaper price at Costco Canada is also based on Mr. Knight's account. This is not sufficient evidence of loss of goodwill.

93 There is no direct evidence from a potential consumer or from a consumer that actually bought a Spaberry. There is no evidence that anyone purchased a Solstice, thinking it was a Spaberry and was not satisfied.

94 Although some consumers may have purchased the Solstice, thinking it was a knock off (as alleged by the Plaintiff) there is no evidence how this harmed the Plaintiff, except due to a possible loss of a sale.

95 The Plaintiff's reliance on *Sleep Country* to argue that its losses due to the Defendants' product cannot be unscrambled from other possible sources, overlooks the unique facts in *Sleep Country*, which as noted, was about confusion related to a slogan, used as a jingle, not a particular product. With respect to the issue of whether lost sales could be quantified, in *Sleep Country*, I noted at para 119:

> The jurisprudence that has found that the harm resulting from infringement, if established, is quantifiable is, for the most part, about infringing products and sales of those products. This is unlike the present case where the infringing conduct is use of a slogan, which has been described as a "value proposition" and which is only one element of a multi-faceted marketing strategy. Professor Wong described the slogan as an idea with subjective and qualitative elements.

96 In *Sleep Country* there was extensive evidence about the different and complicated methodologies that could be employed - and the many assumptions relied on - to determine whether the resulting harm due to the lost sales and other damage due to the likely confusion between the two slogans could be quantified. I concluded at para 156 that it would be difficult to the point of impossibility to quantify Sleep Country's losses.

97 Such a conclusion cannot be reached in the present case. There is no evidence that it would be impossible to determine the lost sales due to any possible confusion between the Spaberry 5.0 and the Solstice.

98 The dispute between the Plaintiff and the Defendants is about hot tubs, i.e., the sale of potentially infringing products. This type of possible harm is generally quantifiable.

99 I agree with the Defendants that it would be possible to determine any lost sales incurred by the Plaintiff and quantify such losses in monetary terms. The Defendants have records of their sales which would be the starting point to determine whether the Defendants' sales of the Solstice took sales away from the Plaintiff's Spaberry 5.0.

100 There is no evidence that the Plaintiff is at any risk of not collecting any damages that might be awarded if successful in its action due to Strong Industries having no assets in Canada. In addition, Costco Canada, is a well-known Canadian company, with assets in Canada.

IX. The Balance of Convenience Need Not Be Determined

101 Given that the Plaintiff has not established with clear and convincing evidence that it will suffer irreparable harm between now and the time that the Plaintiff's action is finally determined, the injunction cannot be granted. Therefore, there is no need to consider which of the two parties would suffer greater harm depending on the outcome. However, the submissions of the parties are acknowledged and some observations are noted.

102 Both the Plaintiff and Defendants argue that the balance of convenience favors them. Both also allege bad faith by the other in support of their argument that the balance of convenience lies in their favour. These allegations reflect the very acrimonious relationship between the parties. The allegations of bad faith are not worthy of consideration and do not need to be addressed.

103 The Plaintiff submits that it is in a "David v Goliath" battle. The Plaintiff argues that the impact on VisionWerx, given that it only manufactures and sells a limited array of hot tubs, will be far greater than the impact on Strong Industries, which manufactures many hot tubs in the US and Canada and on Costco Canada, which sells the Solstice hot tubs, based on online orders, without keeping any inventory.

104 The Plaintiff argues that the sales and distinguishing guise of the Spaberry 5.0 are of much greater importance to it than the Solstice is to the Defendants given that Costco Canada would continue to sell all the other hot tubs manufactured by Strong Industries.

105 The Defendants also submit that they will suffer greater harm if the injunction is granted because Strong Industries will lose all future sales of the Solstice to Costco Canada and their business relationship will suffer. The Defendants also note that the stigma associated with being subject to an injunction, which would be perceived as having acted unlawfully, would tarnish both of their reputations.

106 The Defendants add that the Plaintiff delayed pursuing its motion for an injunction for over a year, which calls into question the need for an injunction. The Defendants dispute that the cross-examinations and the amendments to the pleadings account for the delay, noting that the Plaintiff amended its pleadings to address the evolving features of the guise and that the cross-examination of Mr. Banga was pointless.

107 Of course, there will be an impact on the Plaintiff due to the refusal to grant the injunction. There would also have been an impact on the Defendants if the injunction were granted.

108 I appreciate that the Plaintiff regards itself as the "little guy" up against a larger manufacturer and retailer. However, the Plaintiff has also suggested that it has high sales of its line of hot tubs, not limited to the Spaberry 5.0. I do not agree with the Plaintiff that there are public policy considerations in favor of granting the injunction.

109 I also do not agree with the Defendants' claim that their business relationship will be strained if an injunction is granted, which supports finding that the balance of convenience favors them.

110 Nor do I agree with the Defendants that the stigma of being enjoined from selling the Solstice two-person hot tub would tarnish their reputations. That argument could be made by every business or person subject to an injunction. The evidence relied on by the Defendants demonstrates that Strong Industries has a large product line and large sales. Costco Canada's sales of only four Solstice hot tubs in a four month period does not suggest that this is a top seller for Strong Industries. Moreover, the Defendants' own assertion that it will not pursue the litigation any further if this injunction is granted suggests that the sale of this product is not their top priority.

X. Conclusion

111 The Plaintiff relies on *Corus* for the proposition that the *RJR* test should be considered as a whole and the strength of one part of the test could offset weaknesses in other parts of the test, because the key issue is whether the injunction is equitable in all the circumstances. In *Corus* at para 21, the Court stated:

> Despite the fact that an analysis of Corus' application proceeds through the tripartite test as if a series of stages, I agree that the three requirements for an injunction are to be considered as a whole when assessing their overall impact. The relative strength or weakness in one stage of the test may be offset by the relative weakness or strength in another.

112 I do not regard this passage as suggesting that all three parts of the test need not be established; rather, in applying the test, a court should not lose sight of whether the injunction is equitable.

113 I regard the *RJR* test as requiring that all three parts of the test must be established. Given that the threshold for serious issue is generally low, any other interpretation would collapse the three-part test into a two-part test. The jurisprudence from the Federal Court of Appeal has taken the approach that all parts of the test must be established (e.g. *Glooscap* at paras 4, 24).

114 Although the Plaintiff has met the low threshold to establish a serious issue, the Plaintiff has not provided clear, convincing and non speculative evidence that irreparable harm will occur between now and the disposition of its action.

115 The parties should expedite the completion of the next steps in this litigation and move forward with the determination of the Plaintiff's action.

XI. Costs

116 In the event the parties have reached an agreement with respect to costs, the agreement shall be provided to the Court within 10 days of this Order. If no agreement has been reached, the Plaintiff and Defendants may each make submissions of no more than five pages with respect to reasonable costs, which shall be provided to the Court also within 10 days of this Order. The Court will issue a separate Order with respect to costs.

ORDER in file T-342-19

THIS COURT ORDERS that:

1. The Plaintiff's motion for an interlocutory injunction is dismissed.

2. The Plaintiff and Defendants shall advise the Court of any agreement reached regarding costs, and if not, may make submissions of no more than five pages with respect to reasonable costs, within 10 days of this Order. The Court will issue a separate Order with respect to costs.

Motion dismissed.

2000 CarswellOnt 2627
Ontario Court of Appeal

R. v. Parker

2000 CarswellOnt 2627, [2000] O.J. No. 2787, 135 O.A.C. 1, 146 C.C.C. (3d) 193, 188 D.L.R. (4th) 385, 37 C.R. (5th) 97, 47 W.C.B. (2d) 116, 49 O.R. (3d) 481, 75 C.R.R. (2d) 233

Her Majesty the Queen, Appellant and Terrance Parker, Respondent

Catzman, Charron, Rosenberg JJ.A.

Heard: October 6-8, 1999
Judgment: July 31, 2000
Docket: CA C28732

Proceedings: reversing in part (1997), 12 C.R. (5th) 251 (Ont. Prov. Div.)

Counsel: *Kevin R. Wilson* , for Appellant.
Richard P. Macklin and *Aaron B. Harnett* , for Respondent.
Ed Morgan , for Intervenor, Epilepsy Association of Toronto.

The judgment of the court was delivered by *Rosenberg J.A.* :

1 This is one of two appeals heard by this court concerning the constitutionality of the marihuana prohibition in the former *Narcotic Control Act* , R.S.C. 1985, c. N-1 and the *Controlled Drugs and Substances Act* , S.C. 1996, c. 19. The appeal in *R. v. Clay* [reported (2000), 37 C.R. (5th) 170 (Ont. C.A.)] concerns the use of the criminal law power to penalize the possession of marihuana. This Crown appeal concerns the medical use of marihuana.

Overview

2 It has been known for centuries that, in addition to its intoxicating or psychoactive effect, marihuana has medicinal value. The active ingredients of marihuana are known as cannabinoids. The cannabinoid that gives marihuana its psychoactive effect is tetrahydrocannabinol (THC). While less is known about the other cannabinoids, the scientific evidence is overwhelming that some of them may have anti-seizure properties. The most promising of these is cannabidiol (CBD). Smoking marihuana is one way to obtain the benefit of CBD and other cannabinoids with anti-seizure properties.

3 The respondent Terrance Parker has suffered from a very severe form of epilepsy since he was a young child. For close to 40 years he has experienced frequent serious and potentially life-threatening seizures. He has attempted to control these seizures through surgery and conventional medication. The surgery was a failure and the conventional medication only moderately successful. He has found that by smoking marihuana he can substantially reduce the incidence of seizures. Since he has no legal source of marihuana, he has been growing it himself. On two occasions, the police searched his home and seized the marihuana. He was first charged with cultivating marihuana under the *Narcotic Control Act* . By the time of the second investigation, that Act had been repealed and he was charged with possession of marihuana under the new *Controlled Drugs and Substances Act* .

4 The former *Narcotic Control Act* and the *Controlled Drugs and Substances Act* prohibit under threat of imprisonment the possession and cultivation of marihuana. That prohibition is theoretically not absolute. Both statutes contemplate that drugs like marihuana may have medicinal value and therefore should be available through a regulatory process. If a drug receives the necessary regulatory approval, it can be made available to the public through a physician's prescription. A synthetic version of THC, known as Marinol, has been approved for use in Canada and is available by prescription. No drug company has applied for a licence to sell CBD and therefore it is not available in Canada.

5 Parker decided to fight the charges against him by attempting to show that the prohibition on the cultivation and possession of marihuana in the two statutes is unconstitutional. Specifically, he claims that the legislation infringes his rights as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms* . Section 7 guarantees that everyone has the right to life, liberty and security of the person and the right not to be deprived of those rights except in accordance with the principles of fundamental justice. Put simply, Parker claims that he needs to grow and smoke marihuana as medicine to control his epilepsy. Because Parliament has made cultivation and possession of marihuana illegal, he faces the threat of imprisonment to keep his health. Parker argues that a statute that has this effect does not comport with fundamental justice. To support his claim at trial, Parker led a great deal of scientific and other evidence. That evidence demonstrated the therapeutic value of marihuana for treating a number of very serious conditions including epilepsy, glaucoma, the side effects of cancer treatment and the symptoms of AIDS.

6 The government countered with its own evidence at trial. It argued that Parker does not need marihuana to control his seizures and that he has a number of other legal therapeutic alternatives; such as better treatment with conventional epilepsy medication or obtaining a prescription for Marinol.

7 In reasons reported at (1997), 12 C.R. (5th) 251, Sheppard J. of the Ontario Court of Justice concluded that Parker requires marihuana to control his epilepsy and that the prohibition against marihuana infringes Parker's rights under s. 7 of the *Charter* . Sheppard J. stayed the cultivation and possession charges against Parker. Further, in order to protect Parker and others like him who need to use marihuana as medicine the trial judge read into the legislation an exemption for persons possessing or cultivating marihuana for their "personal medically approved use".

8 The Crown appeals from that judgment. It argues that the trial judge made a factual error in finding that Parker requires marihuana for medical purposes. The Crown also argues that the legislation is valid and that there are legal means by which Parker can obtain marihuana. It says that the legislation is not unconstitutional simply because no drug company has attempted to have marihuana or CBD licensed for sale through prescription. It also argues that Parker could have applied for a special exemption from the Minister of Health under s. 56 of the *Controlled Drugs and Substances Act* . It points to fresh evidence placed before this court that the Minister has granted such exemptions to other persons who need marihuana for therapeutic purposes. Finally, the Crown says the remedy granted by the trial judge was wrong and he should not have, in effect, amended the legislation, that this is a matter for Parliament.

9 Parker supports the decision of the trial judge. The Epilepsy Association of Toronto has intervened in this appeal and it also supports the trial judge's decision. In addition, the Association attempts to raise a new argument, that the statutes also violate the equality provisions of the *Charter* .

10 I have concluded that the trial judge was right in finding that Parker needs marihuana to control the symptoms of his epilepsy. I have also concluded that the prohibition on the cultivation and possession of marihuana is unconstitutional. Based on principles established by the Supreme Court of Canada, particularly in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) , where the court struck down the abortion provisions of the *Criminal Code* , and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.) , where the court upheld the assisted suicide offence in the *Criminal Code* , I have concluded that forcing Parker to choose between his health and imprisonment violates his right to liberty and security of the person. I have also found that these violations of Parker's rights do not accord with the principles of fundamental justice. In particular, I have concluded that the possibility of an exemption under s. 56 dependent upon the unfettered and unstructured discretion of the Minister of Health is not consistent with the principles of fundamental justice. I have not dealt with the equality argument raised by the Epilepsy Association because that argument was not raised at trial.

11 Accordingly, I would uphold the trial judge's decision to stay the charges against Parker and I would dismiss that part of the Crown's appeal. However, I disagree with Sheppard J.'s remedy of reading in a medical use exemption into the legislation. I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marihuana in the *Controlled Drugs and Substances Act* to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the *Charter* , I would suspend the declaration of invalidity for a year. During this period, the marihuana law remains in full force and effect. Parker, however, cannot be

deprived of his rights during this year and therefore he is entitled to a personal exemption from the possession offence under the *Controlled Drugs and Substances Act* for possessing marihuana for his medical needs. Since the *Narcotic Control Act* has already been repealed by Parliament, there is no need to hold it unconstitutional. If necessary, I would have found that Parker was entitled to a personal exemption from the cultivation offence for his medical needs.

12 Following are my reasons for these conclusions. Because a principal part of the Crown's attack on the trial decision was on the trial judge's findings of fact, I will deal at some length with the evidence. I will then review the trial judge's findings on the law before setting out my own analysis of the legal issues. Finally, I will explain why I would grant a different remedy from the remedy granted by the trial judge.

The Facts

(i) The facts of the offences

13 Marihuana was seized from the respondent on two different occasions. On July 18, 1996, police officers executed a warrant at the respondent's home and seized 71 marihuana plants. He was charged with cultivating cannabis marihuana contrary to s. 6(1) of the *Narcotic Control Act* and possession of cannabis marihuana for the purpose of trafficking contrary to s. 4(2) of the *Act* . On September 18, 1997, the police again attended at the respondent's home and seized three growing marihuana plants. By this time, the *Narcotic Control Act* had been repealed. On this occasion, the respondent was charged with possession of marihuana contrary to s. 4(1) of the *Controlled Drugs and Substances Act* .

14 A short note on terminology. Section 3 of the *Narcotic Control Act* prohibits the unauthorized possession of a "narcotic". The term "narcotic" is defined in s. 2 of the Act as anything included in the schedule to the Act. Section 3 of the schedule lists "*Cannabis sativa* , its preparations, derivatives and similar synthetic preparations" including "Cannabis (marihuana)", "Cannabidiol" (CBD), and "Tetrahydrocannabinol" (THC). Section 6 prohibits the unauthorized cultivation of "marihuana". Section 2 defines marihuana as "*Cannabis sativa L.* " In the evidence, the terms cannabis and marihuana tended to be used interchangeably. For simplicity, I will try to use only the term marihuana when referring to the plant and the raw part of it that is smoked by users. This appeal does not deal with "refined" marihuana such as cannabis resin (hashish). I will refer to the two active ingredients about which there was considerable evidence by their initials THC and CBD. Marinol is a synthetic form of THC.

15 The *Controlled Drugs and Substances Act* is slightly different in form from the *Narcotic Control Act* . Section 4 prohibits the unauthorized possession of "substances" listed in certain schedules, including "Cannabis (marihuana)" and CBD and THC. Section 7 of the Act prohibits the unauthorized production of substances in the schedules and thus Cannabis (marihuana). Again, for simplicity I will use the term marihuana to refer to the substance grown and used by Parker.

16 To return to the facts, the charge of possession for the purpose of trafficking was based on Parker's admission to the police that he gives some of his marihuana to other persons who need it for their epileptic seizures. He was found guilty of that offence. The *Charter* challenge does not relate to that offence and it played no part in the proceedings in this court.

17 There was no dispute about the facts upon which the cultivation charge under the *Narcotic Control Act* and the possession charge under the *Controlled Drugs and Substances Act* were based. At one point in the proceedings, Parker had apparently considered relying on a defence of necessity. However, he did not pursue that defence and the only issue at trial was the constitutionality of the prohibition against possession and cultivation of marihuana where an accused claims that he or she requires the marihuana for medicinal purposes.

(ii) Parker's health and experience with marihuana

18 When he was four and six years of age, Parker suffered two serious head injuries. He was diagnosed with epilepsy after the first accident and thus has had epilepsy for almost 40 years. He suffers from the whole range of seizures associated with epilepsy. These range from *petit mal* seizures, which are brief spells where he almost collapses, to *status epilepticus* when he suffers a series of *grand mal* seizures and requires immediate emergency medical attention. *Grand mal* seizures leave Parker

unconscious, violently twitching and writhing on the ground. He will sometimes vomit, lose control of his bowels, choke on his own saliva and smash his head against the ground.

19 Parker also has various other types of seizures including the following:

> Jacksonian: Limbs shake and vibrate uncontrollably, lasts for up to 45 seconds.
>
> Complex partial (psychomotor): Vivid hallucinations and problems in perception that last up to three minutes; during one of these episodes Parker mistook the end of a subway platform for the back of a truck and jumped off; he was brought to his senses by the sound of an approaching train and was able to scramble to safety.
>
> Partial continuous: Uncontrollable grinding of teeth and loss of control of left arm and leg for short bursts up to a minute. An episode can include dozens of attacks lasting more than a day.
>
> Akinetic: Parker drops to the ground and lies unconscious for up to five minutes. He often injures his head and face in the fall.

20 Parker has been prescribed many drugs for the treatment of his epilepsy. The primary drugs in his plan are Phenytoin (Dilantin) and Primidone (Mysoline). Both drugs have various side effects to which I will refer below when reviewing the expert evidence.

21 The seizures associated with Parker's epilepsy severely disrupted his school attendance. As a child and young teen, Parker grew increasingly despondent over his medical condition and the terror he experienced with seizures. Aggressive medical treatment with various drugs did not improve his condition.

22 At the age of 14, in an attempt to control his seizures, Parker underwent a right temporal lobectomy at the Toronto Hospital for Sick Children. The operation involved the opening of his cranium and the removal of brain matter. The operation was a complete failure and Parker suffered a *grand mal* seizure in the recovery room. Parker became depressed and suicidal and was hospitalized in various psychiatric hospitals. At the age of 16, Parker agreed to further surgery. Only local anesthetic was used and thus Parker was awake while his skull was opened and further brain material was scraped away. The operation did not reduce the seizures.

23 In the late 1960's, Parker was introduced to marihuana while an in-patient at a provincial institution. Parker's use was originally recreational. By 1974, he was a regular user and he had observed that while under the influence of marihuana, the frequency and intensity of his seizures sharply declined.

24 In 1980, Parker reported his experience with marihuana to his physician and started to diarize his marihuana use and seizure frequency. Over a six-month period, he found that he experienced *grand mal* seizures when he did not take marihuana and experienced no seizures when he took marihuana in addition to his prescription medicine.

25 In 1987, Parker's physician advised that the side effects of the prescription medications were so severe that higher dosages could not be used. Therefore, the physician advised him to regularly use marihuana in conjunction with his prescription medicine to control his seizures. The physician provided a report in September 1987 that included the following:

> Mr. Parker has had many side effects over the years due to his anti-convulsant medications, which have prevented their perhaps more efficacious use in higher doses. These side effects are well-recognized in the medical literature. Hence, from a medical and quality-of-life point of view, I am of the opinion that it is medically necessary, in order to obtain optimal seizure control, that Mr. Parker regularly use marijuana in conjunction with his other anti-convulsant medications.

26 In 1987, Parker was charged with possession of marihuana. He was acquitted on the basis of the common-law defence of necessity. A Crown appeal to the Ontario District Court was dismissed. Shapiro Dist. Ct. J. noted Parker's lengthy history of *grand mal* epilepsy and his attempts at treatment with drugs and through surgery and concluded that the trial judge could properly find that the necessity defence was made out.

27 Parker continued to derive substantial benefit from smoking marihuana in conjunction with his prescription drugs. If he consumes marihuana on a daily basis, he experiences virtually no seizures. Without marihuana, within three days he experiences seizures again and will have three to five *grand mal* seizures a week and many more other lesser seizures. Parker is also able to use marihuana to avert oncoming seizures. When he experiences a prodrome, a precursor to a *grand mal* seizure, and consumes marihuana, he is able to combat the oncoming seizure.

28 The seizures associated with Parker's epilepsy constitute a serious threat to his health and safety. He has been hospitalized over 100 times due to injuries sustained from seizures. He has been robbed while unconscious and arrested as being drunk, although he does not drink alcohol. Because of the severity of his symptoms, Parker is unable to work and is on a government disability pension.

29 From 1980 to 1996, Parker was not under the care of an epilepsy specialist. He was under the care of a specialist at the time of the trial in 1997, having first seen him about three weeks before the trial. Parker has had his blood levels monitored about twice a year. The only change in medication that has been recommended by a physician in the recent past was from an emergency room physician who suggested that he increase the dosage of Dilantin from 300 mg to 400 mg per day. Parker declined due to his concern about liver damage at the increased dosage. Crown counsel conducted an extremely brief cross-examination of Parker, which showed that Parker had not asked to have Marinol prescribed for him.

30 Parker's mother filed an affidavit on the appeal to update his medical condition. She states that Parker's health has greatly improved since the trial and she attributes this to the lack of seizures due to his use of marihuana.

31 At trial, some evidence was given about Parker's participation in a study at the Addiction Research Foundation in 1979. He testified that he was given some pills containing what he was later told was some form of synthetic THC, a placebo, and a plant that had been sprayed with THC. He had little information at trial about the study or its conclusions. He believed that the study concluded that the use of THC had neither a beneficial nor detrimental effect on his seizures.

32 On appeal, counsel for Parker produced the results of the study. No objection was taken to this evidence and indeed the appellant relied upon this material. This study assumed considerable importance on the appeal and therefore I set out its findings in some detail. The study was undertaken to assess Parker's claim that marihuana was beneficial in controlling his seizures. The authors of the study noted that "recently cannabidiol [CBD], a marijuana constituent which lacks psychotropic effects in man, has been studied in a wide variety of both natural and experimentally induced epileptic models and has been shown, almost uniformly, to be anti-convulsant". However, the ARF study of Parker dealt only with THC, in part, because it was available in a purified form.

33 It is important to set out the conclusions from the study:

> From the study it would appear that [THC] had neither beneficial nor detrimental effects on either the clinical or electroencephalographic features of this man's seizure disorder. Several factors however, make it difficult to correlate our findings with what actually happens while he is out of hospital smoking crude marijuana. The marked decrease in seizure frequency during hospitalization is a well recognized occurrence. Hospitalization also ensured anticonvulsant drug compliance to Dilantin particularly since it was subtherapeutic on admission and also after discharge. The use of pure [THC] is also open to criticism since the patient's experience had been with crude marijuana in which [THC] is only one of several cannabinoids including cannibidiol which may be more exclusively anticonvulsant. This patient however was followed at weekly intervals for four weeks after discharge with his anticonvulsants being supplied in weekly allotments. During this time he was regularly smoking crude marijuana obtained on the street. Seizure frequency remained low with only two seizures in the four weeks. The EEG's showed no significant difference from those done in hospital and the marijuana urine levels were just slightly below those measured in hospital. Dilantin levels were subtherapeutic but Tegretol and Mysoline remained within the therapeutic range.
>
> Much more extensive clinical investigation is needed with both crude marijuana and the individual cannabinoids before any definitive statement can be made concerning either harmful or beneficial effects in epileptics. Perhaps different types

> of seizure disorders respond differently and Feeney has also suggested that the response depends to some extent on the pre-drug baseline seizure frequency and intensity, seizures being activated in individuals with a low baseline frequency and attenuated in those with a high baseline frequency. Until more work is done, however, we feel it prudent to advise epileptics against the use of marijuana. [Footnotes omitted.]

34 The parties drew completely opposite conclusions from this study. Parker relies on the study as further evidence in support of the trial judge's findings of fact. On the other hand, the Crown suggests that the study supports its submission that findings made by the trial judge concerning Parker's need for marihuana to control his seizures are unsupported by the evidence. I will set out those findings of fact in some detail after my review of the expert evidence. Suffice it to say at this stage that the trial judge found as a fact that synthetic THC (Marinol) is not effective for Parker since it does not contain CBD, that Parker had shown control of seizures is best achieved through a combination of conventional medication and smoking marihuana, and that he had been reasonably diligent in attempting to control his seizures through conventional treatment.

35 In my view, the ARF study confirms Parker's belief that THC does not have a therapeutic effect on him. The Crown overstates the case that the ARF study shows that if Parker properly monitored his intake of conventional medications he would not need to resort to marihuana use. As the authors point out, "marked decrease in seizure frequency during hospitalization is a well recognized occurrence". There was no suggestion that Parker's continued hospitalization was a reasonable alternative to his use of marihuana to control his seizure activity outside the hospital. It may be that hospitalization also ensured anticonvulsant drug compliance. However, the issue of Parker's use of conventional medication and compliance with that regime was squarely before the trial judge. It was open to the trial judge to accept Parker's evidence that he took his medication as prescribed. The ARF study also confirms that Parker's decision not to seek a prescription for Marinol was a reasonable one. In addition, no physician has apparently suggested that Parker use Marinol. As counsel for Parker aptly pointed out in oral argument, the only person who has "prescribed" Marinol for Parker is Crown counsel. Finally, the ARF study marginally supports the theory that it is CBD rather than THC that is the medicinal ingredient in marihuana at least in respect of control of seizures. It therefore supports the trial judge's finding in that regard in respect of Parker.

(iii) The harmful and therapeutic effects of marihuana

36 The parties placed a considerable body of evidence before Sheppard J. about the medicinal use of and claims about marihuana. [1] On consent, the parties filed the transcripts from the trial in *R. v. Clay* . The principal experts were Dr. Kalant, who had also testified for the Crown at the *Clay* trial, and Dr. Morgan, who testified on behalf of the defence. Both are highly qualified.

37 It appears to me that the differences between the Crown and defence experts lay mostly in the emphasis they placed on certain facts and the inferences they drew. One fact looms very large in this case, as it did in the *Clay* case. The experts agreed that there is a need for better studies about the long-term effects of regular marihuana use and for better studies about the therapeutic value of marihuana.

38 As I have indicated, the transcripts from the trial in *R. v. Clay* were filed on consent in this trial. That evidence set the background for the issues in this case as it set out the existing state of knowledge about the harmful health effects of marihuana. Sheppard J. adopted the findings of fact made by McCart J. in the *Clay* trial. Since those findings are fully set out in my reasons in the *Clay* appeal, I will only briefly summarize the findings of particular relevance to this appeal.

39 Consumption of marihuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol and there is no "hard evidence" that even long-term use can lead to irreversible physical or psychological damage. Marihuana use is not criminogenic (i.e. there is no causal relationship between marihuana use and criminality) and it does not make people more aggressive or violent. There have been no recorded deaths from consumption of marihuana. Marihuana does have an intoxicating effect and it would not be prudent to drive while intoxicated. As with tobacco smoking, marihuana smoking can cause bronchial pulmonary damage, especially in heavy users. There may be other side effects from the use of marihuana and its effects are probably not as benign as was thought some years ago. However, these other effects are not acute except in very

narrow circumstances, for example, people with schizophrenia. I will return to the question of the harmful effects of marihuana when discussing the objectives of the marihuana prohibition in the legal analysis.

40 On this appeal, the Crown disputes some of the findings by McCart J. and hence their acceptance by Sheppard J. The Crown relies upon evidence that Dr. Kalant gave at the trial in commenting on the findings by McCart J.[2] Dr. Kalant's reservations about the findings made in the *Clay* trial are minor and, in any event, do not seriously affect the constitutional analysis in this case, which is concerned with the medical use of marihuana.[3] For example, Dr. Kalant repeated the testimony he gave at the *Clay* trial that if the level of use went up "dramatically", the amount of harm produced by "heavy use" would undoubtedly also go up. For the purposes of this case, I would accept that common-sense observation, but there is no indication that the medicinal use of marihuana would lead to a dramatic use in marihuana generally.

41 Dr. Kalant also pointed out that the phrase "hard evidence" was not defined in the reasons for judgment, and therefore the statement should not be accepted as a "statement of fact". In my view, this is a matter of semantics and reflects the difficulty of reconciling scientific proof with proof in litigation. In short, scientists can continue to study a problem until it is resolved. They find facts through continual testing, experimentation and research. A finding will only be accepted as a fact when it can be replicated under carefully controlled circumstances by many different researchers. This is a particularly onerous standard where, as with the harmful effects of marihuana, what is sought to be demonstrated is a negative, that marihuana does not cause serious physical or mental harm. The fact that on the current state of the research no such negative conclusion can be reached is not a statement for scientists that there is no harm, only that more studies may have to be done. Trial judges do not have that luxury. They are required to reach a conclusion on the basis of the record placed before them by the parties. When McCart J. said that there was no hard evidence of irreversible organic mental damage from the consumption of marihuana, he was making a finding that he was satisfied that no such harm had been demonstrated on the evidence presented in his courtroom. This finding was in any event qualified by the finding, accepted by Sheppard J., that there was a satisfactory body of evidence that heavy smoking of marihuana can cause bronchial pulmonary damage.

42 I will now turn to the evidence concerning the medicinal use of marihuana. There are a number of active ingredients, cannabinoids, in marihuana. The main ingredient in marihuana that gives it the psychoactive effect is THC. As indicated earlier, THC is available in synthetic form and is available in pill by prescription under the trade name Marinol. There is a dispute between the parties as to whether Marinol is effective in treating seizures associated with epilepsy or any of the other symptoms of diseases for which patients have resorted to marihuana such as glaucoma and AIDS.

43 Other cannabinoids may have anti-seizure properties. One of the most promising may be cannabidiol (CBD). CBD does not have a psychoactive side effect. It is not available by prescription. The studies that have been done indicate that the cannabinoids increase the effectiveness of conventional drugs used to treat epilepsy and are not a replacement for those drugs. The goal for effective treatment of epilepsy is to maintain a steady blood level of medication.

44 The Crown's witness, Dr. Kalant, did, in general, provide strong support for the respondent's position that marihuana does have therapeutic properties for treating epilepsy and other illnesses. He testified, for example, that "there is a lot of evidence showing a variety of cannabinoids, that is the pure compounds contained in and extracted from cannabis, do have anti-seizure activity". Most of this evidence has come from animal studies. He testified that of the various cannabinoids tested the most promising one was CBD. It has at least as much anti-convulsant effect as THC but is free of the psychoactive effects. Further, research shows that tolerance to the anti-convulsant action of THC occurs very quickly, "in a matter of days", so it loses its effect. This does not happen with CBD. As well, there is a simpler dose response relationship with CBD, meaning the more that is given, the greater the effect. With THC, while low doses may be good at controlling seizures, high doses can produce seizures. As he pointed out, this makes smoking marihuana that contains both THC and CBD a problematic delivery system, especially since smoked marihuana contains more THC than CBD. He emphasized that not enough human studies had been done. One good human study done by the Cunha group found that pure CBD taken with patients' regular medication improved the condition of all but one of the epileptic patients.

45 Dr. Kalant also highlighted one of the paradoxical consequences of the drug laws. Marinol, which has these various side effects, especially that it causes the psychoactive effects of marihuana, is available in Canada while CBD, which does not have these side effects, is not. As he said:

> I'm not sure why not because since it is essentially free of psycho-active effect and it has a well demonstrated anti-epileptic activity, I should think that it would be well worthwhile to do clinical trials and I really just don't understand why there has been no further clinical testing since the 1980 [Cunha] study.

46 The defence witness, Dr. Morgan, testified that marihuana has been found useful for treatment of acute nausea and vomiting, as results, for example, from chemotherapy, and Marinol was originally approved for this purpose by the government. Smoking marihuana has been found to be effective in lowering fluid pressure in the eyes of patients with glaucoma. Marihuana is also effective in promoting weight gain and increase of appetite, which is particularly important, for example, for patients with AIDS who are suffering from HIV Related Wasting Syndrome. Marihuana was found to give relief to patients with pathologically elevated muscle tone such as patients with multiple sclerosis or spinal cord damage leading to spastic paralysis of the limbs. Marihuana is also an analgesic. Finally, marihuana has been found to have anti-seizure properties and thus is used by persons with epilepsy, like Parker. According to Dr. Morgan, there were a number of studies showing that THC or CBD have quite pronounced anti-epileptic activity. Dr. Morgan referred to the Cunha study and other literature suggesting that CBD was as effective as or more effective than THC in this respect. Dr. Morgan also referred to anecdotal reports of the effectiveness of marihuana for epileptics. In his view, marihuana is an effective anti-epileptic medication for some individuals.

47 Dr. Morgan reviewed the side effects of the conventional medication that the respondent was taking. Dilantin, one of the most common drugs used to treat epilepsy, can produce sedation and drowsiness so the police have arrested patients because the police believe they are intoxicated. As well, the dose that produces the therapeutic effect is very close to the toxic dose. In chronic use, it can produce gingival hyperplasia, overgrowth of the gums, which requires surgery to correct. It has also been known to produce damage to the brain and liver. In general, it is a dangerous drug. Another drug used by Parker, Primidone, metabolizes in the body to Phenobarbital and has the same side effects, namely, drowsiness, sedation and severe dysfunction. Another drug, Depakene, can produce outright failure of the liver and patients have been known to die from its effect. It also has adverse effects on the foetus of a pregnant woman.

48 On the other hand, marihuana, although it has a variety of effects in humans, has no overdose liability. There has never been a proven overdose death caused by marihuana in humans. Unlike the conventional medications, marihuana has an extremely wide safety margin. There is no reliable evidence that even chronic use of marihuana has an adverse impact on cognition or memory. Marihuana is not known to harm the foetus. Since marihuana and tobacco smoke are similar in character, it can harm the lungs. However, a regular marihuana smoker, even a therapeutic marihuana smoker, smokes much less than a tobacco smoker (three to five marihuana cigarettes a day compared to 30 to 50 tobacco cigarettes) and therefore inhales much less smoke. There is, therefore, reason to believe that the marihuana user will not suffer as much pulmonary harm as tobacco smokers. There are no reports of marihuana-only smokers developing emphysema or lung cancer.

49 According to Dr. Morgan, Marinol is not very effective because the THC is destroyed the first time it passes through the liver. Thus, only about 5% reaches the blood stream. Much more of the smoked marihuana becomes available to the body. Marinol is also essentially useless for acute situations. Smoked marihuana, on the other hand, can be used by persons who feel nausea coming over them, because it delivers the THC quickly and more effectively than Marinol. Marihuana gives acute relief of nausea and vomiting. Marinol is also very expensive. Marihuana is more effective, more efficient and much cheaper. Finally, Marinol, since it only contains THC, is of no use to individuals, particularly epileptic patients, who benefit from CBD.

50 In summary, Dr. Kalant was wary of smoking as a way of delivering the therapeutic benefits of cannabis. He demonstrated greater concern about the risks from smoking marihuana, was concerned that smoking marihuana was a very inexact way to deliver the drug and that a very large amount of marihuana would have to be smoked to keep a therapeutic level of CBD in the patient's bloodstream. He was, in general, more cautious about the long-term effects of marihuana use because of the absence of

research. Dr. Morgan was less concerned about the possible harmful side effects of smoking marihuana. He tended to discount the risks and dangers and thus could see little, if any, reason for refusing patients who need access to the drug.

51 Dr. Morgan filed a further affidavit on the appeal and Dr. Kalant filed an affidavit in response. In his affidavit,[4] Dr. Morgan states that there have been no striking pharmacological advances in the treatment of epilepsy since the trial and that the respondent remains among the minority of sufferers who "are clearly not fully responsive to conventional pharmacological treatment for his condition". As to the use of marihuana to treat epilepsy, Dr. Morgan referred to studies released since the trial. A study by the British Medical Association entitled "Therapeutic Uses of Cannabis" concluded that cannabinoids appear to be effective for a number of ailments including epilepsy and as an anti-nauseant and while further research was needed, "cannabinoids have a margin of safety superior to many conventional drugs". In his affidavit, Dr. Kalant fairly points out that the BMA study referred to the therapeutic benefits of pure cannabinoids and that the study does not recommend the use of smoked marihuana except for terminally ill patients. Of course, this overlooks the fact that there is no legal source for the cannabinoids, other than THC (Marinol).

52 Dr. Morgan also referred to the status of research specifically concerning CBD. He stated that animal studies and a few human studies have indicated that CBD, not THC, may be the therapeutically active cannabinoid for treating epilepsy and this is a reason why Marinol does not answer the needs of some patients. He referred to a report by the United States Institute of Medicine. In general, that report recommended much more extensive study of the possible therapeutic effect of marihuana and the cannabinoids on a long list of illnesses. With respect to CBD, the report noted that the few human studies that had been done were likely too small to demonstrate efficacy and concluded that to date the potential anti-epileptic activity of CBD is not promising. The study emphasized that smoked marihuana is not recommended because of the risk factors (from smoking) but the authors also made these reasonable observations:

> The goal of clinical trials of smoked marijuana would not be to develop marijuana as a licensed drug, but rather as a first step towards the possible development of nonsmoked, rapid-onset cannabinoid delivery systems. However, it will likely be many years before a safe and effective cannabinoid delivery system, such as an inhaler, will be available for patients. In the meantime, there are patients with debilitating symptoms for whom smoked marijuana might provide relief. The use of smoked marijuana for those patients should weigh both the expected efficacy of marijuana and ethical issues in patient care, including providing information about the known and suspected risks of smoked marijuana use.

And

> Until a non-smoked, rapid-onset cannabinoid drug delivery system becomes available, we acknowledged that there is no clear alternative for people suffering from *chronic* conditions that might be relieved by smoking marijuana, such as pain or AIDS wasting . One possible approach is to treat patients as n-of-1 clinical trials, in which patients are fully informed of their status as experimental subjects using a harmful drug delivery system, and in which their condition is closely monitored and documented under medical supervision, thereby increasing the knowledge base of the risks and benefits of marijuana use under such conditions. [Emphasis added.]

53 Dr. Morgan also discussed other studies of more general application. He referred to a symposium of the Society for Neuroscience on "Marijuana and Analgesia" which presented strong evidence that cannabinoids had direct diminishing effects on pain signals in animals. Dr. Kalant reasonably points out that the analegisic effect of cannabinoids described in the study is "well demonstrated, but it does not require the smoking of cannabis". Of course, again, this does not seem to meet the problem that these other cannabinoids are apparently not available in Canada.

54 At trial, the defence called evidence from persons suffering from glaucoma and epilepsy who have used marihuana to treat their systems. The defence also called Dr. John Goodhue, a general practitioner doing primary care in Toronto for persons who are HIV positive. Some of his patients have developed AIDS. He testified that some of his patients have successfully used smoked marihuana to treat the side effects from the many drugs AIDS patients must take.

55 Based on the evidence adduced at trial, the trial judge found that the defence had established that smoking marihuana has a therapeutic effect in the treatment of nausea and vomiting particularly related to chemotherapy, intraocular pressure from glaucoma, muscle spasticity from spinal cord injuries or multiple sclerosis, migraine headaches, epileptic seizures and chronic pain. He accepted Parker's evidence as to the therapeutic effect of smoking marihuana in controlling his seizures. He also accepted that Parker's cultivation of marihuana was incidental to his need to possess marihuana for its therapeutic use for the treatment of his epilepsy. By cultivating marihuana he could control its quality. It was also an economic necessity since he has only disability benefits from the Canada Pension Plan to live on. He cannot afford to pay illicit street prices to obtain marihuana. The trial judge found as a fact that Parker had established he could best control his epileptic seizures through a combination of prescribed medications and the smoking of marihuana.

56 At trial, the Crown argued that Parker had not shown that other legal means were not available to control his seizures. Crown counsel argued that Parker failed to seek sufficient medical attention, failed to request a prescription for Marinol, and failed to have his blood levels monitored by regular blood tests. The trial judge stated that he could "not accept" any of these failures as being supported by the evidence. He held that Parker had been receiving regular medical supervision for his prescribed drugs since 1969. He found that Parker had not sought a Marinol prescription because synthetic THC was not effective for him as demonstrated in the Addiction Research Foundation study. The drug reaches his blood stream much faster when it is inhaled. Further, Marinol does not contain CBD, which appears to have additional therapeutic value for him. Finally, the trial judge concluded that Parker does have regular blood work done during numerous emergency hospital admissions and regular medical visits. The trial judge concluded that he "found no basis on which to fault Mr. Parker for his management of his serious medical condition".

57 The trial judge found that smoking marihuana is more efficient and at least five times faster in delivering THC and CBD to the blood stream than oral medication and, for people like Parker, more effective.

(iv) The regulation of drugs in Canada: Legal means for obtaining marihuana as medicine

(a) The evidence at trial

58 As indicated, there was evidence that Marinol is available in Canada by prescription. Leslie Rowsell, the director of the Bureau of Drug Surveillance, a division of Health Canada, testified at the trial about the lawful means of obtaining marihuana. There is no person authorized to distribute raw marihuana. Mr. Rowsell testified that, while it would be open to a physician to prescribe marihuana, the Canadian government would not look favourably upon a physician who did so and, in any event, no pharmacy could legally fill the prescription.

59 Mr. Rowsell gave evidence as to the method by which a new drug may be approved by the Bureau. A protocol to expedite the availability of new drugs formerly called the Emergency Drug Release Programme, now the Compassionate Use Programme, by which certain drugs were made available for the treatment of AIDS, would not be available since the programme does not apply to narcotics. [5]

60 The other alternatives were for a person, usually a large drug company, to apply for a Drug Identification Number (D.I.N.) or for a physician to request permission to conduct a clinical trial. It is fair to say that neither alternative was a practical solution for Parker. Even the less costly clinical trial method would still require expenditure of hundreds of thousands of dollars and depend on a clinician willing to set up a clinical trial and the respondent then being selected as one of the participants. No one has applied for a D.I.N. to market marihuana and apparently no one has applied to do a clinical study of marihuana. Since marihuana does not have a D.I.N., it is not approved for dispensing by pharmacists. Other more dangerous narcotics such as heroin can be prescribed by a physician and dispensed by a pharmacy, albeit heroin can only be used in a hospital setting. The Bureau has not investigated the potential medicinal benefits of marihuana.

61 At trial, neither Mr. Rowsell nor anyone else mentioned the possibility of an exemption from the marihuana prohibition through an application for a ministerial exemption under s. 56 of the *Controlled Drugs and Substances Act* . The trial judge accordingly made no findings in relation to that section.

(b) The evidence on appeal

62 Parker filed an affidavit from Eugene Oscapella, a director of the Canadian Foundation for Drug Policy. Mr. Oscapella had testified at the *Clay* trial. In the affidavit, he provides information about Health Canada's use of the exemption in s. 56 of the *Controlled Drugs and Substances Act* . In May 1999, Health Canada released the Interim Guidance Document that outlines the process for Canadians to obtain exemptions under s. 56. This document is attached as an exhibit to Mr. Oscapella's affidavit. Among other things, the applicant must identify:

> [The] name and address of the fabricator or distributor who is licensed under *CDSA* , the *Narcotic Control Regulations* and the *Food and Drug Regulations* and who has the capacity to fabricate and distribute in accordance with international drug treaties, if applicable.

63 Mr. Oscapella also attached a recent government document entitled "Marijuana for Medicinal Purposes: A Status Report". This report states that "the safety and efficacy of marijuana as a medicine has not been demonstrated in any country of the world" and therefore the first step is to gather scientific information and conduct clinical trials. The document states that the government is considering a proposal from a pharmaceutical company to conduct trials on inhaled cannabinoids. There was no indication when and if this proposal would be approved. The document also refers to the Compassionate Use Programme, but points out that there is no "licit, licensed, non-governmental supplier anywhere from whom research-grade marijuana can be obtained" under that programme. This document indicates that as of June 3, 1999, just over 30 requests have been made under s. 56 for marihuana for medical purposes. According to the document:

> After all of the required information has been submitted, the Department aims to review the request within 15 working days. The Minister's decision to exercise discretion for each case is made in the context of the recommendation formulated as part of the review and the circumstances of each individual applicant.

64 In addition, the document indicates that Health Canada, "will determine, on a case-by-case basis, the necessity of imposing other terms and conditions, particularly for use within the research context".

65 According to Mr. Oscapella, the Minister of Health had granted two cannabis exemptions under s. 56. It was unclear what had happened to the other applicants or the 15 working day guideline for processing applications, except that the Minister may have required further information, notwithstanding that according to Health Canada 15 applications were said to have been sufficiently well-detailed to be assessed as of August 26, 1999. Mr. Oscapella was cross-examined on his affidavit on September 21, 1999. He was told by officials at Health Canada that as of that date no further exemptions had been granted by the Minister.

66 The day prior to the hearing of this appeal, the Minister issued a press release concerning the granting of further s. 56 exemptions. At the opening of the appeal we asked Crown counsel if he wished to apply for an adjournment to file fresh evidence on the operation of s. 56. He declined the invitation.

The Trial Judge's Findings on the Law

67 The trial judge held that Parker had shown that there was a risk of deprivation of his right to life, liberty or security of the person by the marihuana prohibition. Most obviously, there was the risk of deprivation of liberty should Parker be convicted of an offence under the former *Narcotic Control Act* or the *Controlled Drugs and Substances Act* . There was an additional risk of injury or death to Parker because he would not have access to marihuana in the prison setting to prevent seizures. Thus, prison would be a particularly dangerous place for Parker because of his medical condition. The anxiety about worrying about a seizure would "be a cruel and unusual punishment in itself". In terms of s. 7, jail not only would result in a deprivation of liberty, but also would put his life at risk and threaten the security of his person.

68 The trial judge was satisfied that the possibility of Parker's obtaining Marinol in prison was not an answer since he was satisfied on the evidence that synthetic THC was not effective for Parker and he would need to receive CBD. He was also of the view that due process through the trial procedure did not afford Parker sufficient protection. Barring a medical discovery, Parker has a chronic need for marihuana and is therefore subject to arrest, search and seizure, and detention every day. The fact that he might succeed in defending a prosecution on the basis of a necessity defence, as he had in 1987, was no answer since each prosecution entailed financial cost, stress, uncertainty, arrest and loss of his stock of marihuana and marihuana plants thus interfering with his security of the person. The evidence established that Parker was traumatized by the police raids on his home.

69 The trial judge was satisfied that the deprivation of life, liberty or security of the person was contrary to the principles of fundamental justice. He held that it is an aspect of fundamental justice that a person "possess an autonomy to make decisions of personal importance", including decisions as to health. Serious decisions regarding the management of illness and medical disability in consultation with a physician fall within this area of personal autonomy. Parker has made such a decision respecting his use of marihuana, the use of marihuana has allowed him to control his illness with some success and his decision has been supported by his physicians over the years. The trial judge made this critical finding:

> I find he has established that this control is best achieved through a combination of prescribed medications and the smoking of marihuana. For this Applicant/Accused to be deprived of his smokable marihuana is to be deprived of something of fundamental personal importance.

70 The trial judge found that the marihuana prohibition is overbroad because the legislation does not provide a procedural process for an exemption for an individual in Parker's circumstances. It does not accord with fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada. While the purpose of the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* is to safeguard the health of Canadians, that legislation has the dramatically opposite effect for Parker. The legislation prevents him from having access to a relatively safe drug that has demonstrated therapeutic benefit to him.

71 In response to the Crown's argument that a continued marihuana prohibition was required so that Canada fulfilled its international obligations, the trial judge pointed out that, for example, the United Nations *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* provides that the measures adopted by the contracting states to criminalize marihuana possession and prevent illicit cultivation must be "necessary" and respect fundamental human rights.

72 The Crown conceded before the trial judge that if he found a violation of Parker's rights under s. 7, the violation could not be saved by s. 1 of the *Charter* .

73 The trial judge adopted the following remedy. He concluded that rather than striking down the prohibition the proper remedy was to read in, pursuant to s. 52 of the *Constitution Act, 1982* , an exemption for "persons possessing or cultivating *Cannabis* (marihuana) for their personal medically approved use". This exemption applied to the marihuana possession and cultivation provisions of the former *Narcotic Control Act* and the *Controlled Drugs and Substances Act* , being ss. 3(1) and 6(1) of the former Act and ss. 4(1) and 7(1) of the latter. Parker was also entitled to the personal remedy, under s. 24(1) of the *Charter of Rights* , of a stay of proceedings of the charges laid against him and the return of the plants seized during the September 1997 arrest.

The Issues

74 The Crown makes the following arguments:

1. The conduct in respect of which Parker seeks *Charter* protection is outside the scope of s. 7 of the *Charter* .

2. The trial judge erred in finding that Parker had no legal alternative to control his epilepsy. This submission identifies two errors: (i) that Parker had not shown that Marinol could not treat his epilepsy and (ii) that Parker had not shown that if he maintained a proper regime of conventional medication and regular attendance at a specialist he could not control

his epilepsy. The Crown argues that the trial judge erred by reversing the burden of proof by requiring it to establish that Parker's rights were not infringed and that any infringement was consistent with the principles of fundamental justice.

3. The trial judge erred in finding the legislation was overbroad because there was a possibility for legally obtaining marihuana. The fact that no one had taken the steps to have marihuana approved through the legal procedure set out in the legislation did not render the legislation unconstitutional.

4. The trial judge erred in finding that the *Controlled Drugs and Substances Act* violated Parker's rights because Parker could have applied for an exemption under s. 56 of the Act but had failed to do so and that the process for granting exemptions under s. 56 conforms with the principles of fundamental justice.

5. Assuming there was a breach of s. 7, the trial judge erred in his choice of remedy.

Analysis

Introduction

75 In the course of these reasons, I intend to address the arguments made by the Crown. However, it will be more convenient to deal with those arguments through an analysis that is structured around s. 7. Accordingly, I will consider these issues under the following headings. These headings should be understood as dealing with the therapeutic use of marihuana, not the broader claims dealt with in the *Clay* case.

1. The context

2. The right to liberty implicated by the marihuana prohibition

3. The right to security of the person implicated by the marihuana prohibition

4. Does the marihuana prohibition deprive Parker or persons similarly situated of their rights to liberty and security of the person?

5. The principles of fundamental justice and the right to liberty and security of the person

6. Is there a different analysis of fundamental justice under the *Controlled Drugs and Substances Act* ?

7. Can any violations be saved by s. 1?

8. The appropriate remedy for any violations

1. The context

76 This case depends upon the interpretation and application of s. 7 of the *Charter* :

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

77 In the companion case of *R. v. Clay* , I have already dealt with the submission that, broadly speaking, the marihuana prohibition violates s. 7 because it criminalizes people who have done nothing wrong. This case raises the narrower issue of the impact upon individuals claiming a need for marihuana as a matter of medical necessity, not recreational use.

78 This aspect of the case raises an issue akin to the standing issue that I have touched upon in the *Clay* case. The Crown's approach to this appeal was to try to demonstrate that as a matter of fact Parker did not need marihuana to control his epilepsy. I deal with that issue below. However, it is also open to Parker to challenge the validity of the legislation on the basis that it was overbroad or unconstitutional in some other way in its application to other persons. The Crown respondent appeared to

concede this in the *Clay* appeal. In any event, that conclusion follows from the decisions of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) and *R. v. Morgentaler* . In both cases, the accused were held to have standing to challenge the law under which they were charged although the alleged infringement of the *Charter* concerned the rights of some other person.

79 The decision of the Supreme Court of Canada in *Morgentaler* is of particular assistance because the issues in that case were similar to the issues here. The accused physicians relied upon s. 7 of the *Charter* to challenge a criminal offence based upon the interference with the health of pregnant women seeking abortions. In his dissenting reasons at p. 133, McIntryre J. suggested that the question of the s. 7 violation was hypothetical since, "[t]here is no female person involved in the case who has been denied a therapeutic abortion". However, Dickson C.J.C. was satisfied that the accused physicians had standing. As he said at p. 63:

> As an aside, I should note that the appellants have standing to challenge an unconstitutional law if they are liable to conviction for an offence under that law even though the unconstitutional effects are not directed at the appellants *per se* : *R. v. Big M Drug Mart Ltd.* , at p. 313. The standing of the appellants was not challenged by the Crown.

80 Therefore, it is open to Parker to challenge the validity of the marihuana prohibition not only on the basis that it infringes his s. 7 rights because of his particular illness, but that it also infringes the rights of others suffering other illnesses.

81 The trial judge identified a number of ways in which Parker's liberty and security interests were affected by the marihuana prohibition. In one sense, it would have been sufficient to identify the clearest of those infringements, the possibility of imprisonment upon conviction for the offence. This interference with Parker's liberty interest would conceivably be sufficient to require a determination of whether the deprivation was in accordance with the principles of fundamental justice.

82 However, in my view, this would not adequately capture the defects in the legislation and would fail to come to grips with the context in which the issue arises. As Wilson J. said in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) at 1355-56 a right or freedom may have different meanings in different contexts. "The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it." Thus, the importance of the right or freedom must be assessed in context rather than in the abstract and its purpose must be ascertained in context.

83 Although Wilson J. was particularly concerned about the importance of context for the s. 1 analysis, context is important for analyzing a right, such as s. 7, that to some extent contains its own balancing test and which may or may not be amenable to further balancing under s. 1. The dominant aspect of the context in this case is the claim by Parker and other patients that they require access to marihuana for medical reasons. They do not, like the appellant in the *Clay* case, assert a desire for marihuana for recreational use. Parker does not claim a right to use marihuana on the basis of some kind of abstract notion of personal autonomy. The validity of the marihuana prohibition must be assessed in that particular context. The context here is not simply that the marihuana prohibition exposes Parker, like all other users and growers, to criminal prosecution and possible loss of liberty. Rather, Parker alleges that the prohibition interferes with his health and therefore his security interest as well as his liberty interest.

84 Related to this aspect of the case is that Parker does not seek to avoid the marihuana prohibition to assist in the treatment of some mild discomfort. If it is not properly controlled, his seizure activity can be life-threatening. Further, the evidence concerning the use of marihuana to assist in the treatment of other illnesses centred on patients with profound symptoms: AIDS patients suffering from wasting disease, cancer patients receiving chemotherapy and patients suffering from glaucoma, to name just a few.

85 Having said that, it must be acknowledged that the scope of the liberty and security interests protected by s. 7 is still a matter of considerable debate. See for example, *New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1999), 177 D.L.R. (4th) 124 (S.C.C.) , per Lamer C.J.C. at 146. As I will explain, it is important for the purposes of this case that, although Parker raises important concerns about health and access to drugs for therapeutic purposes, those concerns are raised in the criminal context.

86 As framed by the appellant, the question of whether Parker's conduct attracts s. 7 protection is intertwined with its assertion that Parker had a legal alternative to marihuana, either Marinol or better management through conventional medication, and thus his choice to smoke marihuana is nothing more than a personal preference. Thus, the Crown asserts that the marihuana prohibition does not affect Parker's physical or mental integrity in any fundamental way and so his security of the person is not engaged.

87 I cannot agree with this characterization of the issues for a number of reasons. I am satisfied that the trial judge had ample evidence from which he could conclude that Parker was not asserting a mere preference for an illegal treatment over a legal one. I will deal with that below. The Crown's focus on the evidence respecting Parker also fails to come to grips with the compelling evidence placed before the trial judge that marihuana is of therapeutic benefit to other patients.

2. The right to liberty implicated by the marihuana prohibition

88 The leading decision on the *Charter* implications where medical treatment and the criminal law intersect is *R. v. Morgentaler* . In that case, three judges wrote for the five-person majority, each adopting different reasons for finding that the abortion provisions of the *Criminal Code* infringed the guarantee to liberty or security under s. 7 of the *Charter* . Wilson J. took the broadest view as she found that the decision of a woman to terminate her pregnancy is protected by the right to liberty. She held, at p. 166, that the right to liberty, "properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance" and again, at p. 171, that the right to liberty "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives". The woman's decision to terminate a pregnancy is within this protected zone of personal autonomy, since, as she wrote at p. 171, it "will have profound psychological, economic and social consequences" for her. Dickson C.J.C., writing for himself and Lamer J., found it unnecessary to consider this aspect of liberty since he preferred to rest his decision on the right to security of the person. Beetz J., writing for himself and Estey J., also based his decision on security of the person. He noted, however, at p. 112 in his discussion of the principles of fundamental justice that certain aspects of the law that he found did comport with fundamental justice, such as a second opinion as to the need for the abortion, "would need to be reevaluated if a right of access to abortion is founded upon the right to 'liberty' in s. 7 of the *Charter* ".

89 In subsequent cases, a majority of the Supreme Court of Canada has accepted that liberty includes a degree of personal autonomy over fundamental personal decisions. The most restrictive view is that of Lamer C.J.C., and summarized in his reasons in *B. (R.) v. Children's Aid Society of Metropolitan Toronto* (1994), [1995] 1 S.C.R. 315 (S.C.C.) at 341: "the principle that must be adopted is that generally speaking s. 7 was not designed to protect even fundamental individual freedoms if those freedoms have no connection with the physical dimension of the concept of 'liberty'". He reiterated this view in his reasons in *New Brunswick (Minister of Health & Community Services) v. G. (J.)* . Also see his earlier reasons in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) , especially at 1174-75.

90 The broader view was adopted by La Forest J., writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ. on this issue in *B. (R.)* at p. 368:

> Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance . [Emphasis added.]

91 L'Heureux-Dubé J., writing for herself and Gonthier and McLachlin JJ. in *G. (J.)* at para. 117, again adopted this position in the context of a mother's right to legal representation at a hearing that would give the Minister of Health and Community Services custody of her children for a further six months. She also noted that Bastarache J.A., as he then was, had taken a broader approach in his dissenting opinion in the Court of Appeal. Bastarache J.A. wrote as follows at (1997), 145 D.L.R. (4th) 349 (N.B. C.A.) at 368:

> No clear majority exists on the question of the applicability of s. 7 to parental control. I have already indicated that I personally favor a more generous interpretation of the "liberty" interest than that proposed by Chief Justice Lamer. I would however restrict the scope of the "liberty" interest in s. 7 to essential personal rights that are inherent to the individual and consistent with the essential values of our society, as suggested by La Forest J. at p. 389 [in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*]. I would hold that this is a case where a close analogy can be made with the application of s. 7 to the criminal law and where an extension of the traditional interpretation of the "liberty" interest advocated by Lamer C.J. is required.

92 Accordingly, I believe that I am justified in considering Parker's liberty interest in at least two ways. First, the threat of criminal prosecution and possible imprisonment itself amounts to a risk of deprivation of liberty and therefore must accord with the principles of fundamental justice. Second, as this case arises in the criminal law context (in that the state seeks to limit a person's choice of treatment through threat of criminal prosecution), liberty includes the right to make decisions of fundamental personal importance. Deprivation of this right must also accord with the principles of fundamental justice. I have little difficulty in concluding that the choice of medication to alleviate the effects of an illness with life-threatening consequences is such a decision. Below, I will discuss the principles of fundamental justice that would justify state interference with that choice.

3. The right to security of the person implicated by the marihuana prohibition

93 This case also clearly implicates the right to security of the person of Parker and others who claim to need marihuana for therapeutic purposes. In *Morgentaler* , Dickson C.J.C. held at p. 56 that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person". Beetz J. held in the same case at p. 90 that security of the person "must include a right to access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction". Wilson J. held at p. 173 that the security of the person guarantee protects "both the physical and psychological integrity of the individual".

94 In *R. v. Monney* (1999), 133 C.C.C. (3d) 129 (S.C.C.) at 156, Iacobucci J. held, relying upon *Singh v. Canada (Minister of Employment & Immigration)*, [1985] 1 S.C.R. 177 (S.C.C.) , that "state action which has the likely effect of impairing a person's health engages the fundamental right under s. 7 to security of the person".

95 In *G. (J.)* , Lamer C.J.C. writing for all members of the court on this issue held, at p. 147 that, "the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action". However, he held at p. 147 that it does protect against "serious and profound effect on a person's psychological integrity". The effects of the state interference "must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility" (at p. 147).

96 The Supreme Court also had to deal with s. 7 in the context of the criminal law and medical treatment in *Rodriguez v. British Columbia (Attorney General)* , a case concerning the validity of the assisted suicide provisions of the *Criminal Code* and their impact on a terminally ill woman. Sopinka J., speaking for the majority of the court at pp. 587-88, summarized security of the person in that context as follows:

> In my view, then, the judgments of this Court in Morgentaler can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress . In *Reference re: ss. 193 and 195.1(1)(c) of Criminal Code (Man.)* , *supra* , Lamer J. (as he then was) also expressed this view, stating at p. 106 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these . [Emphasis added.]

97 In view of these very broad statements, I conclude that deprivation by means of a criminal sanction[6] of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person. Such a deprivation fits easily within any of the above statements. It falls squarely within the holding by Beetz J. in *Morgentaler* . Depriving a patient of medication in such circumstances, through a criminal sanction, also constitutes a serious interference with both physical and psychological integrity.

4. Does the marihuana prohibition deprive Parker or persons similarly situated of their rights to liberty and security of the person?

(i) Introduction

98 In my view, Parker demonstrated at trial that the prohibition on the possession and cultivation of marihuana for personal use to treat his epilepsy deprived him of his rights to liberty and security of the person.

99 The appellant argues that the trial judge's findings are tainted by error because he placed the burden on the Crown to prove that there was no deprivation of his rights. This submission appears to be based, in part, on a statement by the trial judge that he could not "accept" the Crown's submissions that Parker failed to seek sufficient medical attention, failed to request a prescription for Marinol and failed to have his blood levels monitored on a regular basis. The trial judge's reasons for judgment, read as a whole, do not disclose any error as to the burden of proof. The trial judge began his analysis of s. 7 by noting that the onus to establish the violation rested with Parker. He then went on to make the factual and legal findings I have set out above. I have undertaken the factual review to also show that the trial judge's findings are supported by the evidence. It remains to situate those findings within the legal analysis of liberty and security of the person.

