CT-2023-003

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Commissioner of Competition for an order under sections 74.01 and 74.1 of the *Competition Act*, RSC 1985, c C-34.

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

- and -

CINEPLEX INC.

Respondent

BOOK OF AUTHORITIES OF THE RESPONDENT, CINEPLEX INC.

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto ON M5H 4E3
T: 416.367.6000
F: 416.367.6749

Robert S. Russell (25529R)
rrussell@blg.com
T: 416-367-6256

Martin Abadi (53275J)
mabadi@blg.com
T: 416-367-6158

Raymond Ashurov (72806N)
rashurov@blg.com
T: 416-367- 6503

Joshua Abaki (75327L)
jabaki@blg.com
T: 416-367-6568

Counsel to Cineplex Inc.

TO: **ATTORNEY GENERAL OF CANADA**
Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9

Jonathan Hood
Tel: 416-954-5925
Jonathan.Hood@cb-bc-gc.ca

Irene Cybulsky
Tel: 613-316-5034
Irene.Cybulsky@cb-bc.gc.ca

Adam Newman
Tel: 819-953-3888
Adam.Newman@cb-bc.gc.ca

Counsel to the Commissioner
Competition

INDEX

21.	*Pries v Economical Mutual Insurance Co.*, 2012 CarswellOnt 12509 (FSCO Arb).
22.	*Purolator Courier Ltd. v United Parcel Service Canada Ltd.*, [1995] OJ 876, 60 CPR (3d) 473.
23.	*R. v. Abbey*, 2009 ONCA 624
24.	*R v Batista, 2008 ONCA 804*
25.	*R v Blackham's Construction*, [1980] BCJ No 1265, 10 CELR 115 (BCCA).
26.	*R. v Canadian Broadcasting Corp*., [1992] OJ No 957 (Gen Div), 42 CPR (3d) 252.
27.	*R v Church of Scientology of Toronto*, [1974] OJ No 2013, 4 OR (2d) 707 (Co Ct).
28.	*R. v. Clark (J.) & Son Limited*, 1986 CanLII 5223, 71 NBR (2d) 257 (NB KB)
29.	*R v Coates*, [1981] SJ No 1151, 15 MVR 70 (Sask QB).
30.	*R v Dubois*, [1935] SCR 378, 3 DLR 209.
31.	*R v International Vacations Ltd.*, [1980] 33 OR (2d) 327 (CA), 124 DLR (3d) 319.
32.	*R v McIntosh*, [1995] 1 SCR 686, SCJ No 16.
33.	*R. v Mohan*, [1994] 2 SCR 9, ACS No 36.
34.	*Regina v Morgentaler, Smoling and Scott*, [1985] OJ No 2662, 52 OR (2d) 353 (CA).
35.	*R v Nahar*, 2004 BCCA 77
36.	*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484
37.	*R v Tuttle*, [1951] OWN 750, 101 CCC 249.
38.	*RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.)
39.	*Royal Trust Co v Minister of National Revenue*, [1953] Ex CR 287, 54 DTC 1001.
40.	*Saskatchewan Action Foundation for the Environment Inc. v Saskatchewan (Minister of the Environment & Public Safety*, [1992] 2 WWR 97, 86 DLR (4th) 577 (Sask CA).
41.	*Smith v London (City)*, [1909] OJ No 16, 20 OLR 133 (Div Ct).
42.	*Tele-Mobile Co v Bell Mobility Inc.*, 2006 BCSC 161.
43.	*Thomson v Canada (Department of Agriculture)*, [1992] 1 SCR 385, 89 DLR (4th) 218.

44.	*White Burgess Langille Inman v Abbott and Haliburton Co*., 2015 SCC 23 at para 23.
Legislation	
45.	*Competition Act*, R.S.C., 1985, c. C-34.
Secondary Sources	
46.	Anita Banicevic, "Assessing General Impression under the Competition Act: The Credulous Man Who Was Never There" (2016) 29:2 CCLR.
47.	Canada, Parliament, *House of Commons Debates*, 33rd Parl, 1st Sess, vol. 8, 1986 (March 3, 1986).
48.	Canada, Parliament, *House of Commons Debates*, 44th Parl,1st Sess, vol. 151, No. 065 (May 5, 2022).
49.	Canada, Parliament, *House of Commons Debates*, 44th Parl,1st Sess, vol. 151, No. 084 (June 8, 2022).
50.	*The Commissioner of Competition v. Aviscar Inc*., CT-2015-001, Registered Consent Agreement, (2 June 2016)
51.	House of Commons, *Senate Standing Committee on Industry and Technology*, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No. 49 (May 19,2022)
52.	House of Commons, Standing Committee on Industry and Technology, *Minutes of Proceeding and Evidence*, 44th Parl., 1st Sess., No 25 (May 20,2022).
53.	House of Commons, Standing Committee on Finance, Minutes of Proceeding and Evidence, 44th Parl., 1st Sess., No 50 (May 24,2022)
54.	R. Sullivan, *Sullivan on the Construction of Statutes* (7th ed. 2014), at §15.05

NOVA SCOTIA COURT OF APPEAL

Citation: *Antigonish (County) v. Antigonish (Town)*, 2006 NSCA 29

Date: 20060307
Docket: CA 242677
Registry: Halifax

Between:

Town of Antigonish

Appellant

v.

Municipality of the County of Antigonish

Respondent

Judges: Cromwell, Freeman and Oland, JJ.A.

Appeal Heard: September 23, 2005, in Halifax, Nova Scotia

Held: Appeal dismissed without costs per reasons for judgment of Oland, J.A.; Freeman and Cromwell, JJ.A. concurring.

Counsel: John MacPherson, Q.C. and Jack Innes, Q.C., for the appellant
Robert Grant, Q.C. and Nancy Rubin, for the respondent
Bruce Outhouse, Q.C., for the Nova Scotia Utility and Review Board, not present
Edward Gores, Q.C., for the Attorney General of Nova Scotia, not present
Gary Cusack in person, for the Antigonish Chamber of Commerce, not present

Reasons for judgment:

Introduction

[1] In May of 2001, the Town of Antigonish (the "Town") applied to the Nova Scotia Utility and Review Board (the "Board") for the annexation of several thousand acres of the Municipality of the County of Antigonish (the "Municipality"). Later that very same month, the Municipality applied to the Board for the amalgamation of it and the Town.

[2] The public hearing before the Board took 11 days. After determining that it had the jurisdiction to hear the Municipality's amalgamation application, the Board proceeded to consider both the annexation and the amalgamation applications. Its preliminary opinion (2005 NSUARB 12), which issued in February 2005, was that the amalgamation that would be in the best interests of the Town and the Municipality. The Board indicated that after receiving the results of a plebiscite which would be held to measure the public support for an amalgamated municipal unit, it would consider all the evidence and then render its ultimate decision. The holding of the plebiscite was stayed after the Town appealed the Board's preliminary opinion.

[3] The Town's appeal to this court raises a single issue, namely whether the Board erred in finding that it had the jurisdiction to hear an application for the amalgamation of the Town and the Municipality. For the reasons which follow, I am of the view that it did not so err.

Background

[4] Three municipal entities lie within the boundaries of the County of Antigonish: the Town, the Municipality, and Havre Boucher Village Commission. As will be seen, the fact that all three exist was considered by the Board in determining whether it could hear the Municipality's amalgamation application.

[5] Each of the Town and the Municipality brought its application for annexation or amalgamation respectively pursuant to s. 358 of the *Municipal Government Act,* S.N.S. 1998, c. 18 (the *Act")*:

Amalgamation or annexation

Municipalities may be amalgamated or the whole or part of a municipality may be annexed to another upon application to the Board by

(a) the Minister;

(b) a municipality; or

c) the greater of ten percent or one hundred of the electors in the area proposed to be amalgamated or annexed. (Emphasis added)

[6] Section 358 falls under Part XVI (Boundaries) of the *Act*. Each of the Town and the Municipality qualifies as a "municipality" as defined in its s. 3(aw):

"Municipality" means a regional municipality, town or county or district municipality, except where the context otherwise requires or as otherwise defined in this Act;

[7] Havre Boucher Village Commission is not a "municipality" as defined in the *Act*. It comes within the definition of a municipal government in s. 3(ar):

3(ar) "municipal government" means a municipal unit, village or service commission in the area to be incorporated as a regional municipality, and includes every authority, board, commission, corporation or other entity of that municipal unit, village or service commission and every joint authority, board, commission, committee or other entity involving that municipal unit, village or service commission;

[8] The essence of the Town's argument on appeal is that the proposed amalgamation of the Town and the Municipality would result in the forced creation of a regional municipality, which is beyond the Board's jurisdiction. According to s. 3(be) of the *Act*, a "regional municipality" is a regional municipality established by or continued under the *Act*. The definition of that term specifically includes the Cape Breton Regional Municipality, the Halifax Regional Municipality, the Region of Queens Municipality, and the area over which each of those bodies corporate has jurisdiction.

[9] The creation of a regional municipality is set out in s. 372 which falls under Part XVII (Municipal Incorporation) of the *Act*. That section begins:

> **Establishment of regional municipality**
>
> (1) The Board may, if requested by all of the councils of the municipalities in a county, undertake a study of the form of municipal government in the county to determine whether a regional municipality would be in the interests of the people of the county.
>
> (2) Where
>
> > (a) a study of the form of municipal government in a county to determine whether a regional municipality would be in the interests of the people of the county has been undertaken, whether the study was undertaken by the Minister or otherwise prepared; and
> >
> > (b) a plebiscite has taken place and its results show that a majority of the electors who voted in the plebiscite are in favour of the establishment of a regional municipality for the county,
>
> the Governor in Council may, on the recommendation of the Minister, order that a regional municipality be established for the county.

Thus a regional municipality can only be created following the requisite approach by all the municipal councils within a county, the submission of a study, the holding of a plebiscite showing a majority of the electors in favour, the Minister of Housing and Municipal Affairs' recommendation and, even then, only if the Governor in Council should so order.

[10] The Town also argues that in reaching its preliminary conclusion regarding amalgamation, the Board considered irrelevant factors, such as the existence of the Village of Havre Boucher and eligibility for equalization funding from the Province under the *Municipal Grants Act*, R.S.N.S. 1989, c. 302. Furthermore it submits that a town cannot be amalgamated with another municipality, since this results in the dissolution of the town contrary to s. 394 of the *Act.* That provision

requires an application to the Board by the Minister, the town council, or ten per cent of the electors of the town.

[11] The issues argued before the Board which concerned its jurisdiction to hear an amalgamation application under s. 358 of the *Act* were as follows:

(a) Does s. 372 which deals with the establishment of a regional municipality implicitly prohibit the amalgamation of all municipalities in a county under s. 358?

(b) Does s. 394 which deals with the dissolution of a town implicitly prohibit the amalgamation of two or more municipalities if one of them is a town?

c) Since the Village of Havre Boucher does not necessarily cease to exist under an amalgamation order, is the form of government which results from an amalgamation under s. 358 a "regional municipality" as contemplated by section 372?

[12] The Board responded to each of these issues in the negative. At § 86 of its decision, it stated its conclusion on the issue of jurisdiction thus:

> The Board has found that the result of an amalgamation under **s. 358** is that, unlike under **s. 372**, Havre Boucher may continue to exist. Even if this were not so, however, the Board also considers that while a similar result (i.e., combining the municipal units) may be achieved by two different avenues under the **Act**, that does not mean that the result should only be achieved by using one of the methods, to the exclusion of the other. The Board considers that nothing, explicit or implicit, in the legislation compels such a conclusion, nor does any principle of statutory interpretation of which it is aware. Based on the Board's conclusions on questions (a) to c) described above, it finds that it has the jurisdiction to consider the Municipality's application to amalgamate the Municipality and the Town. (Emphasis added)

Issues

[13] The core issue on this appeal, namely whether the Board erred in finding that it had the jurisdiction to hear an application for the amalgamation of the Town and

the Municipality pursuant to s. 358 of the *Act*, requires consideration of the following:

1. To what extent should debates in the Legislature and legislative history be considered in determining the intent of the Legislature in enacting certain provisions of the *Act*?

2. Is the result of a s. 358 amalgamation application the creation of a regional municipality?

3. Does the Board have jurisdiction where an amalgamation would result in the dissolution of the Town contrary s. 394 of the *Act*?

4. Did the Board exceed its jurisdiction by considering irrelevant factors when rendering its decision?

Before addressing these matters, I must first determine the correct standard of review.

Standard of Review

[14] In dealing with the question of its jurisdiction to hear the Town's amalgamation application, the Board stated:

> ¶ 52 . . . the Board views the task before it as strictly one of statutory interpretation. As a result, the statutory framework and the applicable provisions are of primary significance. In this case, all provisions under review are contained in one statute, i.e., the **Municipal Government Act**.

[15] According to the Town, the standard of review of the Board's decision in respect of a matter of statutory interpretation is one of correctness. In its view, *Myers v. Windsor (Town)*, 2003 NSCA 64 which concerned the Board's interpretation of a provision pertaining to amendment of land-use by-laws is a complete answer. There Hamilton, J.A. wrote:

> 16 The standard of review on appeal of a Board decision to this Court on questions of law and jurisdiction is one of correctness. **Heritage Trust of Nova Scotia et al v. Nova Scotia (Utility and Review Board)**, [1994] N.S.J. No. 50

> (C.A.). The Board's interpretation of the legislation that confers jurisdiction on the Board is afforded no deference.

[16] While the Town suggests that *Myers*, supra is determinative, Canadian jurisprudence requires an analysis under the pragmatic and functional approach whenever the court conducts a judicial review of an administrative tribunal's decision: see, for example, *Dr. Q. v. College of Physicians and Surgeons of British Columbia* [2003] 1 S.C.R. 226 at ¶ 24-35. In *Creager v. Provincial Dental Board of Nova Scotia*, [2005] N.S.C.A. 9, Fichaud, J.A. recounted the applicable factors in assessing the appropriate level of curial deference as follows:

> ¶ 15 . . . Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paras. 17, 21-25, 33; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 21. The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: *Ryan* at paras. 21, 41, 42; *Dr. Q.* at paras. 17, 21-26, 28-30, 33-34.

[17] Thus in addition to considering the nature of the question, which I agree is one of statutory interpretation, for which the Board would be accorded scant if any deference, the other contextual factors still must be examined. The first factor concerns the presence or absence of a privative clause or statutory right of appeal. The *Utility and Review Board Act*, S.N.S. 1992, c. 11 (the *UARB Act*) contains a strong privative clause regarding the Board's findings of fact. The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive (s. 26). There is no absolute privative clause, one which would shield the Board's decisions from review. Rather, an appeal lies to this court from an order of the Board upon any question as to its jurisdiction or any question of law (s. 30(1)). This suggests a more searching standard of review with respect to those questions. The subject matter of the appeal here concerns a decision of the Board as to its own jurisdiction.

[18] Next to be taken into account is the expertise of the Board. The *UARB Act* does not set out any statutorily prescribed expert qualifications for membership on the Board. The Board is an independent quasi-judicial body which has both regulatory and adjudicative functions. The *Act* gives it the authority to attend to various matters concerning municipalities including, upon application, municipal boundary lines (s. 356 and s. 357) and the incorporation or dissolution (s. 383 and s. 394 respectively) of a town. Before this court it was undisputed that the Board has adjudicated several matters involving the Town and the Municipality, including ones dealing with water utilities, the Town electric utility, land use planning, and municipal electoral boundaries. Although it has not heard any amalgamation application under s. 358 or its predecessors, the Board has heard applications regarding alternation of municipal boundaries by annexation. On this appeal however the question pertains to the Board's own jurisdiction, a question outside its core area of expertise as it concerns municipalities. Relative to this court, it lacks any expertise which is superior in regard to that question.

[19] The final factor to be considered is the purpose of the legislation. Greater deference is to be given where a statute's purpose requires an administrative body "to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations": *Dr. Q.*, supra at ¶ 31. Section 363(1) of the *Act* provides that the Board may order amalgamation or annexation if satisfied that the order would be in:

> . . . the best interests of the inhabitants of the area, taking into account the financial and social implications of the order applied for . . .

Here, however, the matter under appeal is not the final determination or even the initial determination of the applications for amalgamation and annexation. Rather, the issue is one pertaining to the Board's authority to even hear the Municipality's application. As a result, this factor does not demand deference to the Board's decision as to its jurisdiction.

[20] After considering the four contextual factors of the functional and pragmatic approach, it is my view that the standard of review to be applied to the question of the Board's jurisdiction to hear an amalgamation application pursuant to s. 358 of the *Act* is that of correctness.

Analysis

The Board's Jurisdiction

[21] In its decision at ¶ 254, the Board stated that it had no jurisdiction in respect to the creation of a regional municipality. The Town and the Municipality agree that, as the Board itself recognized, the Board lacks the jurisdiction to establish a regional municipality. On this appeal from the Board's decision the Town submits that, both in fact and in law, the application brought by the Municipality for amalgamation, if successful, will create just such a municipality. It says that if the Board's decision is upheld, there will be two methods by which a single government unit within a county can be established.

[22] The Town's arguments are based on the fact that the *Act* contains two provisions which refer to amalgamation, namely s. 358 which concerns amalgamations and annexations and s. 372 which deals with the creation of a regional municipality. According to the Town, the Legislature intended the two sections to serve two distinct and separate processes. Its factum urged that:

> . . . Section 372 was intended to address the difficulties which had arisen through the "forced" amalgamations in Cape Breton and Halifax and to ensure that any future regional municipalities were created on a voluntary basis with the support of all of the political units contained therein, i.e. the municipal councils (section 372(1)) as well as the electors in the county as confirmed by a plebiscite (372(2)(b)). Section 358 was intended to apply to the "usual" situation in which a municipality applies to annex a portion of a neighbouring municipality. Such annexations were not intended to lead to the creation of regional municipalities.

[23] The Municipality agrees with the Town's submission that s. 372 and s. 358 were intended to serve different purposes. Where the parties differ is in their interpretation of the authority granted the Board under s. 358. The Town submits that the application of that provision is limited to the "usual" situation of annexation. The Municipality takes the position that a "plain and ordinary" reading of it confirms that the Legislature vested the Board with the authority to hear and to decide amalgamation applications.

Statutory Interpretation

[24] E.A. Driedger set out the modern principle of statutory interpretation in the *Construction of Statutes* (2nd ed. 1983), at p. 87 as follows:

> 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.

This principle has been cited and relied upon in numerous decisions, and has been acknowledged as the preferred approach. See, for example, *Rizzo & Rizzo Shoes Ltd.* (*Re)*, [1998] 1 S.C.R. 27, at 41; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559 and the cases cited at para. 26; and *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] S.C.J. No. 26 at ¶ 95.

[25] Also to be considered is s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, as amended which directs that:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

I will begin by considering the extent to which the legislative history of s. 358 and s. 372 and the debates in the Legislature may be considered.

Legislative History and Debates in the Legislature

[26] Professor Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) states at p. 497 that the general tendency in the modern evolution of statutory interpretation is to move from a rule-based to a principle-based approach and further at p. 499 that:

> . . . it is now well accepted that 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 also *Municipal Enterprises Ltd. v. Nova Scotia (Attorney General)*, 2003 NSCA 10 at ¶ 65.

(a) Legislative History

[27] The *Act* is the culmination of the consolidation of earlier legislation governing municipalities and the enactment of new legislation. Previous to its passage in 1998, municipalities could apply to annex portions of adjoining municipalities or to amalgamate with those municipalities under provisions first contained in the *Municipal Boundaries Act*, S.N.S. 1964, c. 8, s. 20 and thereafter in the *Municipal Boundaries and Representation Act*, R.S.N.S. 1967, c. 195, s. 18, the *Municipal Boundaries and Representation Act*, S.N.S. 1982, c. 10, s. 20 and the *Municipal Boundaries and Representation Act*, R.S.N.S. 1989, c. 298, s. 20. These provisions were all essentially similar to s. 358 of the *Act*.

[28] The Board noted at ¶ 361 that prior to the Municipality's application, neither those provisions nor s. 358 had been used for amalgamation purposes:

> While the Board occasionally receives applications for annexation, the application for amalgamation is unique in the Board's experience.

[29] No legislation provided for the establishment of regional municipalities until the enactment of the *Halifax Regional Municipality Act*, S.N.S. 1995, c. 3, s. 217; the *Cape Breton Regional Municipality Act*, S.N.S. 1994, c. 3; and the *Queens Municipality Act*, S.N.S. 1995, c. 9. Those statutes created regional municipalities in each of those counties. They also dissolved the towns contained within those regional municipalities.

[30] The passage of the *Act* in 1998 effected a major consolidation of the legislation with respect to municipal governments. The *Act* repealed 19 statutes and amended many others (see s. 545-583 of the *Act*). The legislation that was repealed included the *Municipal Affairs Act*, R.S.N.S. 1989, c. 296, the *Municipal Boundaries and Representation Act*, supra, the *Halifax Regional Municipality Act*, supra, the *Cape Breton Regional Municipality Act*, supra, and the *Queens Municipality Act*, supra. Section 372 on the creation of regional municipalities first appeared in the *Act*.

[31] It is noteworthy that the predecessor of s. 358 as contained in the *Municipal Boundaries and Representation Act*, supra, did not disappear when the *Act* was passed by the Legislature. Rather, that provision was transposed to Part XV1 (Boundaries) of the *Act* as s. 358. It continued to refer to amalgamations as well as to annexations. Moreover, although somewhat modified, the provisions which set out the procedures to be followed regarding preliminary orders for amalgamations or annexations (now s. 359-362), were incorporated in the *Act*. Indeed, in some instances such as ss. 362(2)(3) [required studies] and s. 367 [effect of annexation or amalgamation "unless the Board otherwise orders"], the Board's powers were increased.

[32] In my view, the legislative history would suggest a reaffirmation of the Board's jurisdiction to order amalgamation pursuant to s. 358.

(b) Legislative Debates

[33] In support of its submission that the legislative intent behind s. 372 on the creation of regional municipalities was to remedy the "mischief" of forced amalgamations, the Town urged that certain excerpts from Hansard, regarding comments made during the debates in the legislature when the *Act* was introduced, were relevant and should be considered. To that end, it filed an appeal book volume containing those extracts.

[34] Much of the material sought to be introduced did not consist of statements or accompanying text supplied by the minister introducing or defending the *Act* in the Legislature, which can be helpful in establishing legislative intent. Rather, they were statements or comments made by members of the opposition who criticized the lack of consultation prior to the formation of the Cape Breton and Halifax Regional Municipalities. The minister did not say anything which would even

suggest that the *Act* was intended as a response to those criticisms. Furthermore, it is significant that none of the remarks directly address the question of whether or not s. 372 which deals with the creation of regional municipalities, was intended to displace or to be paramount over s. 358 which concerns amalgamations and annexations.

[35] In my view, the material the Town sought to be introduced does not satisfy the threshold tests of relevance and reliability. Accordingly the volume of Hansard extracts will not be considered in the search for legislative intent.

Whether s. 358 Amalgamation Order Creates a Regional Municipality

[36] According to the Town, the Board erred in determining that the combining of municipal units "may be achieved by two different avenues under the *Act* . . ." It says that s. 358 is limited to annexations and argues that both in fact and in law, the application for amalgamation under that provision, if successful, will create a regional municipality. The Town added that the evidence before the Board supports the conclusion that the Municipality seeks the establishment of a single regional municipal in the County of Antigonish. At ¶ 252 of its decision the Board noted that the Warden of the Municipality suggested that "amalgamation could be the first step on the path to regional government." In addition, the Chair of the Havre Boucher Village Commission advised that if the Board should decide to order the amalgamation of the Municipality and the Town:

> . . . the Village of Havre Boucher intend to request that it be included in the amalgamation so that the resulting municipality would qualify as a Regional Municipality.

[37] For convenience, I set out again s. 358 and s. 372 of the *Act*:

> **Amalgamation or annexation**
>
> 358 Municipalities may be amalgamated or the whole or part of a municipality may be annexed to another upon application to the Board by
>
> (a) the Minister;
>
> (b) a municipality; or

> c) the greater of ten percent or one hundred of the electors in the area proposed to be amalgamated or annexed.

Establishment of regional municipality

372 (1) The Board may, if requested by all of the councils of the municipalities in a county, undertake a study of the form of municipal government in the county to determine whether a regional municipality would be in the interests of the people of the county.

(2) Where

> (a) a study of the form of municipal government in a county to determine whether a regional municipality would be in the interests of the people of the county has been undertaken, whether the study was undertaken by the Minister or otherwise prepared; and
>
> (b) a plebiscite has taken place and its results show that a majority of the electors who voted in the plebiscite are in favour of the establishment of a regional municipality for the county,

the Governor in Council may, on the recommendation of the Minister, order that a regional municipality be established for the county.

[38] Section 358 respecting amalgamations and annexations is followed by various provisions dealing with the application and hearing process. For example, s. 359 sets out the contents of an application for a preliminary order, s. 360 details the notification to be given of the hearing before the Board, s. 361 lists the persons who are to be heard, s. 362 deals with any preliminary order the Board may make, and s. 363(2) the contents of an order. All these provisions, either directly or indirectly, refer to applications or orders for amalgamations and annexations. Section 372, respecting the creation of a regional municipality, is also accompanied by provisions dealing with the application and the process. Those provisions include ones dealing with the transition to a regional municipality.

[39] Statutory interpretation uses certain rules to guide what may be examined to determine legislative intent and meaning. For example, the analysis may include the application of the “presumption against tautology” which Professor Sullivan in

Sullivan and Driedger on the Construction of Statutes, supra, described thus at p. 159:

> . . . every word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

She also notes that this presumption applies not only to individual words and phrases but also to paragraphs and sections.

[40] The Town's position that s. 358 is limited to annexations ignores the express references to amalgamations in that provision and in the procedural provisions which follow. It consequently ignores the presumption against tautology.

[41] The foundation for the Town's arguments is another principle of statutory interpretation, that known as the "presumption of coherence." It provides that the various sections of a statute should and must be read together in a coherent fashion, each portion serving a particular purpose. The Town submits that the Board erred in failing to consider this presumption.

[42] Professor Sullivan explained the governing principle underlying the presumption of coherence thus at pp. 262-263:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. As LaForest J. wrote in *Friends of Oldman River Society v. Canada (Minister of Transport)* [[1992] 1 S.C.R. 3, at p. 38]:
>
> > . . . there is a presumption that the legislature did not intend to make or empower the making of contradictory enactments. . . .

[43] The question becomes whether the existence of both sections 358 and 372 within the *Act* amounts to an internal conflict, repugnancy or inconsistency. In *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at 499, Anglin, J. stated that:

> It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not "inconsistent" unless the two provisions cannot stand together.

If they can "stand together and both operate without either interfering with the other," there is no irreconcilable inconsistency or conflict*: Tabernacle Permanent Building Society v. Knight*, [1892] A.C. 298, at 302 (H.L.).

[44] The *Act* provides for two distinct processes in respect to the joining of municipalities. One, that under s. 358, is essentially adjudicative in nature. Under it, municipalities may apply to the Board for a hearing to determine whether amalgamation would be "in the best interests of the inhabitants of the affected area" (s. 363(1)). The second, under s. 372, is heavily political in nature. Under that process, the Minister must recommend to the Governor in Council the creation of a regional municipality and it is the Governor in Council which determines whether one will be formed. The consent of the municipalities involved and the support of the electors in the area, as expressed through a plebiscite, are also required.

[45] In my opinion, there is no genuine conflict or inconsistency between a union of municipalities resulting from the "adjudicative" process under s. 358 and one resulting from the "political" process under s. 372.

[46] According to the Town, a successful s. 358 amalgamation application would result in a regional municipality; consequently, the Board would have exceeded its jurisdiction. It says that if any form of amalgamation is authorized under s. 358, it would be that of one municipality with any other municipality or municipalities, but not all the municipalities in a county. The last would result in a single municipal unit with authority over the entire county. That, the Town submits, is a regional municipality and the only way to create that entity is through s. 372 which calls for a political process entirely removed from the Board.

[47] The difficulty with this argument is that the two provisions have different objectives and concern different aspects of municipal amalgamation. By definition, s. 358 cannot be used to create a regional municipality. An order pursuant to that provision does not result in a "regional municipality" as that term is defined in the *Act*. It is s. 372 that must be used to create such a municipality. Quite simply, whatever similarities the outcome of a successful s. 358 application for amalgamation may have to a regional municipality, it is not a regional municipality. Moreover, it is not recognized as a regional municipality. As will be seen in the passage later in this decision dealing with equalization grants, there are practical implications which depend on whether the amalgamated entity was formed under s. 358 or s. 372.

[48] In my respectful opinion, the situation here is not one to which the internal coherence principle applies. The provisions do not conflict and they are not inconsistent with one another. What they do, is overlap. Each sets out a method whereby municipalities may seek to be combined. Professor Sullivan states at p. 264:

> When two provisions are applicable without conflict to the same facts, it is presumed that each is meant to operate fully according to its terms. So long as overlapping provisions *can* apply, it is presumed that they are meant to apply. The only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law.

[49] There was no evidence before the Board or the court that s. 372, which deals with the creation of regional municipalities, was intended to be exhaustive. Both it and s. 358 contemplate the merger of two or more municipalities. Nothing in the wording of s. 358 suggests that amalgamations, pursuant to its terms, were to be limited as the Town urges. Furthermore, a plain reading of s. 372 does not disclose any prohibition against an amalgamation of all the municipalities in a county pursuant to s. 358. I am not persuaded that s. 372, which pertains to regional municipalities, was intended to exclude s. 358, which specifically refers to amalgamations, from having any application or a restricted application with respect to amalgamations.

[50] In my view, the Board did not err in failing to rely upon the presumption of coherence or in determining that the *Act* allows for the combining of municipal units by two different methods.

Dissolution of the Town

[51] Section 394 of the *Act* provides:

> A town may be dissolved upon application to the Board by
>
> (a) the Minister;
>
> (b) the council of the town; or
>
> c) ten percent of the electors of the town.

The Town argues that a town cannot be amalgamated with another municipality, since this would result in its dissolution contrary to s. 394, which it maintains is the sole method for the dissolution of a town.

[52] An amalgamation does result in the loss of the identities of the amalgamating entities and their continuation as a new one. In *MacPump Developments Ltd. v. Sarnia (City)* (1994) 20 O.R. (3d) 755, the Ontario Court of Appeal stated:

> [38] The word "amalgamation" does not admit of a single meaning. Used in the corporate law context, an amalgamation may extinguish old entities and create new entities in their place, or it may blend those pre-existing entities and continue them under the auspices of the new amalgamated entity. The effect of a particular amalgamation depends on the purpose the amalgamation is intended to promote as discerned by an examination of the agreement or statute bringing about the amalgamation: **R. v. Black & Decker Manufacturing Co.**, [1975] 1 S.C.R. 411; 1 N.R. 299, at pp. 416-418; **Witco Chemical Co. v. Oakville (Town)**, [1975] 1 S.C.R. 273; 1 N.R. 453, at pp. 281-283. In my view, the same assessment must be made where amalgamation occurs in the municipal law context: **Municipal Act**, R.S.O. 1990, c. M-45; s. 7, **Interpretation Act**, R.S.O. 1990, c. I-11, s. 27(a).
>
> [39] In pursuing the purpose underlying the statutory amalgamation of two former municipalities, it is important to focus on the overall thrust of the relevant

> legislation rather than on isolated words in specific provisions. When I read the **Sarnia-Lambton Act** as a whole and, in particular, those provisions specifically relating to the amalgamation of Old Sarnia and Clearwater, I am satisfied that it was intended that the two former municipalities should be rolled into one and continued as a single undertaking. In the language of Dickson, J., in **Black and Decker**, supra, at p. 421, "the end result is to coalesce to create a homogeneous whole". Or to use the words of Kelly, J.A., in **Stanward Corp. v. Denison Mines Ltd.**, [1966] 2 O.R. 585 (C.A.), at p. 592, the legislative intent was "to provide that what were hitherto two shall continue as one".

See also Rogers, *The Law of Canadian Municipal Corporations*, Vol. 1 (Toronto: Carswell, 2003) which states at p. 71:

> . . . An "amalgamation" has been defined as a fusion of two or more legal entities into a continued new union with the obligations, by-laws and assets of the former municipalities. . . .

[53] I am, however, not convinced that because the proposed amalgamation will result in the dissolution of the Town, the Board exceeded its jurisdiction by considering the Municipality's amalgamation application.

[54] After all, s. 358 begins "Municipalities may be amalgamated. . ." and, as set out earlier, the term "municipality" is defined at s. 3(aw) to "mean . . . a town". The Town's argument that s. 394 prevents amalgamations involving towns completely fails to acknowledge or to apply the statutory definition to the term "municipality" as established by the Legislature in the *Act*.

[55] As to the Town's submission that there is no precedent for the dissolution of a town being brought about by the amalgamation application made pursuant to s. 358 this, of course, is nothing more than the natural consequence of the fact that the Municipality's application for amalgamation is apparently the first under that provision.

[56] The Town then argues that the matter falls under the principle of construction that, within a statute, special provisions prevail over general ones. It says that consequently, s. 358 which deals with amalgamations should give way to s. 394 which deals with the dissolution of a town. Professor Sullivan set out the principle thus at p. 273:

> **Implied exception (generalia specialibus non derogant).** When two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first.

[57] In my view, there is no conflict such as that put forward by the Town. Sections 358 and 394 have different purposes. The purpose of the former is to permit the Board to hear applications for the amalgamation or annexation of municipalities. The purpose of the latter is to permit it to hear applications for the dissolution of a town. As discussed earlier, an amalgamation results in the loss of the identities of the amalgamating entities and their continuation as a new one. Again, a conflict arises only if one refuses to ascribe to the term "amalgamation" in s. 358 its plain and ordinary meaning and refuses or fails to apply the statutory definition given to the term "municipality."

[58] In the result, I am not satisfied that the Board exceeded its jurisdiction because a s. 358 amalgamation would result in the dissolution of the Town.

Irrelevant Factors

[59] According to the Town, the Board considered irrelevant factors in reaching its preliminary conclusion that amalgamation, rather than annexation, was in the best interests of the inhabitants of the area and thus exceeded its jurisdiction. In particular, the Town says that the Board took into account the existence of the Village of Havre Boucher, and eligibility for equalization funding under the *Municipal Grants Act*, supra. I will address each in turn.

(a) The Village of Havre Boucher

[60] In order to appreciate the Town's argument regarding the Village, it would be helpful to set out the effect of the incorporation of a regional municipality and an order for the amalgamation of all municipalities in a county as it pertains to the Village. In the former situation, the "municipal governments" in the area to be incorporated as a regional municipality are dissolved and their assets and liabilities are vested in the regional municipality (s. 379(1) and (2) of the *Act)*. Since Havre Boucher Village Commission comprises a "municipal government" under s. 3(ar)

of the *Act*, it would be automatically dissolved following the establishment of a regional municipality.

[61] However, an amalgamation does not have the same effect. In that situation, the Board would have the discretion to determine whether the Village Commission should be dissolved or affected in any another way. Section 363(3) which relates to orders for amalgamation and annexation provides that:

> 363(3) An order of the Board may
>
> (a) adjust assets and liabilities among those affected by the order as the Board considers fair;
>
> (b) annex, amalgamate, continue or dissolve boards, commissions, villages and service commissions and allocate their assets as the Board considers fair; and
>
> c) require compensating grants for a period of not more than five years from a benefiting municipality to a municipality that loses assessment as a result of an order. (Emphasis added)

[62] The Town takes the position that the Board relied heavily upon the continued existence of the Village of Havre Boucher in deciding that it had jurisdiction to consider amalgamation, when that was an irrelevant factor. It points to the following passage in its decision:

> ¶ 68 Thus, an amalgamated municipal structure clearly falls outside the scope of a regional municipality as contemplated in **s. 379(1)**, since the Village Commission, a "municipal government" as defined in **s. 3(ar)**, does not automatically collapse into a new amalgamated municipal unit. Upon the creation of a regional municipality, a village commission is automatically dissolved, without exception, and its assets and liabilities are assumed by the new municipal entity **(s. 379)**. There is no discretion to do otherwise in the case of a regional municipality. Thus, in the opinion of the Board, the existence of the Havre Boucher Village Commission, and the conflicting operation of **ss. 363(3)(b)** and **379**, prove fatal to the Town's argument. (Emphasis added)

[63] However, it is clear from its decision that, in the Board's assessment, the possibility of the Village Commission's continuing existence was nowhere near determinative. It stated that even if that were not the case, its decision would have

been the same. At § 86, the last and summary paragraph of its consideration of the jurisdiction issue, the Board wrote:

> The Board has found that the result of an amalgamation under **s. 358** is that, unlike under **s. 372**, Havre Boucher may continue to exist. Even if this were not so, however, the Board also considers that while a similar result (i.e., combining the municipal units) may be achieved by two different avenues under the **Act**, that does not mean that the result should only be achieved by using one of the methods, to the exclusion of the other. The Board considers that nothing, explicit or implicit, in the legislation compels such a conclusion, nor does any principle of statutory interpretation of which it is aware. . . . (Emphasis added)

[64] The Board did not rely upon the existence of the Village Commission, as urged by the Town, in making its determination.

(b) Equalization Funding

[65] The second irrelevant factor the Town claims the Board considered in rendering its decision, relates to entitlement to equalization grants under the *Municipal Grants Act*, supra. At ¶ 70 of its decision, the Board stated:

> In addition to the impact upon village commissions, the Board notes a second clear distinction between the proposed amalgamated unit and a regional municipality, which relates to the resulting unit's eligibility for equalization funding under the **Municipal Grants Act**, R.S.N.S. 1989, c. 302. While a regional municipality clearly qualifies for funding as a Class 1 entity under s. **9(1)(a)** of the **Act**, it appears that an amalgamated body comprising all municipalities within a county would not automatically attract similar treatment. Using the example cited above, the Municipality of the County of Victoria (which comprises the only municipality within Victoria County) is designated as a Class II municipality under the **Municipal Grants Act, s. 9(1)(b)**. A different funding formula applies to a county municipality. While the issue of equalization could be a topic of discussion between provincial and municipal officials in the event of amalgamation . . . it appears doubtful that an amalgamated unit would be treated in like fashion to a regional municipality under the present legislative structure for equalization funding. (Emphasis added)

[66] This was not, as the Town submits, improper speculation on the part of the Board as to the level of funding which a new amalgamated entity might receive nor inappropriate reliance on the provisions of the *Municipal Grants Act*, supra to determine its jurisdiction to consider an application for amalgamation under s. 358

of the *Act*. The Town was arguing before the Board that the Municipality's amalgamation application would result in a regional municipality. Parts XVI and XVII of the *Act* and the provisions of the *Municipal Grants Act* could be argued as indications that the Legislature intended to treat "regional municipalities" as special entities in certain respects. Moreover, s. 9(5)(e) and (f) of the *Interpretation Act*, supra requires consideration of "the consequences of a particular interpretation." Taking these factors in combination into account, I am not persuaded by the Town's argument that the Board erred in considering the *Municipal Grants Act* and funding availability.

Disposition

[67] The standard of review of the Board's decision in respect to its jurisdiction to hear an application pursuant to s. 358 of the *Act* is that of correctness. Not having been persuaded that it erred in finding that it had such jurisdiction, I would dismiss the appeal. This being an appeal of a tribunal decision, there will be no award of costs.

Oland, J.A.

Concurred in:

Freeman, J.A.

Cromwell, J.A.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Bell Mobility Inc. v. Telus Communications Company,*** 2006 BCCA 578

Date: 20061215
Docket: CA034616

Between:

Bell Mobility Inc.

Appellant
(Plaintiff)

And

Telus Communications Company

Respondent
(Defendant)

Before: The Honourable Madam Justice Ryan
The Honourable Madam Justice Newbury
The Honourable Madam Justice Levine

Oral Reasons for Judgment

R.J. Deane P.G. Foy, Q.C.	Counsel for the Appellant
D.G. Cowper, Q.C. D. Ullrich	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia 11 December 2006
Place and Date of Judgment:	Vancouver, British Columbia 15 December 2006

Introduction

[1] **RYAN, J.A.**: On 23 November 2006 Mr. Justice Kelleher dismissed the application of the appellant, Bell Mobility ("Bell"), for an interlocutory injunction prohibiting the respondent, Telus Communications Inc. ("Telus"), from including the phrase "Only from Telus" in connection with its advertising of "Flexible Share Plans".

[2] On 6 December 2006 I granted Bell Leave to appeal and ordered that the matter be heard on an expedited basis.

[3] The issue on this appeal is whether the Chambers judge applied the wrong test in determining whether there was a fair issue to be tried, and if he did, whether this Court should make the order that the Chambers judge refused to make.

Factual Background

[4] Bell commenced an action against Telus on 15 November of this year. In its statement of claim, Bell seeks damages for injurious falsehood, unjust enrichment, and damages flowing from the alleged breaches of s. 52 of the ***Competition Act***, R.S.C. 1985, c. C-34 ("Competition Act") and s. 7 of the ***Trade-marks Act***, R.S.C. 1985, c. T-13.

[5] Telus is currently engaged in an advertising campaign for "Flexible Share Plans". The campaign has placed advertisements in local and national newspapers. The advertisement contains a photo of a group of three monkeys with copy that reads:

> For a family of small, medium and extra large talkers

> Flexible Share Plans, only from Telus
> 2 can share their minutes from as low as $35/month.

[6] Television advertisements included depictions of monkeys moving walls together with print that runs across the screen:

> Some family members need more minutes. Others need a lot less. Introducing flexible Share Plans. Only from Telus. Telus. Telus, the the future is friendly. telus mobility.com
>
> [Emphasis added]

[7] Bell took the position before the Chambers judge that these advertisements left the reader or viewer with the impression that Telus was the only wireless telephone provider to offer share plans that are flexible. Or, to put it another way, that Bell does not offer "flexible" share plans.

[8] Evidence was led in the form of affidavits that the major three providers of wireless telephone service in Canada all provide share plans with varying degrees of "flexibility". For example, Telus has individual plans that can be combined. One individual can purchase 50 minutes for $15 a month (Share 15), a second individual can purchase 100 minutes for $20 a month (Share 20), and these plans can then be combined for a total of 150 minutes for $35. There are additional plans for a greater number of minutes and additional individuals may be added to the combined Share Plans. Within the combined plans, each individual may customize his or her options, such as voicemail and caller ID.

[9] Bell has a plan known as the "Family Share Plan." The least expensive is sold for $35 for two subscribers. Each additional subscriber can be added for $15.

In the $35 plan, two subscribers would share 200 calling minutes. Features such as caller ID and text messaging may be added to the shared plan for additional fees. Therefore, if the advertisements in question left the consumer with the impression that Telus was the only wireless telephone service offering flexible share plans, its advertisements would be false or misleading.

Reasons of the Chambers Judge

[10] There is no issue that the Chambers judge correctly set out the test he was to apply in determining whether to grant the injunction. He applied the traditional two pronged test recently approved in ***Onkea Interactive Ltd. v. Smith*** 2006 BCCA 521 where Mr. Justice Smith writing for the Court said this at paras. 9 and 10:

> This Court described the test for the granting of an interlocutory injunction in ***British Columbia (A.G.) v. Wale*** (1986), 9 B.C.L.R. (2d) 333 at 345, [1987] 2 W.W.R. 331; aff'd [1991] 1 S.C.R. 62, [1991] 2 W.W.R. 568, in this way:
>
> > The traditional test for the granting of an interim injunction in British Columbia is two-pronged. First, the appellant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.
>
> The Supreme Court of Canada has also approved a three-pronged test, in which the question of irreparable harm is a separate inquiry: ***Manitoba (Attorney General) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110 at 127-29, 38 D.L.R. (4th) 321; ***RJR-MacDonald Inc. v. Canada (Attorney-General***), [1994] 1 S.C.R. 311 at 334, 111 D.L.R. (4th) 385. However, this Court commonly applies the test in ***Wale***, which acknowledges, as Madam Justice Saunders said for the Court in ***Roxul (West) Inc. v. 445162 B.C. Ltd.*** (2001), 89 B.C.L.R. (3d) 21, 2001 BCCA 362, that,
>
> > [13] … The issue of irreparable harm is bound up in the issue of balance of convenience. So, too, is consideration

> of the adequacy of damages as a remedy for the parties, recognizing that prudence counsels preservation of the status quo where damages might not be an adequate remedy.

[11] The Chambers judge concluded that the first prong required a low threshold. He found that it had been met.

[12] Turning to the balance of convenience, the Chambers judge concluded that the factors he should consider under this part of the test were set out in this Court's decision in ***CBC v. CKPG Television Ltd.*** (1992), 64 B.C.L.R. (2d) 96. They are:

1. whether one of the parties will suffer irreparable harm from granting or not granting the injunction;
2. the strength of the appellant's case;
3. which of the parties has acted to alter the balance of the relationship and so affected the *status quo*;
4. factors affecting the public interest; and
5. any other factor.

[13] It is unnecessary to review the reasons of the Chambers judge with respect to any of these factors with the exception of "the strength of the appellant's case". It is unnecessary to do so because it is common ground that the Chambers judge found that it was the weakness of the appellant's case that tipped the balance of convenience (and the question of irreparable harm) in the respondent's favour.

Grounds of Appeal

[14] Bell says that the Chambers judge applied the wrong test in determining the strength of its case. If the Chambers judge had applied the proper test, counsel

argues, he would have concluded that Bell has a strong case. Furthermore, since the strength of the case was the determining point for the Chambers judge's evaluation of the rest of the factors, it follows, Bell says, that the injunction would have been granted had the Chambers judge applied the correct test.

The Proper Test

[15] The test to apply in determining whether an advertisement is false or misleading is found in the provisions of the ***Competition Act***. The relevant provisions, sections 52(1) and (4), provide:

> **52.** (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.
>
> …
>
> (4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.
>
> [Emphasis added.]

[16] The case law tracks the legislation in setting out the test to apply. In his factum, counsel for Bell, Mr. Deane, summarized the approach required of a trial judge in deciding whether an advertisement can be said to be false or misleading. First, the trial judge must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form. Once assessed in light of the information presented to the consumer in the body of

the advertisement, the impression is fixed as the impression of the average consumer.

[17] I agree with Mr. Deane. I would only add that s. 52(4) requires that the trial judge also examine the literal meaning of the representation in determining whether the advertisement is false or misleading.

[18] Next, Mr. Deane says the giving of a particular impression is only unlawful if the impression is false or misleading in a material respect. The second step of the test requires the court, having regard to extraneous facts if necessary, to gauge whether the impression conveyed to consumers by the representations is false or, alternatively, misleading in a material respect. Only at this stage is extraneous evidence considered, not to alter the general impression, but to gauge whether the impression is false or misleading.

[19] I agree and I do not take counsel for Telus to take issue with that iteration of the test.

Discussion

[20] Bell says that the force of its claim that Telus is in violation of s. 52 of the ***Competition Act*** depends upon the general impression conveyed by the advertisements in question. On the authorities, as just set out, this impression is determined by the average consumer's perception of the information contained within the four corners of the impugned advertisements. The thrust of Bell's argument is that the Chambers judge assessed the general impression conveyed by the advertisements not only in light of the representations made within the

advertisements themselves, but in light of the additional information made available to him in the affidavits filed on the application. Since none of that information is available to consumers viewing the advertisements, it was an error for the Chambers judge to bring that information to bear in the course of assessing the general impression conveyed by the advertisements.

[21] The Chambers judge, says counsel, revealed his error in para. 22 of his draft reasons for judgment. Before turning to it, the alleged offending paragraph must be set in context:

> [21] The Flexible Share Plan is the one Telus provides, so in the most technical sense it is only available from Telus. In that sense, Bell could say equally "Family Share Plan only from Bell Mobility". But that is only part of it. The product is also different from the Bell plan. Telus allows the customer to combine the individual share plans into flexible share plans. Bell does not. Whether this is significant or superior from the consumer's point of view is a question for the consumer, but the share plans are different in that respect.
>
> [22] The real complaint of Bell Mobility though is the implication. Telus conveys the message says Bell Mobility, that Bell and Rogers offer no flexibility. I do not agree that that is the message. It conveys the message that Telus is more flexible in that it offers more options. This does not seem to me to be "false" or "misleading in a material respect" (Competition Act, s. 52). Bell Mobility has five categories in its Family Share Plan. Telus has a product with more options which it says is more accommodating to the different needs of different persons. Whether it is, is a question for the consumer.
>
> [23] I am not persuaded that the plaintiff's case is a strong one.

[22] Counsel for Telus submitted, and I understood counsel for Bell to agree, that in paragraph 21 the Chambers judge was examining the literal meaning of the advertisements. Bell says, however, that in para. 22, when the Chambers judge went on to discuss the "implication" or "general impression" of the advertisements,

he conflated the test for "general impression" with the test for actual falsity. Specifically, Mr. Deane argues that the Chambers judge imported evidence as to whether the advertisement was actually correct into his analysis of what message it conveyed.

[23] Mr. Cowper, counsel for Telus, submitted that the reasons for judgment should not be read in the way Bell advances.

[24] Bearing in mind that these reasons for judgment were oral, Telus says that the finding with respect to general impression by the Chambers judge was simply his statement, "I do not agree that that is the message. It conveys the message that Telus is more flexible in that it offers more options." The next sentence, urges Mr. Cowper, addresses the question of the falsity of the advertisements, but not as part of determining the general impression, but rather as a separate consideration. The final two sentences should be read as a consideration of the second step under the legislation, that is, whether the impression left by the words is actually false or misleading.

[25] Mr. Cowper submits that the conclusion of the Chambers judge is supportable on the evidence. He submits that the conclusion that Telus' plans were "more flexible" than others is derived from examining the advertisements as a whole. In particular, Mr. Cowper directs the court to a disclaimer in the newspaper advertisement that says, "minimum combination of Share 15 and Share 20 plans is required. All Share Plan members must be on Share Plans on the same account." Counsel says; first, that it follows from this disclaimer that with the Flexible Share

Plan, combinations are possible; second, that there are more combinations than just the two identified plans; and third, that the individual “Share Plans” are registered to the same account.

[26] Counsel for Telus submits that the print advertisement draws consumers’ attention to the fact that the divergent needs of individual members within a share plan can be readily accommodated. The description “for a family of small, medium and extra large talkers” also serves to clarify the statement “Flexible Share Plans, only from Telus” to mean that individual members with notably different needs can be readily accommodated only by Telus.

[27] As for the television commercial, counsel for Telus submits that the advertisement is a visual metaphor that expresses the distinguishing feature of Flexible Share Plans with a reference to its website at the end of the commercial. The website contains a full explanation of the plan.

[28] In my view, both interpretations given to paragraph 22 by Mr. Deane and Mr. Cowper have merit. However, it is not enough that this Court is uncertain as to the meaning of this paragraph. To succeed, the appellant must demonstrate error. In this case, the words reasonably bear the meaning ascribed to them by counsel for Telus. I cannot conclude that the paragraph in question demonstrates that the Chambers judge erred in law in analyzing the general impression left by the advertisements. Whether that view prevails at trial is another matter. That being so, this Court should not interfere with the discretionary order made by the Chambers judge.

[29] I would dismiss the appeal.

[30] **NEWBURY, J.A.**: I agree.

[31] **LEVINE, J.A.**: I agree.

[32] **RYAN, J.A.**: The appeal is dismissed.

"The Honourable Madam Justice Ryan"

UNION BANK OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

FRANK C. PHILLIPS AND OTHERS—(DEFENDANTS) .....

AND

BOULTER WAUGH LIMITED (PLAINTIFF) ..... } RESPONDENT.

1919
*Feb. 18,19.
*Mar. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Statute—Construction—Agreement for sale—Assignment—Assignor giving mortgage—Caveat by assignee—Lapse of—Knowledge by mortgagee—Priorities—"The Land Titles Act," Sask. S., 1917, 2nd sess., c. 18, s. 194. R.S. Sask., 1909, c. 41, s. 162.

In April, 1912, the owner made an agreement to sell a lot of land to P. for a price payable by instalments, and in May, 1913, P. assigned to B. his interest in this agreement. This assignment was not registered, but in June, 1913, B. filed a caveat. In September, 1914, P., having paid the purchase price, was registered as owner of the land subject to the caveat. Subsequently P. executed a mortgage of the land, and when it was registered the mortgagee was made aware of B.'s caveat. In June, 1915, the registrar, under section 136 of "The Land Titles Act" of Saskatchewan, notified B., at the request of the mortgagee, that his caveat would lapse at the expiration of a certain delay, unless continued by order of the court; and, by a subsequent order, B.'s caveat was continued for 35 days from the 8th of October, 1915. As no action had been taken by B. within that time, the caveat was vacated.

Held that, under section 194 of "The Land Titles Act" of Saskatchewan and in the absence of fraud, B., having allowed his caveat to be vacated, could not invoke the knowledge by the mortgagee of the existence of the caveat in order to maintain its priority of claim.

Judgment of the Court of Appeal (11 Sask. L.R. 297; 42 D.L.R. 548; (1918) 3 W.W.R. 27, 196), reversed.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Brown C.J. at the trial and maintaining the plaintiff's action. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

S. B. Woods K.C. for the appellant.
P. E. Mackenzie K.C. for the respondent.

THE CHIEF JUSTICE.—The question for our decision in this appeal really turns upon the proper construction to be given section 194 of "The Land Titles Act, 1917," of Saskatchewan. Apart from that statute, and especially from section 194, there is little doubt that, under the authorities, the plaintiff respondent would have a right to maintain its action and the priority of its security over that of the bank and that, but for section 194, the failure on its part to maintain or renew its caveat which it had registered to protect its interest would not, with the knowledge possessed by the bank of the respondent's interest, operate to affect such right of priority. As Chief Justice Haultain puts it,

> The outstanding and important facts are that the plaintiff had an equitable interest in the land in question prior in time to the equitable interest of the defendant bank, and that the bank had full knowledge and notice of that interest at the time it took its security from Phillips. Apart from the provisions of "The Land Titles Act, 1917" (2nd sess.), ch. 18, these facts bring this case clearly within well established principles.

The section in question, 194, reads as follows:—

> 194. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into

(1) 11 Sask. L.R. 297; 42 D.L.R. 548; (1918), 3 W.W.R. 27, 196.

or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding.

2. Knowledge on the part of any such person that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

The authorities relied upon in the argument at bar were to the effect that a purchaser or morgtagee for value of an equitable interest in lands with actual or constructive notice of other equitable unregistered interests prior to that which he acquired took subject to those interests.

But it seems to me that the object and purpose of this section, apart from cases of fraud, was to lay down a different rule which should govern in cases coming within its ambit, and, unless we are prepared to ignore the section altogether or fritter away its language and meaning, we must hold that, except in cases of fraud, these equitable rules established by the authorities, however just and equitable they may seem to be under ordinary circumstances, are not applicable to cases coming within section 194 of "The Land Titles Act."

I think the object and purpose of such statutes as the one here was very well stated by Edwards J. in delivering the judgment of the Court of Appeal in New Zealand in *Fels* v. *Knowles* (1):—

> The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law. * * * The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives,

(1) 26 N.Z. Rep. 604, at p. 620.

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
The Chief Justice.

in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered.

In construing section 194 of "The Saskatchewan Land Titles Act," we must always bear in mind that cases of fraud are excepted from it, but that knowledge of an unregistered interest in lands "shall not of itself be imputed as fraud." The section provides that no person dealing with lands for which a certificate of title has been granted shall

> be affected by any notice direct implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

That seems to be sufficiently explicit and clear as making the register everything and outside notices or knowledge immaterial.

Now in this case a caveat had been filed on behalf of the plaintiff respondent against the lands in question and the registrar having given the plaintiff respondent notice to take action on the caveat the local master made an order under the statute directing the plaintiff within 35 days to bring an action to establish any claim it might have to the lands with an express provision that if such action was not brought the caveat should be vacated. No action having been brought the caveat was vacated.

The plaintiff then notified the appellant bank that it had not abandoned its claim and it brought the present action resting its claim to relief on the ground that the appellant bank, having had the knowledge of plaintiff's claim before taking its mortgage, cannot in equity acquire a title free from and prior to such claim.

This raises a clear cut issue whether the old rules of equity which section 194 was supposed to do away with still prevail and will be given effect to notwithstanding

the section or whether the plain words of the section itself, which practically makes the register everything, shall prevail.

I have no hesitation myself, apart from cases of fraud, in reaching the latter conclusion and that the plaintiff, whether by mistake or negligence, having allowed its caveat to be vacated, cannot invoke the old rule of notice and knowledge to maintain its priority of claim over that of the bank.

Such rule has, in my judgment, been expressly abrogated by this section 194, in all cases coming within its ambit and the register alone made the sole test always of course excepting, as the section does, cases of fraud.

I cannot find that the plaintiff has any one to blame but itself for the position it finds itself in. The bank did not try to take any unjust advantage of it. Perfectly within its right, the bank took proceedings under the Act which resulted in the plaintiff being ordered to bring an action to enforce that claim within a definite period, otherwise its caveat would lapse and be vacated.