100 Before doing so, I would make this comment. Much of the Crown's submissions in this court were an attempt to isolate various parts of the evidence. Thus, Mr. Wilson referred to individual pieces of the expert evidence and contrasted them with Parker's evidence. As I have indicated, he placed a great deal of weight on the ARF study to demonstrate that Parker had a legal alternative. However, the trial judge was required to consider all of the evidence. He had the benefit of the testimony of Parker and the other witnesses who gave *viva voce* testimony. That evidence established to the trial judge's satisfaction that Marinol was not a viable alternative for Parker and that he has received a clear benefit from smoking marihuana that is unavailable to him through conventional treatment alone. These factual findings, for which there is support in the evidence, are entitled to deference by this court and I would not interfere with them.

(ii) Right to liberty

101 I agree with the trial judge that the onus of establishing a violation of the right to liberty is easily satisfied because upon conviction Parker is liable to imprisonment. The trial judge went on to hold that the impact of incarceration was particularly severe for Parker since, deprived of access to marihuana in the jail setting, he was at a real risk of death or injury from seizures. Since any form of incarceration is sufficient to trigger this aspect of the right to liberty, I do not think it necessary or advisable to attempt to quantify the severity of the deprivation. Like the trial judge, I would consider this collateral consequence of deprivation of liberty, if necessary, as an aspect of security of the person.

102 In my view, Parker has also established that the marihuana prohibition infringed the second aspect of liberty that I have identified — the right to make decisions that are of fundamental personal importance. As I have stated, the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance. In my view, it ranks with the right to choose whether to take mind-altering psychotropic drugs for treatment of mental illness, a right that Robins J.A. ranked as "fundamental and deserving of the highest order of protection" in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (Ont. C.A.) at 88.

103 To intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty. For the purposes of this appeal, it is unnecessary to decide whether the decision-making must meet some objective standard to fall within this aspect of liberty. The evidence established that Parker's choice was a reasonable one. He has lived with this illness

for many years. He has tried to treat the illness through highly invasive surgery and continues to take conventional medication notwithstanding the significant side effects. He has studied his illness, he has studied the effects of marihuana, and he has produced a reasonable explanation for why Marinol is not an effective form of treatment. He has found relief from some of the debilitating effects of the illness through smoking marihuana, a drug that, aside from the psychotropic effect, has limited proven side effects in a mature adult. That drug helps protect him from the serious consequences of seizures — consequences that could threaten his life and heath. In those circumstances, a court should not be too quick to stigmatize his choice as unreasonable.

104 In view of my conclusion with respect to Parker's liberty rights, it is not strictly necessary to consider the situation of other persons seeking to use marihuana to alleviate their symptoms from other serious, even terminal, disease. Suffice it to say that Parker presented sufficient evidence that marihuana is a reasonable choice for those persons that I would have found that their liberty interests are infringed by the marihuana prohibition.

(iii) Right to security of the person

105 In his reasons, the trial judge focused on the impact of the criminal justice system in considering Parker's assertion that he was deprived of his security of the person. As I mentioned, he noted the serious risk to Parker's health if he were incarcerated without access to marihuana. He also noted the psychological stress from the police raids upon his home, the questioning, the arrest and the ultimate loss of his marihuana. I would accept that protection from some of these stresses may constitute an aspect of security of the person. However, concentrating only on these effects may miss the context in which this case arises and lead to a narrow, solely procedural, view of the principles of fundamental justice. For example, the powers to search and to arrest upon reasonable and probable grounds have generally been considered to accord with the principles of fundamental justice. The exercise of those powers will have a different impact depending upon the individual. However, as of yet, it has not been suggested that the principles of fundamental justice require distinctions to be made depending on the personal make-up of the suspect. Similarly, if this case were only about criminal procedure, the Crown could argue that the right to a fair trial, including access to the common law necessity defence, could provide Parker with fundamental justice. Accordingly, I would prefer to rest my analysis upon security of the person as it was explained in *Morgentaler* , *Rodriguez* and the other cases I have discussed above.

106 In *Morgentaler* , Beetz J. summarized the right to security of the person as a right to access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. As he said at p. 90:

> Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.
>
> If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person . "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an Act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated . [Emphasis added.]

107 That holding applies in this case. The state has not violated Parker's rights simply because epilepsy in and of itself represents a danger to his life or health. However, to prevent his accessing a treatment by threat of criminal sanction constitutes a deprivation of his security of the person. Based on the evidence, the marihuana laws force Parker to choose between commission of a crime to obtain effective medical treatment and inadequate treatment.

108 In his reasons in *Morgentaler* , Dickson C.J.C. described the infringement of security of the person in these terms at pp. 56-7:

> At the most basic physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations . Not only does the removal of decision making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person . Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice. [Emphasis added.]

109 The same may be said of the marihuana prohibition in this case. That prohibition tells Parker that he cannot undertake a generally safe medical treatment that might be of clear benefit to him. Under the former *Narcotic Control Act* there was no procedure that he could effectively access that would allow him to grow or possess marihuana without threat of criminal sanction. Under the *Controlled Drugs and Substances Act* , the Crown submits that there are lawful means by which he can possess marihuana. I will deal with this aspect of the case below in considering the principles of fundamental justice and s. 1 of the *Charter* . It is sufficient to say that those procedures involve criteria unrelated to Parker's own priorities and aspirations. They involve criteria concerned with much larger questions of drug policy and controls unrelated to Parker's own needs.

110 Finally, the marihuana prohibition infringes Parker's security of the person in the same way as explained by Sopinka J. in *Rodriguez* . That holding, similar to the holding of Beetz J. in *Morgentaler* , protects the right to make choices concerning one's own body and control over one's physical and psychological integrity free from interference by criminal prohibition. Preventing Parker from using marihuana to treat his condition by threat of criminal prosecution constitutes an interference with his physical and psychological integrity.

111 Accordingly, Parker established that the marihuana prohibition in the two statutes deprived him of his right to security of the person. Again, in light of this finding it is unnecessary to consider the impact upon other patients seeking to use marihuana to treat their illnesses. However, as with the right to liberty I would have found that Parker established that the marihuana prohibition deprives other persons of their security of the person because it prevents them on pain of criminal prosecution from using medication found to be effective to treat the symptoms of their very serious illnesses.

5. The principles of fundamental justice

(i) Introduction

112 In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.) at 503, Lamer J. held that the principles of fundamental justice "are to be found in the basic tenets of our legal system". According to Sopinka J. in *Rodriguez* at p. 591, they must not be so broad "as to be no more than vague generalizations about what our society considers to be ethical or moral". This is an important qualification because it would be too easy to resolve this case simply by imposing a moral or ethical standard from one side or the other. Many would consider it immoral to keep medicine from a patient with a serious illness. Others might consider it unethical to expose anyone to the potential harm from a drug where the expert opinion is unanimous that further research is required. Therefore, to quote Sopinka J. in *Rodriguez* at p. 591, the principles of fundamental justice "must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result". They must be "legal principles".

113 In *Rodriguez* , Sopinka J. identified a principle of fundamental justice that, in my view, has particular application to this case. He held at p. 594 that, "Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose." Thus, in determining whether there has been a breach of the principles of fundamental

justice, it is necessary to consider the state interest. As McLachlin J. said in *Cunningham v. Canada*, [1993] 2 S.C.R. 143 (S.C.C.) at 151-52:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally... [7]

114 In *Rodriguez* , at p. 595, Sopinka J. characterized the issue as "whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition". He then engaged in a comprehensive review of the history of criminalization of assisted suicide, the common-law right to refuse medical care and a review of legislation in other countries in order to identify the state interest, the nature of the legal tradition and societal beliefs at stake. From this analysis, he was able to determine whether the deprivation of Ms. Rodriguez's rights enhanced the state interests.

115 In *Morgentaler* , Dickson C.J.C. identified a number of procedural deficiencies in the therapeutic abortion provisions that may assist in understanding the principles of fundamental justice that apply in this case. The therapeutic abortion committee could issue a certificate to permit a therapeutic abortion if the continuation of the pregnancy would be likely to endanger the life or "health" of the woman. Dickson C.J.C. held at p. 69 that the absence of any clear legal standard to be applied by the committee in making the determination as to whether the continuation of the pregnancy would endanger the health of the woman was a "serious procedural flaw". After reviewing several other problems with the legislative scheme that contributed to unnecessary delay, at pp. 72-3 he concluded that while Parliament must be given latitude to design an appropriate procedural structure, if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of *fundamental* justice" [emphasis added by Dickson C.J.C.], that structure must be struck down. This was the problem with the therapeutic abortion provisions of the *Code* . It contained so many potential barriers to its own operation that "the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available".

116 While Beetz J. did not agree that the health criterion created an unworkable standard, at pp. 109-10 he too found a breach of the principles of fundamental justice in the nature of the administrative structure mandated by the legislation. Adopting the same test of "so manifestly unfair, having regard to the decisions it is called upon to make", [8] he found that the scheme was made up of "unnecessary rules, which result in an additional risk to the health of pregnant women". It was thus manifestly unfair and did not conform to the principles of fundamental justice. This unfairness was manifested in two ways: some of the procedural requirements had no connection whatsoever with Parliament's objectives and others were manifestly unfair because they were not necessary to assure that the objectives were met.

117 To summarize, a brief review of the case law where the criminal law intersects with medical treatment discloses at least these principles of fundamental justice:

> (i) The principles of fundamental justice are breached where the deprivation of the right in question does little or nothing to enhance the state's interest.
>
> (ii) A blanket prohibition will be considered arbitrary or unfair and thus in breach of the principles of fundamental justice if it is unrelated to the state's interest in enacting the prohibition, and if it lacks a foundation in the legal tradition and societal beliefs that are said to be represented by the prohibition.
>
> (iii) The absence of a clear legal standard may contribute to a violation of fundamental justice.
>
> (iv) If a statutory defence contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to persons who would *prima facie* qualify for the defence, it will be found to violate the principles of fundamental justice.

(v) An administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.

118 Before turning to the application of these principles, I wish to make a few comments about the relationship between s. 1 and s. 7 of the *Charter* . There was some doubt whether a violation of s. 7 could be upheld as a reasonable limit under s. 1, absent extraordinary circumstances such as war. However, in several recent cases the Supreme Court of Canada has signalled that it may be possible to apply s. 1 in less exceptional circumstances. For example, in *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.) at 359-60 McLachlin and Iacobucci JJ. writing for the majority held as follows:

> [65] It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter* . The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. As McLachlin J. stated for the Court in *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at p. 152, 80 C.C.C. (3d) 492 , regarding the latter: "The ... question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society." Much the same could be said regarding the central question posed by s. 1.
>
> [66] However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the Charter rights .
>
> [67] Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act* , *supra* , at p. 503: "the principles of fundamental justice are to be found in the basic tenets of the legal system." In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature . In *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200 , Dickson C.J. stated, at p. 136, that these values and principles "embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society". In *R. v. Keegstra*, [1990] 3 S.C.R. 697 at p. 737, 61 C.C.C. (3d) 1 , Dickson C.J. described such values and principles as "numerous, covering the guarantees enumerated in the *Charter* and more". [Emphasis added.]

119 Thus, the difference between the s. 1 and the s. 7 analysis is important not only because of the different interests to be considered but also because of the shift in the burden of proof. For example, the Crown argued that in considering whether the law struck the right balance between the accused's interests and the interests of the state under s. 7, the court should consider Canada's international treaty obligations. It may be, however, that such interests are more properly a matter for consideration under s. 1, in which case the Crown would bear the onus of demonstrating that the violation of s. 7 was necessary to uphold Canada's treaty obligations. See *R. v. Malmo-Levine*, 2000 BCCA 335 (B.C. C.A.) at para. 151.

120 Further, an important aspect of the Crown's defence of the *Controlled Drugs and Substances Act* was the availability of a Ministerial exemption under s. 56 of the Act. Again, it may be that the availability of such an exemption is more properly dealt with under s. 1, in which cases the burden would be on the Crown to demonstrate that the availability of such an exemption could save the *prima facie* violation of s. 7. This is of some importance in view of the paucity of evidence on the operation of s. 56.

121 However, this case was argued by both parties on the basis that all of these issues were part of the s. 7 analysis and that the burden was therefore on the respondent throughout. I have dealt with the case on that basis. The fact that I have taken into account a broader range of state interests in the s. 7 analysis, if an error, would benefit the Crown, since at the s. 7 stage the burden was on the respondent. I will return to the relationship between ss. 1 and 7 after the s. 7 analysis.

(ii) History of use and prohibition of marihuana

122 It will be seen that at the core of the analysis of the principles of fundamental justice that apply in this case is the state interest in enacting the prohibition. Identifying the state interest informs the analysis in both the *Morgentaler* and *Rodriguez* cases. In *Rodriguez* , in particular, the issues were more complex than here. In that case, the court had to contend with the dilemma posed by the applicant's claim to choose the time and manner of her death as an aspect of security of the person protected by s. 7 of the *Charter* , and the public interest in sanctity of life that also finds expression in s. 7 of the *Charter* . At the heart of that dilemma was the apparently arbitrary distinction in the blanket statutory prohibition on assisted suicide on one hand and, on the other hand, the common law that allows a physician to withhold or withdraw life-saving or life-maintaining treatment on the patient's instructions and to administer palliative care, which has the effect of hastening death.

123 While this appeal does not present the same level of complexity nor the need to make the same kinds of agonizing distinctions, the form of analysis engaged in by Sopinka J. in *Rodriguez* will assist in applying the principles of fundamental justice to this case. It is only by considering the history of the use of and prohibition on marihuana, the common law respecting patients' rights, law reform and legislative initiatives, and legislation in other countries that the court can put some legal content into the application of the principles of fundamental justice that I have identified above.

124 For reasons that will become apparent, the Crown does not now support the marihuana prohibition on the basis of its historical roots. In the *Clay* trial and appeal, the Crown expressly renounced any reliance on the theories that marihuana is a "gateway" drug to harder drugs; that it provokes criminal activity; that marihuana use leads to lack of motivation; or causes psychosis. The Crown argues that the objectives of the prohibition are first to prevent the harms associated with smoking marihuana, including harm to human health. In addition, it claims the prohibition is necessary to control the domestic and international trade in illicit drugs and to satisfy Canada's international treaty obligations.

125 The parties filed an abundance of evidence about the history of marihuana use. I have found of greatest assistance the 1998 report of the House of Lords Select Committee on Science and Technology, "Cannabis, the Scientific and Medical Evidence". Like many other herbs, marihuana has been used in Asian and Middle Eastern countries for at least 2600 years for medicinal purposes. It first appeared in Western medicine in 60 A.D. in the Herbal (i.e. pharmacopoeia) of Dioscorides and was listed in subsequent herbals or pharmacopoeia since that time. Marihuana was widely used for a variety of ailments, including muscle spasms, in the nineteenth century. In the 1930's, the advent of synthetic drugs led to the abandonment of many ancient herbal remedies including marihuana, although an extract of cannabis and a tincture of cannabis remained in the British Pharmaceutical Codex of 1949.

126 In *R. v. Clay* at pp. 356-57, McCart J. provided a summary of the early history of regulation of marihuana in Canada. That history shows that, unlike the regulation of assisted suicide, for example, regulation of marihuana has a very short history and lacks a significant foundation in our legal tradition. It is, in fact, an embarrassing history based upon misinformation and racism. As McCart J. observed, the marihuana prohibition was enacted in a climate of "irrational fear" based upon wild and outlandish claims that its users are driven completely insane, immune from pain and, while in this state of maniacal rage, kill or indulge in other forms of violence using the most savage methods of cruelty.

127 In 1961, the United Nations *Single Convention on Narcotic Drugs* was adopted by many countries including Canada and the United Kingdom and this led to new legislation in both countries, the *Narcotic Control Act* in Canada and the *Dangerous Drugs Act 1965* in the United Kingdom. Under the *Dangerous Drugs Act 1965* , physicians could still prescribe marihuana. In the *Narcotic Control Act* , marihuana was put in the same category as heroin and its possession was prohibited. Theoretically, a physician could prescribe marihuana under the *Narcotic Control Act* , but since no firm has ever been licensed to produce marihuana, there is no pharmacy to fill such a prescription and thus it is practically not possible to legally possess marihuana pursuant to a prescription.

128 In *R. v. Hauser* (1979), 46 C.C.C. (2d) 481 (S.C.C.) , the Supreme Court of Canada held that the *Narcotic Control Act* should be classified as legislation enacted under the general residual federal power. In reviewing the history of the legislation, Pigeon J. noted that the Act appeared to have been a response to Canada's signing of the *Single Convention of Narcotic Control 1961* . At p. 497, he compared the Act with the preamble to the *Convention* :

The conditions under which narcotics may be sold, had in possession, or otherwise dealt in, are now determined by regulations. A large number of those drugs are authorized for sale or administration under medical prescription. In fact, a certain number are enumerated in the list of drugs to be supplied at Government expense which list was published in the *Quebec Official Gazette* , December 13, 1978, pp. 6737 to 6982, pursuant to the *Quebec Health Insurance Act* , 1970 (Que.), c. 37. These include among others, codeine, cocaine, morphine and opium.

It does not appear to me that the fact that the specific drugs with which we are concerned in this case are completely prohibited, alters the general character of the Act which is legislation for the proper control of narcotic drugs rather than a complete prohibition of such drugs . In the preamble of the 1961 convention one reads:

> The Parties,
>
> *Concerned* with the health and welfare of mankind ,
>
> *Recognizing* that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes ,
>
> *Recognizing* that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,
>
> *Conscious* of their duty to prevent and combat evil,
>
> *Considering* that effective measures against abuse of narcotic drugs require co-ordinated and universal action.
>
> *Understanding* that such universal action calls for international cooperation guided by the same principles and aimed at common objectives ... [Emphasis added.]

129 In this case, the Crown asserts that one of the objectives of the marihuana prohibition is to satisfy Canada's international treaty obligations with respect to the control of illicit drugs. It is ironic then that the preamble of the international convention that led to the enactment of the *Narcotic Control Act* recognizes what Parker asserts — that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes".

130 In 1971, the United Nations adopted the *Convention on Psychotropic Substances* . Cannabis appeared in Schedule I to the Convention and parties were therefore obliged to ban marihuana "except for scientific and very limited medical purposes by duly authorized persons" (House of Lords Select Committee report at para. 2.9). This led to new legislation in the United Kingdom, the *Misuse of Drugs Act 1971* . Cannabis was moved to a new schedule and subject to an absolute ban thereby prohibiting its medical use altogether.

131 In 1988, the United Nations adopted the *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* . A party to the Convention is, *inter alia* , required to adopt measures "subject to its constitutional principles and the basic concepts of its legal system" to prohibit the possession of cannabis and the cultivation of cannabis for personal use. In 1997, Parliament repealed the *Narcotic Control Act* and enacted the *Controlled Drugs and Substances Act* . Marihuana has now been removed from the same category of drugs such as heroin (Schedule I) and is included in Schedule II. The effect is to lower the maximum penalty for possession and cultivation of marihuana. As under the *Narcotic Control Act* , it is theoretically possible for a physician to prescribe marihuana but since there is no legal source for the drug, the prescription could not be filled.

132 While the marihuana prohibition is not firmly rooted in our history, there is a well-established history of regulation of drugs in this country. However, of all of the drugs with potential therapeutic effects, marihuana stands out because it is subject to a complete prohibition. This prohibition results from the web of legislation that makes it impossible as a practical matter for a physician to prescribe marihuana and therefore for a patient to legally possess it pursuant to a prescription.

133 Far more dangerous drugs such as morphine and heroin are subject to regulation, not outright prohibition, and a patient can obtain these drugs through a physician's prescription, although in the case of heroin, there are added safeguards. One telling piece of history is that Marinol, which contains THC and has the psychoactive effects associated with smoked marihuana, has been approved for use in Canada and can be obtained by prescription. In 1999, the House of Commons overwhelmingly passed a motion, M-381, urging the government to legalize the medicinal use of marihuana and to establish clinical trials and a legal supply of the drug.

134 It seems to me that a reasonable conclusion to draw from this history is that a blanket prohibition including medical use of marihuana does not have a long-standing foundation in our legal tradition and societal beliefs. I recognize that the Quebec Court of Appeal drew a somewhat different conclusion in *R. c. Hamon* (1993), 85 C.C.C. (3d) 490 (Que. C.A.) at 494 in meeting an argument that marihuana is less dangerous than alcohol and yet alcohol use is not absolutely prohibited. In that context, Beauregard J.A. held that "we do not have a cultural tradition which would prevent the state from acting". That is not, however, the same as a finding that marihuana prohibition is part of our cultural tradition. As McCart J. demonstrated, it is of recent origin and then was based on a very fragile foundation.

(iii) Common law access to treatment

135 We were not directed to any common law history of entitlement to drug therapy. The closest analogue is the doctrine of informed consent, which makes it a civil wrong to impose treatment without the consent of the patient. The patient may also demand that treatment, once commenced, be withdrawn or discontinued. See *Rodriguez* at pp. 598-99. While there is obviously a difference between a right to refuse treatment and a right to demand treatment, they can also be seen as two points on a continuum rooted in the common-law right to self-determination with respect to medical care. This includes the right to choose to select among alternative forms of treatment. Robins J.A. summarized the common law in *Malette v. Shulman* (1990), 67 D.L.R. (4th) 321 (Ont. C.A.) at 328:

> The right of self-determination which underlies the doctrine of informed consent also obviously encompasses the right to refuse medical treatment. A competent adult is generally entitled to reject a specific treatment or all treatment, or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment . The patient is free to decide, for instance, not to be operated on or not to undergo therapy or, by the same token, not to have a blood transfusion. If a doctor were to proceed in the face of a decision to reject the treatment, he would be civilly liable for his unauthorized conduct notwithstanding his justifiable belief that what he did was necessary to preserve the patient's life or health. The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others ... [Emphasis added.]

136 Some common-law support for access to drugs with a therapeutic value, notwithstanding a legal prohibition, can also be found in the defence of necessity. In *Perka v. R.*, [1984] 2 S.C.R. 232 (S.C.C.) at 250, Dickson J. described the moral and legal basis for the defence:

> At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

137 Using a criminal prohibition to bar access to a drug for a person, such as Parker, who requires it to treat a condition that threatens his life and health, is antithetical to our notions of justice. It is inconsistent with the principle of sanctity of life which, according to Sopinka J. in *Rodriguez* at p. 605, as a general principle "is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail".

138 Permitting access to medicine that may relieve debilitating symptoms of illness is consistent with the common understanding about the purpose of proper medical care. In *Airedale NHS Trust v. Bland*, [1993] A.C. 789 (U.K. H.L.) at 857, Lord Keith of Kinkel stated that the object of medical treatment and care is to benefit the patient. Where illness can neither be prevented nor cured, "efforts are directed towards preventing deterioration or relieving pain and suffering".

139 To summarize, the common-law treatment of informed consent, the sanctity of life and commonly held societal beliefs about medical treatment suggest that a broad criminal prohibition that prevents access to necessary medicine is not consistent with fundamental justice.

(iv) Legislation in other countries

140 A survey of legislation in other countries shows an increasing tolerance for possession of marihuana for personal use, although no country has fully decriminalized possession. There is some movement towards actual decriminalizing of marihuana for medical uses. In the United States, 34 states have legislation that recognizes the medical value of marihuana and theoretically makes the substance available as a medicine. Only a few states, such as California and Hawaii, have actually enacted legislation to implement these initiatives. I have attached as appendices to these reasons the *California Compassionate Use Act of 1996* , which added s. 11362.5 to the *Health and Safety Code* , and the recent Hawaiian legislation. The matter is also complicated in the United States because of the federal government's position on legalization. Federal legislation still makes the possession, use, prescription or sale of marihuana illegal regardless of the state medical exemptions. However, even at the federal level there is now some change. In March 2, 1999, a Bill was introduced in Congress titled *Medical Use of Marijuana Act* . This Act would allow state laws to become fully operative and exempt medical marihuana from federal drug legislation.

141 The House of Lords report, mentioned earlier, recommended that the government transfer cannabis from Schedule 1 to Schedule 2 of the *Misuse of Drugs Regulations* to permit physicians to prescribe it and pharmacists to supply it as an unlicensed medicine. The U.K. government has refused to do so, although it has agreed to approve clinical trials of cannabis for treatment of MS and chronic pain.

142 In *Rodriguez* , Sopinka J. placed some reliance on the fact that the official position of various medical associations was against decriminalizing assisted suicide. I have earlier reviewed Dr. Morgan's testimony concerning recent studies by the British Medical Association and the United States Institute of Medicine. These studies strongly support the view that marihuana has medicinal value and urge more study of the medical use of marihuana. There is no apparent support for a blanket prohibition on medicinal use of marihuana and to the contrary some recognition that at the moment there may be no alternative than to permit patients to smoke marihuana to relieve the symptoms for certain serious illnesses. For example, the House of Lords Select Committee on Science and Technology in its Report on "Cannabis: The Scientific and Medical Evidence" provided this comment at para. 8.7:

> [P]eople who use cannabis for medical reasons are caught in the front line of the war against drug abuse. This makes criminals of people whose intentions are innocent, it adds to the burden on enforcement agencies, and it brings the law into disrepute. Legalising medical use on prescription, in the way that we recommend, would create a clear separation between medical and recreational use, under control of the health care professions. We believe it would in fact make the line against recreational use easier to hold.

(v) Conclusion on the principles of fundamental justice and the blanket prohibition on marihuana possession and cultivation

143 In the companion case of *R. v. Clay* , I have reviewed at greater length the state's objectives in prohibiting marihuana. First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit

drugs. It remains to consider whether the deprivation of Parker's rights to liberty and security of the person enhance these objectives.

144 The blanket prohibition on possession and cultivation, without an exception for medical use, does little or nothing to enhance the state interest. To the extent that the state's interest in prohibiting marihuana is to prevent the harms associated with marihuana use including protecting the health of users, it is irrational to deprive a person of the drug when he or she requires it to maintain their health. As in *Morgentaler* , the court must consider the actual effect of the legislation. While the exemption for therapeutic abortions was designed to preserve the pregnant woman's health, it had the opposite effect in some cases by imposing unreasonable procedural requirements and delays. [9] If the purpose of the marihuana prohibition is to protect the health of users and thereby eliminate the related costs to society, [10] the overbroad prohibition preventing access to the drug to persons like Parker, who require it to preserve their health, defeats that objective. Other harms, such as impaired driving, must be considered in context. For example, prohibiting the small number of seriously ill patients who require it from having access to marihuana does little to enhance the state interest in the safety of the highways.

145 It is also fair to take into account the extent of harm the marihuana prohibition is designed to protect against. As McLachlin J. said in *Cunningham v. Canada* at pp.151-52, fundamental justice requires that a fair balance be struck between the interest of the person who claims his liberty or security interest has been limited and the protection of society. If the harm against which society must be protected is relatively limited, less limitation on the liberty and security interests will be tolerated especially when the infringement on the person's rights is grounded in a risk to life and health. The evidence at trial demonstrated that the side effects of marihuana use are almost trivial compared to the side effects of the conventional medicine Parker also takes. As pointed out, no one has ever died from ingestion of marihuana.

146 As to Canada's international treaty obligations with respect to the control of illicit drugs, I have already referred to the decision of the Supreme Court of Canada in *R. v. Hauser* and its reliance on Canada's being a party to the *Single Convention of Narcotic Control 1961* . As I noted, the first objective of that Treaty, as set out in the preamble, recognizes that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes". The former *Narcotic Control Act* , which made no provision for the legal medical use of marihuana, does not further this objective.

147 Subsequent Conventions have tightened the control on all narcotics and psychotropic substances, including marihuana. The 1971 Convention permitted use of marihuana for limited medical purposes by duly authorized persons. The 1988 Convention requires states to prohibit possession, purchase and cultivation of marihuana for personal use, subject to the country's "constitutional principles and the basic concepts of its legal system". It is self-evident that if under our Constitution, namely s. 7 of the *Charter of Rights and Freedoms* , the prohibition of possession and cultivation of marihuana for medical purposes is unconstitutional, it would be open to Parliament to enact such an exemption and still comply with its treaty obligations. [11] Prohibiting possession or cultivation of marihuana for personal medical use does nothing to enhance the state's interest in fulfilling its international obligations. In *R. v. Clay* at p. 357, McCart J. noted that in their hard-line approach to marihuana possession, the United States (and Canada) appear "somewhat out of step with most of the rest of the western world". The fact that state and federal lawmakers in the United States now seem to favour making marihuana available for medical use suggests that such a move in Canada would not be inconsistent with our international obligations.

148 Finally, in considering Canada's treaty obligations, it should be borne in mind that Canada is also a party to the *International Covenant on Economic, Social and Cultural Rights* , (1976), 993 U.N.T.S. 3. [12] Article 12 of the Covenant includes the following:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health .
>
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. [Emphasis added.]

149 I have already noted the Crown's argument that the trial judge "expressly" reversed the onus of proving that the legislation was in accord with the principles of fundamental justice. This is based in part on the emphasized excerpt from the following portion of the trial judge's reasons:

> However, these schedules include also numerous narcotic drugs which are possessed and used by Canadians with medical approval. The Convention therefore, is not a prohibition against all possession or distribution. As article 3(2) states, the Convention must be read subject to Canada's constitutional principles and it is up to Canada to "adopt such measures, AS MAY BE NECESSARY" (Court emphasis) to criminalize the possession of marihuana. The respondent/Crown, on these facts and based on any of the tests of the principles of fundamental justice, has not demonstrated the necessity of a legislative enactment so broad as to prevent therapeutic use of this non-manufactured grown plant product . [Emphasis added.]

150 In my view, when read in context, this part of the reasons only refers to the discussion about Canada's international obligations. Resolution of that issue did not depend on the burden of proof. In this passage, the trial judge is making the common-sense observation, not disputed at trial or on appeal, that a medical exemption is consistent with international obligations. By this point in his reasons, the trial judge has already held that a blanket prohibition does not accord with the principles of fundamental justice since it does little or nothing to enhance the state interest. Given the Crown position that a medical exemption is possible under the Conventions, the apparent reversal of the burden is of no consequence. [13]

151 The Crown also supports the legislation as necessary to control the domestic and international trade in illicit drugs. While such an objective suggests a need for some form of control on the distribution of marihuana, the complete prohibition on the possession or cultivation of marihuana for personal therapeutic use does little to enhance this state interest. The Crown has never asserted that the number of persons who could legitimately claim access to marihuana for medical purposes is very large. They could have little impact on the huge market for illicit marihuana. Prohibiting these patients access to marihuana does little to enhance these state interests. What is required is regulation of this drug, as with tranquilizers, morphine and other much more dangerous and addictive drugs, for which there is also no doubt a large illicit market.

152 To conclude, the deprivation of Parker's rights to liberty and security of the person because of the complete prohibition on the possession or cultivation of marihuana in the former *Narcotic Control Act* does little or nothing to enhance the state's interest. In my view, Parker established that his rights under s. 7 were violated by the absolute prohibition on cultivation of marihuana in the *Narcotic Control Act* . Parker has no other practical means of obtaining the drug for his medical needs. I did not understand the Crown to suggest that we should distinguish between the possession and cultivation for personal medical use, for the purpose of the s. 7 analysis. Since the cultivation offence is the only provision at issue under that Act, strictly speaking I need not consider the validity of the possession offence. However, it is obvious from this discussion that were that provision before this court, I would have found that it also violates Parker's rights under s. 7.

153 I am also of the view that, subject to the availability of a s. 56 exemption, Parker has established that the similar prohibition on possession and cultivation of marihuana in the *Controlled Drugs and Substances Act* violates his rights under s. 7 of the *Charter* . Again, since, strictly speaking, the possession offence is the only provision at issue under that Act, it is unnecessary to consider the validity of the cultivation offence. Before turning to s. 56, it will be convenient to deal with other principles of fundamental justice.

(vi) Does the practical unavailability of a defence under the legislation infringe the principles of fundamental justice?

154 In *Morgentaler* , Dickson C.J.C. rested his finding that the abortion prohibition was unconstitutional on the practical unavailability of the defence that was theoretically available through the therapeutic abortion committee procedure. He reviewed the extensive evidence that demonstrated that therapeutic abortions were unavailable in many parts of the country and that even where it was available the delays created by the administrative structure often required physicians to use a riskier procedure

when the abortion was finally approved. He explained at pp. 72-3, in a passage that I have previously quoted, why this was inconsistent with the principles of fundamental justice. To summarize, he held that it was manifestly unfair to create a defence that contained so many barriers to its operation that it was practically unavailable to women who would *prima facie* qualify for the defence. Dickson C.J.C. also explained at p. 76 why this violation of s. 7 could not be saved under s. 1:

> I conclude, therefore, that the cumbersome structure of s-s. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion . [Emphasis added.]

155 The same may be said of the theoretical defence available in the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* . Under s. 3 of the *Narcotic Control Act* and s. 4 of the *Controlled Drugs and Substances Act* it is an offence to have possession of any narcotic or scheduled substance respectively including marihuana except as authorized by the Act or regulations. While the regulations theoretically contemplate that a physician could prescribe marihuana, the evidence from the government witness was that since there is no legal source for marihuana, no pharmacist could fill the prescription and that the government would not look favourably upon a physician who purported to write such a prescription. That witness also established the practical impossibility of Parker obtaining a legal source of marihuana. For example, the process for approval of a new drug involves the expenditure of hundreds of thousands of dollars. For most of his life, Parker has been on government assistance as a result of his disability.

156 The Crown says that it is not the fault of the legislation, but the fact that no one has come forward to attempt to comply with the legislation to obtain new drug approval. The practical unavailability of marihuana due to the administrative structure prevents Parker and people like him who require the drug for medical purposes from obtaining a prescription for the drug because of the absence of a legal supply. Put simply, the expense for Parker in obtaining a legal source of the drug through the new drug approval procedure established by the state makes the defence held out under the legislation practically unavailable.

157 Although we heard little argument on the point, I do not doubt the importance of the state interest in ensuring that new drugs meet stringent standards before they are made widely available to the public. One only has to remember the tragedy of Thalidomide to understand the need for the regulatory structure. However, the problem facing this court is different. I have found that Parker established that the criminal prohibition against possession of marihuana infringed his security of the person. He requires marihuana to treat his epilepsy and without it, his life and health are endangered. He has also established that the side effects of his use of marihuana are minor, compared to the side effects from the prescription drugs he is required to take as part of his conventional treatment. The state interest in strict regulation of new drugs must be balanced against the risk to Parker's life and health posed by the administrative structure established by Parliament and the government. The state cannot hold out as a generally available defence the possibility of possessing the drug in accordance with a prescription when Parker is practically precluded from availing himself of the defence.

158 In *Morgentaler* , the Crown made essentially the same argument. As summarized in the reasons of Dickson C.J.C. at p. 61, the Crown argued that any impairment to the physical or psychological interests of individuals caused by the abortion provisions of the Code "does not amount to an infringement of security of the person because the injury is caused by practical difficulties and is not intended by the legislator".

159 Dickson C.J.C. rejected the argument for two reasons. First, as a practical matter it was not possible to erect a rigid barrier between the purposes of the section and the administrative procedures established to carry those purposes into effect. For example, the delay resulted not simply from the practical problems, but was inherent in the cumbersome operating requirements of the section itself. Second, even if it were possible to dissociate purpose and administration, the Supreme Court had previously held that both purpose and effect must be considered. As Dickson C.J.C. said at pp. 62-3:

> Even if the purpose of legislation is unobjectionable, the administrative procedures created by law to bring that purpose into operation may produce unconstitutional effects, and the legislation should then be struck down . It is important to note that, in speaking of the effects of legislation, the court in *R. v. Big M Drug Mart Ltd.* was still referring to effects that can invalidate legislation under s. 52 of the Constitution Act, 1982 and not to individual effects that might lead a court to provide a personal remedy under s. 24(1) of the Charter. In the present case, the appellants are complaining of the general effects of s. 251. If s. 251 of the *Criminal Code* does indeed breach s. 7 of the Charter through its general effects, that can be sufficient to invalidate the legislation under s. 52. [Emphasis added.]

160 I need only consider the second reason referred to by Dickson C.J.C. Even if the purpose of the regulatory scheme created by the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* and Regulations is valid, the administrative procedures created to bring the purpose into operation produce unconstitutional effects for the group of people like Parker who require marihuana for medical purposes. [14]

161 Even if I am wrong on this aspect of the case, the theoretical availability of marihuana through the new drug programme does not answer Parker's claim that the prohibition infringes his right to liberty. I have described that right as the right to make decisions that are of fundamental personal importance, which includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. There may be circumstances in which the state interest in regulating the use of new drugs prevails over the individual's interest in access. This, however, is not one of those circumstances. The evidence establishes that the danger from the use of the drug by a person such as Parker for medical purposes is minimal compared to the benefit to Parker and the danger to Parker's life and health without it. It may be that the state is entitled to require the approval of the patient's choice by a physician in much the same way that in *Morgentaler* , Beetz J. contemplated that even if there was a right of access to abortion founded upon the right to liberty, a second medical opinion as to the mother's health could be justified in some circumstances (Wilson J. suggested the second trimester) because of the state interest in the protection of the foetus. However, the current legal and administrative structure completely deprives Parker of any choice, even with the approval of his physician. [15]

162 In summary, like the defence for women who required an abortion because the continuation of the pregnancy would endanger their health, the defence in the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* is practically unavailable to Parker and others like him who require marihuana for conditions threatening their life or health. This constitutes a violation of the principles of fundamental justice. Again, as Dickson C.J.C. said in *Morgentaler* at p. 70:

> One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory . The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met . [Emphasis added.]

163 Parliament has created a defence to the possession and cultivation offences if the person can comply with the regulations. Those regulations, for example, permitted a person to legally possess the drug under prescription from a physician. The government's own witness established that this defence or exemption is illusory. This is not consistent with the principles of fundamental justice.

6. Is there a different analysis of fundamental justice under the Controlled Drugs and Substances Act?

(i) Introduction

164 The Crown argues that even if Parker has established a deprivation of his right to liberty or security of the person (as opposed to a mere preference for an illegal form of treatment), the *Controlled Drugs and Substances Act* does comply with the principles of fundamental justice because of the three legal means by which Parker could possess marihuana. They are:

(i) The Health Canada procedure for approval of new drugs,

(ii) The Emergency Drug Release (Compassionate Use) Programme,

(iii) An application to the Minister of Health under s. 56 of the Act.

165 I have already briefly dealt with the Health Canada procedure for approval of new drugs. As to the Emergency Drug Release Programme or Compassionate Use Programme under the *Narcotic Control Regulations* , the theoretical availability of this programme to Parker runs up against the practical and, for Parker, insuperable barrier that there is no licensed source of marihuana because it is a controlled substance. Thus, while the Programme allows applications to be made for access to otherwise non-marketed drugs, marihuana is not available because Health Canada has not licensed any firm to produce and distribute it. The Crown says this is because no one has come forward seeking a licence. The same considerations that applied to my discussion of the new drug approval process apply. Parker simply does not have the means to become a licensed dealer in marihuana and therefore no means of taking advantage of the Compassionate Use Programme.

(ii) Section 56 of the Controlled Drugs and Substances Act

166 The third alternative source for legal possession of marihuana is through s. 56 of the *Controlled Drugs and Substances Act* . That section provides as follows:

> 56. The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

167 The trial judge held that there was no provision under the former *Narcotic Control Act* or the *Controlled Drugs and Substances Act* for an exemption for a person requiring marihuana for medical purposes. This statement is true about the *Narcotic Control Act* . It is not the case under the *Controlled Drugs and Substances Act* . In fairness to the trial judge, s. 56 was never drawn to his attention and Mr. Rowsell, the government witness, who should have known about s. 56, made no mention of it in his evidence. In summary, at trial, the Crown did not advance the availability of an exemption under s. 56 as a basis for upholding the legislation.

168 Counsel for Parker argues that the Crown should not now be permitted to rely upon s. 56. This court is reluctant to permit litigants to raise constitutional arguments for the first time on appeal, even where the argument is to support a defence for an accused. Thus, at the opening of the appeal we indicated to the intervener Epilepsy Association of Toronto that it would not be permitted to challenge the validity of the Act under s. 15 of the *Charter* , notwithstanding the potential force of such a submission, because no such challenge was made at trial. [16]

169 There are important institutional and practical reasons underlying our reluctance to allow constitutional arguments to be raised for the first time on appeal. If the matter is not raised at trial, the necessary adjudicative facts may not be before the court to enable the court to adequately address the new issue. An appellate court also does not have the benefit of findings of fact by the trial judge concerning disputed adjudicated and legislative facts. Where the Crown raises a new issue for the first time on appeal, double jeopardy concerns may arise. See *R. v. V. (E.)* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.) at 494.

170 The Crown's new-found reliance on s. 56 involves many of these considerations. We have only a sparse record concerning the operation of s. 56, especially since the Crown declined this court's offer to adjourn the hearing of the appeal to obtain further evidence. What information there is comes from the decisions of LaForme J. of the Superior Court of Justice in *Wakeford v. Canada* (1998), 166 D.L.R. (4th) 131 (Ont. Gen. Div.) and (1999), 173 D.L.R. (4th) 726 (Ont. S.C.J.) to which I will refer and the fresh evidence put forward by Parker through the affidavit and cross-examination of Mr. Oscapella.

171 Nevertheless, in my view, it is necessary for this court to consider the application of s. 56. Although there was no evidence about s. 56 at trial, the section was part of the statute under consideration and in that sense the issue was before the court. Failure to consider, even on this sparse record, the application of s. 56, which has become central to the government's defence of the legislation, could undermine the legitimacy of this court's judgment.

172 I have reviewed the fresh evidence concerning s. 56 applications earlier. In summary, in May 1999, Health Canada released the Interim Guidance Document that outlines the process for Canadians to obtain exemptions under s. 56. At the time of Mr. Oscapella's cross-examination, two exemptions had been granted for cannabis possession. This trial took place in 1997 and, as I have indicated, there was no practical way for Parker to have obtained an exemption under s. 56. Parker submits that the government's new-found interest in s. 56 is the result of the *Wakeford* decisions. It is worth examining those decisions.

173 Mr. Wakeford suffers from AIDS. His illness and the various drugs he must take to control it leave him with many debilitating side effects including nausea and loss of appetite. He tried using Marinol, but this only made him sicker. He began to use marihuana under a physician's supervision in 1996. He found that the marihuana controlled his nausea and stimulated his appetite and countered many of the side effects he experienced from the prescription drugs. In 1998, he applied to the Ontario Court (General Division) (now the Superior Court of Justice) for a constitutional exemption. His submissions were similar to those made in this case, although he also relied upon s. 15 of the *Charter* . In his first judgment released September 8, 1998, LaForme J. held that Wakeford's s. 7 rights were not infringed because he had not demonstrated that he could not obtain an exemption under s. 56 of the Act. However, he also held at pp. 150-51 that if there was no real process or procedure whereby an individual could apply for an exemption, he would "have no hesitation in granting, perhaps even all, the relief Mr. Wakeford seeks".

174 In March 1999, Mr. Wakeford applied to re-open the original application. The evidence adduced on the new hearing demonstrated that in fact there was no process by which Mr. Wakeford could have obtained a s. 56 exemption. As LaForme J. put it, the availability of the exemption was illusory. At the time of the new hearing, the process for obtaining s. 56 exemptions was under development but it was unknown how the process would work, how long it would take to process an application and when Mr. Wakeford's application would be dealt with. Accordingly, on the new hearing, LaForme J. granted Mr. Wakeford an interim constitutional exemption from the operation of the possession and cultivation offences under the Act until the Minister decided upon his application.

175 The Crown submits that if this court were to find that Parker's right to liberty or security of the person is infringed by the marihuana prohibition, that infringement is in accordance with the principles of fundamental justice because of the availability of the s. 56 exemption. Mr. Wilson submits that the fresh evidence shows that there is now a process in place for the Minister to consider such applications. He submits that the Minister would have to comply with the dictates of the *Charter* in considering such applications and further should there be a refusal of the exemption in any particular case, the applicant's remedy is to judicially review the Minister's decision, not strike down the legislation.

176 Before dealing with the Crown's submissions concerning s. 56, it is important to make some preliminary comments. I do not wish the following reasons to be misinterpreted. I do not doubt that the present Minister of Health takes the issue of medical use of marihuana seriously nor do I question his good intentions. On June 9, 1999, in response to a question from a member, the Minister informed the House that he was exercising his power under s. 56 for "two very sick people to use marijuana for medical purposes". [17] In doing so he said the following:

> Let us remember what this is about. This is about showing compassion to people, often dying, suffering from grave and debilitating illness. I want to thank the member and all the members here for pushing this issue so that we behave properly on behalf of those who are sick and dying.

177 The question remains; does this unfettered discretion meet constitutional standards? In my view, notwithstanding the theoretical availability of the s. 56 process, the marihuana prohibition does not accord with the principles of fundamental justice. In *Morgentaler* , Dickson C.J.C. found the therapeutic abortion scheme invalid in part because the provincial Ministers of

Health could impose so many restrictions as to make therapeutic abortions unavailable in the province and because there was no standard provided in the section for the committee to use in determining whether the woman's health was in danger. He held as follows at pp. 67-8:

> The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act* , R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion committees can only be established where there are ten or more members on the active medical staff (Powell Report, at p. 13). A minister of health is not prevented from imposing harsher restrictions. During argument, it was noted that it would even be possible for a provincial government, exercising its legislative authority over public hospitals, to distribute funding for treatment facilities in such a way that no hospital would meet the procedural requirements of s. 251(4). Because of the administrative structure established in s. 251(4) and the related definitions, the "defence" created in the section could be completely wiped out .
>
> A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted . Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.
>
> I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section . There is no evidence that therapeutic abortion committees are commonly applying the World Health Organization definition. Indeed, the Badgley report indicates that the situation is quite the contrary... [Emphasis added.]

178 The same must be said about s. 56. It reposes in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical ... purpose", a phrase that is not defined in the Act. The Interim Guidance Document issued by Health Canada to provide guidance for an application for a s. 56 exemption sets out factors that the Minister "may" consider in deciding whether an exemption is necessary for a medical purpose. This document does not have the force of law and, in any event, merely sets out examples of factors the Minister may consider. It does not purport to exhaustively define the circumstances. In fact, the document explicitly states that the Minister may take into account considerations unrelated to medical necessity such as "the potential for diversion". [18] The document also suggests that the power under s. 56 is only to be exercised in "exceptional circumstances", a qualification not found in the statute itself.

179 Even if the Minister were of the opinion that the applicant had met the medical necessity requirement, the legislation does not require the Minister to give an exemption. The section only states that the Minister "may" give an exemption. The Crown did not suggest that "may" should be interpreted as "shall".

180 The problem is not unlike the issue confronting the court in *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 (S.C.C.) . That case concerned freedom of expression and the validity of s. 7 of the Government Airport Concession Operations Regulations, SOR/79-373, which prohibited the conducting of any business or undertaking, commercial or otherwise, and any advertising or soliciting at an airport, "except as authorized in writing by the Minister". There were several sets of reasons and only some members of the court reached the constitutional issue. The comments of L'Heureux-Dubé J., concurred in in this respect by Gonthier and Cory JJ., are instructive, even taking into account that the case involved a fundamental freedom under s. 2 rather than a guaranteed right under s. 7 and that the relevant part of the discussion comes in the s. 1 analysis.

181 L'Heureux-Dubé J. held that the violation of freedom of expression could not be saved because an applicant could apply for authorization. At p. 214, she wrote as follows:

> Rights and freedoms must be nurtured not inhibited. Vague laws intruding on fundamental freedoms create paths of uncertainty onto which citizens fear to tread, fearing legal sanction. Vagueness serves only to cause confusion and most people will shy from exercising their freedoms rather than facing potential punishment.
>
> In addition, the Regulations provides that "except as authorized in writing by the Minister, no person shall ...". It is clear that the Minister is given a "plenary discretion to do whatever seems best". That in itself may create a standard which is so vague as to be incomprehensible. In any event, vagueness by virtue of the lack of a comprehensible standard does not accord with the requirement that a limit on a right or freedom be "prescribed by law" . [Emphasis added.]

182 Further, in concluding that the regulation did not meet the *Oakes* test under s. 1, she held at pp. 225-26 as follows:

> This particular provision does not even come close to meeting that standard. As a result of its vagueness and overbreadth, there is no foreseeability as to what activity is in fact being proscribed. Furthermore, the unfettered discretion vested in the Minister itself undermines the reasonableness and predictability of the provision's application . Those affected by the Regulation cannot be left to speculate or surmise how or in what circumstances it will be implemented. Such conjecture is incompatible with the spirit, purposes and goals of our *Charter* , and will not pass constitutional muster: it has not been demonstrably justified in a free and democratic society. [Emphasis added.]

183 McLachlin J. reached a similar conclusion in her consideration of s. 1. She held at pp. 246-47 that the limit on the right should contain sufficient safeguards to ensure that as the law is applied the right will not be infringed more than necessary. This latter danger may occur "if too much discretion is granted to administrators charged with applying the limit or law in question".

184 In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice.

185 In effect, whether or not Parker will be deprived of his security of the person is entirely dependent upon the exercise of ministerial discretion. While this may be a sufficient legislative scheme for regulating access to marihuana for scientific purposes, it does not accord with fundamental justice where security of the person is at stake. [19]

186 The problem is not unlike that faced by the court in *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.) in considering the validity of the seven-year minimum term of imprisonment for importing narcotics under the former *Narcotic Control Act* . The Crown argued that violations of the right to protection against cruel and unusual punishment under s. 12 of the *Charter* could be avoided by prosecutorial discretion. At pp. 1078-1079 Lamer J. explained why this could not save the provision:

> In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.
>
> In my view, the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter* . To do so would be to disregard totally s. 52 of the *Constitution Act , 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty-bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter . Therefore, to conclude, I find that the minimum term of imprisonment provided for by s. 5(2) of the *Narcotic Control Act* infringes the rights guaranteed by s. 12 and, as such, is a *prima facie* violation of the *Charter* . Subject to the section's being salvaged under s. 1, the minimum must be declared of no force or effect. [Emphasis added.]

187 In my view, this is a complete answer to the Crown's submission. The court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. Section 56 fails to answer Parker's case because it puts an unfettered

discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person.

188 If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s. 56 process, in my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marihuana does not enter the illicit market. However, I need not finally determine those issues, which, as I will explain in considering the appropriate remedy, are a matter for Parliament.

189 I have one final concern with the availability of the s. 56 process. An administrative structure made up of unnecessary rules that results in an additional risk to the health of the person is manifestly unfair and does not conform to the principles of fundamental justice. We were provided with little evidence as to the operation of the s. 56 procedure as established by the government. The Oscapella affidavit includes the Interim Guidance Document, that is, as I have indicated, to provide guidance for a s. 56 application. The document envisages a detailed application and entitles the Minister to request further information. Since the Crown declined the opportunity to present further fresh evidence about s. 56, the only evidence as to the actual operation of the programme comes from the cross-examination of Mr. Oscapella, which was hearsay based on information he had obtained from government employees, presumably persons who could have provided evidence for the Crown.[20] Mr. Oscapella testified that, despite the statement by the Minister in the House of Commons that he intended there be a "15-day turnaround period", only two exemptions had been granted as of June 9, 1999. As of August 26, 1999, a further 15 applications were complete but had still not been dealt with by the Minister as of the date of the cross-examination on September 14th. These kinds of delays, which may be due to the administrative procedure, would further endanger the health of a person like Parker.

190 To conclude, in my view, Parker has established that the prohibition on possession of marihuana in the *Controlled Drugs and Substances Act* has deprived Parker of his right to security of the person and right to liberty in a manner that does not accord with the principles of fundamental justice. Since Parker was not charged with the cultivation offence, that offence is not expressly before this court. However, it is apparent from these reasons and the reasons dealing with the cultivation offence under the *Narcotic Control Act* that if the cultivation provision had been before this court, I would hold that it too infringes Parker's s. 7 rights. Since there is no legal source of supply of marihuana, Parker's only practical way of obtaining marihuana for his medical needs is to cultivate it. In this way, he avoids having to interact with the illicit market and can provide some quality control.

7. Can any violations be saved by s. 1?

191 The onus was on the Crown to establish that the violations of Parker's rights could be saved under s. 1 of the *Canadian Charter of Rights and Freedoms* . The Crown did not suggest that the violations could be saved by s. 1. In any event, many of the defects in the legislation that contribute to the deprivations of Parker's rights practically preclude the legislation from meeting the proportionality test under s. 1.

192 In particular, one of the purposes of the law is to prevent harm to the health of Canadians and the resulting costs to society. However, the broad nature of the marihuana prohibition has the effect of impairing the health of Parker and others who require it for medical purposes. In this sense, the legislation works in opposition to one of the primary objectives and thus could be described as "arbitrary" or "unfair": *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1 (S.C.C.) per Dickson C.J.C. at 53 and per McLachlin J. (dissenting) at 114.

193 The only possible basis for holding that the provision of the *Controlled Drugs and Substances Act* constituted a reasonable limit is that s. 56 tempers the facial overbreadth of the prohibition. However, for the reasons of L'Heureux-Dubé J. and McLachlin J. in *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada* , the

plenary discretion vested in the Minister precludes a finding that this is a reasonable limit. Thus, whether the s. 56 exemption is considered under s. 1 or s. 7, it cannot save the legislation.

194 Finally, the broad prohibition means that the section fails the minimal impairment test: *R. v. Heywood* (1994), 94 C.C.C. (3d) 481 (S.C.C.) at 523. There is no need to prosecute people like Parker who require marihuana for medical purposes to achieve any of the three objectives identified by the Crown: preventing harm, international treaty obligations, and control of the trade in illicit drugs. Less intrusive means are available to meet these objectives. The Californian and Hawaiian legislative schemes are but two examples of how these objectives might be reconciled with the needs of patients requiring access to marihuana.

8. The appropriate remedy for the violations

195 The trial judge granted remedies through the combination of s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982* . He stayed the charges against Parker and declared that the marihuana possession and cultivation prohibitions in both the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* be read down to exempt "persons possessing or cultivating cannabis marihuana for the personal medically approved use". The trial judge also ordered that the plants seized from Parker on September 18, 1997 be returned to him.

196 I cannot agree with the trial judge's choices of remedies. First, in my view, it was inappropriate to require the police to return the plants as there was no evidence that these perishable items were still available. I would strike out that part of the judgment.

197 I also cannot agree that it was open to the trial judge to grant a declaration in relation to the possession offence under the *Narcotic Control Act* or the cultivation offence under the *Controlled Drugs and Substances Act* . The trial judge's jurisdiction to deal with the constitutional issues before him was dependent upon the criminal charges in issue. He did not have the jurisdiction a superior court would have had on an application for a declaration. I would therefore also set aside those parts of the judgment.

198 I also do not agree with the trial judge that it was appropriate to read a medical exemption into the legislation. In this respect, I agree with the submissions of the Crown. In light of the leading decisions on remedy in *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.) , *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 S.C.R. 203 (S.C.C.) and *Rodriguez* , the Crown submits that, should this court find a violation of s. 7 because the legislation fails to provide adequate exemptions for medical use, the "only available remedy" is to strike down those provisions and suspend the finding of invalidity for a sufficient period of time to allow Parliament to craft satisfactory medical exemptions.

199 Since the federal Crown takes this position in defending its own legislation, it is only necessary for me to briefly indicate my reasons for reaching the same conclusion with respect to the *Controlled Drugs and Substances Act* . Since the *Narcotic Control Act* has been repealed by Parliament, it is unnecessary to strike down the offending provision.

200 In *Schachter* , Lamer C.J.C. extensively reviewed the various remedies available to a court that finds legislation violates a *Charter* provision. Reading in is a remedial option under s. 52 of the *Constitution Act, 1982* , which requires the court to strike down any law that is inconsistent with the Constitution, but only "to the extent of the inconsistency". The purpose of reading in "is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature": *Schachter* at p. 700. Reading in is also sometimes required in order to respect the purposes of the *Charter* .

201 In *Schachter* , Lamer C.J.C. reviewed the factors to be considered in determining whether or not reading in is an appropriate remedy by reference to the factors developed by the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.) . Reading in is particularly appropriate where the legislation fails because it is not carefully tailored to be a minimal intrusion or it has effects that are disproportionate to its purpose. The defects in the *Controlled Drugs and Substances Act* fall within this rationale and thus reading in is a potential remedy. Even so, reading in will not be appropriate if "the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis": *Schachter* at p. 705. To read in an exemption in such circumstances would "amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature not the courts": *Schachter* at p. 707.

202 In its factum, the Crown has listed a number of problems with the reading in remedy adopted by the trial judge. They include the following:

> (a) what constitutes "medically approved use"?
>
> (b) who may grant medical approval? on what basis? on whose onus? to what standard of proof?
>
> (c) given that this is a constitutional protection (i.e. the highest form of protection allowed by our law), what degree of illness is required to engage it? must it be life-threatening? chronically disabling? disruptive? generally inconvenient? merely bothersome?
>
> (d) what quantities of marijuana may an authorized person possess? enough for one day? a week? a year? should there be a presumption that any amount in excess of immediate need is not covered by the exemption? If so, who decides what the threshold amount should be?
>
> (e) what quantities of marijuana may an authorized person cultivate? how much of the plant should be considered useable for the purpose of that determination? just the flowers? the flowers and the leaves? who decides?
>
> (f) does the exemption extend in any way to roommates, family members or caregivers? if an unauthorized individual cares for an otherwise 'exempt' plant while its authorized owner is away, is that individual insulated from prosecution for cultivation? on what basis, if the exemption is personal?

203 I do not necessarily accept that all of these problems necessarily flow from the remedy chosen by the trial judge.[21] I do accept, however, that the Crown has raised matters of sufficient complexity that reading in is not an appropriate remedy. For these reasons, I agree with the Crown that the prohibition on simple possession of marihuana in s. 4 of the *Controlled Drugs and Substances Act* must be struck down.

204 I point out, however, that this is not a case like *Rodriguez* where creating an exception might frustrate the purpose of the legislation because adequate guidelines to control abuse are difficult or impossible to develop. Rather, refusing to read in an exemption demonstrates a recognition of and respect for the different roles of the legislature and the courts. There is, in my view, no question that a medical exemption with adequate guidelines is possible. The fact that such exemptions exist in some states in the United States is testament to that. However, there are many options to consider and this is a matter within the legislative sphere. There is also a particular problem in the case of marihuana because of a lack of a legal source for the drug. This raises issues that can only be adequately addressed by Parliament.

205 There is one other factor that is also worth considering. To avoid an undue intrusion into the legislative sphere, any exemption crafted by a court should probably be the minimum necessary to cure the constitutional defect. However, faced with the need to open up the *Controlled Drugs and Substances Act* to address the constitutional defect, Parliament has the resources to address the broader issue of medical use. By way of example only, people without the means to grow marihuana themselves may be dependent upon caregivers to obtain the drug. This is a complex matter that, while not necessarily implicating *Charter* rights (although it may), is not something a court is equipped to deal with. Put another way, Parliament is not bound to legislate to the constitutional minimum. It can adopt the optimal and most progressive legislative scheme that it considers just.

206 Finally, I believe it is appropriate to sever the marihuana possession prohibition from the other parts of s. 4. That section is central to the control of many dangerous drugs and there was no suggestion by any of the parties that severance in this limited respect was inappropriate.

207 I also agree with the Crown that the declaration of invalidity should be suspended to provide Parliament with the opportunity to fill the void. Such a declaration is required where striking down a provision "poses a potential danger to the public": *Schachter* at p. 715. I would suspend the declaration of invalidity for 12 months.

208 I do not accept the submissions of the intervener that the appropriate remedy is a constitutional exemption for persons requiring marihuana for medical purposes. In *Corbiere* at p. 225, the court held that the remedy of a constitutional exemption has only been recognized in a very limited way, "to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended". [22] Thus, Parker is entitled to a constitutional exemption from the possession offence under the *Controlled Drugs and Substances Act* during the period of the suspended invalidity for possession of marihuana for his medical needs. I have also made it clear in these reasons that if the cultivation offence under that Act were before this court, I would have held that provision to be invalid. I expect that the authorities would not subject Parker to further prosecution under that section in view of these reasons.

209 Finally, Parker is entitled to the personal remedies granted to him by the trial judge under s. 24(1) of the *Charter* . Thus, I would uphold the trial judge's order staying the proceedings for cultivation under the former *Narcotic Control Act* and for possession under the *Controlled Drugs and Substances Act* .

Disposition

210 Accordingly, I would vary the remedy granted by the trial judge and declare the marihuana prohibition in s. 4 of the *Controlled Drugs and Substances Act* to be invalid. I would suspend the declaration of invalidity for a period of twelve months from the release of these reasons. The respondent is exempt from the marihuana prohibition in s. 4 of the *Controlled Drugs and Substances Act* during the period of suspended invalidity for possession of marihuana for his medical needs. I would set aside those parts of Sheppard J.'s judgment reading in a medical exemption into the former *Narcotic Control Act* and the *Controlled Drugs and Substances Act* and ordering the return of the plants seized in the September 1997 search. In all other respects, I would dismiss the Crown appeal.

Appeal allowed in part; charging provision declared to be of no force or effect; declaration of invalidity stayed for 12 months; accused accorded constitutional exemption during stay.

APPENDIX I

California Compassionate Use Act of 1996

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

APPENDIX II

State of Hawaii

A Bill for an Act relating to Medical Use of Marihuana

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that modern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating illnesses such as cancer, glaucoma, human immunodeficiency virus, acquired immune deficiency syndrome, multiple sclerosis, epilepsy, and crohn's disease. There is sufficient medical and anecdotal evidence to support the proposition that these diseases and conditions may respond favorably to a medically controlled use of marijuana.

The legislature is aware of the legal problems associated with the legal acquisition of marijuana for medical use. However, the legislature believes that medical scientific evidence on the medicinal benefits of marijuana should be recognized. Although federal law expressly prohibits the use of marijuana, the legislature recognizes that a number of states are taking the initiative in legalizing the use of marijuana for medical purposes. Voter initiatives permitting the medical use of marijuana have passed in California, Arizona, Oregon, Washington, Alaska, Maine, and the District of Columbia.

The legislature intends to join in this initiative for the health and welfare of its citizens. However, the legislature does not intend to legalize marijuana for other than medical purposes. The passage of this Act and the policy underlying it does not in any way diminish the legislature's strong public policy and laws against illegal drug use.

Therefore, the purpose of this Act is to ensure that seriously ill people are not penalized by the State for the use of marijuana for strictly medical purposes when the patient's treating physician provides a professional opinion that the benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patient.

SECTION 2. Chapter 329, Hawaii Revised Statutes is amended by adding a new part to be appropriately designated and to read as follows:

PART — MEDICAL USE OF MARIJUANA

§ 329-A Definitions.

As used in this part:

"Adequate supply" means an amount of marijuana that is not more than reasonably necessary to assure, throughout the projected course of treatment, the uninterrupted availability of marijuana for purposes of treating or alleviating the pain or other symptoms associated with a qualifying patient's debilitating medical condition or the treatment of such condition; provided that an "adequate supply" shall be between 1 ounce and 10.5 ounces, but no more than a sixty-day supply.

"Debilitating medical condition" means:

(1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or the treatment of these conditions;

(2) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following:

(A) Cachexia or wasting syndrome;

(B) Severe pain;

(C) Severe nausea;

(D) Seizures, including those characteristic of epilepsy; or

(E) Severe and persistent muscle spasms, including those characteristic of multiple sclerosis or crohn's disease; or

(3) Any other medical condition approved by the department of health pursuant to administrative rules in response to a request from a physician or qualifying patient.

"Marijuana" shall have the same meaning as "marijuana" and "marijuana concentrate" as provided in sections 329-1 and 712-1240.

"Medical use" means the acquisition, possession, cultivation, use, distribution, or transportation of marijuana or paraphernalia relating to the administration of marijuana to alleviate the symptoms or effects of a qualifying patient's debilitating medical condition.

"Physician" or "treating physician" means a person who is licensed under chapters 453 and 460.

"Primary caregiver" means a person, other than the qualifying patient and the qualifying patient's physician, who is eighteen years of age or older who has agreed to undertake significant responsibility for managing the well-being of no more than three qualifying patients at any one time with respect to the medical use of marijuana. In the case of a minor or an adult lacking legal capacity, the primary caregiver shall be a parent, guardian, or person having legal custody.

"Qualifying patient" means a person who has been diagnosed by a physician as having a debilitating medical condition.

"Written certification" means the qualifying patient's medical records or a statement signed by a qualifying patient's physician, stating that in the physician's professional opinion, the qualifying patient has a debilitating medical condition and the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient.

§ 329-B Medical use of marijuana; conditions of use.

(a) Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient, or the furnishing of marijuana for medical use by the qualifying patient's primary caregiver pursuant to this chapter, shall be permitted only if:

(1) The qualifying patient has been diagnosed by a physician as having a debilitating medical condition;

(2) The qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; and

(3) The amount of marijuana does not exceed an adequate supply.

(b) Subsection (a) shall not apply to a qualifying patient under the age of eighteen years, unless:

(1) The qualifying patient's physician has explained the potential risks and benefits or the medical use of marijuana to the qualifying patient and to a parent, guardian, or person having legal custody; and

(2) A parent, guardian, or person having legal custody consents in writing to:

(A) Allow the qualified patient's medical use of marijuana;

(B) Serve as the qualifying patient's primary caregiver; and

(C) Control the acquisition of the marijuana, the dosage, and the frequency of the medical use of marijuana by the qualifying patient.

(c) The authorization for medical use of marijuana in this section shall not apply to:

(1) Medical use of marijuana that endangers the health or well-being of another person;

(2) Medical use of marijuana:

(A) In a school bus, public bus, or any moving vehicle;

(B) In the workplace of one's employment;

(C) On any school grounds;

(D) At any public park, public beach, public recreation center, recreation or youth center; or

(E) Other place open to the public; and

(3) Use of marijuana by a qualifying patient, parent, or primary caregiver for purposes other than medical use permitted by this chapter.

§ 329-C Registration requirements.

(a) The qualifying patient shall register with, and provide a copy of the written certification to, the department of health within ten working days of receipt of the written certification by the treating physician. The department of health shall issue to the qualifying patient a registration certificate, and may charge a reasonable fee, not to exceed $25.

(b) Upon an inquiry by a law enforcement agency, the department of health shall verify whether the particular qualifying patient has registered with the department and may provide reasonable access to the registry information for official law enforcement purposes.

§ 329-D Insurance not applicable.

This part shall not be construed to require insurance coverage for the medical use of marijuana.

§ 329-E Protections afforded to a qualifying patient or primary caregiver.

(a) A qualifying patient or the primary caregiver may assert medical use of marijuana as an affirmative defense to any prosecution involving marijuana under this chapter or chapter 712; provided that the qualifying patient or the primary caregiver strictly complied with the requirements of this part.

(b) No person shall be subject to arrest or prosecution for being in the presence or vicinity of the medical use of marijuana as permitted under this part.

§ 329-F Protections afforded to a treating physician.

No physician shall be subject to arrest or prosecution, penalized in any manner, or denied any right or privilege for providing written certification for the medical use of marijuana for a qualifying patient; provided that:

(1) The physician has diagnosed the patient as having a debilitating medical condition, as defined in section 329-A;

(2) The physician has explained the potential risks and benefits of the medical use of marijuana, as required under section 329-B; and

(3) The certification is based upon the physician's professional opinion after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship.

§ 329-G Protection of marijuana and other seized property.

Marijuana and any property used in connection with the medical use of marijuana shall not be subject to search and seizure. Marijuana, paraphernalia, or other property seized from a qualifying patient or primary caregiver in connection with claimed medical use of marijuana under this part shall be returned immediately upon the determination by a court that the qualifying patient or primary caregiver is entitled to the protections of this part, as evidenced by a decision not to prosecute, dismissal of charges, or an acquittal; provided that law enforcement agencies seizing live plants as evidence shall not be responsible for the care and maintenance of such plants.

329-H Fraudulent misrepresentation; penalty.

Notwithstanding any other law to the contrary, fraudulent misrepresentation to a law enforcement official of any fact or circumstance relating to the medical use of marijuana in order to avoid arrest or prosecution under this part or chapter 712 shall be a petty misdemeanor and subject to a fine of $500.

SECTION 3. Section 453-8, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

(a) In addition to any other actions authorized by law, any license to practice medicine and surgery may be revoked, limited, or suspended by the board at any time in a proceeding before the board, or may be denied, for any cause authorized by law, including but not limited to the following:

(1) Procuring, or aiding or abetting in procuring, a criminal abortion;

(2) Employing any person to solicit patients for one's self;

(3) Engaging in false, fraudulent, or deceptive advertising, including, but not limited to:

(A) Making excessive claims of expertise in one or more medical specialty fields;

(B) Assuring a permanent cure for an incurable disease; or

(C) Making any untruthful and improbable statement in advertising one's medical or surgical practice or business;

(4) Being habituated to the excessive use of drugs or alcohol; or being addicted to, dependent on, or a habitual user of a narcotic, barbiturate, amphetamine, hallucinogen, or other drug having similar effects;

(5) Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability, or mental instability;

(6) Procuring a license through fraud, misrepresentation, or deceit or knowingly permitting an unlicensed person to perform activities requiring a license;

(7) Professional misconduct, hazardous negligence causing bodily injury to another, or manifest incapacity in the practice of medicine or surgery;

(8) Incompetence or multiple instances of negligence, including, but not limited to, the consistent use of medical service which is inappropriate or unnecessary;

(9) Conduct or practice contrary to recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association or the American Medical Association;

(10) Violation of the conditions or limitations upon which a limited or temporary license is issued;

(11) Revocation, suspension, or other disciplinary action by another state or federal agency of a license, certificate, or medical privilege for reasons as provided in this section;

(12) Conviction, whether by nolo contendere or otherwise, of a penal offense substantially related to the qualifications, functions, or duties of a physician, notwithstanding any statutory provision to the contrary;

(13) Violation of chapter 329, the uniform controlled substances act, or any rule adopted thereunder[;] except as provided in section 329-B ;

(14) Failure to report to the board, in writing, any disciplinary decision issued against the licensee or the applicant in another jurisdiction within thirty days after the disciplinary decision is issued; or

(15) Submitting to or filing with the board any notice, statement, or other document required under this chapter, which is false or untrue or contains any material misstatement or omission of fact.

SECTION 4. Section 712-1240.1, Hawaii Revised Statutes, is amended to read as follows:

§ 712-1240.1 Defense to promoting.

(1) It is a defense to prosecution for any offense defined in this part that the person who possessed or distributed the dangerous, harmful, or detrimental drug did so under authority of law as a practitioner, as an ultimate user of the drug pursuant to a lawful prescription, or as a person otherwise authorized by law.

(2) It is an affirmative defense to prosecution for any marijuana-related offense defined in this part that the person who possessed or distributed the marijuana was authorized to possess or distribute the marijuana for medical purposes pursuant to part of chapter 329 .

SECTION 5. This Act shall not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 6. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. In codifying the new sections added section 2, and referred to in sections 3 and 4 of this Act, the revisor of statutes shall substitute the appropriate section numbers for the letters used in designating the new sections of this Act.

SECTION 8. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

Footnotes

1 The parties also placed "fresh" evidence before this court. For the most part, this evidence falls within the category of legislative facts and, in my view, is properly admissible. See *Ford c. Québec (Procureur général)* (1988), 54 D.L.R. (4th) 577 (S.C.C.) at 624-26. The one category of evidence that may constitute adjudicative facts is an affidavit from the respondent's mother setting out the respondent's health since the judgment. The Crown objected to one paragraph of that affidavit as hearsay and I have ignored that paragraph.

2 The reasons of McCart J. are reported at *R. v. Clay* (1997), 9 C.R. (5th) 349 (Ont. Gen. Div.) .

3 I note that Howard Prov. Ct. J., who heard similar evidence in *R. v. Caine* (April 20, 1998), Doc. Surrey 65381 (B.C. Prov. Ct.) came to almost the same conclusions as did McCart J. The accused in *Caine* appealed from that decision. The British Columbia Court of Appeal heard that appeal with another appeal raising the same issues. A majority of the court upheld the trial decisions in reasons cited as *R. v. Malmo-Levine*, 2000 BCCA 335 (B.C. C.A.) . I have made extensive reference to this decision in my reasons in *R. v. Clay* . *Malmo-Levine* does not deal with the therapeutic use of marihuana.

4 The Crown objected to certain parts of the Morgan affidavit that referred to material that could have been produced at trial. I have not found it necessary to rely upon any of the objected-to material.

5 The Crown submits that Mr. Rowsell is in error in this respect and it would be possible for someone to obtain a licence under the Regulations for the purposes of the programme. The Crown nevertheless concedes that no firm has been licensed to produce and distribute marihuana.

6 The much more difficult question whether security of the person would be engaged if the lack of access is due not to a criminal sanction but government inaction is not before the court and should be left to another day. It is raised only in passing in this case by the Minister's s. 56 approval, which requires the applicant to disclose the legal source for the marihuana.

7 The need to take into account state or societal interests under s. 7, especially where the court is asked to conduct substantive review of legislation, is discussed more fully in this court's decision in *R. v. Pan* (1999), 134 C.C.C. (3d) 1 (Ont. C.A.) (leave to appeal to S.C.C. granted January 27, 2000 [reported (2000), 252 N.R. 198 (note) (S.C.C.)]) at para. 177 - 187.

8 From *R. v. Jones*, [1986] 2 S.C.R. 284 (S.C.C.) at 304, per La Forest J.

9 See *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1 (S.C.C.) per McLachlin J. dissenting at 114.

10 See the discussion of those issues in *R. v. Malmo-Levine* , *supra* , at para. 142-43.

11 In any event, the Constitution takes precedence over any treaty obligations: *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] A.C. 326 (Canada P.C.) .

12 Canada acceded to the Covenant on May 19, 1976 and it came into force in Canada on August 19, 1976.

13 The Crown, of course, claims that the legislation already contains sufficient exemptions. In any event, if treaty obligations are a matter more properly considered under s. 1, the Crown did bear the burden of proof on that issue.

14 I will deal with the question of remedy, raised in the passage quoted above, later in my reasons. Suffice it to say that I do not consider the defect in the legislation to be merely an individual effect requiring simply a remedy under s. 24(1) alone.

15 Subject to a possible s. 56 exemption discussed below.

16 The Association argues that the marihuana prohibition discriminates on the basis of disability.

17 One of those people was Mr. Wakeford.

18 Presumably, into the illicit market.

19 Section 56 also gives the Minister the power to impose "such terms and conditions" as he deems necessary. It would thus be possible for a Minister of Health to impose conditions that would make the exemption illusory. The fact that the present application requires the applicant to name the source of his or her supply gives some reason for concern when the government must know that at present there is no legal source for marihuana in Canada.

20 As Cory J. said in *MacKay v. Manitoba* (1989), 61 D.L.R. (4th) 385 (S.C.C.) at 388, in light of the importance and impact that some Charter decisions may have, "the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases". While the burden was on the respondent to demonstrate the violation of s. 7, given the importance the Crown placed upon the s. 56 exemption it would have been helpful if the Crown produced expert evidence from the officials in Health Canada in charge of the s. 56 programme.

21 I also do not accept all of the Crown's submissions, based on *Schachter* , for refusing the reading-in remedy. For example, the Crown argues that a medical exemption would undermine the "comprehensive code" governing right of access to controlled substances for medical purposes or would constitute judicial intrusion into the very core of Parliament's legislative authority over criminal law to decide what conduct should be criminalized. This significantly overstates the issue. The *Controlled Drugs and Substances Act* already contains a significant number of exemptions for medical use of drugs. It is obvious that absolute prohibition is not at the core of the power to criminalize conduct. The "comprehensive code" rationale for refusing to read in is based on the theory that reading in would so markedly change the legislation that it could not be safely assumed that Parliament would have enacted the non-offending provisions. Given the various existing exemptions for medical use of other more dangerous drugs, this theory hardly seems credible.

22 Also see Lamer C.J.C. dissenting in *Rodriguez* at p. 577. This part of his reasons was adopted by the court in *Corbiere* .

2019 BCSC 1507
British Columbia Supreme Court

Taseko Mines Limited v. Tsilhqot'in National Government

2019 CarswellBC 2594, 2019 BCSC 1507, [2020] 5 W.W.R. 468,
28 B.C.L.R. (6th) 132, 309 A.C.W.S. (3d) 767, 42 C.P.C. (8th) 58

Taseko Mines Limited (Plaintiff) and Tsilhqot'in National Government, Chief Joe Alphonse, Chief Russell Myers Ross, Cecil Grinder, John Doe, Jane Doe and Persons Unknown (Defendants)

Roger William on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation (Plaintiffs) and Her Majesty the Queen in Right of the Province of British Columbia, The Chief Inspector of Mines, The District Manager, Caribou-Chilcotin Natural Resource District, and Taseko Mines Limited (Defendants)

Matthews J.

Heard: July 29-31, 2019
Judgment: September 6, 2019
Docket: Vancouver S197557, Victoria S172734

Counsel: M. Oulton, S. Humphrey, J. Roos, for Taseko Mines Limited
T. Dickson, A. Laskin, J. Harman, for Tsilhqot'in National Government, Chief Joe Alphonse, Chief Russell Myers Ross, Cecil Grinder, and Roger William on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and the Tsilhqot'in Nation
K. Friesen, for Attorney General of Canada for the RCMP (July 29 only)

***Matthews J.*:**

Introduction

1 Taseko Mines Limited seeks to enjoin members of the Tsilhqot'in Nation from blockading its access to an area in which it holds mineral leases and mineral claims and in which it intends to carry out an exploratory drilling program pursuant to a notice of work permit issued under the *Mines Act*, R.S.B.C. 1996, c. 293 and related authorizations issued in July 2017. Members of the Tsilhqot'in Nation seek an injunction prohibiting Taseko Mines Limited from carrying out the exploratory drilling program pending trial of its action, brought pursuant to s. 35 of the *Constitution Act*, *1982*, to quash the notice of work permit on the basis that it infringes their established and conceded Aboriginal rights.

2 The Tsilhqot'in applicant plaintiffs are Roger William, the former chief of the Xeni Gwet'in First Nations Government, a sub-group of the Tsilhqot'in Nation, the Xeni Gwet'in First Nations Government, and the Tsilhqot'in Nation. I will refer to them and the Tsilhqot'in National Government, the named defendant in Taseko's action, collectively, as the Tsilhqot'in. I will refer to the notice work permit as the NOW permit and the exploratory drilling program as the NOW program.

3 The applications were argued at the same time. As I have decided that the Tsilhqot'in's application should succeed, Taseko's application is moot.

4 The government defendants, to which I will refer to collectively as British Columbia, filed an application response to the Tsilhqot'in's application but did not make oral submissions at the hearing of the application. In its response, British Columbia acknowledges that the Tsilhqot'in have Aboriginal rights to hunt and trap birds and animals and the right to trade in skins

and pelts as a means of securing a moderate livelihood in an area that includes the area where the NOW program will take place. British Columbia further concedes that the Tsilhqot'in have Aboriginal rights to fish for food for social and ceremonial purposes generally within their traditional territory, including the NOW program area. Some of these rights were addressed in *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.) [*Tsilhqot'in* BCSC]; *William v. British Columbia*, 2018 BCSC 1425 (B.C. S.C.) [*William* #2] at para. 73; *William v. British Columbia (Attorney General)*, 2019 BCCA 74 (B.C. C.A.) [*William* #4] at paras. 5, 38. I will refer to these rights as the established and conceded Aboriginal rights.

5 The issues to be determined fall out of the *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) three-part test for an interlocutory injunction: the merits threshold, irreparable harm and balance of convenience as applied to a rights infringement case brought pursuant to s. 35 of the *Constitution Act, 1982*.

6 The parties dispute whether the threshold merits test is a serious issue to be tried or strong arguable case. The Tsilhqot'in argue that the standard serious issue to be tried threshold applies. Taseko argues that if granted, the interlocutory injunction sought by the Tsilhqot'in will amount to granting the relief sought in the main action as the NOW permit will expire prior to trial and therefore the injunction will act to quash the NOW permit approval, which is the relief sought at trial. For that reason, Taseko argues the threshold merits standard should be the strong arguable case standard.

7 After determining the applicable merits threshold test to be applied, the issues are whether the Tsilhqot'in can meet the applicable merits threshold to establish infringement of their established and conceded Aboriginal rights and whether they can meet the applicable merits threshold on whether British Columbia can discharge its burden to justify the infringement. The Tsilhqot'in argue that the evidence shows their established and conceded Aboriginal rights will be infringed due the disturbance the NOW program will cause in a preferred area to exercise these rights. Taseko argues that the Tsilhqot'in's evidence is speculative and imprecise and emphasizes that the interference will be to alleged spiritual and cultural rights which does not amount to meaningful diminution of the established and conceded Aboriginal rights. Taseko points to evidence that the NOW program will only take place in .04% of the Tsilhqot'in's traditional territory and the Tsilhqot'in's established and conceded Aboriginal rights can be exercised elsewhere such that these rights are not meaningfully diminished by the NOW permit.

8 On justification, the Tsilhqot'in argue that British Columbia will not meet its burden to show that the objective of the NOW permit is compelling and substantial because its objective is now moot. Taseko argues that the primary objective was not moot when the NOW permit was issued and in any event, the collateral objectives are still good and are compelling and substantial.

9 Irreparable harm is contested. Taseko argues the evidence of harm to the Tsilhqot'in's established and conceded Aboriginal rights is speculative and that any harm will be repaired through the reclamation aspects of the NOW permit. Taseko further argues that it will suffer irreparable harm if the Tsilhqot'in's injunction is allowed because the NOW permit will expire before the trial and any appeals can be concluded. The Tsilhqot'in argue that the immediate harm and the lasting aspects of the NOW program will be devastating to their practices of hunting, trapping and fishing including the spiritual and cultural aspects of those activities and their practice of gathering in the area for teaching, cultural and spiritual purposes.

10 Finally, the balance of convenience must be considered and each party says it lays with their position. The Tsilhqot'in argue that the balance lies with them because their harm is tangible while Taseko's is not because the obstacles that Taseko faces to construct and operate a mine are such that losing the opportunity to undertake the NOW program is not significant. The Tsilhqot'in further argue that if I find irreparable harm to both, I should favour the status quo which supports the injunction. Taseko argues that because the Tsilhqot'in engaged in self-help by blockading Taseko's route to the site, the balance of convenience favours dismissing the injunction application.

Background

11 The NOW permit relates to mineral leases and tenure rights Taseko holds under the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 in relation to gold and copper deposits southwest of Williams Lake, British Columbia. These leases and rights are good until at least 2035. Taseko estimates there are 11 million ounces of gold and four billion pounds of copper and seeks to develop and operate a mine to extract the minerals. Taseko estimates the mine, if approved, would be in production for 20 years.

12 The NOW program is to take place in an area covering 47 hectares which includes Teztan Biny (Fish Lake), Y'anah Biny (Little Fish Lake) and Nabas, the surrounding meadowlands. I will refer to this as the "NOW program area". Of the 47 hectares in the NOW program area, 31 hectares will be subject to new disturbances. The disturbances allowed under the NOW permit are: 367 trenches and/or test pits; 122 geotechnical drill sites; 48 km of new excavated trails; 28 km of existing access modification; 20 km of cut lines; 1000 m^3 of timber cuts; a 50-person camp with 11 mobile trailer units; a base camp staging area; storage of up to 10,000 litres of fuel on site; seven water pump locations; and a temporary core shed.

13 Historically, the Tsilhqot'in have brought claims pertaining to Aboriginal rights and land title claims in an area greater than but including the NOW program area.

14 In *Tsilhqot'in* BCSC, Mr. Justice Vickers declared that the Tsilhqot'in had an "Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses", as well as an "Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood": paras. 1240 and 1265. The claim area in that case included the NOW program area. These declared Aboriginal rights were upheld on appeal: *Xeni Gwet'in First Nations v. British Columbia*, 2012 BCCA 285 (B.C. C.A.) at paras. 288 and 344 and were not raised on appeal to the Supreme Court of Canada: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (S.C.C.) [*Tsilhqot'in* SCC].

15 Regulatory approval disputes and litigation pertaining to the proposed mine and the NOW permit and have been ongoing for many years as described in *William v. British Columbia (Attorney General)*, 2019 BCCA 112 (B.C. C.A.) [*William* #5] at paras. 5 — 16.

16 In 2010, Taseko proposed the development of what was then known as the Prosperity Mine. The development underwent separate provincial and federal environmental assessments. The provincial assessment recommended approval of the project and on January 14, 2010, the province issued an environmental assessment certificate permitting Taseko to proceed with development of the Prosperity Mine. Pursuant to s. 18 of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 and the environmental assessment certificate, Taseko had five years to commence construction of the mine.

17 The design for the Prosperity Mine included draining Teztan Biny, filling it with waste rock and flooding Y'anah Biny and Nabas to create the tailings pond facility.

18 On July 2, 2010, the federal environmental assessment panel concluded that the Prosperity Mine development would have significant adverse environmental effects on fish and fish habitat, grizzly bears, navigation, the current use of lands and resources for traditional purposes by the Tsilhqot'in people, Tsilhqot'in cultural heritage, and on proven and asserted Aboriginal rights. The federal government accepted those conclusions and rejected the proposed development under the then governing *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

19 In 2011, Taseko redesigned the proposed mine, renamed it the New Prosperity Project, and reapplied to the federal government for approval. Under the revised proposal, Taseko would preserve Teztan Biny, but would still flood Y'anah Biny and much of Nabas. While seeking federal approval, Taseko applied to British Columbia for an amendment of its environmental assessment certificate to apply to the New Prosperity Project. At that time, Taseko also obtained approval to carry out an exploratory drilling program to inform the assessment of the redesigned project. On December 2, 2011, in *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 (B.C. S.C.) [*Taseko Mines*], Justice Grauer granted an injunction restraining Taseko from carrying out that work. The parties eventually agreed to terms that allowed the exploratory drilling program work to proceed in 2012.

20 A federal environmental assessment panel reviewed the New Prosperity Project and issued a report in October 2013. It concluded the New Prosperity Project would have significant adverse effects on the exercise of Aboriginal rights and cultural practices and would also negatively impact the environment, fish and wildlife. The federal government rejected the New Prosperity Project. Taseko brought judicial review applications pertaining to the report and the rejection.

21 On January 14, 2015, British Columbia granted a five-year extension of the environmental assessment certificate which still pertains to Prosperity Mine, not New Prosperity Project.

22 In 2016, Taseko began developing the NOW program.

23 On July 17, 2017, British Columbia's Senior Inspector of Mines granted approval of the NOW program subject to 37 mitigating conditions intended to address the Tsilhqot'in's concerns. The Senior Inspector acknowledged that the probability of a major mine was speculative, but also noted that the federal rejections did not preclude Taseko from applying for approval with another new design.

24 On July 19, 2017, the Tsilhqot'in commenced a petition to quash the NOW permit on the grounds that British Columbia breached its duty to consult. At the same time, the Tsilhqot'in filed this claim challenging the NOW permit as an unjustifiable infringement of their declared and conceded Aboriginal rights.

25 The Tsilhqot'in also brought applications seeking interlocutory injunctions on both the consultation petition and the infringement action preventing Taseko from commencing work on the NOW program until those matters had been heard and determined. The injunction applications were heard from July 31 to August 3, 2017 before Mr. Justice Steeves. During the course of the hearing, the Tsilhqot'in discontinued the injunction application in this infringement action and continued only with the consultation petition injunction application. The court reserved its decision. Soon thereafter, the Canadian Environmental Assessment Agency brought a petition to restrain Taseko from carrying out the NOW program. Because of that, the court adjourned the Tsilhqot'in's consultation petition injunction application generally.

26 On December 5, 2017, the federal court dismissed Taseko's applications challenging the February 2014 federal rejection of the New Prosperity Project: *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1099 (F.C.), 2017 FC 1100 (F.C.). Taseko appealed. The appeal was heard by the Federal Court of Appeal in January/February of 2019, and the decision is currently on reserve.

27 The Canadian Environmental Assessment Agency's petition was rejected on June 22, 2018: *Canada (Canadian Environmental Assessment Agency) v. Taseko Mines Limited*, 2018 BCSC 1034 (B.C. S.C.).

28 Mr. Justice Branch heard the consultation petition and the application for an interlocutory injunction in June 2018. He granted the interlocutory injunction: *William v. British Columbia*, 2018 BCSC 1271 (B.C. S.C.) [*William* #1]; but ultimately dismissed the consultation petition [*William* #2], holding that both the consultation process and degree of accommodation were such that the honour of the Crown was maintained, and adequate reconciliation efforts were made in granting approval. The Tsilhqot'in appealed and sought an interlocutory injunction pending appeal. Madam Justice Dickson granted an injunction enjoining Taseko from starting work until the consultation petition appeal was heard: *William v. British Columbia (Attorney General)* unreported, September 17, 2018, CA45557 [*William* #3]. The Court of appeal dismissed the appeal: *William v. British Columbia (Attorney General)*, 2019 BCCA 74 (B.C. C.A.) [*William* #4]. The Tsilhqot'in filed an application for leave to appeal and an application for a stay pending the leave determination. Mr. Justice Butler granted the stay [*William* #5]. On June 13, 2019, the Supreme Court of Canada dismissed the leave application.

29 The five-year extension to Taseko's provincial environmental assessment certificate expires on January 14, 2020 and cannot be further extended if the mine project has not "substantially started" by that date. Mine construction must be commenced for the mine to be substantially started. If the environmental assessment certificate lapses, Taseko will need to seek a new provincial environmental assessment certificate.

30 At this time, construction cannot begin for several reasons. Taseko's provincial environmental assessment certificate does not pertain to the New Prosperity Project unless the province grants the amendment Taseko has sought; the federal government has rejected the New Prosperity Project and the refusal has been upheld by the Federal Court (the Federal Court of Appeal decision is under reserve); and Taseko requires a provincial mine construction permit under the *Mines Act*.

31 Taseko intends to proceed with the NOW program despite the other obstacles to constructing and operating a mine. The last injunction which enjoined Taseko from proceeding with the NOW program expired with the Supreme Court of Canada's dismissal of the Tsilhqot'in leave to appeal application in June 2019. Taseko immediately gave notice that it would proceed with the NOW program and that it intended to mobilize on-site starting on July 2, 2019. The Tsilhqot'in set up a blockade preventing Taseko access to the NOW program area and subsequently issued a notice of intention to proceed in this action, which the Tsilhqot'in had not been prosecuting pending the outcome of the consultation petition.

Tsilhqot'in's Injunction Application

Threshold merits — Serious Issue to be Tried or Strong Arguable Case?

32 At the first stage, the court is to undertake a preliminary investigation of the merits. The usual threshold is a "serious question to be tried", in the sense that the underlying claim is neither frivolous nor vexatious: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) at para. 13. This threshold is relatively low; a prolonged examination of the merits is generally neither necessary nor desirable: *RJR-MacDonald* at 335 — 338; *Taseko Mines* at para. 42.

33 There is a more stringent "strong arguable case" standard which applies when granting an interlocutory injunction is tantamount to granting the relief sought in the main action or amounts to a final determination of the action. The justification for this higher standard is because of the potential unfairness in resolving an action at an interlocutory stage, and effectively disposing of the case prior to a trial, without a full adjudication on the merits: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 (B.C. S.C.) at para. 229. As stated in *RJR-MacDonald* at 338, this higher standard also arises when "the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial".

34 In this case, the issue is whether an interim injunction prohibiting Taseko from undertaking the NOW program amounts to the granting of relief, a final determination of the action, or removes any benefit of proceeding to trial. The NOW permit, which the Tsilhqot'in seek to quash in the underlying claim, will expire in July 2020, and so if Taseko is enjoined until the action is heard, it is very unlikely the trial could be completed in time for the 4-6 weeks required to complete the NOW program.

35 The Tsilhqot'in submit that the interlocutory injunction would not be tantamount to granting the relief sought in the main action nor cause Taseko hardship because Taseko can extend the NOW permit by two years, to July 2022, under s. 5(1) of the *Permit Regulation*, B.C. Reg. 99/2013. The Tsilhqot'in submit that the extension process is essentially mechanical, as the provision provides for a deemed authorization if Taseko gives notice that it intends to extend the permit. The Tsilhqot'in have affirmed that they will consent to such an extension if the interlocutory injunction is granted.

36 The Tsilhqot'in assert that four weeks is enough to try the underlying action. They have inquired about trial dates for a trial of four weeks and indicate that there are dates available in about two years. They argue that a trial in 2021 will leave enough time for Taseko to carry out the NOW program by July 2022 if Taseko is successful at the trial. The Tsilhqot'in are prepared to go to trial sooner if the other parties are agreeable. They seek an order for an expedited trial.

37 Taseko argues that the extension is not mechanical as the Tsilhqot'in assert because s. 3 of the *Permit Regulation* authorizes the Chief Inspector to overturn a deemed authorization in order to protect health, safety, the environment or a cultural heritage resource. However, there is nothing to suggest that the extension would be assessed any differently than the original permit. In my view, the extension is essentially mechanical and I conclude that, effectively, Taseko will have until July 2022 to complete the NOW program.

38 Taseko argues that the time to complete trial, allow time for appeals and allow the time to undertake the NOW program cannot be accommodated by an extension to July 2022.

39 If appeals are factored in, the timing is too tight. In my view, appeals should not be included in the timing scenario as that requires an assumption about which party will be successful and whether stays pending appeals are granted. In determining whether two years is sufficient to get to trial and how long the trial will be, I take into account that the Aboriginal rights in

issue have been declared or conceded subject to the argument Taseko raises about the cultural or spiritual activities it asserts the Tsilhqot'in have not established as Aboriginal rights. I also take into account that the issue of adequate consultation has been decided in favour of British Columbia. The issues pertaining to infringement and justification will be the focus of the trial but even they are not new to the parties as some of the factual and legal elements have been argued by the parties before different courts and bodies over many years. The discovery process will not be perfunctory, but it also will not be as time consuming as it would be if the issues were new to the parties. Based on the evidence and submissions before me, and only for the purposes of determining whether the timeline to trial is workable, it is my view that if the parties prioritize the matter, eighteen months to two years should be adequate to prepare for trial. Without concluding precisely how long will be needed for trial, a one to two month trial in the summer or fall of 2019 will allow adequate time for the NOW program to be undertaken by July 2022 if Taseko is successful at trial.

40 Accordingly, I conclude that the injunction, if granted, is not tantamount to granting relief nor is it bound to impose a hardship removing any benefit of trial. The threshold merits test is the serious question to be tried standard.

Is there a Serious Issue to be Tried?

41 Section 35 rights infringement actions are decided in accordance with the framework set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) and further explained in *Tsilhqot'in* SCC at paras. 77, 120 — 122, and 125. The burden is on the Aboriginal group to establish an infringement of their Aboriginal rights. Once an infringement is established, the Crown must establish that the infringement is justified.

The characteristics of the rights at stake

42 In determining whether rights have been infringed, in *Tsilhqot'in* SCC, the Supreme Court of Canada said a court must start with the characteristics of the rights at stake (in that decision, a claim for title) and then consider whether the proposed limit to the rights results in a meaningful diminution.

43 The Tsilhqot'in assert that their pleaded Aboriginal rights were established in *Tsilhqot'in* BCSC, and/or have been conceded by British Columbia in this action.

44 Taseko argues that as a matter of pleadings and proof, the Aboriginal rights have not been adequately particularized in the claim, are too broad, and the evidence led on this application does not adequately relate to the claim as pleaded.

45 While specificity and particularization of pleadings are necessary to avoid an unfocussed trial, as held in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 (S.C.C.) at paras. 40 — 44 [*Lax Kw'alaams* SCC], the Supreme Court of Canada has also recognized, in*Tsilhqot'in* SCC at paras. 20 — 23, that a technical approach to pleadings in Aboriginal land claims and rights cases should not be adopted so long as the pleadings provide "an outline of the material allegations and the relief sought". As Chief Justice McLachlin stated for the Court:

> [23] . . . cases such as this require an approach that results in decisions based on the best evidence that emerges, not what a lawyer may have envisaged when drafting the initial claim. What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society. A technical approach to pleadings would serve neither goal. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.

46 Taseko argues that the claims made in the notice of application and the evidence led in support are focussed on the "rights to gather and the rights to pursue ceremonial and spiritual activities", and "cultural enjoyment and value of the area" or "spiritual and healing value of the area", but these cultural and spiritual aspects are not part of the declared or conceded Aboriginal rights. Taseko argues that there is a disconnect between the finding made by Vickers J. in *Tsilhqot'in* BCSC, that the Tsilhqot'in have the right to hunt and trap for "spiritual, ceremonial and cultural uses", and the Tsilhqot'in's assertion on this application that

the rights have spiritual or cultural components. Taseko argues that there is a difference between the spirituality of the activity, which Taseko says is now asserted as a right but was not proven as a right, and the uses to which the products of a right can be put.

47 In the judicial review proceedings pertaining to the duty to consult, the Crown conceded that the Tsilhqot'in have "strong *prima facie* claims to fishing and gathering rights and to pursue ceremonial and cultural activities in the Area as a place of unique and special significance for the Tsilhqot'in cultural identity and heritage": *William* #4 at para. 5.

48 Taseko argues that these concessions, and the findings made in the judicial review proceedings, cannot be "repurposed" in this action, and that findings about the Aboriginal rights and the infringement of them must be made by the trial judge, relying on *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2005 BCCA 140 (B.C. C.A.), at paras. 25-26. I agree that the trial judge will be the one to determine whether the Tsilhqot'in meets their burden of proving infringement. Whether and how the trial judge makes use of concessions or findings made in previous actions or proceedings is not a matter for me to determine. However, on an application for an injunction, such concessions and judicial findings are relevant to assess the strength of the disconnect that Taseko asserts and whether there is a serious issue to be tried.

49 Taseko may pursue the distinction between cultural and spiritual aspects of the rights and cultural and spiritual uses of the products of the rights at trial, but for present purposes the distinction does not rise to the level of establishing a disconnect that precludes the Tsilhqot'in raising a serious issue to be tried on the manner in which they have framed their action and this application.

50 Given that hunting and trapping rights are proven as described, the concessions made by the Crown with regard to fishing rights and the concession made by the Crown of a strong *prima facie* right pertaining to gathering to pursue spiritual and ceremonial activities, I am satisfied there is a serious issue to be tried that the Tsilhqot'in's established and conceded Aboriginal rights are imbued with spiritual and cultural aspects that include the right to gather for those purposes.

51 Taseko also argues that the Tsilhqot'in's claim is a bare pleading regarding fishing within the NOW program area that is not supported by any evidence relating it to pre-contact activities, or the importance of those activities, and that the hunting and trapping rights are for a much broader area and so are not site-specific to Teztan Biny, Y'anah Biny or Nabas.

52 I do not accept this argument. The Tsilhqot'in's hunting and trapping rights in their traditional territory as a whole, including the NOW program area, were established in *Tsilhqot'in* BCSC, and British Columbia's concessions regarding fishing pertain to their traditional territory which includes the NOW program area. The Crown's concession regarding gathering rights and ceremonial, spiritual and cultural activities relate to the NOW program area as a place of unique and special significance for the Tsilhqot'in's cultural identity and heritage: *William* #2 at para. 73; and *William* #4 at paras. 5, 38. By definition, the findings and concessions of Aboriginal rights include the concept of pre-contact activity.

53 The site specific quality of these established and conceded Aboriginal rights, as described in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 138 and in *Tsilhqot'in* BCSC at paras. 1173 — 1175, is supported by the evidence of Tsilhqot'in members and elders on this application as described below.

54 I am satisfied there is a serious issue to be tried that the Tsilhqot'in have the established and conceded Aboriginal rights in the NOW program area.

Infringement

55 Once an Aboriginal right has been established, the court must ask whether there has been a meaningful diminution of that right. If so, an infringement of the right is made out. Meaningful diminution has been defined as including "anything but an insignificant interference with that right": *R. v. Morris*, 2006 SCC 59 (S.C.C.) at para. 53. As set out in *Tsilhqot'in* SCC at para. 122, citing *Sparrow* at 1112, the following three factors will aid in determining whether an infringement has occurred: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right.

56 The Tsilhqot'in plead that the NOW program area is of unique and special significance to the Tsilhqot'in, is critical for the Tsilhqot'in culture, identity, and the exercise of the Tsilhqot'in's Aboriginal rights will be significantly and irreparably impacted by the NOW program, even if all proposed mitigation measures are fully implemented. The impacts the Tsilhqot'in assert are: the Tsilhqot'in will be prohibited from accessing the NOW program area at certain times; noise; industrial activity; and workers which will cause wildlife and the Tsilhqot'in to avoid the program area; lasting adverse effects on the environment and biodiversity due to increased fragmentation of wildlife habitat; deforestation; and increased hunting by non-Tsilhqot'in at a time when regional moose populations have plummeted.

57 Taseko argues that the Tsilhqot'in's evidence does not meet the merits threshold for infringement that results in meaningful diminution because it is speculative and imprecise when compared to studies which show that exploratory drilling will not have material impact on wildlife and fish; because the NOW work program area is only .04% of the Tsilhqot'in's traditional territory and the Tsilhqot'in's established and conceded Aboriginal rights can be exercised elsewhere; and because the Tsilhqot'in's evidence emphasizes that the interference will be to alleged spiritual and cultural rights which does not amount to meaningful diminution of established or conceded Aboriginal rights.

The evidence on impact

58 The Tsilhqot'in rely on affidavit evidence of their members to establish the importance of certain areas to the practice of their established and conceded Aboriginal rights. This is a permissible means to adduce such evidence on an interlocutory injunction: see *Yahey v. British Columbia*, 2017 BCSC 899 (B.C. S.C.) at para. 88.

59 With regard to Taseko's argument that the evidence is only speculative, I observe that when proffering evidence of a rights infringement that will be occasioned by exploratory drilling work not yet undertaken, the evidence is bound to have a speculative quality. The trial judge will have to determine which evidence is reliable on this point. My task is to simply determine whether there is a serious issue to be tried.

60 The evidence of members of the Tsilhqot'in include the affidavit of Richard William who deposed that Tsilhqot'in members will avoid Teztan Biny and Nabas while the work is underway because people do not hunt or trap around this kind of noise and activity. He was taught by his elders to be quiet while hunting. He deposed that these areas are important places for the Tsilhqot'in to teach their youth how to live a Tsilhqot'in way of life through hunting, trapping, fishing, gathering plants and medicines, ceremonies, living on the land, speaking the language, and learning the stories.

61 Marilyn Baptise, an elected chief of the Xeni Gwet'in, one of the six bands that comprise the Tsilhqot'in nation, deposed that Tsilhqot'in members depend on the area for hunting and trapping, for ceremonial practices, for fishing and for gathering plants and medicines. She deposed that the area is special and unique because it is a "one stop shop" for their cultural practices: fishing, trapping, hunting, gathering, spiritual and ceremonial activities. She also deposed that the area is important for food security which requires continuity and a healthy, intact ecosystem. She deposed that many Tsilhqot'in elders eat food from this area and many Tsilhqot'in go to the area because it was one of the few areas that is still intact. She deposed that much of their traditional territory is not suitable for these activities because of development, in particular clear cut logging.

62 Norman William, a Xeni Gwet'in and Tsilhqot'in member deposed that he spent much of his childhood and youth in Nabas. As of the age of ten, he trapped during the winters at Y'anah Biny and at different locations near there including Nabas and Teztan Biny. He saw negative affects after the 2012 exploratory drilling program including less game, and more non-Tsilhqot'in hunters travelling on the new access trails on all-terrain vehicles. He deposed that if the NOW program goes ahead, the animals would run away and so the hunting would not be good. He deposed that gatherings would not occur during drilling work because they would not have peace and could not teach their youth while the work was going on with the workers there. He deposed that Nabas, an area in which he has harvested his entire life, would not recover during his lifetime.

63 Cecil Grinder deposed that he is a Tsilhqot'in member. He started hunting at Teztan Biny when he was seven or eight years old. He deposed that there are other spiritual places in the Tsilhqot'in territory, but the area around Teztan Biny is powerful because it is quiet and less disturbed than other places. He testified that they could not do healings or gatherings at Teztan Biny

while the exploratory work goes on. He testified that the previous exploratory work damaged the area around Teztan Biny, including Nabas. There are a lot more trails, and he sees a lot more people on them on all-terrain vehicles.

64 Photographs of the 2012 exploratory work are in evidence. Access trails are the width of a backhoe and amount to extensive incursions into the forestation and foliage. Roads are the widths of two vehicles. The photos depict the landscape covered with the debris of timber harvesting and the imprints of industrial heavy equipment. The 2012 exploratory drilling program was on a much smaller scale than the drilling to be undertaken pursuant to the NOW permit which permits twice as many new trails to be cut, twelve times as many drill sites, and six times as many test pits: 1852323 #4 at para. 19. Given the evidence pertaining to the 2012 drilling program, the concerns of the Tsilhqot'in cannot be dismissed as merely speculative.

65 With regard to Taseko's assertion that the Tsilhqot'in evidence cannot be reconciled with scientific studies and the latter should be preferred, I note that based on all of the evidence, Senior Mines Inspector Adams concluded that the drilling activity may cause wildlife to change use of the area, may cause changes in wildlife distribution, and may increase access for non-aboriginal hunters, trappers and poachers until the new trails that will be cut are re-claimed. He found the trails would also have a longer term impact on wildlife and habitat features. He also found that harvesting of 1048 square metres of timber will have affects for 15 to 20 years. However, he also found that negative impact on some species may have positive impacts on others. The Senior Mines Inspector described how the reclamation and mitigation possibilities could minimize or avoid some of the negative impact.

66 In March 2017, British Columbia provided the Tsilhqot'in with a Revised Impacts Assessment regarding the NOW program. As summarized by Mr. Justice Branch in *William* #2 at para. 33, this assessment described the following impacts:

> [33] . . .
>
> a) It "would be an extensive drilling program, several times the scale and magnitude of the [2012 exploratory program]";
>
> b) Teztan Biny and Nabas areas are "places of unique and special significance for the Tsilhqot'in cultural identity and heritage" and "highly valued by the Tsilhqot'in due to its remoteness, peacefulness and relatively pristine nature of these lands and waters . . . ";
>
> c) " . . . [T]he exploration work can be disruptive and may have significant emotional impacts that are difficult to quantify in an assessment" such as Tsilhqot'in members "avoiding use of this area for hunting and trapping activities during an active drilling program";
>
> d) "The moose population has plummeted in recent years making the hunting grounds around Teztan Biny and Nabas more significant and the potential displacement of moose due to the drilling activity more of an impact";
>
> e) "[Tsilhqot'in] community members exercising Aboriginal Interests in this area may be impacted by noise, industrial activity, and dust which will cause adverse impacts to the Tsilhqot'in community members who traditionally hunt in the area over the next 3 years, depending on how close they are to the drilling area";
>
> f) It will "significantly impact" Tsilhqot'in's use and enjoyment of this "culturally and spiritually significant area" and "may result in the [Tsilhqot'in] choosing to avoid the area entirely until the work is done, including for fishing activities" and "gathering activities";
>
> g) It is "likely to have serious impacts on social, cultural, spiritual and experiential aspects of [Tsilhqot'in] hunting and trapping activities" and "fishing activities";
>
> h) Activities, "including drilling, trenching, access trails and 50-man camp will have serious impacts on the [Tsilhqot'in's] ability to use and enjoy the area";

i) " . . . [T]he impact on [Tsilhqot'in's] strong claim of an Aboriginal right to cultural and spiritual practices in this area is assessed as serious".

67 The evidence supports a serious issue to be tried that the impact of the NOW program will be a meaningful diminution in relation to the established and conceded Aboriginal rights in the program area.

The .04% argument

68 Taseko argues that the NOW program area covers only .04% of the Tsilhqot'in's traditional area which is comprised of the area where they have proven title, the area in which they have proven rights, and a greater area they describe as their traditional territory. Taseko argues that the interference that will be caused by the NOW program does not reach the tipping point where the area of interference compared to the area available to the Aboriginal group is sufficient to be a meaningful diminution.

69 The Tsilhqot'in argue that a meaningful diminution can be established if there is interference with the Aboriginal group's preferred area to exercise its rights, regardless of the size of that area compared to the rights area as a whole. They have plead and led evidence that Teztan Biny and Nabas are preferred areas to hunt, trap and fish. They also point to evidence that the NOW program area, despite the 2012 exploratory drilling, is relatively undisturbed, compared to other parts of their proven rights areas where there have been significant forestry activities and forest fires. Certain parts of the greater areas are not accessible to the Tsilhqot'in, especially elders, because of the nature of the terrain.

70 Denying the holder of a right their preferred means of exercising it can constitute a meaningful diminution of the right: *Tsilhqot'in* SCC at paras. 104 — 105. Preferred means may include the preferred area in which to exercise the right in question: *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 (B.C. C.A.) at para. 187 per Madam Justice Huddart, concurring; *R. v. Little*, [1993] 3 C.N.L.R. 214 (B.C. S.C.), rev'd on other grounds (1995), 131 D.L.R. (4th) 220 (B.C. C.A.).

71 However, the case law also considers whether the Aboriginal right can be exercised elsewhere in considering whether the restriction truly is a meaningful diminution, or merely an insignificant interference. As observed by Justice Sharlow, in dissent but not on this point, in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2004 FCA 66 (F.C.A.), rev'd 2005 SCC 69 (S.C.C.) at para. 135, the overall size of the area in which the right in question can be exercised and the size of the specific area to be affected by the project in question are not particularly relevant considerations in and of themselves. The key consideration is whether the preferred means of exercising these rights is integrally linked to the place where the proposed project is to take place or where the project may create adverse impacts. A preferred area may be small but integral to the practice of the right in question. Correlatively, simply because an area is rendered inaccessible or less-than-optimal for the exercise of the right, does not inexorably lead to the conclusion that a *prima facie* infringement has occurred. Actual evidence of hardship, and the scope of the protected right, are integral to the analysis: *R. v. Lefthand*, 2007 ABCA 206 (Alta. C.A.) at paras. 177-180, leave to appeal to S.C.C. ref'd (2008), 385 N.R. 392 (note) (S.C.C.), [*R. v. Eagle Child*] (2008), 385 N.R. 393 (note) (S.C.C.), per Conrad J.A., concurring. This evidence may take into account the relative accessibility and convenience of the preferred area, compared to other areas where the right could be exercised, in addition to the comparative quality of exercising the right between the preferred and non-preferred areas: *R. v. Catarat*, 1999 SKQB 28 (Sask. Q.B.) at para. 70, aff'd 2001 SKCA 50 (Sask. C.A.), leave to appeal ref'd (2002), [2001] S.C.C.A. No. 382 (S.C.C.).

72 The Tsilhqot'in have led evidence on the factors relating to the NOW program area including that it includes preferred areas to fish, hunt and trap that are culturally and spiritually important areas; the area is relatively ecologically intact and undisturbed, and therefore quiet and peaceful, which improves the hunting, fishing and trapping compared to other traditional areas; large portions of the traditional areas are not suitable for hunting, fishing and trapping due to settlement, logging, and forest fire devastation; and the NOW program area is accessible due to forest service roads and other access means compared to other traditional areas which are hard to access due to the terrain, especially for elders.

73 In my view, infringement is a serious issue to be tried, notwithstanding that the NOW program is .04% of the Tsilhqot'in's traditional territory.

Cultural, spiritual and gathering aspects of the rights interference

74 Taseko argues that the evidence of the Tsilhqot'in is mostly about the interference with cultural, spiritual and gathering practices. Taseko argues that such interference is not a meaningful diminution of hunting, trapping and fishing Aboriginal rights because the cultural aspects are not necessary to these rights and without proof of necessity, there is no infringement.

75 In response, the Tsilhqot'in argue that cultural issues lie at the core of s. 35 rights because the purpose of s. 35 is "to provide cultural security and continuity for the particular aboriginal society": *R. v. Sappier*, 2006 SCC 54 (S.C.C.) at para. 33. In addition, they rely on evidence that, from the perspective of the Tsilhqot'in, there is no distinction between culture, spirituality, community and their hunting, trapping and fishing rights.

76 In my view, the issue of whether and how cultural, spiritual and gathering practices relate to the established and conceded Aboriginal Rights is an aspect of the serious issue to be tried.

Justification

77 If the Tsilhqot'in establish that their rights were infringed, the burden will shift to British Columbia to justify the infringement. To do so, British Columbia must demonstrate that: (1) it complied with its duty to consult the Tsilhqot'in; (2) its actions are backed by a compelling and substantial objective in the public interest; and (3) the infringement is consistent with the Crown's fiduciary obligations, including that the objective's benefit to the public is proportionate to any adverse effect on the Aboriginal interest. This framework "permits a principled reconciliation of Aboriginal rights with the interests of all Canadians": *Tsilhqot'in* SCC at para. 125.

78 In this case, the consultation petition established that the consultation process upheld the honour of the Crown. The remaining issues are whether there is a serious issue to be tried as to whether the NOW permit is backed by a compelling and substantial objective in the public interest and whether the infringement is consistent with the Crown's fiduciary obligations.

The NOW permit's objective

79 The Tsilhqot'in assert that the objective of the NOW permit when it was issued in 2017 was the "substantial start" objective: to gather data to obtain permits to start construction of the mine prior to the January 2020 expiry of the provincial environmental assessment certificate. They argue that since substantial start cannot be accomplished for reasons other than this injunction application, the objective can no longer be compelling and substantial if it ever was.

80 In *William* #4, the objectives of the NOW permit were characterized as follows:

> [48] . . . it is suggested that the consultation process was limited to [Taseko's] need to meet the January 2020 Substantial Start Deadline. While the record makes clear that was the primary purpose of the application, it is also clear from the material that there were other potential reasons to seek approval of the 2016 Drilling Program. While the federal government had rejected the New Prosperity Project, it had not closed the door on a mine being built, and indeed in its rejection, had invited further proposals. Further, [Taseko] in its letter of October 13, 2016, had disclosed to the Tsilhqot'in that the technical information obtained from the 2016 Drilling Program might be used in regards to a subsequent mine application.
>
> [49] . . . While the possible use of the 2016 Drilling Program in future EA proceedings was clearly collateral, it was a matter the Senior Inspector was entitled to take into account in balancing the respective positions of the parties.

81 I accept that the primary objective of the NOW permit was to meet the January 2020 substantial start deadline and that its collateral objective was to gather data for other potential mine applications. I also accept that a collateral objective can be compelling and substantial depending on the circumstances.

82 To constitute a compelling and substantial objective, "the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective." See: *Tsilhqot'in* SCC

at para. 82. The parties agree that the objective(s) of the NOW permit must be the objective(s) for which it was issued in 2017: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.) at 331 — 336. The parties disagree on whether evaluating whether the permit's objectives are compelling is based on the circumstances at the time the permit was issued, or at the time of this injunction application.

83 The Tsilhqot'in argue the latter, relying on *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.) at 932 — 933; and *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.) at 494 — 496.

84 Taseko acknowledges that in the *Charter* context, it is open to governments to justify legislation on the basis that its objective has become pressing and substantial, regardless of whether it was necessarily pressing and substantial at the time the legislation was introduced. However, Taseko argues this analysis should not be extended beyond the *Charter* context to the s. 35 rights infringement framework.

85 In my view, this issue is not one which needs to be, or should be, resolved on this interlocutory injunction. The only question that I must resolve is whether there is a serious issue to be tried as to the compelling nature of the permit's objectives.

86 The NOW permit was issued in 2017. The Tsilhqot'in assert the permit did not have a compelling objective when it was granted, and its objective is even less compelling now. The primary objective was to gather data to obtain further permits and approvals to start construction on the mine by January 2020, failing which the environmental assessment certificate issued by British Columbia would expire. The Tsilhqot'in argue that even in 2017, substantially starting construction by January 2020 was unlikely because Taseko had neither federal nor provincial approval for the New Prosperity Mine. They say it is impossible now because they still do not have approval from either level of government and it is likely the mine will have to be redesigned for federal approval.

87 With regard to the collateral objectives, the Tsilhqot'in argue that they relates to the bigger picture of operating the mine, or redesigning the mine in order to obtain federal approval for it. They say that these objectives are not compelling since Taseko does not have permission to operate the mine, and it is not known in what form the mine will operate since Taseko has not decided to redesign the mine.

88 Taseko argues that no matter how you look at the primary and collateral objectives, the NOW program is in furtherance of developing a mine which will contribute to the economic development of the British Columbia interior through the creation of jobs and economic growth. These are both objectives the Supreme Court of Canada has identified as being capable of justifying an incursion on Aboriginal rights: *Tsilhqot'in* SCC at para. 83, citing *Delgamuukw* at para. 165.

89 In my view, the uncertainty around this mine generally, both in 2017 and now, and the moot substantial start goal, are such that there is a serious issue to be tried on whether the primary objective of the NOW permit is compelling and substantial. An element of the issue is the time at which the compelling and substantial nature of it is assessed.

90 There is also a serious issue to be tried on the collateral objectives. They are *prima facie* compelling, but whether they are definitively compelling is affected by consideration of whether the collateral purposes are connected to the ultimate construction and operation of the mine. The evidence on this application does not include whether the data gathering is necessary or how it will be used with regard to the ultimate goal of constructing and operating a mine.

91 Given a serious issue to be tried on the compelling and substantial nature of the objectives, it is not necessary to assess whether there is a serious issue to be tried on whether the alleged infringement is consistent with the Crown's fiduciary obligations. For this reason, and because it is premature to address the issue of whether the infringement was consistent with the Crown's fiduciary obligations in the absence of any findings as to the precise nature of the infringement in need of justification (see *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 (B.C. S.C.) at para. 274), I will not do so.

Irreparable harm and balance of convenience

92 Irreparable harm and the multi-factor balance of convenience test are commonly considered together in one analysis: *Yahey* at paras. 34-36 citing *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.). The overall determination to be made is who will suffer greater harm from the granting or refusal of the injunction. The relevant factors to be considered are:

a) the adequacy of damages as a remedy for such harm;

b) the likelihood that awarded damages will be paid;

c) whether the harm from granting or refusing the injunction would be irreparable;

d) which of the parties has acted to affect the status quo;

e) the strength of the applicant's case;

f) the public interest; and

g) any other factors affecting the balance of justice and convenience.

Irreparable harm, adequacy of damages, and likelihood that damages will be paid

93 The Tsilhqot'in argue that interference with the ability to exercise Aboriginal rights in preferred places constitutes irreparable harm that damages cannot remedy as it impacts Aboriginal identity, spirituality, laws, traditions, culture, and rights connected to and arising from a relationship to the land. They rely on *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708 (Ont. S.C.J.) at para. 51 citing *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140 (Ont. S.C.J.) at paras. 79-80.

94 The Tsilhqot'in rely on the evidence from its members about the damage that will be done by the NOW program, as well as the acknowledgements made by British Columbia in the 2017 Revised Impacts Assessment summarized above, and the statements made by this court and the Court of Appeal on various injunction and stay applications.

95 Taseko argues that the NOW permit contains many conditions designed to avoid irreparable harm through, for example, reclamation, and because exploratory drilling work has already been done, the marginal harm does not rise to the level of being irreparable.

96 In *Taseko Mines*, Mr. Justice Grauer heard cross applications for injunctions between Taseko and the Tsilhqot'in with regard to a permit issued by British Columbia for exploratory work in the same area as the NOW program area. He considered similar arguments in assessing irreparable harm and the balance of convenience. In granting the Tsilhqot'in's injunction, Grauer J. stated as follows:

[64] Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:

> [61] . . . The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.

[65] It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.

> [66] The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. . . .
>
> [67] In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights . . . It also speaks to the *status quo*.

97 Subsequent presiders have adopted these remarks, and reached the same conclusion, including Mr. Justice Branch in the interlocutory injunction application in the consultation petition, *William* #1. Branch J. added that certain points made in *Taseko Mines* applied with "additional force" given that the NOW program is of much larger scope than the 2012 program enjoined by Grauer J.; it is the third proposed exploratory program, which increases the cumulative effects recognized by Grauer J.; and the evidence put forward by the Tsilhqot'in had strengthened since the *Taseko Mines* decision because the Tsilhqot'in were able to report interferences with their recognized or alleged aboriginal rights that occurred when the 2012 drilling program took place pursuant to an agreement between the parties.

98 These observations apply on this application especially given the evidence that 31 of the 47 hectares to be disturbed will be new disturbance, and the evidence that even though there has been some industrial activity in the area, it is relatively undisturbed compared to large portions of the Tsilhqot'in traditional territory.

99 When issuing the interlocutory injunction pending the appeal of the dismissal of the consultation petition, *Williams* #3, Madam Justice Dickson said:

> [38] Like Justice Branch, I agree with Justice Grauer's analysis in the 2011 injunction reasons. As he did, I note that the scope of the 2016 Program is much larger than its predecessor and that it is the third such program, which increases the cumulative negative effects. I also agree with Justice Branch that there is a material risk of serious, irreparable harm to the appellants if the 2016 Program proceeds which outweighs the risk of harm to Taseko, particularly as mitigated by the factors Justice Branch described in his reasons and that I have quoted.
>
> [39] Whether any further delay will actually cause Taseko's EA Certificate to lapse or precipitate the demise of the overall project is not established. However, it is more than likely that permanent alteration of the Area will jeopardize the appellants' ability to exercise their Aboriginal rights during the course of work and for years to follow. As Justice Grauer stated, if the injunction does not issue, the appellants will have lost their asserted right . . . On the other hand, granting the injunction will not deprive Taseko of the opportunity to obtain the geological and engineering information it may require, albeit with some delay.

100 As it is now apparent that the provincial environmental assessment certificate will expire in January 2020 before work on the mine is substantially started, this expiry is no longer relevant to the irreparable harm analysis because it cannot be avoided regardless of the outcome of this application. However, Taseko is understandably concerned about the expiry of the NOW permit. This permit, if renewed in July 2020, will permanently expire if the work is not completed by July 2022. Although I have found that it is possible to complete the trial in time for that work to complete if Taseko is successful at trial, it is not a sure thing and there is a material risk that the NOW permit will expire before the work is completed.

101 The expiry of the NOW permit constitutes harm to Taseko if the inability to undertake the NOW program adversely affects Taseko's goal of constructing and operating a mine. This requires a finding that the collateral objectives of the NOW permit is connected to mine construction and operation. However, the collateral purpose of gathering data is not well articulated in the sense of what is to be collected, how it will be used specifically and whether the full scope of the NOW program is necessary to undertake this data collection. There is a suggestion that the data could be used to redesign the mine, but the evidence is that Taseko has not decided to redesign the mine, the federal government has twice rejected Taseko's proposals and Taseko's current environmental assessment certificate is in respect of a mine design it is no longer pursuing. The temporary loss of an ability to collect undefined data for an undefined or only vaguely defined purpose does not amount to significant harm.

102 Taseko also argues that it will suffer reputational harm if it is not permitted to advance its work because preferred contractors ready to work now may not be available in the future. This type of harm is, in my view, far less serious than the harm the Tsilhqot'in have established.

103 It is clear that the harm asserted by the Tsilhqot'in is not compensable in damages. The courts in *Taseko Mines*, *William* #1, *William* #3, and *William* #5 have found such damages to be irreparable and I agree.

104 Taseko argues that it will suffer irreparable harm given that the Tsilhqot'in have not provided an undertaking as to damages and seek to waive this requirement.

105 Unless the court otherwise orders, a party seeking a pre-trial or interim injunction must provide an undertaking to abide by any order that the court may make as to damages: Rule 10-4(5), *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The Tsilhqot'in have not done so because they say they are not in a financial position to make such an undertaking. The Tsilhqot'in advanced the same or similar reasoning in both *Taseko Mines* and *William* #1.

106 In *Taseko Mines*, Grauer J. waived the requirement to provide an undertaking as to damages under Rule 10-4(5), because of his assessment of the balance of convenience, because of the relative strength of the claims, the relative harm to be suffered by the parties, the relative economic resources they had available to them, and because the Tsilhqot'in had given notice that no action should be taken while it considered its options.

107 Mr. Justice Branch, in *William* #1, similarly relieved the Tsilhqot'in of having to provide an undertaking as to damages, relying on Grauer J.'s reasoning in *Taseko Mines* and his view that equity favoured the result: see para. 19.

108 As summarized in *Wahgoshig First Nation* at para. 77, courts have waived the damages undertaking requirement for Aboriginal parties due to constrained finances or impecuniosity where there has been egregious behavior by the respondent, or if it would be in the public interest: see also *Platinex* at paras. 113-124.

109 Several factors favour waiving the undertaking as to damages requirement. The financial difficulty of such an undertaking are obvious, not just because of the potential magnitude based on the estimate of the value of the copper and gold deposits, but because the considerable uncertainly around Taseko ever operating a mine makes the estimate of the quantum of damages that such an undertaking would cover virtually impossible. Aspects of the Tsilhqot'in's claim appear to not only raise a serious issue to be tried but to be strong, while others are challenging. The public interest in reconciliation also supports the waiving of the damages undertaking. While other public interest issues, such as deterring self-help tactics such as the blockade and the economic benefits in the Williams Lake area and British Columbia generally, weigh against granting the waiver, the balance remains in favour of granting it. I conclude that the requirement to undertake to pay damages should be waived in these circumstances.