The respondent allowed it, by its own neglect and inaction, to be vacated and so lost the right it otherwise would have had to enforce its claim of priority as against the defendant bank which in the meantime had acquired an interest in the land. I agree with Mr. Justice Newlands

that the vacating of the caveat cleared the registered title to the land of any claim the plaintiff might have against it in priority to any right that had attached to such land by such lapse.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Idington J.

IDINGTON J.—The question raised herein, I think, should be determined by the interpretation and construction of section 162 of "The Lands Titles Act," ch. 41 of the Revised Statutes of Saskatchewan, 1909, (Sask. s. 1917, 2nd session, c. 18, s. 194) so far as relevant to the facts in evidence.

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease, from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof nor shall he be affected by any notice direct, implied or constructive of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

One Munson sold some land to one Phillips and gave him an agreement of purchase therefor on the 2nd of April, 1912, which he assigned, merely in the way of security, on the 2nd of May, 1913, to a company under whom, by virtue of several assignments, the respondent corporate company claims.

In the course of events attendant upon the said several assignments, one Scott Barlow, who had become one of the said several assignees, as trustee for respondent company, registered a caveat on the 5th of June, 1913.

In September, 1914, Phillips had paid the balance of the purchase money and obtained a conveyance from Munson who had never been notified by the assignees aforesaid, or any of them, of the fact of the said assignment by Phillips the vendor.

No one has pretended that Phillips, in doing so, had any fraudulent purpose in view or claimed that his action in doing so was fraudulent.

Thereafter, on the 23rd of March, 1915, the appel-

lant obtained from Phillips a mortgage upon the said lands and having had, when doing so, knowledge of the said caveat filed by Scott Barlow, the appellant is held by the court below to have committed a fraud and thereby is deprived of its rights as such mortgagee.

Not a word appears in the pleading herein charging such fraud.

And a very curious circumstance appears in evidence which seems quite inconsistent with the charge of fraud made by the court below. It is this: that the appellant, shortly after getting its mortgage from Phillips, instructed solicitors to call the attention of Scott Barlow, in whose name the caveat stood, that he must proceed to enforce his claim thereunder or it would lapse in thirty days, unless continued by order of the court.

The respondent, in consequence of this, applied accordingly and obtained an order continuing the caveat for thirty-five days on terms of the caveator taking proceedings within that time to establish his rights thereunder.

This he and the respondent failed to do and in the language used in the western provinces relative to such omissions, the caveat lapsed.

The respondent took ineffectual steps later to have it re-established.

The consequence of such failures is that on the registry record the appellant stands in priority to anything the respondent can now get registered against the same land. What has that in it in the nature of fraud?

The answer is furnished by the judgment in *Le Neve* v. *Le Neve* (1), upon which had been built, as it were, an enormous volume of law, which produces judicial

(1) 1 Ambler 436.

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Idington J.

expressions that might, if later legislation discarded, warrant one in saying any such advantage with knowledge, was equivalent to fraud and liable to have that declared and the priority of registration deprived of its usual effect.

I cannot, however, see how such doctrines can be maintained in such cases as this, in view of the express language of the legislature in the clause above quoted.

It seems impossible that the proper effect can be given to that section unless we try to appreciate what the legislature was about.

Clearly it was not satisfied with the results of the law as settled by judicial expressions and decisions, and had determined upon the adoption of a system of registration as a basis of ownership of land and a means of settling the order of priority of claims into or out of any such ownership when once registered under the Act in question.

In doing so it cast upon those acquiring any such ownership or claim to any interest therein burdens, perhaps previously unknown, in the way of diligence in order to protect the rights so acquired by observing the provisions of the Act in that regard under penalty of losing ownership or priority of claim save in the case of fraud on the part of those obtaining the priority, which the Act seems clearly to contemplate as possible even with notice or knowledge unless springing from that conveyed by means of registration of a caveat. Notice or knowledge resting upon the warning given by a permissible caveat would be available to him registering it, or those claiming under him by virtue thereof as a means of maintaining priority over any later registration.

But the steps necessary to secure such benefits

must be those contemplated by the Act and not something else.

The principle involved is not new. A privilege of any kind created by statute must be enforced in the way that statute provides.

It cannot be made available in any other way. The respondent seems to have recognized that by getting the renewal under the Act.

When it failed to proceed according to the law enacted for its benefit its rights ceased.

The notice or knowledge thus obtained by appellant was nothing more than all other kinds of notice or knowledge excluded by the section quoted from having any effect and, by the express language of the Act, "shall not of itself be imputed as fraud."

I am unable, therefore, to see how the language of the legislature can be properly defied and set at naught by reason of judicial conceptions of what might have been called fraud, before this express prohibition of their being given further recognition.

We have been referred to a number of New Zealand cases which, of course, do not bind us any more than the judgment appealed from. I have, however, looked at them and find in most, if not all, some element of fact which could well be interpreted as to constitute fraud, or might well be held as within such a compliance with the statute as to found a claim thereunder for the relief sought and got.

The New Zealand Act differs somewhat from that now in question and the corresponding section to that above quoted is capable of a less drastic meaning than it.

The Australian statutes, upon which cases were cited to us, are not in our library. And I may be permitted to think that the attempted construction of

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Idington J.

such like statutes as in question from a reading of a single section or extract therefrom is rather a hazardous sort of proceeding.

For this court to attempt to call that fraud on the part of the appellant which it appears to have done herein, would only tend to impair the regard attaching to any finding of fraud we might be able to find as understood by the exception in above quoted section.

Nor is this the only illustration furnished by the administration of justice wherein due diligence is recognized as entitled to acquire its reward and he wanting in the application thereof is doomed to disappointment.

So long as its application is not associated with a fraudulent purpose, he suffering has no legal right to complain.

It does not seem to me that the facts upon which the court above had to proceed in the case of *Loke Yew* v. *Port Swettenham Rubber Co.* (1), have much resemblance to those we have to deal with and the relevant law contained in the statute there in question has still less to that above quoted.

The appeal should be allowed with costs throughout and, I think, the respondent should be at liberty to redeem and judgment go for that as falling under its alternative prayer for relief.

ANGLIN J.—The facts in this case appear in the judgments delivered (2), in the Court of Appeal. They establish that the appellant bank took the mortgage for which it now claims priority over the respondent's unregistered equitable interest in, or claim upon, the lands in question with "direct" notice of such interest.

(1) [1913] A.C. 491.

(2) 11 Sask. L.R. 297; (1918) 3 W.W.R. 27, 196; 42 D.L.R. 548.

Were it not for the effect of section 194 of "The Land Titles Act" (statutes of Saskatchewan, 1917 (2nd sess.), ch. 18), I should unhesitatingly agree with the learned Chief Justice of Saskatchewan and Lamont J. that any attempt of the bank to give to its security "an effect inconsistent with or destructive of" the respondent's prior interest would, under these circumstances, be "looked upon by equity as a fraud which it (could) not countenance." Mr. Justice Lamont has, in my opinion very convincingly shewn that but for the effect of section 194 a caveat would not have been required to protect the respondent's interest against the bank and that the lapse of its caveat, therefore, did not leave it in any worse position than it would have occupied had it never lodged it.

But I find in section 194 an insuperable difficulty to giving effect to the principle of equity which would otherwise support the respondent in this position. The language of that section is so explicit that it leaves no room for doubt as to the intention of the legislature that that principle shall be abrogated in favour of a

person * * * taking * * * a transfer mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted, except in the case of fraud.

By sub-sec. 2:

Knowledge that any trust or unregistered instrument is in existence shall not of itself be imputed as fraud.

Here there was knowledge, but nothing more. Knowledge, of course, could not of itself constitute fraud. Fraud must always have consisted in the doing of something which that knowledge made it unjust or inequitable to do. The meaning of the statute must, therefore, be that the doing of that which mere knowledge of "any trust or unregistered interest" would make it inequitable to do shall nevertheless not be imputed as fraud, within the meaning of that term as used in

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Anglin J.

sub-sec. 1 of sec. 194. That which equity deems fraud, therefore, is by this enactment of a competent legislature declared not to be imputable as fraud.

A passage from my judgment in *Grace* v. *Kuebler* (1), is cited by the learned Chief Justice and by Lamont J. apparently as inconsistent with this view. All that that case decided was that the mere lodging of a caveat to protect an interest acquired subsequently to the making of an agreement for the sale of registered land does not affect the purchaser under such agreement, otherwise ignorant of them, with notice of the rights to protect which the caveat is lodged so as to render ineffectual as against the caveator payments on account of purchase money subsequently made by the purchaser to his vendor. Expressions of opinion in the judgment on any other point must, it is needless to say, be regarded as *obiter*. If anything I said in that case is really inconsistent with the views I have expressed above, I can only cry *peccavi* and plead that it was not so intended. I find in section 194 the "very explicit language" which I deem necessary to justify our regarding a statute as intended to render unenforceable such a wholesome doctrine as that of the effect of notice in equity. To give effect to a provision that a person is to be unaffected by notice, his rights and remedies must be the same as they would have been had he not had notice. However wholesome we may consider the equitable doctrine as to the effect of notice—however regrettable and even demoralizing in its tendency we may deem legislation rendering it inoperative—it is not in our power to disregard it. The legislative purpose being clear we have no right to decline to carry it out. Were we to do so consequences still more deplorable must

(1) 56 Can. S.C.R. 1, at p. 14; 39 D.L.R. 39, at pp. 47-8.

ensue. The court would occupy a wholly indefensible position, one of usurpation of an authority, sovereign within its ambit, which it is its imperative duty to uphold.

MIGNAULT J.—In my opinion the decision of the question submitted is entirely governed by the provisions of "The Land Titles Act" of Saskatchewan (ch. 41 of the Revised Statutes of Saskatchewan (1909)). (Sask. S., 1917, 2nd session, c. 18).

As briefly as they can be stated, the pertinent facts are as follows:—

In April, 1912, one J. H. Munson made an agreement to sell to Frank C. Phillips lot 10, block 6, plan E.M., town of Humboldt, Saskatchewan, for $1,750 payable by instalments.

In May, 1913, Phillips, being indebted to Boulter Waugh and Company, Limited (now represented by the respondent), assigned his interest in the agreement for sale to the said company, which immediately transferred its interest to its credit manager, Mr. Scott Barlow, in trust for the company. These assignments were not registered, but on the 5th June, 1913, Mr. Barlow filed a caveat in the district land titles office to protect the interest thus assigned by Phillips.

In September, 1914, Phillips, having paid to Munson the purchase price, received a transfer and was registered as owner of the land, subject to a mechanic's lien and to the Barlow caveat.

Subsequently Phillips became indebted to the appellant and executed a mortgage of the land in its favour, which mortgage was registered on the 24th March, 1915. When the appellant acquired this mortgage from Phillips, it was aware of the Barlow caveat, which was entered on the certificate of title, and of the rights represented by this caveat.

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Mignault J.

On the 29th June, 1915, the deputy registrar, under section 130 of "The Land Titles Act," (R.S. Sask. 1909, c. 41) notified Mr. Barlow at the request of the appellant that his caveat would lapse at the end of 30 days unless continued by order of the court. An order was made on the 28th July, 1915, and registered, continuing the caveat until further order. By a subsequent order of the court, the Barlow caveat was continued for 35 days from the 8th October, 1915, and it was ordered that in default of the caveator taking proceedings within that time, the caveat should be vacated. On the 13th November, 1915, a certificate of the clerk of the court was registered stating that no action had been taken during the 35 days continuing the caveat, and that this time having expired the caveat was vacated.

Legal proceedings were subsequently taken to reinstate the Barlow caveat resulting in a judgment of the Supreme Court of Saskatchewan *en banc* of the 14th July, 1916, setting aside an order of the local master at Humboldt reinstating the Barlow caveat, without prejudice, the judgment stated, to the right of the respondent to make application to file a new caveat.

The question to be decided is whether the appellant is entitled to priority over the respondent in respect of their respective rights in and to the lands in question, and this question, as I have said, must be determined according to the rules enacted by "The Saskatchewan Land Titles Act."

The material provisions of this statute (R.S. Sask. 1909, c. 41) are as follows:—

125. Any person claiming to be interested in any land under any will, settlement or trust deed or under any instrument of transfer or transmission or under any unregistered instrument or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially, but the title to which is

registered in the name of some other person or otherwise, may lodge a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the said land shall be made and that no certificate of title therefor shall be granted until such caveat has been withdrawn or has lapsed as hereinafter provided unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in such caveat;

Provided that no caveat which has heretofore been or that may hereafter be lodged shall be deemed to be insufficient for the purposes of the lodgment thereof merely upon the ground that the interest claimed therein is not shewn to be derived from the registered owner of the land affected.

129. The owner or other person claiming any interest in such land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn; and the said judge may upon proof that such last mentioned person has been summoned and upon such evidence as the judge requires make such order in the premises as to the said judge seems fit.

130. Subject to the provisions of the preceding section such caveat shall continue unless and until it is removed as hereinafter set forth, namely: The owner or other person claiming any interest in such land may require the registrar by notice in writing which shall be in form Y in the schedule to this Act to notify the caveator at his address for service as set forth in the caveat that such caveat shall lapse at the expiration of thirty days from the mailing of such notice by the registrar unless within said thirty days, the caveator shall file with the registrar an order made by the judge providing for the continuing beyond the said thirty days of said caveat, and in the event of such order not being filed with the registrar within the said thirty days, such caveat shall lapse and shall be treated as lapsed by the registrar; the notice hereinbefore provided to be given by the registrar shall be by registered letter.

Provided, however, that whenever the registrar is satisfied that any interest in such land other than the interest therein of the caveator is protected by such caveat he may refuse to notify the caveator as required by this section, and in such case the removal of such caveat shall be subject only to the provisions of sec. 129 hereof.

131. The caveator may by notice in writing to the registrar withdraw his caveat at any time; but notwithstanding such withdrawal the court or judge may order the payment by the caveator of the costs of the caveatee incurred prior to such withdrawal.

132. A memorandum shall be made by the registrar upon the certificate of title and upon the duplicate certificate of the withdrawal, lapse or removal of any caveat or of any order made by the court or a judge in connection therewith.

2. After such withdrawal, lapse or removal it shall not be lawful for the same person or for any one on his behalf to lodge a further caveat in relation to the same matter unless by leave of the judge.

1919

UNION BANK OF CANADA v. PHILLIPS AND BOULTER WAUGH LIMITED.

Mignault J.

133. Any person lodging or continuing any caveat wrongfully, and without any reasonable cause, shall be liable to make compensation to any person who has sustained damage thereby.

2. Such compensation with costs may be recovered by proceedings at law if the caveator has withdrawn such caveat and no proceedings have been taken by the caveatee as herein provided.

3. If proceedings have been taken by the caveatee then the compensation and costs shall be determined by the court or judge acting in the same proceedings.

The rules laid down here can give rise to no difficulty. Under section 129, the owner or other person interested in a lot of land may by summons call upon the caveator to attend before a judge to shew cause why the caveat should not be withdrawn, or he may, under section 130, require the registrar to notify the caveator that such caveat shall lapse at the expiration of 30 days from the mailing of the notice by the registrar, unless, within 30 days, the caveator shall file with the registrar an order made by the judge providing for the continuing of the caveat beyond the 30 days, and if such order is not filed, the caveat shall lapse and shall be treated as lapsed by the registrar.

The notice in question was given under section 130. The caveator first obtained an order of the court continuing the caveat until further order, but a subsequent order continued the caveat for 35 days from the 8th of October, 1915, and ordered that in default of the caveator taking proceedings during this term, the caveat should be vacated. No proceedings having been taken by the caveator during the 35 days I am of the opinion that his caveat fully lapsed. The permission subsequently granted him by the Supreme Court *en banc* to file a new caveat—permission which was required under section 132—and the filing of the caveat could only operate from the date of the new caveat and could not affect the prior registered mortgage of the appellant.

But the respondent relies on the knowledge acquired by the appellant at the time it took its mortgage from Phillips of the rights represented by the Barlow caveat as first filed, and the respondent contends that it would be "against conscience" or equivalent to fraud to thus acquire a right in land with knowledge of the existing unregistered rights of the respondent. Many cases are cited in this connection, but I cannot but think that they are without application in view of sec. 162 of "The Saskatchewan Land Titles Act," (R.S. Sask. 1909, c. 41) which section is, in my opinion, a complete answer to the respondent's contention.

This section reads as follows:—

162. No person contracting or dealing with or taking or proposing to take a transfer, mortgage, incumbrance or lease from the owner of any land for which a certificate of title has been granted shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding.

2. The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

In this connection, but of course not an authority, but merely as shewing that the registration laws of the different provinces are not so far apart, I might refer to art. 2085 of the Quebec Civil Code, the application of which has never given rise to any difficulty, and which reads as follows:—

2085. The notice or knowledge acquired of an unregistered right belonging to a third party and subject to registration cannot prejudice the rights of a subsequent purchaser for valuable consideration whose title is duly registered, except when such title is derived from an insolvent trader.

I, however, base entirely my opinion on section 162 of "The Land Titles Act," and I take it that the knowledge acquired by the appellant of the unregistered interest of the respondent cannot, of itself, be imputed

1919
UNION BANK OF CANADA
v.
PHILLIPS AND BOULTER WAUGH LIMITED.
Mignault J.

as fraud. The registration by the appellant of the mortgage acquired by it from Phillips was certainly not a fraudulent act, for if the Barlow caveat had been maintained by the court the appellant's mortgage would have been subject to the rights represented by this caveat. And it certainly cannot be contended that the appellant committed a fraudulent act by availing itself of the right granted by sec. 130 of "The Land Titles Act" to any person claiming an interest in a lot of land to test the validity of a caveat lodged in the land titles office. If Barlow or the respondent allowed the caveat to lapse, no fault or fraud can be imputed to the appellant, but the respondent suffers by reason of its own negligence.

The learned judges of the Court of Appeal who have found in favour of the respondent observe that if the opinion I feel constrained to adopt is to be followed, Barlow would be in a worse position by filing a caveat than if he had relied on the equitable doctrine that the knowledge of his right by the appellant prevented the latter from acquiring priority as against his interest in the land in question.

I am not at all sure in view of sec. 162 that Barlow would have been in a better position had he not filed the caveat, a point on which it is unnecessary to express any opinion. He has, however, filed a caveat to protect his rights and he, therefore, has put himself entirely under "The Land Titles Act." The respondent has, moreover, since the first caveat lapsed and it was refused reinstalment, filed a new caveat which is subsequent in date to the registration of the appellant's mortgage. I think, therefore, that the statute entirely governs the parties in this case, and it is clear to my mind that the appellant is entitled to preference.

The learned Chief Justice of Saskatchewan cites

certain maxims coming, I think, originally from the Roman Law with which, as a civilian, I am familiar, such as *nemo dat qui non habet*, or *qui prior est tempore potior est jure* But I may say with deference that these maxims are not of universal application, and when third parties are concerned they cannot be applied without some qualification. It might, moreover, be possible to offset axiom by axiom and to refer to the one so often mentioned by the old jurists, *vigilantibus non dormientibus scripta est lex.* I prefer, however, to rest on the clear text of the statute, and I take it as being eminently desirable, in the interest of the security of land transactions in a system where registration of titles to land is provided for, that the entries in the public register, in the absence of fraud, be taken as conclusive. Here the respondent failed to register its assignment and even to protect its caveat when it was called upon in the manner prescribed for by "The Land Titles Act" to do so. I cannot, under the circumstances of this case, come to its assistance.

I am, therefore, of the opinion that the appeal should be allowed and the judgment of the learned trial judge restored with costs throughout.

CASSELS J.—I concur in the reasons and result arrived at by Mr. Justice Mignault.

Appeal allowed with costs.

Solicitor for the appellant: *F. H. Bence.*
Solicitors for the respondent: *McCraney, Mackenzie & Hutchinson.*

CITATION: Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE COMMISSIONER OF COMPETITION	)	J. Thomas Curry, Jaan Lilles, Paul-Erik Veel, for the Applicant
Applicant	)	
	)	
– and –	)	
	)	Kent E. Thomson, Anita Banicevic, James D. Bunting, Sean R. Campbell, Nicholas Van Exan, Andrew Carlson, for the Respondents
CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC.	)	
Respondents	)	
	)	
	)	**HEARD:** November 21, 22, 23, 24, 25, 28, 29, 2011 August 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 24, 27, 28, 29, 30, 2012 March 20, 21, 22, 25, 26, 27, 28, April 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17 May 13, 14, 15 & 16, 2013

MARROCCO J.

Contents

The nature of this Application

[1] The Commissioner of Competition commenced this Application on November 19, 2010. The original Application was amended on March 1, 2011.

[2] As amended, the Application requested:

- A declaration that Rogers Communications Inc. ("Rogers") and Chatr Wireless Inc. ("Chatr") had engaged in reviewable conduct contrary to paragraphs 74.01(1)(a) and 74.01(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34;
- An order that the respondents pay an administrative monetary penalty of $10 million;
- An order that the respondents stop making representations about dropped call performance for a period of 10 years;
- An order that the respondents stop making false or misleading representations to the public for the purpose of promoting the use of wireless telecommunication services for a period of 10 years;
- An order requiring the respondents to publish notices describing their reviewable conduct, including the geographic area to which the conduct related and a description of the manner in which the false and misleading representations were disseminated;
- A restitution order for the benefit of each Chatr customer for the period in which the offending representations were published;
- An order pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43 preserving the confidentiality of confidential information referred to during the hearing of the Application; and
- An order that the respondents pay the costs of the applicant's investigation as well as this Application.

[3] During closing argument all parties agreed that if this Application was successful a further hearing should be held concerning penalty.

[4] There were two responding parties named in the Application: Chatr Wireless Inc. and Rogers Communications Inc. It is not disputed that all shares of Chatr Wireless Inc. are owned or controlled by Rogers Communications Inc.

The grounds for this Application

[5] The Application set out the grounds upon which it was based. The grounds are important because the applicant did not serve affidavits with its Notice and Application. Therefore on November 19, 2010, when this Application was served and filed, the grounds for it were those set out in it.

[6] The grounds identified two offending representations:

- "Fewer dropped calls than new wireless carriers"; and
- After November 5, 2010, representations that Chatr subscribers would have "no worries about dropped calls."

[7] For convenience, I will refer to the two offending representations throughout as the fewer dropped calls claim.

[8] The applicant claimed that these two representations, which appeared in both French and English, created a false or misleading general impression regarding the service offered by Chatr as compared to the "new wireless carriers."

[9] When the Application was amended March 1, 2011, the applicant also claimed that the respondents made these two representations in the absence of adequate and proper testing.

[10] The grounds for the Application also set out that these two offending representations were part of an extensive social media and public relations campaign coincident with the launch of Chatr on July 28, 2010.

[11] The grounds for the Application assert that commencing August 9, 2010, there was a broad and nationwide public relations campaign composed of television, radio, digital, out of home and print advertising.

[12] The grounds set out that the two representations were sometimes accompanied by a disclaimer or explainer that stated: "Based on: cell site density; quality of indoor and underground reception; and seamless call transition when moving out of zone."

[13] The Application claims that the disclaimer was inaccurate and ineffective. It claims that the detail in the disclaimer was meaningless to the ordinary average consumer.

[14] The grounds set out that the "no worries about dropped calls" advertisements made after November 5, 2010, included images similar to the images that accompanied the "fewer dropped calls than new wireless carriers" ads, causing the offending conduct to continue.

The Application claims the contentious representations are false and misleading

[15] The Application asserts that the two representations were false because, in certain markets, Chatr had higher dropped call rates than at least one wireless carrier. Specifically, the Application asserts that the advertisements were false because:

- In Ottawa, Chatr's dropped call rate was higher than those of one new carrier on 84 of 92 days.
- In Toronto, Chatr's dropped call rate was higher than one new carrier on 53 of 92 days.

[16] The Application also maintains that the representations were misleading because they conveyed the general impression that there was an appreciable dropped call rate difference among carriers, whereas the truth was that the difference was not appreciable or significant between July 28, 2010, and October 27, 2010.

The Application claims the contentious claims are material

[17] The Application asserts that the claims were material because they were made for the purpose of promoting the purchase of wireless services from Chatr rather than the new carriers.

[18] The Application also asserts that network reliability, including dropped call rates, was a material aspect of wireless telecommunication services and a component of a consumer's decision to purchase a particular wireless telecommunication service.

[19] It is not disputed that dropped calls, and therefore claims concerning dropped calls, are material to consumers.

[20] It is not disputed that the fewer dropped calls claim was made to the public.

[21] It is not disputed that the fewer dropped calls claim was made to promote Chatr, which was a business interest of Rogers.

The Application claims automobile drive tests are not adequate and proper tests

[22] After March 1, 2011, the existence of adequate and proper tests for the fewer dropped calls claim was a live issue in this Application.

[23] The Application sets out that the respondents attempted to support the fewer dropped calls claim with automobile-based drive tests. The Application asserts that the drive tests do not constitute an adequate and proper test of the claim because:

- Given their purpose and limitations, drive tests cannot be used as the basis for market-wide conclusions about wireless network performance, including dropped call rates;
- Rogers' own drive test data in Vancouver, Calgary and Edmonton did not show a statistically significant difference between Chatr's dropped call rates and those of some or all of the new carriers;
- Rogers did not conduct any drive tests in Calgary or Edmonton before making the two offending representations; and
- Rogers' drive tests in the greater Toronto area prior to September 27, 2010, did not include all of the new entrants operating in the greater Toronto area.

The Issues

[24] The Application raised three issues:

- The fewer dropped calls claim was false;
- The fewer dropped calls claim was misleading; and
- The fewer dropped calls claim was not adequately and properly tested before it was made.

[25] The respondents added two issues:

- Section 74.01(1)(b) of the *Competition Act* is inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms*; and
- The administrative monetary penalty provided for in 74.1(1)(c) of the *Competition Act* engages s. 11 of the *Charter*.

The commencement of proceedings

[26] I have set out the Application in detail because the respondents complained that they could not publicly respond to the initiation of this proceeding because supporting affidavits were not served with the Application. Specifically, the applicant failed to serve the affidavits of Andrew McAlpine, a Senior Competition Law Officer with the Competition Bureau; Ken Campbell, Chief Executive Officer of Globalive Wireless Management Corp. (Wind Mobile); and Aleks Krstajic, President and Chief Executive Officer of Public Mobile Inc.

[27] I attach no significance to the respondents' complaints. The respondents knew on November 19, 2010, from the Application, if nothing else, in reasonably specific terms, the reasons why the applicant maintained that the "fewer dropped calls than new wireless carriers" and "no worries about dropped calls" claims were false or misleading.

The Advanced Wireless Spectrum auction

[28] In 2007, as a result of studies it had undertaken, the Government of Canada concluded that Canadian consumers and businesses were paying more for wireless services than consumers in other countries.

[29] In an effort to increase competition, Industry Canada conducted an auction of bands of wireless services radiofrequency spectrum known as the Advanced Wireless Services spectrum.

[30] Radiofrequency spectrum is a finite public resource made available through the infrequent issuance of licences. Not surprisingly, these seldom-issued licences are valuable.

[31] The Government of Canada's stated goal in permitting this auction was lower prices, more choice and increased innovation for Canadian consumers of wireless services. Similar measures had been undertaken in the United States and the United Kingdom.

[32] At the time the auction was announced, the wireless sector of the Canadian telecommunications industry generated approximately $12.7 billion. At the time of the auction, Rogers, Bell Canada and TELUS dominated the wireless market with 94 per cent of the subscribers and 95 per cent of the revenues.

[33] Bell Canada and TELUS were never part of these proceedings.

[34] Industry Canada auctioned 105 MHz of Advanced Wireless Services spectrum: 40 MHz of this spectrum was reserved for persons with less than 10 per cent of Canada's wireless revenue; 65 MHz of spectrum was available to all bidders.

[35] Rogers was precluded from bidding on licences of the 40 MHz of spectrum. Rogers successfully purchased $1 billion worth of spectrum available to all bidders.

[36] The results of the auction were announced on or about July 21, 2008. New wireless carriers were created: Globalive Wireless Management Corp., carrying on business as Wind Mobile; Public Mobile Inc., carrying on business as Public Mobile; Data & Audio-Visual Enterprises Wireless Inc., carrying on business as Mobilicity; and Videotron S.E.N.C.

[37] Prior to the auction, Wind Mobile, Public Mobile and Mobilicity had not provided wireless telecommunication services in Canada. Videotron had a different history.

[38] The amounts paid for the auctioned spectrum licences were as follows:

- Videotron approximately $550 million
- Wind Mobile approximately $442 million
- Mobilicity approximately $243 million and
- Public Mobile approximately $52 million.

Videotron's History

[39] Videotron started in 1964 as a cable television network, and later broadened into other aspects of telecommunications. As far as wireless services were concerned, Videotron had been a reseller of those services in Québec. Specifically, in 2005 Videotron and Rogers began a strategic relationship. Videotron was able to offer Québec consumers Videotron branded mobile wireless services, in addition to its television, broadband Internet and cable telephone services.

[40] From 2005 and on, Videotron operated as a virtual mobile network operator, utilizing wireless voice and data services provided by Rogers. Videotron was responsible for acquiring, billing and technically supporting its customers.

[41] At the time of the events which concern us, Videotron had 1.8 million cable television subscribers, 1.2 million high-speed Internet subscribers, 1 million landline telephone subscribers and more than 80,000 wireless customers.

[42] Rogers' 2010 Leger Brandwatch Study showed that consumers in Québec had a high awareness of Videotron.

[43] I am satisfied by the evidence that, during the time frame with which we are concerned (July 28, 2010, to November 30, 2010), Videotron was an established brand in the Province of Québec.

The unlimited talk and text segment of the wireless services market

[44] Wireless cell phone service began in Canada in the mid-1980s. The evidence established that during the time period referenced in this Application, approximately 75 per cent of Canadians had a cell phone.

[45] Dr. Michael Pearce, a witness called by the respondents who was qualified as an expert to give opinion evidence concerning marketing to consumers, including consumers in the wireless industry in Canada, explained that as an industry matures, different segments of customers for that industry can emerge.

[46] As a result of the Advanced Wireless Spectrum auction in 2008, and the marketing decisions of the new wireless carriers who acquired spectrum in that auction, a zone-based unlimited use segment of the Canadian wireless market emerged. A similar segment had already emerged in the United States in the mid-1990s. This zone-based unlimited use segment differentiated itself in its approach to pricing and usage. This segment did not emerge as a result of a change in technology.

[47] Dr. Pearce explained that market segmentation in the wireless industry encourages innovation, competitive pricing, better products and service and the publication of informative advertising.

[48] Zone-based unlimited use customers were offered prepaid use monthly plans with no term contracts. These plans are different than postpaid use plans, which require the subscriber to sign a term contract for periods longer than one month.

[49] Videotron did not offer prepaid plans during the relevant period of this Application.

[50] Zone-based unlimited use customers were heavy users of wireless services. For example, Chatr customers averaged 1,364 minutes of use per month in 2010, compared to 453 minutes per month on average for customers using other Rogers brand services.

[51] I infer from the fact that zone-based unlimited use customers were heavy users of wireless services that they were also experienced users of those services.

Rogers' strategy for competing with the new carriers

[52] Based in part on the public statements of the new licensees, Rogers anticipated that the new licensees would try to appeal to the unlimited talking and texting segment of the wireless services market. Rogers took note of the US experience, which illustrated a significant demand for unlimited talking and texting services.

[53] Rogers concluded that the incumbent American carriers had waited too long to compete for this segment after it emerged, and resolved not to make the same mistake.

[54] In late 2008 or early 2009, Rogers began seriously considering the launch of a new brand. Mr. Garrick Tiplady, Senior Vice President of Chatr in the July 28, 2010, to November 30, 2010, time period testified that a small group was formed within Rogers to work on this project. The project was known internally as Project Columbia.

[55] The group produced a strategy brief entitled "Columbia the Brand Strategy Brief" dated October 22, 2009.

[56] This strategy brief identified the following problems for consumers:

- Wireless service plans were hard to understand;
- Devices may not work; and
- Discounts may change.

[57] The brief recorded that for customers, price was the dominant factor while network quality was next in importance.

[58] Significantly, the brief identified the challenges facing the new wireless carriers as follows:

- The spectrum that they had purchased had poor propagation qualities. It was harder for that spectrum to achieve in-building coverage and density of signal;
- The coverage offered by the new wireless providers would not be as good as Rogers';
- It would cost the new providers more to achieve parity with Rogers; and
- Although the new wireless service providers must be allowed to roam on the Rogers network, their customers who leave their coverage area while engaged in a call will experience a dropped call, and will have to redial and roam on the Rogers network in order to continue the call (the "hard handoff").

[59] The strategy brief stated that a new Rogers brand would compete head on with the new carriers using a zone-based unlimited talk and text offer. The new brand would offer a low monthly price, unlimited voice and short message service and a pay-in-advance approach.

[60] The brief identified Rogers' objectives as follows:

- Disrupt the new entrants' plan for easy market share steal;
- Take up shelf space, making distribution difficult for the new wireless carriers; and
- Insulate Rogers' existing brands from this competition.

[61] The brief identified the primary target subscribers as follows:

- Heavy users wanting cost-certainty in their monthly cell phone spend;
- Persons for whom their cell phone was an indispensable connection device;
- Users wanting to spend much less on a monthly basis than they are presently spending; and
- Existing wireless users who no longer need a landline.

[62] According to the strategy brief, Rogers' new brand would be different because it would provide low-priced unlimited usage that worked in more places than the new service providers. It was a service that did not drop calls and reliably connected you. The Rogers brand would not disconnect a user when the user moved out of zone (no "hard handoff"). It was worry-free wireless through certainty. It would provide brand-name and reliable devices at good prices, and it would be easy to manage because users could set up automatic payments with no surprises. Finally, there would be no term contract. If a user was not happy he or she could cancel.

[63] The brief noted that this strategy would likely catch the new wireless providers by surprise.

[64] The brief declared that the new brand would position itself as "unlimited wireless that works."

[65] Rogers retained both an advertising agency and a public relations firm to assist with the new brand. The advertising agency produced a November 6, 2009, document entitled "Brand Positioning Recommendations."

[66] The advertising agency suggested that Rogers name the new brand Chatr. The agency also suggested that coverage and reception were key advantages that Rogers had over the new wireless carriers, and that to exploit this advantage the communication strategy in part had to create doubt that the new carriers' service would work. It pointed out that the phrase which defined its approach, namely "unlimited wireless that actually works," suggested that others did not work. The agency suggested that Chatr should position itself on the side of heavy users who wanted cost certainty and suggested that Chatr differentiate itself on the basis that "it actually works."

[67] The agency described the target customers as "mainstreamers". They were persons who needed stability and valued authenticity. It speculated that the competition would be pursuing individualists. Ultimately, the brand positioning was defined as: "for mainstreamers who are heavy mobile phone users, Chatr is the unlimited wireless service that actually works."

[68] The advertising agency speculated that demographically, the market would consist of urbanite adults between the ages of 18 and 54 earning less than $60,000 per year.

[69] Significantly for our purposes, the advertising agency asked the question: "how do we support our claims?"

[70] The advertising agency made more than one presentation in this regard but the essence of its approach remained unchanged.

[71] A public relations firm was retained to disseminate the marketing message. A briefing provided to the public relations firm on February 4, 2010, outlined Rogers' strategy. This briefing added that the new Rogers brand would try to take customers from the new entrants and not from incumbent wireless providers. It would focus most heavily on Wind Mobile, while also considering Public Mobile and Mobilicity.

[72] Rogers decided that customers of the new brand (Chatr) would use the Rogers Network rather than a separate Chatr network. Chatr customers would use both the 850 MHz radio spectrum band and the 1900 MHz spectrum band to provide service. At all times, Chatr customers travelling within Canada would be on the Rogers Network whether or not the customers were within a Chatr zone.

[73] The briefing refers to Videotron on page 12, and records its prospective launch date along with the launch dates of Wind Mobile, Public Mobile and Mobilicity.

[74] I am satisfied that Rogers viewed Videotron as a new carrier. This is quite a separate question from how Videotron was viewed by consumers of wireless services in Québec.

Wind Mobile and Public Mobile enter the market

[75] While Rogers was preparing to compete with the new carriers, Wind Mobile and Public Mobile entered the market, albeit with considerable difficulty.

[76] Wind Mobile launched its services in Toronto and Calgary in December 2009. It launched in Edmonton and Ottawa on February 25 and March 26, 2010, respectively.

[77] Public Mobile launched in Toronto on May 26, 2010, and in Montréal on June 25, 2010.

[78] The evidence offered by the respondents established that Wind Mobile and Public Mobile were criticized in various publications and in the social media after their launch. I will offer four examples from the evidence.

[79] On January 22, 2010, TD Newcrest, a division of TD Securities Inc., published an article entitled: "Wind or just a light breeze?" The authors concluded as follows:

> So our overwhelming conclusion from a month of usage is that [Wind Mobile's] quality and coverage is significantly inferior to that offered by Rogers Wireless…One could argue that [Wind Mobile] will continue to add cell sites and improve its coverage over time, but this is something that customers will have to find out the hard way by enduring dropped calls and dead zones for an unknown period of time.

[80] On March 9, 2010, the Edmonton Journal reported that the Chairman of Wind Mobile acknowledged that Wind was experiencing weaknesses in the Toronto and Calgary networks, and that it was adding cell sites and towers to strengthen coverage.

[81] On July 6, 2010, the Globe and Mail published an article about Public Mobile that stated in part: "Public Mobile has admitted that several key areas in Montréal are without service and the company is refunding phone purchases and offering free service until the problems are resolved." An article to the same effect was published on September 16, 2010, in the Montréal Gazette.

[82] Mr. Brian O'Shaughnessy, the Chief Technology Officer for Public Mobile, testified in these proceedings and confirmed that Public Mobile customers were receiving poor service as late as December 2010, although Mr. O'Shaughnessy indicated that this was true of all networks.

[83] Mobilicity launched in Toronto on May 15, 2010. The respondents did not lead evidence concerning Mobilicity because, apart from complaining to the Competition Bureau, Mobilicity did not assist the Commissioner in these proceedings. Mobilicity declined to provide data derived from the operation of its network to the Commissioner.

[84] The evidence established that the respondents conducted drive tests in Toronto during the relevant period which, among other things, compared the performance of the Rogers and Mobilicity networks. The drive test results demonstrated that the Rogers network had fewer dropped calls than Mobilicity's network. I will elaborate further on the drive testing evidence elsewhere in these reasons.

[85] The inference I draw is that, if Mobilicity had produced the data requested by the applicant, it would have demonstrated that the respondents' network had fewer dropped calls than Mobilicity's network from July 28, 2010, to November 30, 2010. I will not seriously further consider Mobilicity in these reasons.

[86] I am satisfied that the well-publicized difficulties experienced by Wind Mobile and Public Mobile confirmed the respondents' view that their network, during the relevant period, was more reliable and would drop fewer calls than the Wind Mobile or Public Mobile networks.

The hard handoff

[87] As indicated, Rogers planned to compete with the new licensees by taking advantage of the "hard handoff."

[88] At the time of the spectrum auction in July 2008, Industry Canada required Rogers to permit the new licensees to roam on its network. This meant, for example, that Rogers was required to make its network available to a Wind Mobile subscriber who was outside a Wind coverage zone. Specifically, Wind Mobile paid Rogers a negotiated fee in accordance with the Industry Canada Policy Framework; Wind subscribers were permitted to use the Rogers network when outside a Wind Zone, and those subscribers paid Wind Mobile "roaming fees."

[89] A Wind Mobile subscriber who had a call underway within the Wind Zone would experience a dropped call if the subscriber left that zone. In order to complete the call, the Wind subscriber would have to reinitiate the call using the Rogers network.

[90] Mobilicity and Videotron subscribers were in a similar position.

[91] Public Mobile had no roaming agreement at all with Rogers. As a result, Public Mobile subscribers could not use their handsets outside of Public Mobile coverage zones in Toronto and Montréal.

[92] For a Chatr subscriber who had a call underway and who left a Chatr coverage zone, the call continued. It did not drop. The Chatr subscriber was, however, charged a roaming fee by Rogers. This was known as a "seamless handoff."

[93] The "hard handoff" created dropped calls for Wind Mobile, Mobilicity and Videotron subscribers, but not for Chatr customers.

[94] Precisely how the hard handoff affects the calculation of dropped calls is not obvious except to say it would increase dropped calls for Wind Mobile, Mobilicity and Videotron. The evidence established that Wind Mobile, Mobilicity and Videotron subscribers made 2.3 million calls roaming on the Rogers 2G network between August and November 2010. Because the location of the calls is not known, one cannot conclude that all of these calls occurred because customers left the Wind Mobile, Mobilicity or Videotron coverage areas, and therefore experienced a dropped call that they had to reinitiate. However, in some cases that is precisely what happened.

[95] It is also clear that Wind Mobile and Mobilicity complained to the Canadian Radio-television Telecommunications Commission ("CRTC") about the problems created by the dropped calls caused by the hard handoff, demonstrating that these dropped calls had their attention and were important to them.

Wind Mobile, Public Mobile and Mobilicity respond to the Chatr launch

[96] The respondents launched Chatr in Vancouver, Calgary, Edmonton, Toronto and Ottawa on July 28, 2010. The respondents launched Chatr in Montréal on September 16, 2010.

[97] Wind Mobile, Public Mobile and Mobilicity responded to the launch of Chatr by making three complaints to regulatory bodies.

[98] Videotron made no complaints to any regulator.

The abuse of dominance complaint

[99] I elaborate on this complaint because it is contemporaneous with, and provides context for, the Wind Mobile and Public Mobile complaint about false or misleading advertising with which we are concerned.

[100] Shortly after the July 28, 2010, launch of Chatr, Mobilicity made an "abuse of dominance" complaint with the Fair Business Practices Branch of the Competition Bureau. Rogers began responding to this complaint in August 2010.

[101] Mobilicity's complaint was that Rogers was exploiting its market power in the wireless services market to exclude or limit competition in that marketplace. Specifically, the complaint was that Rogers was using Chatr on a temporary basis to substantially lessen or prevent competition from Mobilicity.

[102] Public Mobile, in a September 2, 2010, letter to the Competition Bureau, also complained that Chatr's actions in the marketplace were an abuse of Rogers' dominant market position. Specifically, in an email dated September 24, 2010, Public Mobile complained that it had experienced difficulty in obtaining retail space at major malls because the space had been taken by Rogers and other incumbent carriers. Public

Mobile also complained that it had received "unofficial feedback" from unnamed major electronics retailers that Rogers and the other incumbent carriers had taken steps to prevent its products from being sold in those points of distribution.

The false advertising complaint

[103] On August 24, 2010, counsel for Wind Mobile complained to the Competition Bureau about the fewer dropped calls claim which led to this proceeding.

The hard handoff/undue preference complaint to the CRTC

[104] In October 2010, Wind Mobile and Mobilicity complained to the CRTC about Rogers' failure to permit "seamless handoffs." They argued that dropped calls caused by the lack of seamless handoffs conferred an "undue preference" on Rogers under s. 27(2) of the *Telecommunications Act*, S.C. 1993, c. 38.

[105] Wind Mobile told the CRTC that Chatr's fewer dropped calls claim created the false impression that the networks of the new wireless carriers were less reliable.

[106] Wind Mobile in part asked the CRTC to make an order directing Rogers to provide the same seamless call transition to Wind Mobile subscribers moving out of zone that it provided to Chatr customers. Wind claimed that the current situation was causing ongoing harm to competition in the marketplace and to itself. Wind acknowledged that Industry Canada had declined to make seamless handoffs a requirement when Rogers purchased additional spectrum during the July 2008 auction.

[107] Wind Mobile pointed out that when it began building its network, the only feasible out-of-territory roaming agreement was one with Rogers. Rogers was the only incumbent wireless service provider on whose network Wind subscribers could roam.

[108] Wind Mobile then made submissions concerning whether Rogers had engaged in conduct that was preferential. Wind Mobile complained that Chatr advertised using a tag line of: "fewer dropped calls than new wireless carriers," and in that advertisement relied upon "seamless call transition when moving out of zone." Wind objected to the fact that Rogers, through Chatr, relied upon "fewer dropped calls" as a differentiator while Rogers at the same time dropped its competitors' calls.

[109] Wind Mobile specified the injuries caused by Rogers' conduct as follows:

- Prospective Wind subscribers were offered identical commercial arrangements by Chatr except that Chatr subscribers were offered seamless handoffs while Rogers prevented Wind from making the same offer. As a result, Chatr subscribers were offered the opportunity to avoid the threat of dropped calls;

- Wind subscribers experienced degrading call quality followed by a dropped call as they moved out of a Wind Zone, but were not told why it had occurred. The dropped call was described as an annoyance on social calls, an acute disadvantage on business calls and possibly a matter of life or death on 911 calls; and

- Wind complained that Rogers' conduct put Wind at an undue and unreasonable disadvantage because it undermined potential Wind subscribers' confidence in Wind's ability to provide access to reliable communications.

[110] Pursuant to the CRTC's procedure, Rogers provided an Answer, and Wind Mobile was permitted a Reply.

[111] In its Answer, Rogers referenced that in submissions to the Competition Bureau in this Application, Wind had stated that calls dropped due to hard handoffs were "an extremely low statistical event."

[112] In its Reply, Wind Mobile made the following statement:

> Put simply, every dropped call matters. Prospective subscribers selecting a mobile provider and to whom Rogers Chatr now offers commercial arrangements that are virtually identical to those offered by Wind neither know nor need to know how often they will be affected by the threat of dropped calls. Instead prospective subscribers are offered an opportunity to avoid the problem altogether.

[113] Wind also stated that Rogers' Answer ignored "the reputational effects and basic consumer consequences of each dropped call".

[114] On March 31, 2011, Wind Mobile answered additional questions posed by the CRTC. In that submission, Wind Mobile asserted that by prominently advertising "fewer dropped calls than new wireless carriers," based in part on its seamless network, Rogers created the impression that the new networks were generally less reliable.

[115] On June 3, 2011, the CRTC declined the complaint concerning a preference on the basis that Wind Mobile had not negotiated seamless call transitioning with Rogers. In addition, the CRTC found that there was insufficient evidence to permit a decision mandating seamless roaming.

[116] It is helpful to consider the statements in these complaints. Regardless of their truth, they provide evidence that Wind Mobile and Public Mobile thought dropped calls, including those caused by hard handoffs, were a significant problem. They thought that dropped calls, including those caused by hard handoffs, negatively reflected on the reliability of their networks. Their statements prove to me that the leaders of Wind Mobile and Public Mobile thought that the public was concerned with the risk of dropped calls rather than their comparative frequency.

The nature of and context for the contentious advertisements

[117] A portion of this Application deals with the assertion that the fewer dropped calls claim is both false and misleading. As a result, the nature of the advertisements containing the claim, as well as the context in which the advertisements were relayed, is relevant.

The claims and expenditures of Wind Mobile, Public Mobile and Videotron

[118] Dr. Michael Pearce, called by the respondents as an expert to give opinion evidence concerning marketing to consumers, including consumers in the wireless industry in Canada, collected the advertisements of Chatr, Videotron, Wind Mobile, Public Mobile and Mobilicity during the period with which we are concerned. Copies of those advertisements were received into evidence. I am satisfied that Dr. Pearce collected a representative sample of those ads.

[119] Wind Mobile, Public Mobile and Mobilicity engaged in aggressive price competition with each other and with Chatr. Their ads provided little information concerning roaming costs or dropped calls resulting from a customer leaving their coverage zone.

[120] The evidence disclosed that in 2010, Wind Mobile spent $36.9 million on advertising while offering services in 5 cities. Mobilicity spent $6.1 million while offering services in 4 cities. Public Mobile spent $6.8 million while offering services in 2 cities. The evidence disclosed that in 2010, Chatr spent $7.1 million on advertising; Chatr was offering services in 6 cities.

[121] Videotron took a different approach. Videotron concentrated on bundling its wireless services with existing Internet, telephone and cable services. Mr. Aleks Krstajic, the President and Chief Executive Officer of Public Mobile during the relevant time period, testified that Videotron was trying to attract a different demographic than Public Mobile. He testified that Videotron was competing for a higher end customer than his company. His evidence in this regard was not contentious and I accept it.

[122] The evidence disclosed that in 2010, Videotron spent $5.3 million on advertising in the Province of Québec; Videotron offered wireless services, according to Tab 14 of Exhibit 37A, in three Québec cities.

Characterizing the consumer

[123] The applicant contends that the general impression conveyed by the advertisements in question is to be assessed from the perspective of a credulous and inexperienced consumer. The applicant describes this perspective as the average consumer who is "credulous and inexperienced and takes no more than the ordinary

care to observe that which is staring him or her in the face upon first entering into contact with an entire advertisement." The applicant cites *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at paras. 65-68, 71, as authority for its position.

[124] The *Richard v. Time Inc.* decision involved a representation by means of a direct mail campaign to the public at large, and not to a targeted group of consumers. Mr. Richard was convinced that he had been awarded a cash prize of $833,000, and that all he had to do was return a reply coupon to claim his prize. Time Inc. refused to pay. Mr. Richard commenced proceedings in the Québec Superior Court, alleging prohibited business practices contrary to Québec's *Consumer Protection Act*, R.S.Q. c. P-40.1. It is in this context that the Supreme Court of Canada determined that the average consumer contemplated by Québec's *Consumer Protection Act* was credulous and inexperienced.

[125] The respondents contend that in determining the general impression conveyed by the contentious advertisements, the court should consider the advertisements from the perspective of the average consumer to whom the statements were targeted.

[126] There is a difference between the purpose of Québec's *Consumer Protection Act* and the purpose of the *Competition Act*. The Québec legislation is intended to protect vulnerable persons from the dangers of certain advertising techniques: see *Richard v. Time Inc.*, at para. 72. The *Competition Act* is intended to maintain and encourage competition in Canada in order to "provide consumers with competitive prices and product choices": see s. 1.1 of the *Competition Act*.

[127] The difference in purpose between Québec's *Consumer Protection Act* and the *Competition Act* is a relevant consideration in determining the proper consumer perspective to be applied to the contentious representations.

[128] *Richard v. Time Inc.* defines the person considering the advertisement in three ways: credulous, inexperienced and a consumer. I take this as a starting point for determining the proper consumer perspective for the purposes of this Application.

[129] The consumer in *Richard v. Time Inc.* was less of a consideration because that case involved a representation made to the public at large. In this Application, a consideration of the mass media advertising leads to the conclusion that the consumer is a person wanting unlimited talking and texting wireless services, as well as cost certainty.

[130] Accepting that the consumer is credulous in the context of this Application means that the consumer is willing to believe the fewer dropped calls claim because it is contained in public representations to that effect.

[131] The requirement that the consumer be inexperienced is more difficult to apply. The consumer by definition resides in a segment of the wireless services market that wants unlimited talking and texting wireless services. Such a consumer cannot be

viewed as inexperienced with wireless talking and texting, otherwise the consumer would not reside in a segment of the wireless services market. For example, the consumer might know that he or she wants certainty in their wireless monthly bill due to a previous bad experience with unexpected cell phone fees. In addition, the consumer knows that he or she wants talking and texting wireless services and that he or she wants those services in an unlimited way. Accordingly, I am satisfied that the lack of experience relates to the technical information contained in the advertisements. For example, the advertisements claim that Chatr will drop fewer calls because of its cell site density. It is this aspect of the claim with which the consumer lacks experience.

[132] I am satisfied therefore that the consumer perspective in this case is that of a credulous and technically inexperienced consumer of wireless services.

The literal meaning of the contentious ads

[133] Section 74.03(5) of the *Competition Act* provides that in proceedings under s. 74.01, the literal meaning and the general impression conveyed by a representation must be taken into account in determining whether or not the person making the representation engaged in reviewable conduct.

[134] A literal read of the fewer dropped calls ads conveys the following to a prospective credulous and technically inexperienced consumer exposed to the claim:

- You will have no worries when talking on your cell phone (parle relax);
- You will have worry-free unlimited talk (appels illimités sans souci)(parle au max, parle relax);
- You will have fewer dropped calls than customers of the new wireless carriers (moins d'appels interrompus qu'avec les nouveaux opérateurs sans-fil);
- Your zone plan will be unlimited;
- You will pay a flat fee;
- You will not be asked to sign a term contract;
- You will have great coverage in and out of your zone;
- When you leave your zone, you get unlimited usage in any other Chatr zone;
- You can keep talking and texting as if you never left your zone;
- You will have great reception indoors and underground;

- You will be on a reliable network; and
- You will have a quality phone.

The visual images and sounds in the ads

[135] The visual images that accompany the wording are more general. They convey the sense that the person who is not a Chatr customer is having difficulty with his or her phone, which is obviously not working properly. This person has a cloud or fuzzy speech bubble over his or her head.

[136] The visual portion of the advertisements leaves open the possibility that the non-Chatr customer cannot place a call. The non-Chatr customer is pictured having difficulty in an open area, where there is no obvious obstruction to the wireless communication.

[137] The Chatr customer pictured in the ads is smiling, talking on his or her cell phone and unconcerned about communicating wirelessly. This person has a Chatr balloon over his or her head.

[138] The picture of the smiling unconcerned Chatr customer is usually the picture of someone talking on their cell phone in a covered space, a subway or underground where one might expect reception to be difficult.

[139] The radio ads are accompanied by the Bobby McFerrin song "Don't Worry, Be Happy."

[140] Despite the ambiguity in the visuals, I am satisfied that the visuals, in addition to the English or French words, create the general impression that the representation is in reference to dropped calls only.

[141] I am not satisfied that the "Don't Worry, Be Happy" song, when coupled with the words in the radio ads, broaden the literal reference to dropped calls to give the general impression that the Chatr subscriber will not only have no worries about dropped calls, but also no worries about accessing the Chatr network.

[142] However, I am also satisfied that the constant references to "worry free unlimited talk" and "no worries talk happy" (parle au max parle relax) (appels illimités sans souci) in the contentious ads give the general impression that the Chatr network is more reliable than the networks of the new wireless carriers.

[143] Professor Moorthy, who was called by the respondents and qualified as an expert to give opinion evidence in the areas of marketing and economics, testified that in his opinion, dropped calls were a proxy for the performance of the network. Professor

Moorthy, like the other expert witnesses, was well qualified. Where I have not accepted his evidence, it is because I have disagreed with his conclusion for reasons other than his credibility or reliability.

[144] Wind Mobile, in its hard handoff/undue preference complaint submissions to the CRTC, stated that Rogers undermined confidence in Wind's ability to provide access to reliable communications.

What is the relevant time period for the contentious ads?

[145] The relevant time period is not entirely straightforward. Although Chatr launched on July 28, 2010, its national advertising campaign did not begin until August 9, 2010.

[146] On July 28, Rogers began making the fewer dropped calls representation on its website, on social media, through public relations channels and on product packaging.

[147] Chatr commenced operations on July 28, 2010, in Toronto, Ottawa, Edmonton, Calgary and Vancouver. This meant that Chatr phones were available for purchase at Chatr retail kiosks, as well as through third-party retailers and distributors in each of these places on that date. In addition, the Chatr Wireless Call Centre was open and the Chatr website was operational on July 28, 2010.

[148] The "fewer dropped calls" representation was made between July 28, 2010, and November 30, 2010. The "no worries about dropped calls" representation was made in November 2010. I am satisfied that these two advertising campaigns had one central theme during the period of July 28, 2010 to November 30, 2010. This theme was that the Chatr network dropped fewer calls than the networks of the new wireless carriers, and was therefore a more reliable network.

[149] I am satisfied that, with the exception of Montréal, in order for the fewer dropped calls representation not to be false or misleading, the Rogers network would have to have had fewer dropped calls than the Wind Mobile and Public Mobile networks during the period of July 28, 2010, to November 30, 2010.

[150] Chatr launched in Montréal on September 16, 2010. Accordingly I am satisfied that in order for the fewer dropped calls representation not to be false or misleading, the Rogers network would have to have had fewer dropped calls than the Public Mobile network in Montréal during the period of September 16, 2010, to November 30, 2010.

[151] For the sake of completeness, while the "no worries network" (December 2010) representation did follow a continuous national media campaign about dropped calls that began in August 2010, and while there is a similarity in visual presentation, I am

satisfied that this version of the advertising was not comparative and did not literally or by general impression continue to convey the fewer dropped calls claim.

The general impression of the contentious ads

[152] As indicated elsewhere, Dr. Michael Pearce was called as an expert by the respondents. I will not review in detail Dr. Pearce's lengthy and impressive resume. I will simply point out that Dr. Pearce has a doctorate from the Harvard Business School in marketing. He has been a faculty member at the Ivey Business School for almost 40 years. He has consulted in consumer marketing in Canada, the United States, Europe, Asia and the Middle East.

[153] There were issues raised about the admissibility of Dr. Pearce's evidence; there was no attack upon his credibility. Dr. Pearce was an impressive and reliable witness. I have relied on portions of Dr. Pearce's evidence for the purposes of deciding this Application, and I will describe those portions in these reasons.

[154] Dr. Pearce testified that he was provided with copies of marketing communications for Chatr and the new wireless carriers, including Videotron, for the period with which we are concerned. Dr. Pearce included 153 pages of Chatr advertising as an Appendix to his report. I am satisfied that this appendix (Appendix 7) is representative of the marketing communications that the applicant characterizes as false or misleading.