110 Having waived the undertaking as to damages, the financial loss or harm that may be suffered by Taseko is considered irreparable given the Tsilhqot'in's position that they do not have the financial resources to pay damages: *William* #5 at para. 49 citing *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205 (B.C. S.C.) at para. 34; *Red Chris Development Co. v. Quock*, 2014 BCSC 2399 (B.C. S.C.) at para. 66-69.

111 Given the nature of Tsilhqot'in's harm, and the waiver of the undertaking as to damages, there is a material risk of irreparable harm to both parties.

Status quo

112 In *Wale* at 346, the Court held that where there is a material risk of irreparable harm to both parties, the court should favour the status quo. Madam Justice McLachlin stated "where the only effect of an injunction is to postpone the date upon which a person is able to embark on a course of action not previously open to him, it is a counsel of prudence to preserve the status quo".

113 In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.), Lambert J.A. said as follows about assessing the status quo at 103:

> . . . The first aspect involves a consideration of which party took the step which first brought about the alteration in their relationship which led to an alleged actionable breach of the rights of one of the parties; the second aspect involves a consideration of which party took the action which is said to be an actionable breach of the rights of the other party; and the third aspect involves a consideration of the nature of the conduct which is said to be wrongful and which is being carried on at the time that the application for the interim injunction is brought. . . .

114 Taseko argues that the status quo is defined as of the time the claim is brought, citing *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 (B.C. S.C.) at para. 325. As Taseko has been authorized since July 2017 to carry out the NOW program, it is the Tsilhqot'in who seek to alter the status quo by enjoining Taseko's program-related activities.

115 The Tsilhqot'in submit that the injunction will maintain the status quo, which is the ongoing ability to exercise their Aboriginal rights in the relatively undisturbed NOW program area. The NOW program has not started, construction and operations of the mine have never started and may never start. Hence, they argue that Taseko will alter the status quo should it commence work on the NOW program.

116 In *Relentless Energy Corp. v. Davis*, 2004 BCSC 1492 (B.C. S.C.), the plaintiff sought an injunction restraining the defendants from obstructing, interrupting or interfering with their construction of a road on Crown land for which it had governmental permits to build. The defendants stated that the road stood to negatively affect land upon which Aboriginal rights had been claimed. Madam Justice Satanove dismissed the application for an injunction and held, at para. 25, that the status quo was the prevention of the road being built because " . . . the road has not yet been built. The defendants have been hunting and trapping in this area in the preceding years right up to the present. The status quo is preserved by denying the injunction."

117 In *Red Chris Development Co. v. Quock*, 2014 BCSC 2399 (S.C.C.) at para. 69, Mr. Justice Punnett found that the "presence, development and operation" of the plaintiff's mine was the status quo given that construction had already commenced. It was the defendant blockaders, asserting they were the rightful title-holders of the lands upon which the mine was being constructed, who were seeking to alter this status quo by preventing access to the mine.

118 *Red Chris* and *West Moberly* are different from this case because in both of those cases, construction or operations of the industrial undertaking had commenced. Even though Taseko is authorized to undertake the NOW program, the status quo is the NOW program area undisturbed by the NOW program. In similar circumstances, Grauer J. concluded in *Taseko Mines* that the disturbance to the land would change the status quo as opposed to the delay to lawfully permitted work. I conclude that the NOW program will change the status quo.

Strength of the Tsilhqot'in's case

119 I have found that the Tsilhqot'in have raised a serious issue to be tried on infringement and on defending against British Columbia's burden to prove justification. Where serious issue to be tried is the threshold merits test, it is important that the injunction chambers judge not comment more than necessary on the merits. On the strong arguable case standard the injunction chambers judge is required to considerably delve into the merits.

120 Taseko argues that the merits are important to the balance of convenience and because in its submission the Tsilhqot'in do not meet the alternate strong arguable case threshold, the merits weighs against granting an injunction.

121 While I have deliberately avoided saying more than necessary about the merits, on all the evidence and all of the arguments, the impression I formed was that parts of the Tsilhqot'in's case are strong, while other issues are challenging for all of the parties. An obvious example of a challenging issue is the assessment of whether the NOW program objective is compelling and in particular the sub-issue of the time at which the assessment of compelling and substantial takes place. If it takes place when the substantial start date primary objective is moot, the strength of the Tsilhqot'in's case improves versus assessing it when

the NOW permit was approved. The opposite is true for the positions of British Columbia and Taseko. In my view, the overall strength of the Tsilhqot'in's case is such that the merits do not shift the balance of convenience.

Public interest

122 Taseko also alleges that the Tsilhqot'in have unreasonably delayed in proceeding with this infringement action and the public benefit is harmed by such applications being brought after such delay. Taseko also argues that the Tsilhqot'in unreasonably delayed in bringing this injunction application and because the Tsilhqot'in established a blockade first, the Tsilhqot'in do not come to court with clean hands and the court should not grant the equitable relief sought.

123 With regard to delay in prosecuting the action, it was commenced at the same time as the consultation petition but not pursued for two years. The Tsilhqot'in explain that they held it in abeyance while they pursued the consultation petition because it is more expeditious and had it been successful, the infringement action would not be necessary. The resolution of the consultation issue advances the infringement action in any event as that issue need not be re-litigated.

124 With regard to commencing the injunction application, Taseko gave notice it intended to proceed with the work immediately after the Supreme Court of Canada denied leave on the consultation petition. A month passed before the Tsilhqot'in brought its injunction application. I do not consider a one month delay in bringing the injunction application to be unreasonable.

125 In my view, the Tsilhqot'in's approach has been reasonable and the public interest has not been detrimentally affected by the delay.

126 However, with regard to the blockade, I have no hesitation in saying the Tsilhqot'in ought not to have responded to Taseko's notice that it would start work on the NOW program with a blockade. I agree that the blockade as a self-help remedy is a public interest factor weighing against the Tsilhqot'in's injunction application both in terms of the public interest and as a matter of the Tsilhqot'in seeking equitable relief: see *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 392 (B.C. C.A.) at para. 40; *MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C. C.A.) at 586.

127 Taseko also points to significant evidence of the economic benefit of the NOW program in the Williams Lake area at a time when major employers are cutting back or closing down in the forest industry in particular. The evidence demonstrates that Taseko will use local contractors and workers where possible and the program will create a significant number of jobs and indirect economic activity. What jobs are not created locally will be created in British Columbia in any event.

128 On the other hand, actions regarding rights infringements are an important part of the reconciliation process and so of general public importance: *Lax Kw'alaams* SCC at para. 12; *Tsilhqot'in* SCC at para. 82, 118 and 119; *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) at para. 73; and *Taseko Mines* at para. 60.

Conclusion on irreparable harm and balance of convenience

129 Overall, the Tsilhqot'in stand to suffer greater irreparable harm if the injunction is not granted than Taseko will if it is. The status of Taseko's goal to operate a gold and copper mine is uncertain with many difficult hurdles to overcome. Taseko's harm is to lose the chance to proceed with the NOW program. However, the primary objective of this permit, to substantially start the overall mine project by January 2020 is no longer achievable and the harms suffered by the loss of the collateral objectives, gathering data for the purposes of further applications, permits, or mine redesign, is not well explained and is not as certain, as imminent or as tangible as that of the harm that the Tsilhqot'in will suffer.

130 Taseko's economic interests are important but the evidence that the NOW program will facilitate Taseko's plans to construct and operate a mine is not concrete or compelling. The NOW program will significantly disturb the NOW program area interfering with established, conceded, and asserted Aboriginal rights with the only tangible benefit being to provide jobs over a few months.

131 While there are important public interest issues on both sides, the imperative of reconciliation, an element of which is the ability to pursue infringement actions, is such that the balance of convenience is in the Tsilhqot'in's favour.

Conclusion

132 The Tsilhqot'in's application for an interlocutory injunction is granted on the following terms:

1) until the Tsilhqot'in's claim in this proceeding is heard and determined, or until further order, Taseko, its agents, and its employees are enjoined from undertaking the drilling program authorized under the notice of work permit granted on July 14, 2017 and any associated regulatory approvals;

2) pursuant to Rule 22-4(2) of the *Supreme Court Civil Rules*, the period prescribed by Rule 22-4(4)(a) is shortened from 28 days to 5 days;

3) pursuant to Rule 10-4(5) of the *Supreme Court Civil Rules*, the Tsilhqot'in are relieved of the undertaking to abide by any order that the court may make as to damages; and

4) any party may apply upon eight days' notice to vary or set aside the terms of the order in paragraph 1 in the event that circumstances change materially.

133 The Tsilhqot'in also sought an order that the trial be expedited. I did not receive submissions on what such an order would entail for the parties or for trial scheduling. If an expedited trial is warranted, that should be considered as part of case management and through discussions between the parties and the registry with the assistance of a judge at a case planning conference. At the conclusion of the injunction application hearings, I urged the parties to set a trial date so that in the event I granted the Tsilhqot'in's application, no time would be lost while these reasons were under reserve. The parties should schedule a case planning conference at the earliest possibility to address the timeline to trial. In the event that any of the parties seek the early appointment of a trial judge, they shall make the request in accordance with Practice Direction 4.

134 Taseko's application for an injunction prohibiting the Tsilhqot'in's blockade is moot and dismissed for that reason.

135 With regard to costs, Taseko argues that the Tsilhqot'in's actions in blockading are such that its application should be dismissed and costs awarded to Taseko in any event of the cause. The Tsilhqot'in seek costs of their application and solicitor-own client costs of Taseko's application. Although I have found the Tsilhqot'in's delay in bringing its injunction application to not be unreasonable from a delay perspective, I have also found that the Tsilhqot'in ought not to have responded to the Taseko's intention to proceed with the NOW program with a blockade. In my view, it is appropriate to address such behaviour through costs. In similar circumstances, Mr. Justice Grauer ordered that Taseko have the costs of its application even though it was not successful and ordered that the costs of the Tsilhqot'in on their injunction application be in the discretion of the trial judge: *Taseko Mines* at paras. 74 and 77. I order that Taseko have the costs of its application payable forthwith and that the Tsilhqot'in's costs of their application be in the discretion of the trial judge. The three days of oral submissions are allocated equally to each application.

Order accordingly.

2011 ONSC 7708
Ontario Superior Court of Justice

Wahgoshig First Nation v. Ontario

2011 ONSC 7708, 2012 CarswellOnt 489, [2012] 3 C.N.L.R. 317, [2012] O.J. No. 22, 108 O.R. (3d) 647, 213 A.C.W.S. (3d) 463, 64 C.E.L.R. (3d) 302

Wahgoshig First Nation (Plaintiff) and Her Majesty the Queen in Right of Ontario and Solid Gold Resources Corp. (Defendant)

Carole J. Brown J.

Heard: December 20, 2011
Judgment: January 3, 2012
Docket: CV-11-439248

Counsel: Kate Kempton, Michael McClurg, Jesse McCormick for Plaintiff
Dennis W. Brown, Q.C., Ria Tzimas, Tom Schreiter for Defendant, Her Majesty the Queen in Right of Ontario
Neal J. Smitheman, Tracy A. Pratt for Defendant, Solid Gold Resources Corp.

***Carole J. Brown J.*:**

1 The Plaintiff, Wahgoshig First Nation ("WFN" or "Wahgoshig") brings this motion for an interlocutory injunction restraining the defendant, Solid Gold Resources Corp. ("Solid Gold"), from engaging in all activities relating to mineral exploration in the area of Treaty 9 lands, and an order that Her Majesty the Queen in Right of Ontario ("Ontario" or "the Crown" or "the Province") provide an undertaking in damages to Solid Gold or, in the alternative, an order dispensing with the undertaking requirements of R.40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

2 Solid Gold argues that granting injunctive relief would jeopardize its financial well-being and essentially "shut down" its operations.

3 Ontario submits that the duty to consult is triggered, and that it delegated the operational aspects of the duty to Solid Gold, which has not fulfilled the duty. It seeks the Court's assistance in fashioning a consultation remedy that promotes reconciliation by fairly balancing the right of WFN to be properly consulted and the right of Solid Gold to carry out its mining activities. It proposes that the Court fashion a remedy that will require consultation between Solid Gold and WFN and will permit Solid Gold to carry on its test drilling on a staged and managed basis that is informed by the information and input provided by WFN.

The Parties

Wahgoshig First Nation

4 Wahgoshig is an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and has the capacity of a band within the meaning of the *Indian Act*, RSC 1985, c 1-5. Wahgoshig forms part of the Lake Abitibi people and is a beneficiary to Treaty 9. The people of Wahgoshig have lived on and relied upon the lands in and around Lake Abitibi since time immemorial. The area around Lake Abitibi is the birthplace of the Wahgoshig people and the lands are considered to be sacred by the people of Wahgoshig.

5 Wahgoshig holds, asserts, and exercises inherent, Aboriginal and/or treaty rights throughout its traditional territory including, among other things, hunting, fishing, trapping, berry picking, plant and wood harvesting, cultivation of medicinal plants, use of water, practicing of sacred traditional lifestyle and ceremonial activities, the use and preservation of sacred sites,

prayer areas, and burial grounds ("Traditional Practices"). Its reserve lands are situated within its traditional territory on the south shore of Lake Abitibi.

6 Many Wahgoshig families depend on the land for survival, supporting themselves by fishing, hunting, trapping and gathering on the land.

Solid Gold Resources Corp.

7 Solid Gold is a publicly traded junior mining exploration company headquartered in Ontario. Its Legacy Project mining claim covers 103 unpatented mining claims covering approximately 21,790 hectares which lies within Wahgoshig's traditional territory ("the Claims Block").

Her Majesty the Queen in Right of Ontario

8 The duty to consult and accommodate, which is at the heart of this injunction motion resides in the honour of the Crown. While the Crown may delegate operational aspects of the duty to third parties, such as Solid Gold, the Crown bears the ultimate legal responsibility to ensure the duty is fulfilled.

The Facts

9 The WFN seeks an injunction to prevent Solid Gold from conducting further exploration on Treaty 9 Crown lands on which Wahgoshig Community has exercised Aboriginal and treaty rights though its traditional practices without consultation and accommodation with the WFN.

10 Solid Gold staked its claims in the Claims Block from November 2007 through at least 2010. In July 2009, the Crown advised Solid Gold that Solid Gold should contact WFN to consult regarding its intended mineral exploration and offered to facilitate the process.

11 No consultation occurred before Solid Gold's drilling began in the Spring of 2011.

12 Drilling involves clearing 25 sq. metre "pads", clearing forest, bulldozing access routes to the drilling sites, and transportation and storage of fuels and equipment.

13 The Treaty 9 lands upon which the Claims Block sits were the subject of a preliminary survey done by the Ministry of Natural Resources in 1995 which determined that the Treaty 9 lands are an "area of cultural heritage potential". The study was stated to "serve as a preliminary planning tool to indicate the areas that require field assessment prior to land disturbance though timber harvesting or other development activities".

14 WFN first discovered drilling activity on Treaty 9 lands in the spring of 2011. The drilling crew would not divulge for whom they were working. After research and enquiry, WFN determined the identity of Solid Gold and attempted to contact it to consult. No meaningful consultation occurred. On November 8, 2011, the Crown advised Solid Gold in writing that consultation must occur, to no avail.

15 On November 9, 2011, WFN served a Notice of Claim on the defendant, Ontario, pursuant to s. 7 of the *Proceedings against the Crown Act*, R.S.O. 1990 c. P.27. Upon expiry of the 60 day notice period, WFN will serve its Statement of Claim on Solid Gold and Ontario.

16 Since that time the drilling activities have increased, with a second drill rig brought in.

The Issues

17 The issue to be determined by this Court is whether an injunction should be granted.

18 The basic tripartite test for granting injective relief is set forth in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (S.C.C.), as follows:

(1) There must be a serious issue to be tried;

(2) There must be irreparable harm;

(3) The balance of convenience must favour the applicant.

The Positions of the Parties

WFN

19 WFN submits that the Crown land in issue is the known traditional territory of the Lake Abitibi people, surrendered pursuant to Treaty 9. WFN submits that Solid Gold's exploration program has and will continue to cause adverse effects on Wahgoshig's Aboriginal and/or treaty rights, its values, cultures, cultural heritage and its relationship to the land, which is at the core of its identity as an Aboriginal people. Such rights include its known treaty rights to hunting, trapping and fishing, as well as its asserted rights to the protection of cultural heritage, sacred and burial sites. Unless Solid Gold is enjoined from continuing to drill and/or required to consult and accommodate, such sites including sacred sites could be damaged or destroyed.

20 WFN's original notice of motion sought to enjoin Solid Gold from mineral exploration activities unless it had WFN's prior consent, but WFN conceded in argument that this was not the law of Canada, and submitted that it seeks to enjoin Solid Gold for failure to consult and accommodate.

21 WFN submits that Solid Gold came into the Claims Block, located on Treaty 9 lands without any notification or attempt to consult and discuss with WFN, and willfully continued its operations despite knowledge that it was obligated to consult and accommodate.

Solid Gold

22 Solid Gold submits that it has no legal responsibility or duty to consult, and that if there is such a duty, it resides in the Crown.

23 It submits that the *Mining Act*, R.S.O. 1990, c. M.14 establishes a "free entry" system whereby all Crown lands, including those subject to Aboriginal land claims are open for prospecting and staking, without any consultation or permit required.

24 It further submits that the Treaty 9 lands in question were surrendered to the Crown and WFN has no veto right over their activity. The issue of a "veto" right or consent to enter upon Treaty lands is not in issue as clearly articulated by Ms. Kempton.

25 Further, Mr. Smitherman on behalf of Solid Gold, argues that any impact on Aboriginal rights is minimal and only a small portion of the lands is being drilled. He did, however, concede that any impact, damage or destruction has likely already occurred.

Ontario

26 The Province takes no position in this motion. It submits that the duty to consult has been triggered and that the Court's assistance is required to fashion a consultation remedy that promotes reconciliation by fairly balancing the right of WFN to be properly consulted and the right of Solid Gold to carry out early stage mineral exploration projects on its unpatented mining claims.

27 It submits that without the requisite dialogue and information exchange between WFN and Solid Gold, concerns over the potential impacts of the drilling program on harvesting activities, and on traditional and customary practices that embrace burial and sacred sites, are magnified significantly and a climate of mistrust intensifies.

28 The Province submits that the injunctive relief sought by WFN will have the effect of polarizing the parties and leading to a zero-sum outcome that is entirely contrary to the requirements of s.35 of the *Constitution Act, 1982*, and the expectations of the treaty relationship.

The Law and Analysis

Preliminary Jurisdictional Issue

29 Solid Gold argues that this Court does not have the jurisdiction to hear the motion for an interlocutory injunction, because the injunction is not based on any underlying litigation. This motion was brought prior to commencement of the action. WFN served its Notice pursuant to the *Proceedings Against the Crown Act* on November 9, 2011 and will serve the Statement of Claim pursuant to that *Ac*t, following the 60 day notice period.

30 As I remarked in the course of this hearing, the question of whether I should exercise my discretion to issue an injunction in this pending litigation is properly considered in my determination of the merits of the motion, which I do now.

31 WFN has explained that it has not served Solid Gold yet, because it is bringing an action against both Solid Gold and the Crown and it is required to wait 60 days after filing its notice of claim on the Crown under section 7 of the *Proceedings Against the Crown Act* before commencing its claim.

32 WFN's Notice of Motion summarizes its intended claim as against Solid Gold and the Crown as follows:

> (a) Under authority of the *Mining Act*, R.S.O. 1990, c. M. 14, Solid Gold has entered upon certain portions of the traditional territory of the Wahgoshig First Nation and commenced mineral exploration activities there.
>
> (b) Such mineral exploration activities have or will have potential adverse effects on the treaty or Aboriginal rights of WFN.
>
> (c) The treaty or Aboriginal rights of WFN are protected by Section 35 of the *Constitution Act, 1982* ("Section 35") and by the Honour of the Crown. This protection includes the constitutional right to be meaningfully consulted and adequately accommodated where Crown-authorized activities are contemplated that might have an adverse impact on WFN's treaty or Aboriginal rights.
>
> (d) Such consultation and accommodation have not occurred.
>
> (e) Until such occurs, the defendant Solid Gold has no legal authority to engage in its mineral exploration activities.

33 WFN has undertaken to issue the Statement of Claim at the expiry of the 60-day notice period.

34 Rule 40.01 provides that an order for injunctive relief under section 101 or 102 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 may be obtained on motion by a party to a pending or intended proceeding. While Mr. Smitherman argued for Solid Gold that this Court has no jurisdiction, in the circumstances of this case, to grant an injunction where there is no claim commenced, and where Solid Gold is not able to clearly understand the intended action against it, I am satisfied, considering the provisions of 40.01 and section 101 of the *Courts of Justice Act*, that this Court has jurisdiction.

The Tripartite Test for Injunctive Relief

1. Serious Question to be Tried

35 Ms. Kempton argues for WFN that there are serious issues to be tried regarding the WFN's Constitutional, treaty and asserted rights over its traditional territories, which justify the granting of an injunction in order to preserve such rights. She argues that the constitutionality of the *Mining Act* and its application are in issue.

36 She argues that the duty to consult and to accommodate the concerns of Aboriginal peoples has been recognized as a legal constitutional requirement which has, in this case, not been fulfilled by either Solid Gold or the Crown.

37 Mr. Smitherman argues that there is no serious issue to be tried, that the Treaty 9 lands were surrendered long ago, and that there are no asserted rights over those lands that would justify an injunction. He further argues that there is no duty to consult on the part of Solid Gold and that the duty resides in the Crown and is not delegable.

38 He argues for Solid Gold that the *Mining Act* clearly establishes a "free entry" mining system which entitles Solid Gold to proceed with their exploration. He relies on *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 91 O.R. (3d) 1, 2008 ONCA 534 (Ont. C.A.) in this regard. I note, however, that *Frontenac* was not a *Constitutional* challenge to the *Mining Act*.

39 Further, in *Frontenac* the Ontario Court of Appeal pointed to a potential conflict between the *Mining Act* and s. 35 of the *Constitution Act, 1982*, which led it to reduce the sentences of aboriginal individuals who were in contempt of court orders. This bolsters the *prima facie* merits of WFN's intended *Charter* challenge to that legislation. The Court held at para. 62:

> The intersection of these two background circumstances creates an obvious problem, indeed the problem that lies at the heart of this case. What Frontenac wants to do on Crown land - staking and exploration - is legal under the *Mining Act*. However, the appellants' response, although in contempt of two court orders, is grounded, at a minimum, in a respectable interpretation of s. 35 of the *Constitution Act, 1982* and several recent decisions of the Supreme Court of Canada.

40 In fact, since *Frontenac*, the Ontario government has amended the legislation effective October 28, 2009 to include the following purpose section:

> 2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment.

41 Moreover, Canadian jurisprudence has recognized that the duty to consult and accommodate is not constrained by legislation and that the duty "lies upstream" of any legislative or statutory regime: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.); *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (B.C. C.A.); *Ross River Dena Council v. Yukon*, 2011 YKSC 84 (Y.T. S.C.); *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697 (B.C. S.C.); *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763 (F.C.); *Yellowknives Dene First Nation v. Canada (Attorney General)*, 2010 FC 1139 (F.C.).

42 The threshold for the serious question test is low. It is a preliminary assessment of the merits. The claim must not be frivolous or vexatious. I am satisfied that the intended claim, as summarized in the Notice of Motion, raises serious issues that merit a fulsome hearing at trial.

43 I am further satisfied, based on the caselaw before me, that while the ultimate legal responsibility for fulfillment of the duty to consult resides in the Crown, its operational aspects can be, and often are, delegated to those third parties directly involved in the day-to-day resource development projects, such as Solid Gold.

2. Irreparable Harm

44 WFN submits that Solid Gold's mineral exploration activities threaten to cause, and may have already caused, irreparable harm to sites of cultural and spiritual significance to WFN. It submits that Solid Gold's activities threaten sacred sites including burial sites, and threaten areas of significant cultural importance to Wahgoshig. Mineral exploration drilling includes surface and subsurface activities and thus threatens such sites on the ground and historical archaeological sites on and below the ground. It further submits that it has lost its opportunity to consult with Solid Gold to determine what impact on its Aboriginal and treaty rights might be occasioned by Solid Gold's project and how such impact can be avoided or mitigated.

45 It submits that, given the lands at issue, which include its sacred and burial sites as well as the lands on which it depends for survival, there is significant likelihood of irreparable harm.

46 Solid Gold takes the position that there is no demonstrated irreparable harm. It argues that WFN cannot establish proof of irreparable harm, and that evidence of irreparable harm must be clear and not speculative. It argues that, in this case, WFN has not produced evidence of any sacred, burial or other culturally sensitive sites, nor evidence that the drill holes are even close to lands used to exercise WFN's treaty rights. It argues that the plaintiff cannot demonstrate that any harm occasioned by WFN cannot be compensated by damages.

47 I note that, in argument, Solid Gold conceded that if any sites are threatened, damage may already have occurred.

48 "Irreparable harm" refers to the nature of the harm suffered by the Applicant rather than its magnitude; it must be such that damages will not suffice.

49 Absolute certainty of irreparable harm is not always required. Indeed, Canadian courts have recognized that absolute certainty of irreparable harm may not be possible where the duty to consult and accommodate have not been met as there is often a lack of precise knowledge about the impact of a project on culture, rights, values and how these can be avoided or mitigated. As stated by the British Columbia Supreme Court in *Homalco Indian Band v. Canada (Minister of Agriculture, Food & Fisheries)*, 2004 BCSC 1764 (B.C. S.C. [In Chambers]), at para. 45 [*Homalco*]:

> I am satisfied that the test at this point of the consideration must be whether or not there is a likelihood or probability or reasonable possibility of harm. It need not be an absolute certainty.

50 In *MacMillan Bloedel Ltd. v. Mullin*, [1985] 2 C.N.L.R. 58 (B.C. C.A.) [*MacMillan Bloedel*], the British Columbia Court of Appeal held at paras. 54-55 and 73, adopting the words of Muirhead J. in *Foster v. Mountford & Rigby Ltd.* (1978) 14 A.L.R. 71 at 75:

> The Indians wish to retain their culture on Meares Island as well as in urban museums. ... These people have come to the law for relief and protection... [M]onetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure.

51 The Canadian Courts have been called upon many times to determine conflicts arising from the interaction between resource companies' development activities on Crown lands and the effects on Aboriginal and treaty rights. A significant body of jurisprudence has developed, which has recognized that negative effects on Aboriginal and treaty rights and restrictions on the ability to exercise such rights in preferred places constitutes irreparable harm. Such cases have considered effects of development on Aboriginal hunting, fishing, trapping, harvesting rights and on the less tangible rights and values of identity and cultural and spiritual relationships with the land. As recognized by Smith J. in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 272 D.L.R. (4th) 727, [2006] O.J. No. 3140 (Ont. S.C.J.) [*Platinex*], at paras. 79-80:

> Irreparable harm may be caused to KI ... because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss.
>
> It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.

52 Irreparable harm to Aboriginal peoples has further been judicially recognized when activities such as logging (*MacMillan Bloedel*; *Hunt v. Halcan Log Services Ltd.* [1986 CarswellBC 39 (B.C. S.C.)], 1986 CanLii 863; *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 306 (B.C. C.A. [In Chambers]) [*Lax Kw'Alaams*]), excavation (*Touchwood*

File Hills Qu'Appelle District Chiefs Council Inc. v. Davis, [1985] S.J. No. 514 (Sask. Q.B.)) and other development activities would interfere with or damage culturally significant sites and artifacts such as burial sites and sacred sites.

53 Moreover, Canadian jurisprudence has recognized that the lost opportunity to be meaningfully consulted and obtain accommodation for impacts on treaty and Aboriginal rights constitutes irreparable harm. In *Platinex*, it was held at paras. 79 and 89 that "For consultation to have any meaning, it must take place "before any activity begins and not afterwards or at a stage where it is rendered meaningless" and that harm from such a result cannot be compensated for by way of damages. See also: *Relentless Energy Corp. v. Davis* (2004), [2005] 1 C.N.L.R. 325 (B.C. S.C.) at paras. 16-17, 23; *Homalco*, paras. 62-65; *Ta'an Kwach'an Council v. Yukon*, [2008] 4 C.N.L.R. 222 (Y.T. S.C.); *Musqueam Indian Band v. Canada (Governor In Council)*, [2004] 4 F.C.R. 391, [2004] F.C.J. No. 702 (F.C.) at para. 52; *Première nation de Betsiamites c. Canada (Procureur général)*, [2005] J.Q. No. 8173 (C.S. Que.), reversed, (C.A. Que.).

54 The right to consultation and accommodation is now well established at law. It arises from s. 35 of the *Constitution Act*, 1982, and helps to ensure that the Aboriginal peoples are consulted with respect to development projects on lands over which they have Aboriginal and Treaty rights and that their concerns can be meaningfully addressed. The duty to consult arises when the Crown has knowledge of a potential Aboriginal right that may be affected: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.) [*Haida Nation*]; *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, [2010] 2 S.C.R. 650 (S.C.C.) [*Rio Tinto*]. Consultation after the fact does not satisfy the duty, it must occur prior to exploration activities taking place on a staked claim: *Ross River Dena Council v. Yukon*, 2011 YKSC 84 (Y.T. S.C.).

55 The duty to consult also applies to surrendered land. Justice Binnie observed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 (S.C.C.) that a "*this is surrendered land and we can do with it what we like"* approach is the "antithesis of reconciliation and mutual respect." Thus, if the Crown exercises its right to "take up" surrendered land under a treaty, it is still responsible, by virtue of the honour of the Crown, to meet its duty to consult.

56 Canadian jurisprudence has recognized that industry proponents such as Solid Gold may be liable for their failure to consult : *Platinex*; *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675, [2011] B.C.J. No. 2350 (B.C. S.C.) [*Taseko Mines*].

Failure of Solid Gold to Consult

57 Solid Gold staked its claims to the subject territory as early as November 2007 through at least 2010. The Crown advised Solid Gold in July 2009 that Solid Gold should contact WFN to consult regarding its intended mineral exploration and offered to facilitate the process. Solid Gold failed to engage in any consultation with WFN prior to commencing its exploratory drilling in or about March of 2011. Indeed, the evidence indicates that it chose to complete the IPO "before any contact with Aboriginals". Moreover, it chose to raise money through flow-through shares, which monies had to be expended before year-end 2011, despite its knowledge that the consultations with WFN were inadequate and drilling should be suspended until it occurred.

58 Not only did Solid Gold, as delegatee of the operational, on-the-ground aspects of the duty to consult regarding its mining exploration activities, fail to consult with WFN; the evidence indicates that it made a concerted, willful effort not to consult, at least until after its flow-through share monies for 2011 had been exhausted. There is no indication that it intended in good faith to consult regarding the Legacy Project or any future projects, although it appears from the evidence that there are plans for further exploration in and on the subject lands in 2012.

59 Based on the evidence before me, it further appears that Solid Gold has failed to meet industry standards for responsible exploration as set forth by the Prospectors and Developers Association of Canada with respect to First Nations engagement.

60 I am satisfied based on all of the evidence that, without meaningful consultation and accommodation regarding the exploratory mining operations of Solid Gold, involving *bona fide* dialogue and information sharing between WFN and Solid Gold, facilitated by the presence of the Crown, there is a significant possibility of harm to WFN's Aboriginal and Treaty rights. There has to date been no demonstrated respect for those recognized rights.

61 I am further satisfied that damages would and could not suffice as compensation, given the rights in issue.

3. Balance of Convenience

62 The balance of convenience test requires a determination of which party will suffer the greater harm from granting or refusal of injunctive relief. In constitutional cases, the public interest is a special factor to be considered.

63 WFN submits that the balance of convenience test in this case has, on one side, harms to Wahgoshig, including its constitutionally-protected treaty and Aboriginal rights of meaningful consultation and accommodation, its spiritual and cultural relationship with the land, its sacred and cultural sites and its cultural survival and identity. These harms cannot be compensated with damages. On the other side are potential economic harms to Solid Gold. It submits that the balance of convenience favours granting an injunction.

64 It submits that granting an injunction in this case is in the public interest, that reconciliation, which requires honour, respect and genuine efforts to address concerns and disputes, is at the core of the relationship between the Crown and First Nations and that, if the *Constitution* with its enshrined recognition of Aboriginal and treaty rights, is to be meaningful, an injunction should be granted.

65 It submits that Solid Gold's approach has been entirely inconsistent with the object of reconciliation and that once irreparable injuries occur, it will be too late to repair the damage not only to the WFN but also to the relationship between the WFN and the Crown.

66 WFN submits that if Solid Gold suffers harm as the result of an injunction it was the author of its own misfortune, as it knew from 2009 of its obligations to consult and failed to do so. Rather it raised monies using flow-through shares and proceeded with its project. Had Solid Gold engaged in consultation at the beginning, it would not be in this position today.

67 Solid Gold submits that if it is not permitted to proceed with its drilling, it will be placed in serious financial jeopardy which could put it out of business. It has raised its exploration funds through flow-through shares, which funds must be used by December 31, 2011, failing which significant penalties will be imposed.

68 It argues that its harm is real and substantial, while WFN's harm involves "speculative assertions of possible harms to vaguely defined interests".

69 The Crown submits that an injunction will cause greater tension and conflict and that a consultation remedy, which requires consultation while enabling Solid Gold to continue its activities, will serve to foster reconciliation through a constructive working relationship while protecting their respective rights.

70 I have taken into account the cases cited by both WFN and Solid Gold, including *Lax Kw'Alaams* and *Platinex*.

71 I am mindful of the importance of reconciliation and the derivative concepts of consultation and accommodation as they have developed in Canadian jurisprudence. I am further mindful of the Crown's position that an injunction would not foster relations, but would exacerbate tensions. While a facilitation of the duty to consult is preferable, it is not always possible.

72 I am also mindful of WFN's position that to refuse to enjoin Solid Gold from its drilling, in the circumstances of this case, will send a message that Aboriginal and treaty rights, including the rights to consultation and accommodation can be ignored by exploration companies, rendering the First Nations constitutionally — recognized rights meaningless. This would not be in the public interest. It is in the public interest to ensure that the *Constitution* is honoured and respected.

73 I find, based on the evidence, submissions and relevant jurisprudence, that the balance of convenience favours the granting of an injunction, with terms and conditions imposed.

Undertaking for Damages

74 WFN seeks an order requiring that the Crown provide an undertaking as to damages pursuant to R. 40.03 in the circumstances of this case. In the alternative, it seeks an order dispensing with the requirement for an undertaking. In submissions, WFN stated that in the further alternative, it would provide the normal undertaking.

75 The Crown acknowledges that it has a duty to consult that was not met; that it made attempts to urge Solid Gold to consult with WFN and that, in the circumstances of this case, it is not appropriate to impose the undertaking on it. The Crown submits that no Court order requiring a government to provide such an undertaking has ever been made by any court in Canada or England.

76 I have not been referred to any jurisprudence in which the Crown was required to provide an undertaking under Rule 40.03, in which a First Nation moved against a third party industry proponent.

77 There is judicial precedent for granting an injunction to an Aboriginal moving party while dispensing with the requirement of an undertaking to pay damages in the public interest. The determination of whether to waive the undertaking is part of the assessment of irreparable harm and the balance of convenience. Courts have waived the requirement in circumstances of financial challenge or impecuniousness of the first nation (*Platinex*, *Taseko Mines*, egregious behavior of the respondent (*Homalco*), or in the public interest. I find it appropriate in the circumstances of this case that the requirement of an undertaking under Rule 40.03 be waived.

Order

78 I order that:

(1) Solid Gold be enjoined from carrying on any further exploratory activity on the Claims Block for 120 days from the release of this decision;

(2) during the injunctive period, Solid Gold, WFN and the Province enter into a process of *bona fide*, meaningful consultation and accommodation regarding any future activity on the Claims Block;

(3) in the event that the consultation process need be facilitated by an independent third party, the costs of such are to be shared equally by Solid Gold and the Province;

(4) in the event that the consultation and accommodation process is not productive, WFN is entitled to seek an extension of the injunction;

(5) the requirement for an undertaking for damages is dispensed with.

Costs

79 I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Order accordingly.

2006 CarswellOnt 4758
Ontario Superior Court of Justice

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation

2006 CarswellOnt 4758, [2006] 4 C.N.L.R. 152, [2006] O.J. No. 3140, 150 A.C.W.S. (3d) 467, 272 D.L.R. (4th) 727

PLATINEX INC. (Plaintiff) and KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC, JANE DOE, JOHN DOE and PERSONS UNKNOWN (Defendants)

G.P. Smith J.

Heard: June 22-23, 2006
Judgment: July 28, 2006
Docket: Thunder Bay 06-0271

Counsel: Neal J. Smitheman, Tracy A. Pratt for Plaintiff
Kate Kempton, Bryce Edwards for Defendants
Frances Thatcher for Intervenor, Independent First Nation Alliance

***G.P. Smith J.*:**

1 This case highlights the clash of two very different perspectives and cultures in a struggle over one of Canada's last remaining frontiers. On the one hand, there is the desire for the economic development of the rich resources located on a vast tract of pristine land in a remote portion of Northwestern Ontario. Resisting this development is an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs. Each party seeks to protect these interests through an order for injunctive relief.

Overview

2 The Plaintiff, Platinex Inc., ("*Platinex*") is a junior exploration company that was incorporated pursuant to the laws of Ontario on August 12, 1998. It became a publicly traded company on the TSX Venture Exchange in November 2005.

3 Platinex is in the business of exploratory drilling and is not involved in the mining or development of property.

4 The Defendant, Kitchenuhmaykoosib Inninuwug, ("*KI*"), formerly known as Big Trout Lake First Nation, is an indigenous Ojibwa/Cree First Nation, and is a Band under the *Indian Act*, R.S.C, 1985, c. I-5. The Band occupies a reserve on Big Trout Lake that is approximately 377 miles north of Thunder Bay, Ontario. KI is signatory to the 1929 adhesion to Treaty 9, the James Bay Treaty.

5 Platinex holds as its main asset an unencumbered 100% interest in a contiguous group of 221 unpatented mining claims and an unencumbered 100% interest in 81 mining leases covering approximately 12,080 acres of the Nemeigusabins Lake Arm of Big Trout Lake.

6 Platinex acquired the 81 leases adjoining its claims on February 10, 2006. Seventy-one of the claims were due expire on July 4, 2006 unless Platinex conducted certain work on these claims or unless the Ontario Ministry of Northern Development and Mines (the "*MNDM*") provided an extension.

7 There have been a number of extensions granted to Platinex by the Ontario government since 1999. In February 1999, the MNDM granted an Exclusion of Time Order on all of the 221 Platinex claims, providing relief from the requirement to submit assessment work and allowing the claims to remain in good standing until July 17, 2000. On March 30, 2001 a second Exclusion of Time Order was granted by MNDM. On July 11, 2001, MNDM granted a third Exclusion of Time Order, which kept 63 of the claims in good standing until July 17, 2002. A fourth Exclusion of Time Order was granted on July 17, 2003.

8 Many of these approvals and extensions occurred after Ontario was put on notice of KI's pending Treaty Land Entitlement Claim ("*TLE*") and after the land claim was filed.

9 This case was argued on June 22 and 23, 2006 and it is assumed, for the purposes this judgment, that further extensions by the Ontario government have been granted to Platinex to extend their claims beyond July 4 th of this year.

10 The Big Trout Lake Property ("*the Property*"), which is the subject of this motion, is located in Northwestern Ontario approximately 230 kilometres north of Pickle Lake, Ontario and 580 kilometres north of the City of Thunder Bay. Accessible only by air in the summer and winter road in the winter, it is a vast tract of undeveloped boreal forest.

11 The Property covers 19 square kilometres on the Nemeigusabins Arm of the Big Trout Lake. It is not situated on the KI reserve, but on KI's traditional lands, which encompass approximately 23,000 square kilometres. The KI reserve is located across Big Trout Lake.

12 Over the past 7 years, Platinex has engaged in ongoing discussions with members of KI respecting Platinex's claims on the Property and its intended exploration and development of those claims. The drilling component of Platinex's two-phase exploration programme consists of 14 diamond drilling holes. Phase 1 includes a magnetometer survey and a 3 hole drilling programme. Phase 2 consists of 11 drill holes.

13 Various ministries have determined that the proposed work by Platinex will not impact negatively on the environment. As well, Platinex has agreed that the exact location of any drill holes will be sensitive and subject to cultural input by KI representatives.

14 The company intended to undertake its Phase 1 exploration drilling in the winter of 2005/2006; however, it abandoned the site in February 2006 after being confronted by representatives of KI who were protesting against any work being performed on the Property.

15 As early as 1999, Platinex knew that KI was intending to file a TLE Claim. Platinex was advised by KI in February 2001 that KI wanted a moratorium on all development until proper consultation had taken place.

16 Initially, KI was in favour of Platinex's plans but declared the February 2001 moratorium on further development while negotiations and consultation took place.

17 On February 7, 2001 Chief Donny Morris wrote to Simon Baker, one of the principals of Platinex, stating:

> This is to advise you that the Kichenuhmaykoosib Inninuwug are suspending all mineral activities in and around its traditional territories which they have occupied and used since time immemorial. This moratorium is effective as of today's date of February 07, 2001. The reasons for this moratorium are that the fact that Kichenuhmaykoosib Inninuwug has submitted a Treaty Land Entitlement claim to the Federal Government for consideration in July 2000 and that the area of land under which your company has been conducting mineral exploration activities is covered by the land claim.

18 Exhibit G to the affidavit of Chief Donny Morris is a copy of the Resource Development Protocol developed by KI. That protocol states that its purpose is "to describe the process for consultation with Kichenuhmaykoosib Inninuwug *prior to* and during development activities on KI lands." (highlighting is mine)

19 As indicated in its development protocol, KI is not opposed to development on its traditional lands, but wishes to be a full partner in any development and to be fully consulted at all times. Whether any proposal for development will be accepted depends on the merits of each proposal, and whether the development respects KI's special connection to the land and its duty, under its own law, to protect the land.

20 The KI Development Protocol sets out the following steps required for Platinex to reach an agreement with KI: (1) initial discussion with Chief and Council; (2) discussions with the community; (3) consultation with individuals affected by the development; (4) follow-up discussions with the community; (5) referendum; and (6) approval in writing.

21 Any decision to allow development on KI traditional lands is a community based decision and cannot be made solely by the Chief or Band Council.

22 Although Platinex had several meetings with several members of KI, including the Chief, the Band Council and certain individuals, the KI consultation protocol was not followed nor was any development agreement signed at any time. Chief Morris states at paragraph 32 of his affidavit that: "At several times in 2004 and 2005, I refused to sign a memorandum of understanding, agreement, or letter of support for Platinex's exploration activities, because the community process was not complete, and because the ongoing consensus was that exploratory drilling should not be permitted."

23 On August 30, 2005, KI wrote to Platinex stating that: "It was decided that effective immediately, August 30, 2005, all previous Agreements and Letters of Understanding between all affected parties...related to your proposed work around the above mentioned area, both verbal and written, will be null and void."

24 On October 28, 2005, Platinex made public its Form 2B Listing Application (the "Form 2B") as part of its listing on the TSX Venture Exchange. The purpose of the filing was to provide disclosure of the affairs of the company.

25 The form included the statement that "[t]he Band has verbally consented to low impact exploration" and made no mention of the letter it had received from KI on August 30.

26 On November 2, 2005, Chief Donny Morris wrote to Platinex stating that KI did not consent to any exploration, and attached a press release in which he is quoted as saying, "[w]e have said it before and we will say it again. No exploration means no exploration."

27 On November 17, 2005, Platinex issued its Financial Statements for the quarter that ended September 30, 2005. In the Management Discussion and Analysis section, under the heading "Indigenous Peoples Concerns", Platinex reported that the people of KI opposed further exploration, but "have indicated however that the Company may proceed without opposition provided that continued consultations are held during the work program and that local employment needs and care for the environment be considered."

28 In December 2005, Platinex concluded a series of private placements, resulting in large shareholdings of flow-through common shares by Frontier Alt Resource 2005 Flow-Through LP, MineralFields 2005 III Super Flow-Through LP, and Northern Precious Metals 2005 LP (collectively, the "December 2005 Investors"). These placements raised nearly one million dollars in "flow-through funds" for Platinex.

29 In January 2006, Platinex asked for another meeting. KI agreed to the meeting with the entire community to allow Platinex to voice its position and to allow Platinex to hear the concerns of KI band members. After receiving the agenda for the meeting, it became clear to Platinex that it would not be able to change KI's decision, and Platinex cancelled the meeting.

30 By letter dated February 8, 2006, KI's Chief, Deputy Chief and several members of the Band Council wrote to Platinex to prohibit Platinex from conducting any exploratory drilling on the Property and from transporting exploration equipment on the winter road.

31 On February 10, 2006, Chief Morris and Deputy Chief McKay sent the following notice to Platinex:

> Therefore as every member of this community and as Chief and Council we are committed to take **ALL** measures and means **TO STOP** you from entering anywhere in Kitchenuhmaykoosib Inninuwug Aaki or to conduct any activity therin whatsoever.

32 On or about February 16, 2006, KI became aware that Platinex had sent a drilling team to its camp on Nemeigusabins Lake and that drilling equipment was to be transported onto the property by winter road.

33 On February 19, Chief Donny Morris and Deputy Chief Jack McKay attended the Platinex camp to deliver a letter to the drilling crew. In the letter, KI demanded that Platinex cease all exploratory activities.

34 In response to a number of radio announcements made by Chief Morris and others, several members of KI traveled to Platinex's drilling camp to protest against further work being done. There is a significant difference in opinion as to what happened next.

35 Platinex and its representatives state that Chief Morris confronted them in a hostile and threatening fashion stating that the road was blockaded. Further, they state that the runway for the airstrip was purposely ploughed and that they were given the impression that the drilling team would have to leave within hours before the landing strip was completely ploughed under, thereby preventing anyone from leaving the area by plane.

36 Platinex maintains that it was clear to the members of the drilling crew that their safety was in jeopardy and that the only viable option was for them to leave as quickly as possible. On February 25 and 26, the entire drilling crew flew out of the area and abandoned the drilling site.

37 In contrast, at paragraph 56 of its Factum, KI describes the protest as follows:

> KI protested peacefully. There were 15 or 20 people there. The KI members were resolute that they would stop the drill from getting to the site. They intended to stand on the road, at a sharp corner, where the truck carrying the drill would be moving slowly, and refuse to let the truck pass. There was no intention to use tires or equipment to block the road, nor was there any contingency plan in case the truck did not stop.

38 KI's view of the confrontation was that it involved mostly children and elderly members of the community. At paragraph 64 of its Factum, KI states:

> KI ploughed unused portions of the lake only. The airstrip remained intact. The ploughing was an expressive act. This act did not imperil anyone's safety. The OPP were present throughout, and had specifically stated that they would investigate any damage to property and submit the report for prosecution. The OPP took no action whatsoever about the ploughing.

39 Members of the OPP were present throughout the confrontation; however, the OPP took the position that, without a court order or injunction, they would not remove any blockade or prevent the ploughing of the airstrip.

40 After leaving the site, Platinex states that its buildings were torn down and that its drilling equipment disappeared. KI states that it carefully decommissioned the camp and offered to return the equipment to Platinex, but that Platinex has never responded to this offer.

41 In March of this year, over 400 members of KI signed a petition strongly opposing further exploration by Platinex.

The E3 Prospectors Standards

42 The Prospectors and Developers of Canada's Best Practices Exploration Environmental Excellence Standards (the "*E3 Standards*") sets out a best practices guide for the the exploration industry.

43 The E3 Standards promote discussion and sensitivity to aboriginal concerns requiring companies to demonstrate "Recognition and respect for native rights". The standards state that First Nations "believe that they have had to (unnecessarily)

fight to retain rights that have long been theirs to enjoy. You should avoid actions or statements that are perceived as impinging on or threatening those rights, as you will find that they are particularly sensitive to this."

44 The E3 Standards also require that in all cases, before major physical work including drilling commences on land subject to an aboriginal claim, a memorandum of understanding must be signed between the exploration company and the aboriginal entity in question.

KI's Treaty Land Entitlement Claim and Treaty 9

45 The James Bay Treaty, also known as Treaty 9, was signed by KI on July 5, 1929. The Treaty covers most of northern Ontario north of the height of land to James and Hudson's Bays, to the boundary of Quebec to the east, and is bordered on the west by Manitoba.

46 The Treaty provides for the surrender of title to the Crown in return for certain reserve land. The size of the KI reserve was measured to be 85 square miles and was be based upon a formula of one square mile for a family of five or, for smaller families, 128 acres per person. KI asserts that the area of their reserve was improperly calculated and that it is entitled to approximately 200 additional square miles.

47 Treaty 9 provides in part, as follows:

> And whereas, the said commissioners have proceeded to negotiate a treaty with the Ojibeway, Cree and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon, and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for his Majesty the King and His successors for ever, all their rights titles and privileges whatsoever, to the lands included within the following limits, that is to say: That portion or tract of land lying and being in the province of Ontario, bounded on the south by the height of land and the northern boundaries of the territory ceded by the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by the Northwest Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less. And also, the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada.
>
> And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families...

48 As early as January 13, 1999, KI had indicated its intention to both Platinex and the Federal and Ontario Governments to proceed with its TLE Claim.

49 In May 2000, KI filed its claim, which has progressed through Ontario's historical review stage; it is expected that the legal review stage will be completed by April 2007.

50 The claim is not to any specific piece of land, but rather to an area of land to be agreed upon in consultation between KI and both the provincial and federal levels of government.

51 Although these additional lands have not yet been specifically demarcated, KI asserts that they would necessarily be within KI's traditional territory.

52 The proposed exploration activities by Platinex are within KI's traditional territory, and therefore within the scope of the land claim.

53 While Platinex asserts that KI has put its TLE Claim in issue in these proceedings to gain political and/or legal leverage in obtaining an injunction, KI argues that its land claim is not in issue, but asks for injunctive relief to protect the basis of this

claim, which will be decided at a later date. KI's concern is that, if exploration were allowed to proceed, it could have a negative impact on its claim in the event that either level of government removed the area of land being developed from consideration.

The Principles of Injunctive Relief

54 Rule 40 of the *Rules of Civil Procedure* provides:

> 40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.
>
> 40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).
>
> (2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party. R.R.O. 1990, Reg. 194, r. 40.02 (2).
>
> (3) An extension may be granted on a motion without notice for a further period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (3).
>
> (4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 40.02 (4).
>
> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

55 The principles for the grant of an interlocutory injunction are well established. An applicant must meet three tests:

> (i) the applicant must show that the claim presents a serious question to be tried as to the existence of the right alleged and a breach thereof, actual or reasonably apprehended;
>
> (ii) the applicant must establish that without an injunction, irreparable harm will occur; and
>
> (iii) the balance of convenience must favour the grant of the injunction. [1]

56 The nature of the remedy of injunctive relief is often not suited to situations involving Aboriginal issues, particularly in view of the Crown's obligation of consultation and the importance of the principle of reconciliation.

57 As noted by Allan Donovan and Mariana Storoni,

> When the Crown either consults and accommodates inadequately or fails to consult and accommodate at all before authorizing a third party to conduct land or resource-based activities that will adversely affect aboriginal rights and title, First Nations are left with few options to protect their interests. [2]

58 Similarly, in *Haida Nation v. British Columbia (Minister of Forests)*, [3] the Supreme Court stated:

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. ... Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead

> of being balanced appropriately against conflicting concerns.... Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise. [4]

59 As Professor Kent Roach notes, "Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation." [5] Roach goes on to discuss the use of interlocutory injunctions in the context of Aboriginal rights claims:

> Interlocutory injunctions have typically been sought to stop large development projects that threaten Aboriginal communities. They are designed to provide speedy but temporary relief before a full trial of legal and factual issues is available. Interlocutory relief is especially important given both the time and money it takes to get a full trial in Aboriginal rights litigation and the nature of Aboriginal rights in relation to land and resources. Aboriginal rights can often be quickly and irreparably damaged by development such as logging, mining and hydro-electric development. [6]

60 Professor Roach also asserts that the value of granting interlocutory injunctions is not merely in the temporary relief provided by that injunction, but also results from the fact that "interlocutory injunctions can encourage the parties to return to negotiations, restrain the use of power to frustrate the negotiation process and provide incentives for the parties to reach a settlement that respects Aboriginal rights." [7]

61 Sonia Lawrence and Patrick Macklem have more recently observed that, "despite a number of early high profile successes in obtaining interlocutory injunctions, lower courts have become increasingly reluctant to order this form of interim relief in cases involving an assertion of Aboriginal or treaty rights or an alleged failure of the Crown to fulfill its duty to consult." [8]

62 John J.L. Hunter outlines three general factors that may explain the courts' apparent reluctance to issue injunctions to prevent land and resource-based activities from proceeding in areas where aboriginal rights and/or title have been asserted:

- the realization that injunctions issued in aboriginal rights cases are likely to be in place for a very long time due to the lengthy trials required to resolve aboriginal claims on their merits;
- the increasing consideration of the public interest in assessing the balance of convenience; and
- the increasing understanding of the nature and scope of aboriginal rights. [9]

63 These factors encourage courts to find creative solutions to these problems, such as those employed by McLachlin C.J.S.C. in *Chingee v. British Columbia*. [10]

The Merits Test

64 The merits or threshold test requires a consideration of the merits of a case to ensure that it is serious and not frivolous. The threshold has been held to be a low one so that, unless the case is clearly frivolous and without merit, the court will proceed to the second and third principles.

65 Both parties are able to meet this test. Neither party has alleged that the claim of the other does not raise a serious issue to be tried.

66 More contentious are the second and third elements of the test, as well as the issue of whether this court should exercise its discretion to relieve KI from the requirement to provide an undertaking for damages.

Irreparable Harm

67 The second test for the granting of an injunction is the requirement of irreparable harm. If the harm that is anticipated by the nature of the activity complained of is capable of being compensated for by monetary damages, an injunction will generally be viewed as unnecessary.

The Position of Platinex

68 For the following reasons, I find that Platinex has not proven on a balance of probabilities that, without the grant of an injunction, it will suffer irreparable harm.

69 After being listed on the stock exchange and raising funds by the issue of flow through shares, Platinex was under pressure to commence drilling in order to satisfy the financial obligations it owed to its investors and the narrow time frames in which those obligations had to be met.

70 Since 2001, Platinex has received several letters and notices that KI was not consenting to further exploration. It is inconceivable that Platinex did not know that KI was strongly opposing any further drilling on the property.

71 Platinex decided to gamble that KI would not try to stop them and essentially decided to try to steamroll over the KI community by moving in a drilling crew without notice.

72 While I accept the evidence of Platinex that it will face insolvency if it cannot complete its drilling by the end of this year or shortly thereafter, Platinex is, to a large degree, the author of its own misfortune.

73 At the time that Platinex became listed on the stock exchange and issued a prospectus to raise funds, it knew that access to the land was a serious and real issue.

74 It was at Platinex's request that a meeting with the KI community was scheduled for January 2006. When it became obvious to Platinex that the meeting would not change the position of KI, Platinex cancelled the meeting at the last moment and then, without any notice to KI, proceeded to send in a drilling team when it knew or ought to have known that this action would be strongly opposed by KI.

75 These unilateral actions of Platinex were disrespectful of KI's interests and were interpreted as an insult by the KI community. They can only be viewed as being motivated by the severe financial pressure that it had created and placed itself under.

76 For Platinex to now say that it will suffer irreparable harm if an injunction is not granted flies in the face of the equitable basis upon which injunctive relief is premised. The circumstances giving rise to the economic harm that will be potentially suffered by Platinex relate directly to decisions and choices that it made after KI had said that further exploration would be resisted. In making those choices, including the choice to raise funds by means of flow-through shares, and in understating its problems of access to the property, it ignored or was willfully blind to the concerns and position of the KI community. The financial and time pressures Platinex is now experiencing are self-created and are based on an unreasonable belief that KI would not defend its interests when push came to shove. Platinex had the choice to continue with the process of consultation and negotiation with KI and the Crown and chose not to do so.

The Position of KI

77 For years KI had been declaring its interest in developing the resources that lay within the boundaries of its traditional land, subject to the right to be fully consulted and without prejudice to its TLE Claim.

78 KI's primary concern is that development and exploration on land that is potentially within the scope of its land claim may have a negative results and cause irreparable harm.

79 Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE Claim, but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss.

80 It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.

81 I find that KI has satisfied this aspect of the test for an injunction.

Irreparable Harm and The Failure to Consult

82 Although I have found that KI has satisfied that requirement that it must show irreparable harm in order to obtain injunctive relief, the Crown's duty to consult has been addressed in much detail by both parties and hence the following comments are required.

83 It is well established that the Crown must consult with a First Nation when it seeks to interfere with rights associated with Aboriginal interests. [11] Consultation requirements must be proportional to the nature and extent of the Aboriginal interest and the severity of the proposed Crown action. [12]

84 In *Haida Nation*, [13] McLachlin C.J., writing for the Court, held that "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown." [14]

85 Because the Crown's duty to consult engages the honour of the Crown and flows from its fiduciary relationship with First Nations peoples, McLachlin C.J. affirmed that it cannot be delegated to third parties. [15]

86 McLachlin C.J. went on to define the effect of this duty as follows:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty.... However, the duty's fulfillment requires that the Crown act with reference to the Aboriginal group's best interest in exercising discretionary control over the specific Aboriginal interest at stake. [16]

87 In applying the principle of the honour of the Crown to the facts in *Haida Nation*, McLachlin C.J. held that:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. ... *To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable*. [17]

88 McLachlin C.J. then went on to explain what triggers the Crown's duty to consult:

> The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that *the duty arises when the Crown has knowledge, real or constructive, of the potential existence* of the Aboriginal right or title and contemplates conduct that might adversely affect it. [18]

89 The objective of the consultation process is to foster negotiated settlements and avoid litigation. For this process to have any real meaning it must occur before any activity begins and not afterwards or at a stage where it is rendered meaningless.

90 In this regard, I endorse the comments of the trial judge and the B.C. Court of Appeal in *Halfway River First Nation v. British Columbia (Ministry of Forests)*. [19] The Crown must first provide the First Nation with notice of and full information on the proposed activity; it must fully inform itself of the practices and views of the First Nation; and it must undertake meaningful and reasonable consultation with the First Nation.

91 The duty to consult, however, goes beyond giving notice and gathering and sharing information. To be meaningful, the Crown must make good faith efforts to negotiate an agreement. The duty to negotiate does not mean a duty to agree, but rather requires the Crown to possess a *bona fide* commitment to the principle of reconciliation over litigation. The duty to negotiate does not give First Nations a veto; they must also make *bona fide* efforts to find a resolution to the issues at hand.

92 The Ontario government was not present during these proceedings, and the evidentiary record indicates that it has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex. Yet, at the same time, the Ontario government made several decisions about the environmental impact of Platinex's exploration programmes, the granting of mining leases and lease extensions, both before and after receiving notice of KI's TLE Claim.

93 In the several years that discussions between Platinex and KI have been ongoing, the Crown has been involved in perhaps three meetings. There is no evidence that the Crown has maintained a strong supervisory presence in the negotiations, despite Platinex having expressed its concerns to Ontario it on a number of occasions.

94 In 1990, in *R. v. Sparrow*, [20] the Supreme Court of Canada first stated that the Crown had a duty to consult Aboriginal people. For the past 16 years, courts in Ontario and throughout Canada, have applied and expanded upon this principle, sending consistent and clear messages to the federal and provincial Crowns that their position as fiduciaries compels them to address this duty in all Crown decisions that affect the rights of Aboriginal peoples.

95 Despite repeated judicial messages delivered over the course of 16 years, the evidentiary record available in this case sadly reveals that the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation.

96 One of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies, like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.

97 In circumstances where the Crown fails to consult, the question arises as to what remedy is available.

98 Sonia Lawrence and Patrick Macklem assert that, "the overall purpose of a remedy in the context of a breach of a duty to consult ought to be to facilitate outcomes determined by the parties themselves, without the need for subsequent litigation." [21] They discuss several remedial options available to aggrieved parties.

99 According to Lawrence and Macklem, if the Crown breaches the duty to consult, the ultimate remedy is a declaration that the action in question is unconstitutional. Alternatively, in cases involving compliance with statutory provisions, courts have ordered the Crown to take positive steps towards ensuring compliance.

100 The court can also order the Crown to engage in consultations. For example, in *Cheslatta Carrier Nation v. British Columbia (Project Assessment Director)*, [22] the court ordered the creation of a new consultative committee.

101 A breach of the duty to consult can also be grounds for granting an injunction against the Crown. As Lawrence and Macklem note, "with respect to cases involving a breach of the Crown's duty to consult, however, judicial reluctance to grant interlocutory injunctions creates a perverse incentive on the Crown to engage in ineffective consultations with a First Nation." [23]

Balance of Convenience

102 Once an applicant has convinced a court that irreparable harm will result unless an injunction is granted, it becomes necessary to consider the balance of convenience. This test is essentially the weighing of all of the circumstances of the particular case to determine the effect on the applicant if the injunction is not granted.

103 This is not a case where the ability or right of exploration and resource development companies to pursue their economic interests when they occur on traditional Aboriginal lands is in issue.

104 This case has two very unique aspects:

1. the fact that the exploration and development may take place on lands subject to an ongoing treaty land claim; and

2. the fact that the Crown (Ontario) and the company (Platinex) have chosen to ignore and/or terminate the consultative process and the concerns and ignore perspective of the First Nations Band in question.

105 I accept that, without an injunction, Platinex will face serious financial hardship including possibly bankruptcy or insolvency.

106 On the other hand, it is conceivable that, if exploration continues, KI's TLE Claim may be adversely affected and the development will negatively impact the social and spiritual heart of the community.

107 In considering the balance of convenience, a court may also assess the public interest in addition to the interests of the parties. [24]

108 In *Siska Indian Band* [25] and *Tlowitsis-Mumtagila*, [26] the public interest influenced the courts to deny the injunction because the work stoppages would have resulted in the loss of employment for a large number of citizens of the province. Clearly, this is not the situation in the case at bar.

109 In the instant case, considerations in assessing the public interest include the failure of the Crown to consult with KI and the integrity of the consultation process itself.

110 A decision to grant an injunction to Platinex essentially would make the duties owed by the Crown and third parties meaningless and send a message to other resource development companies that they can simply ignore Aboriginal concerns.

111 The grant of an injunction enhances the public interest by making the consultation process meaningful and by compelling the Crown to accept its fiduciary obligations and to act honourably.

112 Balancing the respective positions of the parties, I find that the balance of convenience favours the granting of an injunction to KI.

Undertaking to Pay Damages

113 Unless a Court exercises its discretion, an applicant must provide an undertaking to pay damages to allow the respondent to recover damages in the event that it was wrongfully enjoined.

114 Robert Sharpe summarizes the law pertaining to the requirement for a plaintiff to give an undertaking as follows:

> Thus there is no inflexible rule which inevitably requires that an undertaking be given or which states that the decision turns on the means of the plaintiff to provide a secure undertaking. However, an undertaking is the usual requirement and it would appear that the plaintiff's case will be very much weaker if he or she is of insufficient substance to ensure its worth. One commentator argues that, while an impecunious plaintiff should not be denied relief on account of inability to give a meaningful undertaking, the undertaking should be required as a reminder to the applicant that he might have to shoulder some of the defendant's losses, in however small a proportion. [27]

115 Similarly, in an article published in the Cambridge Law Journal, Professor Zuckerman examined the courts' use of its discretion to dispense with the undertaking in damages where the plaintiff is financially unable to make the undertaking. He argued that this fact is relevant, but rather than being considered on its own, it should make up one aspect of the balance of convenience test:

> When the impecuniosity of an applicant is considered in relation to the question of whether the injunction should be granted, the need to protect the respondent's rights play a significant part in the decision... The insufficiency of the plaintiff's resources to compensate the defendant is a factor that counts in the balance of convenience. Where the plaintiff's resources fall short of the defendant's potential loss, the defendant's interests are not ignored. Rather they give way to the plaintiff's greater claim to the court's protection. [28]

116 In *RJR-MacDonald*, the Supreme Court acknowledged that

> The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)). [29]

117 As Professor Kent Roach notes: "the decision that the harm of defendants will not be compensated is crucial because it forces the issue of whether to grant the interlocutory injunction on to where the balance of convenience lies." [30]

118 In its statement of claim, Platinex has claimed general damages in the amount of $10,000,000,000; special damages in the amount of $1,000,000; and punitive damages of $500,000.

119 There is no question that KI lacks the financial ability to undertake to pay damages of this magnitude should it not be successful when the case comes to trial.

120 The exercise of the Court's discretion to relieve against the requirement to provide an undertaking as to damages in Aboriginal cases is not uncommon, given that many First Nations are impoverished. [31]

121 No undertaking was required in *MacMillan Bloedel Ltd. v. Mullin*, [32] *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*, [33] *Hunt v. Halcan Log Services Ltd.*, [34] or in *Coalition To Save Northern Flood v. Norway House Council of the Band*. [35]

122 Unfortunately, this issue highlights the difficulty in meeting the strict requirements of injunctive relief in cases involving Aboriginal issues. Large wealthy corporations issuing law suits for many millions of dollars could disentitle First Nations from qualifying from the right to claim injunctive relief. This result cannot be deemed to be in accordance with the principles of equity.

123 To disentitle KI to a grant of an injunction in these circumstances cannot be fair or just.

124 Accordingly, this Court will exercise its discretion and waive the need for KI to provide an undertaking as to damages.

Does KI have Unclean Hands?

125 I do not accept the argument that KI acted improperly or illegally and, as a result, has unclean hands. KI has repeatedly requested that it be consulted. It was Platinex that decided to terminate the consultative process and send in its drilling crew.

126 It is understandable why the members of KI believed that they had no other viable option but to confront Platinex in order to stop the drilling. Platinex's decision to send a drilling crew into the site despite KI's position failed when KI decided to make a last ditch stand.

127 Platinex failed to respect KI's moratorium, ignored its letters and notices, cancelled a meeting with the community and decided it was going to drill despite being clearly told that KI was not agreeing to any further activity on the land. In the background, while all of this was going on, the federal and provincial Crowns were standing on the sidelines as passive observers.

128 Although no violence erupted when KI confronted Platinex's drilling crew, it is clear that the members of that crew had a reasonable apprehension for their safety if they stayed in the area and commenced their drilling operation.

129 There was however, no independent evidence provided to this court of wrongdoing or criminal behaviour by KI or members of the community, despite the fact that the OPP were present for the duration of the confrontation.

130 With respect to the alleged damage to Platinex's buildings and property, the evidence of Platinex and KI directly contradicts each other. KI asserts that Platinex's property has been safeguarded and is available to be released to it immediately.

131 If the evidence had established that KI was not making good faith efforts to consult and simply aborting the process of attempting to find a way to reconcile their differences with Platinex, the argument that they had unclean hands would have had much more weight.

Conclusion and Disposition

132 The duty of the Crown to consult should not be interpreted as a veto in favour of First Nations people.

133 The duty to consult is a reciprocal duty and the Crown as well as the Aboriginal party involved must approach this duty by showing ongoing good faith efforts to reach a consensus.

134 There have been many judicial pronouncements on the special nature of cases involving Aboriginal rights. There have been repeated calls for First Nations and the Crown to reach negotiated settlements and avoid lengthy and expensive litigation. Perhaps the most well-known comments were made by Lamer C.J.C. in *Delgamuukw* when he noted that "ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgment of this Court, that we will achieve...the basic purpose of s. 35(1) — the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." [36]

135 Litigation of cases where Aboriginal issues are involved, whether by means of judicial review or by way of injunctive relief, does not and will not promote reconciliation.

136 Reconciliation will only be achieved by communication and honest and open dialogue. The parties initially engaged in consultation with each other, but it did not continue. It must begin again. The parties must continue to seek their own resolution of their issues and concerns.

137 KI is claiming entitlement to an additional 200 square kilometers of reserve land. Platinex's mining leases cover an area of approximately 19 square kilometers or about 1/10 of the land claimed by KI. KI has expressed a desire to be a full partner in the development of the resources on its traditional land, but does not want to negatively affect its TLE Claim or lose control of how the development occurs. In view of these comments, the possibility still exists that the parties may be capable of reaching of a negotiated settlement.

138 Subject to the conditions listed below, an interim, interim order shall issue enjoining Platinex and its officers, directors, employees, agents and contractors from engaging in the two-phase exploration program as described in the affidavit of James Trusler and any other activities related thereto on the Big Trout Lake Property for a period of five months from today's date after which time the parties shall re-attend before me to discuss the continuation of this order and the issue of costs.

139 The grant of this injunction is conditional upon:

1. KI forthwith releasing to Platinex any property removed by it or its representatives from Platinex's drilling camp located on Big Trout Lake and this property being in reasonable condition failing which counsel may speak to me concerning the issue of damages;

2. KI immediately shall set up a consultation committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI's Treaty Land Entitlement Claim.

Application granted; cross-application dismissed.

Footnotes

1 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

2 Allan Donovan and Mariana Storoni, "The Protection of Aboriginal Rights and Title through Injunction and Judicial Review," October 2004, online: *http://www.aboriginal-law.com/articles/protection-of-rights.htm*.

3 [2004] 3 S.C.R. 511 (S.C.C.).

4 *Ibid*. at para. 14.

5 Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights," (1992) 21 Man. L.J. 498 at para. 2.

6 *Ibid*. at para. 8.

7 *Ibid*. at par. 5.

8 Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," (2000) 79 Can. Bar Rev. 253.

9 John J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (Paper presented to the Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000) at 11.

10 [1988] B.C.J. No. 2560 (B.C. S.C.).

11 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.); *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.); *Relentless Energy Corp. v. Davis*, 2004 BCSC 1492 (B.C. S.C.) (CanLII) 23; *Homalco Indian Band v. Canada (Minister of Agriculture, Food & Fisheries)* (2004), [2005] 2 C.N.L.R. 63 (B.C. S.C. [In Chambers])).

12 *Delgamuukw*, *ibid.*; *Haida Nation*, supra note 3.

13 *Haida Nation*, *ibid*.

14 *Ibid*. at para. 16.

15 *Ibid.*

16 *Ibid*. at paras. 17-18.

17 *Ibid*. at para. 27 [emphasis added].

18 *Ibid*. at para. 35 [emphasis added].

19 (1999), 64 B.C.L.R. (3d) 206 (B.C. C.A.).

20 *Sparrow*, *supra* note 11.

21 *Supra* note 8 at 274.

22 [1998] B.C.J. No. 178 (B.C. S.C.).

23 *Supra* note 8 at 275.

24 *Wiigyet v. Kispiox Forest District* (1990), 51 B.C.L.R. (2d) 73 (B.C. S.C.).

25 *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133 (B.C. S.C.).

26 *Tlowitsis-Mumtagila v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69 (B.C. C.A.).

27 Robert J. Sharpe, *Injunctions and Specific Performance* (Aurora, Ont.: Canada Law Book, 2006) at 2.500.

28 Zuckerman, "The Undertaking in Damages — Substantive and Procedural Dimensions" (1994) 53 Camb. L.J. 546 at 569.

29 *Supra* note 1 at para. 59.

30 *Supra* note 5 at para. 20.

31 *Snuneymuxw First Nation v. British Columbia* (2004), 26 B.C.L.R. (4th) 360 (B.C. S.C.).

32 [1985] 2 C.N.L.R. 58 (B.C. C.A.).

33 (1983), [1984] 4 C.N.L.R. 27 (Alta. Q.B.).

34 (1986), 34 D.L.R. (4th) 504 (B.C. S.C.) .

35 (1995), 106 Man. R. (2d) 28 (Man. Q.B.).

36 *Delgamuukw*, *supra* note 11 at para 1123-24.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Desautel,*
2019 BCCA 151

Date: 20190502
Docket: CA45055

Between:

Regina

Appellant

And

Richard Lee Desautel

Respondent

And

Okanagan Nation Alliance

Intervenor

Before: The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated December 28, 2017 (*R. v. Desautel*, 2017 BCSC 2389, Nelson Registry No. 23646).

Counsel for the Appellant:	G.R. Thompson H.E. Cochran
Counsel for the Respondent:	M.G. Underhill K.R. Phipps
Counsel for the Intervenor:	R. Kyle
Place and Date of Hearing:	Vancouver, British Columbia September 12, 2018
Place and Date of Judgment:	Vancouver, British Columbia May 2, 2019

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

Summary:

The Crown appeals the acquittal of Mr. Desautel for offences under the Wildlife Act. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes in Washington State and a citizen of the United States of America. He has never resided in British Columbia. He was charged after killing a cow elk in the Arrow Lakes area of British Columbia. At trial, he defended the charges by submitting that he was exercising his lawful Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1) of the Constitution Act, 1982. He tendered evidence that: (i) his Sinixt ancestors had occupied territory above and below the 49th parallel, including the area in which he was hunting; (ii) at the time of contact (1811) they had engaged in a seasonal round of hunting, fishing, and gathering throughout their territory; and (iii) the practice of hunting in the area where he had shot the elk had continued with the members of the Lakes Tribe who were a modern-day successor collective of the Sinixt peoples. The trial judge and summary conviction appeal judge agreed. The Crown submitted that Mr. Desautel could not hold a constitutionally protected Aboriginal right to hunt in Canada because he did not belong to a group that was an "Aboriginal peoples of Canada". Even if a non-resident or citizen of Canada could be considered an "Aboriginal peoples of Canada" for the purposes of s. 35, the Crown argued he did not meet the present community criterion of the Van der Peet test. The Crown also submitted the Court must consider the incidental mobility right related to Mr. Desautel's claim and argued that right was incompatible with Canadian sovereignty.

Held: Appeal dismissed. Mr. Desautel was not foreclosed from claiming an Aboriginal right to hunt in British Columbia even though he is not a citizen or resident of Canada. Applying the Van der Peet test, the concept of continuity described therein addresses the necessary connection between the historic collective and the modern-day community. Therefore, claimants who are resident or citizens of the United States can be "Aboriginal peoples of Canada" where they can establish the requirements set out in Van der Peet. Mr. Desautel did so as the trial judge found: (i) Mr. Desautel was a member of a modern-day community, the Lakes Tribe, who were descended from the Sinixt, (ii) and who had continued to the present day the practice of hunting in their traditional territory where Mr. Desautel had hunted the elk. Therefore, there had been no breach of the continuity requirement in Van der Peet. An incidental mobility right does not arise in the circumstances of this appeal.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Introduction

[1] Section 35 of the *Constitution Act, 1982* provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

[2] Aboriginal rights under s. 35(1) differ from individual rights under the *Charter of Rights and Freedoms* in that they are held only by Aboriginal peoples.

[3] The central issue in this appeal is the meaning of "the Aboriginal peoples of Canada" in s. 35(1). Does the phrase include only (i) Aboriginal peoples who are resident or citizens of Canada, or also (ii) Aboriginal peoples whose ancestors occupied territory that became Canada?

[4] This issue arose in the context of a regulatory charge against Richard Desautel for hunting without a licence in the Arrow Lakes area of British Columbia. Mr. Desautel is an Indigenous person and a citizen of the United States of America. He is a member of the Lakes Tribe of the Colville Confederated Tribes (the "CCT") and lives on the Colville Indian Reserve in Washington State. He has never been a resident of British Columbia or a citizen of Canada.

[5] On October 14, 2010, Mr. Desautel shot and killed a cow elk near Castlegar, British Columbia. He conducted the hunt on the instructions of the Fish and Wildlife Director of the CCT to secure ceremonial meat. He did not have a permit, licence or authorization from the Government of British Columbia for the hunt. He reported the kill to the local wildlife conservation officers whereupon he was charged with hunting without a licence and hunting big game while not being a resident of British Columbia, contrary to ss. 11(1) and 47(a) of the *Wildlife Act,* R.S.B.C. 1996, c. 488. Mr. Desautel disputed the charges.

The Trial Judgment

[6] At his trial before Judge Mrozinski of the Provincial Court, Mr. Desautel admitted the *actus reus* of the offence. In his defence, he maintained he was exercising his Aboriginal right to hunt for ceremonial purposes in the traditional territory of his Sinixt ancestors, pursuant to s. 35(1) of the *Constitution Act, 1982* (the "Constitution"). The burden of proof was on Mr. Desautel to establish the Aboriginal right claimed and a *prima facie* infringement of that right: *R. v. Sparrow,* [1990] 1 S.C.R. 1075.

[7] The Crown contended that Mr. Desautel could not have been exercising an Aboriginal right to hunt in that area because the Sinixt's rights did not survive the assertion of Canadian sovereignty. The Crown identified three exercises of Canadian sovereignty that it viewed as incompatible with the claimed Aboriginal right: (i) the establishment of the international boundary line between Canada and the USA in 1846; (ii) the 1896 legislative enactment of *An Act to Amend the Game Protection Act, 1895,* S.B.C. 1896, c. 22 [*Game Protection Act*], which made it unlawful for "Indians" not resident in this province to hunt game in British Columbia; and (iii) the coming into force of s. 35(1) of the Constitution.

[8] In the alternative, the Crown submitted the Lakes Tribe voluntarily drifted away from their traditional practice of hunting in B.C., and therefore, the modern group's claim lacked continuity with the pre-contact group's practices.

[9] The trial judge accepted Mr. Desautel's defence and acquitted him in comprehensive reasons for judgment indexed at 2017 BCPC 84. After reviewing the extensive expert evidence on the pre-contact history of the Sinixt people, the judge found that: (i) the historical records referred to the Sinixt interchangeably with "the Lakes or the Arrow Lakes people" (at para. 22), and there was "a clear and ancient link between the Sinixt and the Arrow Lakes region [of British Columbia]" (at para. 23); (ii) the Sinixt were a mobile people who, before and for some time after contact in 1811, engaged in a seasonal round of hunting, fishing and gathering in their traditional territory north and south of the 49th parallel, including the Arrow Lakes area (at para. 24); (iii) after the 1846 Oregon Boundary Treaty, the Sinixt spent longer periods of time south of the border but continued to assert their rights in the Canadian part of their traditional territory (at para. 38); (iv) by the end of the 19th century only a few members of the Lakes Tribe remained living in the Sinixt territory north of the 49th parallel, but they continued to come north to hunt in their traditional territory (at para. 43)*;* (v) by 1902, only 21 Sinixt remained living in their traditional territory in Canada, when the federal government set aside a reserve for what was called the "Arrow Lakes Band" (at para. 44); (vi) after 1916, almost no one lived on the reserve full time but still occupied it seasonally (at para. 48); (vii) the last living

member of the Arrow Lakes Band died in 1956, and the federal government declared the Band extinct (at para. 48); and (viii) after the 1930s, the Lakes people did not appear to travel or hunt in the northern part of their traditional territory (at para. 49).

[10] Despite the Lakes Tribe's departure from the northern part of their traditional territory, the trial judge found its members remained connected to that geographical area:

> [50] Whether or not the Sinixt, or Lakes Tribe as they are now known, utilized their traditional territory north of the 49th parallel after the 1930s, I am left with no doubt that the land was not forgotten, that the traditions were not forgotten and that the connection to the land is ever present in the minds of the members of the Lakes Tribe of the CCT.

[11] The judge then turned to the test in *R. v. Van der Peet,* [1996] 2 S.C.R. 507, to determine if Mr. Desautel was exercising an Aboriginal right to hunt when he shot the elk and whether that Aboriginal right had been unjustifiably infringed. She found that: (i) the historical evidence overwhelmingly supported a finding that the Lakes Tribe was a successor group to the Sinixt people that lived in British Columbia at the time of contact (at para. 68); (ii) the right being asserted was an Aboriginal right to hunt for food, social and ceremonial purposes in Sinixt traditional territory in Canada (at para. 77); (iii) hunting was a central and significant part of the Sinixt's distinctive culture pre-contact (at paras. 80, 84); (iv) the Sinixt's gradual shift to almost full-time residence in their southern traditional territory was not a voluntary move in the sense that they intended to abandon their claim to their traditional territory in the north (at paras. 85,110, 123); and (v) applying the concept of continuity from *Van der Peet*, the chain of continuity had not been broken (at paras. 88, 119, 128). On this point the judge elaborated:

> [128] … I am convinced on the evidence overall that historical forces led to the drift by the Sinixt to the southern portion of their territory. The Sinixt did not voluntarily and enthusiastically choose allotments and farming over their traditional life; it was a matter of making the best choice out of a number of bad choices. Nothing in the evidence supports a finding that in doing so the Sinixt gave up their claim to their traditional territory. The interval between 1930 and 2010 when hunting in British Columbia either ceased or was

> conducted under the radar, so to speak, does not serve, in my view, when the reasons of *Van der Peet* are taken into account, to sever the continuity between the hunting practices of the pre-contact group and the present day Lakes Tribe or make it any less integral to the Lakes culture.

[12] The judge did not decide the issue of whether other Sinixt regional groups occupied parts of British Columbia because she found it unnecessary to do so for the purposes of determining the regulatory charge against Mr. Desautel (at para. 68).

[13] The judge then addressed the Crown's submission that the Sinixt right to hunt in British Columbia did not survive the Crown's assertion of sovereignty in 1846, 1896 or 1982. The Crown relied on Justice Binnie's concurring reasons in *Mitchell v. M.N.R.,* 2001 SCC 33, which I shall discuss below, in support of its position. The judge noted that the majority reasons of Chief Justice McLachlin in *Mitchell* declined to address the sovereign incompatibility issue. The judge also observed that the Aboriginal right held by Mr. Desautel did not, on its face, include a claim to a right to enter British Columbia to exercise that right, and, in any event, as that issue was not raised by Mr. Desautel it was unnecessary to decide. The judge did, however, offer the following comment:

> [148] Without deciding the point, I am prepared to accept the 1846 Treaty had an impact on the Sinixt's prior practice of moving about their territory at will. The Treaty had the effect of imposing a boundary that the Sinixt had and have to acknowledge and live with. It does not follow that this assertion of sovereignty cannot co-exist with their right to hunt in their traditional territory north of the 49th parallel.

[14] The judge rejected the Crown's submission that the *Game Protection Act* constituted an exercise of Canadian sovereignty. She described the act "as an attempt by the provincial government of the day to specifically regulate Indians *qua* Indians to the exclusion of any other persons" and "clearly *ultra vires* the provincial legislature" (at para. 150). She added that, even if the act was valid provincial legislation, it did not amount to an act of sovereignty capable of extinguishing Aboriginal rights (at paras. 151–52).

[15] As to the Crown's submission that s. 35(1) was an act of sovereignty, which extinguished the Aboriginal right at issue, the judge held that s. 35(1) was not sufficiently plain and clear to extinguish any Aboriginal rights (at paras. 159–160). She underscored that s. 35(1) did not create Aboriginal rights but merely affirmed and protected them, citing *Calder v. Attorney General of British Columbia,* [1973] S.C.R. 313; *Van der Peet* at para. 28; and *Mitchell* at paras. 9–11.

[16] The Crown also raised several practical issues that might result if Mr. Desautel's defence was accepted, including the imposition on the Crown of the duty to consult and accommodate the claims of non-citizens. The judge found that the practical issues raised by the Crown could not foreclose the recognition of proven Aboriginal rights (at para. 166).

[17] Last, having found the impugned provisions of the *Wildlife Act* constituted *prima facie* infringement of Mr. Desautel's Aboriginal right, the judge applied the test for justification from *Sparrow,* as summarized in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para. 77: (i) did the government discharge its procedural duty to consult and accommodate; (ii) was the government acting in accordance with a valid legislative purpose; and (iii) were its actions consistent with the Crown's fiduciary obligation to Aboriginal peoples. Without deciding whether there was a valid legislative objective, the judge held the Crown did not meet the *Sparrow* test because it failed to make any allocation for the Lakes people's Aboriginal right to hunt in their traditional territory in Canada (at para. 184).

[18] In sum, the judge found the Lakes Tribe was a successor group to the Sinixt people living in British Columbia at the time of contact and was a modern day rights-bearing community capable of holding an Aboriginal right.

[19] The Crown appealed Mr. Desautel's acquittal to the Supreme Court of British Columbia submitting that the trial judge erred in finding Mr. Desautel was a member of a collective that is an "Aboriginal peoples of Canada".

The Summary Conviction Appeal Judgment

[20] Justice Sewell presided over the summary conviction appeal. He framed the issues on appeal as: (i) whether an Aboriginal group that does not reside in Canada is entitled to the constitutional protections provided by s. 35 of the Constitution; and (ii) whether the right asserted by Mr. Desautel is incompatible with Canadian sovereignty. His reasons for judgment are indexed at 2017 BCSC 2389.

[21] As a preliminary matter, Sewell J. clarified the trial judge's finding with respect to the nature of the modern collective. He concluded that, despite the judge's use of various terms to describe the pre-contact Aboriginal collective, when her reasons were read as a whole, it was clear the judge considered the Sinixt people to be the relevant collective. He added that the trial judge found the Lakes Tribe members were Sinixt people and were entitled to assert the Aboriginal rights held by the Sinixt at the time of contact in their traditional territory in British Columbia.

[22] Justice Sewell considered two possible interpretations of the words "Aboriginal peoples of Canada": Aboriginal peoples living in Canada and Aboriginal peoples who occupied what became Canada prior to contact. He identified two authorities that considered the application of s. 35 to non-resident Aboriginal peoples, *R. v. Campbell*, 2000 BCSC 956, and *Watt v. Liebelt*, [1999] 2 F.C. 455 (C.A.), but found that neither case definitively determined the issue.

[23] In *Campbell*, the trial judge found Aboriginal peoples who traditionally occupied territory on both sides of an international boundary could be an Aboriginal peoples of Canada and another jurisdiction. However, the summary conviction appeal judge, in *dicta*, appeared to reject this conclusion. In *Watt v. Liebelt*, Mr. Watt, an American Indigenous person and member of the CCT, was ordered removed from Canada. At his immigration hearing, Mr. Watt argued he could not be ordered to leave the country because he had an Aboriginal right to remain in Canada. The adjudicator held there was no jurisdiction to determine whether Mr. Watt was an Aboriginal person of Canada and ordered a departure notice. On appeal to the Federal Court of Appeal, Strayer J.A. found the adjudicator had the

necessary powers to decide the issue and sent the matter back for determination in accordance with his reasons. In his reasons, he found the sovereign nature of Canada was not a legal barrier *per se* to the Aboriginal right claimed by Mr. Watt.

[24] I agree with Sewell J. that neither *Campbell* nor *Watt* are determinative of the issue in this appeal although each provides informative comments in the passages relied upon by the respective parties.

[25] Interpreting s. 35 in light of the interests it was meant to protect, Sewell J. found the proper interpretation of Aboriginal peoples of Canada was Aboriginal peoples who had occupied what became Canada prior to contact. He emphasized that s. 35 did not create Aboriginal rights, rather "it is the pre-contact occupation of the land that gives rise to the rights protected by s. 35" (at paras. 25, 72). He added that this interpretation was consistent with the objective of reconciliation as established in the jurisprudence. Therefore, he found, non-resident members of the Sinixt collective were not precluded from being considered an Aboriginal people of Canada merely because they now live in the United States.

[26] Justice Sewell also rejected the Crown's submission that Mr. Desautel's Aboriginal right to hunt was incompatible with Canadian sovereignty because it necessarily included a right to cross the international border. The Crown relied principally on Binnie J.'s concurring reasons in *Mitchell* at paras. 76, 125–26, 148, and 163 to argue that the government's right to control its borders was fatal to Mr. Desautel's claimed Aboriginal right to hunt in Canada. However, Sewell J. found that: (i) the factual basis for Binnie J.'s conclusion was distinguishable from the facts of this case; (ii) both the majority and the concurring reasons in *Mitchell* recognized that sovereign incompatibility would only arise in rare cases and did not arise in the *Mitchell* case; and (iii) in any event, the evidentiary record was insufficient to permit that issue to be decided. Mr. Desautel had not been charged with coming into Canada unlawfully and there was no evidence that he had been denied entry. Citing Strayer J.A.'s comments in *Watt v. Liebelt* at para. 15, Sewell J. held the jurisprudence did not support the Crown's submission that the doctrine of sovereign

incompatibility erected a complete bar to the existence of the Aboriginal right identified by the trial judge.

[27] In the result, he dismissed the appeal except on the s. 24(1) issue, which is not material to this appeal.

Leave to Appeal and Intervenor Status

[28] On April 4, 2018, Mr. Justice Hunter, sitting in chambers, granted leave to appeal the following three questions of law alone:

> 1. Does the constitutional protection of Aboriginal rights contained in s. 35 of the *Constitution Act, 1982* extend to an Aboriginal group that does not reside in Canada, and whose member claiming to exercise an Aboriginal right is neither a resident nor citizen of Canada?
>
> 2. Is it a requirement of the test for proving an Aboriginal right protected by s. 35 of the *Constitution Act, 1982* that there be a present day community in the geographic area where the claimed right was exercised?
>
> 3. In order to determine whether an Aboriginal person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with Canadian sovereignty?

[29] On July 5, 2018, Mr. Justice Groberman, sitting in chambers, granted Okanagan Nation Alliance (“ONA”) leave to intervene in the appeal.

[30] The Attorney General of Canada, although served with a Notice of Constitutional Question, declined to appear or make any submissions.

On Appeal

Position of the Crown

[31] The Crown submits the summary conviction appeal judge erred in law in finding that Mr. Desautel holds a constitutionally protected Aboriginal right to hunt in British Columbia.

The approach to interpreting s. 35

[32] The Crown's position is that, properly interpreted, s. 35(1) does not apply to non-resident Aboriginal groups. It cautions that an expanded interpretation of s. 35(1) would "significantly extend the ambit of the Crown's duty to consult (and where appropriate, accommodate), to Aboriginal groups wholly resident in the US, in a manner which may be incompatible with US law."

[33] The Crown submits that *Van der Peet* is not the correct legal test for determining whether Mr. Desautel is a member of an "Aboriginal peoples of Canada" for the purposes of s. 35(1). Instead, the Crown argues, the Court must use general principles of constitutional interpretation to determine the "threshold issue" of who is entitled to s. 35 rights. The Crown says those general principles of constitutional interpretation include the modern approach to statutory interpretation and placing constitutional terminology in its "proper linguistic, philosophical and historical context", citing Ruth Sullivan, *Statutory Interpretation*, 3rd ed., (Toronto: Irwin Law, 2016); *Sparrow* at 1106; *R. v. Comeau,* 2018 SCC 15 at para. 52; and *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at para. 19. The Crown also emphasizes the primacy of the written text of the Constitution, citing *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217 at para. 53; *Caron v. Alberta,* 2015 SCC 56 at paras. 6, 35–38; and Sullivan at p. 193.

[34] The Crown contends the analysis must begin with the presumption that the Constitution is intended to apply only to persons in Canada and that nothing in s. 35 rebuts that presumption. The Crown says that while s. 35 contains no limiting language that might restrict its application only to those Aboriginal peoples residing in or citizens of Canada, more significantly it contains no language that expressly or impliedly rebuts the presumption that a constitution is intended to apply only to those in the territory of the enacting jurisdiction, citing Sullivan at p. 371; *R. v. Hape,* 2007 SCC 26 at para. 69; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,* 2004 SCC 45 at paras. 54–55, and

Peter Hogg, *Constitutional Law of Canada,* 5th ed., (Toronto: Thomson Reuters, 2016), vol, 1, & 28.10 m.

[35] The Crown adds that the "threshold issue" is identifying "who" are "Aboriginal peoples of Canada". This issue, it submits, is readily determined by a plain reading of the words "Aboriginal peoples of Canada" and the grammatical arrangement of the words in s. 35(1), which includes two possessives: "existing and treaty rights of [i.e., being held or belonging to] the Aboriginal peoples of [who must be of] Canada" (emphasis added). Extending the analysis to s. 35(2) of the Constitution, which provides that Aboriginal peoples of Canada includes "the Indian, Inuit and Métis peoples of Canada", it says, further supports a narrow interpretation of s. 35(1) to Aboriginal peoples resident in Canada. It contends that the Supreme Court of Canada jurisprudence suggests the purpose of s. 35 is limited to protecting Aboriginal groups resident within Canada because it typically refers to Aboriginal peoples in the same sentence as the word Canadian (i.e., "Aboriginal members of Canadian society"): *Van der Peet* at para. 19; *Beckman v. Little Salmon/Carmacks First Nation,* 2010 SCC 53 at para. 33.

[36] The Crown further submits that the lack of any reference to residency or citizenship in s. 35(1), is explained by the philosophical context of the provision, which distinguishes Aboriginal rights from *Charter* rights. Aboriginal rights are collective rights that are held only by Aboriginal peoples. *Charter* rights, in the liberal enlightenment view, are "general and universal" and held by "all people in society because each person is entitled to dignity and respect" (*Van der Peet* at para. 18). As the Court in *Van der Peet* stated:

> [19] Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. As Academic commentators have noted, aboriginal rights "inhere in the very meaning of aboriginality" …
>
> [20] The task of this Court is to define aboriginal rights in a manner which recognizes that aboriginal rights are rights but which does so without losing sight of the fact that they are rights held by aboriginal people because they

> are aboriginal. The Court must neither lose sight of the generalized constitutional status of what s. 35(1) protects, nor can it ignore the necessary specificity which comes from granting special constitutional protection to one part of Canadian society. The Court must define the scope of s. 35(1) in a way which captures both the aboriginal and the rights in aboriginal rights.
>
> [Emphasis added.]

[37] The Crown also contends that the historical context of Canada's evolution from colony to an independent state supports a narrow interpretation of s. 35(1) as reflected in the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,* (1980), Issue No. 3, November 12, 1980, pg. 3:84, Issue No. 4, November 13, 1980, pg. 4:13, Issue No. 12, November 25, 1980, pg. 12:60; and Issue No. 16, December 1, 1908, pp. 16:13, 16:24, 16:25 (the "*Minutes*"). The *Minutes*, the Crown says, reflect an implicit shared understanding among the committee participants, which included the government and Aboriginal representatives of the time, that s. 35 was intended to protect the Aboriginal rights of Aboriginal communities in Canada; they do not refer to the Aboriginal rights of foreign collectives, which the Crown submits would, in any event, be contrary to the presumption against the extraterritorial application of the Constitution. While the purpose of s. 35 is reconciliation, the Crown says, it is reconciliation only with Aboriginal peoples who are resident or citizens of Canada. It maintains that only Canadian Aboriginal peoples are cognizable rights-holding communities under Canadian law.

[38] Last, the Crown contends that the legislative context of s. 35, which includes s. 35.1 (a commitment to convene a constitutional conference that includes "Aboriginal peoples of Canada" before any amendment is made to the constitution) and the now-repealed ss. 37 and 37.1 (which provided for additional constitutional conferences in 1983 and 1987 that included "Aboriginal peoples of Canada") indicate an intention to include only Aboriginal peoples who are resident in or citizens of Canada as foreign Aboriginal groups cannot participate in discussions regarding amendments to our constitution.

[39] In sum, the Crown submits that the phrase “Aboriginal peoples of Canada” can only mean a contemporary rights-holding Aboriginal community of members who are resident in or citizens of Canada. If the Court accepts this submission, the Crown says it need not address the applicability of the *Van der Peet* test.

Application of the Van der Peet test

[40] In the alternative, if Mr. Desautel is a member of an “Aboriginal peoples of Canada”, the Crown submits that his defence still must fail absent a finding by the trial judge that Mr. Desautel is a member of a present day community in the geographic area where he exercised his claimed Aboriginal right to hunt. The Crown relies primarily on *R. v. Powley,* 2003 SCC 43, and *R. v. Bernard,* 2017 NBCA 48, to establish this additional geographic requirement to the *Van der Peet* test. The Crown argues that as a member of the Lakes Tribe, which is wholly located in Washington State, Mr. Desautel does not meet the present day community criterion.

Incidental mobility right

[41] The Crown further submits that in order to determine whether an Indigenous person who is not a citizen or resident of Canada has an Aboriginal right to hunt in British Columbia, the Court must consider any incidental right of access (i.e., mobility right). The Crown argues that Mr. Desautel’s claimed right necessarily implies a right to cross the international border, which is incompatible with Canadian sovereignty. In support of this submission, the Crown relies on *Mitchell,* where Chief Justice McLachlin, for the majority, described the doctrine of sovereign incompatibility as follows:

> [10] Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown’s assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada. [Footnotes omitted.]

Position of the Respondent

[42] Mr. Desautel views the threshold issue as the identity of the collective. He submits that the trial judge, as summarized by the summary conviction appeal judge, found that the traditional territory of the Sinixt people, who were the relevant collective, included lands in the south that became the United States and lands in the north that became Canada, and that the Lakes Tribe was part of the collective that resided in the United States. He submits that based on these findings, it is not open to the Crown to argue that the contemporary rights-holding collective is limited to the Lakes Tribe or that the modern-day collective is wholly located in the United States.

[43] In the alternative, Mr. Desautel submits that the existing *Van der Peet* test determines who is an "Aboriginal peoples of Canada" for the purposes of s. 35, and *Van der Peet* requires a claimant to establish both a past and present connection between the Aboriginal people and the site-specific practices on the land that is now Canada.

Application of the Van der Peet test

[44] Mr. Desautel rejects the Crown's submission that *Van der Peet* requires a modern-day collective in the same geographical place as the historic collective. He submits there is no principled reason to add such a requirement to the *Van der Peet* test. He does not dispute the proposition that a modern-day collective must exist; rather, he disputes the Crown's submission that the modern-day collective must be located in the same geographic area as the pre-contact collective.

Incidental mobility right

[45] Mr. Desautel further submits that it is unnecessary to consider if his claimed Aboriginal right necessarily includes an incidental mobility right because the Sinixt right to hunt in the Arrow Lakes region did not require an incidental right to cross a border that did not exist. He further contends that, in most cases where an incidental right has arisen, it is because the exercise of that incidental right constitutes the

actus reus of the regulatory offence, that is the state action in issue limited the exercise of the incidental right: see *R. v. Cote,* [1996] 3 S.C.R. 139; *R. v. Sundown,* [1991] 1 S.C.R. 393; and *R. v. Simon,* [1985] 2 S.C.R. 387. Those are not the circumstances in this case. In any event, the issue of an incidental right did not arise in his case.

[46] Mr. Desautel submits the trial judge and summary conviction appeal judge were correct in adopting the analytical framework from *Van der Peet* to determine whether his claimed right to hunt is entitled to constitutional protection under s. 35.

Position of Intervenor

[47] The ONA was granted intervenor status in the appeal. The ONA's principal submission is that the Court should not identify or define the entire collective representing the Sinixt in these proceedings. They submit the contemporary rights-holding entity is larger than the Lakes Tribe and includes other rights-holdings groups in British Columbia who have yet to be expressly identified.

[48] The ONA further submits that the *Van der Peet* test does not require a claimant to prove there is a modern-day community in the geographic area where the Aboriginal right was exercised. The approach to s. 35(1), it submits, should focus on the historic connection to the site-specific area, which is consistent with the Aboriginal perspective.

The Trial Judge's Findings of Fact

[49] The trial judge's central finding of fact, as summarized by Sewell J., was that the Sinixt people were the relevant Aboriginal collective and the Lakes Tribe, of which Mr. Desautel is a member, represents a part of the Sinixt people that now live in Washington State. Both the trial judge and the summary conviction appeal judge were careful not to exclude any potential claim by Sinixt peoples resident in Canada. The trial judge acknowledged that the Lakes Tribe was probably not the exclusive rights-holding modern collective of the Sinixt, and that other successor groups north of the border, particularly in the Arrow Lakes region, also had potential Aboriginal

rights claims that stem from their Sinixt ancestry (at paras. 4, 55). However, as the proceedings in this case involved only a regulatory charge under the *Wildlife Act* against Mr. Desautel, the evidentiary record was limited to Mr. Desautel's claim as a member of the Lakes Tribe.

[50] Other significant findings of fact by the trial judge include that: (i) the practice of hunting in what is now B.C. was a central and significant part of the Sinixt's distinctive culture pre-contact; (ii) despite being physically absent from their traditional territory in B.C. after 1930, the chain of continuity of practice and community was not broken; and (iii) the Lakes Tribe continued hunting in a manner similar to the traditions of the Sinixt in the pre-contact era.

Analysis

General Principles Applicable to Section 35(1)

[51] The meaning and scope of s. 35(1) "is derived from the general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself": *Sparrow* at 1106. *Sparrow* also requires that s. 35(1) be construed in a purposive way and that the words in s. 35(1) be afforded a generous, liberal interpretation.

[52] *Van der Peet* expanded on the purposive approach to be taken in determining the scope of s. 35(1) given the fiduciary relationship between the Crown and Aboriginal peoples. In *Van der Peet,* the Court instructed courts to take into account the perspective of the Aboriginal peoples claiming the right and stated that any doubt or ambiguity as to what falls within the scope of s. 35 must be resolved in favour of the Aboriginal peoples (at paras. 25, 49). The Court explained:

> [30] … the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.

[31] More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and culture, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

…

[36] … It is … the reconciliation of pre-existing aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation of aboriginal rights in s. 35(1) is directed.

…

[49] In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. … Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but must also be aware that aboriginal rights exist within the general legal system of Canada. …The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

…

[60] The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between the aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of the Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

…

[63] … in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to present day. …The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim …but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition has continuity with the practices, customs and traditions of pre-

> contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).
>
> [64] The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in *Sparrow, supra,* at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time". The concept of continuity is, in other words, the means by which a "frozen rights" approach to s. 35(1) will be avoided. …
>
> [65] …the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact.
>
> …
>
> [69] … aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.
>
> [Emphasis added.]

[53] The importance of reconciling the prior occupation of Canadian territory by Aboriginal peoples with the assertion of Crown sovereignty is echoed in several subsequent decisions. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 at para. 1, the Court confirmed that "[t]he fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions". See also *Lax Kw'alaams Indian Band v. Canada (Attorney General),* 2011 SCC 56 at para. 12. More recently, in *Mikisew Cree First Nation v. Canada (Governor General in Council),* 2018 SCC 40, Karakatsanis J. identified reconciliation as a first principle of Aboriginal law and said "reconciliation and not rigid formalism should drive the development of Aboriginal law" (at paras. 22, 44).

Purposive Analysis of Section 35(1)

Does s. 35(1) apply to Aboriginal peoples who are not resident in or citizens of Canada?

Does s. 35(1) require that there be a present day community in the geographic area where the claimed right was exercised?

[54] As both questions are interrelated, I propose to address them together.

[55] The starting point in determining the meaning of "Aboriginal peoples of Canada" in s. 35(1) necessarily begins with *Sparrow. Sparrow*, as formalized in *Van der Peet*, requires a purposive analysis focused on reconciling the pre-existence of Aboriginal societies with the sovereignty of the Crown (at 1106). These foundational decisions root the concept of Aboriginal rights in the historical presence of Indigenous societies in North America (*Van der Peet* at paras. 32, 62). This is why courts must look to the practices, customs and traditions of the historic collective when defining Aboriginal rights (*Van der Peet* at para. 61).

[56] In this case, the relevant historic collective is the Sinixt. The trial judge found "clear and cogent proof" that hunting near Castlegar, the area where Mr. Desautel shot the elk, was a central and significant part of the Sinixt's distinctive culture pre-contact and remained an integral part of the Lakes Tribe's culture in the present day (at paras. 84, 119). She also found the Lakes Tribe "certainly qualify as a successor group to the Sinixt people living in British Columbia at the time of contact" (at para. 68). Whether a member of the Lakes Tribe, a modern collective descended from the Sinixt, can exercise Aboriginal hunting rights in the Sinixt traditional territory in British Columbia depends on the right claimant's ability to establish continuity according to *Van der Peet*. Even though the Lakes Tribe did not hunt in British Columbia after 1930, the trial judge considered all of the evidence, including the perspective of the Lakes Tribe, and found the chain of continuity had not been broken. This finding is entitled to deference on appeal.

[57] In my view, the *Van der Peet* test addresses the necessary connection between the modern and historic collective through the concept of continuity. The

formalistic interpretation of the words “Aboriginal peoples of Canada” proposed by the Crown fails to take into account the Aboriginal perspective and therefore cannot be relied upon to foreclose a modern-day claimant from the opportunity of establishing an Aboriginal right pursuant to *Van der Peet.* Simply put, if the *Van der Peet* requirements are met, the modern Indigenous community will be an “Aboriginal peoples of Canada”.

[58] I also reject the Crown’s submissions on the proper application of *Van der Peet.* The Crown contends that *Powley* requires an Aboriginal rights claimant to be a member of a contemporary community in the geographic area where the right was exercised. This submission assumes that the Sinixt peoples are restricted to the Lakes Tribe, which the trial judge declined to determine within the limited scope of a trial on a regulatory charge under the *Wildlife Act.* In any event, *Powley* does not in my view import a requirement that the modern collective must reside in the same geographic area as the historic collective.

[59] In *Powley,* the Court held the Métis claimants had an Aboriginal right to hunt for food under s. 35(1). The Court found that Métis communities evolved post-contact but prior to the entrenchment of European control. To accommodate the unique history of the Métis, the Court shifted the focus of the time period analysis in *Van der Peet* from pre-contact to pre-control. The Court also emphasized the importance of the claimant’s membership in a contemporary rights-bearing community; it did not impose a requirement that the modern community must occupy the same territory as the pre-contact community.

[60] The Crown also relies on *Bernard*. However, that case is distinguishable. In *Bernard*, a Mi’kmaq member of the Sipekne’katik First Nation in New Brunswick was charged with contravening the *Fish and Wildlife Act*, S.N.B. 1980, c F-14.1, for hunting deer near the mouth of the St. John River. In response, Mr. Bernard claimed he had an Aboriginal right to hunt at that location. The Court dismissed the claim. The evidence in *Bernard* was that the Mi’kmaq communities in that region historically organized themselves into separate bands each with their own traditional hunting

territory. The trial judge found there was a Mi'kmaq community that hunted at the mouth of the St. John River pre-contact. However, the evidence also suggested that that specific community had left the area 250–300 years earlier. The trial judge found Mr. Bernard had failed to establish that he was a member of a modern collective descended from the original rights-bearing Mi'kmaq community that hunted at the mouth of the St. John River. Unlike *Bernard*, Mr. Desautel has established a connection to the historic community that hunted in the traditional territory where the claimed Aboriginal right was exercised.

[61] The *Van der Peet* test has never included a requirement that the modern collective must occupy the same territory the historic collective occupied pre-contact, although the Supreme Court of Canada has modified the test in a few limited circumstances. *Powle*y modified elements of the pre-contact test to account for the "distinctive history and post-contact ethnogenesis" of the Métis (at para. 14). *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, adapted the *Van der Peet* test to better reflect the context surrounding Aboriginal title claims (at paras. 141–142). No decision has been brought to our attention that has recognized such a requirement. I would therefore reframe the Crown's "threshold issue" as whether the *Van der Peet* test should be modified where the Aboriginal right claimant is not a resident or citizen of Canada.

[62] Imposing a requirement that Indigenous peoples may only hold Aboriginal rights in Canada if they occupy the same geographical area in which their ancestors exercised those rights, ignores the Aboriginal perspective, the realities of colonization and does little towards achieving the ultimate goal of reconciliation. In this case, such a requirement would extinguish Mr. Desautel's right to hunt in the traditional territory of his ancestors even though the rights of his community in that geographical area were never voluntarily surrendered, abandoned or extinguished. I would not modify the *Van der Peet* test to add a geographic requirement that would prevent members of Indigenous communities, who may have been displaced, from the opportunity of establishing their Aboriginal rights in areas their ancestors had occupied pre-contact.

[63] The presumption against extraterritorial application of legislation does not apply in these circumstances as Mr. Desautel is exercising his Aboriginal right in Canada. Similarly, the Crown's submission that the Lakes Tribe are a domestic dependent nation in the United States and therefore giving their members rights in Canada, which could extend to the duty to consult and where appropriate to accommodate, might contravene American law, is not a relevant consideration. The issues raised by the Crown regarding the Lakes Tribe's legal status in the United States, or the extent of any potential duty to consult and accommodate, cannot be a matter of functionality. Aboriginal rights are inherent rights that existed at the time of contact. What flows from those rights continues to evolve. However, these are ancillary questions that in my view are not material to the central issue: whether members of a present-day collective situated in Washington State, are entitled to exercise the inherent rights of their Sinixt ancestors, if those rights have been continuously exercised to the present day in the geographic area of the claimed right in Canada.

[64] Nor, in my view, are the Crown's submissions on the legislative context and legislative history helpful. The former would be subject to a justification analysis, which has yet to be undertaken, and the *Minutes*, which are non-specific in their application, do not inform the constitutional interpretation of s. 35(1). Similarly, s. 35.1 is not in my view helpful in deciding the intention of the drafters of s. 35 (1). While s. 35.1 requires "representatives of the aboriginal peoples of Canada to participate in discussions" on a proposed constitutional amendment, the manner and scope of those "discussions" remain undefined.

[65] I would therefore answer the first question in the affirmative and the second question in the negative.

Is it necessary to consider the incidental mobility right of the individual and the compatibility of that right with Canadian sovereignty?

[66] The Crown submits that to find Mr. Desautel has an Aboriginal right to hunt in Sinixt traditional territory in Canada, the Court must also consider his incidental

mobility right (e.g., a right to enter B.C.) and the compatibility of that right with Canadian sovereignty. I do not agree that this issue must be addressed in this appeal or that an incidental right to cross the international border would necessarily follow.

[67] First, this issue was not addressed by the trial judge because the lawfulness of Mr. Desautel's entry into Canada was never disputed, and she found a mobility right did not necessarily arise in the circumstances of the case. Therefore, the evidentiary record necessary to assess the nature and extent of Mr. Desautel's right to cross the border does not exist.

[68] Second, in the cases previously noted (at para. 45) where the issue of an incidental right has arisen, the exercise of the incidental right constituted the *actus reus* of the regulatory offence, that is the state action in issue limited the exercise of the incidental right. It was in that narrow context that incidental rights have been considered. In this case, the state action in question infringes Mr. Desautel's right to hunt, not his right to cross the Canada-US border.

[69] Third, I would recall the Chief Justice's comments in *Mitchell* where, writing for the majority, she declined to address the incidental mobility right because it was unnecessary to the determination of the appeal. However, she offered the following comments:

> [63] This Court has not expressly invoked the doctrine of "sovereign incompatibility" in defining the rights protected under s. 35(1). In the *Van der Peet* trilogy, this Court identified the aboriginal rights protected under s. 35(1) as those practices, customs and traditions integral to the distinctive cultures of aboriginal societies: *Van der Peet, supra,* at para. 46. Subsequent cases affirmed this approach to identifying aboriginal rights falling within the ageis of s. 35(1) (*Pamajewon, supra* at paras. 23-25; *Adams, supra,* at para. 33; *Cote, supra,* at para. 54; see also: *Woodward, supra,* at p. 75) and have affirmed the doctrines of extinguishment, infringement and justification as the appropriate framework for resolving conflicts between aboriginal rights and competing claims, including claims based on Crown sovereignty.

[70] Without deciding the issue, it seems to me that the doctrines of extinguishment, infringement and justification provide a helpful analytical framework

in which to determine the scope of an incidental right of access to the geographical area where an Aboriginal right is to be exercised, and the extent to which that incidental right of access might be curtailed by Canadian laws of general application, including entry into Canada and reasonable conservation measures.

[71] I would therefore answer the third question in the negative in the circumstances of this case.

Summary

[72] Section 35 is directed towards the reconciliation of pre-existing Indigenous societies with the assertion of Crown sovereignty. This requires recognizing Indigenous perspectives on pre-contact and present-day practices, customs and traditions in conjunction with the Crown's interests in meeting the needs of the modern-day Canadian society.

[73] A practice, custom, or tradition that is central and significant to the distinctive culture of an Indigenous society pre-contact and has not been voluntarily surrendered, abandoned, or extinguished, may be exercised by Indigenous members of modern collectives if they can establish that: (i) the modern collective is descended from the historic collective that exercised the practice, custom or tradition in that territory; and (ii) there has been continuity between the practice of the modern collective with the practice of the historic collective pre-contract.

[74] The right claimed by Mr. Desautel falls squarely within the pre-contact practice grounding the right. Hunting in what is now British Columbia was a central and significant part of the Sinixt's distinctive culture pre-contact and remains integral to the Lakes Tribe. The Lakes Tribe is a modern collective descended from the Sinixt that has continued to hunt and maintained its connection to its ancestral lands in British Columbia. Mr. Desautel is a member of the Lakes Tribe. Therefore, he has an Aboriginal right to hunt elk in the Sinixt's traditional hunting territory in British Columbia.

Disposition

[75] I would dismiss the appeal.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Fitch"

2019 ABCA 320
Alberta Court of Appeal

Alberta Union of Provincial Employees v. Alberta

2019 CarswellAlta 1866, 2019 ABCA 320, [2019] A.W.L.D. 3687, [2020] 1 W.W.R. 294, 2020 C.L.L.C. 220-014, 309 A.C.W.S. (3d) 390, 37 C.P.C. (8th) 238, 438 D.L.R. (4th) 465, 92 Alta. L.R. (6th) 1

Alberta Union of Provincial Employees, Guy Smith, Susan Slade and Karen Weiers (Respondents / Applicants) and Her Majesty the Queen In Right of Alberta (Appellant / Respondent)

Marina Paperny, Jack Watson, Frans Slatter JJ.A.

Heard: August 29, 2019
Judgment: September 6, 2019
Docket: Edmonton Appeal 1903-0194-AC

Proceedings: reversing *Alberta Union of Provincial Employees v. Alberta* (2019), 2019 CarswellAlta 1553, 2019 ABQB 577, Eric F. Macklin J. (Alta. Q.B.)

Counsel: P.G. Nugent, A.R. Cembrowski, for Respondents
G.A. Meikle, Q.C., M.L. England, for Appellant

***Jack Watson, Frans Slatter JJ.A.*:**

1 This is an appeal of an interim injunction granted by the trial court: *Alberta Union of Provincial Employees v. Alberta*, 2019 ABQB 577 (Alta. Q.B.). That injunction stayed the implementation by the government of Bill 9, the *Public Sector Wage Arbitration Deferral Act*, SA 2019, c. P-41.7.

Facts

2 The background is that the government and the respondent union entered into a number of three year collective agreements. Those agreements implemented a two year wage freeze, with an option in the third year to reopen negotiations about wages. The agreements provided that if the "wage-reopener" negotiations were not successful, the issue would be sent to binding arbitration, with any wage adjustment to be retroactive to April 1, 2019. Some of the agreements specifically provided that the arbitration would occur no later than June 30, 2019.

3 The wage-reopener negotiations were not successful, and the respondent union triggered the arbitration process. However, a provincial election was held on April 16, 2019, resulting in a change of government. In fulfilment of an election promise, the new government appointed a Blue Ribbon Panel to report on Alberta's finances. The new government did not think it would be adequately prepared to enter into the arbitration process until that report was received, which would be outside the deadline in the collective agreements. Consultation and discussions about an adjournment of the arbitration were unsuccessful, and the arbitrator ruled that she had no jurisdiction to delay the arbitration. The government therefore enacted Bill 9, the essential effect of which is to suspend the arbitration process until October 31, 2019. Several unions commenced actions for a declaration that Bill 9 is unconstitutional, and the respondent union also applied for an interim injunction preventing its implementation.

4 The chambers judge applied the three part test for an interim injunction. He found that there was a genuine issue to be tried, namely whether Bill 9 was an unconstitutional infringement of the rights of the union members. He concluded that there was irreparable harm to the collective bargaining relationship, notwithstanding that any arbitration award could be made retroactive.

The balance of convenience favoured the union. Even though the effect of an injunction would be to nullify the effects of Bill 9, it was more important for the court to protect valid agreements that were freely negotiated between the parties:

> 54. It is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations through legislation that may interfere with *Charter* rights . . .

As a result, the chambers judge stayed the operation of Bill 9 until the respondents' claim could be determined at trial.

Standard of Review

5 The decision to grant an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only for an error of law or principle, where there are palpable and overriding errors of fact, or where the exercise of the discretion is unreasonable: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) at para. 27, [2018] 1 S.C.R. 196 (S.C.C.). However, while deference is due, trial judges are not immune from review, and appellate courts must intervene when reviewable errors are disclosed: *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.) at paras. 73, 75, [2005] 1 S.C.R. 401 (S.C.C.); *R. v. Regan*, 2002 SCC 12 (S.C.C.) at para. 118, [2002] 1 S.C.R. 297 (S.C.C.).

Interim Injunctions Suspending Legislation

6 The test for an interim injunction is well established. It was set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at p. 334:

> . . . First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

There can often be overlap in the factors to be considered under this tripartite test.

7 In a case like this, involving an injunction to prevent the implementation of legislation, there are other collateral principles in play:

> (a) There is a strong presumption that legislation is constitutional: *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.) at para. 9, [2000] 2 S.C.R. 764 (S.C.C.); *Toronto (City) v. Ontario (Attorney General)*, 2018 ONCA 761 (Ont. C.A.) at para. 21, (2018), 142 O.R. (3d) 481 (Ont. C.A.).
>
> (b) There is a strong presumption that the legislation is in the public interest. At this stage " . . . the motions judge must proceed on the assumption that the law . . . is directed to the public good and serves a valid public purpose": *Harper v. Canada (Attorney General)* at para. 9, and
>
> (c) When they effectively amount to final relief, interim injunctions should be granted cautiously: *Harper v. Canada (Attorney General)* at para. 7. An application for an interim injunction should not, in effect, amount to summary judgment.

8 The serious issue to be tried was identified as the constitutionality of Bill 9. While the interim injunction in this case is technically only temporary relief pending a trial of the action, given the issues involved the interim injunction effectively resolved the claim. Bill 9 only deferred the commencement of the arbitration until October 31. It was, at the time the injunction was granted, highly unlikely that a trial could be held between then and October 31. In a practical sense the specific issue respecting the constitutionality of Bill 9 would become moot while the "interim" injunction was in place, and Bill 9 would have been nullified, at least for the collective agreements covered by the injunction. As discussed below, the chambers judge's conclusion at para. 25 that the injunction is not effectively a final determination is not supportable on this record. It is true that

a final finding of a *Charter* breach would be essential to justify the other remedies sought by the statement of claim, but that is not the same thing as sweeping Bill 9 aside for its effective duration on an interim motion.

9 These aspects of the interim injunction impact the first part of the tripartite test, because in practical terms the operational viability of Bill 9 is going to be determined depending on whether the interim injunction is maintained. As noted, interim injunctions should rarely be granted when they amount to final relief.

10 The chambers judge went far beyond considering whether there is a serious issue to be tried. He observed at para. 43 that the public interest reflected in the legislation must be balanced by "reasonable limits imposed, also in the public interest". At para. 46 he concluded: "It is necessary for the Court to consider, however, whether the public interest may be better served by an Interim Injunction staying the operation of Bill 9." He then concluded at para 54: "It is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations through legislation that *may* interfere with Charter rights . . . " (emphasis added).

11 That is not the test to be met at trial, nor was it the test to be met at the interim injunction stage. The interim injunction essentially summarily determined the claim, using the wrong test. The underlying issue is whether: a) Bill 9 involves a breach of the *Charter*, and if so b) whether it is demonstrably justified in a free and democratic society. The issue was not, as the trial judge reasoned, whether Bill 9 was in the "long-term public interest". As stated in *RJR-MacDonald Inc.* at pp. 348-9:

> . . . When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

No part of the tripartite test gives the chambers judge a mandate to assess whether validly enacted legislation is in the public interest.

12 The statement of claim raises a number of arguable, serious issues respecting the constitutionality of Bill 9, but the analysis of the chambers judge became focused, in the abstract, on a balancing of the public interest. The chambers judge essentially decided that Bill 9 was unconstitutional legislation that was not demonstrably justified in a free and democratic society. The government, however, was not in a position in this injunction context to fully defend the litigation, or to put forward a s. 1 justification, something that would obviously require a trial. As discussed below, the analysis also failed to properly apply the presumption that legislation is constitutionally valid, and that stays of legislation based on allegations of unconstitutionality should be sparingly granted.

13 The focus on balancing the public interest was inappropriate, but it was also flawed. The chambers judge relied at para. 52 on the decision in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) for the proposition that it is in the "public interest" that contracts be honoured. *Bhasin*, however, is a case about the relationship between private contracting parties. It is a private law case, not a case about the "public interest", and it does not establish any constitutional rights. The present appeal is about the constitutional limits on a legislative body exercising its rights to legislate. It is not about the government's rights and obligations as a contracting party.

14 Although collective agreements are rarely disturbed by legislation in Canada, the government has the right to legislate with respect to labour relations, within constitutional limits. At the initial stage, it is up to the Legislature (not the courts) to decide if the public policy advantages of legislation like Bill 9 outweigh the disadvantages, and such legislation is entitled to the presumption of constitutional validity. The test at trial will be whether there is a breach of s. 2(d) of the *Charter*, and if so whether it is demonstrably justified in a free and democratic society. That there "may" be a *Charter* breach indicates that there is a genuine issue for trial, but a summary conclusion about the overall public interest did not justify an interim injunction, nor would it be the ultimate test at trial. The courts are " . . . not to make value judgments on what they regard as the proper policy choice": *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.) at para. 136.

15 A principal point of disagreement turned on the concept of "clearest of cases" in the three aspects of the test for injunctions. Each party tended to link the "clearest of cases" to different ideas. The respondents persuaded the chambers judge that the first aspect of the injunction test required merely an arguable case that the legislation in question infringed the freedom of association of its members under s 2(d) of the *Charter*. In other words, the "arguable case" element of the test accepted by the chambers judge was found to be met at the low threshold that has been found to exist in various private law contexts -- namely an argument that has an air of reality on the available evidence. The appellant for its part contended that, inasmuch as this was a situation of regularly enacted legislation, the arguable case had to clearly show a significant adverse effect upon the *Charter* freedom in question, citing *Harper v. Canada (Attorney General)* at para. 9.

16 This is not an issue respecting burden of proof, but rather one involving the presumption of legality, a presumption that does not exist in relation to a private law claim. Before an injunction will issue to restrain the implementation of validly enacted legislation, there must be some precision with respect to the *Charter* claim. This informs the "clearest of cases" analysis. In other words, a court is not to stop legislation in its tracks merely because the court can discern from eloquent arguments of counsel that there might be something constitutionally objectionable about the law. That said, where the applicant can show a clearly identifiable basis for proving a clearly identified *Charter* breach, and the effects of the breach, the question of whether those negative effects involve irreparable harm is considered at the second step of the injunction analysis.

17 Not all legislation receives universal public support, and some legislation is subsequently found to be unconstitutional, but in the short term the elected legislators must be allowed to legislate except in the clearest of cases. In this situation, the government has not purported to take away the right to binding arbitration, or a right to a wage increase in the third year of the collective agreements, but has merely deferred the arbitration for a few months. It is not sufficiently clear that Bill 9 is unconstitutional so as to justify an injunction on its implementation.

18 As the chambers judge found, the respondent union would not suffer any direct irreparable harm. Bill 9 merely delayed the arbitration for four months; having to wait four months is not irreparable harm. The collective agreements state that the ultimate arbitration award will be retroactive until April 1, 2019. Any delays in payment could be dealt with by the arbitrator, possibly through an award of interest. Pre-trial relief for what is essentially a money claim is exceptional: *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.) at p. 10.

19 The chambers judge suggested at para. 36 that the "only concession by HMQ and the only benefit to AUPE" was the agreement to arbitrate within certain timelines, and that "AUPE will have fully lost that agreed-upon concession". This finding is not supported by the record, and reflects palpable and overriding error. The affidavit of Dale Perry confirms that the respondent union achieved benefits from other portions of the negotiations, and agreed to the entire package (including the wage reopener) in order to lock-in the advantages that had been obtained. The respondent union deferred, but never gave up the chance to argue for a wage increase in the third year of the collective agreements. In fact, the respondent union enhanced its position by replacing an opportunity to bargain for a wage increase in the third year, with a right to a binding interest arbitration on that subject.

20 The respondent union asserts that it gave up its right to strike in return for the timing of the arbitration of a wage increase in the third year. One could equally argue that the appellant gave up the right to lock out the employees in order to maintain existing wage levels, and surrendered the final decision on third year wages to an independent arbitrator. The Master Agreement between the parties is over 100 pages long, and includes numerous covenants. It is unrealistic to think that "but for" the time limitation on the commencement of the third year wage increase arbitration, an agreement would not have been reached, and a strike would have resulted.

21 Bill 9 does not disturb the right to arbitration, the prospect of a wage increase in the third year, or its retroactivity. As noted, the only "harm" arising from Bill 9 was a four month delay in the commencement of the arbitration process. The chambers judge's conclusion at para. 48 that the "specified timelines" for the commencement of the arbitration process were the only benefit AUPE gained under the collective agreements is unreasonable on this record.

22 Even though the chambers judge had rejected the respondents' opinion evidence on the subject (reasons at para. 33), he found that irreparable harm arose from damage to the collective bargaining relationship, but that second-guesses the legislative policy choice behind Bill 9. Collective bargaining always is, and always will be adversarial. It was unrealistic to conclude that delaying the commencement of the arbitration for a few months is going to bring about any fundamental change to the overall collective bargaining relationship. The government and the public sector unions are going to disagree about some things all of the time, and different other things from time to time. As noted above, the initial stage, it is up to the Legislature to decide if the public policy advantages of legislation like Bill 9 outweigh the disadvantages arising from disruption of the collective bargaining regime, and the legislation is entitled to a presumption of constitutional validity. The essential issue for trial is whether Bill 9 is within the constitutional limits, either intrinsically or via s. 1.