[155] The evidence disclosed that in 2010, Chatr spent $7.1 million on advertising. During this period, Chatr was offering services in six cities: Vancouver, Calgary, Edmonton, Toronto, Ottawa and Montréal.

[156] Chatr's media communications programme consisted of: newspaper banner ads, newspaper display ads, third-party retailer ads, merchandising material, packaging, online ads, television ads, radio ads, outdoor ads and transit ads.

[157] During the relevant period, Chatr's ads were part of a national advertising campaign. There were no Chatr zones in Eastern Canada.

[158] Chatr used national media and national retailers to publicize itself.

[159] Dr. Pearce testified that during the relevant period, the Chatr communication programme comprised of the following three advertising campaigns: August 2010 to November 2010 ("fewer dropped calls"); November 2010 to December 2010 ("no worries about dropped calls"); and December 2010 ("no worries network").

[160] Chatr began to transition to its second campaign in the week of October 11, 2010. This transition was mostly completed by mid-November. The second campaign

put forward a broader proposition, namely "no worries about dropped calls." A Chatr balloon that had been pictured in the first campaign continued to be prominently pictured in the second campaign print ads.

[161] I am satisfied that the second campaign drew less of a comparison to the new wireless carriers. This can be seen from a comparison of the explanations for the claims that appeared in the ads. For example the first ad campaign contained this explanatory note: "Seamless Canadian network-no need to switch on to other networks when zipping in and out of your Chatr Zone, which means fewer dropped calls." The second campaign version of this explanatory note provided as follows: "[T]he Chatr no worries network has got you covered in over 94% of the Canadian population, whether you're in or out of a Chatr zone."

[162] After the commencement of this Application on November 19, 2010, Chatr began moving to the "no worries network" tagline. These ads were again less comparative than the ones they were replacing. For example, as indicated, the second ad campaign contained the note: "the Chatr no worries network has got you covered in over 94% of the Canadian population, whether you're in or out of a Chatr zone." The third ad campaign version of this explanatory note provided: "Coast-to-coast footprint that covers over 94% of the Canadian population." Finally, the third campaign version of the ads focused more on price, although Chatr did not claim to offer the lowest price for its wireless services. The central messages and taglines were: "No worries. Talk happy or Worry-free unlimited talk."

[163] All three versions of these ads were part of an extensive media campaign suggesting that a Chatr customer would have "fewer dropped calls", "no worries about dropped calls (oublie les appels interrompus)" and finally a "no worries network." While the "no worries network" representation followed a continuous national media campaign about dropped calls that began in August 2010, and while there is a similarity in visual presentation, I am satisfied that that version of the advertising was not comparative and did not literally or by impression continue to convey the fewer dropped calls claim.

[164] I am satisfied that the credulous and technically inexperienced consumer would have had the general impression from all of the "fewer dropped calls" and "no worries about dropped calls" versions of the ad campaigns that there were no worries about dropped calls on the Chatr network because there were fewer dropped calls on that network.

[165] I am satisfied that a credulous and technically inexperienced consumer would not have had the general impression from the "no worries network" campaign that a comparative dropped call claim was being made.

[166] I am satisfied that the credulous and technically inexperienced consumer would also have the general impression that the Chatr network was more reliable.

Must the fewer dropped call claim be true in each city?

[167] The applicant submits that the contentious ads are false unless the evidence proves that the fewer dropped calls claim is true in each of Vancouver, Calgary, Edmonton, Toronto, Ottawa and Montréal.

[168] The respondents take the position that consumers would have expected the fewer dropped calls claim to be true on average across all cities where Chatr operated.

[169] There were no Chatr zones in Eastern Canada during the relevant period, and so Chatr was not nationally available.

[170] There was no statement in the ads that suggested that the claim was based on a national average or national calculation.

[171] The $35 per month Chatr plan provided unlimited outgoing calls to anywhere in the province. I take this to mean the province where the Chatr customer is located. It was only the more expensive Chatr plan that offered unlimited outgoing calls to anywhere in Canada from a Chatr zone.

[172] It was suggested during the course of closing argument that Mr. G. McPhail, the Vice President and Associate General Counsel of Rogers at the relevant time, on behalf of Rogers, admitted in a letter dated October 8, 2010, that Rogers had to demonstrate dropped call superiority both at a national level and in each urban area in which the new entrants had launched. I do not read Mr. McPhail's letter as such an admission. Rather, I interpret his reference to "each urban area in which the new entrants have launched service" as a response to what he termed a specific concern of the Competition Bureau that "in some cities where Chatr and the new wireless carriers operate, the representations… are false."

[173] As indicated elsewhere, Dr. Michael Pearce, an expert witness called by the respondents, collected as many of the Chatr advertisements as possible for the period of July 28, 2010, to December 30, 2010. Copies of these advertisements were filed as an Appendix to a Slide Brief summarizing his expert report. There was no suggestion that Dr. Pearce's collection was deficient. I am satisfied that Dr. Pearce collected a representative and complete sampling of the contentious advertising claims.

[174] A perusal of Dr. Pearce's sampling is extremely helpful on this issue.

[175] When I consider the evidence, including the evidence to which I referred, I am satisfied that the fewer dropped calls claim represents to a credulous and technically inexperienced consumer that use of a Chatr phone within any Chatr zone will result in

fewer dropped calls than would be true for a Wind Mobile, Public Mobile or Mobilicity customer.

[176] Accordingly, I am satisfied that, in order for the fewer dropped calls claim to be neither false nor misleading, the Rogers network should have offered fewer dropped calls than Wind Mobile or Public Mobile in each of Montréal, Toronto, Ottawa, Edmonton, Calgary and Vancouver during the relevant time period.

[177] I have not mentioned Mobilicity because I have drawn an adverse inference concerning Mobilicity's dropped call rate due to its failure to produce information required by the applicant in this proceeding.

Is Videotron captured by the reference to "new wireless carriers"?

[178] There is an issue concerning whether a credulous and technically inexperienced consumer of wireless services in Québec who saw, heard or read the Chatr advertisements between September 24, 2010, and November 30, 2010, would have considered Videotron a new wireless carrier.

[179] At the relevant time Videotron was a wholly-owned subsidiary of Québecor Media Inc. It was also an integrated communications company engaged in cable television, interactive multimedia, Internet access, cable telephone and wireless telephone services.

[180] According to the evidence, Videotron started in Québec in 1964 as a cable television network with 66 subscribers. At the time of the events that concern us, Videotron had 1.8 million cable television subscribers, 1.2 million high-speed Internet subscribers, 1 million landline telephone subscribers and more than 80,000 wireless customers.

[181] The Videotron footprint of its services in Montréal was larger than the Rogers footprint. Unlike the other new wireless service networks, Videotron had a large footprint in Québec that was not limited to metropolitan areas.

[182] Videotron announced for the first time in a press release dated September 20, 2005, that it was providing wireless services in Québec. The press release stated in part that "Videotron plans to launch its mobile wireless offering in the first half of 2006". Videotron also stated in the release that it was offering "one stop shopping: one customer service number."

[183] From 2006 onward Videotron operated wireless services under its own brand name in the province of Québec. Prior to the Advanced Wireless Spectrum auction in July 2008, Videotron provided wireless services as a mobile virtual network operator, utilizing wireless voice and data services provided by Rogers. Videotron, under its own

brand name, was responsible for acquiring and billing customers, as well as providing technical support.

[184] Videotron was precluded by its agreement with Rogers from associating itself with Rogers in any way.

[185] Prior to acquiring its own spectrum, Videotron could not offer unlimited talking and texting because Rogers would not offer a low enough wholesale price per minute.

[186] Aleks Krstajic, the President and Chief Executive Officer of Public Mobile at the time he gave evidence, described Videotron as a "very powerful presence in the Québec market". This evidence was not contentious and I accept it.

[187] After acquiring spectrum in July 2008, Videotron marketed its wireless services by bringing all of its services, namely its cable television, Internet and wireless services, under one umbrella. It marketed one bundled set of services exclusively in Québec using the media tagline "The Infinite Power."

[188] In January 2010, Videotron announced in a press release that it would be soon rolling out its own Advanced Wireless Services network.

[189] Videotron offered competitive bundling arrangements and postpaid zone-based unlimited talking and texting.

[190] Public Mobile, Wind Mobile, Chatr and Mobilicity offered prepaid zone-based unlimited talking and texting.

[191] Mr. Garrick Tiplady, Senior Vice President of Chatr at the relevant time, testified that the prepaid segment of the wireless services market was markedly different than the postpaid segment. His evidence in this regard was not contentious and I accept it.

[192] Reference was made to the fact that Industry Canada referred to Videotron as a "new entrant" during the July 2008 auction. I do not view this as helpful when considering whether a credulous and technically inexperienced wireless services consumer in Québec, between September and November 2010, would have considered Videotron a new wireless carrier. Apart from the fact that the perspectives of a consumer and Industry Canada would be different, the Industry Canada definition of a new entrant included entities that held less than 10 per cent of the national wireless market based on revenue. This suggests that existing carriers could be new entrants for purposes of the Industry Canada July 2008 auction.

[193] The applicant also suggested that Videotron was defined as a new wireless carrier by the respondents in two affidavits that they filed in this Application. These references are not helpful. It is true that Mr. Berner and Mr. Garrick Tiplady, both

Rogers employees, referred to Videotron as a new carrier in their affidavits. Rogers may have considered Videotron a new carrier but the issue for me is whether a credulous and technically inexperienced wireless services consumer in Québec, between September and November 2010, would have considered Videotron a new wireless carrier. Mr. Berner and Mr. Garrick Tiplady hardly match the credulous and technically inexperienced description of the consumer with whom I am concerned.

[194] The applicant pointed out that in Montréal, Chatr was competing with Public Mobile and Videotron, and that the ads in French make the statement "moins d'appels interrompus qu'avec les nouveaux opérateurs sans-fil." The reference to operators in the plural at a time when the only competing operators were Public Mobile and Videotron, according to the applicant, is some evidence that a consumer in Québec would think that the ads referred to Videotron.

[195] It is true that Chatr was created to compete directly with Mobilicity, Wind Mobile, Public Mobile and Videotron. Mr. Garrick Tiplady testified that Chatr delayed its launch in Montréal to see if Videotron was going to go to market with a prepaid wireless services plan. Mr. Garrick Tiplady testified that Rogers wanted to make sure that Chatr was as competitive as possible with Videotron if Videotron made a prepaid wireless plan available.

[196] Videotron launched its network on September 9, 2010. The respondents launched Chatr service in Montréal on September 16, 2010. The respondents maintained that their advertising campaign did not begin until September 24, 2010. However, a press release dated September 8, 2010, was introduced and appended to the affidavit of Mr. McAlpine.

[197] When Videotron launched its network on September 9, its strategic relationship with Rogers ended. Videotron was no longer a mobile virtual network operator. Videotron's customers moved to the new Videotron network.

[198] The new Videotron network offered similar plans to those it had been operating as a mobile virtual network operator. Videotron did not, however, offer a prepaid plan when it launched. This created a situation in which Chatr had a prepaid offering and Videotron did not, while Videotron had a postpaid offering and Chatr did not. It is for this reason that I accept Mr. Garrick Tiplady's evidence that Rogers and Videotron were not competitors in the prepaid market. An October 22, 2008, press release issued by Québecor Media and Videotron is consistent with Mr. Tiplady's evidence. In that press release, Québecor Media and Videotron announced a $1 billion investment "to roll out their own advanced wireless network." They announced their intention to bring an unprecedented offering of advanced wireless telecommunications to consumers and small businesses. They announced that the project would create an additional 1000 jobs at Videotron. Québecor Media and Videotron announced that the creativity of the

members of the Québecor Media family would be their chief asset in facing the challenges of creating a new business model for Québecor Media and its subsidiaries.

[199] The October 22 press release contained a quote from the president and CEO of Videotron as follows: "True to its track record of bringing its customers the best in technology and entertainment, Videotron intends to launch an unprecedented offering of advanced wireless telecommunication services on the Québec market."

[200] The October 22 press release provided that 100 experts would be added to Videotron's engineering department staff of 800 engineers.

[201] The press release provided background about Québecor Media and Videotron. Québecor Media was described in part as a communications company with operations in North America, Europe and Asia. Videotron was described as a wholly-owned subsidiary engaged in cable television, interactive media development, Internet access services, cable and wireless telephone services. Videotron described itself as a leader in new technologies. Finally, the press release described Videotron as a leader in high-speed Internet access with over one million customers.

[202] This press release is quite dissimilar from the Chatr concept.

[203] There is a reference to Videotron being "new" in the October 22 press release. Specifically, Videotron claimed that, because it was a new entrant in the industry, its network would be designed using the latest technology.

[204] Public Mobile, on the other hand, was a new wireless carrier in the sense that it had no history of carrying on business in the Province of Québec. Further, by the time Videotron and Chatr launched in Québec in September 2010, Public Mobile had already launched there.

[205] I make two final observations. First, Videotron launched in Québec under its own name. It maintained a consistent brand image as demonstrated by the Videotron ads that were admitted into evidence. Second, from 2005 and onward, Videotron existed side-by-side with Rogers in the Province of Québec and had 80,000 wireless customers in its own name.

[206] After considering the evidence, including the evidence to which I have referred, I am satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would view Québecor Media and Videotron as companies in Québec with a proven track record who were rolling out their own advanced wireless network. I am satisfied that such a consumer in Québec would have considered Videotron an established presence in Québec, and a known service provider. In short, I am satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would not view Videotron as captured in the Chatr ads by references such as "les nouveaux opérateurs sans-fil."

Conclusions concerning the nature of and context for the contentious advertisements

[207] When I consider the evidence, including the evidence to which I have referred, I am satisfied that the fewer dropped calls and more reliable network general impressions represented to the credulous and technically inexperienced consumer of wireless services that these advantages were available to consumers in each Chatr zone (appels illimités sans souci dans ta zone chatr) (emphasis added).

[208] I am satisfied that the literal meaning of the contentious claims is consistent with this general impression.

[209] I am satisfied that the combined effect of the literal meaning of the contentious ads and their general impression is that the Chatr advantages of fewer dropped calls and network reliability represented in the ads were available to Chatr customers in each Chatr zone.

[210] Finally I am also satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would not view Videotron as captured by the references in the contentious ads to new wireless carriers (les nouveaux opérateurs sans-fil).

The use of switch generated data

[211] An issue arose during the proceedings concerning the use of "switch generated" data. The term switch comes from the fact that initial hardline telephone communication systems required a mechanical switch to connect the caller to the person called.

[212] At the time with which we are concerned, the switching function was performed by multitasking computers. These computers form the highly complex brain of a wireless network. The dialogue between network components is controlled, monitored and recorded by these multitasking computers.

[213] The development and manufacture of switches can occupy the time of thousands of engineers and software developers for a number of years. These multitasking computers operate 24 hours a day, 7 days a week and 365 days a year, and must perform reliably at all times.

[214] Mr. Harri Pietila, called as a witness by the respondents, was qualified to express opinions on the design and use of wireless network switches, switch generated data and the appropriateness of using switch generated data to compare the performance of wireless networks. Mr. Pietila characterized these multitasking computers as one of the most complicated software-controlled computer systems in the world.

[215] Mr. Pietila testified that the mobile switching centers used in the LM Ericsson wireless system utilized a software control logic that had been developed by thousands

of engineers over a period of more than 20 years. He testified that the system was still under development.

[216] Competing manufacturers of these multitasking computers do not share their hardware and software.

[217] Each switch collects data. This data describes and logs the operation of the switch. Switch generated data helps the network operator understand what happened on the network on a day-to-day basis. It can help the network operator understand what happened to a customer who experienced a particular issue during a call.

[218] A multitasking computer has thousands of software blocks, which are pieces of software that perform a dedicated task. The software blocks contain counters that track what happens during each call connected by the switch. The software endeavors to capture these "events" into a centralized database. A combination of events is used to calculate key performance indicators, such as the rate at which the network drops calls.

[219] Switch generated data is analyzed by performance management tools that constitute a computer system outside the switch. These computers collect raw data and produce reports. The nature of the reports produced is defined by the operator.

[220] Generally speaking, this switch generated data is used by network operators to modify and improve their network.

[221] Switch generated data is also proprietary. Competing operators do not share their switch generated data. In part, this is because doing so would disclose the improvements in their network.

[222] The applicant submits that regulators in different parts of the world rely on switch generated data. Specifically, the applicant referred to the Australian regulator and to OFCOM, the British telecommunications regulator.

[223] The applicant submitted that there are standards that define how dropped calls should be calculated on a wireless carrier's network. The 3rd Generation Partnership Project ("3GPP"), is an international standards body. It governs GSM and WCDMA technologies. It provides a high level definition for dropped call rates.

[224] Dr. Robert Ziegler, a witness called by the respondents, was qualified as an expert to give opinion evidence concerning the configuration and performance of wireless networks, and the measurement and evaluation of the performance of those networks. Dr. Ziegler testified that while the 3GPP dropped call definition was at a "very high level", there were no established standards for implementing the definition at the operational level.

[225] Rogers, Wind Mobile and Videotron complied with 3GPP at this "high level." Public Mobile had a different methodology, and was not a part of 3GPP.

[226] The applicant produced evidence that established that Ericsson publishes comparisons of different carriers using Ericsson switches. It provides each of those customers/carriers with that anonymized information so that the customers can see how they rank on a variety of metrics, including dropped call rates. The applicant submits that this means that Ericsson believes that the comparisons are meaningful, and points out that the respondents relied on one such report in a submission to the Competition Bureau.

[227] The applicant's position is that switch generated network data is helpful because it contains data about every call on the network. It is the applicant's position that network data can be used by the court to assess whether representations are false or misleading.

[228] The applicant takes the position that switch generated data, provided to the Competition Bureau by Wind Mobile, Public Mobile and the respondents, demonstrate that the fewer dropped calls claim is false with respect to Videotron and Wind Mobile in Montréal and Ottawa respectively. As indicated elsewhere, I am not satisfied Videotron would be viewed as a new wireless carrier in Québec. As a result, I will not comment further on Videotron.

[229] The applicant takes the position that the switch generated data demonstrates that the representations are misleading with respect to Wind Mobile in Toronto and Edmonton because the differences in drop call rates in those two locations are insignificant.

[230] It is the applicant's position that the dropped call statistics produced using switch generated data constitute real evidence of the dropped call rates of each network. Accordingly, it is the applicant's position that network generated data is admissible evidence capable of being used to prove and compare the dropped call rates of Chatr, Wind Mobile and Public Mobile during the relevant period.

[231] It is the applicant's position that the court can determine from the evidence whether the different networks have counted the same events.

[232] The applicant relied upon the fact that Wind Mobile compares dropped call rates on its own network, despite the fact that different portions of the network use switches manufactured by different manufacturers.

[233] The applicant called Dr. Raymond Nettleton. He was qualified as an expert witness entitled to give opinion evidence on electrical engineering and wireless telecommunications, including the collection and analysis of network key performance

indicator data, drive test results and the adequacy of drive tests undertaken by the respondents.

[234] Dr. Nettleton testified that the Rogers and Wind Mobile formulae for measuring dropped calls reflect the same data. Dr. Nettleton pointed out that the switch data provided by the carriers contained details of more than 3 billion calls, including over 23 million dropped calls. It was his view that this volume overrode minor differences that might introduce errors into switch-based data comparisons between carriers.

[235] Dr. Nettleton offered the opinion that differences in counting formulae used by different equipment vendors would be inconsequential. In his opinion, switch generated data was comparable across carriers.

[236] It was also Dr. Nettleton's view that even if a small amount of network generated data was lost, for example, due to network upgrades, the omission would not impact dropped call rates.

[237] The respondent's position is that switch generated data is not a fair or reliable basis for comparing the dropped call rate performance of one network with another. This view was supported by the evidence of Mr. Berner, the Chief Technology Officer for Rogers, Dr. Ziegler, Harri Pietila and Michael Tiplady. Mr. Michael Tiplady was qualified as an expert to give opinion evidence concerning the measurement and evaluation of the performance of wireless networks. He is no relation to Garrick Tiplady, Senior Vice President of Chatr at the relevant time, who also testified in this proceeding.

[238] I found Mr. Pietila's evidence quite helpful on this question. Mr. Pietila has a Master of Science degree in electrical engineering from the Technical University of Helsinki. Mr. Pietila was a switch engineer with Ericsson until he retired in 2010. During his 25 years with Ericsson, Mr. Pietila specialized in wireless switching-related products and solutions. He was responsible for Ericsson's GSM switching systems, including all research and development activities at one point in his career.

[239] Mr. Pietila's evidence that he was heavily involved in research and development activities for Ericsson switches was not contentious. I accept not only this aspect of his evidence, but I accept his evidence entirely. Of all the expert witnesses, Mr. Pietila had the most practical work experience with multitasking computers or switches. He designed software for GSM switches. He was responsible for the deployment and support of Ericsson cellular switching technology in northern Europe. He has Canadian work experience. He was the head of research and development at Ericsson's Research and Development Centre in Montréal; this facility employed approximately 2000 researchers when he was there.

[240] Mr. Pietila explained that there are several different suppliers of switches or multitasking computers. These different suppliers compete with each other. Each supplier develops, separately and independently, their own multitasking computers as well as the software that operates them.

[241] Mr. Pietila explained that the data recorded by switches is always used as a diagnostic tool within a single network. It assists the network operator in understanding how the network is performing, and what changes should be made to improve its performance.

[242] Mr. Pietila testified that different wireless networks use different technology, software and multitasking computers. He testified that there are no standards governing the design and manufacture of switches. Switches developed by different vendors are not the same. In his experience, every wireless network is configured differently, and each operator has the ability to adjust the results in numerous ways. It was Mr. Pietila's view that there is no way to assess the impact of any one factor on the results generated by each switch. Mr. Pietila testified that comparing switch generated data derived from different switches supplied by different manufacturers is exceedingly difficult. He testified that comparing the performance of one Ericsson-supplied wireless network to another Ericsson-supplied network is exceedingly difficult using switch generated data.

[243] Mr. Pietila testified that there are at least two parties who have an interest in manipulating switch generated data: the vendor of the switch and the network operator's personnel. Mr. Pietila indicated that there are financial and reputational incentives tied to switch generated network performance results.

[244] Mr. Pietila examined the switch data that was made available in this case. He reached the conclusion that it could not be used to perform a fair or reliable comparison between the performance of the wireless networks of Rogers, Wind Mobile and Public Mobile. Mr. Pietila noted that Rogers uses Ericsson switches, while Public Mobile and Wind Mobile do not. Mr. Pietila was concerned that the underlying data for each counter used to calculate the daily drop call rates provided to the Competition Bureau was not available. The underlying data was not available because it had been destroyed by Wind Mobile and Public Mobile after these proceedings were commenced as part of their routine destruction of such data.

[245] Mr. Pietila's concern about using switch generated data to compare networks was confirmed in this case. Public Mobile excludes seven counters from its dropped call formula. One of those counters captures "customer forced terminations." Rogers does not exclude "customer forced terminations" from its dropped call formula; Rogers counts such terminations as dropped calls. On the Public Mobile network, during the relevant time period, a customer forced termination occurred when the network lost contact with a handset during a call, the channel remained open and a new call was established on the network by that same handset within 18 seconds. Customer forced

terminations accounted for 35 to 38 per cent of the total monthly abnormal termination events captured on the Public Mobile network during the relevant time period.

[246] Public Mobile did not disclose these exclusions, including the very significant exclusion of customer forced terminations, to the Competition Bureau when Public Mobile provided its dropped call rates in 2010. These exclusions were not disclosed in the affidavits sworn by Public Mobile's representative in these proceedings. These terminations would have to be added to Public Mobile's dropped call rate calculation to fairly compare Rogers' and Public Mobile's dropped call rates. Adding customer forced terminations to Public Mobile's dropped call rate increases that rate significantly.

[247] It was not contentious that the software used to operate these multitasking computers is regularly upgraded. This means that two wireless networks using multitasking computers manufactured by the same source may be using different software versions to operate. For example, Wind Mobile's network in Eastern Canada, and Videotron's network in Montréal, both use Nokia switches. However, they use different versions of the operating software. The dropped call formulae are different. The more recent version of the Nokia software takes an event that was previously counted by one counter and splits that event into three different sub-events. These sub-events are counted by three different counters. Dr. Ziegler testified that he was unable to determine how this change affected a comparison of their dropped call rate calculations.

[248] Dr. Ziegler testified that had he been asked to verify the comparability of switch generated data in making key performance indicator comparisons, he would have declined because it was at odds with his professional experience. I accept Dr. Ziegler's evidence in this regard. Dr. Ziegler testified that this was the only time he had testified as an expert. Dr. Ziegler testified that Applied Communication Sciences, his employer, rarely provides opinion evidence in proceedings by deliberate choice.

[249] The European Telecommunications Standards Institute published a paper in April 2005 that dealt in part with two approaches to quality of service issues in the area of mobile communications. The two approaches were drive tests and measurements based on switch generated data.

[250] The paper set out the advantages of switch generated data as follows:

- It includes the effects of all calls and therefore provides better comparability of congestion and network failures;

- It takes into account changes in terminals and the actual performance achieved by real terminals used by real users; and

- Quality indicators are produced from the same database for the whole network as well as for different regions and periods.

[251] The paper set out disadvantages of switch generated data as follows:

- Call attempts made out of coverage are not taken into account because the network does not get that information; and

- Measurements based on network counters depend on software algorithms in the switches and base station controllers that implement the counters. The algorithms of different manufacturers may differ, and there may be differences in the algorithms in different versions of the same software.

[252] It is the latter disadvantage that is concerning. There is no evidence that persuades me that the software algorithms in the Rogers, Wind Mobile and Public Mobile switches are the same, or that explains the differences if there are any.

[253] I have not referred to Videotron in this portion of the reasons because, as indicated elsewhere, I am not satisfied that a credulous and technically inexperienced consumer of wireless services in Québec would have viewed Videotron as a new wireless carrier.

[254] I also considered whether Rogers' switch generated data could be used to confirm or deny Rogers' drive test results for the Rogers network. Drive testing is discussed elsewhere in these reasons. Suffice it to say here that drive testing is a standardized and highly utilized method of comparing the performance of different wireless networks. Drive testing was undertaken at times between July 28, 2010, and November 30, 2010, and the results were introduced into evidence.

[255] Dr. Dippon was a witness called by the applicant. Dr. Dippon was qualified to give expert opinion evidence on the wireless telecommunications industry. He provided a statistical analysis of drive test results in Table 9 of his report. The analysis compared Rogers' drive test data of dropped call rates for Chatr, Wind Mobile and Public Mobile. It also addressed network dropped call rates produced by network generated data from the Rogers, Wind Mobile and Public Mobile networks.

[256] Dr. Dippon's Table 9 suggests that Rogers' drive test generated dropped call rates were lower than Rogers' switch generated dropped call rates in Calgary, Edmonton, Montréal, Ottawa and portions of Vancouver. Table 9 suggests that Rogers' drive test generated dropped call rates for portions of Vancouver were higher than Rogers' switch generated dropped call rates for those same areas of Vancouver.

[257] I am unable to conclude that there is any consistent correlation between Rogers' drive test generated dropped call rates and Rogers' switch generated dropped call rates.

[258] I disagree with Dr. Dippon's conclusion that the deviations between drive test generated dropped call rates and switch data generated dropped call rates mean that the

drive test data is unreliable. I prefer the conclusion that the deviations, which occur in both directions, make it impossible to safely use Rogers' switch generated dropped call results to confirm or deny Rogers' drive test generated drop call results.

Conclusions concerning the switch generated data

[259] I agree that switch generated data is admissible in this proceeding. However, I am satisfied, based on the evidence, that it is dangerous to place significant weight on a comparison of the Wind Mobile, Public Mobile and Chatr switch generated dropped call rates when determining whether the Chatr fewer dropped calls claim is false or misleading.

[260] The Commissioner bears the burden of proving that Rogers' fewer dropped calls claim is false.

[261] The applicant's assertion that the fewer dropped calls claim is false is based upon switch generated data.

[262] When I consider all of the evidence in this matter, as well as the fact that I consider switch generated data of little help for the purposes of comparing the dropped call performance of different wireless networks, I come to the conclusion that I am not satisfied that the applicant has proven on a balance of probabilities that the respondents' fewer dropped calls claim is false in Ottawa with respect to Wind Mobile.

[263] Similarly I am not prepared to conclude on the basis of switch generated data that the fewer dropped calls claim was misleading in Calgary, Edmonton and Toronto with respect to Wind Mobile.

Must the differences in dropped call rates be discernible?

[264] I do not accept the applicant's view that differences in drop call rates must be discernible.

[265] I indicated elsewhere that I am satisfied the ads gave the general impression that there were no worries about dropped calls on the Chatr network. They suggested there were fewer dropped calls on that network, and that the Chatr network was more reliable.

[266] I recognize that the Advertising Standards Canada Guidelines provide that comparative performance claims should not be made when the difference is barely discernible to consumers. Similarly, the Canadian Marketing Association's Code of Ethics and Standards of Practice provides that marketing communications should not stress insignificant differences designed to lead the consumer to draw a false conclusion.

[267] At the same time, it is true that there are many claims about products that are not discernible, and yet still important to consumers. Dr. Pearce offered the example of food safety claims or nutritional claims.

[268] On April 17, 2012, Rogers received a Port-Out Analysis that was designed to test the importance of dropped calls to customers who had left Rogers for another telecommunications provider. The customers whose accounts were examined were postpaid term contract customers. The analysis concluded that dropped calls have a statistically significant impact on postpaid customers who have decided to change wireless carriers.

[269] Further, this report identified that the precipice for port-outs (leaving Rogers for another telecommunication provider) and dropped calls in the postpaid long-term contract segment of the telecommunications market was between three and six dropped calls per month. The report concluded that targeting customers with five dropped calls would likely improve Rogers' port-out rate.

[270] The Chatr market was a prepaid services market with no term contracts. It is easier for a prepaid no term contract customer to move to another wireless provider than it is for a postpaid long-term contract customer. I conclude therefore that the precipice for port-outs and dropped calls in the prepaid no term contract segment of the market is likely lower than 3-6 dropped calls per month.

[271] In addition, during the relevant time period, no wireless service provider had a pricing advantage over the other. There was aggressive pricing prior to Chatr's launch in July 2010. Aleks Krystajic testified that from March to June 2010, price competition from other wireless carriers, particularly Mobilicity, forced Public Mobile to respond. Mr. Krystajic described the pricing plans offered by Wind Mobile and Mobilicity as "bordering on lunacy."

[272] In their hard handoff/undue preference complaint submission to the CRTC, Wind Mobile and Public Mobile emphasized the importance of dropped calls. Specifically, in its submissions to the CRTC, Wind Mobile stated:

> Put simply, every dropped call matters. Prospective subscribers selecting a mobile provider and to whom Rogers Chatr now offers commercial arrangements that are virtually identical to those offered by Wind neither know nor need to know how often they will be affected by the threat of dropped calls. Instead prospective subscribers are offered an opportunity to avoid the problem altogether.

[273] In an email to the Competition Bureau dated September 24, 2010, Public Mobile stated that a differential in drop call rates as small as 10 per cent would be significant.

[274] The statements made by Wind and Public to the CRTC provide, regardless of their truth, significant evidence that Wind Mobile and Public Mobile thought dropped calls, including those caused by hard handoffs, were a significant problem. The statements also prove that they thought that dropped calls, including those caused by hard handoffs, reflected badly on the public's perception of the reliability of their networks. Their statements prove that the leaders of Wind Mobile and Public Mobile thought that the public was concerned with the risk of dropped calls rather than their relative frequency.

[275] Michael Tiplady, whose qualifications are discussed elsewhere, testified that a dropped call can be quite significant if the customer is experiencing other problems with the network.

[276] Finally, as a matter of common sense, dropped calls can have a significance that is not quantitative. The customer is not making a comparative analysis to other carriers in that situation. This significance was captured by Wind Mobile in its submission to the CRTC, to which I have referred elsewhere. In that submission, Wind Mobile described a dropped call as an annoyance on social calls, an acute disadvantage on business calls and possibly a matter of life or death on 911 calls.

[277] When I consider the evidence, including the evidence to which I specifically referred, I am satisfied that the credulous and technically inexperienced wireless services consumer between July 28, 2010, and November 30, 2010, would be more inclined to be a customer of a network that offered fewer dropped calls. Where price is not a factor, I find it difficult to believe that a consumer would choose a network that offered only a few more dropped calls. Even if one network only had a few more dropped calls, one of those calls could be extremely important.

[278] This notion was captured by Wind Mobile in its Reply submission to the CRTC in its hard handoff/undue preference complaint. The Reply stated as follows:

> Prospective subscribers selecting a mobile provider and to whom Rogers Chatr now offers commercial arrangements that are virtually identical to those offered by Wind neither know nor need to know how often they will be affected by the threat of dropped calls. Instead prospective subscribers are offered an opportunity to avoid the problem altogether (emphasis added).

[279] I am satisfied that the credulous and technically inexperienced consumer would choose a network that offered fewer dropped calls to avoid the possibility of an important call being dropped.

[280] This is not a case where an indiscernible difference means that the services are indistinguishable.

[281] I am not satisfied that the credulous and technically inexperienced consumer viewing the Chatr ads expected the dropped call experience to be discernibly different.

[282] Accordingly I am not satisfied that the fewer dropped calls claim is misleading unless there is a discernible difference in drop call rates among the respondents, Wind Mobile and Public Mobile.

Is a one per cent dropped call rate a standard beyond which consumers are unconcerned?

[283] The applicant contends that the fewer dropped calls claim is misleading because the dropped call rates of Wind Mobile and Chatr are below one per cent in Calgary. It is the applicant's submission that a dropped call rate of one per cent is a standard below which consumers are unconcerned about dropped calls.

[284] Kenneth Campbell, Wind Mobile's CEO, and Aleks Krystajic, Public Mobile's CEO, testified that consumers are unlikely to consider dropped call rates discernible where the rates are below one per cent.

[285] I do not accept this evidence, nor do I accept the applicant's contention in this regard.

[286] Dr. Bekheit, the Vice-President of Access Network for Wind Mobile, testified that Wind Mobile continued to work and invest money to improve its dropped call rate in Toronto and Ottawa after the rate fell below one per cent in those cities.

[287] Dr. Bekheit testified that as a matter of general policy, Wind Mobile did not stop working to improve its dropped call rate when it fell below one per cent.

[288] In an email to the Competition Bureau dated September 24, 2010, Public Mobile stated that a 10 per cent differential in dropped call rates was significant.

[289] Wind Mobile submitted to the CRTC that "every dropped call matters."

[290] I do not accept the applicant's contention that the fewer dropped calls claim is misleading because the dropped call rates of Wind Mobile and Chatr in Calgary were, during the relevant period, below what it termed the one per cent threshold for dropped calls.

Adequate and proper testing

[291] As indicated earlier, the Application was amended on March 1, 2011. The amendment maintained that Rogers and Chatr made the "fewer dropped calls than new wireless carriers" and "no worries about dropped calls" performance claims in the absence of adequate and proper testing.

[292] The burden of proving adequate and proper testing lies upon the respondents by virtue of the express wording of s. 74.01(1)(b) of the *Competition Act*.

[293] The adequate and proper test must be made prior to the representation to the public: see *Canada (Commissioner of Competition) v. Imperial Brush Co.*, 2008 Comp. Trib. 2, [2008] C.C.T.D. No. 2 (Canadian Competition Tribunal), at para. 125.

[294] The respondents do not dispute that they made the contentious claims about the performance of their wireless network to the public. They do not dispute that they did so for the purpose of promoting the use of wireless services provided by Chatr, and to the detriment of Wind Mobile, Public Mobile and Mobilicity.

[295] The phrase "adequate and proper test" is not defined in the *Competition Act*. Whether a particular test is "adequate and proper" will depend on the nature of the representation made and the meaning or impression conveyed by that representation. Subjectivity in the testing should be eliminated as much as possible. The test must establish the effect claimed. The testing need not be as exacting as would be required to publish the test in a scholarly journal. The test should demonstrate that the result claimed is not a chance result: see *Imperial Brush Co.*, at paras. 122, 124, 126, and 127.

[296] The respondents must show that adequate and proper testing supported the fewer dropped calls claim ("fewer dropped calls than new wireless carriers" and "no worries about dropped calls.")

No testing

[297] Chatr was launched in Calgary and Edmonton on July 28, 2010. Although at this time the fewer dropped calls claim was first made, the respondents had not conducted any tests of the performance of Wind Mobile in Calgary or Edmonton.

[298] With respect to Montréal, the respondents first made the fewer dropped calls claim in a press release issued on September 8, 2010, prior to the Chatr launch in that city. The respondents conducted their first set of drive tests in Montréal from September 15-19, 2010. The results of these drive tests were not available on either September 8 or 16, 2010, and therefore could not have formed the basis for the fewer dropped calls claim in relation to Public Mobile in Montréal.

Drive tests

[299] Drive testing involves placing simultaneous calls on competing wireless networks within a coverage area. These calls are placed at exactly the same location and contain exactly the same content.

[300] Wireless devices using competing wireless networks are attached to a vehicle equipped with an expensive and sophisticated drive test measuring system. The vehicle

travels a predetermined route that has been designed having regard to population density and traffic patterns. While the vehicles are traveling the predetermined routes, the wireless devices use both competitors' networks as well as Rogers' network. The devices automatically make calls to particular land lines. The results of these calls are monitored and evaluated.

[301] The respondents offered drive test results both as an adequate and proper test, as well as helpful evidence concerning the fewer dropped calls comparative claim. The applicant asserted that the drive tests did not constitute adequate and proper testing of the fewer dropped calls claim because:

- Given their purpose and limitations, drive tests could not be used as the basis for market-wide conclusions about wireless network performance, including dropped call rates;

- Rogers' own drive test data in Vancouver, Calgary and Edmonton did not show a statistically significant difference between Chatr's dropped call rates and those of some or all of the new carriers;

- Rogers did not conduct any drive tests in Calgary or Edmonton before making the claim there; and

- Rogers' drive tests in the greater Toronto area prior to September 27, 2010, did not include all of the new entrants operating in the greater Toronto area.

[302] There are three issues that I must consider:

- Are drive tests capable of adequately and properly testing the respondents' fewer dropped calls claim?;

- If drive tests are capable of adequately and properly testing the fewer dropped calls claim, did the drive tests actually conducted adequately and properly test it?; and

- If the drive tests conducted did in fact adequately and properly test the fewer dropped calls claim, do the results of those tests provide a basis for the claim?

[303] The burden of proving that the fewer dropped calls claim was adequately and properly tested lies upon the respondents. Furthermore, the reliability of a new network can change over time, and therefore it is necessary to consider whether the drive testing results were always sufficiently current.

[304] I recognize that drive tests do not actually provide a measure of all dropped calls experienced on a network. Drive tests estimate the actual dropped call rate. As well,

drive test results are results occurring in the particular conditions under which the drive test took place. These qualifications are counterbalanced by evidence that proved that benchmark drive testing is used all over the world to compare network performance.

[305] I also recognize that drive testing is conducted outdoors. According to the evidence, more than half of the cell phone calls with which we are concerned were likely made indoors. Indoor testing occurred after the fewer dropped calls claim was made. Mr. Michael Tiplady reviewed the indoor testing results and offered the opinion that the results of the indoor testing were consistent with Rogers' earlier drive test results. Mr. Tiplady's evidence, which as indicated earlier I accept, and the evidence that wireless networks improve with time, support the conclusion that the drive testing results are an adequate and proper basis for the fewer dropped calls claim both indoors and outdoors.

[306] The *Competition Act* requires an adequate and proper test of a performance claim. Significantly, benchmark drive testing is accepted universally as a way of comparing key performance indicators, including dropped call rates, on different networks. Drive testing does not have to be a perfect test to be an adequate and proper test.

[307] The demand of wireless operators for reliable drive test results has given rise to a $300 million per year industry. To state that billions of dollars have been invested world-wide in wireless networks is to state a well-known and easily confirmed fact. Some significance must be attached to evidence that the persons who invested these significant sums rely on benchmark drive testing.

[308] Evidence, which was not contentious, was introduced describing instances where wireless companies had sought to distinguish themselves in comparative advertising by claiming superior dropped call rates. These claims were based on drive test results.

[309] Rogers tendered two witnesses who were qualified to offer opinion evidence about drive testing. Michael Tiplady, who served as the Chief Technology Officer for O2, a large wireless service provider in the United Kingdom, was one of those witnesses. As Chief Technology Officer for O2, Mr. Tiplady was responsible for an annual budget of approximately £250 million. Mr. Tiplady has extensive experience with the actual operation of wireless networks.

[310] Mr. Tiplady testified that drive testing is globally recognized as the most accurate method of comparing different networks from the user's perspective. I accept Mr. Tiplady's evidence in this regard.

[311] Dr. Robert Ziegler was the second expert called by the respondents. Dr. Ziegler has a PhD in electrical engineering from Stanford University. He manages

approximately 250 people at Applied Communication Sciences. The Wireless Systems and Networks Research Department at Applied Communication Sciences provides research and engineering services to government and commercial customers. Applied Communication Sciences' clients include agencies of the United States government, including both defence and non-defence agencies. Its clients also include AT&T, Q West, Verizon, Sprint and other wireless network operators around the world.

[312] Applied Communication Sciences is a wholly-owned subsidiary of Telcordia Technologies, which is ultimately owned by LM Ericsson. I recognize that LM Ericsson manufactured the multitasking computers used by the respondents.

[313] Dr. Ziegler testified that drive testing is an established and well-thought-out industry-accepted practice for providing comparative assessments of the performance of wireless networks. I accept Dr. Ziegler's evidence in this regard.

[314] The evidence of Dr. Ziegler and Michael Tiplady is consistent with public submissions made by Verizon and AT&T to the United States Federal Communications Commission concerning drive testing. These submissions were to the effect that drive testing is an excellent way to compare the performance of wireless networks in respect of dropped calls.

[315] Vimplecom, Wind Mobile's parent company, uses drive testing to compare the performance of its networks with its competitors.

[316] I am satisfied by the evidence that drive testing is a standardized international method for comparing the performance of wireless networks.

[317] I am satisfied by the evidence that drive tests are capable of adequately and properly testing the respondents' fewer dropped calls claim.

Did Rogers' drive test programme adequately and properly test its fewer dropped call claims?

[318] Rogers began its drive test programme in 2005. Rogers has spent approximately $20 million on the development and implementation of its drive testing programme. Each year since 2005, Rogers has conducted drive tests across Canada four times per year in metropolitan areas.

[319] Rogers uses vehicles equipped with specially calibrated drive testing equipment provided by a company known as SwissQual AG. SwissQual AG is a Swiss company specializing in wireless network benchmarking and wireless network optimization. The evidence established that SwissQual AG is internationally known in this area, and is independent of Rogers.

[320] Rogers' drive test vehicles adhere to SwissQual AG's standards in hardware and software configuration. The test script, speech clips, sequence and frequency used during Rogers' drive tests are predetermined in accordance with established SwissQual protocols.

[321] The applicant submitted that Rogers' drive tests had to be carried out with third-party validation in order to be an adequate and proper test.

[322] There is no provision in the *Competition Act* that expressly provides that an adequate and proper test of a comparative performance claim must be validated by a third-party. Case law has established that courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test. It is not consistent with the notion of a flexible and contextual analysis to invariably insist on third-party validation of test results. I am satisfied that such validation is not a prerequisite to an adequate and proper test: see *Imperial Brush Co*., at para. 122.

[323] If I am wrong about this, I am satisfied also that Rogers' drive testing and drive test results have been independently validated. Specifically, Telcordia Technologies prepared an audit of Rogers' drive test methodology in 2005 and 2011. I recognize that Telcordia Technologies did not audit the methodology or the results of the specific drive tests relied upon in this Application. Rogers engaged Score Technologies and Nielsen Mobility to conduct drive tests to validate and supplement its own drive test results. Score Technologies and Nielsen Mobility are independent of Rogers. The evidence established that these two companies have specialized expertise in the field of drive testing, and that they are used by other wireless service providers for the same purpose. Score Technologies conducted four of the drive tests relied upon in this Application. Score and Neilsen conducted drive tests in the same area that Rogers conducted drive tests. Their results were compared with Rogers' results to provide a level of independent assurance concerning those results.

[324] The applicant submitted that handsets are an important element in a drive test. The applicant relied on the fact that the handsets used to conduct drive tests of Rogers 2G network and the networks of at least some of the new wireless carriers were not handsets purchased from those carriers, nor were they handsets that were commercially available from them.

[325] Specifically, for testing Wind Mobile and Rogers, Score Technologies used the Samsung T-819. The applicant suggested that there was no evidence that this handset was purchased from a Wind Mobile store. The evidence established that it was a common practice to purchase a Wind Mobile handset and then use that handset in the drive test to test the Wind Mobile network.

[326] Rogers' drive test programme uses equipment supplied by SwissQual, one of the leading drive test firms in the world. Evidence was adduced from SwissQual in the form of an email that suggested that Wind Mobile had informed SwissQual that it uses the Samsung T-819. Rogers provided the Competition Bureau on November 4, 2010, with an email from SwissQual confirming that the Samsung T-819 is compatible with its equipment.

[327] Dr. Ziegler testified that the Samsung T-819 uses a common chipset and was specifically validated by SwissQual for use with the drive test equipment used by Rogers in 2010. I accept Dr. Ziegler's evidence in this regard.

[328] The applicant also criticized the fact that Rogers used the Nokia N95 when drive testing its own network. The applicant claimed that this device was not sold by Chatr in 2010. Mr. Berner, the respondents' Chief Technology Officer at the relevant time, testified that this device was fully validated and tested for use on the Rogers GSM network, and that it was used by customers on the network.

[329] I accept this aspect of Mr. Berner's evidence. Mr. Berner was clearly concerned about the Rogers network. He arranged for Rogers' drive testing methodology to be audited by Telcordia Technologies. He arranged for independent testing by Score Technologies and Nielsen Mobility. It seems only reasonable that he would avoid handsets that invalidated or undermined the drive test results that he had otherwise made efforts to verify.

[330] Mr. Michael Tiplady testified that SwissQual tests handsets and recommends to its customers handsets that work well with SwissQual equipment. It was Mr. Tiplady's evidence that the important thing was to use a handset that was so recommended. I accept Mr. Tiplady's evidence in this regard.

[331] I am satisfied that the handsets used by Rogers during its drive tests were compatible with the SwissQual equipment used by the respondents. I am also satisfied that this was an important fact in terms of the validity and reliability of Rogers' drive test results.

[332] Mr. Berner testified that he had no direct knowledge of the conduct of the drive tests with which we are concerned. Mr. Berner's only knowledge about the drive test programme and methodology came through conversations with persons reporting to him. Mr. Berner could not be effectively cross-examined concerning the methodology used on the actual drive tests. This circumstance goes to the weight attached to the drive test results. Its negative effects, however, are offset by the fact that independent auditing of the tests with which we are concerned, was conducted by Mr. Michael Tiplady.

[333] Michael Tiplady conducted a full review of the Rogers drive tests referred to in this proceeding. He reviewed the information provided by Mr. Berner in his affidavit.

He reviewed the methodology and he examined the information from the subcontractors Score Technologies and Nielsen Mobility. He looked at information on the equipment used. Mr. Tiplady examined printouts of the drive test routes to see whether the routes were consistent with the area Rogers was purporting to test. Mr. Tiplady concluded that the drive tests were conducted according to the normal international standard. He concluded that the drive tests were well-thought-out and what you would expect from an operator of Rogers' standing. The tests were what you would expect from similar operators in other countries. I accept Mr. Tiplady's evidence in this regard.

[334] I am satisfied that Mr. Tiplady's validation offsets to a significant degree the fact that no persons were called with personal knowledge of the actual drive tests with which we are concerned.

[335] I reject the applicant's criticism of the Rogers benchmark drive testing.

Is belief in a technological fact an adequate and proper test?

[336] Rogers has invested billions of dollars in capital expenditures to develop and enhance its wireless network. Rogers has a national network that provides services to approximately 95 per cent of the Canadian population. When Wind Mobile and Public Mobile commenced operations, Rogers had been in business for over 25 years.

[337] It was not contentious that the deployment of a wireless network is an iterative process that requires the operator to make constant adjustments to optimize performance. Mr. Berner testified that "we're never done deploying a network". Mr. Berner explained that if a wireless service provider has a brand-new network, its objective is to get as much coverage as it can in order to have a competitive product. As a result, he explained a wireless service provider will not be able to immediately build all the infill sites needed to solve specific coverage problems within its coverage area. In short, it was his evidence that a network gets better over time.

[338] Dr. Ziegler testified that there was no way that a new entrant or any other operator could catch up to 25 years of experience in a few months.

[339] I accept the evidence of both Mr. Berner and Dr. Ziegler in this regard.

[340] I am satisfied that Mr. Berner honestly believed that it was impossible for Wind Mobile and Public Mobile to build and develop a wireless network to match the reliability and performance of the Rogers network in less than one year.

[341] Mr. Berner's belief in Rogers' technical superiority, which was also Rogers' belief, was based on the three components contained within the explainer or disclaimer in the contentious representation: greater cell density; quality of indoor and underground reception; and seamless call transition when moving out of a Chatr zone.

In addition, it was Mr. Berner's view that Rogers' use of lower frequency 850 MHz spectrum would also lead to fewer dropped calls.

[342] The applicant claims that knowledge or belief in a technological fact cannot constitute an adequate and proper test within the meaning of s. 74.01(1)(b) of the *Competition Act*.

[343] In my view, the matter is best given factually specific consideration. Lower frequency 850 MHz spectrum is said to have better propagation qualities, which means that the power of the radio waves decreases less quickly on this lower spectrum than it does on higher spectrum. Wind Mobile and Public Mobile both used higher spectrum than 850 MHz. If the applicant wished to question this principle, then the burden would be on the respondents to provide the applicant with references to the Friis Transmission Formula that was published in 1945, and which established the principle that lower frequency spectrum has better propagation qualities. The *Competition Act* does not require that the respondents duplicate the test but they must provide it.

[344] The respondents have made the fewer dropped calls comparative performance claim. The applicant has asked for the adequate and proper test of that claim. If the respondents rely upon lower frequency spectrum, they are required to show that they have adequately and properly tested whether their radio wave propagation advantage appears to have actually resulted in fewer dropped calls. The law permits a flexible and contextual analysis when assessing whether a claim has been adequately and properly tested, but there must be a test.

[345] Accepting for a moment that the respondents have greater cell site density, more indoor transmitters and other devices to improve indoor and underground reception and seamless call transition, it is still necessary for the respondents to adequately and properly test whether these technological advantages appear to have actually resulted in fewer dropped calls.

[346] The applicant sought to place in doubt the advantages of lower frequency spectrum in an urban environment. The applicant's position is undercut significantly by statements from the complainants themselves. The benefits of lower radio spectrum were acknowledged explicitly by Wind Mobile and Public Mobile in recent submissions to Industry Canada.

[347] Wind Mobile explicitly acknowledged that lower frequency spectrum is better able to penetrate structures than higher frequencies. It further explicitly admitted that it was at a substantial competitive disadvantage because lower frequency spectrum had superior propagation characteristics.

[348] Public Mobile made similar statements to Industry Canada.

[349] The applicant sought to place in doubt the respondents' assertion that they had greater cell site density than Wind Mobile or Public Mobile. Wind Mobile, through its chairman, explicitly acknowledged Rogers' cell site advantage during the relevant period. Specifically, on December 15, 2010, in an interview with the Globe and Mail, he stated: "[W]e have never made the claim nor will I make the claim today that we have greater coverage than Rogers. They have more sites than us in the greater Toronto area and that leads to better coverage in buildings…" Mr. Armeanca, the former Chief Technology Officer of Wind Mobile, confirmed that three of the four specific causes of dropped calls can be remedied by adding more cell sites.

[350] In addition, it appears that lower frequency spectrum also has to be accounted for when considering cell sites. In October 2010, Wind Mobile had 88 cell sites in Ottawa compared to Rogers' 91 sites. However, it turned out that 63 of the Rogers 91 sites were deployed at 850 MHz. Dr. Ziegler testified that this meant that Wind Mobile would require 3-4 times as many cell sites to match Rogers' signal quality.

[351] Mr. Berner testified that, despite having substantial cell site density, there are many locations inside buildings that are effectively dead zones. The only solution to this problem is to provide customized coverage.

[352] The evidence established that Rogers had invested tens of millions of dollars in purchasing and installing an extensive network of transmitters, signal repeaters and other devices in buildings and underground structures. Rogers deployed dedicated systems within buildings to pick up, amplify and redistribute signals inside the buildings. Rogers built specific cell sites and indoor antenna systems to deal with these coverage problems.

[353] Mr. Berner testified that Rogers also built and installed specific outdoor cell sites to solve specific indoor coverage problems.

[354] Indoor transmission systems have been tested extensively, and had the applicant challenged the effectiveness of those systems, the external testing done by others would have perhaps been a complete answer. However, this begs the question of whether the indoor transmission systems that were in place actually resulted in fewer dropped calls than Wind Mobile and Public Mobile.

[355] To the extent that actual testing of dropped call rates prior to making the fewer dropped calls claim occurred and supported that claim, the technological advantages previously mentioned would have to be capable of confirming the adequacy and propriety of that testing as well as the claims.

[356] The applicant suggested that the respondents' network was congested, and that this reduced or eliminated advantages that the respondents might have otherwise

derived from the maturity of their network, their superior spectrum, greater cell site density, superior indoor network and seamless handoffs.

[357] Dr. Nettleton reviewed the respondents' capacity utilization data and offered the opinion that the respondents' network was in fact congested during the relevant period, and that this congestion would have resulted in dropped calls.

[358] I do not accept Dr. Nettleton's evidence in this regard. In my view, Dr. Nettleton's conclusions are not supportable. In his first report, Dr. Nettleton failed to account for the fact that Rogers uses half-rate voice coders that essentially double Rogers' capacity. Dr. Nettleton addressed this in his Reply Report. However, in his Reply Report, Dr. Nettleton identified 300 half-rate congested cells in Toronto. Dr. Nettleton agreed when testifying that he had made a mistake in his capacity analysis, and that only 33 half-rate cells were congested.

[359] Dr. Ziegler undertook a detailed congestion analysis which I accept. Dr. Ziegler demonstrated that in September 2010, of the 33 individually half-rate congested cells, virtually all were co-located with 1900 MHz Rogers' cell sites. These cell sites were not congested. Rogers' network automatically transfers calls to an uncongested co-located or adjacent cell site when a cell site is at capacity.

[360] Dr. Nettleton also suggested that Rogers' 2G network was aging, and that as a result Rogers was dismantling it. I do not accept Dr. Nettleton's evidence in this regard. Instead, I accept the evidence of Mr. Berner that the Rogers 2G network was being demoted as a result of the normal course of Rogers' business. Rogers was gradually moving traffic to its third-generation or "3G" network.

[361] Dr. Nettleton also suggested that Rogers' network was experiencing co-channel interference or radio interference from adjacent cell sites. Dr. Nettleton agreed on cross-examination, however, that a properly designed network will minimize co-channel interference. He conceded that this was a basic principle in the design of cellular systems. I attach no weight to this aspect of Dr. Nettleton's evidence.

[362] I have elsewhere discussed seamless call transitioning or hard and soft handoffs. It is clear that the hard handoff results in actual dropped calls.

[363] I am satisfied that Rogers' network had the technical advantages that the respondents claimed that it had in the fewer dropped calls claim. These advantages, however, do not relieve the respondents of testing the comparative fewer dropped calls claim. The technological advantages are, however, capable of confirming the adequacy and propriety of a test that appears to substantiate the fewer dropped calls claim.

Were the Rogers drive tests conducted too early after the launch of Wind Mobile and Public Mobile?

[364] The applicant suggested that one of the drive tests was conducted immediately after Wind Mobile had launched, and that this was too soon to permit a meaningful comparison. Specifically, Rogers tested Wind Mobile in Vancouver from June 16-23, 2010. Wind Mobile launched in Vancouver on June 3, 2010.

[365] I do not accept this criticism. Wind Mobile was offering wireless services to the public from and after June 3, 2010. Rogers was under no obligation to wait before testing the wireless service that Wind Mobile was offering to the public.

[366] The idea that Wind Mobile's service would have improved over time, and that a later drive test would reflect that improvement does not change the results of the drive tests that were in fact conducted, and whether they provide for a time an adequate and proper basis for the fewer dropped calls claim.

[367] The applicant also argued that the fewer dropped calls claim became misleading because Rogers' advantage, if it had one, changed over time. The applicant used Vancouver as an example.

[368] As indicated, Rogers tested against Wind Mobile in Vancouver in the period June 16-23, 2010. It then tested against Wind Mobile in Vancouver in the period August 10, 2010, to September 3, 2010. During the June drive test, Chatr experienced 6 dropped calls, while Wind Mobile experienced 13 drop calls. During the August/September drive test, Chatr had eight dropped calls, while Wind Mobile experienced seven dropped calls. A third test was conducted in Vancouver during the period of October 1-14, 2010. During the October drive test, Chatr experienced six dropped calls, while Wind Mobile had nine dropped calls.