23 As noted, the government always retains the right to legislate with respect to labour relations, within constitutional limits: *Fraser v. Ontario (Attorney General)*, 2011 SCC 20 (S.C.C.) at para. 47, [2011] 2 S.C.R. 3 (S.C.C.). The respondents argue that irreparable harm arises when "freely negotiated terms [are] unilaterally nullified", and that Bill 9 would make their negotiators reluctant to negotiate and compromise in future. The *prospect* of legislative variation of collective agreements, however, is an inherent part of collective bargaining; any resulting "damage" to the collective bargaining relationship is largely inherent in that prospect. The issue is magnified with public sector collective bargaining, where the government is both employer and legislator. The exercise on a particular occasion of the legislative mandate to override collective agreements is unlikely to have a material impact on the overall, long-term nature of public sector collective bargaining. The granting or denial of the present interim injunction (and the existence or non-existence of Bill 9) will not have any effect on whether that prospect of "unilateral nullification" exists in the background of collective bargaining. The finding of irreparable harm based on the effect of Bill 9 on the collective bargaining relationship is essentially a finding that legislative interference with a collective agreement is: a) never constitutional, or b) that it is bad public policy for the Legislature to ever exercise that jurisdiction. The former is the issue for trial; the latter is not an issue for the courts.

24 There is obviously an important issue here. The law on the extent to which collective bargaining, and collective agreements, are protected by the *Charter* is still being developed: *Canada (Procureur général) c. SCFP, local 675*, 2016 QCCA 163 (C.A. Que.) at para. 31. The government likely takes the view that certain changes to collectively bargained rights are allowed, or can be demonstrably justified in a free and democratic society. The unions would likely want to establish a rule that no legislated variation of a collective agreement is ever constitutional. Those are issues for a trial, at which both parties can present evidence and argument. It is true that in this particular case the issue of the constitutionality of Bill 9 may be moot by the time any trial is held, but this may well be one of those cases where the courts should hear and decide a moot issue. The issue is important, but it should not, in effect, have been summarily determined by the issuance of an interim injunction.

25 The final factor is the balance of convenience. At the time that the collective agreements were negotiated, the parties would have known that a provincial election would occur when it did. The nature of the democratic process is that governments change from time to time, and new governments need some time to get up and running. New governments should be entitled, within limits, to the presumption that legislation is constitutional. There is a presumption that enjoining validly enacted legislation will affect the public interest: *RJR-MacDonald Inc.* at p. 346. The respondents had the burden of showing that suspension of the legislation would serve an overriding public interest. Apart from a four month delay in the commencement of the arbitration, the alleged inconvenience to the respondents seems to amount to an inability to obtain a summary determination that the inroads on their collective agreements made by Bill 9 could never be proven to be constitutional.

26 Furthermore, a denial of an interim injunction would not mean the respondents could not fully pursue the action which nourished the injunction motion in the first place. Ultimately what the chambers judge concluded amounted to a replacement of the determination of balance of convenience in light of the foregoing considerations, with a conclusion that the government should be held to the terms of its collective agreements because otherwise the public's confidence in government collective bargaining would be undermined. That was error.

27 As noted, the recited purpose of Bill 9 was to give the new government more time to prepare for the arbitration, specifically by receipt of the Blue Ribbon Panel report. The chambers judge found at para. 51, in the context of the balance of convenience,

that the government actually had all the information it needed. It was in fact fully prepared to arbitrate. Bill 9 was not needed after all. The conclusion that this line of reasoning justified suspending validly passed legislation is an error in principle, and also reflects a reviewable error.

Conclusion

28 An interim injunction is discretionary equitable relief, and deference is owed to the chambers judge. The decision under appeal, however, rests on errors of principle, and is unreasonable. The factual and other findings with respect to irreparable harm and the balance of convenience reflect palpable and overriding error. The appeal is allowed, and the injunction set aside.

Marina Paperny J.A. **(dissenting):**

Introduction

29 The government appeals an interlocutory order that enjoins the operation of a piece of legislation. The respondent Alberta Union of Provincial Employees (AUPE), as bargaining agent, is party to a number of collective agreements, with the government as employer, that contain wage-reopener provisions. The government recently passed Bill 9, *The Public Sector Wage Arbitration Deferral Act*, SA 2019 c P-41.7, that suspends an agreed-upon interest arbitration process that had been scheduled under the terms of those provisions. AUPE has challenged the constitutionality of Bill 9, which it says breaches s 2(d) of the *Charter*, and was granted an interlocutory injunction pending trial of that challenge.

Background

30 When AUPE began its most recent round of collective bargaining with the government, it sought wage raises in each year. The government's position was that there would be no raises whatsoever in the first two years, but in the third year there would be a possibility of a wage reopener. The subsequent negotiations and mediations did not move the parties. Eventually, AUPE acceded to the government's position and the parties agreed that arbitrations on wages would occur by a specific date. In reaching that agreement, AUPE gave up its right to strike.

31 On May 17, 2019, the newly elected government appointed an independent panel to prepare a report on Alberta's economic situation, to be provided by August 15, 2019. The government asked AUPE to delay the agree-upon arbitration until after delivery of the report. AUPE refused. The government then applied to the Chair of the arbitration panel for an adjournment of the arbitration. The Chair concluded she had no jurisdiction to delay the arbitration provided for in the collective agreement, and scheduled dates in June and August for the arbitration to proceed.

32 On June 13, 2019, the government introduced Bill 9 in order to suspend the bargained-for arbitration process. Bill 9 came into force on June 28, 2019.

33 On June 24, 2019, AUPE commenced the within action seeking, among other things, a declaration that Bill 9, or portions thereof, infringes s 2(d) of the *Charter* and is not saved by s. 1.

34 AUPE then applied for an order staying the operation of Bill 9 as against AUPE. The chambers judge granted the interim injunction on July 30, 2019, with the result that the interest arbitrations agreed upon in the collective agreements, and that were then in progress, could continue.

35 The government appeals the granting of the interim injunction. This appeal raises the question of the correct test for granting an interim injunction of apparently validly enacted legislation in the face of an alleged constitutional infringement, and the level of deference to be given to the findings of the chambers judge when applying that test.

Decision to grant the interlocutory injunction

36 In granting the interlocutory injunction, the chambers judge applied the well known tri-partite test articulated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

37 At the outset of his reasons, the chambers judge noted that a legislature, as a democratically elected body, is generally entitled to enact laws as it sees fit in a manner it believes to be in the public interest.

38 He also concluded, based on the record before him, that there was a serious issue to be tried, namely whether Bill 9 interferes with AUPE's section 2(d) right to freedom of association. In concluding that the challenge to the constitutionality of Bill 9 raises a serious issue, the chambers judge rejected the argument that the delay imposed by the legislation was temporary or insignificant. He concluded that by effectively rendering aspects of the collective agreement inoperative, Bill 9 called into question the value of associating for the purposes of collective bargaining and entering into a collective agreement, as discussed in *British Columbia v. BCTF*, 2015 BCCA 184 (B.C. C.A.) [hereinafter BC Teachers' Federation] per Donald JA (in dissent, affirmed and adopted by the Supreme Court of Canada on appeal, 2016 SCC 49, [2016] 2 S.C.R. 407 (S.C.C.)). He specifically noted the following statement of Donald JA at para 285:

> The act of associating for the purpose of collective bargaining can ... be rendered futile by unilateral nullification of previous agreements, because it discourages collective bargaining in the future by rendering all previous efforts nugatory.

39 On the issue of irreparable harm, the chambers judge concluded that, while the length of the delay or any possible financial loss would not result in irreparable harm, the effect of Bill 9 "goes deeper than mere delay or short-term monetary loss". He discussed the significance of the wage reopener to the collective bargaining process and to the AUPE and noted that the agreed upon third year wage reopener (with its fixed dates) was the only concession AUPE received. In reaching that agreement, AUPE relinquished two years of wage increases and the right to strike. The chambers judge concluded that, if Bill 9 is found to be unconstitutional, AUPE will have fully lost that agreed upon concession by the government, and AUPE's right to have the arbitration proceed within the specified times will not be recoverable. In addition, he found a likelihood of irreparable harm arises from the damage to the relationship between the parties. He concluded that irreparable harm to future negotiations could lead to a refusal to negotiate and compromise, and upset the bargaining relationship between the parties, "only one of whom can use its power to amend an 'agreement'".

40 On the issue of balance of convenience, the chambers judge noted at the outset the comments of the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764 (S.C.C.) that, when assessing balance of convenience, a motions judge must assume that the impugned legislation is directed towards the public good and serves a public purpose. He went on to state that the court must also consider whether denying the injunction may deprive the applicants of their constitutional rights because of the time involved in getting a matter to trial. Having considered and cited the statements in *Harper*, the chambers judge nevertheless concluded that there was a competing and more significant public interest at stake here; namely that parties to otherwise valid, freely negotiated agreements honour their obligations. He found it is in the long-term public interest for the public to see that its government cannot unilaterally change its contractual obligations where such legislation has the effect of interfering with *Charter* rights. He weighed the public's interest in the operation of validly enacted legislation against the public interest in protecting collective bargaining from potential breaches of the *Charter*. In his assessment, the balance of convenience in this case favoured the latter, and he granted the injunction.

41 The government appeals. It submits that the chambers judge's conclusion on irreparable harm is unsustainable as it was made in an evidentiary vacuum. The government also says that chambers judge's weighing of the balance of convenience is contrary to established legal principles, including the presumption that legislation is enacted in the public interest. The government argues that the chambers judge erred in doubting the legislation served a public interest or was effective for such a purpose, in failing to give the presumption of public interest sufficient weight, and in finding there is a counter vailing, and more weighty, public interest at play.

Standard of review

42 All parties recognize that an interim injunction is a discretionary order and that the standard of review on appeal is deferential. An appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge has committed a legal error or a serious misapprehension of the evidence,

or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it": *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196 (S.C.C.) at para 27.

Analysis

43 Courts of first instance should be cautious in granting interlocutory injunctive relief generally, but particularly so in the face of apparently validly enacted legislation. The challenge for trial judges faced with an application to enjoin the operation of legislation that may infringe constitutional rights is well recognized and has been the subject of considerable judicial discussion. Those challenges were ably identified and addressed by Beetz J in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and in the subsequent decision in *RJR-MacDonald Inc.*. The test is the same for all interlocutory injunctions, and it is the applicable test here.

44 It is well established that courts have jurisdiction to grant the relief requested by the applicants, even if the result would be a suspension of the legislation (although, as AUPE points out, the relief requested in this case amounts to an exemption from the legislation, not a complete suspension of its operation). As was noted in *RJR-MacDonald Inc.* at p 331, the suspension power must be exercised sparingly, but that is achieved by applying the *Metropolitan Stores* criteria strictly and not by a restrictive interpretation of the courts' jurisdiction.

45 Whether to grant an interlocutory injunction in circumstances such as those now before the court involves a balancing process. On the one hand, the court must be cautious of rulings that deprive legislation enacted by elected representatives of its effect. On the other hand, to insist on legislation being enforced may to be to condone the continuing violation of *Charter* rights by legislation that may prove to be unconstitutional: *RJR-MacDonald Inc.* at pp 333-4.

46 The tri-partite test requires a chambers judge to consider the following:

1 A preliminary assessment of the merits of the case to ensure there is a serious question to be tried;

2 Whether the applicant would suffer irreparable harm if the injunction were not granted;

3 Where the balance of convenience lies - which of the parties would suffer greater harm from the granting or refusal of the injunction. The public interest is a relevant consideration where the relief sought involves the operation of legislation.

47 The first criterion requires the court to undertake a preliminary assessment of the merits of the claim. The threshold, adopted from *American Cyanamid Co. v. Ethicon Ltd.* [[1975] A.C. 396 (U.K. H.L.)], is a low one: whether there is a serious question to be tried.

48 The court in *RJR-MacDonald Inc.* specifically rejected the argument that a stricter standard should apply where an injunction would have the effect of suspending legislation, noting the importance of the interests which are alleged to have been adversely affected when a *Charter* violation is alleged: *RJR-MacDonald Inc.* at p 337. The court agreed with the statement of Beetz J in *Metropolitan Stores (MTS) Ltd.* at p 128 that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where ... the public interest is taken into consideration in the balance of convenience". Beetz J went on to state that it would be too high a test to say that it is only in exceptional and rare circumstances that the courts will grant interlocutory relief, particularly in exemption cases:*Metropolitan Stores (MTS) Ltd.* at p 147. Indeed, a more stringent standard would be incompatible with the court's role under the *Charter*.

49 The authorities recognize two exceptions to the limited inquiry into the merits. A more rigorous inquiry into the merits may be appropriate where the granting of the injunction amounts to a final determination of the action, or where the constitutional question "presents itself as a simple question of law alone":*RJR-MacDonald Inc.* at pp 338-339. The parties did not argue that either of these exceptions applies here, and, in my view, neither is applicable. In particular, the injunction granted does not amount to a final determination of the action. The issue of the constitutionality of the government's action in passing Bill 9 remains unresolved.

50 At one point in oral argument, it was argued a higher threshold might apply to the assessment of the merits of this case, on the basis of a statement in *Harper* to the effect that, "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed": *Harper* at para 9. I do not read this statement as implying a need for a higher threshold test on the merits. Such a reading would be incompatible with the statements of the Supreme Court in both*RJR-MacDonald Inc.* and *Metropolitan Stores (MTS) Ltd.*.

51 The Supreme Court has been clear that the public interest in the enforceability of validly enacted legislation is to be factored into the weighing of the balance of convenience: *Metropolitan Stores (MTS) Ltd.* at p 135; *RJR-MacDonald Inc.* at p 343. *Harper* reiterated that point at para 9. The court in *Harper* also emphasized that only when the interests that would be protected by the granting of the injunction will outweigh the public interest in the continued operation of the legislation should the injunction should be granted. This is a balance of convenience assessment, and does not imply a stricter standard at the first stage of the test. The "serious question to be tried" threshold is applicable here.

52 The second aspect of the *RJR-MacDonald* test consists in deciding whether the applicant "would, unless the injunction is granted, suffer irreparable harm". "Irreparable" refers to the nature of the harm rather than its magnitude. Only harm to the applicant is relevant; any alleged harm to the respondent and to the public interest should be considered at the third part of the analysis: *RJR-MacDonald Inc.* at p 341.

53 The third criterion is a weighing of the balance of convenience. This assessment has been described as "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits": *Metropolitan Stores (MTS) Ltd.* at p 129.

54 The factors to be balanced will vary in each case. There are, however, well-established principles that apply in constitutional cases where an applicant seeks to enjoin the operation of legislation. First, as has been noted, all constitutional cases will include a consideration of the public interest in the balance of convenience: *Metropolitan Stores (MTS) Ltd.* at p 149; *RJR-MacDonald Inc.* at p 343.

55 A second and related principle is that it is generally presumed that legislation will produce a public good: *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.) at para 9; see also *RJR-MacDonald Inc.* at pp 348-9 where it was noted that "When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so". I do not agree that *Harper* stands for the proposition that there is also a presumption of constitutional validity. If what is meant by that term is that a legislative provision that has been challenged as unconstitutional must be presumed to be consistent with the *Charter*, that proposition was rejected by Beetz J in*Metropolitan Stores (MTS) Ltd.* as "not helpful" and "not compatible with the innovative and evolutive character" of the *Charter*: *Metropolitan Stores (MTS) Ltd.* at pp 121-124. *Harper* does not say otherwise; it posits only that when legislation is declared to promote the public interest, there is a presumption that it is in the public interest and has that effect. In my view, only one presumption is placed on the scales of balance of convenience, not two.

56 The public interest in having legislation put into operation must be weighed in the balance of convenience, but it can be outweighed by countervailing interests of the public. The government does not have a monopoly on the public interest. As was noted in *RJR-MacDonald Inc.* at p 343:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the 'public interest'. Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

57 As will be seen, the chambers judge undertook just such a balancing exercise in this case.

The application of the test by the chambers judge

(i) Serious question to be tried

58 Although its arguments can be variously characterized, the government essentially submits that the outcome of collective bargaining is not constitutionally protected. While as a general proposition this may be so, the case here is about the government refraining from interfering in an already agreed upon collective agreement and the process and timing of a resolution under that agreement.

59 In order to establish a breach of s 2(d), an applicant has to show a substantial interference with the right to collectively bargain. The test for establishing a breach of association entails asking two questions: the importance of the matter affected to the process of collective bargaining, and the manner in which the measure impacts on the collective right to good faith negotiation and consultation: *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 (S.C.C.) (*BC Health Services*) at para 93.

60 As to the first inquiry, the Supreme Court has recognized that "laws that unilaterally nullify significant negotiated terms in existing collective agreements" may amount to a substantial interference with collective bargaining rights: *BC Health Services* at para 96. Here, the chambers judge found that the wage reopener clause was not procedural, but a significant right that had been freely bargained for by the parties in the context of setting wages in the collective agreement. The only thing the AUPE had obtained was a timely consideration of the wage-reopener. And that is the one thing that Bill 9 removed.

61 The second inquiry considers the manner in which Bill 9 affects the right to good faith bargaining. Again, this matter was addressed by the chambers judge; he found that AUPE cannot "confidently negotiate detailed terms and conditions of a collective agreement" knowing that it could be unilaterally nullified by legislation. *BC Health Services* has established that such *ex post facto* legislative amendments to significant terms of already bargained collective agreements can meet the test for a breach of s 2(d). That observation is also supported by the more recent decision in *BC Teachers' Federation*, as cited by the chambers judge.

62 As was noted by the Supreme Court in *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 (S.C.C.)at para 71:

> The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful way (*Health Services*; *Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: "One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees ..." (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(*d*).

63 It is unnecessary to expand further on the matter of a serious issue to be tried. Although they characterize the issues somewhat differently, the parties agree that the threshold is met here. Whether Bill 9 breaches s. 2(d) rights in a manner that cannot be constitutionally justified is indeed serious.

(ii) Irreparable harm

64 The government raises only one argument under this heading, namely that the conclusion arrived at by the chambers judge was without evidentiary foundation. It relies on the chambers judge's rejection of certain opinion evidence as to what constitutes irreparable harm as being unnecessary or inadmissible because it is the role of the chambers judge to determine whether on the facts before him or her, the harm alleged is irreparable. This is a circular argument. In my view, there was an ample record to support the conclusions about the significance of the arbitration proceedings to the AUPE, and the effect of the unilateral suspension of those proceedings on AUPE's rights, on which to base a finding of irreparable harm. While other conclusions may have been available, it is not for this court to usurp the role of the chambers judge in the absence of reviewable error. No such error has been demonstrated.

65 Moreover, much of the rejected evidence did not go to the harm actually found by the chambers judge. That evidence relates primarily to the potential damage to the relationship between AUPE and its membership. The chambers judge, on the other hand, found harm would result from the fact that AUPE, having made significant concessions in the collective bargaining process, would lose the only agreed-upon concession by the government; the agreement to arbitrate the issue of wages within specified timelines.

66 The chambers judge further found that irreparable harm would arise from damage to future collective bargaining and the parties' ongoing relationship if the government's attempt to unilaterally change the terms of the collective agreement was found to be unconstitutional. The chambers judge was entitled to draw those conclusions based on the record before him and his own view of the situation. I note that these observations are not peculiar to this case, but are general observations about the effect of unconstitutional government action of the sort alleged here, and accord with comments made by the Supreme Court in *BC Health Services*, *Mounted Police Assn. of Ontario / Assoc. de la Police Montée de l'Ontario v. Canada (Attorney General)*, and in the reasons of Donald JA (affirmed and adopted by the Supreme Court) in *BC Teachers' Federation*. "Laws or government action that make it impossible to achieve collective goals have the effect of limiting freedom of association, by making it pointless": *BC Teachers' Federation* at para 286, citing *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, [2011] 2 S.C.R. 3 (S.C.C.) at 46.

67 The findings and conclusions of the chambers judge were available on the record before him, and he was entitled to make them. I see no basis on which to interfere with those conclusions.

(iii) Balance of Convenience

68 This type of case generally falls to be decided on the balance of convenience, and this case is no exception.

69 The thrust of the government's argument is that the chambers judge did not give sufficient, or any, weight to the caution articulated in *Harper* that it must be assumed that the legislation was enacted with the public interest in mind. The government submits that, although the chambers judge adverts to this principle, he failed to give it any weight, or worse, cast doubt on whether such a public interest actually exists in this case. In addition, the government submits that the chambers judge did not find this to be a clear case, as required by *Harper* , because he failed to do the necessary analysis to determine whether the alleged breach was clear and unequivocal, sufficient to override presumptively valid legislation.

70 First, as set out above, a careful reading of the jurisprudence leads me to conclude that the "clear case" criterion is to be applied only at this third stage, namely balance of convenience. Thus, it cannot go to the merits of the case; that test is already established in the jurisprudence and is clearly met here. I accept the submission of AUPE that it is intended to answer the following question: Having regard to all the circumstances, is this a clear case for granting the injunction? Put another way, the applicant must satisfy the court that the injunction ought to be granted in order to immediately protect the rights of those adversely affected.

71 The government submits that the chambers judge improperly examined Bill 9 and found it wanting in terms of valid public purpose. I disagree and suggest this mischaracterizes the exercise undertaken by the chambers judge. He accepted the public purpose articulated in the Bill's preamble. His comments were directed to weighing those valid public interests against what he considered to be a worthy and competing public and private interest: the nullification of hard won concessions in a collective agreement and the impact on the prospect of future collective bargaining and labour peace, and the public's interest in seeing its government uphold its commitments in an already freely bargained collective agreement.

72 In my view, it is part of the balance of convenience analysis to consider the effect of an injunction on the impugned government action. It is appropriate for a chambers judge to consider what will happen to those public interests (in this case, as expressed in the preamble) should operation of the legislation be stayed. A failure to consider that, in my view, would be reversible error.

73 The chambers judge found there was a public interest in preventing the legislature from unilaterally altering contracts by legislation that, on its face, appears to infringe the *Charter*. While the law provides for the legislated amendment of collective agreements, that legislation must be *Charter* compliant. There are constraints on legislation that interferes with collective bargaining. This is a legitimate public interest and finds its expression, for example, in *BC Teachers' Federation*, *BC Health Services*, and *Mounted Police* .

74 Concluding that something is in the public interest is not strictly a legal analysis, but is also informed by societal norms and the specific context and circumstances of each case. It involves the exercise of judicial discretion and is entitled to deference on appeal.

75 The chambers judge considered the stated purposes of Bill 9 and the related public interest of the legislation. But he was also alive to competing interests that arise by virtue of the nature of the legislation and the nature of the alleged breach of s 2(d) in this case. I see no basis to interfere in the chambers judge's finding these to be legitimate public interests. Nor do I see a reversible error in the finding that, in these circumstances, the balance of convenience favoured that interest.

Conclusion

76 I would dismiss the appeal.

Appeal allowed; injunction set aside.

Unofficial English Translation of the Judgment of the Court
Procureur général du Québec c. Quebec English School Board Association **2020 QCCA 1171**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-029030-202
(500-17-112190-205)

DATE: September 17, 2020

CORAM: THE HONOURABLE FRANCE THIBAULT, J.A.
ROBERT M. MAINVILLE, J.A.
BENOÎT MOORE, J.A.

ATTORNEY GENERAL OF QUEBEC
APPELLANT – Defendant
v.

QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
LEASTER B. PEARSON SCHOOL BOARD
ADAM GORDON
RESPONDENTS – Applicants
v.

NEW FRONTIERS SCHOOL BOARD
SHANNON KEYES
ENGLISH MONTREAL SCHOOL BOARD
WESTERN QUEBEC SCHOOL BOARD
RIVERSIDE SCHOOL BOARD
EASTERN TOWNSHIPS SCHOOL BOARD
SIR WILFRID LAURIER SCHOOL BOARD
EASTERN SHORES SCHOOL BOARD
CENTRAL QUEBEC SCHOOL BOARD
CHRIS EUSTACE
IMPLEADED PARTIES – Interveners

JUDGMENT

[1] The Attorney General of Quebec ("AGQ") seeks leave to appeal from the judgment rendered on August 10, 2020 by the Honourable Mr. Justice Sylvain Lussier of the Superior Court, District of Montreal, that ordered a stay of the application of *An Act to amend mainly the Education Act with regard to school organization and governance*, S.Q. 2020, c. 1 ("*Bill 40*") to the English school boards of Quebec until a judgment is rendered on the merits of the application for judicial review filed by the respondents, the Quebec English School Boards Association, the Lester B. Pearson School Board and Adam Gordon, with the support of all the English school boards of Quebec as impleaded parties.

[2] The parties agree that the matter is urgent, given that the upcoming school elections are to be held on November 1, 2020. Indeed, the judgment under appeal permits, among other things, the holding of such elections for the English school boards in accordance with the provisions of the *Act respecting school elections*, CQLR, c. E-2.3, and of the *Education Act*, CQLR, c. I-13.3, as they existed before the coming into force of *Bill 40*, and avoids the imposition of a new school governance model on Quebec's English-speaking minority as of these school elections.

[3] Given the urgency and the significant issues at stake in this matter, on August 20, 2020, a judge of this Court referred the application for leave to appeal to this panel, to be heard at the same time as the appeal.

* * *

[4] Leave to appeal a judgment suspending the application of legislation during proceedings contesting its constitutionality is governed by article 31 of the *Code of Civil Procedure* ("*C.C.P.*"). The criteria for obtaining such leave to appeal are well known and were summarized by Bich, J.A. in *Devimco Immobilier inc. c. Garage Pit Stop inc*., 2017 QCCA 1, para. 9:

> [TRANSLATION]
>
> [9] That being said, the motion for leave to appeal is governed by article 31 *C.C.P.* (rather than by article 32) and, in order to succeed, the petitioners must demonstrate (1) that the impugned judgment determines part of the dispute or causes them irremediable injury and (2) that the proposed appeal is in the interests of justice (art. 9, para. 3 *C.C.P.*) in that it raises an issue meriting the attention of the Court, has a reasonable chance of success and is consistent with the guiding principles of procedure (ss. 17 and following *C.C.P.*).
>
> [Reference omitted]

[5] As his grounds of appeal, the AGQ essentially argues that the judge erred: (1) by finding that there is irreparable harm based on a false premise, namely, the disappearance of the school boards, despite his statement that the evidence did not establish such harm; (2) by imposing a burden of proof on the AGQ that he does not have in connection with the balance of convenience test; (3) by ordering the stay without finding this to be a clear case; and (4) by suspending *Bill 40* as a whole.

[6] For their part, the respondents argue that the judge did not err in finding that there is harm. Such harm does indeed exist, if only by the mere fact that elections will be held under the new rules adopted by the legislature rather than the old rules. The respondents argue, in essence, that the interests of justice do not require that leave to appeal be granted, because, in light of the applicable standard of review, the appeal is destined to fail. They submit that the AGQ's grounds of appeal essentially amount to criticizing the judge's weighing of the various circumstances, which is not the role of this Court.

[7] It is true that the decision whether or not to stay legislation while it is being challenged is, as with interlocutory injunctions or safeguard orders, discretionary on the part of the trial judge and limited in time. In this regard, it is generally acknowledged that leave to appeal such a judgment will be granted only in exceptional circumstances. We are, however, of the opinion that this is the case in the matter at hand.

[8] The appeal raises questions of interest, and even if the appellant's burden is very heavy, the appeal is not necessarily destined to fail. We would add that determining the interests of justice is not limited to an assessment of the chances of success of an appeal—a highly speculative exercise—even if it is an important factor. A judgment ordering a stay of legislation enacted by the National Assembly, before presentation of the evidence and argument on the merits have occurred, has a significant effect that is both practical and symbolic and calls upon founding principles of our legal system, including the separation of powers. In the present case, the significance of these consequences is heightened by the impending school elections.

[9] For all of these reasons, it is in the public interest and in the interests of justice that leave to appeal be granted. We turn now to the appeal itself.

* * *

[10] The legal principles applicable to a stay of legislation are well known and were recently summarized in *Hak v. Attorney General of Quebec*, 2019 QCCA 2145, paras. 103-106 ("*Hak*"). Thus, a party seeking to stay the application of a statute must demonstrate that it meets the following tests: first, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Second, it must be determined whether the applicants or the persons on whose behalf they claim to act would suffer irreparable harm if the application were refused. Finally,

an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the relief pending a decision on the merits: *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR – MacDonald*").

[11] The third test—assessing where the balance of convenience lies—is particularly relevant, because it is here that the public interest, which is presumed to be reflected in the impugned legislation, must be considered and given the weight it should carry: *RJR – MacDonald*, pp. 342-347. As Sopinka and Cory, JJ., noted in *RJR – MacDonald*, p. 346, "[a] court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought", because doing so "would in effect require judicial inquiry into whether the government is governing well", which is not the role of the courts. On the contrary, the court should in most cases assume that harm to the public interest would result from a suspension of the statute. In this regard, the Supreme Court of Canada cautioned us in *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, para. 9:

> [9] Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR – Macdonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at pp. 348-49:
>
> > When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law—in this case the spending limits imposed by s. 350 of the Act—is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in *RJR – MacDonald* was of s. 2(b). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.
>
> [Emphasis added]

[12] When a judgment granting or refusing a stay of the application of a statute is appealed, an appellate court can intervene only in rare circumstances. Indeed, the decision regarding such a measure is a discretionary exercise on the part of the trial judge, and an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*, pp. 155-156, the Supreme Court of Canada specified the circumstances under which the exercise of that discretionary power can be overturned. Those circumstances were recently reiterated by Brown, J., writing for a unanimous Supreme Court in *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5, [2018] 1 S.C.R. 196, para. 27:

> Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge [. . .] could have reached it".

[13] It is readily apparent that this burden is a particularly heavy one. For the reasons that follow, while we do not endorse the trial judge's entire analysis, the AGQ has not convinced us that the Court should intervene.

* * *

[14] Given that the dispute before us deals essentially with the interpretation and application of s. 23 of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*"), it is useful to review its general principles.

[15] According to this section, in Quebec (a) citizens of Canada who have received their primary school instruction in Canada in English have the right to have their children receive primary and secondary school instruction in that language: s. 23(1)(*b*) of the *Canadian Charter*; and (b) citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English in Canada, have the right to have all their children receive primary and secondary school instruction in that language: s. 23(2) of the *Canadian Charter*.

[16] These rights are framed by s. 23(3) of the *Canadian Charter*:

23. (3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province	**23.** (3) Le droit reconnu aux citoyens canadiens par les paragraphes (1) et (2) de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité francophone ou anglophone d'une province :
(*a*) applies wherever in the	*a*) s'exerce partout dans la

province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

province où le nombre des enfants des citoyens qui ont ce droit est suffisant pour justifier à leur endroit la prestation, sur les fonds publics, de l'instruction dans la langue de la minorité;

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

b) comprend, lorsque le nombre de ces enfants le justifie, le droit de les faire instruire dans des établissements d'enseignement de la minorité linguistique financés sur les fonds publics.

[Emphasis added]

[17] Section 23 of the *Canadian Charter* is one component in Canada's constitutional protection of the official languages. The section is especially important because of the vital role of public education in preserving and encouraging the linguistic and cultural vitality of official language minorities in each of the provinces of Canada, that is, the English-speaking minority in Quebec and the French-speaking minorities in the rest of the country: *Mahe v. Alberta*, [1990] 1 S.C.R. 342, p. 350 ("*Mahe*") (see also *Doucet-Boudreau v. Nova Scotia (Minister of Education*, 2003 SCC 62, [2003] 3 S.C.R. 3, para. 26 ("*Doucet-Boudreau*")).

[18] It is a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with, which has a remedial purpose and allows for specific legal remedies, as Dickson, C.J., writing for a unanimous Supreme Court, noted in *Mahe*, p. 365 (see also Doucet-Boudreau, para. 27, and *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, paras. 3 and 15-16 ("*Conseil scolaire francophone de C.-B.*")):

> The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

[19] Section 23 places positive obligations on governments to mobilize resources and enact legislation for the development of major institutional structures for the province's language minority, which gives the exercise of the rights set out therein a unique

collective aspect: *Mahe*, pp. 365 and 389, *Doucet-Boudreau*, para. 28; *Conseil scolaire francophone de C.-B.*, para. 17.

[20] In *Mahe*, the Supreme Court of Canada recognized that s. 23(3) of the *Canadian Charter* includes the right for linguistic minorities to exercise a measure of management and control over the schools that provide education in their language. Such management and control "is vital to ensure that their language and culture flourish": *Mahe*, p. 372. The measure of control and management varies based on the circumstances, but may include the management of the schools through school boards where the number of children warrants. As Dickson, C.J. indicated, "[i]n some circumstances an independent Francophone school board is necessary to meet the purpose of s. 23": *Mahe*, p. 374. While Dickson, C.J. had in mind the French-speaking minority in Alberta, these remarks are just as applicable to the English-speaking minority in Quebec. This approach was recently reiterated by Wagner, C.J. in *Conseil scolaire francophone de C.-B.*, para. 24: "The number of children of rights holders might also entitle the minority to the management and control of a separate school board".

[21] But even where the number of children does not warrant the creation of school boards for the linguistic minority, in most cases in which the number justifies at least one separate educational institution, the "measure of management and control" of schools guaranteed by s. 23 must at a minimum ensure "exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns": *Mahe*, pp. 375-376 (emphasis added), which includes, at a minimum, exclusive control over expenditures of funds relating to instruction in its language and the facilities for doing so, the appointment and direction of those responsible for the administration of such instruction and facilities, the establishment of programs of instruction, the recruitment and assignment of personnel, including teachers, and the making of agreements for education and services for minority language pupils, as Dickson, C.J. indicated in *Mahe*, p. 377:

> In my view, the measure of management and control required by s. 23 of the Charter may, depending on the numbers of students to be served, warrant an independent school board. Where numbers do not warrant granting this maximum level of management and control, however, they may nonetheless be sufficient to require linguistic minority representation on an existing school board. In this latter case:
>
> (1) The representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed;
>
> (2) The number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible;

> (3) The minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:
>
> (a) expenditures of funds provided for such instruction and facilities;
>
> (b) appointment and direction of those responsible for the administration of such instruction and facilities;
>
> (c) establishment of programs of instruction;
>
> (d) recruitment and assignment of teachers and other personnel; and
>
> (e) making of agreements for education and services for minority language pupils.
>
> [Emphasis added]

[22] Likewise, "the persons who will exercise the measure of management and control described above are 's. 23 parents' or persons such parents designate as their representatives": *Mahe*, p. 379.

[23] Of course, the exclusive control does not preclude the application of provincial laws and regulations governing the content and the qualitative standards of educational programs, but the Supreme Court specified that these must not interfere "with the linguistic and cultural concerns of the minority": *Mahe*, p. 380. It provided a good summary of the limits imposed by s. 23 on legislative discretion in *Arsenault-Cameron v. Prince Edward Island,* 2000 SCC 1*,* [2000] 1 S.C.R. 3, para. 53:

> The province has a legitimate interest in the content and qualitative standards of educational programs for the official language communities and it can impose appropriate programs in so far as they do not interfere with the legitimate linguistic and cultural concerns of the minority. School size, facilities, transportation and assembly of students can be regulated, but all have an effect on language and culture and must be regulated with regard to the specific circumstances of the minority and the purposes of s. 23.

[24] The rights conferred by s. 23 of the *Canadian Charter* must also be considered in light of the historical context of the linguistic minority in each of the provinces of Canada: *Conseil scolaire francophone de C.-B.*, para. 17. It is indisputable that this section is designed to correct the progressive erosion of minority official language groups through remedial measures: *Mahe*, pp. 363-364. It therefore imposes positive duties on governments to ensure that the linguistic minority has real and effective control of its schools if the number warrants.

[25] In Quebec, the protection of the school rights of the English-speaking minority seems, at first glance at least, to be tied in part to the rights formerly guaranteed in

Quebec by s. 93 of the *Constitution Act, 1867*, which deals with denominational schools. Indeed, the principal respondent in the present matter, the *Quebec English School Boards Association*, which brings together all of the English school boards of Quebec, was founded in 1936 as the *Provincial Association of Protestant School Boards of the Province of Quebec* and changed its name only in 1999, when denominational school boards were abolished in Quebec. Thus, as Dickson, C.J. emphasized in *Mahe*, p. 373, denominational schools were the principal bulwarks of minority language education:

> Historically, separate or denominational boards have been the principal bulwarks of minority language education in the absence of any provision for minority representation and authority within public or common school boards. Such independent boards constitute, for the minority, institutions which it can consider its own with all this entails in terms of opportunity of working in its own language and of sharing a common culture, interests and understanding and being afforded the fullest measure of representation and control. These are particularly important in setting overall priorities and responding to the special educational needs of the minority.

[26] When the *Constitution Amendment, 1997 (Quebec)* (SI/97-141) was enacted, incorporating new s. 93A in the *Constitution Act, 1867* in order to make the constitutional rights guaranteed by s. 93 inapplicable in Quebec, the federal government, via Stéphane Dion, its Minister of Intergovernmental Affairs, who was in charge of the file, informed Parliament that this amendment would not have an impact on the English-speaking minority in Quebec, given the constitutional rights conferred in s. 23 of the *Canadian Charter*, in particular the right of that linguistic minority to have separate school boards it could manage and control (House of Commons, Debates of the House of Commons, 36th Parliament, 1st Sess., Vol. 135, No. 31, November 17, 1997, p. 1743 (Hon. S. Dion):

> In that connection I reiterate that Quebec's anglophone minority, which has traditionally controlled and managed its own school system, thanks to protections granted to Protestants under section 93, can support amending that provision in all confidence. That is because its rights have been better protected since the coming into force of the Constitution Act, 1982, specifically section 23 of the Canadian charter.
>
> Unlike section 93, section 23 of the Canadian charter has the specific objective of providing francophone and anglophone minorities with linguistic guarantees with respect to education. It has been interpreted progressively and generously by the courts. In effect, section 23 guarantees official language minorities the right to manage and control their own schools and even their own school boards. A number of groups and experts confirmed that during their testimony to the committee.
>
> In that respect the establishment of linguistic school board will enable the anglophone community to consolidate its school population of [*sic*] and gain the maximum benefit from the guarantees under section 23.

[Emphasis added]

[27] Moreover, s. 23 is not subject to the notwithstanding clause in s. 33 of the *Canadian Charter*, which reflects the importance attached to the rights set forth therein and the intention that intrusions on it be strictly circumscribed: *Conseil scolaire francophone de C.-B.*, para. 148. Section 23 protects an official language minority, including Quebec's English-speaking minority, from the effects of decisions of the majority in the area of education by granting the minority certain control in that regard. By excluding s. 23 from the scope of the notwithstanding clause, the *Canadian Charter* prevents the government of a province from being able to circumvent its constitutional obligations: *Conseil scolaire francophone de C.-B.*, para. 149.

[28] This description of the state of the law regarding s. 23 makes it easy to distinguish the present case from the matter in *Hak*. Not only did that decision deal in part with s. 28 of the *Canadian Charter*, with respect to which the state of the law is more uncertain and embryonic than that pertaining to s. 23 of the *Canadian Charter*, but, above all, the legislature had used the notwithstanding clause of s. 33 of the *Canadian Charter*, which it has not done and cannot do here, as we have seen.

* * *

[29] In addition to this legal context, one must consider the demographic context, which is described in the respondents' pleadings filed in support of their application for an interlocutory injunction. Thus, in 1971 there were more than 250,000 students registered in elementary and secondary English schools in Quebec, all segments combined, while there were less than 100,000 in 2018-2019, representing a 62% decrease (*Application for Judicial Review and Declaratory Judgment, Notice of Constitutional Question and Application for Interlocutory Injunction and Provisional Execution of the Injunction Pending Appeal*, para. 16-21).

[30] Similarly, according to the respondents, while the number of French mother tongue speakers in Quebec rose from 4.8 million in 1971 to more than 6.2 million in 2016, the number of English mother tongue speakers decreased from approximately 788,000 to 600,000, which is a significant demographic decline, dropping from 13% to 7.5% of the total population of Quebec.

* * *

[31] Before addressing the criteria for granting a stay, it is necessary to carefully examine *Bill 40* and its effect on the rights of Quebec's language minority in light of the rights guaranteed in s. 23 of the *Canadian Charter*.

[32] The respondents argue that the very purpose of *Bill 40* is to effect a paradigm shift in school organization and governance in Quebec. This change involves abolishing the school boards and replacing them with "school service centres" whose mission would be radically different. In the respondents' view, as the new name implies, the

school service centres are service delivery centres whose primary purpose is to ensure that school services are delivered in accordance with ministerial regulations and directives. Thus, school service centres no longer play a decisive governance role, but rather an implementing role.

[33] In support of this statement regarding the purpose of *Bill 40*, the respondents refer to the remarks of Quebec's Minister of Education in his news release at the time *Bill 40* was tabled as well as on November 6, 2019 during the National Assembly consultations on *Bill 40* leading to its enactment (trial judgment, para. 66):

> [TRANSLATION]
>
> But this is where one cannot exactly transpose what commissioners do versus what people on a board of directors will do. It's a paradigm shift, the pyramid of powers is reversed, the people who will sit on the boards will not have the same mission, the same workload, and, in fact, there will be training so they can understand their roles, duties and responsibilities. But in that respect, I can understand that for someone who is looking at the bill and thinks that we are simply going to ask the board members to do what the commissioners do, but to a lesser degree, that is a problem. That said, that's not it. The mission will be different. They will be asked to come and sit on a board, to be a kind of guardian of fairness, a guardian ... that decisions are made according to the rules, and they will not be asked to govern a governing body, as school boards are at present. And that's where there's a paradigm shift, and that's where it requires a little more effort, but I understand that concern.
>
> [Emphasis added]

[34] But, over and above the Minister's presentation, the respondents argue in particular that this paradigm shift is reflected in the very text of *Bill 40.* It is useful to present some of the amendments raised by the respondents in support of their arguments. These pertain primarily to two aspects: the loss of power of school service centres to employees and the Minister and the loss of control by the English-speaking minority over its schools and the education provided there.

[35] First, the respondents point out that, unlike members of a council of commissioners, members of a board of directors of a school service centre will not be remunerated: s. 66 of *Bill 40*, replacing s. 175 of the *Education Act* ("*EA*"), which indicates their diminished role. They then point out that the Minister may annul any decision made between October 1, 2019 and November 5, 2020 by an English school board that has an impact on the school board's human, financial, physical or information resources that the Minister considers contrary to the future interests of a school service centre: s. 329 of *Bill 40*.

[36] The Minister may now determine, for all the school service centres or for one or certain centres, objectives or targets relating to their administration, organization or operation, thereby ensuring significant effective control over the activities of the centres: s. 142 of *Bill 40*, which adds s. 459.5.4 to the *EA*. These powers are in addition to the slew of imposing ministerial powers already provided for in the *EA* and added thereto over the years.

[37] The members of a board of directors of a school service centre no longer play any political role in educational matters and cannot express themselves as spokesperson. Henceforth, it is the director general, a civil servant, who acts alone as "official spokesperson" for the centre: s. 93 of *Bill 40*, which amends s. 201 *EA.* It may be presumed that the official spokesperson role extends to presenting observations to the Minister regarding the educational needs of the English-speaking minority served by the school service centre.

[38] The powers of school service centres over school immovables and equipment are also substantially modified as compared with the powers of the school boards they replace. Besides the fact that they must now "facilitate the sharing of resources and services, especially administrative resources and services, with each other [or] with other public bodies" (s. 105 of *Bill 40*, which adds s. 215.2 to the *EA*), they can no longer acquire an immovable without the Minister's authorization (s. 117 of *Bill 40*, which amends s. 272 *EA*), nor can they construct, enlarge, develop, convert, demolish, replace or renovate their immovables without the Minister's authorization if the cost of the work exceeds the amounts determined by the Minister (s. 118 of *Bill 40*, which adds s. 272.1 to the *EA).* Henceforth, the school service centre's space requirement plan is also subject to the approval of the Minister (s 118 of *Bill 40*, which adds ss. 272.8 and 272.9 *EA*), who may determine the standards and procedures applicable to such forecasts (s. 139 of *Bill 40*, which adds s. 457.7.1 to the *EA*). The Minister may also order a school service centre to give a municipality access to its facilities (s. 142 of *Bill 40*, which adds s. 459.5.5 to the *EA*).

[39] In addition to these measures which diminish the powers previously held by school boards, the respondents argue that *Bill 40* also affects the control that the English-speaking minority in Quebec exercises over its schools, on two levels: (1) through a new electoral system and (2) through the creation of a commitment-to-student-success committee.

[40] Regarding the electoral system, *Bill 40* effects a fundamental reform for French-speaking school service centres, whose essential clientele represents over 92% of the population of Quebec, in that the members of their boards of directors are no longer elected. While the situation is different for English-speaking school service centres, which are now subject to a new electoral process, the respondents argue that the changes to that process significantly weaken the representative power of the boards of directors.

[41] Thus, the pre-*Bill 40 EA* and *Act respecting school elections* provide that the vast majority of commissioners (8 to 18) are elected for a four-year term by all the members of the English language minority based on a number of electoral divisions that varies depending on the total number of electors. These electoral divisions are delimited, keeping in mind, as far as possible, any natural community, in such a manner as to ensure that each electoral division has the greatest possible socioeconomic homogeneity. In addition to these elected commissioners, there are three or four representatives of the parents' committee and a maximum of two commissioners appointed after consulting with the groups most representative of the social, cultural, business and labour sectors in the region.

[42] *Bill 40* replaces this system with another one that confers the majority of positions on the board of directors to parents who sit on the governing board of a school or vocational training centre (from 8 to 17 members), who will be elected in electoral divisions. As regards representatives of the minority language community who do not sit on the governing board (from 4 to 13 members), they will now be elected from a single electoral division comprising the territory for the entire school service centre. They must also meet certain additional eligibility requirements under *Bill 40*, which we will return to below. Lastly, four members of the board of directors are designated from among staff members, namely, one teacher, one non-teaching professional staff member, one support staff member and one principal of an educational institution.

[43] The English school boards, as representatives of the linguistic minority, firmly and unanimously, oppose this new electoral process, both because it prevents the linguistic minority from designating the representatives it wants and because the system is impracticable.

[44] According to the respondents, nearly all members of the minority language community will not be eligible in the upcoming elections as candidates for the seats reserved for the members of the governing boards, which is the majority of seats. According to the evidence filed by the respondents (Exhibit P-11), there were 267,104 electors registered on the English school boards' voting lists in 2014, all of whom were eligible as candidates for the position of commissioner. Since, according to the respondents' estimates, there will be at most between 1,134 and 4,093 members of the governing boards of these English-speaking school service centres, a significant portion of the official minority language electorate will henceforth be ineligible for these positions.

[45] As for the positions reserved for community representatives, *Bill 40* requires that at least one person have expertise in governance, in ethics, in risk management or in human resources management, that another person have expertise in finance or accounting or in financial or physical resources management, that another come from the community, municipal, sport, cultural, health, social services or business sector and that a fourth be 18 to 35 years old. In addition to the fact that these criteria are difficult to determine and will likely dissuade a number of individuals, the respondents argue that

they disqualify a considerable number of members of the minority language community as candidates.

[46] Finally, there is no requirement that the four positions reserved for staff members be allocated to individuals from the minority language community.

[47] Lastly, the respondents argue that the establishment of the commitment-to-student-success committee also erodes the rights of the minority language community set out in s. 23 of the *Canadian Charter*. This committee is provided for in s. 91 of *Bill 40*, which adds ss. 193.6 to 193.9 to the *EA.* This new committee is made up solely of members of the staff of the school service centre, except for one member from the education research sector, without any requirement that one of the members be from the minority language community. It is this committee that develops and proposes the commitment-to-success plan provided for in s. 209.1 *EA*, which sets out, among other things, the needs of the official linguistic minority's schools, the directions and objectives selected by those schools and their targets. Although the commitment-to-success plan is subject to the approval of the board of directors of the school service centre, it is clear, according to the respondents, that the objective is to delegate the principal directions of the school service centre to staff rather than to the board of directors.

* * *

[48] Given that the AGQ rightly conceded that the serious issue test has been met, he challenges the existence of an irreparable harm. He submits that the trial judge did not define the harm, save for stating, theoretically, that the disappearance of the school boards constitutes, in and of itself, irreparable harm.

[49] Regardless of how the judge expressed himself when considering the issue of harm, first, the AGQ gives the judge's reasons a narrow meaning which they do not have and, second, he disregards the judge's analysis of *Bill 40* in connection with the serious question test, an analysis during which the harm he relied on was identified.

[50] The replacement of English school boards by the school service centres forms part of what, at first glance at least, constitutes (a) a significant transfer of the power of management and control over the English language minority's educational system to the Minister and to the employees of the future school service centres, and (b) major restrictions on the candidacy of a significant segment of s. 23 rights holders for election to the boards of directors of the new school service centres.

[51] The trial judge dealt at length with these aspects (in paras. 39-48 and 62-126) when analyzing the existence of a serious question, an analysis that cannot be severed from his remarks as a whole. It was therefore by taking into consideration all of the effects of *Bill 40* on the linguistic rights of Quebec's official language minority that the judge, relying on the Alberta Court of Appeal ruling in *Whitecourt Roman Catholic Separate School District No. 94 v. Alberta*, 1995 ABCA 260 ("*Whitecourt*"), concluded that there was irreparable harm. The judge did not err on this point.

[52] In *Whitecourt*, the trial judge had refused to issue an interlocutory injunction in order to exempt the Catholic school network in Alberta—which enjoyed certain constitutional protections (see s. 15 of *Whitecourt*)—from the application of the provisions of provincial legislation intended to consolidate these school boards for purposes of administrative and financial rationalization. It is worth noting that the consolidation of the school boards in question did not affect the right to elect representatives to the consolidated school board. Notwithstanding this, the Court of Appeal of Alberta unanimously concluded that the proposed consolidation had sufficient effects to satisfy the irreparable harm test. In its view, measures that threaten self-governance of a public institution that serves a minority may constitute irreparable harm in appropriate circumstances:

> [29] In our view, evidence of actual harm is unnecessary where the alleged harm relates to the abolishment of the entity alleging it, and the substitution of another administrative body. Reconstitution of that entity could not fully redress prejudice arising from the period of its non-existence. Harm arising from the effects of changes in policy or philosophy is not fully reversible. Though the policy or philosophy may ultimately be reversed, those adversely affected by it during the interim cannot be wholly compensated. Ratepayers whose elected representatives would be deposed, students who may not be allowed to progress in accordance with their competency, aboriginal students whose special interests may not be adequately represented, and students and parents whose religious philosophy may be compromised, even on a temporary basis, would all suffer harm of the sort which is not compensable.
>
> […]
>
> [32] In our view, and with great respect, the learned chambers judge misunderstood the law regarding the concept of irreparable harm. He erred in too narrowly restricting that concept to the examples cited by Sopinka, J. and Cory, J. at p. 341 in *RJR-MacDonald* of cases involving market loss or damage to business reputation, and in concluding that any harm that might arise here would not constitute similar harm. He erred as well by failing to appreciate the nature of the critical harm that may result from the substitution of decision makers. Though it is the nature and not the magnitude of the harm that must be considered, the harm must nonetheless be serious. However, in our view, harm that threatens the essence of self governance is serious.
>
> [Emphasis added]

[53] This is precisely the irreparable harm invoked here by the English school boards. The distinction the AGQ is attempting to make—that in the case at bar the school boards are not disappearing but are merely being modified and are merely changing their name—seems, *prima facie*, both formalistic and unduly simplistic. It bears reminding that s. 23 of the *Canadian Charter* guarantees to the official language minority, if the numbers warrant it, "exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns" (*Mahe,* p. 376). In the present case, while it is true that the English-speaking minority retains a separate entity,

the respondents submit that, in fact, the transfer of powers to the Minister and the method of selecting the members of the board of directors remove exclusive control thereof from the s. 23 rights holders, thereby infringing their guaranteed rights. Certainly, it will be up to the judge hearing the case on its merits to rule on this issue, but the fact remains that this is not a simple debate on structure, as the AGQ is attempting to convince us, but rather one pertaining to the effective continued exercise by the English-speaking minority of its right of exclusive control guaranteed by the Constitution.

[54] The amendments brought about by *Bill 40*, as presented by the respondents, were sufficient, in combination, to allow the trial judge to conclude, at this stage and at first sight, that there is a significant transfer to the Minister and to staff of the school service centres of the power to manage and control the English school boards. *Bill 40* also seems to impose significant restrictions on the candidacy of numerous members of the minority language community for positions on the boards of directors of the school service centres. This leads to the conclusion that there is irreparable harm to the very governance of the English school boards by Quebec's official language minority. We would add that the courts have, on several occasions, accepted the fact that a potential infringement of s. 23 of the *Canadian Charter* could constitute irreparable harm, at least to those students receiving an education during the proceedings (*Conseil des écoles publiques de l'Est de l'Ontario v. Ontario Federation of School Athletics Associations*, 2015 ONCS 5328, and the cases cited, para. 70).

[55] The AGQ relies on *Hogan v. Newfoundland (Attorney General)* (1998), 163 D.L.R. (4th) 672, 1998 CanLII 18115 (NL CA) ("*Hogan*") to argue the contrary. The context in which that judgment was rendered indicates it has a very limited scope. Indeed, the decision rests largely on the specific facts of the case. In *Hogan*, religious representatives had sought an interlocutory injunction to delay the Government of Newfoundland and Labrador's efforts to implement school reform seeking to dismantle the denominational school system. The reform followed a referendum held on September 5, 1995 during which the province's population had approved the recommendation of a Royal Commission of Inquiry seeking to amend the constitutional covenant applicable to the province that conferred vast powers over education to the denominational institutions. The constitutional amendment was enacted by the province and the federal government and ultimately approved by the Parliament of Canada at the end of 1996.

[56] The interlocutory injunction was refused principally because the new school system had already been put into place and the students were to begin school imminently: *Hogan*, paras. 76-79. It is therefore on the basis of the balance of convenience and the chaos that would ensue for students if the interlocutory relief were granted that the injunction was refused: *Hogan* paras. 78 and 85. That is not the case here.

[57] Therefore, as regards the irreparable harm test, there is no error warranting this Court's intervention.

* * *

[58] We must now consider the balance of convenience test. While the Court does not necessarily endorse the trial judge's entire analysis, this test also favours the respondents.

[59] The public interest plays a leading role in weighing the balance of convenience when considering a stay of legislation. There is no doubt that the public interest is presumed to be reflected in the impugned legislation and that a court must tread very carefully before ordering an interlocutory stay of legislation without the benefit of all the evidence and of argument on the merits. This is why, as we stated above, such a measure must be reserved for "clear cases". However, although the government need not prove the existence of a substantial and pressing need or an urgent evil to be eradicated (*Hak*, paras. 104 and 105), the fact remains that it "does not have a monopoly on the public interest" and the public interest may not necessarily always gravitate in favour of enforcement of existing legislation: *RJR – MacDonald*, p. 343. Similarly, the public interest is not solely that of society generally, but may also involve the particular interests of identifiable groups: *RJR – MacDonald*, p. 344; *Groupe CRH Canada inc. c. Beauregard*, 2018 QCCA 1063, para. 86. This is especially true in the present case, because, as the trial judge noted, the rights conferred by s. 23 of the *Canadian Charter* have a significant collective aspect.

[60] In the present case, the public interest must be assessed by considering the limited scope of the requested stay. It is not a question of staying the effect of *Bill 40* and the significant reform of the educational system it entails (a paradigm shift according to the responsible Minister) for the entire population of Quebec. Indeed, even if the stay ordered by the trial judge remains in effect, the reform that *Bill 40* introduces will nevertheless apply to all of the Francophone public educational institutions serving more than 92% of the population of Quebec.

[61] Therefore, there is no question here of preventing the government from implementing the legislative reforms for which it was elected and depriving the population of its benefits, as the AGQ argues, but rather of specifically weighing the effects of this reform on the constitutional rights of the official linguistic minority representing approximately 7.5% of the population according to the evidence in the record. Although this is not a case where a constitutional exemption may be sought (see *Hak*, paras. 154-155), the fact remains that the limited effect of the stay may play a role in weighing the balance of convenience, because the reform intended by the government already applies and will continue to apply to the vast majority of the citizens of Quebec.

[62] The exercise therefore consists in weighing the public interest presumed to be reflected in *Bill 40* against the interest of ensuring that the rights guaranteed to the

official language minority in Quebec under s. 23 of the *Canadian Charter* are respected, including the right to exercise "exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns": *Mahe*, pp. 375-376.

[63] As Iacobucci and Arbour, JJ. indicated in *Doucet-Boudreau*, at para. 29, the rights guaranteed in s. 23 are "particularly vulnerable to government delay or inaction". They are also particularly susceptible to being weakened by subtle legislative erosion. In *Conseil scolaire francophone de C.-B.*, at para. 16, Wagner, C.J. noted that "[t]his means that the courts have a crucial role to play, as the framers made them responsible for overseeing the implementation and protection of *Charter* rights".

[64] That being said, given that the changes in school governance resulting from *Bill 40* appear, at first glance at least, to withdraw powers of management and control from the English school boards and limit the eligibility of the members of the official language minority of Quebec for elected positions in the new school service centres, in this case the public interest leans in favour of protecting the rights of the official linguistic minority rather than implementing *Bill 40* in the English educational sector, at least until there is a judgment on the merits.

[65] Lastly, there is no need to limit the scope of the interlocutory injunction issued by the trial judge to only the impugned provisions of *Bill 40*, as the AGQ suggests. First, the trial judge concluded that there was much more at issue than the impugned provisions and that it would be appropriate to stay the effect of *Bill 40* as a whole, as the respondents, in fact, had requested. Second, a careful review of *Bill 40* and the laws it amends indicates that a partial stay would lead to extreme legal confusion surrounding the application of these various laws in the English educational sector, resulting in legal chaos. Third, the court proceedings have only just begun and it is possible that the respondents will add several other provisions of *Bill 40* to their constitutional challenge. Lastly, it is worthwhile repeating that, even though *Bill 40* as a whole is stayed, the stay affects only the English school boards. In this sense, the vast majority of the intended effects of *Bill 40* are following their normal course. In these circumstances, there is no reason to intervene in the judge's decision to stay *Bill 40* in its entirety as regards the English school boards.

* * *

FOR THESE REASONS, THE COURT:

[66] **GRANTS** the application for leave to appeal;

[67] **DISMISSES** the appeal;

[68] **THE WHOLE** with legal costs in favour of the respondents.

FRANCE THIBAULT, J.A.

ROBERT M. MAINVILLE, J.A.

BENOÎT MOORE, J.A.

Mtre Samuel Chayer
Mtre Manuel Klein
Mtre Alexandra Hodder
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Mtre Lucie Roy
For the impleaded party, English Montreal School Board

Mtre Myriam Donato
GWBR
For the impleaded parties, Western Québec School Board, Riverside School Board, Eastern Townships School Board, Sir Wilfrid Laurier School Board and Eastern Shores School Board

Mtre Pierre Duquette
NORTON ROSE FULBRIGHT CANADA
For the impleaded party, Central Québec School Board

Chris Eustace
Intervening as *amicus curiae* (article 187 of the *Code of Civil Procedure*)

Date of hearing: September 14, 2020

2001 BCSC 1593
British Columbia Supreme Court [In Chambers]

Law Society (British Columbia) v. Canada (Attorney General)

2001 CarswellBC 2569, 2001 BCSC 1593, [2001] B.C.J. No. 2420, [2001] B.C.T.C. 1593, [2002] 3 W.W.R. 455, [2002] B.C.W.L.D. 96, 109 A.C.W.S. (3d) 648, 14 C.P.C. (5th) 242, 160 C.C.C. (3d) 347, 207 D.L.R. (4th) 705, 89 C.R.R. (2d) 321, 98 B.C.L.R. (3d) 282

The Law Society of British Columbia (Petitioner) and Attorney General of Canada (Respondent) and Canadian Bar Association (Intervenor)

Federation of Law Societies of Canada (Petitioner) and Attorney General of Canada (Respondent) and Canadian Bar Association (Intervenor)

Allan J.

Heard: November 8, 13, 14, 2001
Judgment: November 20, 2001 *
Docket: Vancouver L013116, L013117

Counsel: *Josiah Wood*, *Q.C.*, *Roy Millen*, for Petitioner, Federation of Law Societies of Canada
Jack Giles, *Q.C.*, *Cassandra Doulis*, for Petitioner, Law Society of British Columbia
Ron A. Skolrood, *G. Delbigio*, *M. Bain*, for Intervenor, Canadian Bar Association
Harry J. Wruck, *Q.C.*, *Raymond D. Leong*, *W. Paul Riley*, for Respondent, Attorney General of Canada

Allan J. **[In Chambers]:**

1 On November 8, 2001, Regulations implementing certain provisions of the *Proceeds of Crime (Money Laundering) Act,* S.C. 2000, c. 17 (the "Act") came into force. The petitioners, The Law Society of British Columbia (the " Law Society") and the Federation of Law Societies of Canada (the " Federation"), seek to exempt lawyers from the force of that legislation. The Canadian Bar Association (the " CBA") sought and obtained leave to intervene.

2 The petitioners challenge the constitutional validity of the legislation and seek the following relief:

• a declaration that ss. 5(i) and 5(j) of the Act are inconsistent with the Constitution of Canada, and are of no force and effect to the extent that "persons and entities" include legal counsel;

• a declaration that ss. 5(i) and 5(j) of the Act be read down so as to exclude legal counsel from "persons and entities" referred to in those subsections;

• a declaration that s. 5 of the Regulations is *ultra vires* the Act and inconsistent with the Constitution of Canada, invalid and has no force and effect;

• interim and interlocutory relief suspending the operation of s. 5 of the Regulations until the hearing of the petitions;

• a declaration that ss. 62 and 63 of the Act be read down so as to exclude legal counsel from "persons and entities" referred to in those sections;

• a declaration that s. 64 is inconsistent with the Constitution of Canada, invalid and of no force and effect; and

• a declaration that s. 17 of the Act is inconsistent with the Constitution of Canada, invalid and of no force and effect.

3 On this application, the petitioners, supported by the CBA, seek interlocutory relief exempting lawyers from the effect of s. 5 of the Regulations until the petitions can be heard on their merits. They assert that s. 5 of the Regulations makes it a crime for every lawyer to fail to obtain and secretly report to a government agency, any information that has raised suspicion in the course of the lawyer's dealing with his or her client. It is left to the subjective opinion of the lawyer to determine what is a "suspicious transaction". The petitioners say this legislation threatens the independence of the bar and solicitor-client confidentiality, and creates a conflict between lawyers' duties to their clients and their obligation to report confidential information to the government.

4 The respondent Attorney General of Canada (the "Government") opposes the application.

The impugned legislation:

5 "Money laundering" occurs when money produced through criminal activity is converted into "clean money", the criminal origins of which are obscured. The legislative purpose of the Act, described in s. 3, is to enable authorities to detect and deter money laundering, to facilitate the investigation and prosecution of money laundering offences, to enhance law enforcement, and to assist in fulfilling Canada's international commitments to participate in the global battle against money laundering.

6 The legislation creates the Financial Transactions and Reports Analysis Centre of Canada (the "Centre") and empowers it to gather information concerning money laundering, including " suspicious transactions," and to share it with domestic and international law enforcement agencies.

7 The Act received Royal Assent on June 29, 2000 and portions of it have been proclaimed in force incrementally. Part I of the Act is entitled "Record Keeping and Reporting of Suspicious Transactions."

8 On July 5, 2000, a number of sections establishing the infrastructure for the legislative scheme came into force. Those sections included ss. 1 to 4 of Part I setting out the Act's definitions and purpose, Part III which creates the Centre, Part IV which provides the power to make regulations, and Part V which contains the offences and punishment provisions.

9 Sections 5, 7, 8, 10 and 11 of Part I came into force on October 28th, 2001.

10 Section 5 of the Act describes the persons and entities that are subject to Part I. While legal counsel are not named, s. 5 (i) refers to "persons engaged in a business, profession or activity described in regulations made under paragraph 73(1)(a)". Section 5(j) refers to "persons engaged in a business or profession described in regulations made under paragraph 73(1)(b), while carrying out the activities described in the regulations".

11 Sections 73(1)(a) and (b) provide:

> s. 73(1) The Governor in Council may, on the recommendation of the Minister, make any regulations that the Governor in Council considers necessary for carrying out the purposes and provisions of this Act, including regulations
>
> (a) describing businesses, professions and activities for the purpose of paragraph 5(i);
>
> (b) describing businesses and professions for the purpose of paragraph 5(j), and the activities to which that paragraph applies;

12 The Regulations, which make legal counsel subject to Part 1 of the Act, came into force on November 8th, 2001. Section 5 provides:

> s. 5. Every legal counsel is subject to Part I of the Act when they engage in any of the following activities on behalf of any person or entity, including the giving of instructions on behalf of any person or entity in respect of those activities:

(a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses or bail;

(b) purchasing or selling securities, real property or business assets or entities; and

(c) transferring funds or securities by any means.

13 The term "legal counsel" is defined by s. 2 of the Act as " in the province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor."

14 Section 7 of the Act requires the reporting of suspicious transactions:

s. 7 ...every person or entity shall report to the Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence.

15 The "prescribed form and manner" are described in the Regulations. Section 9 of the Regulations requires that a report under s. 7 of the Act must contain information set out in the Schedule to the Regulations. That Schedule identifies the extensive information that must be included in such a report, known as a "Suspicious Transaction Report." Part G of the Schedule, entitled "Description of Suspicious Activity", requires:

1. Detailed description of the grounds to suspect that the transaction is related to the commission of a money laundering offence.

16 Section 10 of the Regulations requires that a Suspicious Transaction Report be sent to the Centre within thirty days after the person or entity "first detects a fact respecting a transaction that constitutes reasonable grounds to suspect that the transaction is related to the commission of a money laundering office."

17 Section 8 of the Act prohibits legal counsel from disclosing to their clients that they have made a Suspicious Transaction Report under s. 7 or disclosing the contents of that Report with the intent to prejudice a criminal investigation, whether or not one has begun.

18 Section 11 of the Act states that nothing in Part I "requires a legal counsel to disclose any communication that is subject to solicitor-client privilege." The scope of solicitor-client privilege is not defined.

19 Section 75 of the Act provides that a breach of s. 7 of the Act is a hybrid offence, punishable on indictment by a fine of up to $2,000,000 and imprisonment for up to five years. Section 76 provides that a breach of s. 8 is punishable on indictment by imprisonment of up to two years.

20 The Centre has published "Guideline 2: Suspicious Transactions", which includes common indicators and industry-specific indicators of money laundering. The petitioners say that many of the indicators to which legal counsel are specifically directed (such as, "client appears to be living well beyond his or her means in light of his or her employment, profession or business") lack specificity and are not unusual or suspicious in the context of a solicitor-client relationship.

The issue:

21 The narrow issue on this application is whether legal counsel should be exempted from the provisions of s. 5 of the Regulations pending the hearing of the petitions on their merits. The petitioners do not question the general principle that the effect of democratically enacted legislation should not be suspended temporarily pending a determination of the issues of unconstitutionality or invalidity on the merits. However, they assert that this case is an exception to the general rule and they seek only an exemption from the legislation, continuing the status quo, rather than a suspension of the legislative scheme.

22 The constitutional issue raised by the petitioners is whether certain provisions of the legislation that impose duties on legal counsel are unconstitutional because they violate the protected right of an independent bar, the *Constitution Acts 1867* and *1982*; and ss. 7, 8 and 10(b) of the *Canadian Charter of Rights and Freedoms* (the *"Charter")*.

23 The respondent submits that the petitioners are not entitled to interlocutory relief. Moreover, Mr. Wruck, counsel for the Government, challenges these proceedings for several reasons: (a) the petitioners lack standing to bring these proceedings; (b) this Court is not the *forum conveniens;*(c) interim injunctive relief does not lie against the Crown; (d) the petitioners are seeking a declaration of invalidity without a full hearing; and (e) a constitutional challenge requires adjudicative facts.

The relevant principles of law relating to interim relief on a constitutional challenge to legislation:

24 Counsel agree that the principles governing interim relief in a constitutional challenge are articulated in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), and *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 (S.C.C.). They disagree as to whether the application of those principles to the issues raised by the petitioners entitles them to the relief they seek.

25 Before considering the issue of whether the petitioners can meet the threshold for interlocutory relief, I propose to consider the Government's objections to the standing of the petitioners and their right to challenge the legislation.

(a) Do the petitioners have standing as proper parties to bring these proceedings?

26 Mr. Wruck disputes the petitioners' standing to challenge the constitutional validity of the legislation. He asserts that they have no direct legal interest in the impugned legislation because it imposes no obligations or duties on them, and, further, that they cannot satisfy the criteria for public interest standing.

27 In *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.), Martland J., for the majority of the Court, described the two methods of attaining standing at p. 598:

> I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

28 The principles of public interest standing were reconsidered in *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.). At p. 253, Cory J., for the Court, stated:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

29 The Law Society claims it is directly affected by the impugned legislation, which impacts its obligations to maintain proper standards of professional and ethical conduct by lawyers. Mr. Giles submits that the legislation forces lawyers to choose between two evils. They must either (1) breach solicitor-client confidentiality, or (2) breach the Act by failing to report clients in order to maintain solicitor-client confidentiality, thus incurring stiff penal sanctions. Either course of action would impose upon the Law Society the obligation to investigate, and discipline where necessary, lawyers who have either breached solicitor-client confidentiality, or who have breached the Act and brought their professional reputation into question.

30 Pursuant to s. 3 of the *Legal Profession Act*, S.B.C. 1998, c. 9, the Law Society's paramount statutory duty is to the public interest:

3. It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by

(i) preserving and protecting the rights and freedoms of all persons,

(ii) ensuring the independence, integrity and honour of its members, and

(iii) establishing standards for the education, professional responsibility and competence of its members and applicants for membership, and

(b) subject to paragraph (a),

(i) to regulate the practice of law, and

(ii) to uphold and protect the interests of its members.

31 The Federation's members are representatives of the governing bodies of the legal profession in all of the Canadian Provinces and Territories, save Nunavut. On August 18, 2001, the members of the Federation unanimously resolved to initiate appropriate legal challenges to the Act and Regulations.

32 In my opinion, the Law Society has a direct legal interest over and above any general interest by virtue of its statutory obligations imposed by the *Legal Profession Act.* In *Canadian Bar Assn. v. British Columbia (Attorney General)* (1993), 101 D.L.R. (4th) 410 (B.C. S.C.), the Court dismissed the provincial Attorney General's challenge to the standing of the CBA and the Law Society to attack the constitutional validity of the *Social Service Tax Amendment Act, 1992*, which imposed a tax on the purchase of legal services. The right of the Law Society to challenge the constitutionality of certain sections of the *Immigration Act*, R.S.C. 1985, c. I-2 was not questioned in the recent case of *Law Society (British Columbia) v. Mangat*, [2001] S.C.J. No. 66, 2001 SCC 67 (S.C.C.).

33 In addition, both petitioners qualify for public interest standing: there is a serious issue as to the constitutional validity of the impugned legislation, both have a genuine interest in its validity, and there is no other reasonable or effective way to challenge its validity.

34 I do not agree with Mr. Wruck that the most reasonable and effective method to challenge the legislation would be to have a lawyer who was "directly" affected by the Act test its validity in the context of a specific transaction.

35 An effective fact-specific *Charter* challenge to the legislation might be raised in two ways. A lawyer who failed to report a suspicious transaction because of concerns about breaching solicitor-client confidentiality could be charged under the impugned legislation, and challenge its constitutionality as a defence to the charges. Alternatively, a lawyer who breached solicitor-client confidentiality by reporting a client could be disciplined by the Law Society for the breach, or sued by the client, and challenge the legislation based on the specific factual circumstances of his or her disciplinary or civil proceedings.

36 In either case, significant time would elapse before a suitable fact situation arose and ripened to the point that a constitutional challenge could be heard. Were the legislation to be ultimately struck down, lawyers may have, in the interim, made hundreds of unconstitutional reports to the Centre in violation of their ethical obligations to their clients. If the legislation were upheld, the lawyer bringing the test case would have committed a crime and subjected him or herself to severe criminal penalties. It is neither reasonable nor effective to require that the matter be brought before the Court by either of these routes. The issue is properly raised by the petitioners without the necessity of risking the reputation of an individual lawyer. The challenge is to the validity of the legislation on its face, not to its unconstitutional nature within a specific fact pattern.

37 The Government did not oppose the CBA's application for intervenor status. Since 1998, the CBA has examined the issues concerning money laundering, suspicious transaction reporting and cross-border currency reporting. It consulted with the Government in connection with the draft Act and Regulations.

(b) Is the Supreme Court of British Columbia the forum conveniens?

38 The doctrine of *forum conveniens* is a recognized principle that a court should not entertain a proceeding where there is another more convenient and appropriate forum in which to hear that proceeding: *Dudnik v. Canada (Radio-Television & Telecommunications Commission)* (1995), 41 C.P.C. (3d) 336 (Ont. Gen. Div.).

39 Mr. Wruck submits that the *forum conveniens* in this case is the Federal Court. Although the Act and Regulations have application throughout Canada, this Court's jurisdiction does not extend beyond British Columbia. Any order exempting lawyers from the requirement to report suspicious transactions would apply only within British Columbia and lawyers in the rest of Canada would remain bound by the legislation. In contrast, a decision of the Federal Court would have application and be binding throughout Canada, thus avoiding the uncertainty and confusion inherent in the suspension of a law of national application in only one of thirteen jurisdictions.

40 It is beyond question that the provincial superior courts have the jurisdiction and authority to review the constitutional validity of federal legislation, strike down or declare invalid federal legislation, and grant ancillary interim relief: *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.).

41 Assuming that the Federal Court has concurrent jurisdiction, the matter remains one of discretion. The matter is urgent, the issues have been argued at length before me, and challenges to federal legislation have historically been made in the provincial superior courts. In those circumstances, I consider this Court to be the appropriate forum to consider and decide the issues raised in the petitions.

(c) Does interim injunctive relief lie against the Crown?

42 At common law, injunctive relief does not lie generally against the Crown. Section 22(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, prohibits injunctive relief against the Crown but permits the court "in lieu thereof [to] make an order declaratory of the rights of the parties."

43 Nevertheless, whether the interim relief sought in constitutional cases is characterized as injunctive relief or a suspension of, or exemption from, the impugned legislation, there is clear authority that such relief is available in appropriate circumstances: *Metropolitan Stores, supra;RJR - MacDonald supra;* and *Harper, supra.* Although interim relief was refused in the circumstances of those cases, the Supreme Court of Canada did not suggest that such relief was not available against the Crown. As Peter Hogg and Patrick Monahan note in *Liability of the Crown*, 3rd ed. (Toronto: Carswell, 2000) at p. 36: " [t]he Crown cannot use its remedial immunity to shield an unconstitutional act." Section 24(1) of the *Charter*, which empowers a court of competent jurisdiction to grant "such remedy as the court considers appropriate and just in the circumstances" overrides Crown immunities.

(d) Are the petitioners seeking a declaration of invalidity without a full hearing?

44 The respondent submits that the effect of any injunction granted by this Court "would be the same as if the Court made an interim declaration that Parliament enacted an invalid law without a full trial or hearing."

45 It is true that in many cases, for example *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124 (S.C.C.) and *Harper*, *supra*, the effect of granting interim relief would be to actually determine the rights of the applicant. That would not be the result in this case where the petitioners seek a temporary exemption from the impugned legislation. In effect, they seek no more than a continuation of the status quo.

(e) Do the petitioners lack "an adequate record of adjudicative facts"?

46 The respondent submits that the Court cannot determine the validity of the legislation in a factual vacuum. A full factual record, containing all of the adjudicative facts and legislative facts, is necessary.

47 In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.), the appellant argued that the *Manitoba Elections Finances Act* was unconstitutional because totalitarian or extremist groups could be financed from public funds. Cory J., on behalf of the Court, stated at pp. 361-2:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter*cases.
>
> . . . . .
>
> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.
>
> (emphasis added)

48 Accordingly, the Supreme Court declined to hear an issue upon which the appellants had advanced a number of unsubstantiated propositions that were central to their submissions. However, the Court noted, at p. 366, that a further issue (an allegation that statutory funding of candidates in provincial elections could infringe a taxpayer's *Charter* right to freedom of expression) did not require a factual foundation.

49 In *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.) the Court stated at p. 1099:

> This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the *Charter*, particularly where the effects of the impugned legislation are the subject of the attack.

50 The Court went on to distinguish between adjudicative and legislative facts:

> It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and " legislative facts" . . . . Adjudicative facts are those that concern the immediate parties: . . . "who did what, where, when, how, and with what motive or intent . . . ." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements . . . .

51 Sopinka J. noted, at p. 1100, that in a rare case, the constitutional question could be decided in the absence of a factual foundation:

> This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof).

52 Sopinka J. quoted Beetz J. in *Metropolitan Stores, supra*, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian*

Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away . . . . It is trite to say that these cases are exceptional.

53 Sopinka J. went on to say at p. 1101:

The unconstitutional purpose of Beetz J.'s hypothetical law is found on the face of the legislation, and requires no extraneous evidence to flesh it out. It is obvious that this is not one of those exceptional cases. In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred. As Morgan put it, op. cit., at p. 162:" ... the process of constitutional litigation remains firmly grounded in the discipline of the common law methodology."

54 In summary, a constitutional challenge to legislation must usually be based on an adequate factual foundation. However, the Supreme Court has stated that in some cases, legislative facts will suffice, and a court may consider the issues without reference to specific adjudicative facts. Moreover, cases involving questions of pure law may not require any supporting factual evidence. The petitioners submit that the unconstitutional purpose of the impugned legislation is obvious on its face and, arguably, this case is one of pure law. In my opinion, adjudicative facts generated by a lawyer who had created a specific fact pattern within a solicitor-client relationship would not advance the analysis of the constitutional issues raised by the petitioners.

The tripartite test for interlocutory relief on a constitutional challenge:

55 As stated above, the Supreme Court set out the proper principles relating to the stay or suspension of legislation pending a considered determination of its validity in *Manitoba Food & Commercial Workers, Local 832*, *supra,* and reaffirmed them in *RJR - MacDonald*, *supra*, and *Harper*, *supra*.

56 The basic test for granting interlocutory relief in constitutional proceedings is threefold:

• is there a serious constitutional issue to be determined?

• will the applicant suffer irreparable harm if the relief is not granted? and

• does the balance of convenience, taking into account the public interest, favour the granting of the relief?

57 Within that general framework, certain specific principles are relevant to the unique circumstances of this case:

• it is assumed that all legislation enacted by a democratically elected government is for the common good;

• only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed;

• interim relief in constitutional cases will rarely, if ever, be available when it amounts to a final determination of the applicant's rights;

• there is an important distinction between relief that suspends legislation and that which merely exempts one or more persons from the application of legislation; and

• interim relief that preserves the status quo is less disruptive to the administration of justice than relief that alters the status quo.

(a) is there a serious constitutional issue to be determined?

58 Section 52(1) of the *Constitution Act*, *1982* provides that any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The constitutional questions raised by the petitioners may be framed as follows:

• Is there an arguable case that the independence of the bar, which includes the confidentiality of lawyer-client relations, is a right protected either by the Canadian Constitution, or by the *Charter*, or by both? and

• If so, is there an arguable case that the impugned legislation violates that right?

59 The respondent asserts that the concepts of an independent bar and solicitor-client confidentiality cannot be raised to the level of a constitutionally protected right. Mr. Wruck contrasts those concepts to a guaranteed *Charter* right, such as the right of a detained person to retain and instruct counsel without delay, and to be informed of that right, pursuant to s. 10(b). He suggests that the petitioners are unable to demonstrate any constitutional right that has been violated by the impugned legislation; at best, the independence of the bar is a "constitutional convention" which cannot be enforced by the courts.

60 While the constitutional issues cannot be resolved on this interlocutory application, it is necessary to examine them in some depth to determine whether the petitioners have raised a serious issue to be tried.

Is there an arguable case that the independence of the bar is a constitutionally protected right?

61 The *Charter* is not the sole source of civil rights and freedoms in Canada. As Peter Hogg notes, in *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at pp. 33-4:

> The Charter will never become the main safeguard of civil liberties in Canada. The main safeguards will continue to be the democratic character of Canadian political institutions, the independence of the judiciary and a legal tradition of respect for civil liberties. The Charter is no substitute for any of these things, and would be ineffective if any of these things disappeared. This is demonstrated by the fact that in many countries with bills of rights in their constitutions the civil liberties which are purportedly guaranteed do not exist in practice.

62 A major source of the constitutional protection of civil liberties is found in the unwritten norms that underlie the Constitution. In , *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.), at para. 92, the Supreme Court, relying on its earlier decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 (S.C.C.),

> . . . [agreed] with the general principle that the Constitution embraces unwritten, as well as written rules . . . . Indeed, given that ours is a Constitution that has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents, it is of no surprise that our Constitution should retain some aspect of this legacy.

63 The petitioners submit there is ample authority for the proposition that the independence of the bar, and the confidentiality of the lawyer-client relationship, comprise fundamental principles of justice that are deserving of the Court's protection and cannot be infringed by legislation or by governmental action.

64 In *Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.), at p. 875, Lamer J. found that solicitor-client confidentiality was a "substantive rule" of law. In *Canada (Attorney General) v. Law Society (British Columbia)*, *supra*, the Supreme Court recognized that an independent bar was a cornerstone of a democratic society and that the bar must be free from government regulation. In *Pearlman v. Law Society (Manitoba)*, [1991] 2 S.C.R. 869 (S.C.C.), at p. 887, Iacobucci J., finding that the self-governing status of the legal profession was "created in the public interest", endorsed the conclusions of the Ontario Report of the Professional Organizations Committee (1980):

> The authors noted the particular importance of an autonomous legal profession to a free and democratic society. They said at p. 26:
>
> > Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state.

65 In the recent decision of *Mangat*, *supra*, the Supreme Court re-affirmed the value of an independent bar and the critical role it plays in the proper administration of justice. Gonthier J., for the Court, acknowledged that solicitor-client confidentiality is a principle of fundamental justice.

66 It may also be argued that the interdependent relationship between an independent bar and an independent judiciary requires that the former as well as the latter should be considered unwritten constitutional norms.

67 It is beyond question that the protection of the independence of the judiciary is an unwritten principle of the Constitution. In *R. v. Campbell*, *supra*, Lamer C.J., for the majority of the Court, held at para. 83 that "judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*." (emphasis in the original). At para. 109, he concluded:

> . . . the express provisions of the *Constitution Act, 1867* and the *Charter* are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

68 In *LaBelle v. Law Society of Upper Canada* (2001), 52 O.R. (3d) 398 (Ont. S.C.J.) at p. 408, McKinnon J. examined the relationship between the independence of the bar and the independence of the judiciary:

> An independent bar is essential to the maintenance of an independent judiciary. Just as the independence of the courts is beyond question (see *Valente v. R.*, [1985] 2 S.C.R. 673, 14 O.A.C. 79), so the independence of the bar must be beyond question. The lawyers of the independent bar have been the constant source of the judges who comprise the independent judiciary in English common law history. The "habit" of independence is nurtured by the bar. An independent judiciary without an independent bar would be akin to having a frame without a picture.

69 Mr. Wruck notes that earlier in his judgment, McKinnon J. referred to the independence of the bar as "a constitutional convention." Citing *LaBelle*, the petitioners describe the independence of the bar as " a constitutional convention which underlies the rule of law." In fact, it appears settled that "[c]onventions are rules of the constitution that are not enforced by the law courts" (P. Hogg, *Constitutional Law of Canada, supra*, at p. 1-9). With respect, McKinnon J. may be in error in describing the independence of the bar as a constitutional convention. That description clearly conflicts with the petitioners' principal argument that the independence of the bar has been recognized and enforced by the Supreme Court as an unwritten constitutional norm.

70 The unique role of the legal profession was articulated by McIntyre J. in *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.) at pp. 187-188:

> It is incontestable that the legal profession plays a very significant - in fact, a fundamentally important - role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or *quasi*-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals.... By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

Is there an arguable case that the independence of the bar is a right protected by the Charter?

71 The independence of the bar is not an enumerated right in the *Charter*. However, the petitioners submit that the independence of the bar underlies other *Charter* rights and that those rights are without meaning unless lawyers are independent.

72 In numerous cases the Supreme Court has looked beyond the rights expressed in the *Charter* to protect the principles that underlie those rights. As a result, those principles, in and of themselves, have become *Charter* rights as well. An obvious example is the Court's treatment of an accused person's right under s. 10(b) to retain and instruct counsel without delay upon arrest

73 On a plain reading, s. 10(b) provides a detained person with the right " to retain and instruct counsel without delay and to be informed of that right." On its face, the section imposes no further obligations on the police when they arrest or detain a suspect. However, the Court has greatly expanded the rights of an accused under that section. In *R. v. Manninen*, [1987] 1 S.C.R. 1233 (S.C.C.), the Court held that s. 10(b) imposes at least two additional duties on police: they must give the accused a reasonable opportunity to exercise the right, and they must refrain from attempting to elicit evidence from the detainee until he or she has had that opportunity. In *R. v. Brydges*, [1990] 1 S.C.R. 190 (S.C.C.), the Court held that s. 10(b) imposed an obligation on police to inform the detainee of the availability of duty counsel and legal aid. And, in *R. v. Evans*, [1991] 1 S.C.R. 869 (S.C.C.), the Court held that the police are under an obligation to ensure that the accused *understands* his or her s. 10(b) right. If it appears that an accused does not understand the right, the police must take steps to facilitate that understanding.

74 In all of those cases, the Court imposed obligations on the police beyond those required by a plain reading of s. 10(b). Those additional obligations were imposed because they were consistent with the main purpose underlying the s. 10(b) right, which was to facilitate contact with counsel. Without protecting the purpose underlying the right to counsel, the right itself would be meaningless.

75 By way of analogy, the petitioners argue that the protections afforded to the public by the independence of the bar and the confidentiality of the solicitor-client relationship underlie enumerated *Charter* rights. Specifically, they say that the rights guaranteed by ss. 7, 8 and 10(b) of the *Charter* would be meaningless without those underlying protections.

Does the impugned legislation violate the constitutionally protected norms of an independent bar and solicitor-client confidentiality?

76 The petitioners submit that the impugned legislation places all lawyers in a profound conflict of interest between their duty of solicitor-client confidentiality owed to a client and their duty to report that client to the government. The legislation provides serious penalties for non-compliance and counsel will be careful to avoid prosecution.

77 The solicitor-client relationship is a unique one, not comparable to the other professions and entities covered by the Act and Regulations. The principles of fundamental justice that are said to be threatened by this legislation include the independence of the bar, solicitor-client confidentiality, and the duty of loyalty owed by lawyers to their clients.

78 I conclude that the issues of (a) whether the independence of the bar is a constitutionally protected right and, if so, (b) whether the impugned legislation violates that right, raise serious constitutional questions to be tried.

(b) Will the petitioners suffer irreparable harm if the relief sought is not granted?

79 The Supreme Court defined "irreparable harm" in *RJR - MacDonald*, *supra*, at p. 341:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

80 Mr. Wruck submits that lawyers are fully protected by s. 11 of the Act, which provides that legal counsel are not required to disclose any communication that is subject to solicitor-client privilege. Clearly the protection provided by that privilege falls far short of the traditional confidential nature of the solicitor-client relationship that the petitioners seek to preserve.

81 The petitioners describe the harm caused by the legislation to the administration of justice as irreparable and devastating. They say s. 5 of the Regulations places legal counsel in an irreconcilable conflict of interest with their clients, struggling to maintain an impossible balance between their duty of loyalty to their clients and their statutory duty to gather evidence against those clients, under threat of serious penalties.

82 It is clear that if interlocutory relief is not granted, lawyers will be compelled to report information relating to "suspicious transactions" to the Centre for months, or perhaps years, while the constitutional challenge proceeds through the hearing of the petitions and the inevitable appeals. Should the legislation ultimately be read down to exempt lawyers, irreparable harm will have been done. Information will have been collected and reported unconstitutionally. The public's confidence in an independent bar will have been shaken and the lawyer-client relationship irrevocably damaged.

83 If the impugned legislation is subsequently upheld, what harm will have accrued to the Government? The historic solicitor-client relationship permitting solicitor-client confidentiality will have been continued, following centuries of tradition. In view of the fact that sixteen months elapsed between Royal Assent to the provisions of Part I and the proclamation of the Regulations enforcing those provisions vis-à-vis lawyers, the respondent cannot characterize the need to alter that relationship as urgent.

84 I conclude that the petitioners (as well as lawyers and clients, and indeed the administration of justice) may suffer irreparable harm unless lawyers are exempted from reporting suspicious transactions pending a determination of the constitutional issues.

(c) Does the balance of convenience, taking into account the public interest, favour the granting of interlocutory relief?

85 Determining the balance of convenience in a constitutional case is far more complex than in private disputes. Because it is assumed that laws enacted by democratically elected legislatures are directed to the common good and serve a valid public purpose, interlocutory injunctions are rarely granted in constitutional cases. The applicants in *Harper*, *supra*, *Metropolitan Stores*, *supra*, and *RJR - MacDonald*, *supra,* all failed to establish that the balance of convenience entitled them to the relief they sought.

86 In *Harper*, *supra* the plaintiff sought a declaration that the provisions in the *Canada Elections Act* limiting third party spending on campaign advertising were unconstitutional because they unjustifiably limited his right to free expression guaranteed by s. 2(b) of the *Charter.* The trial was heard and judgment reserved. An election was called. The plaintiff sought an interlocutory injunction restraining the enforcement of third party spending limits pending the trial decision. The trial judge granted the injunction and the Alberta Court of Appeal upheld it. The Government's application for leave to appeal from the injunction and a stay of the injunction was successful in the Supreme Court.

87 The Court assumed that there was a serious question to be tried and that the plaintiff would suffer irreparable harm in the absence of interlocutory relief. Considering the balance of convenience, McLachlin C.J. stated, at p. 769:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough . . . .

88 McLachlin C.J. concluded, at p. 771, that "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."

89 In *Metropolitan Stores*, *supra*, the Manitoba Labour Board had been empowered by the *Labour Relations Act* to impose a first collective agreement. After the union applied to have the Board impose a contract, the employer sought to have that power declared invalid as contravening the *Charter*. The employer also sought to stay the Board's order until the issue of the legislation's validity had been heard. That motion was denied but the Manitoba Court of Appeal allowed the employer's appeal and ordered a stay. The Supreme Court allowed the union's appeal.

90 Beetz J., for the Court, considered the importance of taking the public interest into consideration when evaluating the balance of convenience. At p. 135, he reiterated the policy basis for declining interim relief in the majority of cases where the validity of legislation is challenged:

> It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, . . . in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.
>
> While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public . . . from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and given the weight it deserves.

91 In *RJR - MacDonald*, *supra,* the applicants challenged the constitutional validity of the *Tobacco Products Control Act* as violating s. 2(b) of the *Charter.* They sought an interim exemption from the provisions of the Act regulating the advertising and labelling of tobacco products.

92 Sopinka and Cory JJ., for the Court, described the careful balancing process that must be undertaken in a case of this kind at pp.333-4:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of C*harter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

93 Mr. Wruck emphasized the importance of the objectives of the Act. Money laundering of the proceeds of crime is a serious problem both nationally and globally and lawyers, knowingly and unknowingly, act as intermediaries to facilitate these transactions. He described Canada's international commitments to co-operate in efforts to eliminate money laundering from the proceeds of crime. In 1989, Canada and six other nations in the G-7, established the Financial Action Task Force ("FATF") to develop and promote international anti-money laundering standards.

94 A limited examination of the law in other jurisdictions does not support Mr. Wruck's assertion that other countries have enacted comparable legislation requiring lawyers to report "suspicious transactions".

95 Both the petitioners and the respondent submitted opinions of experts in U.S. law. There is no counterpart in U.S. law to the Canadian requirement that lawyers report transactions that they have a reasonable basis to believe are " suspicious" and provide the reasons for their conclusion. It is unclear whether such legislation would be constitutional in that country. It appears that any determination as to whether disclosure could be compelled under U.S. law is a fact-intensive question that cannot be decided in the abstract.

96 In the United Kingdom, the *Drug Trafficking Act 1994* provides that a person is guilty of an offence if "he knows or suspects that another person is engaged in drug money laundering." However, that legislation provides an exemption for a professional legal advisor who fails to disclose any matter that came to him in privileged circumstances. "Privileged circumstances", which are defined in the legislation, appear to be far broader than the scope of the traditional "solicitor-client privilege" referred to, but not defined, in the Act. The *Criminal Justice Act 1988 as amended by Criminal Justice Act 1993* contains a similar exemption for legal advisers.

97 Mr. Wruck advised that on November 13, 2001, the European parliament approved a Directive to amend an earlier 1991 Directive "on the prevention of the use of the financial system for the purpose of money laundering." It is expected that the new Directive will be adopted shortly and it will then be binding on all member states of the European Union. An explanatory memorandum to the draft Directive notes that lawyers would be exempted from any suspicious transaction identification or reporting requirements connected with the representation or defence of the client in legal proceedings, and "again to make full allowance for the professional duty of discretion, as called for by the European Parliament," member states would have

the option of allowing lawyers to communicate their suspicions of money laundering to their bar association or equivalent professional body. Those principles are incorporated into the Directive. Para. 17 of the preamble notes:

> Thus, legal advice remains subject to the obligation of professional secrecy unless the legal counsellor is taking part in money laundering activities, the legal advice is provided for money laundering purposes, or the lawyer knows that the client is seeking legal advice for money laundering purposes.

98 In *RJR - MacDonald*, *supra*, Sopinka and Cory JJ. stated that public interest considerations, which the court must consider when determining both irreparable harm and the balance of convenience, weigh more heavily in a "suspension" case than in an "exemption" case. At p. 346, they explained:

> The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely.

99 In *RJR - MacDonald*, two tobacco companies sought an exemption from the legislation that required new labelling on tobacco products. The Court concluded that, because there were only three tobacco companies in Canada, the relief sought constituted a suspension rather than a true exemption.

100 In this case, the petitioners submit that the exemption of lawyers from the provisions of the Act and Regulations would not seriously impair the legitimate steps taken by the Government to investigate and prosecute money laundering. Lawyers comprise a discrete class of persons who have historically occupied a unique position in the administration of justice for the benefit of society. A temporary exemption from the application of Part I would simply continue the unique position they have traditionally held.

101 The legislation would remain applicable to all the other persons and entities enumerated in the legislation: banks, credit unions, trust companies, loan companies, securities dealers, investment counsellors, foreign exchange brokers, life insurance brokers, money services businesses, accountants, real estate brokers, and the like. Hence, interlocutory relief would only minimally infringe the legislative intent of Parliament and it would prevent the alleged infringement of the constitutional rights of lawyers and the public.

102 Although the status quo is not determinative in an interlocutory application in a constitutional challenge, I consider that an exemption in this case would continue the status quo, preserving the confidentiality inherent in the historic solicitor-client relationship. I am unable to agree with Mr. Wruck that the status quo has been defined by the introduction of the impugned legislation.

103 The harm identified by the petitioners is serious. The harm to the Government by exempting lawyers until the merits of the issues are fully argued is minimal. The Act itself does not impose a reporting duty on legal counsel. By exempting lawyers from the Regulations, the Act remains intact and applicable to all other persons and entities described in the Act and the Regulations.

104 It should be noted that, even without the obligations imposed by this legislation, lawyers are subject to codes of conduct and ethical obligations imposed by Law Societies and to the provisions of Part XII.2 of the Criminal Code. They cannot engage in money laundering schemes or be a party to any transactions with clients that conceal or convert property or proceeds that they believe to involve money laundering.

105 The exemption of lawyers from the effect of the legislation would not undermine the legislative scheme. In *Metropolitan Stores*, *supra*, at p. 147, the Supreme Court disagreed with a statement made by Linden J. in *Morgentaler v. Ackroyd* (1983), 42 O.R. (2d) 659 (Ont. H.C.) that the courts will grant interlocutory injunctive relief only in " exceptional" or "rare" circumstances. Beetz J. stated:

> It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public . . . .

106 I conclude that this is an exceptional case in which the balance of convenience favours the granting of interlocutory relief. Such relief, which simply postpones the application of Part I to the legal profession, continues the status quo and the unique position that counsel have historically held.

Conclusion:

107 While the Government's goal of deterring and prosecuting money laundering offences is laudatory, the fundamental values of the Constitution must be protected. As McLachlin J. stated in the context of a s. 1 analysis in *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.) at p. 329:

> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

108 The proclamation of s. 5 of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court. The petitioners seek a temporary exemption from the legislation until the merits of their constitutional challenge can be determined. I conclude that the petitioners have satisfied the tripartite test for the exemption they seek. They are entitled to an order that legal counsel are exempt from the application of s. 5 of the Regulations pending a full hearing of the Petitions on their merits.

Application granted.

Footnotes

* Affirmed [2002] 3 W.W.R. 483, 98 B.C.L.R. (3d) 310, 2002 BCCA 49, 2002 CarswellBC 160, 160 C.C.C. (3d) 378, 207 D.L.R. (4th) 736 (B.C. C.A.).

2020 ABCA 163
Alberta Court of Appeal

Fort McKay First Nation v. Prosper Petroleum Ltd

2020 CarswellAlta 747, 2020 ABCA 163, [2020] 9 W.W.R. 375, [2020] A.W.L.D. 1808, [2020] A.W.L.D. 1850, [2020] A.W.L.D. 1896, 317 A.C.W.S. (3d) 176, 32 C.E.L.R. (4th) 202, 445 D.L.R. (4th) 671, 4 Alta. L.R. (7th) 215

Fort McKay First Nation (Appellant) and Prosper Petroleum Ltd and Alberta Energy Regulator (Respondents) and Her Majesty the Queen in Right of Alberta (Intervenor)

Barbara Lea Veldhuis, Sheila Greckol, Jo'Anne Strekaf JJ.A.

Heard: October 29, 2019
Judgment: April 24, 2020
Docket: Edmonton Appeal 1803-0183-AC

Proceedings: reversing *Prosper Petroleum Ltd., Re* (2018), 2018 CarswellAlta 1146, 2018 ABAER 5, C. Low Presiding Commr., C. Macken Commr., T. Engen Commr. (Alta. E.R.)

Counsel: J.J. Arvay, Q.C, J. Woodward, Q.C., for Appellant
S. Duncanson, S.R. Sutherland, for Respondent, Prosper Petroleum Ltd.
M.G. Lacasse, for Respondent, Alberta Energy Regulator
D.L. Sharko, A.J. Croteau, for Intervenor

***Barbara Lea Veldhuis, Jo'Anne Strekaf JJ.A.*:**

Introduction

1 This appeal arises out of negotiations that began in 2003 between the Government of Alberta and the Fort McKay First Nation (FMFN) to develop a Moose Lake Access Management Plan (MLAMP) to address the cumulative effects of oil sands development on the First Nation's Treaty 8 rights. The MLAMP has not yet been finalized.

2 The Alberta Energy Regulator (AER) approved an application by Prosper Petroleum Ltd (Prosper) in June 2018 for the Rigel bitumen recovery project (Project), which would be located within 5 kilometers of the FMFN's Moose Lake Reserves. The AER approval is subject to authorization by the Lieutenant Governor in Council (Cabinet), which has yet to be granted.

3 The FMFN was granted permission to appeal on the question of whether the AER erred by failing to consider the honour of the Crown and refusing to delay approval of the Project until the FMFN's negotiations with Alberta on the MLAMP are completed.

4 For the reasons that follow, the appeal is allowed.

Background

5 The FMFN is an "aboriginal people of Canada" under s 35 of the *Constitution Act, 1982* and a "band" within the meaning of the *Indian Act*, RSC 1985, c I-5 that has Treaty 8 rights to hunt, fish and trap within the Moose Lake Area, part of its traditional territory. The Moose Lake Area is north west of Fort McKay and consists of the area around Moose Lake (also known as Gardiner Lake) and Buffalo Lake (also known as Namur Lake), on which lakes the FMFN has two reserves (Moose Lake Reserves). The Moose Lake Area is of cultural importance to the FMFN.

6 Due to the extensive industrial and resource development surrounding Fort McKay, FMFN is concerned that the ability of its members to pursue their traditional way of life in the Moose Lake Area has been severely and adversely affected by the cumulative effect of oil sands development in the surrounding area. The record shows that 70% of FMFN's traditional territory is leased for oil sands purposes: Lagimodiere Report, p. 3, AEKE Tab 31, A165. The FMFN's traditional territory has been described as "the *most* severely affected of all First Nations by oil sands development in the region": Review Panel Report 2015, p. 156, AEKE Tab 11, A50, emphasis in original.

7 A March 2010 report commissioned by FMFN and submitted to a Joint Review Panel established in 2012 as part of the AER process for a separate project proposed by Shell Canada was also submitted to the AER in its consideration of the Rigel Project at issue in this appeal. This report spoke to the need for "the mitigation and accommodation of cumulative effects . . . beyond the project-level": Fort McKay Specific Assessment, Disturbance and Access: Implications for Traditional Use, p. 61. The Joint Review Panel found that the cumulative effects of oil sands development on the First Nation's cultural heritage are "already adverse, long-term, likely irreversible and significant": [*Shell Canada Energy, Re*] 2013 ABAER 11 (Alta. E.R.C.B.) at para 1741. However, the Panel found that these cumulative effects could not be addressed within the context of the project-specific AER review process: *ibid* at para 1720.

The MLAMP Negotiations

8 The FMFN began negotiating with Alberta in 2001 to obtain protection for the Moose Lake Area. They began discussing a possible MLAMP in 2003 to address the cumulative effects of oil sands development on the FMFN's Treaty 8 rights. The MLAMP negotiations were delayed while the Lower Athabasca Regional Plan (the LARP) was negotiated and implemented. It is envisaged that when the MLAMP is finalized, it will be adopted as a sub-plan of the LARP.

9 The LARP is a regional plan under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 [*ALSA*] to manage the region's natural resources. The purpose of the *ALSA* includes providing "a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples": s 1(2)(b). The LARP addresses conservation areas, water, recreation, air quality and sustainable resource development. The "Regulatory Details" section of LARP is legally binding on the Crown and administrative decision-makers. The Regulatory Details section stipulates that the Strategic Plan and Implementation Plan sections of LARP, while not themselves legally binding, must be considered by decision-makers before they make their decisions: LARP, s 7(1).

10 During negotiations with Alberta about the LARP between 2009 and 2010, FMFN specifically sought a 10 km buffer zone from oil sands development around the Moose Lake Reserves. Alberta denied this request. The LARP was proclaimed into force in September 2012.

11 In August 2013, FMFN applied for a review of the LARP, which led the Minister responsible for administration of the *ALSA* to appoint a Review Panel. The Review Panel's June 2015 report found that "[t]he LARP has not taken adequate measures to protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use and culture. In fact, it has done quite the opposite . . . in the not-too-distant future, FMFN will not be able to utilize *any* of their Traditional Land because of industrial development activities".

12 In November 2014, Alberta's then Premier, the late Jim Prentice, met with Chief Jim Boucher of FMFN to discuss the MLAMP. In February 2015, Alberta advised FMFN that it "could commit to developing a Moose Lake Access Management Plan under LARP on an expedited basis pursuant to terms of a letter of intent that would be agreed upon" by the parties: Affidavit of Karla Buffalo.

13 In March 2015, Premier Prentice and Chief Boucher signed a Letter of Intent to confirm "our mutual commitment and interest in an expedited completion of the [MLAMP]". It went on to state that "Alberta acknowledges the importance of Moose Lake to the community of Fort McKay and looks forward to advancing mutual goals for the management of the region". The letter contemplated that the draft MLAMP was to be completed and approved by March 31, 2016 and that planning and

implementation of the portion of the Access Management Plan within 10 kilometers of the Moose Lake Reserves was to be completed by September 30, 2015.

14 Alberta issued a press release on March 25, 2015 titled "Traditional First Nations lands in the heart of Alberta's Oil Sands region to be protected". It states:

> The Moose Lake area is culturally significant to the First Nation and Metis people of Fort McKay, so the Alberta government is taking steps to ensure this sacred land is protected for generations to come.
>
> Premier Jim Prentice, Environment and Sustainable Resource Development Minister Kyle Fawcett and Fort McKay First Nation Chief Jim Boucher signed a Letter of Intent in March to develop an access management plan for the Moose Lake area.
>
> > The Fort McKay First Nation has done a wonderful job of preserving their traditional way of life. While allowing for responsible oil sands development near their community. This has enabled their people to thrive economically within the oil sands region. But it has also meant that some land that is meaningful to them near their reserve has been used for development. When Chief Boucher asked for our support to protect the small parcel of land near Moose Lake for his community, I didn't hesitate to say yes.
> >
> > - Jim Prentice, Premier of Alberta and Minister of Aboriginal Relations

15 Despite the 2015 Letter of Intent, characterized by FMFN as the "Prentice Promise", the MLAMP has still not been finalized and is the subject of ongoing negotiations between Alberta and the FMFN.

Prosper's application to the AER

16 Prosper is the proponent of the Rigel Project, a proposed bitumen recovery project that would use steam-assisted gravity drainage to produce 10,000 barrels a day. Prosper applied to the predecessor of the AER in 2013 for three approvals for the Project under the *Oil Sands Conservation Act*, RSA 2000, c O-7 [*OSCA*], the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and the *Water Act*, RSA 2000, c W-3.

17 The Project would be located within the 10-kilometer buffer zone surrounding the Moose Lake Reserves; that is, within the area covered by the MLAMP.

18 On May 6, 2016, the AER suspended its consideration of Prosper's application as "a result of its recognition of the ongoing discussions between the Government of Alberta and Fort McKay First Nation regarding the [MLAMP] and the close proximity of the activities proposed in the Applications to the areas under consideration in those discussions". It was further noted in the same letter that land use policies stemming from these discussions will "directly impact the outcome of the Applications before the AER".

19 Prosper requested the AER reconsider its decision to suspend processing of its application for the Project.

20 On November 2, 2016, the AER resumed the approval process for the Project. By letter dated November 8, 2016, counsel for the AER advised that its "decision was made because MLAMP is still not finalized, there is no indication that finalization of the MLAMP is imminent and there is no certainty when submission of the plan will occur" and that it was prohibited by s 7(3) of the LARP from postponing its consideration of the Project until the MLAMP negotiations were completed.

21 The AER issued a notice of hearing with respect to Prosper's application in January 2017. The FMFN took part in the hearing as a full participant. After receiving submissions from the parties on the process, scope and timing for the hearing, the AER identified the issues to be addressed. The following issues were "deemed to be not in the scope of this proceeding":

> 1. The adequacy of Crown consultation. The AER has no jurisdiction with respect to assessing the adequacy of Crown consultation.

2. The adequacy of LARP and any existing subregional plans under LARP.

3. MLAMP does not exist as a subregional plan and consideration of it is not within the panel's mandate.

4. Cumulative effects unrelated to the effects that might be caused by the Rigel Project.

2018 ABAER 005 at para 16 (AER Decision)

22 The AER hearing was held in Fort McMurray. Evidence was heard by the AER from January 9 to 18, 2018, the Aboriginal Consultation Office (ACO) report was issued on February 22, 2018, and final oral arguments were heard on March 14, 2018.

The AER Decision

23 The AER issued its decision on June 12, 2018. It found the Project to be in the public interest and approved the Project on conditions, subject to authorization by Cabinet pursuant to s 10(3)(a) of *OSCA*.

24 The AER recognized that the overarching question to be answered was whether the Project is in the public interest: AER Decision at para 46. It addressed safety, efficiency, and the effects on existing rights of aboriginal peoples. The AER understood the FMFN submission was that it either deny the Prosper application or, if approval is given, that it be subject to the condition that the central processing facility be located more than 10 kilometers from the Moose Lake reserves: AER Decision at para 92.

25 In considering the potential effects of the Project on FMFN's Treaty 8 rights, the AER found that: (1) the Project will cause members of the First Nation to experience a sense of disruption to their connection to the land but this is not an impact on a Treaty 8 right; and (2) the Project will not render the First Nation's Treaty 8 rights meaningless and will not prevent the First Nation from continuing to exercise its treaty rights on the Moose Lake Reserves or in reasonable proximity to them: AER Decision at paras 126 and 130-32. With respect to several discrete Treaty 8 rights, the AER found that the evidence was insufficient to allow it to determine how the Project will affect those rights.

26 The AER posed the question for deciding the *OSCA* application as "whether the impacts on Fort McKay First Nation's treaty rights identified above are or are not in the public interest when weighed in the balance with the other impacts, such as social, environmental, and economic impacts": AER Decision at para 134. In finding the Project to be in the public interest, the panel declined to consider the MLAMP negotiations that contemplated a 10-kilometer buffer zone, the Prentice Promise, and whether it implicates the honour of the Crown.

27 The AER concluded the status of the MLAMP negotiations was not a valid reason to deny Prosper's application. Specifically, the AER concluded that s 21 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*] precludes it from assessing the adequacy of Crown consultation, and that it is prohibited from deferring consideration of a project on the basis that a LARP regional plan is incomplete. The AER also noted that Cabinet is required to authorize the Project and concluded that "Cabinet is the most appropriate place for a decision on the need to finalize the MLAMP". These conclusions were set out at paras 180-182 of the AER Decision:

> [180] In our view, the balance between the overall economic benefits, including employment, and the negative impacts of the Prosper Rigel project are more or less even. So to answer the question of whether the Rigel project is in the public interest, we also considered the following public-interest considerations: first, Fort McKay First Nation's argument that we should not frustrate the MLAMP negotiations; second, Prosper's submissions about the desirability of regulatory and investment certainty; and third, public policy guidance expressed through the OSCA, EPEA, the Water Act and REDA.
>
> [181] Fort McKay First Nation described MLAMP as accommodation owed to it by the Crown to address historical impacts on their treaty and Aboriginal rights. LARP indicates that, once finalized, MLAMP will be a LARP regional plan.
>
> [182] Fort McKay First Nation provided a significant amount of evidence — e.g. Ms. Buffalo's affidavit and her oral evidence about the adequacy of the LARP and MLAMP processes. To the extent that Fort McKay First Nation frames

> LARP and MLAMP as elements of Crown consultation, section 21 of REDA says we may not assess their adequacy. LARP prohibits decision makers, including the AER, from "adjourning, deferring, denying, refusing, or rejecting any application . . . " by reason only of incompletion of a LARP regional plan. We may not deny Prosper's application solely because MLAMP negotiations are not yet complete. Furthermore, AER approval of an application made under section 10 of OSCA is subject to prior authorization by the lieutenant governor in council (cabinet). Cabinet is the most appropriate place for a decision on the need to finalize MLAMP. Consequently, Fort McKay First Nation's assertion that we must not frustrate MLAMP negotiations does not tip the public interest balance against approving the Rigel project.

Permission to Appeal

28 A decision by the AER can be appealed to this court with permission on a question of law or jurisdiction: *REDA*, s 45(1). The FMFN sought permission to appeal various questions arising out of the AER decision. Permission was granted on the following question (*Fort McKay First Nation v. Prosper Petroleum Ltd.*, 2019 ABCA 14 (Alta. C.A.)):

> Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP are completed?

Standard of Review

29 As this is a statutory appeal brought pursuant to s 45(1) of *REDA*, the standard of review to be applied to the question of law on which permission to appeal was granted is correctness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.) at para 37.

Positions of the Parties

FMFN

30 FMFN submits the AER erred in failing to ensure Alberta's obligation to act honourably with respect to its treaty and aboriginal rights when determining whether approval of the project was in the public interest. The honour of the Crown is implicated by treaty implementation issues and requires consideration of whether approval of the Project is consistent with maintaining a mutually respectful long-term relationship. The direct promise to get the MLAMP completed by March 31, 2016 in the Letter of Intent signed by Alberta's Premier and the Chief of the First Nation attracts the honour of the Crown, and required Alberta to fulfill its promise to complete the MLAMP process to ensure that additional development would proceed in accordance with a cumulative-effects-based approach before any further oil sands facilities were approved within the Moose Lake Area.

31 The FMFN also submits that the AER erred in finding that it was precluded by s 21 of *REDA* and s 7(3) of the LARP from considering matters relating to the MLAMP. The FMFN says that s 21 of *REDA* only removes assessment of the sufficiency of consultation, and s 7(3) of the LARP only contemplates delay by reason of the Crown's noncompliance with a provision of the LARP Strategic or LARP Implementation Plan or any direction or commitment made therein, none of which are at issue in relation to the MLAMP process.

Prosper

32 Prosper submits the AER has no statutory authority to consider whether the honour of the Crown required finalization of the MLAMP before the Project is approved, or authority to delay hearing the Project application until the MLAMP was implemented. The AER properly reserved determinations on the MLAMP to Cabinet; because Cabinet has not issued its decision, the appeal is premature.

AER

33 The AER's submissions were limited to the record of the proceeding, the standard of review and an explanation of the statutory scheme. It did not address the merits of the appeal.

Alberta

34 Alberta submits that FMFN's assertion that the AER erred in not considering the honour of the Crown would effectively require the AER to consider the adequacy of Crown consultation (which is contrary to s 21 of *REDA*), or place the AER in a supervisory role over whether, when or how the Crown makes policy decisions, which is beyond its jurisdiction. The AER is a statutory tribunal that is required to act within the confines of its statutory authority. It is neither required nor permitted to indefinitely delay an application for approval of a project while Alberta engages in negotiations with First Nations. Moreover, the LARP specifically prohibits it from doing so.

35 Alberta also submits that the honour of the Crown is a narrow and circumscribed doctrine that only applies in four situations, none of which require the AER to delay approval of a project while the Crown and a First Nation are discussing a land management policy. The Letter of Intent was a good faith commitment to work with the First Nation and other stakeholders, not an accommodation of the Project.

36 In oral argument, Alberta conceded that if the honour of the Crown is implicated by the Project in light of the outstanding MLAMP negotiations, Cabinet bears the responsibility for ensuring any resulting obligations are met.

Discussion

The Jurisdiction of the AER

37 The AER is a public agency which exercises adjudicative functions pursuant to the *Alberta Public Agencies Governance Act*, SA 2009, c A-31.5. As the regulator of energy development in Alberta under *REDA*, its constituent statute, the AER is mandated to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta: *REDA*, s 2. It has final decision-making power over many energy project applications. However, Cabinet authorization is required where, as here, a project is governed by s 10 of *OSCA*.

38 In deciding whether to approve a project, the AER is required to consider various factors prescribed by its governing regulations: *REDA*, s 15; *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013, 3 [*REDA General Regulation*]. To this end, the AER has broad powers of inquiry to consider the "public interest" in making its decisions: *OSCA*, s 10.

39 Tribunals have the explicit powers conferred upon them by their constituent statutes. However, where empowered to consider questions of law, tribunals also have the implied jurisdiction to consider issues of constitutional law as they arise, absent a clear demonstration the legislature intended to exclude such jurisdiction: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 (S.C.C.) at para 69, [2010] 2 S.C.R. 650 (S.C.C.) [*Rio Tinto*]. This is all the more so where the tribunal is required to consider the "public interest": *ibid* at para 70. In such circumstances, the regulatory agency has a duty to apply the Constitution and ensure its decision complies with s 35 of the *Constitution Act, 1982*: *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 (S.C.C.) at para 36, [2017] 1 S.C.R. 1069 (S.C.C.) [*Clyde River*]. As the Supreme Court has noted, "[a] project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest": *ibid* at para 40. The tribunal cannot ignore that aspect of its public interest mandate.

40 It follows from a review of its constituent legislative scheme that the AER has the implied jurisdiction to consider issues of constitutional law as they arise in its proceedings. As discussed further below, that jurisdiction is explicitly removed where the adequacy of Crown consultation is concerned: *REDA*, s 21. However, issues of constitutional law outside the parameters of consultation remain within the AER's jurisdiction, including as they relate to the honour of the Crown. Section 21 of *REDA* does not prevent the AER from considering other relevant matters involving Aboriginal peoples when carrying out its mandate to decide if a particular project is in "the public interest".

41 Nor is the AER confined to considering "questions of constitutional law" as that term is defined in the *Administrative Procedures and Jurisdiction Act*, RSA 2000 c A-3 [*APJA*]. Section 11 of *APJA* provides that "a decision maker has no

jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so". In the case of the AER, it has been given the jurisdiction to determine "all questions of constitutional law" (*Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006, s 2 and Schedule 1), subject to notice requirements being complied with under s 12 of *APJA*. However, not all constitutional issues that arise in an AER hearing will fall within the definition of "questions of constitutional law" in the *APJA*, meaning that the AER will at times be asked to consider constitutional issues for which it has not received formal notice under *APJA*.

42 In other words, a statute like the *APJA* should not be read as confining the AER's jurisdiction to consider constitutional issues as they relate to the "public interest": *Rio Tinto* at para 71-72. Indeed, the AER itself acknowledges its responsibility to address such issues, having considered under "the public interest" the potential adverse impacts of the Project on Aboriginal rights under s 35 of the *Constitution Act, 1982*. This broad jurisdiction to consider treaty rights outside the scope of the *APJA* is itself recognized in Ministerial Order (Energy 105/2014 and ESRD 53/2014).

43 The AER therefore has a broad implied jurisdiction to consider issues of constitutional law, including the honour of the Crown, as part of its determination of whether an application is in the "public interest". The question raised by this appeal is whether the AER should have considered the honour of the Crown in relation to the MLAMP negotiations as part of this assessment.

44 In determining whether the Project was in the "public interest", the AER considered the effect on FMFN's treaty rights generally but declined to consider whether approval would frustrate MLAMP negotiations. It gave three reasons for that narrow approach:

a. Section 21 of *REDA* prohibits the AER from assessing the adequacy of Crown consultation;

b. Section 7(3) of LARP prohibits the AER from "adjourning, deferring, denying, refusing, or rejecting any application" by reason only of incompletion of a LARP regional plan; and

c. AER approval of the Project under s 10(3) of *OSCA* is subject to authorization by Cabinet, which is "the most appropriate place for a decision on the need to finalize MLAMP".

45 A statutory decision-maker is required to perform its mandate as outlined in the applicable legislation. Where directed by legislation to grant an approval "if in its opinion it is in the public interest to do so", consideration must be given to all matters relevant to determining the "public interest". A conclusion that legislation precludes considering certain matters does not relieve the decision-maker of its obligation if that legislative interpretation proves incorrect. Nor can a decision-maker decline to consider issues that fall within its legislative mandate because it feels the matter can be better addressed by another body. As a result, the three reasons given by the AER for declining to consider anything relating to the MLAMP process when considering the public interest must be examined to determine if their reasons justify its decision.

Section 21 of REDA

46 When an energy project is under consideration in Alberta that could affect the treaty interests of a First Nation, the provincial Crown has a duty to consult and potentially accommodate. This duty stems from the honour of the Crown, a constitutional principle (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 (S.C.C.) at para 24, [2018] 2 S.C.R. 765 (S.C.C.) [*Mikisew 2018*], citing *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (S.C.C.) at para 42, [2010] 3 S.C.R. 103 (S.C.C.)) that has as its ultimate objective the reconciliation of pre-existing Aboriginal interests with the assertion of Crown sovereignty: *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (S.C.C.) at para 66, [2013] 1 S.C.R. 623 (S.C.C.) [*Manitoba Metis*].

47 The responsibility to ensure the honour of the Crown is upheld remains with the Crown: *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41 (S.C.C.) at para 37, [2017] 1 S.C.R. 1099 (S.C.C.); *Clyde River* at para 22. However, the Crown can determine how, and by whom, it will address its obligations to First Nations, meaning that aspects of its obligations can be delegated to regulatory bodies.

48 Alberta has delegated procedural aspects of the duty to consult and to consider appropriate accommodation arising out of that consultation to the AER. Under Ministerial Order (Energy 105/2014 and ESRD 53/2014), the AER must "consider potential adverse impacts of energy applications on existing rights of Aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982* within its statutory authority under *REDA*". It is said that "AER processes will constitute part of Alberta's overall consultation process as appropriate". The Order also sets out the Aboriginal Consultation Direction, which describes its objective as follows:

> [T]o ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta
>
> > (a) in meeting its consultation obligations associated with the existing rights of aboriginal peoples as recognized and affirmed under Part II of the Constitution Act, 1982; and
> >
> > (b) in undertaking its consultation obligations pursuant to The Government of Alberta's [consultation policies] as amended and replaced from time to time ("Consultation Policy") and associated Consultation Guidelines ("Guidelines")

49 The AER is ultimately responsible for considering and accommodating potential adverse impacts on the advice of the Aboriginal Consultation Office (ACO), a specialized office housed within the Ministry of Indigenous Relations. Most of the responsibility for managing Crown consultation on AER applications rests with the ACO. The ACO has the responsibility to: (1) determine if consultation is required; (2) manage the consultation process; (3) assess the adequacy of consultation undertaken; and (4) advise the AER on whether actions may be required to address potential adverse impacts of a project on Treaty rights and traditional uses.

50 The Government of Alberta has retained the responsibility to assess the adequacy of Crown consultation on AER-regulated projects. This is reflected in s 21 of *REDA*, which provides as follows:

> The Regulator has no jurisdiction with respect to assessing adequacy of Crown consultation associated with the rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*.

51 In the present case, the ACO held consultations with FMFN regarding the Rigel Project, and the AER considered the recommendations of the ACO and the impact of the Project on the FMFN's treaty rights as part of its hearing. FMFN has challenged the adequacy of the ACO process in another proceeding, and it is not the subject of this appeal.

52 Neither the ACO nor the AER considered the issue raised on this appeal, namely whether the honour of the Crown was implicated by the MLAMP process and the Letter of Intent. Are the matters that FMFN sought to put before the AER in relation to the MLAMP negotiations limited to the "adequacy of Crown consultation"? We find they are not.

53 The honour of the Crown can give rise to duties beyond the duty to consult. The Supreme Court of Canada in *Manitoba Metis* at para 73 stated that the "duty to consult" is only one of four situations recognized "thus far" where the honour of the Crown arises:

> (1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum Indian Band v. Canada* [2002 CarswellNat 3438 (S.C.C.)], at paras. 79 and 81; *Haida Nation*, at para. 18);
>
> (2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution* Act, 1982, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);
>
> (3) The honour of the Crown governs treaty-making and implementation (*Canada (Attorney General) v. Ontario (Attorney General)* (1895), 25 S.C.R. 434 (S.C.C.), at p. 512, per Gwynne J., dissenting; *Mikisew Cree First Nation*

> *v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.), at para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and
>
> (4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456 (S.C.C.), at para. 43, referring to *St. Saviour in Southwark (Churchwardens case)* (1613), 10 Co. Rep. 66b, 77 E.R. 1025 (Eng. K.B.), and *Rutland's (Earl) Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555 (Eng. K.B.); *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

54 While the honour of the Crown is always at stake in its dealings with Aboriginal peoples, it is not engaged by every interaction: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.) at para 16, [2004] 3 S.C.R. 511 (S.C.C.) [*Haida Nation*]; *Mikisew 2018* at para 23; *Manitoba Metis* at para 68. Rather than being an independent cause of action, the honour of the Crown "speaks to *how* obligations that attract it must be fulfilled": *Manitoba Metis* at para 73, emphasis in original. It will give rise to different duties in different circumstances: *Haida Nation* at para 18; *Mikisew 2018* at para 24. In the present case, FMFN asserts that the honour of the Crown is implicated through treaty implementation, relying on *Manitoba Metis* and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) [*Mikisew 2005*]. It notes that the honour of the Crown infuses the performance of every treaty obligation, and stresses the ongoing relationship between the Crown and First Nations brought on by the need to balance the exercise of treaty rights with development under Treaty 8.

55 Since *Haida Nation*, it is clear that the honour of the Crown and its attendant focus on reconciliation arise prior to questions of rights infringement, or even proof of Aboriginal rights claims. Where rights have yet to be concluded through treaty, "the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims": *Haida Nation* at para 20. And while treaties "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" (*ibid*), they do not end the need for reconciliation, which is "not a final legal remedy" but a "process flowing from rights guaranteed by s 35(1)": *Haida Nation v. British Columbia (Minister of Forests)* at para 32; see also Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR 433 (S.C.C.) at 440.

56 In this case, FMFN argues that the MLAMP process and the Letter of Intent give rise to additional obligations stemming from the honour of the Crown beyond the duty to consult on an individual project. Specifically, FMFN suggests that the honour of the Crown is engaged in this case on the basis of treaty implementation.

57 Section 21 does not prevent the AER from considering relevant matters involving aboriginal peoples when carrying out its mandate to decide if a particular project is in the public interest. The issues raised here are not limited to the adequacy of the consultation on this Project, but raise broader concerns including the Crown's relationship with the FMFN and matters of reconciliation. These issues engage the public interest and their consideration is not precluded by the language of s 21.

58 Accordingly, the AER erred in concluding that s 21 of *REDA* prevented it from considering whether the MLAMP process was relevant to assessing whether the Project was in the public interest. While that provision removes the adequacy of Crown consultation from the AER's jurisdiction, the issues raised here are not so limited.

Section 7(3) of LARP

59 The AER is required to "act in accordance with any applicable ALSA regional plan": *REDA*, s 20. The LARP is the applicable *ALSA* regional plan for the area where the Project is proposed. Section 7(3) of the LARP states:

> Notwithstanding subsections (1) and (2), a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of
>
> (a) the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or

(b) the incompletion by the Crown or any body of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.