[369] I have concluded elsewhere that Rogers' decision to filter out hard handoffs after August 9, 2010, resulted in these drive test results understating Wind Mobile's and Public Mobile's dropped calls.

[370] It is the applicant's position that things changed between June and September, and therefore the fewer dropped calls claim had become misleading with the passage of time. In short, it was the applicant's position that the circumstances were changing, and therefore the advertising had to change. I agree in principle, however whether these ads were misleading is a more precise question.

[371] In the June 2010 drive test, Wind Mobile experienced slightly more than two times as many dropped calls as Chatr. In the October drive test, Wind Mobile had one and one half times as many dropped calls as Chatr. When I consider all three Vancouver drive tests, I am not satisfied that they demonstrate any comparative change between Wind Mobile and Chatr in the periods of June 16-23, 2010, and October 1-14, 2010.

[372] Such a conclusion is not inconsistent with statements made by representatives of the complainants. For example, Mr. Anthony Lacavera, Wind Mobile's chairman, said on September 13, 2011, "if there was a knock against us in the beginning it was [the quality of] our networks but the gap between us and the big guys is quickly going away." The events that concern us occurred in the period August to December 2010. It is clear that Mr. Lacavera thought that there was a gap between Wind Mobile and "the big guys" in September 2011, although it was also his view that the gap at that time was narrowing. Accordingly, there must have been a gap between Wind Mobile and "the big guys" during the period we are concerned. There is no reason why Mr. Lacavera would make a statement acknowledging the network superiority of competitors unless his information was that it was true. Mr. Lacavera's statement tends to confirm Rogers' interpretation of its 2010 drive test results against Wind Mobile.

[373] The applicant criticizes the fact that the drive testing conducted September 15-19, 2010, which tested Public Mobile in Montréal, was methodologically unsound because it was an expedited drive test. Specifically, the Public Mobile Montréal drive test was conducted over 4 days for 24 hours each day. Dr. Ziegler testified that the expedited drive test could not by itself be used as a basis for an unqualified comparison between Rogers and Public Mobile, and I accept his evidence in that regard.

[374] I am satisfied that the expedited Montréal drive test was not an adequate and proper test of the fewer dropped calls claim. Additionally, it is clear that Chatr launched in Montréal on September 16, 2010, and that these drive tests could not have substantiated the fewer dropped calls claim made at that time.

[375] There was an expedited drive test that tested Wind Mobile in Toronto from September 26, 2010, to October 2, 2010. This test could not, by itself, be used as a basis for an unqualified comparison between the Rogers and Wind Mobile networks in Toronto. However, this drive test was in addition to a normal drive test conducted August 20, 2010, to September 8, 2010, that compared those two networks in Toronto.

Conclusion concerning adequate and proper testing

[376] It is obvious that on July 28, 2010, when Rogers began making the fewer dropped calls representation on its website, in social media, through public relations channels and on product packaging, Rogers had only conducted drive tests against Wind Mobile in Vancouver, Toronto and Ottawa. However, as of July 28, 2010, Wind Mobile and Chatr offered services in Calgary and Edmonton. Rogers did not conduct tests in either of these markets prior to July 28, 2010.

[377] The idea that comparative performance claims had to be adequately and properly tested was well known to the respondents. Specifically, the advertising agency retained to promote Chatr asked in a November 6, 2009, document: "How do we support our claims?"

[378] Rogers began its extensive advertising campaign on August 9, 2010. By this time it had conducted a drive test in Calgary, but it had lost its 2G network benchmark drive test results.

[379] I accept the respondents' submission that drive testing is capable of adequately and properly testing the fewer dropped calls claim.

[380] I am satisfied that the Rogers drive testing with which we are concerned adequately and properly tested the fewer dropped calls claim when those drive tests were conducted prior to the claim being made.

[381] I am satisfied that the respondents failed to conduct an adequate and proper test in Calgary and Edmonton prior to July 28, 2010, when they began making the fewer dropped calls claim.

[382] The drive test conducted in Calgary on August 6, 2010, is not an adequate and proper test because the results were lost and are therefore not known and cannot be verified.

[383] No adequate and proper test against Public Mobile was conducted in Montréal prior to the respondents making the fewer dropped calls claim at the time of Chatr's launch on September 16, 2010.

[384] No adequate and proper test against Public Mobile was conducted in Toronto prior to July 28, 2010, when Chatr began making the fewer dropped calls claim in Toronto.

[385] I attach no significance to the fact that Rogers did not test against Videotron in Montréal before September 16, 2010, because I have concluded elsewhere in these reasons that a credulous and technically inexperienced wireless services consumer in Québec would not have considered Videotron a new wireless carrier.

Filtering out hard handoffs

[386] The evidence was that prior to August 9, 2010, Rogers' drive test results included dropped calls due to hard handoffs. Rogers' drive test results for Montréal from September 15-19, 2010, included dropped calls due to hard handoffs as well.

[387] Mr. Berner, Rogers' Chief Technology Officer, decided that he wanted to look at the drive test results with and without the hard handoffs. As a result, calls originating in the Wind Mobile, Public Mobile, Mobilicity and Videotron coverage zones or footprints that terminated outside those zones were removed from their dropped call totals.

[388] The applicant submits that when using drive test results to compare networks, the respondents' results should be those with hard handoffs removed.

[389] The applicant relies in part on the fact that Applied Communication Sciences (a.k.a. Telcordia Technologies) filtered out of its drive test audit results calls concluding outside a new wireless carrier's coverage area. Dr. Ziegler's concern was that if vehicles were driving in and out of the new carrier's coverage area, there would not be a proper comparison. While I agree with Dr. Ziegler's expressed concern, I do not agree that there was evidence that Rogers' drive test vehicles were inappropriately driving in and out of new carriers' coverage zones. The evidence of Michael Tiplady is to the contrary.

[390] Telcordia was performing a third-party evaluation of Rogers' use of quality measurements procedures, selected drive test measurements, data collection, processing and reporting procedures to compare Rogers' wireless voice and data services with those of other carriers. Performance of this exercise was obviously not hindered by the systematic removal of hard handoffs and the disclosure of that fact to Telcordia. Finally, both sets of drive test results were available to Applied Communication Sciences.

[391] Dr. Nettleton, in his expert report dated June 14, 2012, stated that filtering out hard handoffs was necessary to avoid "an artificial increase in dropped calls that does not reflect how the service is intended to be used by its subscribers."

[392] I do not accept this aspect of Dr. Nettleton's opinion. Some subscribers of Wind Mobile and Public Mobile will leave their coverage area while engaged in a call, their signal strength will degrade and eventually the Wind Mobile or Public Mobile network will drop the call. Wind Mobile and Public Mobile may not have intended that customers use the service in this way, but it is foreseeable that this type of dropped call would occur. Wind Mobile negotiated a roaming agreement with Rogers to allow customers to use their phones outside the Wind coverage zones.

[393] In somewhat of an about-face, Dr. Nettleton agreed on cross-examination that a fair comparison of the rates at issue in these proceedings would appropriately include hard handoff dropped calls.

[394] Mr. Michael Tiplady testified that he would not have filtered out hard handoffs when comparing the networks using drive test data because this filtering was inconsistent with the customer's experience. Mr. Tiplady testified that, in reviewing Rogers' drive testing, he saw no evidence of oversampling at coverage area borders.

[395] I prefer Mr. Tiplady's approach, although I view the matter somewhat differently.

[396] The fewer dropped calls claim stated that one reason Chatr had fewer dropped calls was because Chatr offered a seamless Canadian network, and therefore there was no need to switch to other networks when "zipping in and out of your Chatr zone." The

comparative nature of the fewer dropped calls claim invites consideration of calls dropped when Wind Mobile and Public Mobile customers are "zipping in and out" of their Wind Mobile and Public Mobile zones. Accordingly, filtering out such calls is not helpful for purposes of this Application.

[397] In addition, this Application carries serious reputational risks, as well as a significant administrative monetary penalty should it succeed. Accordingly, the claim should be somewhat strictly construed. The court should try to avoid altering genuine test results when trying to determine whether the representation is false or misleading.

[398] I am satisfied therefore that Rogers' drive test results after August 9, 2010, understated the difference between Rogers dropped call rate and the dropped call rates of Wind Mobile and Public Mobile during the drive tests because dropped calls due to hard handoffs were filtered out of the drive test results. This does not apply to the Montréal results for September 15-19, 2010, that included dropped calls resulting from hard handoffs.

[399] Mr. Berner testified that, if dropped calls attributed to hard handoffs are added back into the results for drive tests conducted after August 9, 2010, the respondents' network had fewer dropped calls than Wind Mobile and Public Mobile in every drive test conducted between June 16, 2010, and December 15, 2010. I accept his evidence in this regard. While the applicant challenged whether certain differences in dropped call rates were statistically significant, the mathematics of the exercise were not challenged.

[400] At the risk of belaboring the obvious, I have not referred to Videotron because, elsewhere in these reasons, I determined that Videotron would not be viewed by a credulous and technically inexperienced wireless services consumer in the Province of Québec as a new wireless carrier. I have not referred to Mobilicity because, elsewhere in these reasons, I have drawn an adverse inference concerning Mobilicity's dropped call rate during the relevant period. This inference is based on Mobilicity's refusal to cooperate with the Competition Bureau in this proceeding.

Are the drive test results statistically significant?

[401] The applicant also maintains that Rogers' drive test results do not show a statistically significant difference between Rogers' wireless network and the networks of the new wireless carriers. It is the applicant's position that, even if the court considers drive testing an adequate and proper test in principle, it is not sufficient for the court to look at raw drive test dropped call rates and determine that Chatr had the lower rate. It is submitted that the court must also determine whether the differences in dropped call rates are statistically significant.

[402] We are dealing with dropped calls in circumstances where there was no price differential among Chatr, Public Mobile and Wind Mobile services. There was also no evidence suggesting that changing wireless carriers meant the loss of one's phone number.

[403] I am satisfied that a credulous and technically inexperienced wireless services consumer would not analyze the problem from a statistical perspective. I am satisfied that such a consumer would not want an important call dropped, and would be influenced in his or her choice of a wireless carrier by the idea that one wireless carrier dropped fewer calls than another, regardless of the statistical significance of the difference. To put the matter differently, if price and cell number are not issues, why choose more dropped calls?

[404] Despite my view that no difference in dropped call rate is sufficiently small to be insignificant or immaterial, I propose to consider the dispute in the evidence about the statistical significance of the differences in dropped call rates of Chatr, Wind Mobile and Public Mobile.

[405] The applicant called Dr. Christian Dippon to testify in part on the statistical significance issue. Dr. Dippon is an economist. He is a Vice-President of National Economic Research Associates, which is a firm of economists. He specializes in the economics and business of telecommunications and other high-tech industries. Dr. Dippon holds a PhD in economics from Curtin University in Perth, Australia. Dr. Dippon has been qualified as an expert many times in the past by courts in the United States and Singapore.

[406] The respondents entered evidence from 16 drive tests. Dr. Dippon considered these drive test results without filtering out hard handoffs. These drive tests were performed in Vancouver, Calgary, Edmonton, Toronto and Montréal. Dr. Dippon used these tests to do hypothesis-testing.

[407] Dr. Ennis was called by the respondents. He was qualified in part to give expert opinion evidence on statistics, and in particular the statistical significance of the Rogers drive test results. Dr. Ennis testified that in hypothesis-testing, there are two hypotheses. A null hypothesis is considered true until proven false, while an alternative hypothesis contradicts the null hypothesis and is only accepted when there is sufficient statistical evidence. The null hypothesis is the hypothesis that the experimenter needs to reject in order to support the alternative hypothesis. The alternative hypothesis is the hypothesis that the experimenter wishes to establish.

[408] Dr. Dippon used as his null hypothesis the proposition that Rogers had statistically the same amount of dropped calls as the new wireless carriers. He used as the alternative hypothesis the proposition that Rogers did not have the same amount of dropped calls as the new wireless carriers. Dr. Dippon worked to a confidence level of

95 per cent, which meant that he wanted only a 5 per cent chance that the drive test was a chance comparison.

[409] Dr. Dippon concluded, after considering these 16 drive test results, that on 8 occasions, the drive test data accepted the null hypothesis, while the drive test data rejected the null hypothesis on 8 occasions.

[410] On the occasions where the drive test data accepted the null hypothesis, Dr. Dippon concluded that Rogers' sampled dropped call rate was not sufficiently lower than the sampled dropped call rate of the new carriers to permit the conclusion that Rogers had fewer dropped calls.

[411] Although not explicitly stated, Dr. Dippon's conclusion with respect to the eight sets of drive test data which rejected the null hypothesis must have been that Rogers' sampled dropped call rate was sufficiently lower than the sampled drop call rate of the new carriers to permit the conclusion that Rogers' dropped call rate was not the same as the new wireless carriers.

[412] Dr. Dippon did not explain what his conclusions would have been if he had chosen a confidence level of less than 95 per cent. Dr. Dippon offered no evidence concerning the confidence level that would equate to rejecting the null hypothesis on a balance of probabilities.

[413] As indicated earlier, eight sets of drive test data rejected the null hypothesis in. Dr. Dippon's analysis, and therefore must have rejected the null hypothesis using Dr. Dippon's confidence level of 95 per cent.

[414] Dr. Ennis has two doctorate degrees, one of which is in mathematical and statistical psychology. Dr. Ennis has published on statistical significance and statistical equivalents. Dr. Ennis also employed hypothesis-testing. Dr. Ennis chose as his null hypothesis the conclusion that Chatr's dropped call rate is equal to the dropped call rate of the new wireless carriers. His alternative hypothesis was that Chatr's dropped call rate was superior to the new wireless carriers' dropped call rates. Dr. Ennis tested these hypotheses using different statistical tools than those used by Dr. Dippon.

[415] Dr. Ennis testified that his review of the Rogers drive test results led him to the conclusion that those results are statistically valid, and establish that Chatr had fewer dropped calls than both Public Mobile and Wind Mobile during the relevant period. Once again I decline to refer to Mobilicity and Videotron.

[416] It was also Dr. Ennis' opinion that Chatr's dropped call rates were significantly better than the new wireless carriers. Dr. Ennis' confidence level in his results was 95 per cent.

[417] Dr. Ennis also created confidence interval charts. Dr. Ennis first calculated each carrier's mean dropped call rate. Next, Dr. Ennis calculated the 95 per cent confidence interval for each of Chatr and the new wireless carriers' mean dropped call rates. A 95 per cent confidence interval means that one can be 95 per cent confident that the carrier's true mean dropped call rate falls within that interval. Dr. Ennis produced a graphic illustration of the confidence intervals for the mean dropped call rates of Chatr and the new wireless carriers. He concluded that this exercise established that Chatr had statistically significant fewer dropped calls than each of the new wireless carriers during the period with which we are concerned.

[418] Dr. Ennis also performed a similar exercise with something he called the "call success rates" of Chatr and the new wireless carriers. This calculation measured calls that did not fail and were not dropped during drive testing. Dr. Ennis calculated mean successful call rates for Chatr and each of the new wireless carriers. Once again Dr. Ennis calculated 95 per cent confidence intervals for these mean successful call rates.

[419] After performing these two exercises, Dr. Ennis concluded that both demonstrated the statistically significant superiority of Chatr in respect of dropped calls and successful calls during the period with which we are concerned.

[420] Dr. Ennis testified that these exercises quantified the degree to which Chatr's mean dropped call rate and mean success rate were superior to the new wireless carriers during the period with which we are concerned.

[421] The second test performed by Dr. Ennis was the Wilcoxon Sign Test. This test assigns a "+" where a drive test recorded that Chatr had a lower dropped call rate than the new wireless carriers. The test assigns a "-" where the drive test recorded that Chatr had a higher dropped call rate. Chatr had a lower dropped call rate than the new wireless carriers in 15 out of 16 drive tests. Dr. Ennis then calculated the odds of Chatr having a lower dropped call rate in 15 out of 16 drive tests as a result of mere chance, and calculated that the likelihood of this happening by chance was less than 0.03 per cent.

[422] Dr. Dippon criticized the fact that in some of his testing, Dr. Ennis aggregated drive test results for the new wireless carriers across the cities in which they operated. The two exercises of Dr. Ennis to which I referred dealt with the drive test results on a disaggregated basis.

[423] Dr. Dippon made no attempt to attack the accuracy or legitimacy of Dr. Ennis' confidence interval calculations. Dr. Dippon did not refer to these confidence interval charts in his initial or reply reports.

[424] I prefer the evidence of Dr. Ennis. Dr. Ennis has a Doctor of Science degree in Mathematical and Statistical Psychology. He taught statistical quality control at the University of Guelph. He has experience designing and analyzing test data to determine

whether tests support claims made in advertisements. He has provided advice on a pro bono basis to the National Advertising Division of the Better Business Bureau Division, which conducts proceedings to resolve advertising claim disputes in the United States. Finally, he has published in the area of statistics.

[425] I find Dr. Ennis' dropped call rate and success rate calculations logically compelling and un-assailed.

[426] Finally, although not necessary for resolving a dispute concerning statistical analyses, but helpful when considering what constitutes a significant difference in dropped call rates for purposes of this Application, Public Mobile, in an email to the Competition Bureau dated September 24, 2010, stated that a differential in dropped call rates as small as 10 per cent was significant.

[427] Dr. Dippon and Dr. Ennis both used the 95 per cent confidence level standard in their analyses. As a result, I have not considered the appropriateness of that confidence level in deciding to accept the evidence of Dr. Ennis that Chatr's dropped call rate was superior to the new wireless carriers. However, I do not wish to leave this question without commenting that I am not persuaded that, in deciding whether the respondents have discharged the burden of proving that their fewer dropped calls claim was based upon an adequate and proper testing, a 95 per cent confidence level is consistent with a balance of probabilities standard of proof. The level of confidence required in the result of the test before it can be considered adequate and proper must be consistent with that standard of proof.

How long are the drive test results valid?

[428] The benchmark drive test results were collected and filed as Tab 14 of Exhibit 37A. These test results indicate that consistent with Mr. Berner's evidence, Rogers engaged in ongoing benchmark drive testing.

[429] Full market drive tests occurred in Vancouver in June, August to September and October, 2010. There were partial market drive tests in Vancouver in November 2010.

[430] Full market drive tests occurred in Calgary in September and December, 2010. There were no partial market drive tests in Calgary during the relevant period.

[431] Full market drive tests occurred in Edmonton in August and September, 2010. There were no partial market drive tests in Edmonton during the relevant period.

[432] Full market drive tests occurred in Toronto in June, August to September, September to October and November, 2010. No partial drive tests were conducted in Toronto. Indoor walk testing took place in Toronto in November to December, 2010.

[433] Full market drive tests occurred in Ottawa in July and November, 2010. Indoor walk testing took place in Ottawa in December 2010.

[434] Full market drive tests occurred in Montréal in September 2010. Partial market drive tests occurred in Montréal in October 2010. Three partial market drive tests occurred in different parts of Montréal in November 2010.

[435] It was Mr. Berner's evidence that the deployment of a wireless network is an ongoing iterative process. This means benchmark drive testing must be ongoing. I do not wish to imply that benchmark drive testing should be continuous. Nevertheless, the environment can change and benchmark drive testing must continue to occur to ensure that performance claims are always adequately and properly tested.

[436] Dr. Ziegler testified it was clear that Wind Mobile and Public Mobile operators were building out their networks, and that as a result he would expect changes at least every two months.

[437] Garrick Tiplady testified that removing the fewer dropped calls claim from the market started in October 2010. He testified that television ads, radio spots and print ads can be changed quickly; however, third-party distribution took longer because the respondents did not control the third-party distributors. It was his estimate that, depending on the medium, it would take from 2-6 weeks to remove the fewer dropped calls claim from the market.

[438] The respondents forwarded a timeline to the Competition Bureau that indicated that the fewer dropped calls claim would be showing in television and radio ads until October 11, in digital online ads until November 1, in mini posters until November 8, in brochures until November 11, in third-party retail flyers until November 14, on handset packaging until November 30 and in third-party retailer in-store magazines until November 30, 2010.

[439] Accepting these timelines, as well as Dr. Ziegler's suggestion that two months is about as long as drive test results could be considered current, I am satisfied that the drive tests conducted by the respondents were sufficiently contemporaneous with the fewer dropped calls claim with which we are concerned.

Conclusions concerning hard handoffs, statistical significance and timing of the drive tests

[440] I am satisfied that the Rogers drive test results with which we are concerned should be considered without filtering out hard handoffs.

[441] I am satisfied that the drive tests conducted by the respondents were sufficiently contemporaneous with the fewer dropped calls claim with which we are concerned.

[442] I do not accept the applicant's submission that the Rogers drive testing results support a finding that the fewer dropped calls claim is either false or misleading.

[443] I am satisfied that the Rogers drive testing results are an adequate and proper basis for subsequent claims by Chatr that its network will drop fewer calls than the networks of the new wireless carriers.

[444] I am also satisfied that the Rogers drive testing results that postdate the comparative fewer dropped calls claim are not an adequate and proper test for those claims because s. 74.01(1)(b) has been interpreted as requiring that the adequate and proper testing take place before the performance claim is made.

[445] I am satisfied that the Rogers drive testing results demonstrate that the Rogers 2G network, in a statistically significant way, dropped fewer calls during the relevant period than the networks of Wind Mobile and Public Mobile.

Indoor dropped call rates

[446] The applicant points out that networks may perform differently outdoors than they do indoors. The evidence established that the majority of wireless calls are made indoors. Drive testing is outdoor testing. It is the applicant's position that a claim concerning indoor wireless communications should have been qualified or not made at all.

[447] The applicant submits the fewer dropped calls claim conveyed the general impression that it applied to indoor calls. Having reviewed the ads in question, I agree that the ads with which we are concerned gave the impression to the credulous and technically inexperienced wireless services consumer that the fewer dropped calls claim applied to both indoor and outdoor calls. The applicant maintains that in giving that impression, the fewer dropped calls claim is misleading because Rogers did not conduct tests specifically comparing indoor dropped call rates prior to publicly making the fewer dropped calls claim.

[448] Mr. Michael Tiplady testified that in his experience, the level of radio signal inside a building, although attenuated as it passes through the structure, will generally be in proportion to the level outside. It was his opinion that if one operator had better results than another outdoors, that operator would most certainly have better results indoors at that location.

[449] Nextgen Innovation Labs LLC ("NIL") was retained by Rogers to carry out an independent comparative in-building benchmarking study. The study was meant to determine failed and successful call rates, as well as other key performance indicators on Rogers' 2G network and the networks of Wind Mobile, Public Mobile and others.

[450] The NIL indoor walk testing occurred in Ottawa and Toronto in November and December, 2010. It occurred in Montréal in February and March, 2011.

[451] None of this testing was conducted prior to the launch of Chatr.

[452] Mr. Sushil Chawla, a witness called by the respondents, was qualified to give opinion evidence on comparative in-building and walk testing of wireless network performance, including the testing done for the respondents. Mr. Chawla is Vice President-Innovative Engineering of NIL.

[453] The evidence established that in 2010, indoor testing emerged as a necessary adjunct to drive testing. Mr. Chawla testified that NIL had only begun this type of indoor walk testing in early 2010. He also testified that he was not aware of any other company that offered comparable indoor testing at that time. Michael Tiplady testified that the indoor testing offered by NIL was likely the first of its kind.

[454] The technology to conduct indoor walk testing was not commercially available prior to July 28, 2010, the date of Chatr's launch.

[455] The words adequate and proper have been held to be synonymous with sufficient and appropriate. Traditional or scientific testing is not required. Courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test: see *Imperial Brush Co*., at para. 122; *R.v Big Mac Investments Ltd*. (1988), 24 C. P. R. (3d) 39, at p. 45, [1988] M.J. No. 586 (Man. Q.B.).

[456] The evidence established that Rogers had an extensive indoor network in 2010. Mr. Berner testified that Rogers had invested tens of millions of dollars in purchasing, installing and maintaining a network of transmitters, signal repeaters and other such devices in buildings and underground structures to improve coverage. Mr. Berner also testified that for substantial buildings, Rogers deployed an in-building distributed antenna system to transmit signals throughout the building.

[457] Transmitters, signal repeaters and other such devices are not tests but they are capable of confirming an assertion that Rogers' superior outdoor performance, adequately and properly tested by drive tests, was duplicated indoors in the same geographic area. Of course, such confirmation is not possible until drive testing has occurred, because until that time there are no test results from which to extrapolate.

[458] The indoor walk testing results are not capable of being an adequate and proper test of the fewer dropped calls claim because the testing occurred after the performance claims had been made.

[459] The indoor walk testing results are capable of supporting an inference that the 2010 drive test results in Toronto, Ottawa and Montréal adequately and properly tested both outdoor and indoor dropped call performance.

[460] In addition, the evidence is that Wind Mobile and Public Mobile were constantly working to improve their networks. Therefore, any difference in indoor dropped call rates favoring the respondents, and measured in December 2010 or February to March, 2011, was likely to be less than it would have been between July 28 and November 30, 2010. No one suggested that the Wind Mobile or Public Mobile networks worsened over time.

[461] The indoor walk testing results are helpful in deciding whether the respondents' fewer dropped call claim in Ottawa in reference to Wind Mobile was false or misleading. Dr. Nettleton, who was called to give expert evidence by the applicant, testified that the performance of Wind Mobile and Public Mobile at the time of the NIL walk testing was likely better than it was earlier in 2010.

[462] I am satisfied that Rogers made use of indoor walk testing as soon as it was commercially available.

[463] Dr. Nettleton testified that Chatr had superior dropped call rates to Wind Mobile and Public Mobile on those indoor walk tests. I am satisfied that the indoor walk testing results indicated that Chatr had better in-building dropped call rates than Wind Mobile in Toronto and Ottawa, and better in-building dropped call rates than Public Mobile in Toronto and Montréal.

[464] The applicant urged caution with respect to the NIL study. The applicant pointed out that the Toronto study was organized and designed within a few days. The applicant also took the position that NIL did not conform to its methodological criteria.

[465] The applicant also points out that Dr. Ennis did not statistically analyze the NIL results.

[466] It is also clear that NIL used a Blackberry to test Rogers' 2G network in circumstances where Chatr did not offer a Blackberry for sale during the relevant period.

[467] One specific criticism concerns the choice of indoor sites. Prior to retaining NIL, Rogers had conducted its own informal indoor walk testing. NIL indicated that it chose its indoor sites using Google maps. A comparison shows that the sites used by Rogers in its own indoor testing and the sites chosen by NIL for its indoor testing were substantially similar and, in some cases, the sites were listed by both Rogers and NIL in the same order.

[468] Dr. Nettleton, called as an expert by the applicant, offered the opinion that the walk tests were well executed.

[469] I am satisfied that Rogers shared with NIL the locations that it informally tested, and that these locations in Toronto were adopted by NIL. This affects the weight

to be given to the indoor testing, because one of the requirements of the indoor walk testing methodology is that the indoor sites be selected randomly. At the same time, a review of the sites indicates that the testing was done in the major indoor locations in Toronto.

[470] The applicant asserts this demonstrates that the NIL indoor walk testing was not independent of the respondents. I do not draw this conclusion. I am satisfied that a shortcut was taken in choosing the locations. I am also satisfied that the appropriate indoor locations in Toronto were tested using well-executed indoor walk tests.

Conclusion concerning indoor walk tests

[471] I am satisfied that the NIL indoor walk tests indicate that Rogers' 2G or GSM network had better dropped call rates than Wind Mobile and Public Mobile in Toronto, Ottawa and Montréal when the indoor walk testing was conducted in December 2010 and early 2011.

[472] The indoor tests were not conducted prior to the fewer dropped calls claim and therefore are not an adequate and proper test of that claim. They do confirm its accuracy with respect to indoor calls at the time of the indoor tests. Because I am satisfied that the networks of Wind Mobile and Public Mobile improved with the passage of time, I am satisfied that the indoor walk tests also confirm that the fewer dropped calls claim was accurate indoors in Toronto, Ottawa and Montréal during the relevant time period.

[473] I do not accept the applicant's contention that the fewer dropped calls claim was misleading because it gave the impression that the claim was true indoors as well as outdoors.

[474] The indoor walk tests cannot be an adequate and proper test within the meaning of s. 74.01(1)(b) because those tests were conducted after the fewer dropped calls claim was published.

Is s. 74.01(1)(b) of the *Competition Act* inconsistent with the provisions of the *Charter*?

[475] The applicant accepts that s. 74.01(1)(b) of the *Competition Act* infringes s. 2(b) of the *Charter*.

[476] The applicant does not concede that s. 74.01(1)(b) infringes s. 11 of the. *Charter*.

Section 1 and s. 2(b) of the *Charter*

[477] As a result of the applicant's concession, the only issue to be decided with respect to the infringement of s. 2(b) is whether s. 74.01(1)(b) is a demonstrably

justifiable and reasonable limit on the freedom of expression guaranteed by s. 2(b) *Charter*. The applicant bears the burden of proof concerning this issue.

Does s. 74.01(1)(b) have a pressing and substantial objective?

[478] Sections 74.01(1)(a) and (b) are part of a scheme of protections against false or misleading advertising.

[479] False or misleading claims made intentionally or recklessly are addressed in s. 74.01(1)(a), as well as s. 52, of the *Competition Act*.

[480] Section 74.01(1)(b) protects against false or misleading performance claims made in the absence of prior adequate and proper testing. These claims may occur because the provider of the good or service is careless about the performance claim, or because the provider of the good or service overconfidently believes that the performance claim is true and therefore has not tested the claim before making it.

[481] The specific aim of s. 74.01(1)(b) is contained in the section itself, namely the prohibition of performance claims in the absence of prior adequate and proper testing. This specific purpose occurs in the context of the purpose of the *Competition Act* set out in s. 1.1. Section 1.1 provides that the purpose of the *Competition Act* is as follows:

> [T]o maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy…in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

[482] Professor Kenneth Corts, a witness called by the applicant, was qualified as an expert to give opinion evidence on the subject of economics, competition policy, industrial organization economics and business strategy. He discussed the effect of false or misleading performance claims upon the consumer.

[483] Professor Corts explained that the consumer who takes false claims at face value may very well, before discovering that the claim is grossly exaggerated or outright false, misallocate resources by mistakenly purchasing the good or service, by mistakenly buying too much of the product or service or by mistakenly paying too high a price for it. The consumer will, as a result, divert resources from other products that he or she would have been better off buying.

[484] Professor Corts also said that there is harm to competing firms. One type of harm is direct in the sense that consumers divert their demand away from truthful firms providing a higher quality product.

[485] Professor Corts testified that a skeptical consumer will be harmed and will misallocate resources, but not to the same degree as a more naïve consumer. More skeptical consumers also lose confidence in advertising claims in general, which makes it harder for legitimate firms to communicate with them.

[486] In the longer run it becomes very hard for truthful firms to credibly convey the quality of their products, and to be rewarded for producing such products. One consequence of permitting false or misleading claims is that legitimate firms find it more difficult to survive.

[487] Dr. J. Howard Beales III, a witness called by the respondents, was qualified as an expert to give opinion evidence concerning the United States Federal Trade Commission's ("FTC") consumer protection regulation and enforcement. Dr. Beales testified that he had been involved with the FTC for over 25 years, and that during that period he had held a variety of senior positions.

[488] Dr. Beales testified that truthful information in the marketplace promotes market efficiency. It leads to lower prices for consumers. It leads to more product innovation. According to Dr. Beales, "[G]etting truthful information out there is the goal of both the prohibition on deceptive claims and a lot of what the FTC tries to do."

[489] Professor Michael Pearce, a witness called by the respondents, was qualified as an expert to give opinion evidence on marketing to consumers, including the wireless industry in Canada. He agreed that false or misleading representations are harmful to competition, consumers and competitive firms.

[490] Parliament is not required to provide scientific proof based on concrete evidence of the problem that it seeks to address. If the social science evidence relating the harm to Parliament's measures is inconclusive or conflicting, the court may rely on a reasoned apprehension of that harm. In *Thomson Newspapers Co. v. Canada*, [1998] 1 S.C.R. 877, evidence concerning the influence of polls on voters' choices was uncertain, nevertheless a majority of the Supreme Court of Canada concluded that the possible influence of polls on voters' choices was a legitimate harm that Parliament could seek to remedy, and thus was a pressing and substantial objective: see also *Harper v. Canada*, 2004 SCC 33, [2004] 1 S.C.R. 827, at paras. 77-78.

[491] No one suggested that the publication of false or misleading claims was a benefit.

[492] I am satisfied that the protection of consumers, competitive firms and competition from the harmful effects of false or misleading performance claims is the ultimate objective to which s. 74.01(1)(b) is directed. I am satisfied that it is a pressing and substantial objective.

The rational connection between s. 74.01(1)(b) and the protection of consumers, competitive firms and competition from the harmful effects of false or misleading performance claims

[493] It seems reasonable, and almost intuitive, to suppose that prohibiting the advertising of untested claims will reduce the publication of false or misleading claims and their attendant harmful effects.

[494] It seems reasonable to suppose that it will, for the most part, be impossible to adequately and properly substantiate a false claim.

[495] It is possible that a claim can be adequately and properly substantiated and later turn out to be false due to the availability of more accurate testing. The *Competition Act* addresses this possibility. It provides that in such a situation, the only remedy available to the applicant is an order that the false representation cease. No administrative monetary penalty can be imposed.

[496] The FTC introduced a substantiation policy in the United States in the mid-1970s. Two academic papers were introduced into evidence that considered the effect of the introduction of the policy on advertising claims. The papers were published in peer-reviewed journals. Both papers concluded that the introduction of a substantiation requirement resulted in an increase in the credibility of advertising. The John Healey and Harold Kassarjian paper, published in 1983, concluded that "[o]n overview it appears that advertisers were more conscientious about claims being made after being asked to provide substantiation."

[497] In Canada, it has been held in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48, that to establish a rational connection, "[t]he government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."

[498] The Supreme Court of Canada has stressed the need for deference when considering the rational connection test. Specifically, in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 41, the court stated the following:

> Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems… may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

[499] Section 74.01(1)(a), which prohibits false claims, will not deter a firm that overconfidently believes that a false performance claim about its product is true.

However, s. 74.01(1)(b) will prevent the overconfident firm from mistakenly making a false performance claim because it will require testing of the claim before it can be made.

[500] If the Competition Bureau was confronted with a performance claim that it believed to be false, it could demand the testing upon which the claim was based. In the absence of such testing, the Bureau could move to prevent the claim from being made. This would not be possible if only s. 74.01(1)(a) was available. If the only recourse was s. 74.01(1)(a), the Competition Bureau, in order to obtain an injunction, would require evidence proving that the claim was likely false.

[501] I am satisfied that there is a rational connection between s. 74.01(1)(b) and the protection of consumers, competitive firms and competition from the harmful effects of false or misleading performance claims.

Does s. 74.01(1)(b) interfere as little as possible with the right to freedom of expression?

[502] This case concerns the fewer dropped calls claim. There are three significant possibilities: the claim is true; the claim is false; and the applicant cannot prove the claim is false, while the respondents cannot prove the claim is true.

The claim is true

[503] Section 74.01(1)(b) of the *Competition Act* interferes with the freedom to express the true claim by first requiring substantiation. If the claim is tested properly, the testing will likely suggest that the claim is true, and the claim can be made publicly.

[504] Section 74.01(1)(b) can also interfere with the expression of this claim despite the fact that it is true. This could occur in circumstances where the cost of testing the claim appears to exceed the likely increase in revenues to be gained by publicizing the claim. Such a situation implies that the market for the product or service is either small or relatively unprofitable.

The claim is false

[505] Section 74.01(1)(b) interferes with the freedom to express the false claim by first requiring substantiation. The applicant is not required to demonstrate in a *prima facie* way that the claim is false before taking steps to prevent its continued publication.

[506] No one suggested that it was in the public interest to permit the public expression of false claims.

[507] Section 74.01(1)(a) of the *Competition Act* already prohibits the expression of false claims. Accordingly, s. 74.01(1)(b) does not further interfere with the freedom to express a false claim because such a freedom never existed.

The applicant cannot prove the claim is false and the respondents cannot prove the claim is true (the uncertain claim)

[508] Section 74.01(1)(b) prohibits the publication of the uncertain claim unless it is substantiated.

[509] The respondents urge that the uncertain claim be permitted to enter the marketplace until the applicant can demonstrate that it is false. The respondents argue that this is less impairing of freedom of expression than s. 74.01(1)(b).

[510] In putting this position forward, the respondents are urging a policy choice that is different than the one chosen by Parliament.

[511] The respondents' policy choice is less impairing of freedom of expression because it forces the marketplace to tolerate the risk that the uncertain claim is false. Parliament chose not to tolerate that risk by insisting that the uncertain claim be substantiated before it is made.

[512] Parliament decided not to permit the uncertain claim to enter the marketplace because it might be false. The respondents urge the court to permit the uncertain claim to enter the market place because it might be true.

[513] Professor Corts pointed out that if the law only contains a false claim penalty, a firm will reason that its exposure to that penalty is related to the probability of enforcement and whether they think the claim is false. The firm that is overconfident about the truth of the performance claim will discount a false claims penalty dramatically because it does not believe the claim is false. Such a firm would not discount a substantiation requirement or the penalty for the lack of substantiation because they know that they are subject to that penalty whether the untested claim is true or false.

[514] In *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, at para. 160, the Supreme Court of Canada made the following statement:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement…

[515] Similarly, the choice of a reasonable policy alternative from a range of reasonable policy alternatives is a matter in which the courts must accord some leeway to the legislator.

[516] The minimal impairment test under s. 1 of the *Charter* should not be used to force Parliament to adopt the policy decision that the marketplace will be better off with a higher tolerance for false performance claims.

[517] Section 74.01(1)(b) applies only to performance claims. In the United States, the FTC substantiation policy applies to "objective claims." The only claims exempted from the FTC substantiation requirement are subjective or immaterial claims. For example, the claim that Rogers used low frequency spectrum is an objective claim for which substantiation would be required in the United States but not in Canada. I refer to this in order to demonstrate that Parliament has narrowed the scope of s. 74.01(1)(b). This is relevant when applying the minimal impairment test.

[518] I recognize that s. 74.01(1)(b) is not restricted to performance claims that are "material," but rather applies to all performance claims, whereas the FTC regulatory regime focuses on material claims. However, this is not a differentiating characteristic because the evidence established that the FTC presumes performance claims to be material. Specifically the FTC presumes that performance claims might affect a consumer's decision in relation to the product. I agree with this presumption. It is impossible to believe that a performance claim would be immaterial to a consumer's decision in relation to a product. Accordingly, I am satisfied that limiting s. 74.01(1)(b) to performance claims incorporates the notion of materiality into the section. I do not view the absence of the word material in s. 74.01(1)(b) as indicative that the section is overbroad.

[519] Evidence was led that established that in the United States, the substantiation of a claim after it has been disseminated may inform the FTC's decision to commence proceedings. Obviously the applicant has the same discretion in Canada. However, the fact that the applicant, like all applicants, may elect not to proceed, is unhelpful as far as the minimal impairment test is concerned.

[520] The courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test.

[521] The applicant has suggested that in order for a test to be proper and adequate, testing must be done to a 95 per cent confidence level. I have not accepted that submission. The burden of proof is upon the respondents to prove adequate and proper testing on a balance of probabilities. No higher standard of proof can logically be required to prove a fact relevant to whether that standard of proof has been met.

[522] The applicant has suggested that the notion of a test requires elimination of the possibility that the result relied upon was a chance occurrence. This is simply consistent with the requirement that a claim be tested. I take the same view of the applicant's suggestion that the sample tested must be a representative one. These suggested requirements of s. 74.01(1)(b) do not additionally impair freedom of expression beyond

the impairment flowing from the use of the phrase "an adequate and proper test thereof."

[523] As stated elsewhere, the respondents urge that the uncertain claim be permitted to enter the marketplace until the applicant can demonstrate that it is false. While this may be less impairing, it does not address Parliament's conclusion that the harm resulting from false uncertain claims is so significant that it is better to prohibit all uncertain claims. Parliament is entitled to a measure of deference and I accept its conclusion in this regard.

[524] When I consider all of this, I come to the conclusion that s. 74.01(1)(b) only minimally impairs the fundamental freedom guaranteed by s. 2(b) of the *Charter*.

Do the benefits of s. 74.01(1)(b) outweigh its deleterious effects?

[525] At the risk of stating the obvious, a few preliminary observations are necessary. Section 74.01(1)(b) does not affect a truthful performance claim that can be tested in advance. Prohibiting a false claim from entering the marketplace is not a deleterious effect. Section 74.01(1)(b) requires substantiation of performance claims only. The reference to performance claims incorporates the notion of materiality because performance claims will always affect a consumer's decision with respect to a product or service.

[526] One deleterious effect of s. 74.01(1)(b) is that a truthful performance claim that cannot be proven true, or cannot be substantiated prior to publication, will be withheld from consumers. Related to this effect is the fact that post-publication substantiation is not a complete answer to an allegation of reviewable conduct.

[527] A second proposed deleterious effect is that a performance claim may be ambiguous. As a result, the provider may undertake a number of tests to cover all possible interpretations of the performance claim and pass those costs on to the consumer. Alternatively the provider may guess at the interpretation and face prosecution if the guess is wrong. Finally, the provider might decide to drop the claim.

[528] Professor Moorthy offered the opinion that if the provider chooses to perform all possible tests, this will delay the dissemination of the truthful information and increase the cost of the good or service.

[529] Obviously, guessing at the interpretation exposes the provider to the risk of proceedings and dropping the claim deprives the consumer of truthful information.

[530] Section 74.01(1)(b) is not ambiguous. Language in a performance claim, on the other hand, can always be ambiguous and require interpretation. In addition, disputes

can arise about whether a claim is a performance claim. This problem cannot be avoided. This is not a deleterious effect associated with s. 74.01(1)(b); it is a deleterious effect associated with language itself.

[531] One benefit of s. 74.01(1)(b) is that a performance claim that cannot be proven true or false prior to publication, but which is in fact false, will be withheld from the marketplace.

[532] Professor Moorthy expressed the opinion that by restricting the provision of information, the *Competition Act* makes it difficult for those who provide goods and services to make people aware of their product. In his opinion, it could hinder the ability of those persons to disseminate the truth about the strength of their product.

[533] However, it is also true that when a performance claim that cannot be proven in advance to be true or false, but which turns out to be false, is permitted to enter the marketplace, a negative effect on consumers' confidence in advertising will result. The provider of the good or service may be able to more readily convey information but the consumer is likely to be less willing to accept it. Preventing performance claims that cannot be proven in advance to be true or false will, at a minimum, maintain the current level of consumer confidence in advertising claims and presumably make it easier for providers of goods and services to communicate with consumers. I do not accept Professor Moorthy's opinion in this regard. I prefer the evidence of Dr. Corts.

[534] Dr. Corts testified that in his opinion, lowering the incidence of unsubstantiated claims increases consumer confidence and allows more truthful firms to more credibly and more reliably communicate their information to consumers.

[535] Dr. Beales testified that the FTC believes that an onerous substantiation requirement might deter truthful advertisements.

[536] Section 74.01(1)(b) does not impose an onerous substantiation requirement. The words adequate and proper have been held to be synonymous with sufficient and appropriate. Traditional or scientific testing is not required. I have stated elsewhere in these reasons that I do not accept the applicant's suggestion that 95 per cent testing certainty is required. Courts have applied a flexible and contextual analysis when assessing whether a representation is based on an adequate and proper test.

[537] As a practical matter, this is not a case in which the respondents were prevented from making a truthful claim because they were unable to substantiate it in advance. The respondents did make the fewer dropped calls claim. The respondents claim that in the case of more than one city, they proved the fewer dropped calls claim in advance. This Application arises because the Competition Bureau has a contrary view. Even if s. 74.01(1)(b) was not in the *Competition Act*, the respondents would still be in court

because the Competition Bureau considers the fewer dropped calls claim to be both false and misleading.

[538] Professor Moorthy noted that due to the Internet, modern day consumers have much more product information available at their fingertips. He pointed out that there are many websites where consumers comment on products, and that there are review sites for products that are very easily accessible. Professor Moorthy expressed the opinion that the Internet has increased market efficiency because consumers have better information when making decisions. It was also his opinion that competitors could use the Internet to dispute comparative performance claims.

[539] Professor Corts was of the opinion that a substantiation requirement was necessary despite the advent of the Internet. He referred to a paper entitled: "Market Transparency via the Internet, A New Challenge for Consumer Policy." Professor Corts expressed the opinion that the Internet has provided much more information for consumers, but not necessarily better information. Professor Corts noted that the same problems concerning the source of information arise whether the information is disseminated on the Internet or traditionally. He pointed out that consumer sites on the Internet can be quite extreme, and can be manipulated by firms who have people posing as consumers and posting comments.

[540] It is undoubtedly correct that modern consumers have access to more information, and I am satisfied that this means that fewer people will be deceived by false ads because the false claims will be discovered sooner. I am not satisfied, however, that this addresses the loss of confidence in advertising that results when people realize that they have been duped by or exposed to false advertising claims.

[541] As noted earlier, Professor Moorthy suggested that one effect of s. 74.01(1)(b) and the related sections dealing with administrative monetary penalties might be to cause companies to avoid any risk of contravention of the *Competition Act* by not making even truthful claims, thereby depriving consumers of helpful information.

[542] It was Dr. Corts' opinion that imposing a penalty for an unsubstantiated claim would not suppress the communication of true information.

[543] Dr. Corts also expressed the opinion that monetary penalties reduce false, misleading and unsubstantiated representations because they raise the cost of making those representations, making such behavior less attractive. It was his opinion that this would also have the effect of making sure that market prices provide appropriate incentives for firms to invest in innovation and new products, and otherwise remain in the market.

[544] When I consider the conflicting social science evidence, as well as the other evidence tendered in this Application, I am satisfied that the benefit from protecting

consumers, competitive firms and competition from the harmful effects of false or misleading performance claims outweighs the deleterious effects of preventing a true claim that cannot be tested in advance from entering the marketplace.

[545] Accordingly, I am satisfied by the evidence that s. 74.01(1)(b) of the *Competition Act* is a demonstrably justified reasonable limit prescribed by law, to which the fundamental freedom described in paragraph 2(b) of the *Charter* is subject.

Does the $10 million administrative monetary penalty provided for in the *Competition Act* engage s. 11 of the *Charter*?

[546] Section 11 of the *Charter* provides certain enumerated rights for any person "charged with an offence." The respondents have not received the benefit of all of these rights. Accordingly the question is whether the respondents are "charged with an offence".

[547] In *Regina v. Wigglesworth* [1987] 2 S.C.R. 541, at pp. 558-559, the Supreme Court of Canada decided that matters which fell within the ambit of s. 11 were "criminal and penal matters." The court also stated more specifically that "criminal and penal matters" meant proceedings that were by their very nature criminal, or when a conviction in respect of the matter could lead to a "true penal consequence." In that same decision, the court stated in part at p. 561, that a "true penal consequence" attracting protection under s. 11 of the *Charter* could be a fine that, "by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."

[548] This Application does not carry with it the possibility that the respondents would be imprisoned. It was commenced as an Application pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in the Province of Ontario. These proceedings were regulatory in nature. This Application was initiated to further and encourage public confidence in advertising in the context of the *Competition Act's* purpose, as set out in s. 1.1 of the Act.

[549] The *Competition Act* has repeatedly been described as a regulatory statute: see *R. v. Wholesale Travel Group*, [1991] 3 S.C.R 154, at pp. 222-223. The legislative history of s. 74.01 makes it clear that the 1999 amendments to the *Competition Act*, which created the provisions in issue, were designed to remove the regulation of deceptive marketing practices from the realm of criminal law.

[550] When I consider the objectives of the *Competition Act* and the deceptive marketing practices provisions, the provisions of s. 74.1(4) of the *Competition Act* describing the purpose of the administrative monetary penalties with which this Application is concerned and the civil Application process leading to the imposition in

appropriate cases of administrative monetary penalties, I am satisfied that these proceedings are not by their nature "criminal."

[551] This Application does carry with it the possibility of an administrative monetary penalty of $10 million on a first finding of reviewable conduct, and $15 million on subsequent findings.

[552] Accordingly, the question is whether such an administrative monetary penalty is a fine "which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity."

[553] Professor Corts offered the opinion that an administrative monetary penalty has to be large enough to offset the anticipated gains from making the false, misleading or unsubstantiated representations. Professor Corts was of the view that higher administrative monetary penalties are necessary when dealing with a larger market because a shift in consumer demand in a larger market leads to larger increases in profits.

[554] Professor Corts also considered that part of the incremental profit from false, misleading or unsubstantiated representations is that they induce competing firms to exit the market. This means that the firm making the representations will be more profitable in the long run. Professor Corts offered the opinion that this has to be considered when assessing the appropriate administrative monetary penalty. Professor Corts testified that this was especially true if the competitor firms had undertaken huge investments and were beginning to enter the market; such firms would be trying to pay back some of the capital that they had raised, develop a loyal customer base and establish their brand name. Dr. Corts testified that if demand was inappropriately diverted from them at such a time, they would find it much more difficult to become viable competitors of the offending firm.

[555] Finally, Professor Corts pointed out that firms with more resources will find monetary penalties less deterring because they can withstand the penalty. In this regard, the evidence established that at the time of the Advanced Wireless Spectrum auction, the wireless sector of the Canadian telecommunications industry generated approximately $12.7 billion. At that time, Rogers, Bell Canada and TELUS dominated the wireless market with 94 per cent of the subscribers and 95 per cent of the revenues.

[556] The *Competition Act* is quite specific concerning the purpose of the administrative monetary penalty. Section 74.1(4) provides that the terms of any order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the Deceptive Marketing Practices Part of the Act, and not with a view to punishment. This section of the *Competition Act* clearly informs any Application of the principle of proportionality at

the penalty-fixing stage of proceedings under s. 74.01(1)(b). Section 74.1(4) also overrides statements made when this Application was launched which suggested that the quantum of the administrative monetary penalty should reflect the "egregious activity" engaged in by the respondents.

[557] A consideration of these factors and the balance of the evidence satisfies me that the administrative monetary penalties provided for in s. 74.1(1)(c) are not "true penal consequences."

[558] Accordingly, I am satisfied that the $10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*.

Final Conclusions

[559] I am satisfied that it is dangerous, based on the evidence in this Application, to place significant weight on switch generated dropped call rates when determining whether the Chatr fewer dropped calls comparative performance claim was false or misleading.

[560] Because the applicant's assertion that the fewer dropped calls claim is false is based to a significant degree upon switch generated data, I am not satisfied that the applicant has proven on a balance of probabilities that the respondents' fewer dropped calls claim was false in Ottawa with respect to Wind Mobile from July 28, 2010, to November 30, 2010. I would have come to a similar conclusion concerning Videotron in Montréal but for the fact that I have concluded elsewhere in these reasons that a credulous and technically inexperienced consumer in the Province of Québec would not have considered Videotron a new wireless carrier.

[561] I am not satisfied due to the applicant's reliance on switch generated data that the applicant has proven on a balance of probabilities that the respondents' fewer dropped calls claim was misleading in Calgary, Edmonton and Toronto with respect to Wind Mobile from July 28, 2010, to November 30, 2010.

[562] I am satisfied that had Mobilicity produced the data requested by the applicant, it would have demonstrated that the respondents' network dropped fewer calls than Mobilicity's network from July 28, 2010, to November 30, 2010.

[563] I am satisfied that a credulous and technically inexperienced consumer expected that dropped calls would be fewer on the Chatr network, and that he or she would have "no worries about dropped calls" on the Chatr network. I am not satisfied that a credulous and technically inexperienced consumer viewing the Chatr ads expected that the difference between the dropped call experience on the respondents' network and the dropped call experience on the Wind Mobile or Public Mobile networks would be so pronounced that it would be discernible.

[564] Accordingly, I am not satisfied with the applicant's assertion that the fewer dropped calls claim is misleading unless there is a discernible difference in dropped call rates among the respondents, Wind Mobile and Public Mobile.

[565] I do not accept the applicant's contention that the fewer dropped calls claim is misleading because the dropped call rates of Wind Mobile and Chatr in Calgary were, during the relevant period, below what it termed the one per cent threshold for dropped calls.

[566] I do not accept the applicant's contention that the fewer dropped calls claim was misleading because it gave the impression that the claim was true indoors as well as outdoors. I am satisfied that the networks of Wind Mobile and Public Mobile improved with the passage of time. I am therefore satisfied that the indoor walk test results confirmed that the fewer dropped calls claim was accurate in Toronto, Ottawa and Montréal, both indoors as well as outdoors, from July 28, 2010, to November 30, 2010.

[567] I am satisfied that the Rogers benchmark drive testing results provided an adequate and proper basis for the fewer dropped calls claim made subsequent to that drive testing.

[568] I am satisfied that the Rogers drive testing in fact adequately and properly tested the fewer dropped calls claim made subsequent to that drive testing.

[569] I do not accept the applicant's submission that the Rogers drive testing results support a finding that the fewer dropped calls claim is either false or misleading.

[570] I am satisfied that drive tests conducted after the fewer dropped calls claim was made are helpful in deciding whether the claim was true, false or misleading when it was made.

[571] I am satisfied by the evidence that, during the time frame with which we are concerned, Videotron was an established brand in the Province of Québec.

[572] I am satisfied that a credulous and technically inexperienced consumer of unlimited talk and text wireless services in Québec would not view Videotron as captured by the references to "les nouveaux opérateurs sans-fil" in the contentious ads.

[573] I am satisfied that the general impression given by the fewer dropped calls claim is that the advantages of fewer dropped calls and a more reliable network were available to consumers in each Chatr zone (appels illimités sans souci dans ta zone chatr) (emphasis added). I am also satisfied that the literal meaning of the contentious claims is consistent with this general impression.

[574] I am satisfied by the evidence that s. 74.01(1)(b) of the *Competition Act* is a demonstrably justified reasonable limit prescribed by law, to which the fundamental freedom described in paragraph 2(b) of the *Charter* is subject.

[575] The $10 million administrative monetary penalty provided for in s. 74.1(1)(c) does not engage s. 11 of the *Charter*.

[576] I am satisfied that the respondents failed to conduct an adequate and proper test in Calgary and Edmonton prior to making the fewer dropped calls claim at the time of Chatr's launch in those cities on July 28, 2010, and therefore engaged in reviewable conduct contrary to s. 74.01(1)(b) of the *Competition Act*.

[577] I am satisfied that the respondents failed to conduct an adequate and proper test in Toronto against Public Mobile prior making the fewer dropped calls claim at the time of Chatr's launch in Toronto on July 28, 2010, and thereby engaged in reviewable conduct contrary to s. 74.01(1)(b) of the *Competition Act*.

[578] I am satisfied that the respondents failed to conduct an adequate and proper test in Montréal against Public Mobile prior to making the fewer dropped calls claim at the time of Chatr's launch in Montréal on September 16, 2010, and thereby engaged in reviewable conduct contrary to s. 74.01(1)(b) of the *Competition Act*.

[579] Pursuant to s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990 c. C. 43, information previously ruled confidential which was referred to during the hearing of the Application will remain confidential.

Marrocco J.

Released: August 19, 2013

CITATION: Canada (Competition Bureau) v. Chatr Wireless Inc., 2013 ONSC 5315
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20130819

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC.

Respondents

REASONS FOR JUDGMENT

Marrocco J

Released: August 19, 2013

CITATION: Canada (Commissioner of Competition) v. Chatr Wireless Inc., 2014 ONSC 1146
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20140221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE COMMISSIONER OF COMPETITION	)	*J. Thomas Curry, Jaan Lilles, Paul Erik Veel,* for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	*Kent Thomson, Anita Banicevic, James Bunting, Sean Campbell,* for the Respondents
CHATR WIRELESS INC. AND ROGERS COMMUNICATIONS INC.	)	
	)	
Respondents	)	
	)	
	)	
	)	
	)	**HEARD:** January 14, 2014

REASONS FOR PENALTY

MARROCCO A.C.J.S.C.

[1] This court found that the respondents had failed to conduct adequate and proper tests prior to claiming that Chatr Wireless Inc. ("Chatr Wireless") dropped fewer calls than Wind Mobile in Calgary and Edmonton and Public Mobile in Toronto and Montréal.

[2] The "fewer dropped calls" claim appeared on Chatr Wireless' website, in press releases, in media statements, in social media and in the fine print on Chatr handset packaging.

[3] Failure to conduct an adequate and proper test prior to making a performance claim to the public is defined as reviewable conduct in section 74.01(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act"). Section 74.01 is located in Part VII.1 which is entitled Deceptive Marketing Practices.

[4] The applicant also alleged that the fewer dropped calls claim was false and misleading under s. 74.01(1)(a) but they were not successful on this point.

[5] Where a court determines that a person has engaged in reviewable conduct, the court may issue a variety of orders pursuant to s. 74.1(1). In this case the applicant seeks orders that:

- The respondents not engage in similar reviewable conduct for a period of 10 years (s. 74(1)(a))
- The respondents pay a $5-7 million administrative monetary penalty (s. 74(1)(c))

[6] There are three factors which distinguish this case from others referred to me by the parties:

1. The applicant failed to prove that the fewer dropped calls claim was false or misleading.
2. The respondents continued testing the fewer dropped calls claim after publicly making it.
3. The respondents' post-claim testing substantiated the fewer dropped calls claim.

Misrepresentations under the Act

[7] As noted above, s. 74.01(1)(a), which prohibits false claims, was alleged but not made out by the applicant. That section will not deter an overconfident firm that honestly but mistakenly believes a false performance claim about its product.

[8] Permitting untested claims to be made in the marketplace will decrease consumer confidence because some claims will turn out to be false or misleading. Section 74.01(1)(b) is preventative. It prevents untested false or misleading claims because it requires testing prior to publication. The ultimate objective of s. 74.01(1)(b) is the protection of consumers, competitive firms and competition from the harmful effects of untested performance claims.

[9] When the respondents published the untested fewer dropped calls claim, they ran the risk that the claim might be false. In this way they disregarded Parliament's decision that the harm to consumers, competitive firms and competition from this risk outweighed the cost of prior testing. The fact that, in this particular case, post-claim testing substantiated the claim does not address this aspect of the matter.

[10] A court that finds a person has engaged in reviewable conduct can order an administrative monetary penalty under s. 74.1(1)(b) of the Act. An administrative monetary penalty decreases the number of unsubstantiated claims by raising the cost of making them.

[11] It is not sufficient for the respondents to know the claim is true because it was based on technological facts or experience, publicity regarding the matter, or any other basis. Parliament

did not create a technological facts or experience exception to s. 74.01(1)(b). Performance claims must have a foundation in adequate and proper testing.

Proportionality

[12] Subsection 74.1(4) declares that the purpose of any remedial order made under Part VII.1 is the promotion of conduct which conforms to the purposes of that Part of the *Competition Act*. Therefore the amount of any administrative monetary penalty ordered must be proportional with the nature of the person whose conduct one seeks to change.

[13] The evidence established that in early 2008, the wireless telecommunications industry in Canada was dominated by three large national carriers and a number of smaller regional providers. The three national wireless carriers, Rogers Communications Inc. ("Rogers"), Bell Canada Enterprises Inc. ("Bell") and Telus Communications Co. ("Telus"), accounted for 94% of wireless subscribers and 95% of wireless revenues.

[14] Rogers' 2010 Annual Report states that it provided wireless communications service to approximately nine million subscribers, representing 36% of all Canadian wireless subscribers. Rogers' Wireless Division generated operating revenue of $6.968 billion. Its adjusted wireless operating profit margin as a percentage of network revenue was 48.2%.

[15] Proportionality also requires keeping in mind the counterbalancing effects of the respondents' reviewable conduct, such as loss of reputation. Genuine companies like the respondents are loathe to see their reputations damaged and it can be assumed they will take steps to prevent this from happening again in the future. In this way, the counterbalancing effects of reviewable conduct will generally have a conformist effect and thus will reduce the amount of the monetary penalty.

[16] In applying the principle of proportionality the court also has to keep in mind that there is no notion of general deterrence in subsection 74.1(4).

Public Mobile in Toronto and Montreal

[17] The evidence established that the respondents never conducted an adequate and proper test against Public Mobile in Toronto or Montréal.

Toronto

[18] Chatr Wireless launched in Toronto on July 28, 2010. Expedited drive testing, which was not an adequate and proper test, comparing Chatr Wireless and Public Mobile was conducted in Toronto between September 26 and October 2, 2010. The respondents updated their Toronto results on November 2, 2010. The respondents also conducted indoor and outdoor walk testing comparisons between their network and Public Mobile in Toronto between November 29 and December 3, 2010.

[19] The evidence indicated that at that time there was a limited selection of handsets compatible with Public Mobile's network due to the high-frequency wireless spectrum purchased by Public Mobile at the 2008 spectrum auction. The evidence indicated that, when the respondents sought a handset compatible with both the Public Mobile network and their drive testing equipment, the selection was limited to the Samsung R-312. This handset was not readily available and drive testing against Public Mobile was delayed. The respondents knew, however, that this difficulty did not justify disregarding the *Competition Act* requirement to test the fewer dropped calls performance claim prior to publicly making it.

Montréal

[20] Chatr Wireless launched in Montréal on September 16, 2010. The respondents began making the fewer dropped calls claim on that date. Expedited drive testing, which was not an adequate and proper test, ran from September 15-19, 2010. Even if the expedited drive tests had been adequate and proper, which they were not, the results were not known on September 16, 2010 when the campaign launched.

[21] Partial drive testing comparing Chatr Wireless and Public Mobile in Montréal North, Montréal Centre and Montréal West occurred on October 2, November 1-9 and 26, 2010.

[22] Indoor and outdoor walk testing comparing Chatr Wireless and Public Mobile was conducted in Montréal between February 24 and March 3, 2011 but this was after the period with which we are concerned: July 28, 2010 - November 30, 2010. The indoor and outdoor walk testing could not therefore satisfy section 74.01(1)(b).

[23] The evidence did establish, however, that the Wind Mobile and Public Mobile networks improved over time because it takes time for a new wireless network to establish its operational rhythm. As a result, these indoor and outdoor walk testing results understate the respondents' dropped call advantage during the timeframe of this application.

Wind Mobile in Calgary and Edmonton

[24] The evidence established that the respondents did not conduct adequate and proper testing in Calgary and Edmonton against Wind Mobile before publicly making the fewer dropped calls representation commencing July 28, 2010.

Calgary

Drive testing results from August 6, 2010 comparing the respondents' 2G network in Calgary, which was the network generally available for Chatr Wireless customers, and Wind Mobile's 3G network, which was the network available to Wind customers, were lost at the time of the testing. Drive testing results comparing the respondents' 3G network with Wind Mobile's 3G network were not lost. Those results confirmed that the respondents' 3G network dropped fewer calls than Wind Mobile's 3G network. The respondents claim that, since their 2G network outperformed their 3G network in Calgary in 2010, it can be inferred that their 2G network

would have outperformed Wind Mobile's 3G network during the relevant timeframe. However, even if this inference counted as an adequate and proper test, it could not have been made based on annual performance measures because in July, August and September 2010 the yearly performance of the respondents' 2G network versus their 3G network was not yet available.

Edmonton

[25] Drive testing substantiating the respondents' fewer dropped calls claim against Wind Mobile in Edmonton was completed on August 5, 2010.

Due Diligence

[26] Subsection 74.1(3) of the *Competition Act* provides that if a person against whom a finding of reviewable conduct has been made exercised due diligence to prevent the conduct from occurring, no order can be made against them. Due diligence does not apply to prevent a finding of reviewable conduct. The burden of establishing due diligence rests on the respondents.

[27] In determining whether the respondents have shown due diligence the court must consider whether, despite their failure to perform adequate and proper testing, the respondents: (1) took all reasonable steps appropriate for their business to avoid publicly making the fewer dropped calls claim without adequate and proper testing, or (2) reasonably believed in a mistaken set of facts that, if true, would have meant they had adequately and properly tested the claim: see *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at 1326.

[28] The respondents knew that it was necessary to test performance claims before making them. The respondents knew months in advance that they were going to launch Chatr Wireless in the summer of 2010 and that its core message was going to be the fewer dropped calls performance claim. The respondents had an ongoing drive test programme, implemented in 2005 at a cost of $20 million, that they used to compare their network's performance with that of their competitors. They could have used this programme to adequately and properly test the claim before making it in the relevant markets but they did not.

[29] To the extent that the respondents did test the claim, they were not relying upon tests conducted by others. The respondents were relying on their own comparative drive testing results. The respondents' experience comparing their network with the Wind Mobile and Public Mobile networks can be an adequate and proper test: see *R. v. Big Mac Investments Ltd.* (1988), 24 C.P.R. (3d) 39 (Man. Q.B.). In that case the defendant was selling a weight loss machine. A principal of the defendant had used the machine over an extended period of time and had recorded her results. She had also investigated the operations of other clinics using the weight loss machine and recorded the weight loss experienced by hundreds of users. On appeal the court held that this evidence was relevant to the trial court's determination that the performance claim for the weight loss machine had been adequately tested.

[30] In this application the respondents made the performance claim against Wind Mobile in Calgary and Edmonton, and Public Mobile in Toronto and Montréal, before they had their own

comparative drive test results. The respondents argue that despite this fact they were duly diligent on several bases.

Technological facts

[31] There was a deliberate decision to make the fewer dropped calls claim against Wind Mobile and Public Mobile based on results inferred from technological facts suggesting the superiority of the respondents' networks, including higher cell site density, indoor transmission systems, low-frequency spectrum and seamless handoffs. In other words, the respondents inferred that certain key facts about their network meant it would perform better than the networks of Wind Mobile and Public Mobile. The respondents deliberately chose to rely upon these technological facts rather than testing.

[32] Mr. Garrick Tiplady testified that, following discussions with Rogers' legal, regulatory and network teams, a decision was made to perform drive testing prior to launch as additional support for the comparative performance claims. When I consider the evidence, I am satisfied that there was no mistaken belief on the part of the respondents' that reliance on these technological facts constituted an adequate and proper test of the fewer dropped calls claim.

[33] Even if I had not made this finding, the belief that inferring fewer dropped calls from higher cell site density, low-frequency spectrum, indoor transmission systems and seamless handoffs is an adequate and proper comparative test is a legal conclusion about the proper interpretation of s. 74.01(b). It is not a belief, mistaken or otherwise, in a fact or set of facts. Rather, it is a mistake of law and cannot serve as a basis for a finding of due diligence: *La Souveraine, Compagnie d'assurance générale v. Autorité des marches financiers*, 2013 SCC 63, at para. 65.

[34] If the respondents thought that technological facts that were true in Calgary and Edmonton could, when coupled with drive test results from Vancouver, constitute adequate and proper testing of the fewer dropped calls claim, the respondents' view was an erroneous legal conclusion about whether the adequate and proper test requirement in the *Competition Act* had been met.

Sampling

[35] The respondents argue that the industry practice was to rely on drive test sampling to support performance claims. Sufficient sampling means that testing need not be required in every market. The respondents referred to the 2006 Cingular Wireless Corporation decision of the U.S. National Advertising Division of the Better Business Bureaus: see NAD Case Report #4508 (May 26, 2006). In that case Sprint challenged Cingular's "more bars in more places" national advertising claim. Cingular successfully defended by relying upon drive testing conducted on a sampling basis. The sampling results were held to be sufficient to support Cingular's national performance claim. The drive testing sample consisted of results from drive tests conducted in the top 200 markets in the United States.

[36] Chatr Wireless launched in six top Canadian markets. It failed to test against Wind Mobile in two of those six top markets and against Public Mobile in another two of those six top markets. The respondents could not have reasonably believed that failing to test in several markets altogether amounted to sampling similar to that conducted by Cingular Wireless.

Validity of drive testing

[37] The respondents also relied upon *R. v. Envirosoft Water Inc.* (1995), 62 C.P.R. (3d) 365 (Alta. Prov. Ct.). The facts of that case are instructive. The product was a water softener. The trial judge observed that the science in the area was complex and the experts were divided on the basic principles. In addition, the validity of the test conducted was the subject of considerable debate, which the trial judge thought would continue after the trial. The trial judge found that the accused had been reasonably diligent in relying upon the research done before making their claims about the product.

[38] Unlike in *Envirosoft*, here there was a valid and accepted method for testing the respondents' claims. Any debate about the validity of drive testing as a way of comparing wireless networks was resolved in favour of the respondents. The results of the respondents' drive testing were accepted as a valid comparison of the performance of the networks of the respondents, Wind Mobile and Public Mobile. Drive testing done on an expedited basis, however, was not accepted by this court as a valid method of comparison. Even if it was an adequate and proper testing methodology, the expedited drive testing done against Public Mobile's network in Montréal and Toronto came after the campaign launch dates in those cities.

[39] The expedited drive testing in Montréal occurred between September 15 and 19, 2010. As indicated, Chatr Wireless launched in Montréal on September 16, 2010. The respondents began making the fewer dropped calls claim on that date.

[40] In Toronto the respondents conducted expedited drive testing between September 26 and October 2, 2010. This was almost two months after Chatr Wireless began its advertising campaign in that market. The only additional drive test that the respondents conducted against Public Mobile in Toronto during the relevant period occurred on November 2, 2010. The later test updated aspects of the September expedited drive test and was not an adequate and proper test either on its own or in combination with the earlier expedited test.

Publicity regarding Wind Mobile and Public Mobile's network problems

[41] The respondents argue that the publicity surrounding the network problems experienced by Wind Mobile and Public Mobile as they launched their services also factored into their belief that their claims were adequately and properly tested.

[42] Publicity of a competitor's problems does not constitute an adequate and proper test and the respondents could not reasonably have believed that it did. Nor can this publicity, in combination with technological facts known to the respondents, constitute adequate testing. The technological facts and adverse publicity undoubtedly confirmed the respondents' sincere belief

that their network dropped fewer calls than the networks of Wind Mobile and Public Mobile but they could not reasonably be viewed as substitutes for adequate and proper testing of the claim.

Inferring results between markets

[43] Contrary to the submission of the respondents, drive testing the performance claim in Toronto in June against Wind Mobile and Mobilicity could not reasonably be viewed as adequately and properly testing that claim against Public Mobile in Toronto.

[44] Drive testing the fewer dropped calls claim against Wind Mobile in Vancouver could not reasonably be viewed, either individually or in combination with technological facts and adverse publicity, as adequately and properly testing that claim against Wind Mobile in Calgary or Edmonton.

Internal policies and training

[45] Rogers has memorialized its business conduct policy in a Policy Manual. The existence of this manual and the continuing education of Rogers employees is evidence relevant to an assessment of due diligence. It is also relevant to an assessment of the appropriate administrative monetary penalty.

[46] Evidence was received that established the policy was intended to reflect Rogers' core values – honesty, integrity and corporate responsibility. All employees are provided with a copy of this policy; employees are educated about this policy through online and in person seminars. Rogers engages in regular compliance training in the marketing group to explain advertising guidelines and Rogers' commitment to truthful and transparent advertising.

[47] The Policy Manual outlines the scope and purpose of competition law in Canada. There is a compliance guide containing practical advice to help employees anticipate and avoid problematic conduct. There is a section on compliance and employee monitoring, training, education and responsibility. There is a statement of "dos and don'ts". One of the principles set out in the guide is that untested claims relating to the performance of a product should not be made.

[48] Despite the existence of these laudable policies, the evidence indicated an intention to make a performance claim based on support points other than adequate and proper testing. A March 10, 2010, PowerPoint presentation contained the following note: "At launch, the claim will be based on results inferred from technological fact. For longer-term, we will leverage the benchmarking that JP Larocque is performing vs. new entrants." On March 10, 2010, it was impossible to reasonably believe that results inferred from technological facts amounted to an adequate and proper test of the comparative performance of the Chatr Wireless and Public Mobile networks because Public Mobile had not yet launched its service. Public Mobile launched in Toronto on May 26, 2010 and in Montréal on June 25, 2010.

Conclusion on due diligence

[49] I am not persuaded by the evidence, including the evidence to which I have made specific reference, that the respondents were duly diligent.

Should the court impose an administrative monetary penalty?

[50] The applicant seeks an order that the respondents pay an administrative monetary penalty in the range of $5-7 million. I did not find this submission helpful because it failed to take into account two key aspects that distinguish this case from others – that the false or misleading advertising portion of the application was not established and that subsequent testing substantiated the fewer dropped calls claim.

[51] As with any order under s. 74.1(4), an administrative monetary penalty must be imposed for the purpose of promoting compliance with the *Competition Act*. An administrative monetary penalty cannot be imposed with a view to punishment or deterring others who might contemplate making unsubstantiated performance claims.

[52] A monetary penalty in the range of $5-7 million might have been justified on the facts of this case if the fewer dropped calls claim had been false or misleading.

[53] Section 74.1(5) of the Competition Act provides a number of factors to be taken into account in determining the amount of any administrative monetary penalty, many of which are relevant to this case:

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) the effect on competition in the relevant market;

(g) the gross revenue from sales affected by the conduct;

(h) the financial position of the person against whom the order is made;

(i) the history of compliance with this Act by the person against whom the order is made;

…

(j) any other relevant factor.

These criteria are analyzed below.

[54] While post-claim substantiation cannot justify the respondents' decision to expose consumers, competitive firms and competition to the prohibited risk that the untested fewer dropped calls claim might have been false, it does not follow that post-claim substantiation cannot affect the weight attached to the factors in section 74.1(5). The respondents did not make a claim they knew to be false. Rather, they made a claim they suspected to be true without adequately and properly testing that claim and, after testing, the claim proved to be true. This is relevant to determining the quantum of the administrative monetary penalty.

The reach of the conduct within the relevant geographic market and the frequency and duration of that conduct

[55] The representations were part of an extensive advertising campaign that ran from July 28, 2010 to November 30, 2010. The reach, frequency and duration of the publication of the performance claim do not aggravate the amount of the administrative monetary penalty in this case because the claim was substantiated.

The vulnerability of the class of persons likely to be adversely affected by the conduct

[56] This criterion is similarly not aggravating because post-claim testing substantiated the claim.

The materiality of the representation

[57] Comparative performance claims are always material. However this factor is not aggravating because the representation was substantiated.

The likelihood of self-correction

[58] The respondents did not immediately self-correct in the face of concern expressed by the applicant, Public Mobile and Wind Mobile, although it should be remembered that the applicant's original concern was that the fewer dropped calls claim was false or misleading.

[59] The respondents withdrew the first set of ads prior to this application. The second version (the "no worries" version) had the same central theme, namely fewer dropped calls and therefore a more reliable network. The respondents did provide the applicant with a draft of the "no worries" version of the fewer dropped calls claim prior to publishing it and asked if it was appropriate. The applicant did not respond.

[60] The respondents knew the extent to which they had tested the fewer dropped calls claim prior to making it. The fact that the respondents had a drive testing programme in place and had ample time to conduct testing between the launch of the new wireless carriers and the July 28, 2010 campaign start date, but did not properly test, does not suggest a likelihood of self-correction. This is somewhat counterbalanced by the desire to avoid a repeat of the reputational risk created by this application which is referred to elsewhere.

The effect on competition

[61] The fewer dropped calls claim may have been harmful to the new wireless carriers but, if that was the case, the harm was not inflicted in a manner which caused harm to consumers because the claim was substantiated. Equally, because the claim was substantiated, any harm inflicted on Wind Mobile and Public Mobile was appropriate. The evidence suggests that Public Mobile probably had the worst performing network of any wireless carrier in Canada during the period with which we are concerned.

[62] However competition was adversely affected because, contrary to Parliament's expressed intention, the market was exposed to the risk that the untested performance claim might be false. This aggravates the amount of the administrative monetary penalty.

Gross revenue from sales affected by the reviewable conduct

[63] This factor has only a marginal effect on the amount of the administrative monetary penalty. Any increase in gross revenue as a result of the fewer dropped calls claim was an increase in gross revenue that occurred as a result of a performance claim which was ultimately substantiated. Members of the public who relied upon the claim and became Chatr Wireless customers ultimately joined a network which dropped fewer calls than Wind Mobile and Public Mobile.

The financial position of the respondents

[64] This is a significant relevant consideration when setting the administrative monetary penalty. There is a need for regulatory sanctions to create economic incentives to foster compliance. An administrative monetary penalty will not foster compliance if the financial position of the noncompliant person is ignored: see *Rowan (Re)* (2010), 33 O.S.C.B. 91, at para. 74. According to Rogers' 2010 Annual Report, the Wireless Division generated operating revenue of $6.968 billion. Its adjusted wireless operating profit margin as a percentage of network revenue was 48.2%.

[65] I do not accept the submission that the respondents simply determined the benefit of making an unsubstantiated claim outweighed the cost of violating the *Competition Act*. I reject this submission because the reputational risk to a genuine business, such as Rogers', in an application such as this is so significant that a properly conducted cost-benefit analysis will lead to the conclusion that it is better to comply with the *Competition Act*.

The respondent's history of compliance

[66] There are no previous findings that the respondents have engaged in reviewable conduct. The applicant referred to an injunction application in the case of the *TELUS Communications Co. v. Rogers Communications Inc.*, 2009 BCCA 1610, 99 B.C.L.R. (4th) 229. This was a case in which the Court of Appeal of British Columbia upheld a motion judge's decision to grant an injunction against Rogers restraining it from publicly representing that it had "Canada's Most

Reliable Network". Rogers had made the claim without testing its network against Telus' HSPA/HSPA + network. The court stated that Telus had a very strong case and was entitled to an injunction. While this was not a trial decision, this finding is some evidence that Rogers has been willing to make aggressive representations prior to testing when it believes those untested representations are true. This is precisely what Parliament has forbidden in section 74.01(1)(b). Rogers' previous history is a relevant consideration in this application and it aggravates the amount of the administrative monetary penalty.

Other relevant factors

(1) Penalties given in past cases

[67] In *The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)* (2008), 65 C.P.R. (4th) 123, the Competition Tribunal was asked to impose an administrative monetary penalty for a breach of section 74.01(1)(b). The Imperial Brush Company claimed that its fire logs reduced the risk of chimney fires in circumstances where the Competition Tribunal could not find evidence of any adequate and proper testing of the claim. The circumstances were inherently dangerous because the unsubstantiated claim gave consumers false comfort about the likelihood of a fire. The representations at issue had persisted for years and were never substantiated. The administrative monetary penalty ordered was $25,000 when the maximum penalty for a corporation was $100,000. The financial position of Imperial Brush Company was not disclosed in the order.

[68] In *P.V.I. International Inc. v. Canada (Commissioner of Competition)*, 2004 FCA 197, 31 C.P.R. (4th) 331, the respondents made fuel saving and emission reduction performance claims about something called a "platinum vapor injector". These claims were found to be false or misleading. The Federal Court of Appeal upheld the Competition Tribunal's award of $75,000 against the corporate respondent and $25,000 each against two individual respondents, when the maximum penalty was $100,000 against a corporation and $50,000 against an individual.

[69] Subsequent to these two decisions, Parliament amended the *Competition Act* in 2009 to increase the maximum administrative monetary penalty payable by a corporation by a factor of 100, from $100,000 to $10 million. This amendment expressed Parliament's decision that the previous maximum penalty was not sufficient to promote corporate conduct in conformity with the purposes of Part VII.1 of the *Competition Act*. I agree with the applicant that the increase in the maximum monetary penalty makes cases decided prior to the 2009 amendments less persuasive.

[70] In *Commissioner of Competition v. Yellow Page Marketing*, 2012 ONSC 927, a judge of this Court ordered an $8 million administrative monetary penalty. This decision was upheld by the Ontario Court of Appeal. The applicant submits that this decision reflects Parliament's intention that deceptive marketing practices should attract more significant administrative monetary penalties. The respondents suggest that this case is not helpful because it is a case of fraud. Yellow Page Marketing had been fined and shut down by regulators in other jurisdictions

and countries. The respondents claimed that imposing a similar penalty would unfairly stigmatize them as a similar company.

[71] The applicant also referred to consent agreements to illustrate what market participants have considered appropriate monetary penalties since the 2009 amendments. Most notably, Bell Canada agreed to stop making representations that the Competition Bureau had concluded were misleading about the prices offered for its services and agreed under the terms of a Consent Agreement filed with the Competition Tribunal to pay an administrative monetary penalty of $10 million. While the conduct to which the Competition Bureau objected began in 2007, the settlement agreement was not announced until June 28, 2011, after the 2009 amendments. This particular consent agreement is not helpful, however, because the representations were misleading, a fact not present in this application.

(2) The harm caused to the respondents by the conduct of the complainants

[72] In circumstances where the untested performance claim is later substantiated, the harm caused to the respondents by the conduct of the complainants can be relevant in assessing the quantum of the administrative monetary penalty. Public Mobile took advantage of the fact that the applicant commenced this proceeding by making false statements about the respondents. Alex Krstajic, the President and Chief Executive Officer of Public Mobile, stated at a MobileMonday Toronto Conference in December 2010, attended by more than 500 people, that the Competition Commissioner had determined after its investigation that Public Mobile's network dropped fewer calls than the respondents' network. This statement was false. The applicant gave no such assurance to Public Mobile.

[73] The Chair of the Board of Wind Mobile made a speech to the Toronto Board of Trade in which he stated that the fewer dropped calls claim was so misleading that Wind Mobile had lodged a complaint with the Competition Bureau. His remarks were reported in the media. The fewer dropped calls claim was not misleading or false as far as Wind Mobile was concerned, although the Chair of the Board may have thought so when he spoke to the Toronto Board of Trade.

[74] Mobilicity, to which very little reference was made in these proceedings, publicly complained to the Competition Bureau about the fewer dropped calls claim, publicly celebrated the commencement of this application and then declined to cooperate with the applicant. Mobilicity's conduct suggests that it did not doubt that the claim was true and that it was interested in provoking the initiation of proceedings to gain a short-term public relations advantage.

[75] In addition, material information affecting dropped calls such as the "hard handoff" or the fact that Public Mobile had no roaming agreement with Rogers was not readily provided to consumers by either Wind Mobile or Public Mobile during the relevant timeframe.

[76] The harm caused to the respondents by the conduct of the complainants in this matter mitigates the amount of the administrative monetary penalty.

Conclusions on an administrative monetary penalty

[77] When I consider all of the evidence, including the evidence to which I referred, I am satisfied that an administrative monetary penalty ought to be imposed in this case and that an appropriate administrative monetary penalty is $500,000.

Should the court impose a prohibition order that Rogers not engage in substantially similar reviewable conduct?

[78] Section 74.1(2) of the *Competition Act* states that a prohibition order lasts for 10 years unless otherwise ordered. The applicant seeks an order that the respondents not engage in substantially similar reviewable conduct for a period of 10 years.

[79] The applicant submitted that a prohibition order is directed at ensuring compliance because it draws the significance of compliance with the *Competition Act* to the firm's attention. In the applicant's view the prohibition order is a reprimand and a reminder not to engage in the reviewable conduct again. The applicant pointed to decisions such as *Commissioner of Competition v. Sears Canada Inc.* (2005), 37 C.P.R. (4th) 65, as authority for the proposition that prohibition orders are routinely made even where the reviewable conduct persisted only for a limited duration. The applicant submitted that there was no reason to depart from the normal practice of making such orders following a finding of reviewable conduct.

[80] The respondents maintained that a prohibition order was a mandatory injunction rather than a reprimand. The respondents pointed out that no precedent exists for making such an order where the claim was true but untested prior to publication. The respondents also point out that the Competition Bureau has never previously asked for such a remedy where the representation was truthful. The respondents' view is that a prohibition order is an unfair punishment, in part because it exposes the respondents to a $15 million administrative monetary penalty for subsequent reviewable conduct, as well as damages or fines pursuant to sections 36(1)(b) and 66 of the *Competition Act*. The respondents argue that such consequences are excessive given the extensive drive testing conducted by Rogers and the fact that the fewer dropped calls claim was ultimately substantiated.

[81] The respondents also point out that they have suffered reputational harm as a result of these proceedings and that a prohibition order would unfairly compound that harm.

[82] The commencement of proceedings harmed the respondents because it contained an allegation of false or misleading advertising. Commencement of these proceedings was covered by at least 63 different broadcast media outlets. A national newspaper erroneously reported that the respondents had been ordered to pay $10 million because they had made misleading wireless claims.

[83] It was also incorrectly reported that the respondents had refused to address the applicant's concerns, forcing the applicant to commence this application. The evidence demonstrated that the respondents voluntarily removed the contentious advertisements, although removal by third party retailers was not immediate.

[84] The respondents were also attacked by the new wireless carriers who used the commencement and existence of this application to try to obtain a competitive advantage.

[85] The respondents were put to considerable expense in responding to this application. While there is no evidence of the actual cost, the court can take notice of its experience with the cost of proceedings generally in reaching this conclusion.

[86] I am satisfied on the evidence that the respondents have suffered reputational harm as a result of this application. While the evidence does not permit me to quantify the respondents' reputational harm, I am satisfied that reputational harm is a relevant consideration when deciding to impose a prohibition order. It is reasonable to think that genuine Canadian corporations, such as the respondents, would not repeatedly risk reputational harm and that therefore the prospect of future proceedings will encourage compliance. This is relevant when considering the need for a prohibition order.

[87] The respondents also argue that the Competition Bureau's practice is to stop pursuing a complaint once testing has resolved the issue with a claim. They referred to the Bureau's Inquiry into Canadian Auto Preservation Inc. and its "Final Coat" electronic anticorrosion device. In that instance the Bureau commenced an Inquiry under section 10 of the *Competition Act* because it was of the opinion that tests provided by Canadian Auto Preservation Inc. were not sufficient to support its claims regarding the "Final Coat" device. At the Bureau's request the company performed additional tests on the device, which the Bureau concluded were adequate and proper. The Competition Bureau then discontinued its Inquiry. The respondent submitted that this case reflects the Competition Bureau's policy for not proceeding with a complaint when adequate and proper testing occurs after commencement of an Inquiry. The respondents submit they were harshly treated because they were forced to respond to this application despite post-claim testing and substantiation of the fewer dropped calls claim.

[88] The respondents also point out that there was no distortion of the proper functioning market as a result of the fewer dropped calls claim because the claim was substantiated.

[89] Finally the respondents observe that they are multi-division telecommunications and media company and that it would be unreasonable to expose other branches of its organization, which have nothing to do with wireless communication, to such an order. In this regard, I note that prohibition orders can be limited in scope. For example, in the *Imperial Brush* case, the prohibition order expired once the claim was adequately and properly tested. In *P.V.I. International*, the false or misleading representation was that the "platinum vapor injector" significantly increased combustion efficiency when installed in a gasoline fueled internal

combustion engine. The Competition Tribunal's prohibition order applied only to representations concerning platinum vapor injectors installed in gasoline fueled internal combustion engines.

[90] When I consider all of the evidence, including the evidence to which I have referred, and considering that I am imposing an administrative monetary penalty, I am not satisfied that it is also necessary to make a prohibition order to promote conduct by the respondents that is in conformity with the purposes of Part VII.1 of the *Competition Act*.

Conclusion

[91] The applicant's request for an administrative monetary penalty is granted. The respondents will pay an administrative monetary penalty of $500,000.

[92] The applicant's request for a prohibition order is denied.

A.C.J.S.C. MARROCCO

Released: 20140221

CITATION: Canada (Commissioner of Competition) v. Chatr Wireless Inc., 2014 ONSC 1146
COURT FILE NO.: CV-10-8993-00 CL
DATE: 20140221

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

ROGERS COMMUNICATIONS INC. AND CHATR WIRELESS INC.

Respondents

REASONS FOR JUDGMENT

A.C.J.S.C. MARROCCO

Released: 20140221

2005 SCC 54
Supreme Court of Canada

Canada Trustco Mortgage Co. v. R.

2005 CarswellNat 3212, 2005 CarswellNat 3213, 2005 SCC 54, [2005] 2 S.C.R. 601, [2005] 5 C.T.C. 215, [2005] S.C.J. No. 56, 142 A.C.W.S. (3d) 1075, 2005 D.T.C. 5523 (Eng.), 2005 D.T.C. 5547 (Fr.), 259 D.L.R. (4th) 193, 340 N.R. 1, J.E. 2005-1901

Her Majesty The Queen, Appellant v. Canada Trustco Mortgage Company, Respondent

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: March 8, 2005
Judgment: October 19, 2005
Docket: 30290

Proceedings: affirming (2004), 2004 FCA 67, 2004 CarswellNat 305, [2004] 2 C.T.C. 276, 2004 CAF 67, 2004 CarswellNat 523, *(*sub nom. *R. v. Canada Trustco Mortgage Co.)* 2004 D.T.C. 6119 (F.C.A.); affirming *Canada Trustco Mortgage Co. v. R.* (2003), 2003 CCI 215, 2003 CarswellNat 5460, 2003 TCC 215, 2003 CarswellNat 1299, 2003 D.T.C. 587, [2003] 4 C.T.C. 2009 (T.C.C. [General Procedure])

Counsel: Graham Carton, Q.C., Anne-Marie Lévesque, Alexandra K. Brown, for Appellant
Al Meghji, Monica Biringer, Gerald Grenon, for Respondent

***Per curiam*:**

1. Introduction

1 This appeal and its companion case, *Mathew v. R.*, 2005 SCC 55 (S.C.C.) (hereinafter "*Kaulius*"), raise the issue of the interplay between the general anti-avoidance rule (the "GAAR") and the application of more specific provisions of the Income Tax Act, R.S.C. 1985, c.1 (5th Supp.). The Act continues to permit legitimate tax minimization; traditionally, this has involved determining whether the taxpayer brought itself within the wording of the specific provisions relied on for the tax benefit. Onto this scheme, the GAAR has superimposed a prohibition on abusive tax avoidance, with the effect that the literal application of provisions of the Act may be seen as abusive in light of their context and purpose. The task in this appeal is to unite these two approaches in a framework that reflects the intention of Parliament in enacting the GAAR and achieves consistent, predictable and fair results.

2. Facts

2 The respondent, Canada Trustco Mortgage Company ("CTMC"), carries on business as a mortgage lender. As part of its business operations, CTMC enjoyed large revenues from leased assets. In 1996 it purchased a number of trailers which it then circuitously leased back to the vendor, in order to offset revenue from its leased assets by claiming considerable capital cost allowance ("CCA") on the trailers in the amount of $31,196,700 against $51,787,114 for the 1997 taxation year. The essence of the transaction is explained in the memorandum of Michael Lough, CTMC's officer in charge of the recommendation to proceed: "The transaction provides very attractive returns by generating CCA deductions which can be used to shelter other taxable lease income generated by Canada Trust." This arrangement allowed CTMC to defer paying taxes on the amount of profits reduced by the CCA deductions which would be subject to recapture into income when the trailers were disposed of at a future date and presumably in excess of the amount claimed as CCA.

3 The details of the transaction are complex and described in greater detail in the Appendix. Briefly stated, on December 17, 1996, the respondent, with the use of its own money and a loan of approximately $100 million from the Royal Bank of Canada ("RBC"), purchased trailers from Transamerica Leasing Inc. ("TLI") at fair market value of $120 million. CTMC leased the trailers to Maple Assets Investments Limited ("MAIL") who in turn subleased them to TLI, the original owner. TLI then prepaid all amounts due to MAIL under the sublease. MAIL placed on deposit an amount equal to the loan for purposes of making the lease payments and a bond was pledged as security to guarantee a purchase option payment to CTMC at the end of the lease. These transactions allowed CTMC to substantially minimize its financial risk. They were also accompanied by financial arrangements with various other parties, not relevant to this appeal.

4 On October 18, 2002, the Minister of National Revenue reassessed CTMC on its 1997 taxation year and denied the CCA claim of $31,196,700 on the basis that CTMC had not acquired title to the trailers and, in the alternative, that the GAAR applied to deny the deduction. CTMC appealed to the Tax Court of Canada.

5 The Crown abandoned the argument that CTMC had failed to obtain title to the trailers and the appeal before the Tax Court proceeded solely on the issue of whether the GAAR applied to deny the deduction. A similar reassessment with respect to CTMC's 1996 taxation year was statute-barred. The Tax Court found in favour of CTMC, as did the Federal Court of Appeal. For the reasons that follow, we would dismiss the Crown's appeal.

3. Legislative Provisions

6 This appeal and its companion case *Kaulius* were brought and argued under s. 245 of the Income Tax Act. The relevant provisions of the Act, as they applied to the parties, read in part:

> **245.**(1) [Definitions] In this section,
>
> > "tax benefit" means a reduction, avoidance or deferral of tax or other amount payable under this Act or an increase in a refund of tax or other amount under this Act;
> >
> > . . . . .
> >
> > "transaction" includes an arrangement or event.
>
> (2) [General anti-avoidance provision] Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.
>
> (3) [Avoidance transaction] An avoidance transaction means any transaction
>
> > (a) that, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit; or
> >
> > (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit, unless the transaction may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit.
>
> (4) [Where s. (2) does not apply] For greater certainty, subsection (2) does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section, read as a whole.
>
> (5) [Determination of tax consequences] Without restricting the generality of subsection (2),

(a) any deduction in computing income, taxable income, taxable income earned in Canada or tax payable or any part thereof may be allowed or disallowed in whole or in part,

(b) any such deduction, any income, loss or other amount or part thereof may be allocated to any person,

(c) the nature of any payment or other amount may be recharacterized, and

(d) the tax effects that would otherwise result from the application of other provisions of this Act may be ignored,

in determining the tax consequences to a person as is reasonable in the circumstances in order to deny a tax benefit that would, but for this section, result, directly or indirectly, from an avoidance transaction.

. . . . .

248.(10) [Series of transactions] For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

7 A recent amendment to s. 245 (Budget Implementation Act, 2004, No. 2, S.C. 2005, c. 19, s. 52) has no application to the judgments under appeal. Although this amendment was enacted to apply retroactively, it cannot apply at this stage of appellate review, after the parties argued their cases and the Tax Court judge rendered his decision on the basis of the GAAR as it read prior to the amendment. Furthermore, even if this amendment were to apply, it would not warrant a different approach to the issues on appeal. In our view, this amendment to s. 245 serves *inter alia* to make it clear that the GAAR applies to tax benefits conferred by Regulations enacted under the *Income Tax Act*. The Tax Court judge in the instant case proceeded on this assumption, which was not challenged by the parties in submissions before us.

4. Judicial Decisions

4.1 Tax Court of Canada, [2003] 4 C.T.C. 20092003 TCC 215(T.C.C. [General Procedure])

8 The Tax Court judge found an avoidance transaction giving rise to a tax benefit under s. 245(1) and (3) of the Act. He inquired into the purpose of the CCA provisions of the *Income Tax Act* as applied to sale-leaseback arrangements, in order to determine if the transaction was abusive under s. 245(4) of the Act. He held that the purpose of the CCA provisions permitted the deduction of CCA based on the "cost" of the trailers, as defined by the transactions documents. He went on to conduct a detailed analysis of the legal transactions. He found that CTMC had acquired title and became the legal owner of the trailers, and declined to recharacterize the legal nature of the transaction. The transactions in issue, in his view, amounted to an ordinary sale-leaseback. The Tax Court judge found that the transaction fell within the spirit and purpose of the CCA provisions of the Act, and concluded that the GAAR did not apply to disallow the tax benefit.

4.2 Federal Court of Appeal, [2004] 2 C.T.C. 2762004 FCA 67(F.C.A.)

9 The Federal Court of Appeal unanimously dismissed the appeal, relying on the reasons in *OSFC Holdings Ltd. v. R.* (2001), [2002] 2 F.C. 288, 2001 FCA 260 (Fed. C.A.) ("OSFC"), in which the court had set out a two-stage analysis for abuse under the GAAR, focussed first on interpretation of the specific provisions at issue, second on the overarching policy of the *Income Tax Act*. Evans J.A., for the court, held that the Tax Court judge had not erred in concluding that, for the purposes of s. 245(4) of the Act, the transactions at issue did not constitute a misuse of a provision of the Act or an abuse of the CCA scheme as a whole. He noted that counsel for the appellant did not seek to recharacterize the transactions and did not allege that they were a sham, but argued instead that the policy underlying s. 20(1)(a) and the CCA provisions as a whole was "to permit taxpayers to claim CCA in respect of the 'real' or 'economic' cost that they incurred in acquiring an asset, and not the 'legal' cost, that is, on the facts of this case, the purchase price paid by the taxpayer" (para. 2). Going on to consider policy, Evans J.A. found that there was no clear and unambiguous policy underlying s. 20(1)(a) or the CCA scheme read as a whole that rendered the transaction a misuse or abuse of those provisions.

5. Analysis

5.1 General Principles of Interpretation

10 It has been long established as a matter of statutory interpretation that "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": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

11 As a result of the Duke of Westminster principle (*Inland Revenue Commissioners v. Duke of Westminster* (1935), [1936] A.C. 1 (U.K. H.L.)) that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable, Canadian tax legislation received a strict interpretation in an era of more literal statutory interpretation than the present. There is no doubt today that all statutes, including the Act, must be interpreted in a textual, contextual and purposive way. However, the particularity and detail of many tax provisions have often led to an emphasis on textual interpretation. Where Parliament has specified precisely what conditions must be satisfied to achieve a particular result, it is reasonable to assume that Parliament intended that taxpayers would rely on such provisions to achieve the result they prescribe.

12 The provisions of the *Income Tax Act* must be interpreted in order to achieve consistency, predictability and fairness so that taxpayers may manage their affairs intelligently. As stated at para. 45 of *Shell Canada Ltd. v. R.*, [1999] 3 S.C.R. 622 (S.C.C.):

> [A]bsent a specific provision to the contrary, it is not the courts' role to prevent taxpayers from relying on the sophisticated structure of their transactions, arranged in such a way that the particular provisions of the Act are met, on the basis that it would be inequitable to those taxpayers who have not chosen to structure their transactions that way.
>
> [Emphasis added.]

See also *65302 British Columbia*, at para. 51, *per* Iacobucci J. citing P. W. Hogg and J. E. Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76:

> It would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision.

13 The *Income Tax Act* remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation. Onto this compendium of detailed stipulations, Parliament has engrafted quite a different sort of provision, the GAAR. This is a broadly drafted provision, intended to negate arrangements that would be permissible under a literal interpretation of other provisions of the *Income Tax Act*, on the basis that they amount to abusive tax avoidance. To the extent that the GAAR constitutes a "provision to the contrary" as discussed in *Shell* (at para. 45), the Duke of Westminster principle and the emphasis on textual interpretation may be attenuated. Ultimately, as affirmed in *Shell*, "[t]he courts' role is to interpret and apply the Act as it was adopted by Parliament" (para. 45). The court must to the extent possible contemporaneously give effect to both the GAAR and the other provisions of the *Income Tax Act* relevant to a particular transaction.

5.2 Interpretation of the GAAR

14 The GAAR was enacted in 1988, principally in response to *Stubart Investments Ltd. v. R.*, [1984] 1 S.C.R. 536(S.C.C.), which rejected a literal approach to interpreting the Act. At the same time, the Court rejected the business purpose test, which would have restricted tax reduction to transactions with a real business purpose. Instead of the business purpose test, the Court proposed guidelines to limit unacceptable tax avoidance arrangements. Parliament deemed the decision in *Stubart* an inadequate response to the problem and enacted the GAAR.

15 The *Explanatory Notes to Legislation Relating to Income Tax* issued by the Honourable Michael H. Wilson, Minister of Finance (June 1988) ("Explanatory Notes") are an aid to interpretation. The Explanatory Notes state at the outset that they "are intended for information purposes only and should not be construed as an official interpretation of the provisions they describe". They state the purpose of the GAAR at p. 461:

> New section 245 of the Act is a general anti-avoidance rule which is intended to prevent abusive tax avoidance transactions or arrangements but at the same time is not intended to interfere with legitimate commercial and family transactions. Consequently, the new rule seeks to distinguish between legitimate tax planning and abusive tax avoidance and to establish a reasonable balance between the protection of the tax base and the need for certainty for taxpayers in planning their affairs.

16 The GAAR draws a line between legitimate tax minimization and abusive tax avoidance. The line is far from bright. The GAAR's purpose is to deny the tax benefits of certain arrangements that comply with a literal interpretation of the provisions of the Act, but amount to an abuse of the provisions of the Act. But precisely what constitutes abusive tax avoidance remains the subject of debate. Hence these appeals.

17 The application of the GAAR involves three steps. The first step is to determine whether there is a "tax benefit" arising from a "transaction" under s. 245(1) and (2). The second step is to determine whether the transaction is an avoidance transaction under s. 245(3), in the sense of not being "arranged primarily for *bona fide* purposes other than to obtain the tax benefit". The third step is to determine whether the avoidance transaction is abusive under s. 245(4). All three requirements must be fulfilled before the GAAR can be applied to deny a tax benefit.

5.3 Tax Benefit

18 The first step in applying the GAAR is to determine whether there is a tax benefit arising from a transaction or series of transactions of which the transaction is part.

19 "Tax benefit" is defined in s. 245(1) as "a reduction, avoidance or deferral of tax" or "an increase in a refund of tax or other amount" paid under the Act. Whether a tax benefit exists is a factual determination, initially by the Minister and on review by the courts, usually the Tax Court. The magnitude of the tax benefit is not relevant at this stage of the analysis.

20 If a deduction against taxable income is claimed, the existence of a tax benefit is clear, since a deduction results in a reduction of tax. In some other instances, it may be that the existence of a tax benefit can only be established by comparison with an alternative arrangement. For example, characterization of an amount as an annuity rather than as a wage, or as a capital gain rather than as business income, will result in differential tax treatment. In such cases, the existence of a tax benefit might only be established upon a comparison between alternative arrangements. In all cases, it must be determined whether the taxpayer reduced, avoided or deferred tax payable under the Act.

5.4 Avoidance Transaction

21 The second requirement for application of the GAAR is that the transaction giving rise to the tax benefit be an avoidance transaction within s. 245(3). The function of this requirement is to remove from the ambit of the GAAR transactions or series of transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose. The majority of tax benefits claimed by taxpayers on their annual returns will be immune from the GAAR as a result of s. 245(3). The GAAR was enacted as a provision of last resort in order to address abusive tax avoidance, it was not intended to introduce uncertainty in tax planning.

22 A "transaction" is defined under s. 245(1) to include an arrangement or event. Section 245(3) specifically defines "avoidance transaction" as a transaction that results in a tax benefit, either by itself or as part of a *series of transactions*, "unless the transaction may reasonably be considered to have been undertaken or arranged *primarily for bona fide purposes* other than to obtain the tax benefit". These two underlined expressions warrant further discussion.

5.4.1. Series of Transactions

23 Section 245(2) reads:

> (2) [General anti-avoidance provision] Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

24 Section 245(3) reads in part:

> (3) [Avoidance transaction] An avoidance transaction means any transaction
>
> (a) that, but for this section, would result, directly or indirectly, in a tax benefit ... or
>
> (b) that is part of a series of transactions, which series, but for this section, would result, directly or indirectly, in a tax benefit...

25 The meaning of the expression "series of transactions" under s. 245(2) and (3) is not clear on its face. We agree with the majority of the Federal Court of Appeal in *OSFC* and endorse the test for a series of transactions as adopted by the House of Lords that a series of transactions involves a number of transactions that are "pre-ordained in order to produce a given result" with "no practical likelihood that the pre-planned events would not take place in the order ordained": *Craven v. White* (1988), [1989] A.C. 398 (U.K. H.L.), at p. 514, *per* Lord Oliver; see also *W.T. Ramsay Ltd. v. Inland Revenue Commissioners*, [1981] 1 All E.R. 865 (U.K. H.L.).

26 Section 248(10) extends the meaning of "series of transactions" to include "related transactions or events completed in contemplation of the series". The Federal Court of Appeal held, at para. 36 of *OSFC*, that this occurs where the parties to the transaction "knew of the ... series, such that it could be said that they took it into account when deciding to complete the transaction". We would elaborate that "in contemplation" is read not in the sense of actual knowledge but in the broader sense of "because of" or "in relation to" the series. The phrase can be applied to events either before or after the basic avoidance transaction found under s. 245(3). As has been noted:

> It is highly unlikely that Parliament could have intended to include in the statutory definition of "series of transactions" related transactions completed in contemplation of a subsequent series of transactions, but not related transactions in the contemplation of which taxpayers completed a prior series of transactions.
>
> (D. G. Duff, "Judicial Application of the General Anti-Avoidance Rule in Canada: *OSFC Holdings Ltd. v. The Queen*", 57 I.B.F.D. Bulletin 278, at p. 287)

5.4.2. Primarily for Bona Fide Purposes

27 According to s. 245(3), the GAAR does not apply to a transaction that "may reasonably be considered to have been undertaken or arranged primarily for *bona fide* purposes other than to obtain the tax benefit". If there are both tax and non-tax purposes to a transaction, it must be determined whether it was reasonable to conclude that the non-tax purpose was primary. If so, the GAAR cannot be applied to deny the tax benefit.

28 While the inquiry proceeds on the premise that both tax and non-tax purposes can be identified, these can be intertwined in the particular circumstances of the transaction at issue. It is not helpful to speak of the threshold imposed by s. 245(3) as high or low. The words of the section simply contemplate an objective assessment of the relative importance of the driving forces of the transaction.

29 Again, this is a factual inquiry. The taxpayer cannot avoid the application of the GAAR by merely stating that the transaction was undertaken or arranged primarily for a non-tax purpose. The Tax Court judge must weigh the evidence to determine whether it is reasonable to conclude that the transaction was not undertaken or arranged primarily for a non-tax

purpose. The determination invokes reasonableness, suggesting that the possibility of different interpretations of the events must be objectively considered.

30 The courts must examine the relationships between the parties and the actual transactions that were executed between them. The facts of the transactions are central to determining whether there was an avoidance transaction. It is useful to consider what will not suffice to establish an avoidance transaction under s. 245(3). The Explanatory Notes state, at p. 464:

> Subsection 245(3) does not permit the "recharacterization" of a transaction for the purposes of determining whether or not it is an avoidance transaction. In other words, it does not permit a transaction to be considered to be an avoidance transaction because some alternative transaction that might have achieved an equivalent result would have resulted in higher taxes.

31 According to the Explanatory Notes, Parliament recognized the Duke of Westminster principle "that tax planning — arranging one's affairs so as to attract the least amount of tax — is a legitimate and accepted part of Canadian tax law" (p. 464). Despite Parliament's intention to address abusive tax avoidance by enacting the GAAR, Parliament nonetheless intended to preserve predictability, certainty and fairness in Canadian tax law. Parliament intends taxpayers to take full advantage of the provisions of the *Income Tax Act* that confer tax benefits. Indeed, achieving the various policies that the *Income Tax Act* seeks to promote is dependent on taxpayers doing so.

32 Section 245(3) merely removes from the ambit of the GAAR transactions that may reasonably be considered to have been undertaken or arranged primarily for a non-tax purpose. Parliament did not intend s. 245(3) to operate simply as a business purpose test, which would have considered transactions that lacked an independent *bona fide* business purpose to be invalid.

33 The expression "non-tax purpose" has a broader scope than the expression "business purpose". For example, transactions that may reasonably be considered to have been undertaken or arranged primarily for family or investment purposes would be immune from the GAAR under s. 245(3). Section 245(3) does not purport to protect only transactions that have a real business purpose. Parliament wanted many schemes that do not have any business purpose to endure. Registered Retirement Savings Plans (RRSPs) are one example. Parliament recognized that many provisions of the Act confer legitimate tax benefits notwithstanding the lack of a real business purpose. This is apparent from the general language used throughout s. 245, as opposed to language which would have adopted a broad anti-avoidance test subject to exemptions for specific schemes like RRSP transactions.

34 If at least one transaction in a series of transactions is an "avoidance transaction", then the tax benefit that results from the series may be denied under the GAAR. This is apparent from the wording of s. 245(3). Conversely, if each transaction in a series was carried out primarily for *bona fide* non-tax purposes, the GAAR cannot be applied to deny a tax benefit.

35 Even if an avoidance transaction is established under the s. 245(3) inquiry, the GAAR will not apply to deny the tax benefit if it may be reasonable to consider that it did not result from abusive tax avoidance under s. 245(4), as discussed more fully below.

5.5 Abusive Tax Avoidance

36 The third requirement for application of the GAAR is that the avoidance transaction giving rise to a tax benefit be abusive. The mere existence of an avoidance transaction is not enough to permit the GAAR to be applied. The transaction must also be shown to be *abusive* under s. 245(4).

37 It is this requirement that has given rise to the most difficulty in the interpretation and application of the GAAR. A number of features have provoked judicial debate. The section is cast in terms of a double negative, stating that the GAAR does "not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse ... or an abuse". It is tempered by the word "reasonably", suggesting some ministerial and judicial leeway in determining abuse. It does not precisely define abuse or misuse. To further complicate matters, the English and French versions of s. 245(4) differ. Overarching these particular difficulties is the central issue of the relationship between the GAAR and more specific provisions of the Act.

5.5.1 "Misuse and Abuse": Two Different Concepts?

38 We turn first to the debate about "misuse" and "abuse" which has arisen from the different English and French versions of s. 245(4). This arises from the apparently disjunctive version of the subsection in English ("misuse of the provisions of this Act" or "abuse having regard to the provisions of this Act ... read as a whole") and the non-disjunctive French version ("*d'abus dans l'application des dispositions de la présente loi lue dans son ensemble*"). This discrepancy led the majority of the Federal Court of Appeal to conclude in *OSFC* that s. 245(4) mandates two different inquiries. The first was whether there was a misuse of the particular provisions of the Act that were relied upon to achieve the tax benefit. The second was whether there was an abuse of any policy of the Act read as a whole. The term policy was used to refer collectively to purpose, object, spirit, scheme or policy (*OSFC*, at para. 66).

39 With respect, we cannot agree with this interpretation of s. 245(4). Parliament could not have intended this two-step approach, which on its face raises the impossible question of how one can abuse the Act as a whole without misusing any of its provisions. We agree with the Tax Court judge, in the present case, at para. 90, that "[i]n effect, the analysis of the misuse of the provisions and the analysis of the abuse having regard to the provisions of the Act read as a whole are inseparable". As discussed more fully below, the interpretation of specific provisions of the Act cannot be separated from contextual considerations arising from other provisions. The various provisions of the *Income Tax Act* must be interpreted in their contextual framework, so that the Act functions as a coherent whole, with respect to the particular statutory scheme engaged by the transactions.

40 There is but one principle of interpretation: to determine the intent of the legislator having regard to the text, its context, and other indicators of legislative purpose. The policy analysis proposed as a second step by the Federal Court of Appeal in *OSFC* is properly incorporated into a unified, textual, contextual, and purposive approach to interpreting the specific provisions that give rise to the tax benefit.

41 The courts cannot search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue. First, such a search is incompatible with the roles of reviewing judges. The *Income Tax Act* is a compendium of highly detailed and often complex provisions. To send the courts on the search for some overarching policy and then to use such a policy to override the wording of the provisions of the *Income Tax Act* would inappropriately place the formulation of taxation policy in the hands of the judiciary, requiring judges to perform a task to which they are unaccustomed and for which they are not equipped. Did Parliament intend judges to formulate taxation policies that are not grounded in the provisions of the Act and to apply them to override the specific provisions of the Act? Notwithstanding the interpretative challenges that the GAAR presents, we cannot find a basis for concluding that such a marked departure from judicial and interpretative norms was Parliament's intent.

42 Second, to search for an overriding policy of the *Income Tax Act* that is not anchored in a textual, contextual and purposive interpretation of the specific provisions that are relied upon for the tax benefit would run counter to the overall policy of Parliament that tax law be certain, predictable and fair, so that taxpayers can intelligently order their affairs. Although Parliament's general purpose in enacting the GAAR was to preserve legitimate tax minimization schemes while prohibiting abusive tax avoidance, Parliament must also be taken to seek consistency, predictability and fairness in tax law. These three latter purposes would be frustrated if the Minister and/or the courts overrode the provisions of the *Income Tax Act* without any basis in a textual, contextual and purposive interpretation of those provisions.

43 For these reasons we conclude, as did the Tax Court judge, that the determinations of "misuse" and "abuse" under s. 245(4) are not separate inquiries. Section 245(4) requires a single, unified approach to the textual, contextual and purposive interpretation of the specific provisions of the *Income Tax Act* that are relied upon by the taxpayer in order to determine whether there was abusive tax avoidance.

5.5.2. Abusive Tax Avoidance: A Unified Interpretive Approach

44 The heart of the analysis under s. 245(4) lies in a contextual and purposive interpretation of the provisions of the Act that are relied on by the taxpayer, and the application of the properly interpreted provisions to the facts of a given case. The first

task is to interpret the provisions giving rise to the tax benefit to determine their object, spirit and purpose. The next task is to determine whether the transaction falls within or frustrates that purpose. The overall inquiry thus involves a mixed question of fact and law. The textual, contextual and purposive interpretation of specific provisions of the *Income Tax Act* is essentially a question of law but the application of these provisions to the facts of a case is necessarily fact-intensive.

45 This analysis will lead to a finding of abusive tax avoidance when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent. As well, abusive tax avoidance will occur when a transaction defeats the underlying rationale of the provisions that are relied upon. An abuse may also result from an arrangement that circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions. By contrast, abuse is not established where it is reasonable to conclude that an avoidance transaction under s. 245(3) was within the object, spirit or purpose of the provisions that confer the tax benefit.

46 Once the provisions of the *Income Tax Act* are properly interpreted, it is a question of fact for the Tax Court judge whether the Minister, in denying the tax benefit, has established abusive tax avoidance under s. 245(4). Provided the Tax Court judge has proceeded on a proper construction of the provisions of the Act and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

47 The first part of the inquiry under s. 245(4) requires the court to look beyond the mere text of the provisions and undertake a contextual and purposive approach to interpretation in order to find meaning that harmonizes the wording, object, spirit and purpose of the provisions of the *Income Tax Act*. There is nothing novel in this. Even where the meaning of particular provisions may not appear to be ambiguous at first glance, statutory context and purpose may reveal or resolve latent ambiguities. "After all, language can never be interpreted independently of its context, and legislative purpose is part of the context. It would seem to follow that consideration of legislative purpose may not only resolve patent ambiguity, but may, on occasion, reveal ambiguity in apparently plain language." See P.W. Hogg and J.E. Magee, *Principles of Canadian Income Tax Law* (4th ed. 2002), at p. 563. In order to reveal and resolve any latent ambiguities in the meaning of provisions of the *Income Tax Act*, the courts must undertake a unified textual, contextual and purposive approach to statutory interpretation.