60 The AER interpreted s 7(3) as prohibiting it from delaying or denying approval of the Project because "LARP indicates that, once finalized, MLAMP will be a LARP regional plan" (para 181). However, the only mention of the MLAMP in the LARP is a statement in the "Introductory Section" that "the Moose Lake Access Management planning initiatives will be assessed for inclusion in the LARP implementation" (LARP, page 5). A planning initiative that will be assessed for inclusion in the LARP implementation does not fall within the scope of a "provision of either the LARP Strategic Plan or LARP Implementation Plan" or a "direction or commitment made in a provision of either the LARP Strategic Plan or Implementation Plan" so as to be subject to s 7(3).

61 The AER failed to properly interpret s 7(3) of the LARP when it concluded that it applied to the MLAMP process.

Deferring consideration to Cabinet under s 10(3) of OSCA

62 Section 10(3) of *OSCA* provides that the AER may "if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the Regulator considers appropriate ".

63 As noted, the AER viewed the positive and negative impacts of the Project as being "more or less even" (para 180), and that FMFN's "assertion that we must not frustrate MLAMP negotiations does not tip the public interest balance against approving the Rigel project" (para 182). The AER referred to s 10 of *OSCA* and concluded that Cabinet was "the most appropriate place for a decision on the need to finalize MLAMP".

64 A statutory decision-maker is required to follow the directions in the applicable legislation. It is the legislature, not the statutory decision-maker, which delegates responsibility for making a particular decision. The responsibility to determine whether projects reviewed under s 10 of *OSCA* are in "the public interest" was delegated to the AER. Only projects deemed by the AER to be in the public interest may proceed to the next stage. Cabinet then has the authority to decide whether "to authorize" and impose "terms and conditions" on the project. Matters that fall within the scope of the "public interest", within the meaning of s 10(3) of *OSCA*, must be considered by the AER as part of its public interest mandate; the regulator is not entitled to decline to address such matters because, in its view, they could be better addressed by Cabinet. This is not to say that Cabinet cannot also take such matters into account when considering whether to authorize the Project, but that does not relieve the AER of its responsibility.

65 The legislature granted to the AER a broad mandate to determine whether a project is in the public interest; factors to consider include the social and economic effects of the energy resource activity, the effects of the energy resource activity on the environment, and the impacts on a landowner as a result of the use of the land on which the energy resource activity is or will be located: *REDA*, s 15; *REDA General Regulation*, s 3. The "public interest" also includes adherence to constitutional principles like the honour of the Crown, and the AER is no less responsible for considering the Crown's constitutional obligations than is Cabinet. To the extent the MLAMP negotiations implicate the honour of the Crown and therefore need to be considered as part of the "public interest", the AER was under a statutory duty to consider that issue.

66 The need for ultimate Cabinet approval does not provide the AER a lawful reason to decline to consider the MLAMP negotiations and related issues insofar as they implicate the honour of the Crown. For that reason, we reject Prosper's argument that this appeal is premature on account of the fact that Cabinet has yet to give final authorization to the Project. Prosper notes that only final decisions can be reviewed and likens the decision of the AER to the National Energy Board (NEB), whose recommendations to Cabinet are said not to be amenable to judicial review: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (F.C.A.) at paras 170-203, leave to appeal to SCC refused, 38379 (2 May 2019) [*City of Burnaby v. Attorney General of Canada, et al.*, 2019 CarswellNat 1517 (S.C.C.)]. However, as FMFN points out, the decision of the AER regarding whether the Project is in the public interest is, unlike an NEB recommendation, a final decision subject to statutory appeal.

Whether the AER erred in failing to consider the honour of the Crown as it relates to MLAMP negotiations when determining "the public interest" is a matter for which permission to appeal was granted and is properly before us.

67 Moreover, the AER's consideration of these issues does not, contrary to Alberta's argument, place the AER in an improper role with respect to government policy decisions. The issue before the AER is whether the approval of a project is in the public interest. Considerations of the effect of the project on aboriginal interests and adherence with constitutional principles are part of the AER's public interest mandate. The AER's consideration of these issues in the context of a proposed project does not relieve the Crown of its ultimate constitutional responsibilities.

Conclusion

68 We are satisfied that there was no basis for the AER to decline to consider the MLAMP process as part of its assessment of the public interest rather than deferring the issue to Cabinet. The public interest mandate can and should encompass considerations of the effect of a project on aboriginal peoples, which in this case will include the state of negotiations between the FMFN and the Crown. To preclude such considerations entirely takes an unreasonably narrow view of what comprises the public interest, particularly given the direction to all government actors to foster reconciliation.

69 At the oral hearing, FMFN asked that the matter be remitted back to the AER to consider this issue, acknowledging it is for that decision-maker to determine whether the Project should be delayed, approved or denied. We agree.

70 We have had the opportunity to review the concurring judgment of Greckol JA. She concludes that the honour of the Crown was engaged by the MLAMP negotiation process. As the AER declined to consider this issue at the hearing, a full evidentiary record relating to this matter is not available. We are therefore of the view that the issue should be determined by the AER on an appropriate record.

71 Accordingly, the appeal is allowed and the AER's approval of the Project vacated. The AER is directed to reconsider whether approval of the Project is in the public interest after taking into consideration the honour of the Crown and the MLAMP process. In so concluding, we stress that nothing in this decision should be viewed as a comment on whether approval of the Project is in the public interest.

Sheila Greckol J.A. **(concurring in the result):**

72 I agree that the appeal must be allowed and join with them in the reasons for doing so. However, I wish to make a few additional comments by way of guidance regarding the honour of the Crown and the MLAMP negotiations in this case.

73 The honour of the Crown is a constitutional principle which governs the relationship between Aboriginal peoples and the Crown: *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 S.C.R. 765 (S.C.C.) at paras 21, 24 [*Mikisew 2018*]. Dating back to the *Royal Proclamation of 1763*, the Crown's duty of honourable dealing arises out of its assertion of sovereignty over an Aboriginal people who had *de facto* control of land and resources: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (S.C.C.) at para 32, [2004] 3 S.C.R. 511 (S.C.C.) [*Haida Nation*]; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (S.C.C.) at para 66, [2013] 1 S.C.R. 623 (S.C.C.) [*Manitoba Metis*]; *Mikisew 2018* at para 21.

74 Reconciliation of these opposing realities - pre-existing Aboriginal societies with the assertion of Crown sovereignty - is the ultimate purpose of the honour of the Crown: *Mikisew 2018* at para 22; *Manitoba Metis* at para 66. The duty to treat Aboriginal peoples honourably is also enshrined in s 35 of the *Constitution Act, 1982*, of which "[t]he reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose": *Beckman v. Little Salmon/ Carmacks First Nation*, 2010 SCC 53 (S.C.C.) at para 10, [2010] 3 S.C.R. 103 (S.C.C.).

75 The continued need to reconcile Aboriginal interests with Crown sovereignty through treaty implementation is evident from *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388 (S.C.C.) [*Mikisew 2005*], itself a case involving the Crown's ability to "take up" land under Treaty 8. As noted by Binnie J at para 54,

"[t]reaty making is an important stage in the long process of reconciliation, but it is only a stage". In *Mikisew 2005*, the Supreme Court of Canada held that the duty to consult imposed upon the Crown in *Haida Nation* similarly applied to the "taking up" of land where a First Nation's treaty rights might be affected. The implementation of Treaty 8 was said to "demand a *process* by which lands may be transferred from the one category (where the First Nations retain rights to hunt, fish and trap) to the other category (where they do not)", the content of which was dictated by the duty of the Crown to act honourably:*Mikisew 2005* at para 33, emphasis in original.

76 That the honour of the Crown attaches to the implementation of its constitutional obligations is particularly clear from *Manitoba Metis*, where the Supreme Court of Canada granted a declaration that the Crown failed to implement the *Manitoba Act, 1870* in a manner consistent with the honour of the Crown. *Manitoba Metis* considered s 31 of that constitutional document, which obliged the Crown to distribute 1.4 million acres of land to the children to Metis families. In implementing such obligations, the honour of the Crown requires that the Crown (1) take a broad purposive approach to the interpretation of the promise, and (2) act diligently to fulfill it: para 75. The latter duty was said to arise because "the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled" (para 79) and not leave the Aboriginal group "with an empty shell of a treaty promise" (para 80, citing *R. v. Marshall*, [1999] 3 S.C.R. 456 (S.C.C.) at para 52).

77 Alberta points out that the promise at issue in *Manitoba Metis* is quite different from any promise in this case. However, in my view, the question is not whether the so-called Prentice Promise must itself attract the label "solemn obligation" or "solemn promise", or even whether it is sufficiently exacting to preclude any development in the Moose Lake area. The question, rather, is whether it was made in furtherance of the Crown's obligation to protect FMFN's rights under Treaty 8. If so, then it can properly be said to fall within treaty implementation as a measure designed to ensure the Crown's obligations are fulfilled. To see why this is the case, the precise nature of FMFN's treaty rights must be considered.

78 First Nations groups who adhered to Treaty 8 in 1899 - of which FMFN is a descendant - ceded a large amount of land to the Crown in exchange for certain guarantees, chief among them a provision protecting the right of the signatories to hunt, trap, and fish: *Mikisew 2018* at para 5. Indeed, it has been said that "the guarantee that hunting, fishing and trapping rights would continue was the *essential element* which led to their signing the treaties": *R. v. Badger*, [1996] 1 S.C.R. 771 (S.C.C.) [*Badger*] at para 39, emphasis added. These rights as set out in Treaty 8 were subsequently circumscribed by the *Natural Resources Transfer Agreement*, a schedule of the *Constitution Act, 1930*, of which paragraph 12 provided for a continuing right to hunt for food on unoccupied land: *Badger* at para 100. The right to hunt will accordingly be lost where land has been "taken up" as contemplated by Treaty 8, meaning it will not extend to private lands put to a visible use incompatible with hunting: *Badger* at paras 49, 51, 58, 66.

79 As later clarified in *Mikisew 2005*, however, not every "taking up" by the Crown constitutes an infringement of Treaty 8: para 31. Instead, an action for treaty infringement will only arise once, as a result of the Crown's power to take up land, "no meaningful right to hunt" remains over the Aboriginal group's traditional territories: *Mikisew 2005* at para 48; *Grassy Narrows First Nation v. Ontario (Minister of Natural Resources)*, 2014 SCC 48 (S.C.C.) at para 52, [2014] 2 S.C.R. 447 (S.C.C.). This raises the prospect that the effects of any one "taking up" of land will rarely, if ever, itself violate an Aboriginal group's Treaty 8 right to hunt; instead, the extinguishment of the right will be brought about through the *cumulative effects* of numerous developments over time. In other words, no one project on FMFN's territory may prevent it from the meaningful right to hunt - however, if too much development is allowed to proceed, then, taken together, the effect will be to preclude FMFN from being able to exercise their treaty rights.

80 The right to hunt (in a meaningful way) in Treaty 8 is a "solemn promise" (*Badger* at para 41) made by the Crown, just as the promise of land in *Manitoba Metis* was a solemn constitutional obligation. And yet it is clear that, given the nature of the respective rights, their implementation will necessarily look very different. The obligation in*Manitoba Metis* was met at the point in which the Crown distributed the 1.4 million acres of land to Metis children (and would have accorded with the honour of the Crown had it been done diligently). Conversely, the "promise" of hunting - given the reality of large-scale oil and gas developments in Treaty 8 territory, which is incompatible with Aboriginal hunting - is not fulfilled definitively. Rather, the promise is easy to fulfill initially but difficult to *keep* as time goes on and development increases.

81 The foregoing makes clear that the Crown's obligation to ensure the meaningful right to hunt under Treaty 8 is an *ongoing* one. Proper land use management remains a perennial concern for the Crown, as "none of the parties in 1899 expected that Treaty 8 constituted a finished land use blueprint": *Mikisew 2005* as para 27. Reconciling this "inevitable tension" (para 33) between Aboriginal rights and development in Treaty 8 territory has, first and foremost, been a matter of the Crown adhering to its duty to consult on individual projects, as mandated in *Mikisew 2005*. Acting honourably in this fashion has promoted reconciliation, in part, by "encouraging negotiation and just settlements as an alternative to the cost, delay and acrimony of litigating s. 35 infringement claims" (*Mikisew 2018* at para 26), much as *Haida Nation* had counselled with respect of unproven Aboriginal rights claims. And yet, as this record itself attests, the long-term protection of Aboriginal treaty rights, including the right to hunt under Treaty 8, is increasingly thought to require negotiation and just settlement of disputes outside the context of individual projects in order to address the *cumulative effects* of land development on First Nation treaty rights.

82 That is exactly what has been taking place in this case between the Crown and FMFN. The Crown has long been on notice that the piece-meal approach to addressing FMFN's concerns through consultation on individual projects has not adequately considered the cumulative effects of development. Whether MLAMP itself is mandated by Treaty 8 is not the issue. If the evidence establishes that the Crown entered into negotiations with FMFN on a buffer zone and ultimately agreed to implement MLAMP as a way of seeking to uphold its ongoing constitutional obligation to protect FMFN's right to hunt within its traditional area, then these were not, as suggested by Alberta, mere "policy" discussions. They would instead be negotiations designed to ensure that the Crown meet its treaty obligations. In such circumstances, the honour of the Crown would be engaged.

83 Nor would it be an answer to say - as both Prosper and Alberta have suggested - that FMFN's concerns could instead be addressed in its treaty infringement claim against the Crown. The honour of the Crown has as its ultimate purpose the reconciliation of Aboriginal interests with Crown sovereignty. It is engaged *prior* to treaty infringement (*Mikisew 2018* at para 67) and seeks to protect Aboriginal rights from being turned into an empty shell. Whether or not the treaty rights of FMFN have been infringed remains to be seen. Regardless, the Crown must deal honourably with First Nations in negotiations designed to stave off infringement. The honour of the Crown may not mandate that the parties agree to any one particular settlement, but it does require that the Crown keep promises made during negotiations designed to protect treaty rights. It certainly demands more than allowing the Crown to placate FMFN while its treaty rights careen into obliteration. That is not honourable. And it is not reconciliation.

Appeal allowed.

1987 CarswellMan 176
Supreme Court of Canada

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832

1987 CarswellMan 176, 1987 CarswellMan 272, [1987] 1 S.C.R. 110, [1987] 3 W.W.R. 1, [1987] D.L.Q. 235, [1987] S.C.J. No. 6, 18 C.P.C. (2d) 273, 25 Admin. L.R. 20, 38 D.L.R. (4th) 321, 3 A.C.W.S. (3d) 390, 46 Man. R. (2d) 241, 73 N.R. 341, 87 C.L.L.C. 14,015, J.E. 87-396, EYB 1987-67148

ATTORNEY GENERAL OF MANITOBA v. METROPOLITAN STORES (MTS) LTD., MANITOBA FOOD AND COMMERCIAL WORKERS, LOCAL 823 and MANITOBA LABOUR BOARD

Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

Heard: June 20, 1986
Judgment: March 5, 1987
Docket: No. 19609

Counsel: *S. Whitley* and *V.J. Matthews-Lemieux*, for appellant.
W.L. Ritchie, Q.C., and *R. Kersey*, for respondent Metropolitan Stores (MTS) Limited.
A.R. McGregor, Q.C., and *D.M. Shrom*, for respondent the Manitoba Food and Commercial Workers, Local 832.
D. Gisser, for respondent the Manitoba Labour Board.

The judgment of the court was delivered by *Beetz J.*:

I The Facts, the Proceedings and the Judgment of the Courts Below

1 The facts are not in dispute. Here is how the Manitoba Court of Appeal (1985), 86 C.L.L.C. 14,014, 37 Man. R. (2d) 181, described them at p. 181:

> Under the terms of the *Labour Relations Act*, C.C.S.M., c. L-10, there is provision allowing the Manitoba Labour Board to impose a first collective agreement upon the employer and the union, in circumstances where bargaining for a first contract has not been fruitful. In this particular case the respondent union is the certified bargaining agent, but has not been successful in negotiating a first collective agreement with the appellant employer. The union applied to have the Manitoba Labour Board impose a first contract.
>
> The employer then commenced proceedings, by way of originating notice of motion in the Manitoba Court of Queen's Bench, to have those provisions of the *Labour Relations Act* under which a first collective agreement might be imposed, declared invalid, as contravening the *Charter of Rights and Freedoms*. Within the framework of that action, the employer then applied by way of motion for an order to stay the Manitoba Labour Board until such time as the issue as to the validity of the legislation might be heard by a judge of the Court of Queen's Bench. The motion for a stay was denied by Krindle J. [see 36 Man. R. (2d) 152]. The board, unfettered by a stay order, then indicated that if the parties failed to conclude a first collective agreement through further negotiations by September 25, 1985, the board would proceed to impose a first contract upon the parties within 30 days thereafter.

2 The employer launched an appeal from the decision of Krindle J. refusing a stay order. The Manitoba Court of Appeal allowed the appeal and granted a stay.

3 The reasons of Krindle J. (1985), 22 C.R.R. 156, 36 Man. R. (2d) 152, for refusing a stay read in part as follows at pp. 153-54:

> The employer argues that the granting of a stay will maintain the status quo between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a status quo in these circumstances is fanciful. As of the date of the application for certification there were 22 employees in the unit. At the date this matter came to court, only five of the original 22 continued to be employed. The industry in question is a high turn-over one with no history at all of trade union involvement. At some point the union was able to gain the support of a majority of the 22. Nine employees wrote in letters opposing the certification of the union.
>
> We are not here looking to a strong base of support that can withstand lengthy periods of having the union appear to do nothing whatsoever for these people. It is acknowledged by both counsel that this case may well have to wend its way up to the Supreme Court of Canada for final resolution, a matter which will take years. Considering the high turn-over rate in the unit and the lack of union tradition in the unit, it seems to me to be self evident that the protracted failure of the union to accomplish anything for the employees in the unit virtually guarantees an erosion of support for the bargaining agent. The right of 55% of the employees within the unit to compel decertification of the bargaining agent, the right of another union to apply for certification on behalf of those employees, are rights not affected by the stay of proceedings. The status quo cannot be frozen. Attempts to freeze it will prejudice the position of the union.
>
> The employer argues that the imposition of a first contract may prejudice the position of the employer. It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation ...
>
> Counsel for the employer also raises concern about the contents of the agreement to be imposed. The unit in question is situate in a mall on an Indian Reservation outside The Pas. The terms of the lease between the employer and the owner of the shopping mall contain a provision regarding the employment of a certain minimum percentage of Indian people. That requirement may cause problems if the usual seniority clauses present in most agreements are simply rubber stamped into this first agreement. It may well be that the traditional seniority provisions will have to be modified somewhat in this case to accommodate the requirements of the lease. Surely, though, that is a matter to be brought to the attention of the Board during the course of the Board's hearings into settling the terms of the agreement. I cannot imagine that the Board would fail to give consideration to such a problem in arriving at those terms ...
>
> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.
>
> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

4 In reviewing the decision of the learned motion judge, the Manitoba Court of Appeal did not make any finding that Krindle J. was in error in concluding that stay ought to be refused, or that she had declined to exercise her discretion or had acted on a wrong principle in exercising her discretion. The Court of Appeal exercised fresh discretion based on additional considerations which, in its view, were not before the motion judge (pp. 181-83):

> The appeal first came before this court on September 10, 1985 before a panel consisting of Matas, Huband and Philp, JJ.A. Before any hearing took place on the merits of the appeal, the court adjourned for a few moments, consulted with Court of Queen's Bench authorities as to the prospect of an earlier date for a hearing in the Queen's Bench of the employer's attack on the legislation, resumed the hearing and informed counsel that one day could be set aside for such a hearing on September 25, 1985. This would enable a hearing on the validity of the legislation to take place before any collective agreement could possibly be imposed. Counsel for employer, union and the Manitoba Labour Board, agreed to the September 25th hearing date ...

It was understood by all concerned that the one-day hearing would proceed on September 25th. On that date counsel appeared before Glowacki, J., of the Court of Queen's Bench, but in addition, counsel representing the Canadian Labour Congress also appeared, requesting permission to intervene. Glowacki, J., was advised by counsel for the C.L.C. that it wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the *Charter of Rights and Freedoms*.

Instead of the planned one-day hearing, a hearing of several days' duration was envisaged. Instead of the matter proceeding on September 25th, Glowacki, J., fixed a hearing date for some time in December 1985.

Once again the prospect of a collective agreement being imposed before a hearing to determine the validity of the legislation became real. Counsel for the employer immediately requested a hearing in this court on the appeal from the order of Krindle, J., denying the stay order which had been adjourned sine die on September 10th. The present panel heard the appeal on the afternoon of September 25th.

At the conclusion of that hearing, it was suggested to counsel for the Manitoba Labour Board, that in order to expedite matters and obtain a decision on the validity of the legislation, it was open to the Manitoba Labour Board to direct a reference to this court. We are informed that there are other cases besides this one where provisions of the *Labour Relations Act* are under attack as violating the *Charter*, and it was suggested that these matters might also be resolved by way of a direct reference to this court. We have now been informed however that the board "... will not, at this time, be requesting a reference to the Court of Appeal pursuant to the *Labour Relations Act*" ...

By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the *Labour Relations Act*. As previously noted, other provisions in the *Act* are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the *Act*, based upon the *Charter* in other litigation.

There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.

In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the *Charter*.

A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

5 In allowing the appeal, the Manitoba Court of Appeal ordered that:

... all proceedings before the Manitoba Labour Board relating to the application for settlement of a first collective agreement between the Applicant and the Respondent Manitoba Food and Commercial Workers, Local 832, pursuant to Section 75.1 of *The Labour Relations Act* (Case No. 586/85/LRA), be stayed until after this action has been heard and determined by the Court of Queen's Bench, or further Order of this Court.

6 It is from this interlocutory order that the Attorney General is appealing by leave of this court. He is supported by Manitoba Food and Commercial Workers, Local 832 ("the union") and by the Manitoba Labour Board ("the board").

II The Issues

7 The points in issue, according to appellant's factum, are as follows:

1. Did the Manitoba Court of Appeal err in failing to recognize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the *Canadian Charter of Rights and Freedoms*?

2. Did the Manitoba Court of Appeal err in exercising its discretionary power to grant a stay of proceedings until the constitutional validity of section 75.1 of *The Labour Relations Act*, C.C.S.M., c. L10 has been determined, since the effect of the stay is to render the legislation inoperative?

3. Did the Manitoba Court of Appeal err when it interfered with the exercise of the trial Judge's discretion in refusing to grant a stay of proceedings?

4. Did the Manitoba Court of Appeal apply proper legal principles when it decided that proceedings before a quasi-judicial tribunal; namely, a labour board constituted under provincial legislation, should be stayed?

8 The first issue stated by the appellant is related to the existence of a so-called presumption of constitutional validity of a law when challenged under the Canadian Charter of Rights and Freedoms and will be dealt with first.

9 The second and fourth issues essentially address the same question: in a case where the constitutionality of a legislative provision is challenged, what principles govern the exercise by a superior court judge of his discretionary power to order a stay of proceedings until it has been determined whether the impugned provision is constitutional? This issue arises not only in Charter cases but also in other constitutional cases and I propose to review some cases dealing with the distribution of powers between Parliament and the legislatures and some administrative law decisions having to do with the vires of delegated legislation: as I read those cases, there is no essential difference between this type of case and the Charter cases insofar as the principles governing the grant of interlocutory injunctive relief are concerned.

10 Finally, the third issue raises the question of the appropriateness of the Court of Appeal's intervention in the motion judge's discretion; it will be examined in the last part of this judgment.

III The Canadian Charter of Rights and Freedoms and the So-called Presumption of Constitutional Validity

11 According to the appellant, the Manitoba Court of Appeal erred in granting a stay of the proceedings since it failed "to recog nize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the *Canadian Charter of Rights and Freedoms*".

12 I should state at the outset that, while I have reached the conclusion that the appeal ought to be allowed, it is not on account of what the appellant calls a presumption of constitutional validity.

13 We have not been told much about the nature, weight, scope and meaning of that presumption. For lack of a better definition, I must assume that the so-called presumption means exactly what it says, namely, that a legislative provision challenged on the basis of the Charter must be presumed to be consistent with the Charter and of full force and effect.

14 Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading. If it is a presumption strictly so-called, surely it is a rebuttable one. Otherwise a stay of proceedings could never be granted. But to say that the presumption is rebuttable is to open the way for a rebuttal. This in its turn involves a consideration of the merits of the case which is generally not possible at the interlocutory stage.

15 A reason of principle related to the character of the Charter also persuades me to dismiss the appellant's submission based on the presumption of constitutional validity. Even when one has reached the merits, there is no room for the presumption of constitutional validity within the literal meaning suggested above: the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter.

16 As was said by Lamer J., speaking for himself and five other members of the court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 496, *(*sub nom. *Ref. re S. 94(2) of Motor Vehicle Act)* [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266:

> The truly novel features of the *Constitution Act*, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.

17 The Charter extends its protection to rights of a new type such as mobility rights and minority language educational rights. It is significant also that the effect of s. 15, relating to equality rights, was delayed, pursuant to s. 32(2) of the Charter, by three years, presumably to give time to Parliament and the legislatures to prepare for the necessary adjustments.

18 Furthermore, the innovative character of the Charter affects even traditional rights already recognized before the coming into force of the Charter and which must now be viewed in a new light. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81, this court declined to restrict the meaning of the freedom of conscience and religion guaranteed by the Charter to such interpretation of this freedom as had prevailed before the Charter. At pp. 343-44 of the *Big M* case, Dickson J., as he then was, speaking for himself and four other members of the court, wrote as follows:

> ... it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter's* entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> 2. Everyone has the following fundamental freedoms:
>
> (*a*) Freedom of conscience and religion;
>
> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.

19 Similarly, as traditional a right as the presumption of innocence is given a greater degree of protection under the Charter than it has received prior to the Charter: *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87.

20 Thus, the setting out of certain rights and freedoms in the Charter has not frozen their content. The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the Charter, must remain susceptible to evolve in the future:

> In my opinion the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.

(Per Le Dain J., dissenting, although not on this point, in *R. v. Therens*, [1985] 1 S.C.R. 613 at 638, [1985] 4 W.W.R. 286, 45 C.R. (3d) 97, 32 M.V.R. 153, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 40 Sask. R. 122, 59 N.R. 122.)

21 The views of Le Dain J. reflect those of Dickson J., as he then was, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 84 D.T.C. 6467, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future.

> Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

22 In my view, the presumption of constitutional validity understood in the literal sense mentioned above, and whether it is applied to laws enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of this constitutional instrument.

23 This proposition should not be taken as necessarily affecting what has sometimes been designated, perhaps improperly, as other meanings of the "presumption of constitutionality".

24 One such meaning refers to the elementary rule of legal procedure according to which "the one who asserts must prove" and "The onus of establishing that legislation violates the Constitution undeniably lies with those who oppose the legislation": Dale Gibson, The Law of the Charter: General Principles (1986), pp. 56 and 58. By definition, such a rule is essentially directed to the merits of the case.

25 Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: *McKay v. R.*, [1965] S.C.R. 798, 53 D.L.R. (2d) 532 [Ont.]. In the *Southam* case, supra, a Charter case, it was held at p. 169 that it "should not fall to the courts to fill in the details that will render legislative lacunae constitutional." But that was a question of "reading in", not "reading down". The extent to which this rule of construction other wise applies, if at all, in the field of the Charter is a matter of controversy: *Fed. Republic of Germany v. Rauca* (1983), 41 O.R. (2d) 225, *(*sub nom. *R. v. Rauca)* 43 C.R. (3d) 97, 4 C.C.C. (3d) 385, 145 D.L.R. (3d) 638 at 658, 4 C.R.R. 42 (C.A.); *Black v. Law Soc. of Alta.*, [1986] 3 W.W.R. 590 at 628, 44 Alta. L.R. (2d) 1, 20 Admin. L.R. 140, 27 D.L.R. (4th) 527, 20 C.R.R. 117, *(*sub nom. *Black & Co. v. Law Soc. of Alta.)* 68 A.R. 259 (C.A.); leave to appeal has been granted, [1986] 1 S.C.R. x, 22 C.R.R. 192n, 72 A.R. 240, 69 N.R. 319; P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés" in La Charte canadienne des droits et libertés: Concepts et impacts (1984), pp. 124-26; R. McLeod et al., eds., The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences, vol. 1, pp. 2-198-2-209; P. Hogg, Constitutional Law of Canada, 2nd ed. (1985), p. 327; D. Gibson, The Law of the Charter: General Principles, pp. 57, 58 and 186-88. I refrain from expressing any view on this question which also arises only when the merits are being considered.

IV The Principles Which Govern the Exercise of the Discretionary Power to Order a Stay of Proceeding Pending the Constitutional Challenge of a Legislative Provision

26 The second question in issue involves a study of the principles which govern the granting of a stay of proceedings while the constitutionality of a legislative provision is challenged in court by the plaintiff.

27 It should be observed that none of the parties has disputed the existence of the discretionary power to order a stay in such a case and, in my view, the parties were right in conceding that the trial judge had jurisdiction to order a stay: see *A.G. Can. v. Law Soc. of B.C.; Jabour v. Law Soc. of B.C.*, [1982] 2 S.C.R. 307 at 330, [1982] 5 W.W.R. 289, 37 B.C.L.R. 145, 19 B.L.R. 234, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 43 N.R. 451.

(1) The Usual Conditions for the Granting of a Stay

28 Prior to the Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), no distinction between injunctions restraining proceedings and other sorts of injunctions was drawn in English law: Halsbury's Laws of England, 4th ed., vol. 24, para. 1033, p. 577. The Parliament of Westminster then enacted the Act referred to above, which in the main has been adopted by all of the provinces of Canada except Quebec, where the distinction between equity and law is unknown. The distinction the English

Judicature Act created between a stay of proceedings and an injunction was, however, essentially procedural. Section 24(5) stated that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction provided that "any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof ... shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just." Section 25(8) of the same Act provided further that an injunction may be granted in all cases in which it shall appear to the court to be "just and convenient" that such order should be made. See also *Boeckh v. Gowganda-Queen Mines Ltd.* (1912), 4 O.W.N. 27, 6 D.L.R. 292 (H.C.).

29 A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions: *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127 at 132 (C.A.); *Haldimand-Norfolk Regional Health Unit v. Ont. Nurses' Assn.*, Ont. Div. Ct., Galligan, Van Camp and Henry JJ., 17th January 1979 (unreported); *Daciuk v. Man. Lab. Bd.*, Man. Q.B., Dureault J., 25th June 1985 (unreported); *Metro. Toronto Sch. Bd. v. Ont. Min. of Educ.* (1985), 53 O.R. (2d) 70, 6 C.P.C. (2d) 281 at 292, 23 D.L.R. (4th) 303, 13 O.A.C. 113 (Div. Ct.), leave to appeal to the Court of Appeal refused.

30 The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

31 The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: *Chesapeake & Ohio Ry. Co. v. Ball*, [1953] O.R. 843 at 854-55, [1953] O.W.N. 801, per McRuer C.J.H.C. The House of Lords has somewhat relaxed this first test in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the court that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J., speaking for himself and five other members of the court in a unanimous judgment, referred to but did not comment upon this difference in *Aetna Fin. Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at 9 and 10, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241.

32 *Amer. Cyanamid* has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance, Toronto (1983), at pp. 66-77.

33 In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *Amer. Cyanamid* description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured: see Hanbury and Maudsley, Modern Equity, 12th ed., pp. 736-43. In my view, however, the *Amer. Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

34 The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves whether the granting of the interlocutory

injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

35 The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

36 I now propose to consider the particular application of the test of the balance of convenience in a case where the constitutional validity of a legislative provision is challenged. As Lord Diplock said in *Amer. Cyanamid*, at p. 511:

> ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

37 It will be seen in what follows that the consequences for the public, as well as for the parties, of granting a stay in a constitutional case do constitute "special factors" to be taken into consideration.

(2) The Balance of Convenience and the Public Interest

38 A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

39 The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

(i) Difficulty or Impossibility to Decide the Merits at the Interlocutory Stage

40 The limited role of a court at the interlocutory stage was well described by Lord Diplock in the *Amer. Cyanamid* case, at p. 510:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

41 The *Amer. Cyanamid* case was a complicated civil case but Lord Diplock's dictum, just quoted, should a fortiori be followed for several reasons in a Charter case and in other constitutional cases when the validity of a law is challenged.

42 First, the extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the province may not yet have been notified as is usually required by law: see *Home Oil Distributors Ltd. v. A.G.B.C.*, 53 B.C.R. 355, [1939] 1 W.W.R. 49, [1939] 1 D.L.R. 573 at 577 (C.A.); *Weisfeld v. R.* (1985), 16 C.R.R. 24 (Fed. T.D.); and, for an extreme example, *Turmel v. C.R.T.C.* (1985), 16 C.R.R. 9 (Fed. T.D.).

43 Still, in Charter cases such as those which may arise under s. 23 relating to minority language educational rights, the factual situation as well as the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff: *Marchand v. Simcoe County Bd. of Educ.* (1984), 10 C.R.R. 169 at 174 (Ont. H.C.).

44 Furthermore, in many Charter cases such as the case at bar, some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although prima facie in violation of a guaranteed right or freedom, can be saved under s. 1 of the Charter. But evidence adduced pursuant to s. 1 of the Charter essentially addresses the merits of the case.

45 This latter rule was clearly stated in *Gould v. A.G. Can.*, [1984] 2 S.C.R. 124, 42 C.R. (3d) 88n, 13 D.L.R. (4th) at 491, 53 N.R. 394, affirming [1984] 1 F.C. 1133, 42 C.R. (3d) 88, 13 D.L.R. (4th) 485, 54 N.R. 232, which set aside [1984] 1 F.C. 1119, 42 C.R. (3d) 78. It was held that a court is not at the interlocutory stage in an adequate position to decide the merits of a case even though the evidence that is likely to be adduced under s. 1 seems of little weight. In the Federal Court of Appeal, Thurlow C.J.F.C., dissenting, held that a court is sometimes entitled to examine the merits of the case and anticipate the result of the action (pp. 1137-38):

> I agree with the criticisms and views expressed by the learned Trial Judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of paragraph 14(4)(*e*) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the Court so show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.
>
> In such circumstances then should the Court treat it seriously? Should the Court irrevocably deprive the respondent of a constitutional right to which he appears to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this Court should interfere with the exercise of the discretion of the Trial Judge in the circumstances.

46 Mahoney J., whose opinion was generally approved by this court, took the opposite view (p. 1140):

> The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14(4)(*e*) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional.

47 Such cautious restraint respects the right of both parties to a full trial, the importance of which was emphasized by the judicious comments of May L.J. in *Cayne v. Global Natural Resources*, [1984] 1 All E.R. 225 at 238 (C.A.). Also, it is consistent with the fact that, in some cases, the impugned provision will not be found to violate a right or freedom protected by the Charter after all and thus will not need to be saved under s. 1: see *R. v. Jones*, [1986] 2 S.C.R. 284, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 73 A.R. 133, 69 N.R. 241.

48 In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J.E. Magnet (J.E. Magnet, "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 Man. L.J. 21, at p. 29):

> Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.

49 However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away: see *A.G. Que. v. Que. Assn. of Protestant Sch. Bd.*, [1984] 2 S.C.R. 66 at 88, 10 D.L.R. (4th) 321, 9 C.R.R. 133, 54 N.R. 196. It is trite to say that these cases are exceptional.

50 Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in Charter cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor Robert J. Sharpe wrote in Injunctions and Specific Performance, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this

stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

(ii) The Consequences of Granting a Stay in Constitutional Cases

51 Keeping in mind the state of uncertainty above referred to, I turn to the consequences that will certainly or probably follow the granting of a stay of proceedings. As previously said, I will not restrict myself to Charter instances. I also propose to refer to a few Quebec examples. In that province, the issuance of interlocutory injunctions is governed by arts. 751 and 752 of the Code of Civil Procedure:

> 751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.
>
> 752. In addition to an injunction, which he may demand by action, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.
>
> An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

52 While these provisions differ somewhat from the English law of injunctions, they are clearly inspired by and derived from this law and I do not think that the Quebec cases I propose to refer to turn on any differences between the English law and the Code.

53 Although constitutional cases are often the result of a lis between private litigants, they sometimes involve some public authority interposed between the litigants, such as the board in the case at bar. In other constitutional cases, the controversy or the lis, if it can be called a lis, will arise directly between a private litigant and the state represented by some public authority: *Morgentaler v. Ackroyd* (1983), 42 O.R. (2d) 659, 150 D.L.R. (3d) 59 (H.C.).

54 In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type I will call exemption cases.

55 Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance, the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases is susceptible temporarily to frustrate the pursuit of the common good.

56 While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given

the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest dis tinct from that of the public to which they owe the duties imposed upon them by statute.

57 The following provide examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. I will first address the suspension cases.

58 *Société de développement de la Baie James c. Kanatewat*, [1975] C.A. 166, is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole. In that case, the Quebec Court of Appeal, reversing the Superior Court, [1974] R.P. 38, dismissed an application for interlocutory injunction which would have required the appellants to halt the James Bay project authorized by the James Bay Region Development Act, S.Q. 1971, c. 34, the constitutional validity of which had been challenged by the respondents. Crête J.A., as he then was, wrote what follows in looking at the balance of convenience at p. 182:

59 ... je n'ai pu me convaincre que les inconvénients subis ou appréhendés par les intimés étaient de la même échelle de grandeur que les besoins croissants d'énergie pour tout le Québec.

60 Turgeon J.A. reached the same conclusions at p. 177:

> Il est important de noter au départ que l'hydroélectricité est la seule ressource d'énergie primaire possédée par la province de Québec. Avec la crise du pétrole qui sévit actuellement dans le monde, cette ressource est devenue d'une importance capitale pour assurer l'avenir économique et le bien — être des citoyens. *L'intérêt de la population québécoise est représenté dans cette cause par les principales sociétés appelantes*.
>
> La preuve démontre qu'il est impérieux pour l'Hydro-Québec de réaliser son programme pour faire face à la demande croissante d'éléctricité jusq'en 1985 ... Un arrêt des travaux aurait des conséquences désastreuses car il faudrait mettre sur pied un programme de substitution pour produire l'électricité par des centrales thermiques ou nucléaires. (emphasis added)

(Leave to appeal was granted by this court on 13th February 1975, but a declaration of settlement out of court was filed on 28th January 1980, further to which, on the same date, Chief Robert Kanatewat and others discontinued their appeal.)

61 In *P.G. Qué. c. Lavigne*, [1980] C.A. 25, the Quebec Court of Appeal, again reversing the Superior Court, [1980] C.S. 318, dismissed an application for interlocutory injunction enjoining the Attorney General, the Minister of Education, the Minister of Municipal Affairs and others from temporarily enforcing certain provisions of the Act respecting municipal taxation and providing amendments to certain legislation, S.Q. 1979, c. 72. The statute in question provided for school financing through a system of grants; taxation became a complementary method subject to new conditions. The scheme allegedly violated the constitutional guarantees of s. 93 of the Constitution Act, 1867, an allegation which was later sustained by this court in *A.G. Que. v. Greater Hull Sch. Bd.*, [1984] 2 S.C.R. 575, 28 M.P.L.R. 146, 15 D.L.R. (4th) 651, 56 N.R. 99.

> The Superior Court had granted an interlocutory injunction for the following reasons, inter alia, at pp. 323 and 324:
>
> Au départ, précisons que le cas d'espèce soumis n'est pas une question constitutionnelle *ordinaire*: il ne s'agit pas ici du conflit habituel entre la juridiction de l'Etat fédéral et l'une des provinces, du conflit juridictionel entre deux provinces, d'une province qui légiférerait hors des cadres des pouvoirs accordés par l'article 92 *A.A.N.B.*
>
> Il s'agit ici plutôt du *cas très spécial* (comme celui de l'article 133 *A.A.N.B.*) où l'on attaque une législation que l'on prétend à l'encontre *d'une garantie constitutionnelle*.
>
> En conséquence, il ne s'agit pas d'une simple question constitutionnelle, mais d'un droit garanti, comme le droit à la langue (133).

> Il suffit, dans le cas d'une garantie constitutionnelle, comme la langue ou la religion, qu'il appert à sa face même qu'on enlève un droit pour que, d'une façon absolue, le justiciable ait droit à son recours en injonction. Cela découle de la nature même de la garantie constitutionnelle. *Quand un droit est garanti constitutionnellement, peu importe l'énonnité des conséquences, son aspect immuable demeure* ... (emphasis added)

62 The Quebec Court of Appeal reversed the Superior Court, holding as follows at p. 26:

> Le juge de la Cour supérieure, pour motiver l'émission des injonctions, décide que les dispositions attaquées, à leur face même, violent des garanties constitutionnelles contenues à l'article 93 de *l'Acte de l'Amérique du Nord Britannique*, qu'il suffit dans ce cas qu'on enlève un droit pour que d'une façon absolue, le recours en injonction soit fondé sans que soit requise une preuve de préjudice ou de la balance des inconvénients.
>
> Après études du dossier et considération des arguments que nous soumettent les procureurs des parties en regard des jugements de la Cour supérieure, nous sommes d'avis que le droit sur lequel se fondent les demandeurs, requérants en injonction interlocutoire, n'est pas clair, que les questions en litige sont fort complexes. L'étendue des garanties constitutionnelles invoquées n'est pas sans susciter des doutes et *l'effet des injonctions est de suspendre la mise en opération d'une partie importante de la loi, dans toute la province de Québec*. Dans les circonstances, à ce stade des procédures, la présomption de validité de la loi doit prévaloir sur l'apparence d'un droit incertain. (emphasis added)

63 It can be seen that, apart from the presumption of constitutionality, the Court of Appeal took into consideration the paralysing impact of the injunction which would have suspended the operation of an important part of the impugned legislation throughout the province.

64 A somewhat similar situation arose in *Metro. Toronto Sch. Bd. v. Min. of Educ.*, supra. Interim measure regulations which provided for the funding of separate schools were challenged as being ultra vires by the school board and the teachers' federation in an application for judicial review. The Divisional Court vacated an order of a single judge prohibiting the expenditure of funds pursuant to the regulations, pending a decision of the Divisional Court on the main application. The following words reflect the interest shown by the court in the preservation of the educational system (pp. 293-94):

> On the evidence before this Court as between the applicants, on the one hand, and the Roman Catholic Separate School Boards, teachers, students and parents on the other, the balance of convenience overwhelmingly is in the latter's favour. *The disruption of the educational system and its interim funding is, in the opinion of this Court, a matter to be avoided at all costs*. (emphasis added)

65 Reference can also be made to *Pac. Trollers Assn. v. A.G. Can.*, [1984] 1 F.C. 846, where the Trial Division of the Federal Court declined to grant an interlocutory injunction restraining certain fisheries officers from enforcing amendments made to the Pacific Commercial Salmon Fishery Regulations, the validity of which had been attacked. And see *A.G. Can. v. Fishing Vessel Owners' Assn. of B.C.*, [1985] 1 F.C. 791, 61 N.R. 128, where the Federal Court of Appeal, reversing the Trial Division, dismissed an application for interlocutory injunction restraining fisheries officers from implementing the fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, and the Pacific Commercial Salmon Fishery Regulations, C.R.C. 1978, c. 823. The plan in question was alleged to be beyond the legislative power of Parliament and beyond the powers conferred by the Fisheries Act. The court noted at p. 795:

> ... the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm ...

66 These words of the Federal Court of Appeal amplify, somewhat broadly perhaps, the idea expressed in more guarded language by Browne L.J. in *Smith v. Inner London Educ. Authority*, [1978] 1 All E.R. 411 at 422 (C.A.):

> He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the "special factors" affecting the balance of convenience which are referred to by Lord Diplock in *American Cyanamid Co v Ethicon Ltd.*

67 Similar considerations govern the granting of interlocutory injunctive relief in the context of exemption cases.

68 *Ont. Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), is the earliest example I know of an exemption case. The plaintiff club sought an interim injunction restraining the Provincial Treasurer and the Provincial Police Commissioner from collecting from it a provincial tax which was allegedly indirect and ultra vires of the province or, in the alternative, from closing the club's race track, until a decision was rendered on the merits. Middleton J., concerned with the protection of the public interest, issued the injunction subject to an undertaking by the club to pay into court from time to time the amount payable in respect of the taxes claimed.

69 In *Campbell Motors Ltd. v. Gordon*, [1946] 3 W.W.R. 177, [1946] 4 D.L.R. 36 (B.C.C.A.), the appellant company sought a declaration that the National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25, and certain regulations made thereunder for the purpose of [s. 2(1)(*c*)] "maintaining, controlling and regulating supplies and services, prices, transportation ... to ensure economic stability and an orderly transition to conditions of peace" were ultra vires on the ground that the war had come to an end. That appellant company was a used car dealer. It had been convicted four times for contravention to the regulations further to which its licence had been cancelled by the Wartime Prices and Trade Board, three of its motor vehicles had been seized together with certain books and records and it had been prohibited from selling any motor vehicles except with the concurrence of the representative of the board in Vancouver. By a majority decision, the British Columbia Court of Appeal, confirming the motion judge, refused to continue an ex parte interim injunction restraining members of the board from prosecuting the company for doing business without a licence and also refused to order the return of the company's seized property. Sidney Smith J.A., who gave the reasons of the majority, wrote at p. 48:

> If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

70 Robertson J.A., who agreed with the reasons of Sidney Smith J.A., added at p. 47:

> Subsection (*c*) of s. 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

71 A more recent example can be found in *Black v. Law Soc. of Alta.*, [1983] 3 W.W.R. 7, 24 Alta. L.R. (2d) 106, 144 D.L.R. (3d) 439, 5 C.R.R. 305, 42 A.R. 118 (Q.B.), and *Law Soc. of Alta. v. Black*, [1984] 6 W.W.R. 755, 29 Alta. L.R. (2d) 326, 7 Admin. L.R. 55, 8 D.L.R. (4th) 346, 69 A.R. 322 (C.A.). The law society had adopted two rules, one of which prohibited members from being partners in more than one law firm; the other rule prohibited members residing in Alberta from entering into partnerships with members residing outside Alberta. This latter rule was challenged as being inconsistent with s. 6(2) of the Charter. The Alberta Court of Queen's Bench granted an interlocutory injunction restraining the law society from enforcing the two rules against the plaintiff solicitors pending the trial of the action. The law society only appealed the order granting the interlocutory injunction with respect to the first rule. In allowing the appeal, Kerans J.A., who delivered the reasons of the court, wrote at p. 349:

> It is correct ... that the fact that the injunction is sought against a public authority exercising a statutory power is a matter to be considered when one comes to the balance of convenience. However, we do not agree that the *Cyanamid* test simply disappears in such a case.

72 The *Morgentaler* case, supra, is an exemption case involving the Charter which has been quoted and relied upon several times. The plaintiff applicants had opened a clinic offering abortion services, which was not an "accredited hospital" within the meaning of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34. They commenced an action claiming that s. 251 was inconsistent with the Canadian Charter of Rights and Freedoms and an interim injunction and a permanent injunction. Pending the hearing and disposition of the interim injunction, they sought an "interim interim" injunction restraining the Chief of the Metropolitan Toronto Police Force, the Commissioner of the Ontario Provincial Police, and their servants, agents or any persons acting under their instruction from investigating, enquiring into, reporting and otherwise acting upon the activities of the plaintiffs referable only to s. 251 of the Criminal Code. Linden J., of the Ontario High Court, dismissed their application and expressed the following opinion on the balance of convenience at pp. 666-68:

> The third matter that must be demonstrated is that the balance of convenience in the granting of an interim injunction favours the applicants over the respondents. If only these two sets of parties were involved in this application it might well be that the convenience of the applicants would predominate over that of the respondents, since the applicants have much to lose while the respondents do not. However, this is not an ordinary civil injunction matter; it involves a significant question of constitutional law and raises a major public issue to be addressed — that is, what may law enforcement agencies do pending the outcome of constitutional litigation challenging the laws they are meant to enforce?
>
> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences under s. 251 pending the final resolution of the constitutional issue. Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever. In the event that the impugned law is ultimately held to be invalid, no harm would be done by such a course of conduct. But, if the law is ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. This cannot be.
>
> For example, let us assume that someone challenged the constitutional validity of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and sought an injunction to prevent the police from investigating and prosecuting that person for importing and selling narcotics pending the resolution of the litigation. If the court granted the injunction, the sale of narcotic drugs would be authorized by court order, which would be most inappropriate if the law is later held to be valid ...
>
> In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement. Such a course of action seems to be the best method of ensuring that our society will continue to respect the law at the same time as it is being challenged in an orderly way in the courts. This does not mean, however, that in exceptional circumstances this court is precluded from granting an interim injunction to prevent grave injustice, but that will be rare indeed.

73 The principles followed in the above quoted cases have been summarized and confirmed for the greater part by this court in *Gould*, supra. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(*e*) of the Canada Elections Act, R.S.C. 1970, c. 14 (1st Supp.), had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the Canadian Charter of Rights and Freedoms, which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. By a majority decision reversing the Trial Division, the Federal Court of Appeal dismissed his application. Mahoney J., with whom this court expressed its general agreement, wrote at p. 1139 as follows:

> Paragraph 14(4)(*e*) plainly cannot stand unless, by virtue of section 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society.

74 That the respondent inmate had thus a prima facie case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, inter alia, to be found at pp. 1139-40:

> To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(*e*) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

75 And, as we have already seen above, Mahoney J. went on to hold that the interlocutory injunction should be refused for the additional reason that it decided the merits, a matter that should not be resolved at the interlocutory stage.

76 The same principles have been followed recently in *Bregzis v. Univ. of Toronto* (1986), 53 O.R. (2d) 348, 9 C.C.E.L. 282 (H.C.), where the applicant, an associate librarian, was retired involuntarily from his employment with the university, when he reached the age of 65, in accordance with the university's mandatory retirement policy. He challenged the legality of the retirement policy as well as s. 9(*a*) of the Human Rights Code, 1981, S.O. 1981, c. 53, on the ground that they offended s. 15 of the Canadian Charter of Rights and Freedoms. In his reasons, Osborne J. of the Ontario Supreme Court referred to judgments in both *Morgentaler*, supra, and *Gould*, supra, and agreed that "the spectrum of concern on the balance of convenience issue must be wider than the issue joined by the parties themselves" (p. 286).

77 Another case involving facts somewhat similar to *Bregzis* is *Vancouver Gen. Hosp. v. Stoffman* (1985), 68 B.C.L.R. 230, 23 D.L.R. (4th) 146 (C.A.), where the plaintiffs, 15 doctors with active medical practices, contested the validity of a hospital regulation approved by the Minister of Health pursuant to the Hospital Act, R.S.B.C. 1979, c. 176, and under the authority of which their admitting privileges had been terminated because they were over the age of 65. The regulation allegedly constituted discrimination based on age in violation of s. 15(1) of the Canadian Charter of Rights and Freedoms. In a unanimous judgment, the British Columbia Court of Appeal confirmed the judgment of the Supreme Court of British Columbia, which had granted the doctors an interlocutory injunction restraining the hospital from interfering with their privileges pending termination of the issue. While the Court of Appeal did not explicitly refer to the public interest, it nevertheless showed its concern for the safety of the 15 respondents' patients in holding that "All of the doctors were in good health at the material time" (at p. 154).

78 Finally, in *Rio Hotel Ltd. v. Liquor Licensing Bd. (N.B.)*, S.C.C., 31st July 1986, granting leave to appeal and staying proceed ings before the Liquor Licensing Board, Dickson C.J.C. and Beetz, McIntyre, Chouinard and Lamer JJ. [now reported at 29 D.L.R. (4th) 662n, 72 N.B.R. (2d) 180, *(*sub nom. *Rio Hotel Ltd. v. Comm. des Licenses et Permis d'Alcool)* 183 A.P.R. 180], Rio Hotel Ltd., which had admittedly violated the conditions of its liquor permit relating to the presence of nude dancers on the premises, challenged the validity of those conditions on the basis of the Charter as well as of ss. 91 and 92 of the Constitution Act, 1867. It had lost in the New Brunswick Court of Appeal [reported at 29 D.L.R. (4th) 662, 69 N.B.R. (2d) 20, 177 A.P.R. 20] and was threatened with the cancellation of its permit when, in a judgment dated 31st July 1986, this court granted it leave to appeal as well as a stay of proceedings before the Liquor Licensing Board, pending the determination of its appeal. The stay was granted subject to compliance with an expedited schedule for filing the materials and for hearing the appeal. No reasons were given by this court but those who were present at the oral argument of the application for leave to appeal and for a stay could easily infer from exchanges between members of the court and counsel that the court was alive to the enforcement problems created for the New Brunswick Liquor Licensing Board with respect to licence holders other than the Rio Hotel.

(iii) Conclusion

79 It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.

80 The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

81 The problem had already been raised in the *Campbell Motors* case, supra, where Robertson J.A. wrote at p. 47 in the above quoted passage:

> If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish ...

82 In a case like the *Morgentaler* case, supra, for instance, to grant a temporary exemption from the provisions of the Criminal Code to one medical doctor is to make it practically impossible to refuse it to others. This consideration seems to have been very much in the mind of Linden J. in that case where, passing from the particular to the general, he wrote at p. 667:

> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences ... Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever.

83 This being said, I respectfully take the view that Linden J. has set the test too high in writing in *Morgentaler* that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of *Law Soc. of Alta. v. Black* and *Vancouver Gen. Hosp. v. Stoffman*, both supra, can be considered as exceptional or rare. Even the *Rio Hotel* case, supra, where the impugned provisions were broader, cannot, in my view, be labelled as an exceptional or rare case.

84 On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in *Morgentaler* is closer to the mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

85 One of these instances is *Home Oil Distributors Ltd. v. A.G.B.C.*, supra, where the majority of the British Columbia Court of Appeal confirmed the granting of an interlocutory injunction restraining the enforcement of the Coal and Petroleum Products Control Board Act, S.B.C. 1937, c. 8, pending final determination of the validity of this statute which regulated the price at which gasoline could be sold in the province. The impugned legislation was intra vires on its face. The sole ground invoked against it was that it constituted a colourable attempt to regulate the international oil industry and to foster the local coal industry at the expense of that of foreign petroleum. And the sole evidence of this colourable intent was the interim report of a Royal Commission made prior to the passing of the statute. In *Home Oil Distributors Ltd. v. A.G.B.C.*, [1940] S.C.R. 444, [1940] 2 D.L.R. 609, this court looked at the report of the Royal Commission but it upheld the validity of the legislation. The granting of an interlocutory injunction by the motion judge, confirmed by the Court of Appeal, in a case of this nature, is an early and perhaps the first example where this was done in Canada. In a strong dissent, McQuarrie J.A. was the only judge who dealt at any length with the public interest aspect of the case and underlined the one million dollars a year cost of the injunction to the public. The decision seems to have been regarded as an isolated one in the *Campbell Motors* case, supra, at p. 48, in a passage that may amount to a veiled criticism. In my view, the *Home Oil Distributors* decision of the British Columbia Court of Appeal constitutes a weak precedent.

86 The other instance is *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342, where the Quebec Court of Appeal, reversing the Superior Court, issued an interlocutory injunction restraining the Attorney General and any other person, physical or corporate, from enforcing any right conferred upon them by Bill 70, la Loi constituant la Société nationale de

l'amiante, and by Bill 121, la Loi modifiant la Loi constituant la Société nationale de l'amiante, pursuant to which the appellant's property could be expropriated and the constitutional validity of which had been challenged in a declaratory action. The two statutes in question had been enacted in the French language only, in violation of s. 133 of the Constitution Act, 1867, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

87 In short, I conclude that in a case where the authority of a law enforcement agency is constitutionally challenged, no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry. Such is the rule where the case against the authority of the law enforcement agency is serious, for if it were not, the question of granting interlocutory relief should not even arise. But that is the rule also even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Canadian Charter of Rights and Freedoms.

88 I should point out that I would have reached the same conclusion had s. 24 of the Charter been relied upon by counsel. Assuming for the purpose of the discussion that this provision applies to interlocutory relief in the nature of the one sought in this case, I would still hold that the public interest must be weighed as part of the balance of convenience: s. 24 of the Charter clearly indicates that the remedy sought can be refused if it is not considered by the court to be "appropriate and just in the circumstances".

89 On the whole, I thus find myself in agreement with the following excerpt from Sharpe, above, at pp. 176 and 177:

> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

90 I would finally add that in cases where an interlocutory injunction issues in accordance with the above stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part: see in this respect *Black v. Law Soc. of Alta.*, p. 453 [Q.B.], and the *Rio Hotel* case, both supra.

V Review of the Judgments of the Courts Below

91 Finally, it is now appropriate to review the judgments of the courts below in light of the principles set out above.

92 The main legislative provision under attack is s. 75.1 of the Labour Relations Act of Manitoba, enacted in S.M. 1984-85, c. 21, s. 37, which enables the board to settle the provisions of a first collective agreement. It is alleged by the employer that these provisions in question violate ss. 2(*b*) and (*d*) and 7 of the Canadian Charter of Rights and Freedoms relating respectively to freedom of expression, freedom of association, liberty and security of the person. The Manitoba Court of Appeal has taken the view that the employer raises "a serious challenge" to the constitutional validity of the impugned provision and all the parties have conceded that the constitutional challenge is indeed a serious one. The test of a "serious question" applicable in a constitutional challenge of a law has therefore been met.

93 The "irreparable harm" test also clearly appears to have been satisfied.

94 As I read her reasons, Krindle J., at p. 153, implicitly accepted the employer's argument that the imposition of a first contract was susceptible to prejudice its position:

> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.

95 It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

96 The same observation should be made with respect to the position of the union; as I understand the findings of Krindle J., the very existence of the unit was compromised without the imposition of a first collective agreement.

97 Krindle J.'s findings of facts have not been questioned by the Court of Appeal and it is not for this court to review these findings.

98 Krindle J. then considered the balance of convenience and I refer in this respect to the above quoted parts of her reasons for judgment. I am of the view that she applied the correct principles. More particularly, at p. 154, she looked at the public interest and at the inhibitory impact of a stay of proceedings upon the board, in addition to its effect upon the employer and the union:

> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.
>
> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

99 While this is an exemption case, not a suspension case, and each case, including a fortiori an exemption case, turns on its own particular facts, yet, the inconvenience suffered by the parties is likely to be quite similar in most cases involving the imposition of a first collective agreement. Accordingly, the motion judge was not only entitled to but required to weigh the precedential value and exemplary effect of granting a stay of proceedings before the board. I have not been persuaded that she committed reversible error in concluding that "the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements".

100 I now turn to the reasons of the Court of Appeal. I repeat that the Court of Appeal did not find any error of facts or law in the judgment of Krindle J. nor any abuse of her discretion. The main consideration which appears to have been present in the mind of the Court of Appeal is the issue of delay in disposing of the merits.

101 Thus, the Court of Appeal observed that it was open to the board to direct a reference to the Court of Appeal "in order to expedite matters and obtain a decision on the validity of the legislation" [p. 182] and it noted that the board declined to do so. I would not go so far as to say that this was not a relevant consideration but it was anything but determinative.

102 According to the reasons of the Court of Appeal (p. 182), the Canadian Labour Congress, which had obtained leave to intervene on the merits,

> ... wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the *Charter of Rights and Freedoms*.

103 The appellate level is not the conventional forum for the adducing of evidence and the case may not have appeared to the board to be a clearly appropriate one for a direct reference to the Court of Appeal. In any event, what matters is not so much the attitude or conduct of the board in declining to request a reference to the Court of Appeal as the impact of a stay upon the litigants who came within the purview of the board's authority and upon the public in general. To repeat what was said by Browne L.J. in *Smith v. Inner London Educ. Authority*, supra, at p. 422:

> ... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

104 The other new factors which were not before the motion judge and on the basis of which the Court of Appeal purported to exercise fresh discretion are also all related to the issue of delay. I find it convenient here to repeat part of the above quoted reasons of the Court of Appeal (pp. 182-83):

> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the *Labour Relations Act*. As previously noted, other provisions in the *Act* are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the *Act*, based upon the *Charter* in other litigation.
>
> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.
>
> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.
>
> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the *Charter*.
>
> A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

105 With the greatest of respect, these reasons contain in my view at least two fatal errors of law.

106 In the first place, the Court of Appeal was not justified in substituting its discretion for that of the motion judge on the basis of new facts which were not before the latter.

107 The emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion. In the case at bar, the Court of Appeal failed to indicate in what respect the new facts affected the judgment of Krindle J. It did not even refer to her reasons. Each of those new facts related to the issue of delay in hearing and deciding the merits, a factor which, as can be seen in her above quoted reasons, had been considered and taken into account by Krindle J.

108 The House of Lords has recently emphasized the limits imposed upon a Court of Appeal in substituting its discretion to that of a motion judge with respect to the granting of an interlocutory injunction, even in a case where the Court of Appeal has the benefit of additional evidence: *Hadmor Productions Ltd. v. Hamilton*, [1983] 1 A.C. 191, [1982] 2 W.L.R. 322, [1982] 1 All E.R. 1042. In this latter case, which presents striking similarities with the case at bar, the Court of Appeal had held it was justified in exercising fresh discretion in view of additional evidence adduced before it, and had set aside the decision of the motion judge without commenting upon it. The House of Lords restored the judgment of first instance in a unanimous judgment delivered by Lord Diplock (p. 1046):

> Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think ap propriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts

> existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.
>
> In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J. for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence "so virtually we have to consider it all afresh".
>
> My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions.

(See, also to the same effect, *Garden Cottage Foods Ltd. v. Milk Marketing Bd.*, [1984] A.C. 130, [1983] 3 W.L.R. 143, [1983] 2 All E.R. 770 (H.L.).)

109 I have no hesitation in holding that the Manitoba Court of Appeal erred in thus substituting its discretion to that of the motion judge and, on this sole ground, I would allow the appeal.

110 But there is more.

111 The Court of Appeal did not exercise its fresh discretion in accordance with the above stated principles. It did not itself proceed to consider the balance of convenience nor did it consider the public interest as well as the interest of the parties. It only urged the parties to be expeditious. But urging or even ordering the parties to be expeditious does not dispense from weighing the public interest in the balance of convenience. It simply attenuates the unfavourable consequences of a stay for the public where those consequences are limited.

112 The judgment of the Court of Appeal could be construed as meaning that an interlocutory stay of proceedings may be granted as a matter of course whenever a serious argument is invoked against the validity of legislation or, at least, whenever a prima facie case of violation of the Canadian Charter of Rights and Freedoms will normally trigger a recourse to the saving effect of s. 1 of the Charter. If this is what the Court of Appeal meant, it was clearly in error: its judgment is in conflict with *Gould*, supra, and is inconsistent with the principles set out herein.

VI Conclusions

113 I would allow the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

114 There should be no order as to costs.

Appeal allowed.