48 As previously stated, the predominant issue in this and its companion appeal is what constitutes abusive tax avoidance. The Explanatory Notes state in part, at pp. 464-65:

> Subsection 245(4) recognizes that the provisions of the Act are intended to apply to transactions with real economic substance, not to transactions intended to exploit, misuse or frustrate the Act to avoid tax. It also recognizes, however, that a number of provisions of the Act either contemplate or encourage transactions that may seem to be primarily tax-motivated.... It is not intended that section 245 will apply to deny the tax benefits that result from these transactions as long as they are carried out within the object and spirit of the provisions of the Act read as a whole. Nor is it intended that tax incentives expressly provided for in the legislation would be neutralized by this section.
>
> Where a taxpayer carries out transactions primarily in order to obtain, through the application of specific provisions of the Act, a tax benefit that is not intended by such provisions and by the Act read as a whole, section 245 should apply. This would be the case even though the strict words of the relevant specific provisions may support the tax result sought by the taxpayer. Thus, where applicable, section 245 will override other provisions of the Act since, otherwise, its object and purpose would be defeated.
>
> ...Thus, in reading the Act as a whole, specific provisions will be read in the context of and in harmony with the other provisions of the Act in order to achieve a result which is consistent with the general scheme of the Act.
>
> Therefore, the application of new subsection 245 must be determined by reference to the facts in a particular case in the context of the scheme of the Act.... This can be discerned from a review of the scheme of the Act, its relevant provisions and permissible extrinsic aids.

49 In all cases where the applicability of s. 245(4) is at issue, the central question is, having regard to the text, context and purpose of the provisions on which the taxpayer relies, whether the transaction frustrates or defeats the object, spirit or purpose of those provisions. The following points are noteworthy:

> (1) While the Explanatory Notes use the phrase "exploit, misuse or frustrate", we understand these three terms to be synonymous, with their sense most adequately captured by the word "frustrate".
>
> (2) The Explanatory Notes elaborate that the GAAR is intended to apply where under a literal interpretation of the provisions of the *Income Tax Act*, the object and purpose of those provisions would be defeated.
>
> (3) The Explanatory Notes specify that the application of the GAAR must be determined by reference to the facts of a particular case in the context of the scheme of the *Income Tax Act*.
>
> (4) The Explanatory Notes also elaborate that the provisions of the *Income Tax Act* are intended to apply to transactions with real economic substance.

50 As previously discussed, Parliament sought to address abusive tax avoidance while preserving consistency, predictability and fairness in tax law and the GAAR can only be applied to deny a tax benefit when the abusive nature of the transaction is clear.

51 The interpretation of the provisions giving rise to the tax benefit must, in the words of s. 245(4) of the Act, have regard to the Act "read as a whole". This means that the specific provisions at issue must be interpreted in their legislative context, together with other related and relevant provisions, in light of the purposes that are promoted by those provisions and their statutory schemes. In this respect, it should not be forgotten that the GAAR itself is part of the Act.

52 In general, Parliament confers tax benefits under the *Income Tax Act* to promote purposes related to specific activities. For example, tax benefits associated with business losses, CCA and RRSPs, are conferred for reasons intrinsic to the activities involved. Unless the Minister can establish that the avoidance transaction frustrates or defeats the purpose for which the tax benefit was intended to be conferred, it is not abusive.

53 Care must be taken in assessing the purposes for which the provisions at issue confer a tax benefit. "The [*Income Tax Act*] is a complex statute through which Parliament seeks to balance a myriad of principles" (*Shell*, at para. 43). The conferring of particular tax benefits can serve a variety of independent and interlocking purposes. These range from imposing fair business accounting principles and promoting particular kinds of commercial activity, to providing family and social benefits.

54 In interpreting the provisions of the *Income Tax Act*, the statutory language must be respected and should be interpreted according to its well-established legal meaning. In some cases, a contextual and purposive interpretation may add nuance to the well-established legal meaning of the statutory language. Section 245(4) does not rewrite the provisions of the *Income Tax Act*; it only requires that a tax benefit be consistent with the object, spirit and purpose of the provisions that are relied upon.

55 In summary, s. 245(4) imposes a two-part inquiry. The first step is to determine the object, spirit or purpose of the provisions of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids. The second step is to examine the factual context of a case in order to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue.

56 The Explanatory Notes elaborate that the provisions of the *Income Tax Act* are intended to apply to transactions with real economic substance. Although the expression "economic substance" may be open to different interpretations, this statement recognizes that the provisions of the Act were intended to apply to transactions that were executed within the object, spirit and purpose of the provisions that are relied upon for the tax benefit. The courts should not turn a blind eye to the underlying facts of a case, and become fixated on compliance with the literal meaning of the wording of the provisions of the *Income Tax Act*. Rather, the courts should in all cases interpret the provisions in their proper context in light of the purposes they intend to promote.

57 Courts have to be careful not to conclude too hastily that simply because a non-tax purpose is not evident, the avoidance transaction is the result of abusive tax avoidance. Although the Explanatory Notes make reference to the expression "economic substance", s. 245(4) does not consider a transaction to result in abusive tax avoidance merely because an economic or commercial purpose is not evident. As previously stated, the GAAR was not intended to outlaw all tax benefits; Parliament intended for many to endure. The central inquiry is focussed on whether the transaction was consistent with the purpose of the provisions of the *Income Tax Act* that are relied upon by the taxpayer, when those provisions are properly interpreted in light of their context. Abusive tax avoidance will be established if the transactions frustrate or defeat those purposes.

58 Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose. When properly interpreted, the statutory provisions at issue in a given case may dictate that a particular tax benefit may apply only to transactions with a certain economic, commercial, family or other non-tax purpose. The absence of such considerations may then become a relevant factor towards the inference that the transactions abused the provisions at issue, but there is no golden rule in this respect.

59 Similarly, courts have on occasion discussed transactions in terms of their "lack of substance" or requiring "recharacterization". However, such terms have no meaning in isolation from the proper interpretation of specific provisions of the *Income Tax Act*. The analysis under s. 245(4) requires a close examination of the facts in order to determine whether allowing a tax benefit would be within the object, spirit or purpose of the provisions relied upon by the taxpayer, when those provisions are interpreted textually, contextually and purposively. Only after first, properly construing the provisions to determine their scope and second, examining all of the relevant facts, can a proper conclusion regarding abusive tax avoidance under s. 245(4) be reached.

60 A transaction may be considered to be "artificial" or to "lack substance" *with respect to specific provisions of the Income Tax Act*, if allowing a tax benefit would not be consistent with the object, spirit or purpose of those provisions. We should reject any analysis under s. 245(4) that depends entirely on "substance" viewed in isolation from the proper interpretation of specific provisions of the *Income Tax Act* or the relevant factual context of a case. However, abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.

61 A proper approach to the wording of the provisions of the *Income Tax Act* together with the relevant factual context of a given case achieve balance between the need to address abusive tax avoidance while preserving certainty, predictability and fairness in tax law so that taxpayers may manage their affairs accordingly. Parliament intends taxpayers to take full advantage of the provisions of the Act that confer tax benefits. Parliament did not intend the GAAR to undermine this basic tenet of tax law.

62 The GAAR may be applied to deny a tax benefit only after it is determined that it was not reasonable to consider the tax benefit to be within the object, spirit or purpose of the provisions relied upon by the taxpayer. The negative language in which s. 245(4) is cast indicates that the starting point for the analysis is the assumption that a tax benefit that would be conferred by the plain words of the Act is not abusive. This means that a finding of abuse is only warranted where the opposite conclusion — that the avoidance transaction was consistent with the object, spirit or purpose of the provisions of the Act that are relied on by the taxpayer — cannot be reasonably entertained. In other words, the abusive nature of the transaction must be clear. The GAAR will not apply to deny a tax benefit where it may reasonably be considered that the transactions were carried out in a manner consistent with the object, spirit or purpose of the provisions of the Act, as interpreted textually, contextually and purposively.

5.6. Burden of Proof

63 The determination of the existence of a tax benefit and an avoidance transaction under s. 245(1), (2) and (3) involves factual decisions. As such, the burden of proof is the same as in any tax proceeding where the taxpayer disputes the Minister's assessment and its underlying assumptions of facts. The initial obligation is on the taxpayer to "refute" or challenge the Minister's factual assumptions by contesting the existence of a tax benefit or by showing that a *bona fide* non-tax purpose primarily drove the transaction: see *Hickman Motors Ltd. v. R.*, [1997] 2 S.C.R. 336 (S.C.C.), at para. 92. It is not unfair to impose this burden, as the taxpayer would presumably have knowledge of the factual background of the transaction.

64 By contrast, the inquiry into abusive tax avoidance under s. 245(4) involves a textual, contextual and purposive analysis of the provisions on which the tax benefit is based. We see no reason to maintain the distinction between a theoretical and practical perspective on the burden of proof, adopted by the majority of the Federal Court of Appeal in *OSFC*. The Federal Court of Appeal held that there is no burden on either party at the stage of interpreting the provisions at issue, since this is a question of law, which is ultimately for the court to decide. It went on to state at para. 68 that "from a practical perspective, ... [t]he Minister should set out the policy with reference to the provisions of the Act or extrinsic aids upon which he relies".

65 For practical purposes, the last statement is the important one. The taxpayer, once he or she has shown compliance with the wording of a provision, should not be required to disprove that he or she has thereby violated the object, spirit or purpose of the provision. It is for the Minister who seeks to rely on the GAAR to identify the object, spirit or purpose of the provisions that are claimed to have been frustrated or defeated, when the provisions of the Act are interpreted in a textual, contextual and purposive manner. The Minister is in a better position than the taxpayer to make submissions on legislative intent with a view to interpreting the provisions harmoniously within the broader statutory scheme that is relevant to the transaction at issue.

5.7. Summary

66 The approach to s. 245 of the Income Tax Act may be summarized as follows.

1. Three requirements must be established to permit application of the GAAR:

   (1) A *tax benefit resulting from a transaction* or part of a series of transactions (s. 245(1) and (2));

   (2) that the transaction is an *avoidance transaction* in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a *bona fide* purpose other than to obtain a tax benefit; and

   (3) that there was *abusive tax avoidance* in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer.

2. The burden is on the taxpayer to refute (1) and (2), and on the Minister to establish (3).

3. If the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer.

4. The courts proceed by conducting a unified textual, contextual and purposive analysis of the provisions giving rise to the tax benefit in order to determine why they were put in place and why the benefit was conferred. The goal is to arrive at a purposive interpretation that is harmonious with the provisions of the Act that confer the tax benefit, read in the context of the whole Act.

5. Whether the transactions were motivated by any economic, commercial, family or other non-tax purpose may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4). However, any finding in this respect would form only one part of the underlying facts of a case, and would be insufficient by itself to establish abusive tax avoidance. The central issue is the proper interpretation of the relevant provisions in light of their context and purpose.

6. Abusive tax avoidance may be found where the relationships and transactions as expressed in the relevant documentation lack a proper basis relative to the object, spirit or purpose of the provisions that are purported to confer

the tax benefit, or where they are wholly dissimilar to the relationships or transactions that are contemplated by the provisions.

7. Where the Tax Court judge has proceeded on a proper construction of the provisions of the *Income Tax Act* and on findings supported by the evidence, appellate tribunals should not interfere, absent a palpable and overriding error.

6. Application to the Facts of this Case

67 The appellant Crown agreed with the finding of the Tax Court judge that there was a tax benefit and an avoidance transaction. Therefore, the only issue is whether there was abusive tax avoidance under s. 245(4).

68 The respondent purchased and leased trailers in order to generate CCA deductions, which were then used to shelter other taxable lease income generated by CTMC. It is common ground that on their face, the CCA provisions permit the deductions claimed. It is also common ground that a standard sale-leaseback transaction, involving qualifying assets, where the vendor is also the lessee, is consistent with the object, spirit or purpose of the CCA provisions. However, the appellant submits that the manner in which the respondent structured and financed the purchase, lease and sublease of the trailers contravened the object, spirit or purpose of the CCA regime and resulted in abusive tax avoidance under s. 245(4) of the Income Tax Act.

69 As discussed above, the practical burden of showing that there was abusive tax avoidance lies on the Minister. The abuse of the Act must be clear, with the result that doubts must be resolved in favour of the taxpayer. The analysis focuses on the purpose of the particular provisions that on their face give rise to the benefit, and on whether the transaction frustrates or defeats the object, spirit or purpose of those provisions.

70 The appellant submits that the object and spirit of the CCA provisions are "to provide for the recognition of money spent to acquire qualifying assets to the extent that they are consumed in the income-earning process", relying on the reasons of Noël J.A. in *Duncan v. R.* (2002), [2003] 2 F.C. 25, 2002 FCA 291 (Fed. C.A.), at para. 44. The appellant submits that the transaction involved no real risk and that CTMC thus did not actually spend $120 million to purchase the trailers from TLI. In the appellant's view, CTMC created a "cost for CCA purposes that is an illusion" without incurring any "real" expense. This, the appellant argues, contravenes the object and spirit of the CCA provisions and constitutes abusive tax avoidance within s. 245(4) of the Act. The appellant summarizes its main submission as follows:

> In this case, the pre-ordained series of transactions misuses and abuses the CCA regime because it manufactures a cost for CCA purposes that does not represent the real economic cost to CTMC of the trailers. CTMC borrowed $97.4 million from the Royal Bank, but ... the loan was effectively repaid in its entirety on the day it was made. The assignment by CTMC to the Bank of MAIL's rent payments under the lease continued the circular flow of money.... There was no risk at all that the rent payments would not be made. Even the $5.9 million that CTMC apparently paid in fees was fully covered as it, along with the rest of CTMC's contribution of $24.9 million in funding, will be reimbursed when the $19 million bond pledged to CTMC matures in December 2005 at $33.5 million.
>
> CTMC incurred no real economic cost, and thus was not entitled to any "recognition for money spent to acquire qualifying assets"....
>
> [Emphasis added; paras. 80-81.]

71 The respondent takes a different view of the purpose of the CCA provisions and the transaction. It relies on the Tax Court judge's conclusion that the transaction was a profitable commercial investment and fully consistent with the object and spirit of the Act. The respondent submits that its deductions were permitted under the "Leasing Property Rules" and the "Specified Leasing Property Rules" of the Act. It argues that the specific rules enacted by Parliament to address CCA on leased assets are plainly a vital part of the statutory scheme, and that the GAAR cannot be utilized to change the scope of those rules. The respondent submits that it is the policy of the Act that "cost" means the price that the taxpayer gave up in order to get the asset, except in specific and precisely prescribed circumstances not here applicable. The respondent argues that the GAAR cannot be used to override Parliament's explicit policy decision to limit the scope of the rules.

72 The respondent argues that the transaction was consistent with the object and spirit of the legislation. The Act's inclusion of specific provisions that take "cost" to mean the amount "at risk" in limited circumstances illustrates the general policy of the Act that the term "cost" outside of those specific provisions means cost as understood at law, namely the amount paid. A cost is not reduced to reflect a mitigation of economic risk. In the result, the respondent argues that on the facts of this case "it may reasonably be considered that the transaction would not result directly or indirectly in a misuse ... or an abuse ..." under s. 245(4).

73 We are of the view that the appellant's arguments do not reflect a proper interpretation of the GAAR and that the respondent's position should prevail. We are led to this conclusion by a textual, contextual and purposive interpretation of the relevant provisions of the *Income Tax Act*.

74 Textually, the CCA provisions use "cost" in the well-established sense of the amount paid to acquire the assets. Contextually, other provisions of the Act support this interpretation. Finally, the purpose of the CCA provisions of the Act, as applied to sale-leaseback transactions, was, as found by the Tax Court judge, to permit deduction of CCA based on the cost of the assets acquired. This purpose emerges clearly from the scheme of the CCA provisions within the Act as a whole. The appellant's argument was not that the purpose of these provisions was unclear, but rather that the GAAR ought to override their accepted purpose and effect, for reasons external to the provisions themselves.

75 The appellant suggests that the usual result of the CCA provisions of the Act should be overridden in the absence of real financial risk or "economic cost" in the transaction. However, this suggestion distorts the purpose of the CCA provisions by reducing them to apply only when sums of money are at economic risk. The applicable CCA provisions of the Act do not refer to economic risk. They refer only to "cost". Where Parliament wanted to introduce economic risk into the meaning of cost related to CCA provisions, it did so expressly, as, for instance, in s. 13(7.1) and (7.2) of the Act, which makes adjustments to the cost of depreciable property when a taxpayer receives government assistance. "Cost" in the context of CCA is a well-understood legal concept. It has been carefully defined by the Act and the jurisprudence. Like the Tax Court judge, we see nothing in the GAAR or the object of the CCA provisions that permits us to rewrite them to interpret "cost" to mean "amount economically at risk" in the applicable provisions. To do so would be to invite inconsistent results. The result would vary with the degree of risk in each case. This would offend the goal of the Act to provide sufficient certainty and predictability to permit taxpayers to intelligently order their affairs. For all these reasons, we agree with the Tax Court judge's conclusion that the "cost" was $120 million, not zero as argued by the appellant.

76 The appellant's submissions on this point amount to a narrow consideration of the "economic substance" of the transaction, viewed in isolation from a textual, contextual and purposive interpretation of the CCA provisions. It did not focus on the purpose of the CCA provisions read in the context of the Act as a whole, to determine whether the tax benefit fell outside the object, spirit or purpose of the relevant provisions. Instead, it simply argued that since there was (as it alleged) no "real economic cost", the GAAR must apply. As discussed earlier, the application of the GAAR is a complex matter of statutory interpretation in which the object, spirit and purpose of the provisions giving rise to the tax benefit are assessed in light of the requirements and wording of the GAAR. While the "economic substance" of the transaction may be relevant at various stages of the analysis, this expression has little meaning in isolation from the proper interpretation of specific provisions of the Act. Any "economic substance" must be considered in relation to the proper interpretation of the specific provisions that are relied upon for the tax benefit.

77 The appellant originally suggested that the GAAR should be used to override the usual effect of the CCA provisions for a second reason - namely that the relationships and transactions that are expressed in the documents are abusive of the provisions of the Act and should be set aside. It properly abandoned this argument and the submission that the transaction was a sham before the Federal Court of Appeal. Here the documents detailing the transaction left no uncertainty as to the relationships between the parties. CTMC paid $120 million to TLI for the equipment, partly with borrowed funds and partly with its own money. Having become the owner of the equipment, it leased it to MAIL. MAIL then subleased it back to the vendor, TLI. The relationships between the parties as expressed in the relevant documentation were not superfluous elements; they were the very essence of the transaction.

78 As the Tax Court judge concluded, under the CCA scheme, "[l]eases of such [exempt] properties will continue to be viewed as acceptable means of providing lower cost financing" (para. 67). TLI's use of the money ultimately reduced the risk, but a company in the financing business is expected to do what it can to reduce risk. Therefore, the way the borrowed money was used provided no grounds for concluding that there was abusive tax avoidance. The Tax Court judge, after considering all the circumstances, found that the transaction was not so dissimilar from an ordinary sale-leaseback to take it outside the object, spirit or purpose of the relevant CCA provisions of the Act and Regulations.

79 In determining the result in this appeal, the Tax Court judge's conclusions on matters of fact should not be displaced provided that they are based on the correct legal analysis and find support in the evidence.

80 The Tax Court judge's analysis on the issue of abuse under s. 245(4) is largely consistent with the approach to the application of the GAAR we have adopted. He rejected the two-stage overriding-policy approach to abuse and misuse. He went on to inquire into the policy or purpose underlying the CCA treatment in sale-leaseback arrangements. Construing the CCA provisions as a whole, he rejected the submission that "cost" in the relevant provisions of the Act should be reread as "money at risk", and he also rejected the argument that the "economic substance" of the transaction determined that there was abusive tax avoidance. He conducted a detailed analysis of the transactions to determine whether they fell within the object, spirit or purpose of the CCA provisions. In the end, he concluded that a tax benefit was consistent with the object, spirit and purpose of the CCA provisions and held that the GAAR could not apply to disallow the tax benefit. These conclusions were based on a correct view of the law and were grounded in the evidence. They should be confirmed.

7. Conclusion

81 We would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

Appendix

I. The following parties weave through the multiple transactions at one point or another:

Canada Trustco Mortgage Company ("CTMC" or "Purchaser" or "Lessor" or "Borrower"), respondent, was a large diversified financial institution carrying on business in Canada.

Royal Bank of Canada (Canadian branch) ("RBC" or "Lender").

Transamerica Leasing Inc. ("TLI" or "Vendor" or "Sublessee"), a corporation in the United States.

Maple Assets Investments Limited ("MAIL" or "Lessee" or "Sublessor"), a limited liability company incorporated under the laws of England.

Maple Assets Charitable Trust ("MACT" or "Trust"), constituted by an instrument of trust dated December 17, 1996, owns 100 percent of the shares in MAIL.

Royal Bank of Canada Trust Company (Jersey) Limited ("RBC Jersey" or "Trustee") is the trustee of MACT and is a wholly owned subsidiary of RBC, incorporated in Jersey.

Royal Bank of Canada Trust Corporation Limited ("RBCTC" or "Manager"), a company incorporated in England, undertook to manage and fulfil the affairs and obligations of MAIL under the relevant transactions and to provide the directors and officers of MAIL.

Transamerica Finance Corporation ("TFC" or "Guarantor"), the parent corporation of TLI, who guaranteed to MAIL the performance of all TLI's obligations under the sublease agreement and to CTMC all TLI's obligations under the "Equipment Purchase Agreement".

Macquarie Corporate Finance (USA) Inc. ("Lease Arranger").

II. CTMC held as part of its ongoing business a portfolio of loans and leases to generally larger corporations and government agencies. CTMC testified that it was looking for a leasing arrangement in the range of $100 million. It specified the type of equipment (long-term assets that were easy to value, such as tractors or trailers), the duration of the lease and the strength of the proposed lessee. The structure of the leasing arrangement was left to the Lease Arranger. The trailers remained in the possession of TLI and CTMC continued to own the trailers, to lease them out, and to earn income from them. CTMC previously entered into similar arrangements to the one implemented in this case. The Lease Arranger arranged the TLI deal which was approved by CTMC's Board of Directors. The key transactions proceeded as follows:

The Purchase and Sale of the Trailers

III. On December 17, 1996, CTMC and TLI entered into an agreement for the purchase and sale of trailers at a fair market value of $120 million. TLI agreed to sell and CTMC agreed to purchase the trailers absolutely and ownership in the trailers passed from TLI to CTMC.

IV. On December 17, 1996, for administrative convenience, CTMC appointed TLI as trustee and agent of CTMC to hold in TLI's name, the certificate of title, certificate of ownership, registration and like documentation in respect of the trailers.

Lease of the Trailers to MAIL and the Option to Purchase

V. The terms of the Lease between CTMC and MAIL included the following:

1. the term was for an initial period ending December 1, 2014;

2. the rent payments under the Lease were based upon an effective interest rate of 8.5 percent;

3. MAIL, as lessee, was required to make semi-annual payments to CTMC; and

4. MAIL was provided with an option to purchase the trailers, $84 million being the First Option Value on December 1, 2005 and another option exercisable at the fair market value on December 1, 2014.

Sublease of the Trailers to TLI

VI. Most of the terms of the Sublease to TLI are similar to those in the Lease to MAIL. The Sublease provided TLI with purchase options similar to those provided to MAIL.

Security for the Sublease

VII. On December 17, 1996, pursuant to the terms of the Sublease, TLI prepaid all amounts due to MAIL under the Sublease (approximately $120 million). As a result of the prepayment, TLI had no ongoing Sublease payment obligations and there was no credit risk to MAIL under the terms of the Sublease. TLI maintained certain obligations with respect to indemnities and early termination. TLI retained a net present value benefit of 3.35 percent of the cost of the trailers being the difference between the payment TLI received from CTMC for the sale of the trailers and the prepayment of rent TLI paid to MAIL.

Security for the Lease

VIII. On December 17, 1996, MAIL applied the prepayment it received from TLI as follows:

1. MAIL placed on deposit with the RBC an amount equal to the Loan (approximately $100 million); and

2. MAIL paid the balance of the prepayment (approximately $20 million) to RBC Jersey on the condition that RBC Jersey use these funds to purchase a Government of Ontario Bond (the "Bond"), maturing on December 1, 2005.

IX. On December 17, 1996, the Bond was pledged to CTMC as security for MAIL's obligation to pay the Purchase Option Payments or the Termination Values under the Lease. The risk of the inability of MAIL to pay the First Option Value was removed by the acquisition of the Bond and the provision to CTMC of a security interest in the Bond.

Security for the Loan

X. On December 17, 1996, CTMC assigned to RBC the rent payments owed to CTMC from MAIL under the Lease. CTMC also provided MAIL with an irrevocable instruction to pay the assigned rent payments to RBC such that RBC would apply the rent payments directly to the installment payments due by CTMC to RBC under the terms of the Loan Agreement. RBC's recourse under the Loan was limited to the rent payments assigned to it by CTMC.

XI. The rent payments under the Lease and a portion of the First Option Value would be applied to pay off the RBC loan and the remainder of the purchase option price would be covered by the Bond.

The Effect of Non-Recourse Debt on Regulatory Capital Requirements

XII. The use of non-recourse debt to finance the purchase of the trailers significantly improved CTMC's management of regulatory capital requirements.

Guarantees

XIII. On December 18, 1996, TFC, the parent corporation of TLI, unconditionally and irrevocably guaranteed to MAIL and to CTMC the performance of TLI's obligations under the relevant transactions.

Reversibility of the Transactions

XIV. The transactions in issue could be unwound if there were adverse changes affecting CTMC.

Return on Investment

XV. CTMC would realize a before-tax return of approximately $8.5 million from the transactions.

IN THE MATTER OF "AN ACT RESPECTING THE CANADIAN PACIFIC RAILWAY," 44 VICT. CH. 1, AND THE CONSTRUCTION OF THE SUDBURY BRANCH OF THE SAID RAILWAY.

1905

*Mar. 17, 20, 21.

*April 6.

THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPLICANTS.

AND

THE JAMES BAY RAILWAY COMPANY..... } CONTESTANTS.

ON A REFERENCE FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Branch lines—Canadian Pacific Rway. Co's. charter—44 V. c. 1, (D), and schedules—Construction of contract—Limitation of time—Interpretation of terms—"Lay out", "Construct", "Acquire"—"Territory of Dominion"—Hansard debates—Construction of statute—"The Railway Act, 1903."

The charter of the Canadian Pacific Railway Company, [44 Vict. ch. 1, (D.)] and schedules thereto appended imposes limitations neither as to time nor point of departure in respect of the construction of branch lines;—they may be constructed from any point of the main line of the Canadian Pacific Railway between Callender Station and the Pacific Seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity of any further legislation.

On a reference concerning an application to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under section 43 of "The Railway Act, 1903", it is competent for objections as to the expiration of limitation of time to be taken by the said Board, of its own motion, or by any interested party.

SPECIAL CASE submitted by the Board of Railway Commissioners for Canada for hearing and consideration, under the provisions of the forty-third section of The Railway Act, 1903.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

The statement of the case was as follows :—

" 1. The Canadian Pacific Railway Company was incorporated in 1881 by Letters Patent issued by the Governor General under the Great Seal of Canada pursuant to section 2 of the Act 44 Victoria, chapter 1.

" 2. The said Letters Patent are in the form set forth as schedule A to the said Act and the contract between Her late Majesty and the syndicate whose rights were subsequently acquired by the Canadian Pacific Railway Company, is also set forth as a schedule to the said Act, which will be found in the statutes of Canada for the year 1881 on pages 3 to 30 both inclusive.

" 3. On 14th November, 1902, the said company deposited in the Department of Railways and Canals at Ottawa a map and plan of a proposed branch line of railway from a point near Sudbury, on the company's main line of railway, to a point near Kleinburg, on the Ontario and Quebec Railway, all in the Province of Ontario, together with profile and book of reference.

" 4. On the 18th day of November, 1902, the said map and plan, profile and book of reference were duly sanctioned by the Minister of Railways as appears by his certificate indorsed thereon.

" 5. Subsequently an application to the Board of Railway Commissioners for Canada was made by the Canadian Pacific Railway Company for the approval of certain deviations from the said proposed route.

" The James Bay Railway Company was incorporated by statute 58 & 59 Victoria (Canada), chapter 50 and thereby authorized to construct a railway from Parry Sound in the Province of Ontario to French River, thence northerly to the easterly side of Lake Wahnapitae and thence to James Bay, and by statute 60 & 61 Victoria (Canada), chapter 47 the James Bay Railway

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Company was authorized to extend its line from Parry Sound to the City of Toronto or to a point adjacent thereto.

"7. Upon the said application to the Board of Railway Commissioners, the James Bay Railway Company filed a protest with the said Board, and being notified of the hearing of the application by the said Board appeared and objected to the approval of the said deviations upon the ground that the Canadian Pacific Railway Company had no power to construct the branch in question for two reasons:—

"(*a*) That the period within which branch lines of railway could be constructed by the Canadian Pacific Railway Company under its statutory and charter authority had expired; and—

"(*b*) That no such authority empowered the construction, at any time, of branch lines in the Province of Ontario.

"The following questions, being in the opinion of the said Board of Railway Commissioners questions of law, are submitted by the said board for the opinion of the Supreme Court of Canada:

"I. Has the Canadian Pacific Railway Company, under the legislation, schedules and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed?

"II. Do such legislation, schedules and charter authorize construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario?

"III. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired?

"8. All statutes and orders-in-council, also the said maps, plans, profiles and books of reference may be referred to on the argument of the case subject to all objections as to their admissibility in evidence.

"9. All the statements in the schedule hereto for the purpose of this reference are admitted by the parties to be correct and may be used on the argument subject to all objections as to their admissibility in evidence.

"SCHEDULE."

"REFERRED TO IN THE FOREGOING STATEMENT OF CASE."

"(1) At the date of the Canadian Pacific Railway Charter (1881) the territory through which its main line was to be constructed was, with the exceptions to be mentioned, almost completely uninhabited and only by its general characteristics had become known to the people of Canada. The exceptions to this statement are:—

"(*a*) A small settlement existed at Port Arthur and Fort William:

"(*b*) Southern portions of the Province of Manitoba and as far west at the present western boundary of the Province had been surveyed and were sparsely settled, particularly in the neighborhood of Rat Portage and the Red River District where the Winnipeg settlement was:

"(*c*) Some portions of the country between such western boundary and British Columbia had been surveyed into blocks of sixteen townships each:

"(*d*) A small settlement on the British Columbia coast.

"(2) From year to year after the date of the contract the Government of the Dominion of Canada caused portions of Manitoba and the Northwest Territories to be surveyed and set off into townships and sec-

1905

In re BRANCH LINES CAN. PAC. RY. CO.

tions but it was not until the year 1901 that the last of the townships in the North-West Territories and western part of Manitoba through which the railway runs was surveyed and set off into sections. Some of the territory in the eastern part of Manitoba and the western part of Ontario, and in British Columbia, together with large tracts in Manitoba and the North-West Territories through which branch lines of the Canadian Pacific Railway may at some time run (if the contentions of the Canadian Pacific Railway in in question herein are sustained) have not yet been surveyed even into townships by the Government.

" (3) At the date of the Canadian Pacific Railway charter the main line of the railway north of Lake Superior had been projected to run some distance north of the Lake and join the line between the Lake and Selkirk. The accompanying sketch marked Plan No. 1, (partial copy of a map attached to the report of the then Engineer-in-Chief of the Department of Railways—Mr. Sandford Fleming—dated 26th April 1878), shows the projected junction of the eastern and Lake Superior sections of the railway and the line to Fort William as then contemplated. After that date the route of the main line was changed. The part of it lying north of Lake Superior was brought more to the south so as to skirt the Lake and the western end of the eastern section was made to join the eastern end of Lake Superior section at or near Fort William as shown in the accompanying sketch marked Plan No. 2 which is a partial copy of a map.

" (4) Prior to 1st May, 1891, the Canadian Pacific Railway Company, without any other legislative authority than that contained in the legislation of the Parliament of Canada appearing in the said statute 44 Vict., ch. 1, and the schedules thereto and the charter issued in pursuance thereof, constructed and

equipped the branch lines of railway or extensions of branches in List A, in paragraph 5, hereof. Subsequent to said first May, 1891, the Canadian Pacific Railway Company have constructed, without any such other authority, the branches or extensions of branches set out in List B in paragraph 5 hereof. In respect of the branches or extensions of branches set out in the said lists, those which are accompanied by the word "(Inspected)" were inspected by a Government Engineer and permission granted to the Company to open such branches respectively for the public conveyance of passengers.

(5) For the information of the court the following lists have been prepared:—

"LIST A"

BRANCHES OF THE COMPANY'S MAIN LINE CONSTRUCTED PRIOR TO MAY 1ST, 1891."

"1. Ontario: The Algoma Branch from Sudbury to Sault Ste. Marie, 182·1 miles. Constructed 1883-6 (Inspected).

"2. Ontario: The Stobie Branch from Sudbury to Copper Mines, 5·6 miles. Constructed 1887.

"3. British Columbia: The New Westminster Branch from New Westminster Junction to New Westminster, 13·7 miles. Constructed 1887. (Inspected).

"4. British Columbia: The Port Moody Branch from Port Moody to Vancouver, 13 miles. Constructed 1887.

"5. Manitoba: The Pembina Mountain Branch from Winnipeg to Manitou, 110·1 miles. Constructed 1882. (Inspected).

"6. Manitoba: The Gretna Branch from Rosenfeld to Gretna, 13·7 miles. Constructed, 1882.

"7. Manitoba: The Selkirk Branch from Winnipeg to West Selkirk, 24 miles. Constructed 1883. (Inspected).

1905

In re BRANCH LINES CAN. PAC. RY. CO.

"LIST 'B.'"

"BRANCHES CONSTRUCTED SUBSEQUENT TO MAY 1ST, 1891."

"8. Ontario: The Dyment Branch from Dyment to Ottamine, 7 miles. Constructed 1900. (Inspected.)

"9. British Columbia: The Mission Branch from Mission Junction to Mission, 10 miles. Constructed 1895.

"10. British Columbia: The Arrow Lake Branch from Revelstoke to Arrowhead, 27.7 miles. Constructed 1897.

"11. British Columbia: The Coal Harbour Branch from Vancouver to Coal Harbor, 1.2 miles. Constructed 1903.

"12. Manitoba: An extension of the Stonewall Branch, from Stonewall to Teulon, 19 miles. Constructed 1898. (Inspected.)

"13. Manitoba: The Lac du Bonnet Branch from Molson to Lac du Bonnet, 27 miles. Constructed 1900. As to this branch the Dominion Statute 63 & 64 Vict., ch. 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

"14. Manitoba: The McGregor Branch from McGregor to Brookdale, 36 miles. Constructed 1900-02. As to this branch the Dominion Statute 63 & 64 Vict., ch 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

"15. Manitoba: Extension of Souris Branch from Souris to Glenboro, 45.7 miles. Constructed 1891-2. (Inspected.)

"16. Manitoba: Extension of Souris Branch from Napinka to Deloraine, 18.6 miles. Constructed 1892.

"17. Manitoba and North-West Territories: The Pheasant Hills Branch from Kirkella in Manitoba to

Haywood in the North-West Territories, 146 miles. Constructed 1903-4. (Inspected.)

"18. Manitoba and North-West Territories: The Souris Branch from Kemnay to Estevan, 156.2 miles. Constructed 1891-2. (Inspected from Kemnay to Melita.)

"19. North West-Territories: The Portal Branch from North Portal to Pasqua, 160.3 miles. Constructed 1893."

The statement then referred to Dominion legislation and action respecting subsidies for branch lines or extensions thereof constructed by the Canadian Pacific Railway Company under its charter; and certain Parliamentary references thereto, that is to say;

As to the Algoma Branch, in Ontario:— 47 Vict., ch. 1 (sanctioning a Government loan), sec. 5. (At this time the Algoma Branch Line had been constructed to Algoma on the Georgian Bay.)—48 & 49 Vict., ch. 57, secs. 1, 3 and 10; 49 Vict., ch. 9, secs. 2 and 3; 50 & 51 Vict., ch. 56, sec. 4. The Company enacted by-laws in connection with the issue of the branch bonds, and, on 19th May, 1887, an order-in-council was passed approving of such by-laws.

As to the Dyment Branch, in Ontario, 63 & 64 Vict., ch. 8, authorized a cash subsidy. "The subsidy has been paid by the Dominion Government to the Canadian Pacific Railway Company. The subsidy agreement between the Crown and the company, dated 28th August, 1902, and signed on behalf of Her Majesty by the Acting Minister of Railways, contains the following recital:—'Whereas the company was incorporated and authorized to build the railway hereinafter mentioned by the Act or Acts following, namely, Canada 1881, chapter 1, section 14.' This section is the clause in the company's original charter authorizing the construction of branch lines."

1905

In re BRANCH LINES CAN. PAC. RY. CO.

As to the Arrow Lake Branch, in British Columbia. 55 & 56 Vict., ch. 5, sec. 3, authorized a cash subsidy. "The subsidy has been paid by the Dominion Government to the company."

As to the Pheasant Hills Branch, in Manitoba and North-West Territories, by 3 Edw. VII., ch. 57, a cash subsidy was authorized. "Nearly all of this subsidy has been paid by the Dominion Government to the Canadian Pacific Railway Company. The subsidy agreement is dated 14th January, 1904, and the recital contains a reference to the company's original charter similar to that in the Dyment Branch."

As to the Souris Branch, in Manitoba and North-West Territories, by 53 Vict., ch. 4, sec. 1, "the Governor-in-Council may grant subsidies in land hereinafter mentioned to the railway companies and towards the construction of the railways also hereinafter mentioned, that is to say:—To the Canadian Pacific Railway Company, Dominion lands to an extent not exceeding six thousand four hundred acres per mile for a branch line to be constructed from Glenboro' westerly a distance of about sixty miles, to a point on the proposed branch railway of the said company running from Brandon, south-westerly.—To the Canadian Pacific Railway Company, Dominion lands to an extent not exceeding six thousand four hundred acres per mile for a branch line of railway from a point at or near Brandon, on the main line of the Canadian Pacific Railway, south-westerly to or near township three, range twenty-seven, west of the first principal meridian, and thence westerly a total distance of one hundred miles; and also a similar grant, at the same rate per mile, for the said company's proposed branch railway from a point on the line just described at or near township three, range twenty-seven, west of the first principal meridian, easterly to Deloraine, a

distance of about twenty-five miles,—making the total length of railway to which this grant is applicable one hundred and twenty-five miles."

"The order-in-council of 18th of May, 1899, providing for this grant of land states that: 'It is the intention of the company to build these extensions under the powers conferred upon it in relation to the building of branch lines.' The order-in-council of 7th February, 1891, sets apart the reservation of land required to meet the above grant. Orders-in-council were made in 1890 and in 1891 (after 1st May) extending the time for completing this branch. The order-in-council of 24th August, 1894, provides for a land grant of 6,400 acres per mile, for the extension of the Souris Branch from a point in the vicinity of Souris in a westerly direction, a distance of about 32 miles. The order-in-council of 22nd August, reports that the company has earned 1,408,704 acres of land by the construction of the Souris Branch and provides for grants thereof; 54 & 55 Vict., ch. 10 authorizes the Governor in Council to grant the land subsidies for another branch in Manitoba; 54 and 55 Vict., ch. 71, "authorizes the issue of Consolidated Debenture Stock to use in acquiring or satisfying bonds issued in respect of the Souris Branch and contains the following words in sub-section (*a*) of section 1; 'The company being at the time of the passing of this Act empowered by its charter to construct the same.' All this stock has been issued and sold by the company and is now outstanding."

The statement continues :—

"The only reference in the statutes to the Sudbury Line is contained in 51 Vict. ch. 51 (1888), which is the Act increasing the company's bonding powers on branch lines from $20,000 to $30,000 a mile. The preamble to this Act is as follows :—"Whereas the Cana-

1905

In re BRANCH LINES CAN. PAC. RY. CO.

dian Pacific Railway Company has, by its petition, represented that the branch line, to be known as the Toronto Branch of the Canadian Pacific Railway, which it proposes to construct under its charter from a point at or near Sudbury to a point at or near Claremont, will be unusually expensive; that an issue of twenty thousand dollars of bonds per mile thereon would not constitute a sufficient aid towards the construction thereof; and that a similar state of things will probably occur in respect of other branches to be hereafter built by the said company, and it has prayed that the maximum amount of bonds to be issued on any such branch, be fixed at thirty thousand dollars per mile, and it be authorized to issue debenture stock in the place and stead of such bonds; and it is expedient to grant the prayer of the said petition.

" 8. The route map of the James Bay Railway Company was duly filed and approved by the Minister of Railways and Canals pursuant to section 122 of the 'Railway Act 1903' on the 2nd day of April 1904. Plans, profiles and books of reference showing the James Bay Railway Company's location through the districts of Nipissing, Parry Sound and Muskoka and the County of York were duly submitted to and sanctioned by the Minister of Railways and Canals prior to the coming in force of the said Act and thereafter by the Board of Railway Commissioners at various dates between January 26th, 1904, and December 14th 1904, and all requirements of the several Railway Acts applicable thereto preliminary to the commencement of construction have been duly complied with.

" 9. The locations of the two railways in the District of Nipissing for some distance occupy identical areas and at other places throughout the locations they overlap and cross each other. By the deviations of the Canadian Pacific Railway in question herein that com-

pany is seeking to occupy a line which will cross the line of the James Bay Railway Company.

" 10. At the dates of the passing of the Act 44 Vict. ch. 1, the entering into the agreement and the granting of the charter referred to in the said Act, the North-West Territories were governed by the Parliament of Canada by virtue of The Imperial Act 34 & 35 Vict. ch. 28, sec. 4."

" 11. On or about the 13th day of November, 1897, at the request of the then Minister of the Interior, Sir Oliver Mowat, then Minister of Justice, after hearing counsel for those interested including the Canadian Pacific Railway Company, gave a written opinion which deals with the power of the Canadian Pacific Railway Company to build branches under the statute 44 Vict. ch. 1. The following is the whole of such opinion in so far as it relates to the power of the Canadian Pacific Railway Company to build branches."

" I think, though the point is not free from difficulty, that the time for building branch lines was limited to the time mentioned in clause 4 of the contract. That clause stipulates for the completion, on or before the 1st May, 1891, of the works therein described as the east section and centre sections of the road and the 15th section of the Act provides for the company's constructing " the main line," and an existing branch described in the Act, and also other branches to be located by the company from time to time as provided by the said contract * * * 'the said main line of railways and the said branch lines of railway shall be commenced and completed as provided by the said contract.' This language is so clear and explicit that it is out of the question to suppose it not to have been intended that there should be a limit of time as regards the branches. Not only does the Act expressly state the contrary, but to give an unlimited time for com-

1905

In re BRANCH LINES CAN. PAC. RY. CO

mencing or completing a railway authorized by any Act would have been contrary to the whole course of railway legislation. It would be contrary also to the policy of the General Railway Act of 1879 s. (6) which Act is referred to in the 22nd clause of the contract as applying to the Canadian Pacific Railway so far as applicable thereto and as not inconsistent with the Act relating to that company.

"Now it is true that the 4th section of the contract does not expressly mention branch lines. But it being quite clear from the 15th section of the Act that it was intended there should be a limit of time both for commencing and for completing these, that Parliament interpreted some provision in the contract as containing a limit or as showing a limit when read with the 15th section of the Act, and that the only provision on the subject of such a limit is the 4th clause of the contract, that clause is to be construed accordingly. The words 'the said main line of railway and the said branch lines of railway shall be commenced and completed as provided by the said contract' may be read as including in the eastern and centre sections named the branch lines which the company should build therefrom under the authority of the Act; or the 15th section may be read as if it said "provided for by the contract in respect of the works therein specified. It was evidently intended by Parliament to put the main line and the branch lines on the same footing in this respect.

"It has been suggested that the 15th section may be read as limiting time for those branch lines only which the company had contracted to build, but these are no more provided for by the words than other branch lines are; and if the 4th clause may in the light of the 15th section be read so as to embrace the branch lines contracted for, these may be read in like manner as

embracing the branch lines located by the company from time to time."

The date fixed by the contracts referred to in section six of the agreement in the schedule to 44 Vict. ch. 1 for the completion of the construction of the Lake Superior section, were all prior in time to the first of May, 1891.

The statement then refers, with extracts to the following statutes namely,—33 & 34 Vict. ch. 3 (D), (preamble and sec. 1); 34 & 35 Vict. ch. 28 Insp. (preamble, enacting clause and secs. 1, 3 and 4); 46 Vict. ch. 34 (D), sec. 6; and 47 Vict. ch. 1 (D.) preamble; 44 Vict. ch. 1 (D), with schedules, and "The Consolidated Railway Act, 1879" ch. 9, sec. 28, subsec. 6.

The principal questions referred to upon the arguments at the hearing of the case are discussed in the judgments now reported.

Ewart K.C., *Aylesworth K.C.* and *Creelman K.C.*, for the Canadian Pacific Railway Company. As to the meaning of the word "territory" generally:—"From the fundamental doctrine of territorial sovereignty * * flows the corrollary that *territory* and *jurisdiction* are co-extensive;" Hannis Taylor, International Law, 206:—"The whole space over which a nation extends its government becomes the seat of its jurisdiction and is called its *territory*;" Vattel, Droit des Gens, I, c. 18, sec. 205; Hannis Taylor, International Law, 206:—"A dependency is a *territory* placed under a subordinate government;" Cornewall Lewis, Government of Dependencies, 9:—"The entire *territory* subject to a supreme government possessing several dependencies (that is to say, a *territory* formed of a dominant country together with its dependencies) is sometimes styled an Empire;" Cornewall Lewis, Government of Dependencies, 73; "The *territorial*

1905

In re BRANCH LINES CAN. PAC. RY. CO.

property of a state consists of all the land and water within its geographical boundaries, including all rivers, lakes, bays, gulfs and straits lying wholly within them * * The *non-territorial* property of a state consists of such possessions as it may hold in its public capacity beyond its own limits;" Hannis Taylor, International Law, 263: "*Territory* of the state acquired by prescription;" Ib., 275: "One sovereign power is bound to respect the subjects and rights of all other sovereign powers outside of its own *territory*;" *The Queen* v. *Jameson* (1): "Every state possesses the power of regulating the conditions on which property within its *territory* may be held or transmitted;" Fœlix, Droit Int. Privé, sec. 9; Hannis Taylor, International Law, 206.: "The jurisdiction of the nation within its own *territory* is necessarily exclusive and absolute;" *per* Marshall, C. J. in *The Schooner Exchange* v. *McFaddon*, (1812). (2): "It is a principle * * universally recognized that the power of legislation in constituting offences * * is *primâ facie* local, limited to the *territory* over which the legislature has jurisdiction;" *Re Criminal Code Bigamy sections* (1897), (3) at pages 469, 470, 471, 472, 476, 477, 484, 488, 489: "If the legislature of a particular country should think fit by express enactment to render foreigners subject to its laws with reference to offences committed beyond the limits of its *territory*;" *Reg.* v. *Keyn*, (4): 'Straits only, or less than, six miles wide are wholly within the *territory* of the state or states to which their shores belong;" Hannis Taylor. International Law, 279: "The jurisdiction of colonies is confined within their own *territories*, and the maxim * * * *extra territorium jus dicenti impune non paretur* would be applicable to such a case;" *Macleod*

(1) [1896] 2 Q. B. 425.
(2) 7 Cranch 116 at p. 136.
(3) 27 Can. S. C. R., 461.
(4) 2 Ex. D. 63 at p. 160

v. *Attorney-General for New South Wales* (1): "The laws of a colony cannot extend beyond its *territorial* limits;" *Low* v. *Rutledge* (2); *Reg.* v. *Mount* (3); *Reg.* v. *Brierly* (4): "But since states are not accustomed to permit another state to enter their *territory* for the sake of exacting punishment;" Grotius, Bk. II, c. 21, secs. 3, 4; Clarke, Extradition, 2: "Assassins, incendiaries and robbers are seized everywhere at the desire of the sovereign in whose *territories* the crime was committed;" Vattel, Bk. II, sec. 76; Clarke, Extradition, 3: "He ought to be delivered up to those against whom the crime is committed, that they may punish him within their own *territories*;" Rutherford, Bk. II, c. 9, sec. 12; Clarke, Extradition, 8: "There ought to be laws on both sides giving power * * * to each government to secure persons who have committed offences in the *territory* of one and taken refuge in the *territory* of the other;" Lord Brougham in the House of Lords, 14th Feb. 1842; Clarke, Extradition, 10: "The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the *territory* of another;" *United States* v. *Rauscher* (5); Hannis Taylor, International Law, 255: "Statutes relating to the removal of persons from the *territory* of the law maker;" Lefroy, Legislative Power in Canada, pp. 322-338: "*Territorial* waters of Her Majesty's *Dominions*" does not mean North-West Territory waters, in the Dominion of Canada; see 41 & 42 Vict. (Imp.), ch. 73, sec. 7; Hannis Taylor, International Law, 277: "Charles the Second made a grant to Lord Clarendon and others of the *territory* lying on the Atlantic ocean;" Story on the Constitution, (ed. 1891,) 93: "A project was formed for the settlement of a colony

(1) 1891) A. C. 455.
(2) 1 Ch. App. 42.
(3) L. R. 6 P. C. 283 at p. 301.
(4) 14 O. R. 525, 534.
(5) 119 U. S. R. 407.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

upon the unoccupied *territory* between the rivers;" *Ibid*, 101: "At the time of the first grants of the colonial charters, there was not any possession or occupation of the *territory* by any British emigrants; *Ibid*, 107.

The treaty between Great Britain and the United States of 9th August, 1842, is styled "A treaty to settle and define the boundaries between the *territories* of the United States and the posessions of Her Britannic Majesty in North America * * * and for the giving up of criminals," etc. But the word "territories" here does not apply to Oregon, but to the State of Maine principally. In the recital of the treaty are the words: "The prevention of crime within the *territories* of the two parties." Section 4 provides for the case of "grants of land heretofore made by either party within the limits of the *territory* which," etc. And section 5 provides for the "Disputed *Territory* Fund." So also, in the Treaty of 1846 establishing the boundary west of the Rocky Mountains, the desire is recited for "An amicable compromise of the rights mutually asserted by the two parties over the said *territory*. And see articles 1 and 3 of the treaty.

As to whether or not the James Bay Railway Company can raise objection as to time of construction see *Roy* v. *La Compagnie du Chemin de Fer Quebec, Montmorency & Charlevoix* (1), *per* Cassault J.; Morawetz on Corporations, secs. 1006, 1015; *Re New York Elevated Railway* (2); Thompson on Corporations, secs. 6598, 6602; *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio Railroad Co.* (3), *per* Buchanan C. J. at page 121; *Becher* v. *Woods* (4); *McDiarmid* v. *Hughes* (5); *Doe d. Hayne* v. *Redfern* (6); *Doe d. Evans* v. *Evans* (7).

(1) 11 Legal News, 359.
(2) 70 N. Y. 337.
(3) 4 Gill & J. (Md.) 1.
(4) 16 U. C. C. P. 29.
(5) 16 O. R. 570.
(6) 12 East 96.
(7) 5 B. & C. 584.

The following cases and authorities were also cited: —Am. & Eng. Encycl. vol. XCIII, p. 677; *Chicago and Western Indiana Railroad Co.* v. *Dunbar* (1); *Rochester H. & L. Railroad Co.* v. *New York Lake Erie & Western Railroad Co.* (2); *Trester* v. *Missouri etc. Railroad Co.* (3); *New York & Erie Railroad Co.* v. *Young* (4); *Williamsport & N. B. Railroad Co.* v. *Philadelphia & Erie Railroad Co.* (5); *Major* v. *The Canadian Pacific Railway Co.* (6), *per* Ritchie C. J. at pages 237-240 and *The North Eastern Railway Co.* v. *Lord Hastings* (7) at page 268.

S. H. Blake K. C., Walter Cassels K. C. and W. A. H. Kerr for the James Bay Railway Co. In order to arrive at the rights of the Canadian Pacific Railway Co. in view of the legislation which has been enacted, it becomes essential to consider what rights were granted to the contractors by section 14 of Vict., ch. 1. The company stand in the place of the contractors, they *are* the contractors, and their right to construct branch lines is a right given them "from time to time." It must be limited to the time within which their contract had to be performed. No right could exist after they had received the consideration for the fulfilment of their contract, within the time limited, after the expiration of their contract and after the time had expired.

No such right can be inferred from the provisions of section 15 of the charter. The opinion of Sir Oliver Mowat, on this question, (8) is obviously correct and we refer to it as part of our argument. It is obvious that if the general powers to build branches, as claimed, existed there could be no necessity for the

(1) 100 Ill., 110.
(2) 44 Hun., 210.
(3) 33 Neb., 171.
(4) 33 Penn., 175.
(5) 141 Penn., 408 at 415.
(6) 13 Can. S. C. R., 233.
(7) [1900] A. C., 260.
(8) Page 53 *ante*.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

specific powers given as to building branches mentioned in clause 15 of the charter.

It was never contemplated or intended that the Dominion should infringe the rights of the provinces to incorporate railways having their terminal points within the provincial boundaries, in virtue of the British North America Acts, 1867 and 1871. At the time of the contract the powers subsequently taken by the Dominion, by 46 Vict, ch. 24, sec. 6, as to legislation in regard to railways intersecting or crossing railways chartered by the Dominion, did not exist nor was any such right then claimed by the Dominion. The "territory" within which the rights were granted respecting branch lines was, obviously, only that territory over which the Dominion had sole jurisdiction under the British North America Act, 1871. It is impossible to place any construction upon clause 14 of the contract which might extend its meaning so as to include other parts of Canada.

The only other clause which can be relied upon by the company as giving them the powers claimed as to the construction of branch lines is clause 15 of the charter, and this still leaves them subject to the condition that any branches or branch lines, including those specifically named, must be completed within the time limited for the construction of the main line according to the contract. If there was such power conferred as is now claimed by the company as to the construction of branch lines, then there would have been no necessity of giving specific powers as to the branches particularly mentioned. These particular branches were named and power given to construct them for the reason that they would not be covered by section 14 of the contract, their terminal point not being within the territory of the Dominion.

It is obvious that, when the contract was entered into, the contractors were to have the right to lay out and equip, etc., branch lines to any point or points within the territory of the Dominion, what was meant by the word "territory" was what was known by the British North America Act of 1871, as the territory of the Dominion. It would seem an absurd contention that these words should be construed as meaning any point or points within the Dominion of Canada.

The contractors were constructing two sections; *quâ* contractors they would have the right to build branch lines. The Government were constructing the other sections of the railway, and the words "to any point or points within the territory of the Dominion" cannot be held to mean more than they say, and have reference only to as the territory over which the Dominion had exclusive legislative jurisdiction, and in which the Dominion owned the Crown lands. This is manifest from the provision of the clause 14, providing that the Government shall grant to the company the lands required for the road-bed of such branches, for the stations, etc., in so far as such lands are vested in the Government. How can it reasonably be contended, having regard to this language, that a general power to construct east from Winnipeg to the Atlantic Ocean, or west from Winnipeg to the Pacific Ocean, could be conferred upon these contractors?

We also submit that if, in point of fact, any particular branches have been sanctioned by the Parliament of Canada, although we do not admit that any have been so sanctioned, such a thing as estoppel could only be set up in regard to the particular branches so sanctioned. There is no ambiguity whatever as to the meaning of the statute, 44 Vict., ch. 1. There is no power in the Government to vary or alter the

1905

In re BRANCH LINES CAN. PAC. RY. CO.

terms of the contract and such a thing as an estoppel against the Crown and the public of Canada, by an acceptance of certain lines constructed even if beyond the powers of the company, could have no possible effect in enlarging the powers conferred by the statute and contract hereinbefore set out.

As to our rights of contestation, we do not require to bring in the Attorney General for Ontario; we can sustain our position alone as our lands and rights are imperilled. *Grahame* v. *Swan* (1), at page 559. As to the interpretation of the words "time to time" see 26 Am. & Eng. Encycl. (2 ed.), and at page 167 as to *stare decisis* being a wider term than *res judicata*. This is not a case for *scire facias*, there is no question of a forfeiture of any kind.

Newcombe K.C., Deputy of the Minister of Justice, and *A. S. White K.C.* held a watching brief on behalf of the Attorney General for Canada.

Formal answers were rendered by the Supreme Court of Canada, as follows:—

"In the matter of application No. 590 of the Canadian Pacific Railway Company for approval of certain deviations from the original plan of the route of the Sudbury Branch of their railway, referred by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada, under the statute of Edward VII., chapter 58, section 45, being 'The Railway Act, 1903,' the following questions were submitted to the court for hearing and consideration:

"I. Has the Canadian Pacific Railway Company, under the legislation, schedule and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed?

(1) 7 App. Cas. 547.

"II. Do such legislation, schedule and charter authorize construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario?

"III. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired?

"The court, having heard counsel on behalf of the Canadian Pacific Railway Company, as well as on behalf of the James Bay Railway Company (the Attorney General for Canada also represented by counsel who stated that he was taking no part in the argument), and having considered the questions submitted as aforesaid, certifies to the said Board of Railway Commissioners for Canada that, for the reasons contained in the documents hereunto annexed, the following are the answers of the said court:

"To the first question;—Yes, the Canadian Pacific Railway Company has now power to construct the said Sudbury branch of its railway, Idington J dissenting.

"To the second question;—Yes, Idington J. dissenting, on ground of time having expired.

"To the third question;—Yes, as to both the James Bay Railway Company and the Board of Railway Commissioners; Girouard and Davies JJ. taking no part in this answer, because the answers to the first and second questions render any answer to the third question unnecessary."

(Signed) "ROBT. SEDGEWICK J."
"D. GIROUARD J."
"L. H. DAVIES J.
"WALLACE NESBITT J."
"JOHN IDINGTON J."

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Reasons for foregoing answers were delivered by Their Lordships, annexed to the formal opinion, as follows:—

SEDGEWICK J.—This is a reference to this court from the Board of Railway Commissioners for Canada by virtue of the Dominion Railway Act, 1903. Some years ago the Canadian Pacific Railway Co. had located a branch line from Sudbury in the Province of Ontario to Toronto, and had obtained, before the passing of the Railway Act of 1893, the approval of the Minister of Railways to the location and plans thereof. Subsequently, after the passing of that Act, the Canadian Pacific Railway Co. applied to the Board for approval of certain deviations from the proposed route of this Sudbury branch. The James Bay Railway Co. opposed the application on the ground that the Canadian Pacific Railway Co. had no authority to construct the branch either under its original charter or by any subsequent legislation. These are the questions:

1. Has the Canadian Pacific Railway Company, under the legislation, schedules and charter aforesaid now power to construct the branch line referred to; or has the time expired within which such branch line might be constructed?

2. Do such legislation, schedules and charter authorize construction by the said Company of the proposed branch line, it being altogether situated in the Province of Ontario?

3. Is it open to the James Bay Railway Company, or to the Board of Railway Commissioners, to take the objection that the time within which the said Company may build branch lines under its charter has expired?

Section 15 of the Canadian Pacific Railway Co's charter is as follows:

15. The Company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches, which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also, a branch line of railway from some point on the main line of railway to Fort William

on Thunder Bay ; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said Province ; and also other branches to be located by the Company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid ; and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract ; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

This section contemplates two classes of branch lines, namely, branches such as that from Selkirk to Pembina, and another from a point on the main line of railway to Fort William. These two branches may be called the Government branches to distinguish them from the other branches to be located by the company from time to time, which may be called the company branches.

I take the meaning of this clause to be that the company might "acquire" (it certainly was not intended that they should "lay out" or "construct") the two sections of the main line which the Government were to build and those Government branches which were either in process or in contemplation of being built ; and that they might "construct" the other two sections of the main line and other branches "to be located by the company from time to time."

The first question then is : Has the time expired for the construction of branch lines ? The controlling word is in clause 15 above set out, wherein it is provided that the company may construct other branches to be located by the company from time to time, and that the whole, namely, the said main line of railway and the said branch lines of railway (Government branch lines and company branch lines) shall be commenced and completed as provided by the said contract. There is a time specified when the main line is to be

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Sedgewick J.

commenced and also when it is to be completed, but there is no provision in the contract which can with any certainty lead to the conclusion that any time was ever fixed for the commencement or completion of the company's branch lines. The contestants, the James Bay Railway Co., seek to eliminate the words " shall be commenced and completed as provided by the said contract," and to insert in lieu thereof words which may have, and which I think have as a matter of fact, a different meaning: They propose to read the provision that branch lines must be commenced and completed as provided by the said contract, as if it said that branch lines " shall be commenced and completed within the same time as is provided by the contract for the commencement and completion of the two sections of the main line by the company." I have not sufficient boldness to venture upon such judicial legislation as this. Judicial legislation may be necessary where we have to delve into the common law to obtain some precedent for a state of affairs involving legal rights the like of which is new in the experience of mankind, but I have never yet been able to see any necessity for a resort to that method when we are endeavouring to interpret a written instrument, whether it be a statute, a contract, or any other document. No matter what the intention may have been, unless that intention can be unequivocally drawn from the language which the parties have used in the instrument under consideration, it is all the same as if there had been no intention at all.

The contestants contend that the contract must be construed so as to make the commencement of the branch lines co-incident with those of the two sections of the main line, but one section of the main line is to be commenced by the "first July next" and the other not later than the " first May

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Sedgewick J.

next." Which of these dates applies to branch lines?

Several considerations in addition to those arising from a study of the mere words themselves will, I think, lead to the conclusion that it could not have been the intention of Parliament to provide a definite period beyond which the company would lose their power of building branch lines.

Consider the condition of the North West Territories at the time this contract was made. A vast, practically unknown country, the fertile belt of which was in round numbers nearly 1000 miles in length, and nearly 500 miles in width. It was practically unsurveyed. The road was intended to be not only a great international highway extending from the Atlantic to the Pacific, but a great colonization railway as well, its main object being to open up to the world that magnificent area of wheat growing country, the wealth and potentialities of which we have even yet hardly begun to appreciate.

The Government had entered into an obligation with British Columbia pursuant to the "Carnarvon Terms" to complete the road at the earliest possible moment, and the whole power of Parliament, practically the whole revenues of the country, and every energy the Canadian people possessed, were cheerfully given to attain the end in view, the national honour of Canada being to a certain extent involved. The first great aim of the government, of Parliament and of the company must therefore have been to finish the main line first; branch lines to be built by the company might well afford to wait. They could not be built anyway for any practical purpose, particularly through the fertile belt so called, without previous survey and considerable settlement. What concession would it have been to give the company the right to build branch lines only during the ten years

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Sedgewick J.

during which the main line was being built ? They could not touch branch lines. It would be an illusory gift at the best. It has been suggested to us that the power contended for by the Canadian Pacific Railway Co. that they have the right in perpetui y to build branch lines from their main line was such a tremendous power, a power so fraught with danger to the state and the exercise of which might prevent the building of other railways by competing companies, that any construction other than that must be resorted to. I have yet to see anything very extraordinary in the grant of this power, especially when we consider the other grants which Parliament in its wisdom was induced to make for the purpose of completing the railway and of thus cementing together the theretofore scattered fragments, the *disjecta membra* of the Dominion.

Parliament had contributed $25,000,000 in cash and 25 million acres of land. It had given gratuitously to the company the two main sections ready to be operated, at a cost I suppose as great as that of the sections built by the company. It had made them a perpetual corporation, and eliminated from the general Act section after section which might be supposed to interfere more or less with the carrying on of the enterprise and with the borrowing of money for that purpose. It had also, (and this may be deemed to be an extraordinary concession, necessary doubtless in the interests of the enterprise, but still extraordinary,) enacted that the Canadian Pacific Railway, and all stations, station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, should be forever free from taxation by the Dominion or by any province thereof to be established or by any municipal corporation therein, and it had as well

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Sedgewick J.

exempted the company's lands from taxation for twenty years after the grant thereof from the Crown. Thus Parliament had given the company chartered powers to last forever. It had given them the right to operate forever a line of railway from the Atlantic to the Pacific, assuming the company took advantage as it has since done of this special provision in the charter for the acquirement of railways east of Sudbury. It had exempted the company's property, so far as it was within the North-West Territories and was used for railway purposes, from taxation forever. Why should it be thought a strange thing, an abnormal thing, a thing so unthinkable that the words of the contract must be twisted out of shape to obviate the difficulty—why should it be thought a strange thing that Parliament should give to the company along with these other perpetual rights, the perpetual right of building branch lines from any part of its main line to any other point within Canadian territory? The whole state of affairs at the time of the charter must have indicated that for many years, perhaps for generations, the Canadian Pacific Railway could be successfully operated only by the opening up of the North-West for settlement and by the building of branch lines by this parent road for the purpose of making the most of the country and developing its innumerable magnificent resources. One can easily imagine that it would have brought a smile to the cheek of those illustrious gentlemen whose daring and patriotism, and whose pluck and fortitude (along with that of others,) accomplished the work, had some law officer of the Crown in treaty with them suggested "Oh, but if you want to build any branch lines you must begin and complete them at the same time as you begin and complete the main line." Short work,

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Sedgewick J.

one can readily conceive, would be made of such a proposition as that.

I take the liberty of adding here an epitome of the Canadian Pacific Railway Company's argument on this branch of the case, as set out in their factum:

1. The contract does not fix any date for completion of branch lines.

2. The dates fixed for the commencement and completion of the main line cannot apply to the company's branches;

(*a.*) Because there are several such dates, and there is no reason for selecting one rather than the other.

(*b.*) Because the short periods for the commencement of the main line would be absurdly inadequate for the location of the necessary branches.

(*c.*) And still more inadequate for the comencement of construction.

(*d.*) Because the speedy construction of the main line was the paramount object of the contract.

(*e.*) Because the main line itself (from which branches were to be built) was not itself fixed by the contract and was not definitely settled until the year 1882 or afterwards.

(*f.*) Because the clause itself speaks of "other branch lines" to be "hereafter constructed by the said company."

I am now come to the second question: Has the Canadian Pacific Railway Company power to build branches in Ontario? The contestants say—"No. That they cannot build branches except to a point within what is known as the North-West Territories," basing their argument upon section 14 of the contract which provides that:

> The company shall have the right from time to time to lay out, construct, equip and maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion.

They argued that the word "territory" there must mean immovable property owned by the Dominion. This argument appears to me to be so, shall I venture to say, far-fetched, that the very statement of it is its own contradiction.

They also argue that "territory of the Dominion" means "The North-West Territories."

A third argument is that the Canadian Pacific Railway Company is empowered to build branches from the eastern and central sections only. To my mind nothing can be more unlikely or inconceivable than this. Even admitting the contention, nothing can be derived from it, for the branch which is under consideration is admitted to commence at a point upon the eastern section.

I simply propose to assert that the territory of the Dominion has no connection whatever with the phrase "The North-West Territories of Canada," except in so far as the North-West Territories are part of that territory. The territory of the Dominion, I take it, is all those lands and lands covered with water which form part of or are under the Parliamentary control of the Dominion. The phrase has no reference whatever to the *dominium* or ownership of the Crown, but to those British Dominions beyond the seas, known under the constitutional Act by the name of Canada. The point, however, seems to me so insignificant that the elaborate argument given by counsel for the Canadian Pacific Railway Company is all that need be referred to.

As to the third question I concur in the judgment of my brother Nesbitt.

GIROUARD J.—This reference—the first from the Board of Railway Commissioners for Canada—involves very important questions of construction of the powers of the Canadian Pacific Railway Co., to construct branch lines. It has been said that franchises of this character are to be construed most strictly against the corporation and in favour of the public; but it is now well settled both in England and the United States that the powers may be implied as well as expressed, and that their construction must be reasonable, that is,

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Girouard J.

consistent with and following a reasonable view of the general scope and purpose of the legislative grant, viewed in the light of surrounding circumstances. *Attorney General* v. *Great Eastern Railway Co.* (1); *The Government of Newfoundland* v. *Newfoundland Railway Co.* (2); *Jacksonville Railway Company* v. *Hooper* (3). It will not, therefore, be out of place at the outset to give a short history of the Canadian Pacific Railway and inquire into the circumstances which gave rise to the construction and operation of this transcontinental line.

The Canadian Pacific Railway does not owe its existence to the ambition of individual adventurers, but to the national policy of Canada, as expressed in several Acts of its Parliament. The very preamble of the Act we are now requested to consider, 44 Vict. ch. 1, declares that by the terms and conditions of the admission of British Columbia into the Dominion of Canada

> the Government of Canada has assumed the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada.

The immense western country known as Rupert's Land, which had recently been acquired from the Hudson Bay Company, had not been surveyed; it was very little known and, as stated in the printed case, "was almost completely uninhabited.". The Canadian Government, however, was so satisfied that the obligation assumed in favour of British Columbia would easily be accomplished, that it agreed to do so within ten years from the date of the union, that is in 1881.

The stated case, settled by the Board of Railway Commissioners and agreed to by the parties, refers us to many statutes and other public documents. I think

(1) 5 App. Cas. 473.
(2) 13 App. Cas. 199, 206.
(3) 160 U. S. Z. 514; 7 A. & E. Ency. 712.

that in a case of public interest, I may say of Government or parliamentary contract or agreement like the present one, we ought to carefully consider not only the parts of the documents quoted, but also the whole, and in fact all the public documentary records which may affect the case, and which, under the Evidence Act of 1893, courts of justice can take official notice of without causing any surprise or injury to any party. In many past cases of this description this court and the Privy Council have even referred to opinions expressed in Parliament as reported in Hansard.

In 1872 the Parliament of Canada passed the first Canadian Pacific Railway Act and granted a subsidy of 50 million acres of land, and 30 million in cash; 35 Vict. ch. 71. Although two companies were incorporated to carry out the scheme, and one of them was accepted and obtained the contract, nothing came out of this first effort. In 1874 another offer was made, which will be found in 37 Vict. ch. 14. Briefly stated, it provided for a subsidy of 20,000 acres of land, and $10,000 cash per mile, and a Government guarantee of 4 per cent for twenty-five years upon such sum as might be necessary to secure the construction of the road. There was no provision for any branch line except the Georgian Bay and the Pembina branches, which were also generously subsidized. The second scheme also failed, and to keep faith with British Columbia an extension of time had to be demanded and the Government set to work by commencing to build two of the heaviest sections of the entire line, extending over about 644 miles of a mountainous country, namely, the Lake Superior section, from the head of Lake Superior near Fort William to Selkirk, and the western section from Kamloops to Port Moody. While these extensive works were in progress under Government contracts a new project was proposed, and

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Girouard J.

approved of by Parliament, the meaning of which we are called upon to determine, as to branches to be constructed. This statute is 44 Vict. ch. 1, and was passed in 1881, although the contract which led to it was signed in October, 1880. The Government undertook to finish and deliver to the company the two sections commenced, and the company promised to build the eastern section from Callander Station to the Lake Superior section, and also the central section from Selkirk to Kamloops, on or before the first day of May, 1891, the company receiving a cash subsidy of 25 millions of dollars and a land subsidy of 25 millions of acres, valued at that time at about $1.50 per acre. This statute is composed of three parts. 1st. "An Act respecting the Canadian Pacific Railway;" 2nd. The said contract; and, 3rd. the charter or Act of incorporation. I presume the three documents must be read together, but if there is any discrepancy between them the contract must give way. I believe there is none, at least as to the point before us.

As it may easily be understood from the past experience most extensive and, in fact, unprecedented powers were demanded and obtained. To do so the whole policy of the country, as expressed in the Railway Act of 1879, had to be set aside and a new and exceptional one adopted. More liberal subsidies and concessions had to be granted. The two Government sections, which were estimated to cost about $28,000,000, but did actually cost a little over $31,000,000, were to be delivered free of charge. The lands required for the road bed, for stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards, if vested in the Government, were granted to the company. It was also agreed that all this property and the railway, its rolling stock and the capital stock of the company were

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Girouard J.

to be forever free from taxation by the Dominion or the Territories, or any province or any municipal corporation to be established therein, and that the land grants were also to be free from taxation for 20 years from the date of the Crown patent, unless sooner sold or occupied. The selection of these lands was entirely left with the company instead of the Government. The importation of the rails and all railway and telegraph material to be used in the original construction was declared to be free from customs duty. The company might at any time, whether within ten years or after, operate lines of steamers over seas, lakes and rivers, which it might reach or connect with, although in doing so it might damage or even destroy similar lines already existing. Finally, to come to the matter which is the subject of this reference, unlimited powers to build branch lines were given to the railway company by merely depositing the plan of location, without the sanction of the Governor in Council.

Notwithstanding these extraordinary concessions and privileges, the company soon almost came to grief, and in 1884 had to come to Parliament for relief. It was granted in the form of a temporary loan for nearly $30,000,000, which was satisfied and settled a few years afterwards, and before maturity, partly in cash or its equivalent, and partly by selling to the Government 6,793,014 acres of its land grants at $1.50 an acre. (47 Vict. ch. 1., 49 Vict. ch. 9.) Ever since the company's success has been constant and on the increase, so much so that it has added 4,785 miles of extensions and branches to its original main line, and has finally become one of the greatest railway corporations in the world, with a paid-up capital of $407,000,000, and nearly $133,000,000 of bonded debt, according to the blue books published by the Government, from which and the Acts of Parliament all the above figures have been collected.

1905

In re BRANCH LINES RY. CO. CAN. PAC.

Girouard J.

Now railway charter holders who are always to be found in every progressive and prosperous country, are quarrelling with it over the power, which it has at all times exercised, of building branch lines anywhere within the Dominion under their charter and without a special Act of Parliament.

At the argument I was very much impressed with the magnitude of the powers claimed by the Canadian Pacific Railway Co., as it would strike the mind under existing circumstances, but viewed in the light of the above circumstances it is not extraordinary. Parliament and the country, it seems to me — for its action was sanctioned by the people the following year — were prepared to grant almost anything to meet its obligation to British Columbia. But let us go now to the pure legal aspect of the case.

The charter, clause 15, enacts:

> The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches, which railway shall extend from the terminus of the Canada Central Railway, near Lake Nipissing, known as Callander Station, to Port Moody, in the Province of British Columbia; and also a branch line of railway from some point on the main line of railway to Fort William, on Thunder Bay; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina, in the said province; *and also other branches to be located by the company from time to time, as provided by the said contract* –the said branches to be of the gauge aforesaid; *and the said main line of railway, and the said branch lines, shall be commenced and completed as provided by the said contract;* and, together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called the Canadian Pacific Railway.

Clause 18 of the charter, para. (*d*), enacts that

> the map or plan or book of reference of any part of the main line of the Canadian Pacific Railway made and deposited in accordance with this section, after approval by the Governor in Council, *and of any branch of such railway hereafter to be located by the said company, in respect of which the approval of the Governor shall not be necessary, shall avail, etc.*

Clause 31 of the charter also provides for the issue of bonds in place of land grant bonds

on the main line of the Canadian Pacific Railway and the branches thereof hereinbefore described, but exclusive of such other branches thereof, etc.

Clause 14 of the contract reads as follows :—

14. The company shall have the right, *from time to time*, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points *within the tevritory of the Dominion.* Provided always, that before commencing any branch, they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, *in so far as such lands are vested in the Government.*

I was first inclined to think that the power to build the branch lines was limited to the North-West Territories, which were the property of the Dominion. After carefully examining all the clauses of the contract I soon became convinced that the word "territory" (without a capital T) in section 14 must be taken in its ordinary sense, that is, jurisdiction. Whenever Parliament intends to use it as indicating the country known as the "Territories," it generally uses that expression, or sometimes that of "Territory," as in section 9 of the charter and the preamble of the Act, or more often that of "North-West Territories," as in sections, 11, 14, 15 and 16 of the contract. Such is, moreover, the name which Parliament had previously given to that country. 32 & 33 Vict. ch. 3, s. 1.

Likewise, as to time, I fail to find any limitation. It is contended that branch lines, like the main line, must "be commenced and completed as provided by the said contract." But the contract does not impose any limitation as to the commencement or completion of their location or construction; it has a limitation in clause 4 as to the main line only and also "the said

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Girouard J.

branch lines of railway" contracted for, namely, the Fort William branch—which was never built in consequence of a deviation of the main line — and the Pembina branch, which, although finished, had to be maintained and worked. As to the other branches to be located, which the company may or may not immediately construct, the charter, section 15, and the contract, clause 14, both provide that they may be constructed *from time to time*, that is, at any time the company deems it expedient. This is the only reasonable construction which can be placed upon these enactments. It is, in fact, necessary to the working out of the land grant arrangement.

It is stipulated in the contract, section 11, that these land grants are to extend back 24 miles deep on each side of the main railway from Winnipeg to Jasper House; but if they are not fit for settlement the deficiency is to be made up in the fertile belt or elsewhere "at the option of the company * * * extending back 24 miles deep on each side of any branch line or lines of railway to be located by the company." It would take years, certainly more than ten years, before the company might be called upon to make this option and select its land grants; in fact the parties have admitted in the stated case that it was not till 1901 that the last townships through which the main line of the railway runs were surveyed and set off into sections. They also admit that large tracts of land through which branch lines of the company may run under the charter have not yet been surveyed into townships by the Government. There is no limitation of time as to the option or selection; it could not be commenced before some years, and certainly could not be completed before the necessary surveys were made; parties agree that it cannot be completed even at the present time. How can it be contended that the company could possibly

locate or build branch lines necessary to the development of these lands before they are selected and probably patented by the Crown?

Clause 6 of the contract provides for the completion and delivery of the Government sections partly by the 30th of June, 1885, and the whole at the latest by the 1st of May, 1891. I cannot understand how the company could possibly complete all its branch lines from these sections before the latter date, for, as I understand clause 7 of the contract and clause 15 of the charter, these sections form part of the Canadian Pacific Railway from which the company can construct branch lines as well as from the sections constructed by the company. As a matter of fact only seven branches were built prior to the 1st of May, 1891, in order to give railway facilities to distant settlements or to industrial establishments in close proximity, whereas nineteen have been built since that date. In all cases of railway development, especially in an immense and wild country like that traversed by the Canadian Pacific Railway, almost entirely uninhabited on its entire length of about 2,644 miles west of Callander Station, near Sudbury of to-day, the necessity of branch lines is not generally felt till the main line is built and operated, and for many years afterwards.

If any doubt be possible upon the point, which I do not, however, entertain, courts of justice should hesitate before denying a power which has often been recognized by the highest authorities. We have no expression of judicial opinion exactly in point except as to location, but we find, in the case of the *Canadian Pacific Railway Co.* v. *Major*, (1) decided by this court in 1886, and reported in 13 Can. S. C. R., at page 237, dicta and propositions as to time, which seem to sustain the contention of the company in the present instance.

(1) 13 Can. S. C. R. 233.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Girouard J.

Chief Justice Ritchie, referring to a certain limitation enacted by the Railway Act of 1879, and to section 14 of the contract, said, speaking for the court :—

From which (section 14) it is abundantly clear that the right conferred on the railway company from time to time to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion is entirely inconsistent with any such limitation ; and therefore I think the company had a right to construct a branch from any point or points on the railway to English Bay as well as to any other point or points within the territory of the Dominion.

And further on the learned judge adds (at page 240) :—

No court has a right to reject, or refuse to give effect to, the words of the legislature if a reasonable construction can be placed on the language used, and, therefore, I am constrained so to construe this statute as to give effect, if possible, to this, to my mind, very plain language of the legislature, and I can give no effect to it if it was not the intention of the legislature to authorize such branches and such extensions of the main line as might be found expedient to complete and make available this great national undertaking, the construction of a railway connecting the sea-board of British Columbia with the railway system of Canada, a construction not only reasonable but one which, in my opinion, harmonizes with the subject of the enactment and the object which the legislature had in view.

When the contract was under discussion in the House of Commons Mr. Blake, the leader of the Opposition, demanded its rejection upon the ground, among others, that

by the contract, power is given to the company *forever* to build branch lines in various parts of the Dominion. (See Votes and Proceedings, (1881) p. 159).

From the time of its approval by Parliament to the 1st of May, 1891, no less than seven branch lines were constructed within the limits of the old provinces, and after that date to the year 1903 eighteen more were built and operated within the old provinces, two of them extending through the Territories and only one being entirely in the latter country, the

whole without any objection being raised by any one, and in almost every case, after due Dominion inspection and authorization.

In 1884 Parliament expressly recognized the Algoma branch, then in course of construction from Sudbury to Sault Ste. Marie, in the province of Ontario, under the general powers of the charter and authorized a large issue of bonds (47 Vict. ch. 1). Parliament has also granted cash and land subsidies to branch lines of the company constructed before and since 1891. A full list of all these branch lines is given in the stated case, and it is not necessary to repeat it here. I will, however, reproduce the preamble of a Canadian statute passed in 1888, 51 Vict. ch. 51, which is the Act increasing the company's bonding power on branch lines generally, and one of the Sudbury branches in particular, from $20,000 to $30,000 per mile, as expressing the views of Parliament both upon the location and time of their construction :

Whereas, the Canadian Pacific Railway Company has, by its petition, represented that the branch line, to be known as the Toronto branch of the Canadian Pacific Railway, which it proposes to construct under its charter from a point at or near Sudbury to a point at or near Claremont, will be unusually expensive ; that an issue of twenty thousand dollars of bonds per mile thereon would not constitute a sufficient aid towards the construction thereof ; and that a similar state of things will probably occur *in respect of other branches to be hereafter built by the said company*, and it has prayed that the maximum amount of bonds to be issued on any such branch be fixed at thirty thousand dollars per mile, and that it be authorized to issue debenture stock in the place and stead of such bonds ; and it is expedient to grant the prayer of the said petition, etc.

It may be said that implied recognition of power by the legislature is not sufficient to confer that power, although very high American authorities can be quoted to the contrary, which will be found collected in American and English Encyclopœdia, (2 ed.) vol. 7, p. 708 ; I refer especially to the case of *Society vs Pawlet*, (1)

(1) 4 Peters 501.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Girouard J.

decided by the United States Supreme Court. But it cannot, I submit, be seriously contended that the subsequent action of Parliament is not sufficient to remove any possible doubt in the matter. And finally, when we consider the disastrous consequences which a decision adverse to the Canadian Pacific Railway Company would bring upon its millions of bonds and debenture stock distributed all over the world, which would not be binding upon the so-called branch lines, I think we should come to the conclusion that it has at least that effect, unless forced to do otherwise by clear terms of the statute. For the reasons already advanced I think the statute supports this conclusion. Without wishing to add anything to the judgment of the House of Lords in *Attorney-General vs. Great Eastern Railway Co.* (1) which I believe fully covers the case, I would be inclined, under the special circumstances of the case, to treat the charter of the Canadian Pacific Railway Company in a liberal manner, like any other statute, in accordance with the principle laid down in the Interpretation Act, namely, that every Act of Parliament must receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of every provision or enactment thereof according to its true intent, meaning, and spirit; 31 Vict. ch. 1, s. 7, par. 39; R. S. C., ch. 1, s. 7, par. 56.

With these explanations, I shall now proceed to answer the questions submitted:

To the first question I answer:—Yes, the Canadian Pacific Railway Company has now power to construct the branch line referred to, as under section 14 of the contract and section 15 of the charter it may construct any branch line at any time.

To the second question, answer;—Yes.

(1) 5 App. Cas. 473.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

To the third question :—In consequence of the above answers the answer to this question is unnecessary.

Davies J.

DAVIES J —After the fullest consideration and repeated conferences with my colleagues, I have reached the conclusion that the first two questions should be answered in the affirmative These answers render it unnecessary to give any answer to the third question, and I express no opinion with regard to it.

I have read with great care the opinion prepared by Mr. Justice Nesbitt and, as I find myself in full accord alike with his reasoning and his conclusions with respect to these two main questions, I will content myself with concurring with his judgment so far as it relates to these two questions and their answers.

NESBITT J.—This is a case submitted by the Board of Railway Commissioners for Canada under the 43rd section of the Railway Act, 1903. The following are the questions submitted :

1. Has the Canadian Pacific Railway Company, under the legislation, schedule and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed ?

2. Do such legislation, schedule and charter authorize construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario ?

3. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired ?

In the year 1874 an Act was passed, chapter 14 of 37 Victoria, intituled: "An Act to provide for the construction of the Canadian Pacific Railway." This Act recites the admission of British Columbia into the union with the Dominion of Canada. It recites the fact that by the terms of the admission the Government of the Dominion were to construct a railway

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

from the Pacific to connect the seaboard of British Columbia with the railway system of Canada. It then provided that a railway to be called the Canadian Pacific Railway should be made from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean. It provided for the division of the said railway into four sections. It also provided for certain branches of the railway to be constructed, such branches to form part of the Canadian Pacific Railway. Section 8 of the said statute provided for the construction of the said railway in subsections by contractors, and, after providing for the construction and the consideration to be paid therefor, subsection 10 of the said section 8 provided that in applying the said Railway Act to the Canadian Pacific Railway or any portion thereof the expression "the railway" shall be construed as meaning any section or subsection of the said railway the construction of which has been undertaken by any contractors, and the expression "the company" shall mean the contractors for the same. The said statute sets out further provisions for the construction of the railway.

Subsequent to this statute the Act in question (and upon which mainly this case turns) being chapter 1 of 44 Victoria, assented to on the 15th of February, 1881, was enacted. It recites that by the terms and conditions of the admission of British Columbia into union with the Dominion of Canada the Government of the Dominion has assumed the obligation of causing a railway to be constructed connecting the seaboard of British Columbia with the railway system of Canada. It also recites:

> That whereas certain sections of the said railway have been constructed by the Government and others are in course of construction, but the greater portion of the main line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and for the preservation of the good faith of the

Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said railway.

It then recites:

And whereas in conformity with the express desire of Parliament a contract has been entered into for the construction of the said portion of the main line of the said railway and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval, and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract and to make provision for the carrying out of the same.

The statute then enacts under section 1 as follows:

The said contract, a copy of which with schedule annexed is appended hereto, is hereby approved and ratified, and the Government is hereby authorized to perform and carry out the conditions thereof, according to their purport.

The second section of the said statute provides that for the purpose of incorporating the persons mentioned in the said contract and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Government may grant to them, in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter being published in the *Canada Gazette* with an Order in Council relating to it shall have force and effect as if it were an Act of the Parliament of Canada.

The contract by its first clause *inter alia* provided:

The individual parties hereto are hereinafter described as the company.

I read this clause as a conveyancing description applicable to the contractors until after the necessary steps were taken by them to complete the incorporation authorized by the charter when the rights, franchises and privileges conferred by the contract on the incorporators became vested in the "corporate entity" to be known as the Canadian Pacific Railway Company. This was complete as I understand after the 9th April, 1881. See Gazette of that date.

The 13th clause provided that the company should have the right to lay out and locate the line of railway

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

contracted for preserving the terminal points from Callander Station to the point of junction with the Lake Superior section and from Kamloops and from Selkirk to the junction with the western section. The work was divided into four sections and two branches, and the company were to build the central and Eastern sections which were to be commenced respectively by the 1st May and the 1st July, 1881, and to be completed by the 1st May, 1891. See fourth clause of contract. The Government, by the sixth clause of contract, were to complete the Western and Lake Superior sections by the latest by May, 1891. There were also two branch lines, one from Selkirk to Pembina and one from some point on main line to Fort William. These the Government were to construct the Fort William branch as part of the Lake Superior section, as a reference to the first clause of the contract and the map on page 16 of case will shew.

By the 14th clause of the contract it was provided:

The company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the company the lands required for the road bed of such branches and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

And by the 15th clause of the charter it was provided:

The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one half inches; which railway shall extend from the terminus of the Canada Central Railway near lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also a branch line of railway from some point on the main line of the railway to Fort William on Thunder Bay; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said province; and

also other branches to be located by the company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid, and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Ralway.

It is upon the construction of these two clauses that the contest mainly turns. Mr. Blake and Mr. Cassels for the James Bay Railway Company argued that the contract was one between the Government and the incorporators described as "The Company" and was only for the Eastern and Central sections and that the incorporators must complete building within ten years, and had only the right contemporaneously with their building of such sections to carry out and locate branches; that the "corporate entity" only became assignee of the privileges and franchises granted to the incorporators and could enjoy no higher rights than granted to the incorporators under the contract, and such rights were only, so far as we are here concerned, to locate branches up to May, 1891, and only from some point on the eastern and central sections to some point on land *owned* by the Dominion. I think this is a fair statement of the position taken by the counsel for the James Bay Railway Company. The Canadian Pacific Railway Company's counsel, Mr. Ewart and Mr. Aylesworth, contended that the "corporate entity," the Canadian Pacific Railway Company, had the right for all time to lay out and locate branches from time to time from any point on the main line between Callander and the Pacific sea-board subject, at the present time, to the filing of plans and approval required by the Railway Act, 1903; that from Callander eastward the rights of the company were governed by section 25 of the charter with which we are not now concerned. A great deal was said in argu-

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

ment as to the previous railway policy of the Parliament of Canada and the policy since in respect to other railways, and as to the public danger involved if a construction such as contended for by the Canadian Pacific Railway Company was adopted. We are not in one sense concerned with that construction. The purpose is expressed by the terms of the statute which are absolutely controlling as to the legislative intent, and while a construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed, yet if Parliament has explained its own meaning too unequivocally to be mistaken the courts must adopt that meaning. We have only to declare what the law is, not what it ought to be, and I feel relieved from any doubt in this case which I might entertain (though I entertain none whatever) by the fact to which I attach considerable importance that successive Acts of Parliament have been passed by which Parliament itself has assumed as the correct one the construction I adopt. (I shall refer to these later.) The courts too have expressly in one case and by implication in another adopted one phase, viz., the right to build anywhere from the main line from Callander to the Pacific. I will also refer later to these more at length. On the question of the construction contended for by the James Bay Railway Company being likely to place the territory tributory to the main line from Callander to the Pacific in the grasp of a monopoly I would only say that in practice no such result has followed. Numerous railway charters have been obtained and railways actually built in many places where, if my construction of the charter and contract is correct, the fear of the right of the Canadian Pacific Railway

Company to parallel, &c, would have deterred the application for the charter or the construction of the railway if capital was likely to be deterred by such fear. It is to be borne in mind also that in the United States, in most if not all of the states, the location of the line of its road is entrusted by law to the company alone, and that where a corporation has been organized in compliance with the conditions of the statute and has made a map and profile of the route intended to be adopted by the company, it has acquired a vested and exclusive right to build, construct and operate a road on the line which it has adopted subject to the right of other road companies to cross its route and lands in the way and manner provided by law. It would scarcely be urged that this policy, the very opposite to the one adopted here, has deterred railway building in the United States. It is to be further borne in mind that in this country all branches built by the Canadian Pacific Railway Co. to develop territory or to acquire traffic as the needs of the country arise, have to be approved as to the general route by the Minister of Railways and as to deviations, etc., by the Railway Committee and the public rights thus fully conserved. This of course has no bearing on the construction of the charter but is, I think, an answer to the argument of future monopoly which has been advanced as a reason for a different construction being the proper one to arrive at.

The general rule which is applicable to the construction of all other documents is equally applicable to statutes and the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words related to. He may call to his aid all those external or historical facts which are necessary for this purpose and which led to the enactment and for those he may consult contempo-

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

rary or other authentic works and writings. This, however, does not justify a departure from the plain reasonable meaning of the language of the Act. The best and surest mode of expounding an instrument is by construing its language with reference to the time when and circumstances under which it was made, and next to such method of exposition is the rule that if an Act be fairly susceptible of the construction put upon it *by usage*, the courts will not disturb that construction. The authorities for these statements are too well known to render lengthy citation necessary. I refer, however, to *Read* v. *The Bishop of Lincoln* (1); *Herbert* v. *Purchas* (2); Maxwell on Statutes, (3 ed.) pp. 32-39, inclusively, pp. 423 and following; Broom's Legal Maxims (7 ed.) pp. 516-579. As to reference to House of Commons records for purposes of historical exposition, see *The Attorney General of British Columbia* v. *The Attorney General of Canada* (3); *The Fisheries Case* (4); pages 456-465 *et seq.*; *In re Representation in the House of Commons* (5), pages 497, 581-593. To apply, then, contemporaneous historical reference and legislative and judicial exposition, the recital in the Act under consideration establishes that the Government of Canada was under obligation to construct a railway connecting the sea-board of British Columbia with the railway system of Canada. The stated case contains the following admissions:—

(1) At the date of the Canadian Pacific Railway charter (1881) the territory through which its main line was to be constructed was, with the exceptions to be mentioned, almost completely uninhabited, and only by its general characteristics had become known to the people of Canada. The exceptions to this statement are:

(*a*) A small settlement existed at Port Arthur and Fort William;

(1) (1892) A. C. 644.
(2) L. R. 3 P. C. 605 at p. 648.
(3) 14 Can. S. C. R. 345, pages 361-369; 14 App. Cas. 295, page 305.
(4) 26 Can. S. C. R. 444.
(5) 33 Can. S. C. R. 475.

(*b*) Southern portions of the Province of Manitoba and as far west as the present western boundary of the province had been surveyed and were sparsely settled, particularly in the neighbourhood of Rat Portage and the Red River district, where the Winnipeg settlement was;

(*c*) Some portions of the country between such western boundary and British Columbia had been surveyed into blocks of sixteen townships each;

(*d*) A small settlement on the British Columbia coast.

(2) From year to year after the date of the contract the Government of the Dominion of Canada caused portions of Manitoba and the North-west Territories to be surveyed and set off into townships and sections, but it was not until the year 1901 that the last of the townships in the North-West Territories and western part of Manitoba through which the railway runs was surveyed and set off into sections. Some of the territory in the eastern part of Manitoba and the western part of Ontario and in British Columbia, together with large tracts in Manitoba and the North-West Territories through which branch lines of the Canadian Pacific Railway may at some time run if the contentions of the Canadian Pacific Railway Company in question herein are sustained, have not yet been surveyed, even into townships, by the Government.

(3) At the date of the Canadian Pacific Railway charter the main line of the railway north of Lake Superior had been projected to run some distance north of the lake and join the line between the lake and Selkirk. The accompanying sketch marked plan No. 1 (partial copy of a map attached to the report of the then Engineer-in-chief of the Department of Railways—Mr. Sandford Fleming—dated 26th April, 1878) shows the projected junction of the eastern and Lake Superior sections of the railway and the line to Fort William as then contemplated. After that date the route of the main line was changed. The part of it lying north of Lake Superior was brought more to the south so as to skirt the lake, and the western end of the eastern section was made to join the eastern end of Lake Superior section at or near Fort William, as shown in the accompanying sketch marked plan No. 2, which is a partial copy of a map.

(4) Prior to the 1st May, 1891, the Canadian Pacific Railway Company, without any other legislative authority than that contained in the legistion of the Parliament of Canada appearing in the said statute 44 Vict. ch. 1, and the schedules thereto and the charter issued in pursuance thereof, constructed and equipped the branch lines of railway or extensions of branches in list A in paragraph 5 hereof. Subsequent to said 1st May, 1891, the Canadian Pacific Railway Company have constructed without any such other authority the branches or extensions of branches set out in list B in paragraph 5 hereof. In respect of the branches or extensions of branches set out in the said lists, those which are accompanied by the word "inspected" were inspected by a Government engineer and permission granted to the company to open such branches respectively for the public conveyance of passengers.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

LIST "A."

BRANCHES OF THE COMPANY'S MAIN LINE CONSTRUCTED PRIOR TO MAY 1ST, 1891.

1. Ontario: The Algoma Branch from Sudbury to Sault Ste. Marie, 182·1 miles. Constructed 1883 and 6. (Inspected.)

2. Ontario: The Stobie Branch from Sudbury to Copper Mines, 5·6 miles. Constructed 1887.

3. British Columbia: The New Westminster Branch from New Westminster Junction to New Westminster, 13·7 miles. Constructed 1887. (Inspected.)

4. British Columbia: The Port Moody Branch from Port Moody to Vancouver, 13 miles. Constructed 1887.

5. Manitoba: The Pembina Mountain Branch from Winnipeg to Manitou, 110·1 miles. Constructed 1882. (Inspected.)

6. Manitoba: The Gretna Branch from Rosenfeld to Gretna, 13·7 miles. Constructed 1888.

7. Manitoba: The Selkirk Branch from Winnipeg to West Selkirk, 24 miles. Constructed 1883. (Inspected.)

LIST "B."

BRANCHES CONSTRUCTED SUBSEQUENT TO FIRST MAY, 1891.

8. Ontario: The Dyment Branch from Dyment to Ottamine, 7 miles. Constructed 1900. (Inspected.)

9. British Columbia: The Mission Branch from Mission Junction to Mission, 10 miles. Constructed 1895.

10. British Columbia: The Arrow Lake Branch from Revelstoke to Arrowhead, 27·7 miles. Constructed 1897.

11. British Columbia: The Coal Harbour Branch from Vancouver to Coal Harbour, 1·2 miles. Constructed, 1903.

12. Manitoba: An extension of the Stonewall Branch from Stonewall to Teulon, 19 miles. Constructed 1898. (Inspected.)

13. Manitoba: The Lac du Bonnet Branch from Molson to Lac du Bonnet, 27 miles. Constructed 1900. As to this branch the Dominion statute 63 & 64 Vict. c. 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

14. Manitoba: The McGregor Branch from McGregor to Brookdale, 36 miles. Constructed 1900-02. As to this branch the Dominion statute 63 & 64 Vict. c. 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

15. Manitoba: Extension of Souris Branch from Souris to Glenboro, 45·7 miles. Constructed 1891-2. (Inspected.)

16. Manitoba: Extension of Souris Branch from Napinka to Deloraine, 18·6 miles. Constructed 1892.

17. Manitoba and North-West Territories: The Pheasant Hills Branch from Kirkella in Manitoba to Haywood in the North-West Territories, 146 miles. Constructed 1903-4. (Inspected.)

18. Manitoba and North-West Territories: The Souris Branch from Kemnay to Estevan, 156. 2 miles. Constructed 1891-2. (Inspected from Kemnay to Melita.)

19. North-West Territories: The Portal Branch from North Portal to Pasqua, 160·3 miles. Constructed 1893.

The undertaking was of a very exceptional speculative character and in turning to the Act, contract and charter we find unprecedented clauses. The Government bound itself to complete two sections, the Fort William Branch and the Selkirk and Pembina Branch, and hand same over to the contractors, to pay a cash subsidy of twenty-five million dollars and to give a land grant of twenty-five million acres *to be fit for settlement* and to be in alternate sections; the land grant to be free from taxation for twenty years from the grant from the Crown; the capital stock of the company and its stations, station grounds, workshops, buildings, yards, rolling stock, etc., to be exempt from taxation forever. There are other marked benefits conferred, a masterly summation of which may be found in Hansard, 1881, vol. 5, p. 517. I refer to this latter only to show that the undertaking was thought to be so hazardous that exceptional privileges were deemed necessary to induce the contractors to enter upon the undertaking and to give point to the consideration that it was extremely unlikely any person contemplated that branches would be required prior to May 1891; that the road was a colonization road and branches would be built as the country developed and the future revealed along what lines trade developed making the location and construction of branch lines feasible and practicable. This being the situation of the parties the contract was made with the incorporators and a charter was granted creating the corporate entity which, after the incorporators had performed the initial requirements, came into existence on the 9th April, 1881. As I have before indicated, in my view after that date

1905

In re BRANCH LINES CAN. PAC. RY. CO

Nesbitt J.

it was such corporate entity which is described by the word company when that word is used in the contract and charter. This is apparent when section after section is examined.

Section 7. The railway constructed under the terms hereof shall be the *property* of the company.

(This must mean the corporate entity not the incorporators who are also as I have said referred to as the company). The same section provides "and the company shall thereafter and *forever* efficiently maintain, work and *run* the Canadian Pacific Railway."

Section 9 The Government agree to grant to the company a subsidy in money of twenty-five million dollars and in land of twenty-five million acres.

Section 10 grants the road-bed to the "company."

Section 11 grants the land to the company, and further on the grant of land is to be

on each side of any branch line or lines of railway *to be located by the company.*

Section 16 exempts forever from taxation the *capital stock* of the company and the lands of the company for twenty years from the Crown grant. As I have stated, according to Mr. Blake's argument, the word "company" meant incorporators, and the incorporators' obligations ceased in May, 1891, and the rights acquired by the contract by them were by the Act and charter at that date and then only vested in the corporate entity. In sections 17, 18 and 20 the word "company" is also used in a sense wholly inappropriate to the incorporators described as such as it would scarcely be argued that when the company may issue land grant bonds, etc., the incorporators as contractors were meant and not the corporate entity. If then the corporate entity is intended to be described when the word "company" is used in the contract when section 14 says

The company shall have the right from *time to time* to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion

a sensible construction can be placed on the language. If the argument is acceded to that the contractors (the incorporators) are thus described the result follows that as the gentlemen named were only to build and own the eastern and central sections "their" line of railway is only the eastern and central part of the railway, and branch lines can only be built from such sections. Mr. Blake and Mr. Cassels urged this most strenuously pointing to section 13 which says:

The Company shall have the right * * * to lay out and locate the line of railway hereby contracted for

and as the only line contracted for was that part comprised in the eastern and central section, the language used in section 14 must be construed as I have indicated, and further that the words "within the territory of the Dominion" meant within land owned by the Dominion and not the area over which the Dominion Parliament exercised legislative jurisdiction. I may describe this as the argument of "place" as opposed to that of "time" with which I will deal later. To deal with "place" first. In my view the contract means that the company, the corporate entity at any rate up to May, 1891, could built branches anywhere from the main line of railway between Callander and the Pacific sea-board, and in using the words "territory of the Dominion" Parliament meant within the area over which the jurisdiction of the Parliament of Canada extended as to the whole main line of railway from Callander to the Pacific. If the construction argued for is to be placed on these sections it would lead to such obviously absurd results that some other construction must be sought for. In pointing to these results I cannot do

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

better than adopt some of the arguments of the counsel for the Canadian Pacific Railway Company upon this point:—

(1) A branch may commence at "any point or points along their main line of railway"—anywhere in any province—but it must *end* in the North-West Territory.

(2) For example, a branch may (indisputably) commence at Portage la Prairie in Manitoba and run south-west; but it cannot stop until it gets beyond the boundary of the province. It must finish in the Territories.

(3) Conversely a branch may (indisputably) commence at Regina in the North-West Territories and run north-east; but it must stop before crossing the Manitoba line. It must finish in the Territories.

(4) What more absurd provision than that a branch line may start anywhere along a 2,500 mile line of railway, but must always run towards its centre, and must finish there within a fixed limit of a few hundred miles.

Objection: Points "within the territory of the Dominion" means points upon land owned by the Dominion.

Pursuing the line or reasoning just submitted, it would appear that the effect given by the present objection to the clause under consideration is that although a branch may begin anywhere on the main line it must always finish upon Government property. It must not stop a mile short on Jones's land, or go a mile beyond to Smith's land. Some Government property must always be picked out for one of the termini.

So that if the Government did not happen to own a lot or two in a certain town, no branch could have its terminus there. And if in the town the Government did own a lot, the railway would have to lay the last

rail upon it however inaccessible it might be—or stay away altogether.

And what if the Government sold the lot before the railway reached it ?

I would also add, I find in the contract the draftsman there describing the North-West Territories says :

> The company may, with the consent of the Government, select in the North-West Territories any tract or tracts of land. (Contract, sec. 11).
>
> In the establishment of any new province in the North-West Territories. (Contract, sec. 15).
>
> The lands of the company in the North-West Territories shall be free from taxation. (Contract, sec. 16).

Mr. Cassels also argued that if the company already possessed the power to construct branches in Ontario, why was it necessary to get special provision inserted in clause 15 of the charter in reference to the branch line from Fort William to the main line ? This branch was to be built by the Government and acquired by the company, so that argument fails.

These considerations would be sufficient in my view to determine that the argument as to the places from which branch lines would be built could not be limited as to point of commencement to the eastern and central sections and, as to terminals, to land owned by the Dominion. But, when one sees how the court and Parliament have dealt with the subject, it makes the conclusion to be now arrived at irresistible.

This court has already held in *The Canadian Pacific Railway Co.* v. *Major* (1) that the company had power to build a branch from Port Moody to Vancouver, and this branch was on the western section and in the area of the Province of British Columbia, but within the legislative jurisdiction for the purposes of railway authorization of the Dominion Parliament. It is true the present argument was not advanced to the court but it must be assumed that the

(1) 13 Can. S. C. R. 233.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

court would not overlook so obvious a want of legislative authority as is contended for here. In the case of *Ontario etc. Railway Co.* v. *Canadian Pacific Railway Co.* (1) the point urged as to the meaning of "within the territory of the Dominion" was, if correct, so complete an answer that one can scarcely understand if it was tenable if the court could say, at page 443,

> no question was raised as to the authority of the defendants (the Canadian Pacific Railway Co.) to construct a line of railway to the Sault Ste-Marie,

and it is to be observed that the counsel now raising the question were engaged for the plaintiff in that case. For the action of Parliament, I refer also on this point to the list "A" before referred to, and to the list "B," 8 to 16 inclusive, as to the points from or to which branches could be built, all of which acts are opposed to the construction contended for.

I have therefore come to the conclusion I have above indicated that as to section 14, the line of railway referred to is the line from Callander to the Pacific seaboard, and that the words "territory of the Dominion" mean the area along such line or railway over which the Dominion Parliament had legislative jurisdiction.

I come now to deal with the time within which the right to build branches so authorized must be exercised. The clause pointed to under which it is claimed no branch could be built after May, 1891, is 15 of the charter before set out. The clause used the words "lay out, construct and acquire" and these have to be divided and made applicable to the subject matter. The company was not to "lay out or construct" either of the branches nor two sections of the main line, but was to "acquire" these. That is the Government were under obligation to build two sections of the railway or two branches for the company and, as to these, the words "lay out" or "construct" are inapplicable to

(1) 14 O. R. 432.

the company. There were other branches to be located from time to time by the company as *provided by the contract.* (Clause 14). When the draftsman says in clause 15 of the Act (schedule A),

> the said main line of railway and the said branch lines of railway shall be commenced and completed as provided by the said contract

I take it he is referring to the various sections and described branches for the completion of which an obligation existed both on the part of the Government and the company under the contract, and when he refers to *other branches to be located* from time to time he refers to the branches under clause 14 which the company have the *privilege* of building but as to which no contractual or other obligation existed. No time was fixed by the contract either for the commencement or completion of such branches and it is a misdescription to refer to them as having a time limit under the contract. The express right to lay out, locate and build from time to time given by the contract cannot be cut down by mere surmise that a power to build from time to time could not be contemplated because it would be out of harmony with existing railway policy. The contract was very keenly debated; the effect of this provision was drawn in the most marked manner to the public attention and denounced as mischievous. See Hansard vol. 5, p. 503. I refer to this not as throwing any light upon the meaning of the clause but as shewing the attention of Parliament was drawn to the existence of such a clause and that it was open to the construction claimed for it. The clause was passed and the list I have referred to shews the branches built since 1891 and the action of Parliament thereon from that date until the present time.

In a case decided by the Supreme Court of the United States in 183), in a court in which both those great jurists Chief Justice Marshall and Justice Story

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

sat, and the opinion of the court was delivered by Mr. Justice Story, it was held that the naming of a society in a royal charter was a plain recognition by the Crown of the *existence of a corporation and of its capacity to take the land in controversy* and further that such a recognition would confer the power to take the land even if it had not previously existed. See 4 Peters, 480, at p 502, where the argument of Mr. Daniel Webster is given effect to by the court. I cite this case not as an authority but as entitled to great weight on account of the eminence of the counsel and Bench concerned in it. It seems to me to be on the same principle as the cases referred to by me before collected in Maxwell on Statutes, (3 ed.) pp. 428-429, and as Parliament has over and over again recognized the right to build branches after 1891, that great importance is to be attached to such Parliamentary interpretation or recognition. It is to be borne in mind also that on the faith of the contract being ample authority to build at any time branches within the limits described, large sums of money it was stated had been borrowed solely on the security of such branch lines and Parliament must have known that such would have been the inevitable result. It is said that Sir Oliver Mowat, in 1897, when Minister of Justice, advised that no such power existed, but, it seems to me, that the fact of Parliament subsequently disregarding and ignoring his advice and again recognizing the right to build both as to time and place, strengthens the position of the Canadian Pacific Railway Company in appealing to the doctrine of recognition embodied in the case in 4 Peters before referred to. It appears to me, therefore, that the time limit in clause 15 is only as to branches *contracted* for and has no application whatever to such branches as the company was *privileged* to build at its option.

The third question it is perhaps unnecessary to answer in view of the opinion I have formed of the proper answers to the first two.

Assuming that ten years was the limit within which branch lines were to be built, I am of opinion nevertheless that as there are no words in the Act, charter or contract expressly providing that at the end of the ten years all power to built shall cease such as were used in *Montreal Park and Island Railway Co.* v. *The Chateauguay and Northern Railway Co.* (1), that the power still exists until a forfeiture of such power is declared in properly constituted judicial proceedings. This is the rule in the United States. See Morawetz on Corporations. ss. 1006-1015; Thompson on Corporations, Vol. 5, ss. 6598-6602. In England I find no direct authority but if I am correct that the power still exists it would seem to follow that only in a suit to which the Attorney General is a party plaintiff (or if he refuses he may be made a party defendant) can the question be successfully raised. I do not decide this, however, as it is very doubtful where, as in this case, the James Bay Railway Company will be crossed and otherwise interfered with by the building of the branch and it has, therefore, a special and peculiar interest, whether it cannot raise the question. *Hinckley* v. *Gildersleeve* (2); *Town of Guelph* v. *Canada Co.* (3); *Stockport District Waterworks Co.* v. *Mayor of Manchester* (4); *Pudsey Coal Gas Co.* v. *Corporation of Bradford* (5), would seem to indicate that in such case the James Bay Railway Company *would* be entitled to be heard in a suit brought by it to restrain the Canadian Pacific Railway Company entering upon its lands. In this proceeding, however, ss. 3 and 5 of the gen-

(1) 35 Can. S.C.R. 48 at p. 60.
(2) 19 Gr., 212.
(3) 4 Gr., 632.
(4) 9 Jur. N.S., 266.
(5) L. R. 15 Eq,, 167.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Nesbitt J.

eral Railway Act, 1903, should be read in with clause 14 of the contract and as additional to it, and as the Canadian Pacific Railway Company have to file plans and obtain approval of them, the James Bay Railway Company would have a right to appear and appeal to the discretion of the Minister of Board on such application. It is doubtful if the court could compel the Minister or the Board to act if in his or its *bonâ fide* discretion approval of plans was declined *Attorney General* v. *Toronto Junction Recreation Club* (1); *In re Massey Manufacturing Co.* (2) shew when the court can interfere and compel executive action.

I think the Minister or Board has more than ministerial powers and represent the Crown, and it seems to me that this distinguishes the case from a mere action by a private party when, even with his special interest, he might be precluded from raising the question as to which I do not think we are called upon to decide. I think, in this application to the special tribunal created by the Act, the James Bay Railway Co. may be heard.

I would therefore answer to the first question :

The Canadian Pacific Railway has power to construct the branch referred to and the time within which such branch ought to be constructed has not expired.

To the second question ; Yes.

To the third question ; Yes

IDINGTON J.—Under the Railway Act of 1903 the Board of Railway Commissioners submit for the opinion of this court the following questions :

1. Has the Canadian Pacific Railway Company, under the legislation, schedules and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed ?

(1) 7 Ont. L. R. 248. (2) 11 O. R. 444 ; 13 Ont. A.R. 446.

2. Do such legislation, schedules and charter authorise construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario?

3. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired.

The legislation, schedules and charter aforesaid consist of 44 Vict. ch. 1, and the schedules annexed thereto, of which latter the first is a copy of the contract between Her Majesty and certain gentlemen who undertook thereby to build parts of the Canadian Pacific Railway, and the second is a copy of the legislation that became the authority for the issue of the letters patent creating the Canadian Pacific Railway Company.

It is the extent of the corporate powers of this company as to building branch lines that is now called in question. The questions asked must be answered by the meaning given to sec. 14 of the contract schedule just referred to.

To interpret it properly regard must be had not only to the rest of the contract and the enactment that gives it vitality, but also to the history leading up to it and the conditions immediately surrounding it.

Whilst all must be looked at and the whole considered together, we must bear in mind that the one schedule contains a temporary contract and the other the foundation for a chartered corporation that was to have a perpetual existence.

The contract was with certain parties who could not, save by the creation of the corporation, transfer their rights to any one else.

The corporation was to consist not only of such parties, but also of such others as they might associate with them as shareholders. The contract was only to be binding in the event of the *Act of Incorporation* being granted to the company in the form of schedule "A."

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

Section 21 of said contract that shews this, is as follows :—

21. The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of *an Act of incorporation being granted* to the company in the form hereto appended as schedule "A."

This legislation having been passed providing the Act of incorporation, the contract became thereupon immediately binding and the contractors then might or not as they saw fit seek for the immediate issue of the letters patent creating the corporation. They were not bound to do so. No part of this contract expressly rendered it necessary to do so.

Whatever may have been the design of this cumbrous method and the hiatus that was to exist between the legislation providing for, and the incorporation of, the company, it is important to mark the existence of this hiatus for it enables one more clearly to observe by the actual segregation of the contract from the incorporation and incorporating enactments that there may, and perhaps must, be attached to each of the provisions of the contract a meaning quite independent of anything else in schedule A which might never have been called into active existence.

I have no doubt that the parties who provided this condition of things had some real purpose in view and that it did not come about as mere accident.

Its resultant effect on the meaning we must give to the provisions of the contract is not to be waived off by saying that the promoters, though contractors, never intended or were intended to construct the railway. Their legal position by virtue of this contract was that they must, and that there was no other means of escape from its obligations than by and through the creation of a corporate body which the contract did not render by its express terms at all obligatory on them to bring into being.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

Let us, therefore, interpret this contract as we can, and as far as we can, by itself as an independent document, but of course to be interpreted in light of what had gone before and the then surrounding conditions.

The first clause thereof interprets "The Canadian Pacific Railway" to mean the entire railway as described in 37 Vict. ch. 14, and the individual parties thereto as described by the words "The Company."

The words "The Company" being a term that might appropriately be applied to the corporation to be formed, when formed may have been used in anticipation thereof and designed to bear a reference as occasion called for it to the syndicate body or the corporate body, but this possible double use or meaning in no way ought to be permitted to confuse us.

The primary meaning of the term "The Company" in this contract, and particularly in every place where present contractual obligation or present privilege or franchise is designed to be expressed, must mean the individuals as contractors.

When those privileges and franchises have been transferred to and those obligations imposed on the corporate body by the occurrence of certain events, and the operation of the enactments that anticipated such events, and the Parliamentary assignment resultant therefrom has taken effect, the term "The Company" may be read then and thereafter in the same clauses or some of them as descriptive of or meaning the corporation.

Meanwhile the term "The Company" designates contractors who have undertaken certain work. It means no one else.

The Canadian Pacific Railway which is in question in this contract and interpreted therein as I have pointed out by reference to 37 Vict. ch. 14, is by sec. 1 thereof defined as follows:

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

1. A railway, to be called "The Canadian Pacific Railway," shall be made from some point near and south of Lake Nipissing to some point in British Columbia, on the Pacific Ocean, both the said points to be determined and the course and line of the said railway to be approved of by the Governor in Council.

3. Branches of the said railway shall also be constructed as follows, that is to say:

First. A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the points to be determined by the Governor in Council.

Secondly. A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina, on the southern boundary thereof.

And by sec. 4 thereof it is enacted that

the branch railways above mentioned shall, for all intents and purposes, be considered as forming part of the Canadian Pacific Railway.

This railway was in process of construction by the Government when this contract was entered into.

The road to be built has been divided into four sections, of which the terminal points were in this contract more accurately defined than in 37 Vict. ch. 14. Two of these sections had been partially constructed and were by this contract allotted to the Government to complete, and the other two, called respectively the eastern and central sections, were by the contract assigned to the company for construction.

The Selkirk branch, from Selkirk to Pembina, was then completed. Sections 13 and 14 of the contract are as follows:

13. The company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of the railway hereby contracted for, as they may see fit, preserving the following terminal points, namely: from Callander station to the point of junction with the Lake Superior section; and from Selkirk to the junction with the western section at Kamloops by way of the Yellow Head Pass.

14. The company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along *their main line* of railway to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the

company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

It is this right from time to time to lay out, etc., branch lines of railway, etc., that is now said by the Canadian Pacific Railway Company here to continue for all time as theirs.

The question has been approached and argued as if the company had always existed, and as if it had been owner or in some way master of the main line from end to end of the original project, and as if the words "their main line" in sec. 14 meant the whole main line.

Had that been the case, and the corporate company had an existence when this contract was entered into, one could understand the reason for asserting that the term "*their main line*" means what is now claimed by that company.

Not only, as I have pointed out, is this not the case, but it was certain contractors only who were given the rights there and now in question. These contractors had by said sec. 13 only the right, subject to the approval of the Governor in Council, to lay out and locate two sections of the main line, and the subsidies of $25,000,000 and 25,000,000 acres of land that they were to get by sec. 9 of the contract were mainly given for that work, and were to be paid and granted as the work of construction proceeded. The subsidies were by subsec. (*a*) of sec. 9 appropriated in relation to said central and eastern sections on the respective bases as to land and money as therein appears.

What concerns us here is to observe that those subsidies were to be paid or granted as the work of construction of those two sections progressed and became in twenty mile sections completed, so as to admit of the running of regular trains thereon. These subsi-

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

dies would by this process be exhausted by the time of the completion of these two sections, which time was fixed at 1st May, 1891.

If we remember the limited authority given the company by sec. 13 and that their contract for construction had nothing to do with what was beyond their two sections, and that, though by sec 7 they became entitled to running rights over the other sections being constructed and to be constructed by the Government as same were completed, they were not to have any right of property therein until the eastern and central sections had been completed by them, and then only as Government had completed its parts, which need not be until 1st May, 1891, we will be able to understand the very peculiar words "*their main line*" in this sec. 14. We see thus why what at first blush seems a strangely inapt expression is used. "*Their main line*" were the central and eastern sections built by them.

Its true meaning being thus seized, it is plain that their rights to build branch lines were limited to that part of which they were in a limited sense masters. This also furnishes obvious common sense reasons for giving powers to build branches from their main line, when one reflects on the probable needs of construction and the anticipated colonization of the country that the contractors were becoming so deeply interested in.

Without giving to these words "*their main line*" a meaning that they will not bear in light of what I have adverted to or attributing to the man who drafted this contract a poverty of language or ignorance of its precise meaning that he nowhere else indicates as one of his failings, I think these words must be held to refer only to the two sections that were then, as they

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

were constructed, to become the property of the company of contractors.

We find on turning to sec. 11 provision for selecting lands along and for 24 miles deep "on each side of any branch line or lines of railway to be located by the company and to be shown on a map or plan to be deposited with the Minister of Railways."

This indicates nothing beyond a plain intimation that at least some branch lines of the nature indicated were expected to be built during and within the time when the company had to have their contract finished and be in a position to select their lands.

It is said, however, that all this does not, and that the contract does not, in express terms put a limit of time or place upon the expected construction of branch lines. I have indicated why I think the part or place was limited. If I am right in that limitation, I am unable to comprehend why it should exist in that limited way only unless we are to construe the grant of this power as one to be exercised only as incident to and during and not beyond the period fixed for the construction of those two sections in relation to which the parties were speaking and contracting, to be known as the eastern and central sections. Within such limits one could understand such a grant being made. Time and the existing condition of things would keep its exercise within reasonable bounds. If it were intended as a general power for all time I can see many more reasons for its creation or existence in relation to the other sections after construction than I can in relation to those to which my interpretation confines it.

And why, if intended in the sense now contended for, should the extension of the then existing Selkirk and Pembina branch and branches from such an important branch have been omitted?

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

We thus find the probable limitation of time, without imputing absurdity either in language, intention or construction.

Without formulating any rule or pushing any canon of construction too far for this complex matter of a grant, a contract and a Parliamentary concession rolled into one to bear, I think I am safe in saying that we need to seek for a reasonable meaning or intention and to avoid, if possible, that which would be repugnant to the then mode of thought and strangely inconsistent with the remainder of the contract.

That which I now suggest would not be unreasonable.

We find it by considering the contract as a whole, and the legislation before and with it, including Schedule A as a whole. We are forbidden by considering the Consolidated Railway Act of 1879, which was the deliverance of this same Parliament as to the general policy, of that time, in regard to railways and especially as to their branch lines, and the time within which main lines should be constructed, and in the application of that Act to the undertaking in question, to give this paragraph the meaning now contended for by the Canadian Pacific Rly. Co.

The lines upon which this contract was framed had been laid down by 37 Vict. ch. 14, in every essential feature.

Except in regard to the extent of the subsidies and the financial arrangements based thereon, speaking in a comprehensive and general sense, there was no material departure from those lines unless we are to interpret this contract as conferring upon the contractors the right (as now asserted) forever to build branch lines.

Why should we suppose such a radical change of purpose or of policy? Why when decided upon, if

ever decided upon, should we find it conferred by a grant of a personal and non-assignable franchise and not expressly given to the perpetual corporation as such?

I think we should be slow to attribute to Parliament an assignment forever of all right of control over the power of a railway company, building a line of such magnitude as this one, to build when, where and how it saw fit such branch lines as the company should decide to build. The aspect of national importance, from both the political and commercial points of view, seems also to forbid such a purpose, and especially such a sudden change of purpose.

Of course, even if the purpose, so repugnant to all this, and the thought of that time, were yet plainly expressed we must give effect to it. It has not been so expressed unless we impute to the words "from time to time" as used here the meaning of "forever." The contrary to my mind was intended, if not expressed in words, and the power of building branches was limited to those sections that the contractors undertook personally to build, and to the time of limitation for that building, and incidental thereto, as part of the whole, that whole being the completion and delivery over of the parts and branches so built to the future controlling power that from the 1st May, 1891, if not earlier, was to use the whole road.

It would seem from all this not only that the intention of the parties to the contract is discovered by reading it with regard to these limitations of time and space for the operation of the powers given by sec. 14 but also that full effect is given to the words "from time to time" when read to mean so long as the constructive period that these contractors might possibly have something to say in regard to the subject matter, and not to mean from time to time forever.

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

A remarkable feature of this matter is that in so far as affecting the then present and soon or immediately to become operative contractual obligations, privileges or franchises this contract and the Parliamentary transfer thereof are implicitly relied upon to execute the purpose of the parties, but when it comes to the exercise of a right that would come into or might only come into being, or rather that the parties intended should have a right to exist and become at a later period a perpetual right, vested in the corporate company, the parties to this contract do not rely upon this contract, ample as are its powers, but in regard to its accruing future rights of paramount and permanent importance they are careful to repeat the provisions therefor in the legislation.

See for example the *repetition* in sec. 3 of the Act, of the contract conditions in regard to the perpetual and efficient operation of the railway and the money and land grants, and in sec. 5 of the Act of the future running rights over the road and ownership of same as completed, and of the whole when completed.

The deposit, the standard of construction, the times for completion, the grants of land for road bed &c, the extinction of Indian title, the restriction of competitive lines, some of the bonding provisions, and the right to build branch lines, are all treated alike as of a temporary character and permitted to rest upon the contract, also temporary, and are not repeated elsewhere. That which is not necessarily legislative in its character but merely contractual is governed by the contract. That which is to abide for all time is as one would expect treated as needing direct legislation.

I recognize that this line of distinction is not adhered to in every respect and literally, but when we look at the contract and the legislation I think there exists a clear line of demarcation such as I have indicated

between what was temporary in character and that which was to be permanent, and we find such an important matter as the construction of branch lines omitted entirely from the permanent side of the line of demarcation. Why should it from its importance and permanency not find its place there?

All the Syndicate had acquired by this contract was transferred by the operation of secs. 3 and 4 of schedule "A," as soon as the letters patent were issued and the provisions of that schedule became operative, but that transfer did not enlarge the power to build branches beyond what had been possessed by the contractors. It transferred a right which at best could not have extended beyond the lives or surviving life of those to whom it was granted as a personal right, license, or franchise. I have to repeat that it could never extend by this contract to their assigns, for they were not named in the instrument framing the personal grant.

This being the only alternative limitation of the grant indicates again in another way the intention of the contracting parties that the right to build such branch lines should exist only in relation to and during the process of construction of what they had respectively undertaken should be done by each.

Now, coming to the consideration of sec. 15 of schedule "A," which is as it were a summing up of the whole matter, and seems conclusive upon close analysis thereof as binding us to adopt a temporary and not a perpetual time for the existence of the right to build those branch lines, sec. 15 is as follows:—

15. The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches; which railway shall extend from the terminus of the Canada Central Railway near lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also a branch line of railway from some point on the main line of railway to Fort William on

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

Thunder Bay; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said province; and also other branches to be located by the company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid; and the said main line of railway and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

This, analysed, provides as follows:

(1.) "A continuous line of railway" &c.

(2.) "A branch line of railway from some point on the main line of railway to Fort William on Thunder Bay."

(3.) The existing branch line of railway from Selkirk in the Province of Manitoba to Pembina in the said province.

(4) And also "other *branches to be located* by the Company *from time to time as provided by the contract.*"

4a. "The said branches to be of the gauge aforesaid."

(5) "And the said main line of railway and *the said branch lines of railway* shall be commenced and *completed as provided by the said contract.*

(6) "And together with such other branch lines as shall be hereafter constructed by the said Company, and any extensions, &c..... shall constitute the line of railway hereinafter called the Canadian Pacific."

Observe that there are only two specific branches named, of which one is already existing and not needing "to be located" or built.

When we ask the meaning of the 5th paragraph of this analysis we find the plural—"branch lines of railway"—used. It cannot, therefore, only refer to the specified branches preceding it, as there is only one "to be commenced and completed." It must, therefore, of necessity include another or others.

What other or others? Those that "*shall be commenced and completed as provided by the said contract*, is the only possible reply, to begin with. And they can, in the next place, only be those (in the 4th paragraph of analysis) "*other branches to be located by the Company from time to time as provided by the contract.*"

Whether I have made my meaning clear or not, this seems to me as simple as the simplest mathematical problem. It is said, however, that though this be taken as the correct rendering of the language used, the words "commenced and completed as provided by the said contract", do not refer to branches, or at all events to those "to be located" branches. It cannot refer to any branches unless it be those branches to be located, for the contract does not name or refer by name to the branch here specified to Fort William at all.

Moreover, the Fort William branch was not off or from the eastern or central section at all, and if what is now contended for by the Canadian Pacific Railway Company ever was supposed to have a foundation in fact, there was no necessity for referring in this incidental way to the Fort William branch. If the company had a right by the terms of the contract to build any branches they saw fit, there was no necessity for specially describing or apparently thus enabling them to build the Fort William branch.

No other branch is, or I submit can be, in question if those here referred to as "to be located" do not answer the description.

Are we then, not being able to find something to which to apply those words (in paragraph 5 of this analysis) to read the paragraph as if the words "and the said branch lines of railway" had no existence or meaning?

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

Is it to escape, as the only way of escape, from the imperative words "*shall be commenced and completed as provided by the said contract*" that we are to resort to that alternative?

I think that they should be read in light of what I have adverted to as applicable to what may or shall have been done within sec. 14 of the contract, and that only. We thus, and only thus, can give effect in a reasonable and natural way to every word in this sec. 15.

And when we have done so, we look back to the contract to find what is meant by these words "completed as provided by the said contract," which plainly imply a period of completion.

I think the 6th paragraph of this analysis relates to the branch lines which the Railway Act gives power to construct, and such other lines as might lawfully be constructed by or acquired by the corporate company.

Such anticipatory words are in such legislation useful and were appropriately used here.

I am in this view not troubled about the Algoma branch legislation, the Sudbury branch legislation, or any other legislation relating to those branches built or partly built within the time limit I have suggested, nor am I in this result troubled about small branches within the powers given by the Railway Act of 1879.

What is relied upon as happening since May, 1891, as confirmatory of the pretentions now put forward by the company, is for the most part thus disposed of, and what remains is of an administrative character that ought not to influence any court in the interpretation of an Act of Parliament. I am unable to understand why some of these incidents have been allowed to trouble us at all. The branches running off the

branch lines, as, for example, the Souris Branch, surely cannot help us to interpret the powers of the company in regard to branch lines running from a point on their main line.

What was done in relation to these subsidiary branches illustrates when closely examined a variety of cases such as a parliamentary beginning within the time, a carelessness or audacity as to whether powers had or had not existed after the time expired, and finally a statute expressly granting the power by 63 & 64 Vict., ch. 55, to build just the same sort of branch lines if not the same as are here expressly put before us as exemplifying alleged parliamentary recognition, or extensions thereof.

The company petitioned Parliament for this grant of new powers, and in this same Act there is provided, expressly as it seems to me, that two lines off and from the main line shall be built by virtue of the powers therein given.

It looks very much as if in 1900 the company had abandoned, if indeed it ever seriously had before then put forward, the contention here in question.

The Arrow Lake branch is apparently part of the Kootenay railway scheme, for which there was independent legislation, and by 54 & 55 Vict. ch. 71, s. 2, as well as a preceding section, this company is empowered and protected

The Pheasant Hills Branch grant was to be commenced within two years from 1st August, 1903, completed before the end of four years from that date, or as fixed by the Governor in Council, and to be constructed according to the description, conditions, and specifications approved by the Governor in Council on report of the Minister of Railways and Canals, and specified in a contract with the Minister, who is empowered, with approval of the Governor in Council, to make it,

1905

In re BRANCH LINES CAN. PAC. RY. CO.

Idington J.

and the location of the line is to be subject to the approval of the Governor in Council, and by sec. 6, the Governor in Council may at all times secure to other companies running powers and reasonable facilities for enjoying same equally, etc. And the Governor in Council is to have control over all tolls, etc.

Indeed much time spent on this branch of the case following up the data given, so far as given, leads me to the conclusion that all the grants relied upon as some recognition of the existence of the powers now claimed were conditional upon terms to be imposed by the Governor in Council. And where the branch line involved a bonding power, as in the case of the Kootenay and other companies, no reliance was placed upon the powers now claimed and existing, but parliamentary sanction or confirmation was sought and got for what was to be done.

I am quite aware that much of the reasoning I have adopted in reaching the conclusions I have is not in accord with that by which some of the former members of this Court arrived at their conclusions in the case of *Canadian Pacific Railway Co.* v. *Major* (1), which might have been supported on other grounds, and also does not necessarily govern us in this case.

With great respect and regard for those who decided that case, I take the liberty of thinking here that in some respects the arguments presented to us now were not presented then. It was admitted by counsel that if the time had elapsed within which the power to build branches was given, the question of the extent of that power need not be answered.

I therefore confine myself on this point, without concealing my opinion, to saying in reply to question No. 1, that the time has expired within which such branch line might have been constructed.

(1) 13 Can. S. C. R. 233.

And as to the third question, I think in view of the great length of time that has elapsed, in my judgment, since any such power existed in the company and nothing as to the work in question here done under it, or asserting it, save filing of plans in question here, that it became the duty of the Board of Railway Commissioners to consider and determine the question of right, or extent of right, existing in the company when they applied to that Board and within their exercise of powers to determine, and that the Board could hear any one interested as the James Bay Railway Co. seemed to be here; and that Company as well as the Board had the right to take the objection taken.

This is a case of the limitation of the company's powers by time and space that were as I find defined.

It raises none of the questions that might have arisen in regard to work that had been only partly done when the time expired.

Solicitor for the Canadian Pacific Railway Co.:

A. R. Creelman.

Solicitors for the James Bay Railway Co.:

Blake, Lash & Cassels.

CAN. PERFORMING RIGHT SOC., Ltd. v. FAMOUS PLAYERS CAN. CORP., Ltd.

Judicial Committee of the Privy Council, Hailsham, L.C., Lord Buckmaster, Viscount Sumner and Lords Blanesburgh and Warrington. February 1, 1929.

W. Greene, K.C., and *S. O. H. Collins,* for appellants.

W. N. Tilley, K.C., and *H. Douglas,* for respondents.

The judgment of the Board was delivered by

LORD WARRINGTON:—The appellants, the plaintiffs in the action, are the owners by assignment of the performing rights in Canada of a very large number of musical works, the copyright in which is still subsisting.

The action in which the present appeal arises was an action under the Copyright Act, 1921 (Can.), c. 24, against the respondents for an injunction and damages in respect of the infringement by the respondents of the exclusive performing rights in Canada of two of the said musical pieces.

The respondents, amongst other grounds of defence, alleged that the appellants could not maintain the action because of their failure to register the grants under which they claimed title as required by s. 39 of the above-mentioned Act.

The action was tried before Rose, J., [1927] 2 D.L.R. 928, who delivered judgment over-ruling the various grounds of defence other than that of failure to register, but allowing the latter ground. He therefore dismissed the action with costs.

Imp.
P.C.
1929.
CAN. PERFORMING RIGHT SOC. v. FAMOUS PLAYERS CAN. CORP.
Lord Warrington.

The appellants thereupon appealed to the Appellate Division of the Supreme Court of Ontario which, by a unanimous judgment, [1927] 3 D.L.R. 931, dismissed the appeal with costs.

By an order of His Majesty in Council dated November 3, 1927, special leave was given to enter and prosecute the present appeal. The facts are not in dispute.

At the date of the assignment next hereinafter mentioned, the exclusive right of performing in public in all parts of the world the musical pieces, the subject of the action, was by virtue of certain prior assignments vested in the Performing Right Society, Ltd. (hereinafter called the British Society).

By an indenture dated February 15, 1926, and made between the British Society, thereinafter called the assignor of the one part and the appellants thereinafter called the assignee of the other part, the assignor assigned to the assignee the right of performance in Canada of the music of (amongst a large number of other musical works) the musical works, the subject of this action.

At the date of the said indenture the British company by virtue of s. 41(1) of the Copyright Act was entitled to the sole right to perform the said musical works in public, and such right was by virtue of s. 11(2) of the same Act effectually transferred to the appellants by the said indenture.

The infringement of the appellants' right by the respondents is admitted, and but for the several grounds of defence above referred to the appellants' right to maintain the action is clear.

Inasmuch as their Lordships agree with the view of the Courts below on the point on which the case was decided in Canada, it is unnecessary to consider any of the other grounds of defence set up by the respondents.

The questions turns entirely on the construction of s. 39(2) of the Copyright Act. Section 39 of that Act is as follows:—

"(1) Any grant of an interest in a copyright, either by assignment or license, may be registered, if made in duplicate, upon production of both duplicates to the Copyright Office and payment of the prescribed fee. One duplicate shall be retained at the Copyright Office and the other shall be returned to the person depositing it, with a certificate of registration.

"(2) Any grant of an interest in a copyright, either by assignment or license, shall be adjudged void against any subsequent assignee or licensee for valuable consideration without actual notice, unless such assignment or license is registered in the manner directed by this Act before the registering of the instrument under which a subsequent assignee or licensee claims,

and no grantee shall maintain any action under this Act, unless his and each such prior grant has been registered."

The appellants are indisputably "grantees," their "grant," *viz.*, the assignment to them executed by the British company, has not been registered, the action is an action under the Act; therefore, reading the words literally, they are precluded from maintaining the action. The above is the effect of the several judgments in Canada, and their Lordships can see no answer to the respondents' case as thus stated.

Strenuous efforts, however, have been made by counsel for the appellants to induce their Lordships to accept a construction other than the literal one, and it is necessary therefore to consider whether such a construction is the correct one.

Great stress is laid by the appellants on the extreme inconvenience of a literal construction. It may, it is said, be practically impossible, when occasion arises to register an assignment, to obtain a duplicate without which, as it would appear, registration is impossible.

One answer to this argument is that it ought to be addressed to the legislature and not to the tribunal of construction, whose duty it is to say what the words mean, not what they should be made to mean in order to avoid inconvenience or hardship. On this point it may be pointed out that though the Act received the Royal Assent on June 4, 1921, it did not come into operation until January 1, 1924, and there was ample time for persons interested to point out defects and endeavour to obtain their removal.

Of course, if it could be established that the provision in question is capable of two meanings, one of which would produce a reasonable and the other an unreasonable and unjust result much might be said in favour of adopting the former. But it is here that the appellants' difficulty arises. The main endeavour on the part of counsel for the appellants was to show that the concluding words are a complement to the earlier part of the subsection, and are to be confined to cases where the action is one between competing grantees, and stress was laid on the words "each such prior grant" as referring, they maintained, to the grant to which that of the "subsequent assignee" mentioned in the section, is subsequent in point of date. But in the first place "each such prior grant" suggests that there may be more than one, and in the second, there is a sensible meaning for the words which fits in with the wider construction adopted by the Courts in Canada. The words to be construed are "his," *i.e.*, the grantee's, "and each such prior grant," *viz.*, "his grant

Imp.
P.C.
1929.
CAN. PERFORMING RIGHT SOC. v. FAMOUS PLAYERS CAN. CORP.
Lord Warrington.

and each such prior grant." The natural meaning of these words is, in their Lordships' opinion, "his grant and each grant such as his own and prior in date thereto." The statute would then require him to register his own grant and every prior grant of the same nature, comprising the same subject-matter and conferring the same interest therein as that made to himself. So construed, the words would distinctly point to grants forming part of the chain of title as those to be registered. If the words are construed, as the appellants say they ought to be, they might require the grantee, who has registered his grant and as against whom therefore the prior grant is void, to register that grant before he could bring an action against the holder of it—surely, a most unreasonable requirement.

The first part of the subsection it is true left open the question what, if any, right of action would be in the holder of either grant if neither was registered, but the legislature by the general words it has used has covered this point by making registration an essential condition to the maintenance of any action.

For these reasons, their Lordships are of opinion that the order appealed from ought to be affirmed and this appeal dismissed with costs. They will humbly advise His Majesty accordingly.

Appeal dismissed.

2009 CarswellOnt 3736
Ontario Superior Court of Justice

Clitheroe v. Hydro One Inc.

2009 CarswellOnt 3736, [2009] O.J. No. 2689, 178 A.C.W.S. (3d) 1047, 2009 C.E.B. & P.G.R. 8349 (headnote only), 76 C.C.P.B. 195, 96 O.R. (3d) 203

Eleanor R. Clitheroe (Plaintiff) and Hydro One Inc. (Defendant)

Mesbur J.

Heard: May 19-22, 2009
Judgment: June 26, 2009 *
Docket: 06-CV-307811PD1

Proceedings: additional reasons at *Clitheroe v. Hydro One Inc.* (2009), 2009 CarswellOnt 3881 (Ont. S.C.J.)

Counsel: Alan J. Lenczner, Q.C., for Plaintiff
Benjamin Zarnett, Peter Kolla for Defendant
Robin Basu, Robert Donato for Intervenor, Attorney General for Ontario

Subject: Corporate and Commercial; Constitutional; Public; Contracts; Employment; Human Rights
Related Abridgment Classifications
Constitutional law
XI Charter of Rights and Freedoms
XI.3 Nature of rights and freedoms
XI.3.f Life, liberty and security
XI.3.f.ii Economic, commercial and proprietary rights
Pensions
I Private pension plans
I.2 Payment of pension
I.2.h Determination of benefits payable
I.2.h.ii Credited service
Public law
I Crown
I.1 Contractual principles regarding Crown
I.1.d Breach of individual covenants by Crown
Public law
IV Public utilities
IV.3 Actions by and against public utilities
IV.3.d Miscellaneous
Public law
IV Public utilities
IV.4 Termination, valuation and privatization
IV.4.e Privatization and deregulation
Statutes
III Retroactive and retrospective operation
III.3 Vested rights

Headnote

Pensions --- Payment of pension — Determination of benefits payable — Credited service

Plaintiff based career decisions, including latest position with public utility, in part on transferability of defined benefit pension plan to new employers and enhanced benefit of "two for one" credit for years of service — In 1999, utility was reorganized into multiple companies, including HO Inc., of which plaintiff became director and CEO — HO Inc. assumed utility's pension obligations, and plaintiff's and others' pensions were rolled into HO Inc.'s registered and supplementary plans — Plaintiff was only member of HO Inc. supplementary plan to receive special additional benefit of "three for one" credit for years of service and bonuses included in earnings for purpose of calculating eventual pension benefits — In 2002, provincial government passed Bill 80 ("Bill") terminating plaintiff's positions and prohibiting payment of benefits in excess of amounts authorized by s. 12 of Bill, thereby effectively capping plaintiff's credited service at maximum, which actuarial calculations indicated was 14.74 years — Plaintiff brought action for declaration that Bill was inapplicable to her pension rights and for declaration credited service was 21.75 years — Action dismissed — Bill clearly and without ambiguity deprived plaintiff of any pension benefits calculated other than by provisions of Bill — Commencing January 1, 1999, plaintiff had no other pension rights than those set out in HO Inc. plans — Bill retroactively changed and limited amounts that could be paid out after January 1, 1999 under plans — Limiting language and calculations were clear — Entitlement was first limited to amount payable under registered plan, and there was no dispute as to what sum was — There was no question plaintiff was only one with special arrangement under supplementary plan, and no question that amount under enhanced benefit provisions exceeded amounts payable under supplementary plan's calculations for all members of plan, so plaintiff's additional enhanced benefits could not be paid out — Maximum pension and retirement income plaintiff was entitled to receive under s. 12 of Bill was amount calculated pursuant to terms of registered plan and supplementary plans applicable to all members — While plaintiff had contractual entitlement to use 21.75 years of credited service in calculating pension, legislation's clear wording, when read in conjunction with other sections, indicated that legislature intended to cancel plaintiff's contractual pension entitlements in excess of maximum — Plaintiff's pension entitlement, which was purely economic contractual right, was afforded no protection under s. 7 of Canadian Charter of Rights and Freedoms.

Statutes --- Retroactive and retrospective operation — Vested rights — General principles

Plaintiff based career decisions, including latest position with public utility, in part on transferability of defined benefit pension plan to new employers and enhanced benefit of "two for one" credit for years of service — In 1999, utility was reorganized into multiple companies, including HO Inc., of which plaintiff became director and CEO — HO Inc. assumed utility's pension obligations, and plaintiff's and others' pensions were rolled into HO Inc.'s registered and supplementary plans — Plaintiff was only member of HO Inc. supplementary plan to receive special additional benefit of "three for one" credit for years of service and bonuses included in earnings for purpose of calculating eventual pension benefits — In 2002, provincial government passed Bill 80 ("Bill") terminating plaintiff's positions and prohibiting payment of benefits in excess of amounts authorized by s. 12 of Bill, thereby effectively capping plaintiff's credited service at maximum, which actuarial calculations indicated was 14.74 years — Plaintiff brought action for declaration that Bill was inapplicable to her pension rights and for declaration credited service was 21.75 years — Action dismissed — Bill clearly and without ambiguity deprived plaintiff of any pension benefits calculated other than by provisions of Bill — Commencing January 1, 1999, plaintiff had no other pension rights than those set out in HO Inc. plans — Bill retroactively changed and limited amounts that could be paid out after January 1, 1999 under plans — Limiting language and calculations were clear — Entitlement was first limited to amount payable under registered plan, and there was no dispute as to what sum was — There was no question plaintiff was only one with special arrangement under supplementary plan, and no question that amount under enhanced benefit provisions exceeded amounts payable under supplementary plan's calculations for all members of plan, so plaintiff's additional enhanced benefits could not be paid out — Maximum pension and retirement income plaintiff was entitled to receive under s. 12 of Bill was amount calculated pursuant to terms of registered plan and supplementary plans applicable to all members — While plaintiff had contractual entitlement to use 21.75 years of credited service in calculating pension, legislation's clear wording, when read in conjunction with other sections, indicated that legislature intended to cancel plaintiff's contractual pension entitlements in excess of maximum — Plaintiff's pension entitlement, which was purely economic contractual right, was afforded no protection under s. 7 of Canadian Charter of Rights and Freedoms.

Public law --- Crown — Contractual principles regarding Crown — Breach of individual covenants by Crown

Plaintiff based career decisions, including latest position with public utility, in part on transferability of defined benefit pension plan to new employers and enhanced benefit of "two for one" credit for years of service — In 1999, utility was reorganized into multiple companies, including HO Inc., of which plaintiff became director and CEO — HO Inc. assumed utility's pension obligations, and plaintiff's and others' pensions were rolled into HO Inc.'s registered and supplementary plans — Plaintiff was only member of HO Inc. supplementary plan to receive special additional benefit of "three for one" credit for years of service and bonuses included in earnings for purpose of calculating eventual pension benefits — In 2002, provincial government passed Bill 80 ("Bill") terminating plaintiff's positions and prohibiting payment of benefits in excess of amounts authorized by s. 12 of Bill, thereby effectively capping plaintiff's credited service at maximum, which actuarial calculations indicated was 14.74 years — Plaintiff brought action for declaration that Bill was inapplicable to her pension rights and for declaration credited service was 21.75 years — Action dismissed — Bill clearly and without ambiguity deprived plaintiff of any pension benefits calculated other than by provisions of Bill — Commencing January 1, 1999, plaintiff had no other pension rights than those set out in HO Inc. plans — Bill retroactively changed and limited amounts that could be paid out after January 1, 1999 under plans — Limiting language and calculations were clear — Entitlement was first limited to amount payable under registered plan, and there was no dispute as to what sum was — There was no question plaintiff was only one with special arrangement under supplementary plan, and no question that amount under enhanced benefit provisions exceeded amounts payable under supplementary plan's calculations for all members of plan, so plaintiff's additional enhanced benefits could not be paid out — Maximum pension and retirement income plaintiff was entitled to receive under s. 12 of Bill was amount calculated pursuant to terms of registered plan and supplementary plans applicable to all members — While plaintiff had contractual entitlement to use 21.75 years of credited service in calculating pension, legislation's clear wording, when read in conjunction with other sections, indicated that legislature intended to cancel plaintiff's contractual pension entitlements in excess of maximum — Plaintiff's pension entitlement, which was purely economic contractual right, was afforded no protection under s. 7 of Canadian Charter of Rights and Freedoms.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Life, liberty and security — Economic, commercial and proprietary rights

Plaintiff based career decisions, including latest position with public utility, in part on transferability of defined benefit pension plan to new employers and enhanced benefit of "two for one" credit for years of service — In 1999, utility was reorganized into multiple companies, including HO Inc., of which plaintiff became director and CEO — HO Inc. assumed utility's pension obligations, and plaintiff's and others' pensions were rolled into HO Inc.'s registered and supplementary plans — Plaintiff was only member of HO Inc. supplementary plan to receive special additional benefit of "three for one" credit for years of service and bonuses included in earnings for purpose of calculating eventual pension benefits — In 2002, provincial government passed Bill 80 ("Bill") terminating plaintiff's positions and prohibiting payment of benefits in excess of amounts authorized by s. 12 of Bill, thereby effectively capping plaintiff's credited service at maximum, which actuarial calculations indicated was 14.74 years — Plaintiff brought action for declaration that Bill was unconstitutional in that it infringed her rights under s. 7 of Canadian Charter of Rights and Freedoms — Action dismissed — Plaintiff's pension entitlement was purely economic contractual right that was afforded no protection under s. 7 of Charter — Right to pension was simply deferred compensation — Salary or compensation, whichever form they might take, were purely economic rights and were not protected by s. 7 — Plaintiff's decision to work for HO Inc. and negotiate pension entitlement could hardly be equated with circumstances in prominent Supreme Court of Canada decision involving abortion rights, as plaintiff's situation could hardly be considered "profound social and ethical decision" on same level as woman's decision to terminate pregnancy — Attorney general's position and decision cited by attorney general wherein interest in pension plan was characterized as economic, was to be accepted.

Public law --- Public utilities — Termination, valuation and privatization — Privatization and deregulation

Plaintiff based career decisions, including latest position with public utility, in part on transferability of defined benefit pension plan to new employers and enhanced benefit of "two for one" credit for years of service — In 1999, utility was reorganized into multiple companies, including HO Inc., of which plaintiff became director and CEO — HO Inc. assumed utility's pension obligations, and plaintiff's and others' pensions were rolled into HO Inc.'s registered and supplementary plans — Plaintiff was only member of HO Inc. supplementary plan to receive special additional benefit of "three for one" credit for years of service and bonuses included in earnings for purpose of calculating eventual pension benefits — In 2002, provincial government passed Bill 80 ("Bill") terminating plaintiff's positions and prohibiting payment of benefits in excess of amounts authorized by s. 12 of Bill, thereby effectively capping plaintiff's credited service at maximum, which actuarial calculations indicated was 14.74

years — Plaintiff brought action for declaration that Bill was inapplicable to her, and for declarations credited service was 21.75 years and that Bill infringed rights under s. 7 of Canadian Charter of Rights and Freedoms — Action dismissed — Bill clearly and without ambiguity deprived plaintiff of any pension benefits calculated other than by provisions of Bill, and plaintiff's pension entitlement, which was purely economic contractual right, was afforded no protection under s. 7 of Canadian Charter of Rights and Freedoms — Commencing January 1, 1999, plaintiff had no other pension rights than those set out in HO Inc. plans — Bill retroactively changed and limited amounts that could be paid out after January 1, 1999 under plans — Entitlement was first limited to amount payable under registered plan, and there was no dispute as to what sum was — There was no question plaintiff was only one with special arrangement under supplementary plan, and no question that amount under enhanced benefit provisions exceeded amounts payable under supplementary plan's calculations for all members of plan, so plaintiff's additional enhanced benefits could not be paid out — Maximum pension and retirement income plaintiff was entitled to receive under s. 12 of Bill was amount calculated pursuant to terms of registered plan and supplementary plans applicable to all members — While plaintiff had contractual entitlement to use 21.75 years of credited service in calculating pension, legislation's clear wording, when read in conjunction with other sections, indicated that legislature intended to cancel plaintiff's contractual pension entitlements in excess of maximum.

Public law --- Public utilities — Actions by and against public utilities — Miscellaneous

Plaintiff based career decisions, including latest position with public utility, in part on transferability of defined benefit pension plan to new employers and enhanced benefit of "two for one" credit for years of service — In 1999, utility was reorganized into multiple companies, including HO Inc., of which plaintiff became director and CEO — HO Inc. assumed utility's pension obligations, and plaintiff's and others' pensions were rolled into HO Inc.'s registered and supplementary plans — Plaintiff was only member of HO Inc. supplementary plan to receive special additional benefit of "three for one" credit for years of service and bonuses included in earnings for purpose of calculating eventual pension benefits — In 2002, provincial government passed Bill 80 ("Bill") terminating plaintiff's positions and prohibiting payment of benefits in excess of amounts authorized by s. 12 of Bill, thereby effectively capping plaintiff's credited service at maximum, which actuarial calculations indicated was 14.74 years — Plaintiff brought action for declaration that Bill was inapplicable to her, and for declarations credited service was 21.75 years and that Bill infringed rights under s. 7 of Canadian Charter of Rights and Freedoms — Action dismissed — Bill clearly and without ambiguity deprived plaintiff of any pension benefits calculated other than by provisions of Bill, and plaintiff's pension entitlement, which was purely economic contractual right, was afforded no protection under s. 7 of Canadian Charter of Rights and Freedoms — Commencing January 1, 1999, plaintiff had no other pension rights than those set out in HO Inc. plans — Bill retroactively changed and limited amounts that could be paid out after January 1, 1999 under plans — Entitlement was first limited to amount payable under registered plan, and there was no dispute as to what sum was — There was no question plaintiff was only one with special arrangement under supplementary plan, and no question that amount under enhanced benefit provisions exceeded amounts payable under supplementary plan's calculations for all members of plan, so plaintiff's additional enhanced benefits could not be paid out — Maximum pension and retirement income plaintiff was entitled to receive under s. 12 of Bill was amount calculated pursuant to terms of registered plan and supplementary plans applicable to all members — While plaintiff had contractual entitlement to use 21.75 years of credited service in calculating pension, legislation's clear wording, when read in conjunction with other sections, indicated that legislature intended to cancel plaintiff's contractual pension entitlements in excess of maximum.

Table of Authorities

Cases considered by *Mesbur J.*:

Attorney General v. De Keyser's Royal Hotel Ltd. (1920), [1920] All E.R. Rep. 80, [1920] A.C. 508 (U.K. H.L.) — referred to

Authorson (Litigation Guardian of) v. Canada (Attorney General) (2003), (sub nom. *Authorson v. Canada (Attorney General))* 2003 C.E.B. & P.G.R. 8051, (sub nom. *Authorson v. Canada (Attorney General))* 227 D.L.R. (4th) 385, (sub nom. *Authorson v. Canada (Attorney General))* 109 C.R.R. (2d) 220, (sub nom. *Authorson v. Canada (Attorney General))* 306 N.R. 335, (sub nom. *Authorson v. Canada (Attorney General))* 66 O.R. (3d) 734 (note), (sub nom. *Authorson v. Canada (Attorney General))* [2003] 2 S.C.R. 40, 2003 CarswellOnt 2773, 2003 CarswellOnt 2774, 2003 SCC 39, 36 C.C.P.B. 29, (sub nom. *Authorson v. Canada (Attorney General))* 175 O.A.C. 363, 4 Admin. L.R. (4th) 167 (S.C.C.) — considered

B. (R.) v. Children's Aid Society of Metropolitan Toronto (1995), 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

Blencoe v. British Columbia (Human Rights Commission) (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 3 C.C.E.L. (3d) 165, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307 (S.C.C.) — considered

Charles v. Canada (Attorney General) (1996), 1996 CarswellOnt 871, 134 D.L.R. (4th) 452, 35 C.R.R. (2d) 301, 14 C.C.P.B. 98 (Ont. Gen. Div.) — considered

Charles v. Canada (Attorney General) (1998), 158 D.L.R. (4th) 192, 1998 CarswellOnt 1297 (Ont. C.A.) — referred to

Dikranian c. Québec (Procureur général) (2005), 2005 SCC 73, 2005 CarswellQue 10752, 2005 CarswellQue 10753, (sub nom. *Dikranian v. Québec (Procureur Général))* 260 D.L.R. (4th) 17, (sub nom. *Dikranian v. Quebec (Attorney General))* 342 N.R. 1, [2005] 3 S.C.R. 530 (S.C.C.) — referred to

Florence Mining Co. v. Cobalt Lake Mining Co. (1908), 12 O.W.R. 297, 1908 CarswellOnt 398, 18 O.L.R. 275, C.R. [1911] 2 A.C. 412 (Ont. K.B.) — considered

Godbout c. Longueuil (Ville) (1997), (sub nom. *Godbout v. Longueuil (City))* 152 D.L.R. (4th) 577, 1997 CarswellQue 883, 1997 CarswellQue 884, (sub nom. *Godbout v. Longueuil (Ville))* 219 N.R. 1, [1997] 3 S.C.R. 844, (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 (S.C.C.) — considered

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1999), 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615, 1999 CarswellNB 305, 1999 CarswellNB 306, 244 N.R. 276, 177 D.L.R. (4th) 124, 26 C.R. (5th) 203 (S.C.C.) — considered

R. v. Morgentaler (1988), 63 O.R. (2d) 281 (note), (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, 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — considered

Siemens v. Manitoba (Attorney General) (2002), 34 M.P.L.R. (3d) 163, 299 N.R. 267, [2003] 4 W.W.R. 1, 102 C.R.R. (2d) 345, 2002 CarswellMan 574, 2002 CarswellMan 575, 2003 SCC 3, 47 Admin. L.R. (3d) 205, [2003] 1 S.C.R. 6, 173 Man. R. (2d) 1, 293 W.A.C. 1, 221 D.L.R. (4th) 90 (S.C.C.) — considered

Walker v. Prince Edward Island (1995), 181 N.R. 158, 124 D.L.R. (4th) 127, 28 C.R.R. (2d) 63, [1995] 2 S.C.R. 407, 130 Nfld. & P.E.I.R. 181, 405 A.P.R. 181, 1995 CarswellPEI 38, 1995 CarswellPEI 38F (S.C.C.) — considered

Wells v. Newfoundland (1999), 99 C.L.L.C. 210-047, 180 Nfld. & P.E.I.R. 269, 548 A.P.R. 269, 46 C.C.E.L. (2d) 165, [1999] 3 S.C.R. 199, 15 Admin. L.R. (3d) 268, 1999 CarswellNfld 214, 1999 CarswellNfld 215, 177 D.L.R. (4th) 73, 245 N.R. 275 (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. 32(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 109 — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 251 — referred to

Hydro One Inc. Directors and Officers Act, 2002, S.O. 2002, c. 3

Generally — referred to

s. 1 — referred to

ss. 9-11 — referred to

s. 12 — considered

s. 12(1) — considered

s. 12(2) — considered

s. 13 — considered

s. 14 — considered

s. 16 — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

ACTION by former director and CEO of privatized public utility company for declaration that Bill retroactively limiting pension benefit rights was inapplicable and/or contrary to rights under s. 7 of Canadian Charter of Rights and Freedoms.

***Mesbur J.*:**

In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine ... The prohibition "Thou shalt not steal," has no legal force upon the sovereign body. And there would be no necessity for compensation to be given.

Florence Mining Co. v. Cobalt Lake Mining Co. [1]

Introduction:

1 In 2002 Eleanor Clitheroe's long and successful career in business, the Ontario Government, Ontario Hydro and Hydro One came to an abrupt halt with the Ontario government's passage of what is commonly called "Bill 80" [2]. That legislation, among other things, terminated her positions as a director and the Chief Executive Officer of Hydro One Inc. with effect on June 4, 2002, and also purported to eliminate a significant portion of her contractual rights to pension benefits from Hydro One.

2 There is no question the legislative branch has the power to enact such legislation. Riddell J. in the *Florence Mining* decision made that eloquently clear. What is equally clear, however, is that the legislature can divest a person of vested rights if and only if it does so in clear, unequivocal and unambiguous terms, and does not infringe a person's *Charter* [3] rights in doing so.

3 Ms. Clitheroe takes the position that Bill 80 fails on both bases, and therefore its attempt to limit or reduce her pension entitlement is of no effect. She says Bill 80 is neither clear nor unequivocal. Even if it is, she says it has improperly infringed her liberty rights under section 7 of the *Charter* and is therefore unconstitutional. Because Ms. Clitheroe has raised a constitutional issue in relation to Bill 80, the Attorney General for Ontario has intervened in these proceedings. [4]

4 Not surprisingly, both Hydro One and the Attorney General for Ontario take a contrary position to Ms. Clitheroe's.

Factual background:

5 Eleanor Clitheroe is now fifty-five years old. She holds a bachelor of laws degree from the University of Western Ontario, a civil law degree from McGill University, as well as a Masters of Business Administration degree from the University of Western Ontario. Since the passage of Bill 80 and the loss of her job with Hydro One, she has become ordained as an Anglican priest, and is currently training to become a military chaplain. She has had a successful, varied and demanding career.

6 Upon her graduation from law school, Ms. Clitheroe was articled to the Tory's law firm in Toronto, and then joined the Canadian Imperial Bank of Commerce, where she worked while completing her Bar Admission Course requirements. She continued with CIBC after her call to the bar in 1982, and remained there until 1989, eventually rising to the position of Vice President, foreign exchange and money market trading.

7 In 1989 Ms. Clitheroe left CIBC in order to join the Ontario government. She testified that she made the choice because she had been approached to do so, and was interested in pubic policy matters which she could pursue in government. She described the proposed salary as "OK", but with a potential for upward mobility. Her CIBC pension was transferable into the government plan, and she viewed the government pension as a good one. It was a defined benefit plan, with what she saw as significant security, since it was backed by the government of Ontario, which enjoyed a Triple A credit rating.

8 Ms. Clitheroe began her work with the government as an assistant deputy minister in the finance ministry. She remained with the government until October of 1993 when she was asked to join Ontario Hydro. At the time she left the government, Ms. Clitheroe held the position of Deputy Minister of Finance. As a deputy minister, Ms. Clitheroe enjoyed enhanced pension benefits, along with all other deputy ministers. For the purpose of calculating their eventual pension benefits, deputy ministers were entitled to what is called a "two for one" credit of their years of service. In other words, in calculating their pension benefits pursuant to the government pension formula, when multiplying their requisite earnings by the number of years of credited service, deputy ministers are entitled to have two years of credited service calculated for each year of credited service they actually work.

9 In 1993, the Chairman of Ontario Hydro approached Ms. Clitheroe to join the company, which was in need of a Chief Financial Officer. As she explained it, the position was of interest to her because she had a significant interest in energy policy, the proposed remuneration was good, and she could transfer her government pension to a plan that she viewed as a "bit better" than the government's. She felt the Ontario Hydro plan was just as secure as the Ontario government pension. Like the government plan, it also was a defined benefit plan. Ontario Hydro also offered her the same "two for one" credited service calculation as she had enjoyed as a deputy minister.

10 Ms. Clitheroe joined Ontario Hydro in 1993 as Senior Vice President and Chief Financial Officer, reporting to the president, Mr. Maurice Strong. Her starting salary was $270,000. Ms. Clitheroe transferred her pension entitlements from the Ontario government pension plan to the Ontario Hydro pension plan. Her salary and benefits at Hydro One (including pension benefits) were governed by contracts with her employer. The terms of these contracts were changed from time to time as her responsibilities within the corporation changed.

11 In 1996 Ms. Clitheroe's role was enlarged include the position of chief development officer, as well as CFO. As chief development officer she was also responsible for Hydro's research labs and developing new products and options, in addition to her responsibilities as chief financial officer. Her additional role and responsibilities as chief development officer marked the beginning of the eventual restructuring of Ontario Hydro.

12 She next added the responsibilities of chief transition officer for Ontario Hydro to her other roles, with an increase in her salary to $360,000. As chief transition officer she was responsible for the potential break up of Ontario Hydro into its component parts, and to look at competition for electricity and privatization of parts of it.

13 On January 1, 1999 Ontario Hydro was reorganized into a number of different companies, of which the defendant, Hydro One Inc. was one. Hydro One was the corporation that was to be responsible for the distribution of electricity throughout the Province of Ontario. Ms. Clitheroe became the CEO of Hydro One, at a salary of $575,000 together with the opportunity to earn performance bonuses. Performance bonuses were matters of contract as well, and were payable at certain percentages of Ms. Clitheroe's salary, depending on the extent, if any, that her performance exceeded set performance targets in her contracts. In each year of her employment with Hydro One, Ms. Clitheroe earned significant performance bonuses in addition to her salary.

14 Hydro One took over all the obligations under the Ontario Hydro pension plan for those Ontario Hydro employees who joined Hydro One. Those employees then became members of the Hydro One pension plan. Ms. Clitheroe was one of those

employees. Ms. Clitheroe had had significant pension rights under the Ontario Hydro plan, and these were rolled into the Hydro One pension plan. Ms. Clitheroe continued to have regular pension benefits pursuant to Hydro One's registered pension plan, and also obtained significant additional benefits under the Hydro One supplementary pension plan. These additional benefits arose in an additional segment of the supplementary plan that provided special arrangements for Ms. Clitheroe.

15 Effective January 1, 1999 Ms. Clitheroe became a member of the Hydro One Pension Plan, namely the registered pension plan. Effective the same date, Hydro One established the supplementary pension plan.

16 All Hydro One employees, including Ms. Clitheroe, were members of the Hydro One registered pension plan, or RPP. Employers and employees who make contributions to RPPs are entitled, up to certain limits, to deduct those contributions from their income in computing taxable income for tax purposes under the *Income Tax Act*.[5] This tax deductibility creates a tax incentive for employers to create pension plans for their employees. The contributions an employer or employee makes to a pension plan on an annual basis are usually expressed as a percentage of the employee's annual income or compensation. Tax deductibility for these pension contributions, however, is not unlimited. The *Income Tax Act* sets a limit on the level of income or level of contribution that will be allowed as a tax deduction each year.

17 Since many employees earn income above the *Income Tax Act* limit for deductibility, some employers create what are called supplementary plans, to allow the development of pension credits above the tax limit. Since the tax limit is set at a relatively low level (until fairly recently the income limit for tax deductibility into registered plans was about $60,000), companies set up supplementary plans so that employees can earn the pension benefits they would have earned, but for the limits imposed by the *Income Tax Act*. For example, if an employee were earning $80,000 per year, and the income limits were set at $60,000 per year, and the RPP provided for contributions of n% of income to be contributed into the plan, the employer and employee could only contribute to the limit to the registered plan on a tax deductible basis, and the excess (often referred to as a "top up") would be contributed to the supplementary plan, but without tax deductibility for either the employer or employee.

18 The Hydro One pension, like many others, is a defined benefit plan. A defined benefit pension plan funds an employer's promise to pay a particular income stream to an employee on that employee's retirement. With a defined benefit plan, that particular income stream is usually calculated on the basis of a formula that uses some aspect of the employee's earnings, takes a specified percentage of that sum, and then multiplies it by the number of years the employee has worked for the employer.

19 The figure the formula uses for earnings is dependent on the terms of the plan, as is the percentage that will be used, as well as the calculation of the years of service. For example, "earnings" may or may not include bonuses, or may include only a fixed percentage of them. Earnings may be defined as average earnings, or the average of the last few years of earnings, or the average of the "best three" years, or some other formula. Similarly, years of service may be actual years worked, or may be a formula that credits more years than those the employee has actually worked. The terms of the pension plan itself, coupled with any additional contractual terms an employee may have will determine how the pension will eventually be calculated. The plan will also generally set out how many years of service, and what age an employee must be before he or she is entitled to receive an unreduced pension. Whether a pension plan is a defined benefit plan, or a defined contribution plan, it is a form of deferred compensation for an employee.

20 Debra Vines, the manager of compensation and benefits at Hydro One, explained the workings of the Hydro One registered pension plan quite simply. She said the basic formula under the registered plan is 2% of the average of an employee's highest three years of earnings, multiplied by the number of years of credited service the employee has accumulated. The RPP counts credited service on a "one to one" basis, that is, credited service is calculated as actual years worked. In calculating income, the RPP defines it as base salary plus half of any bonus earned.

21 Because many employees earn more than the amount that the Canada Revenue Agency (CRA) allows for deductibility of pension contributions, many employers have supplementary pension plans by which they "top up" the employees' pensions to the level they would be at but for the *Income Tax Act* restrictions on deductibility. That is to say, the formula to calculate pension entitlement under the registered plan is applied to the employee's excess earnings that do not qualify for tax deductibility

in relation to contributions to the registered plan. These payments are often referred to as a "top up". Hydro One has a supplementary plan of this nature.

22 The primary objective of the supplementary plan is stated in section 8.01 of the Plan. It says:

> The primary objective of the Supplementary Plan is to provide a benefit that, together with the amount of the benefit actually paid under the Registered Plan, would have been payable from the Registered Plan if the amount of such benefit were not restricted by the limitations contained in the Registered Plan in respect of the maximum pension payable thereunder (as is required by the I.T.A.) and taking into account for a DSPS Eligible Employee, those exceptions, if any, that are specified in the Special Arrangement applicable to the DSPS Eligible Employee.

23 DSPS is defined as a "Designated Supplementary Payment Schedule", which is the component of the supplementary plan governed by Part III of the supplementary plan. Simply put, the Hydro One supplementary plan also has additional benefits, called special arrangements, for particular employees. These are contained in Part III of the supplementary plan. The only particular employee of Hydro One who had such a special arrangement was Ms. Clitheroe. Ms. Clitheroe's special arrangements under the supplementary plan were set out in her employment contracts with Hydro One.

24 The salient features of Ms. Clitheroe's supplementary pension was that it was a "special arrangement" as defined under the supplementary plan, and that it created higher additional benefits for Ms. Clitheroe than were available to other employees who were part of the general supplementary plan. In Ms. Clitheroe's case, her years of credited service were to be calculated on the basis of two years of credited service for each actual year of credited service she worked. On April 17, 2001 the terms of Ms. Clitheroe's employment contract [6] changed to give her three years of credit for each year worked. This contract also provided that Ms. Clitheroe's years of credited service under the Deputy Minister Order-in-Council would be recognized as credited service under the Hydro One supplementary plan. The contract specified that on January 29, 2001 her credited service under the supplementary plan was 29 years and four months, on January 29, 2002 her credited service would be 32 years and four months. After December 31, 2002 her credited service would be capped at 35 years.

25 Ms. Clitheroe's employment contracts also had varying provisions regarding the inclusion of her bonuses in the calculation of her income for the purposes of determining her eventual pension entitlement. By the end of her time with Hydro One, Ms. Clitheroe was entitled to have 100% of her bonuses included in her earnings for the purpose of calculating her eventual pension benefits.

26 But for Bill 80, Ms. Clitheroe's years of credited service would have been roughly 33 years and four months. For the purposes of this action, Ms. Clitheroe seeks a declaration that Bill 80 does not affect her pension benefit rights, including credited service, prior to April 1, 1999. She seeks a declaration that her credited service pursuant to the pension plans in 21.75 years. She also seeks a declaration that section 12 of Bill 80 is inapplicable to her pension rights including credited service, before January 1, 1999.

27 Scott Clausen, the actuary retained by Hydro One to provide expert evidence in this action, prepared a number of scenarios setting out the total monthly or annual pension Ms. Clitheroe would be entitled to, depending on the years of credited service she was assumed to have at retirement. For his calculations, Mr. Clausen first used 14.4167 years of credited service. This figure represents the actual number of years Ms. Clitheroe worked for Hydro One, including the time she worked for Ontario Hydro and the government of Ontario. It does not reflect either the "two for one" credit she earned both as a Deputy Minister and then pursuant to her contracts with Ontario Hydro and then Hydro One. It also does not reflect her last contract with Hydro One, which provided a "three for one" calculation of credited service. Assuming Ms. Clitheroe's termination on June 4, 2002, this scenario based on 14.4167 years of credited service would provide her with a monthly pension of $25,637.08, or yearly pension income of $307,644.96 on her retirement.

28 Mr. Clausen did a similar calculation, assuming 21.75 years of credited service. This is the figure Ms. Clitheroe seeks to use in the calculation of her eventual pension entitlement. On this scenario, Ms. Clitheroe's monthly pension at age 65 would be $33,644.21 or $464,133.84 per year.

29 Mr. Clausen also made calculations of the pension payable if Ms. Clitheroe were to take early retirement benefits at age 55. The general provisions of the pension plan contain formulae setting out reductions in pension benefits if an employee takes early retirement. In Ms. Clitheroe's case, her special arrangements under the supplementary plan provided that she could take early retirement without any actuarial reduction in her pension entitlement.

30 I turn now to discuss the legal framework of this action, and the positions of all of the parties within that overall framework.

The legal framework:

31 The parties are all in agreement that the overarching principle embodied in this lawsuit is that a government can do as it pleases in terms of divesting a person of rights, either prospectively or retrospectively, subject only to the safeguards guaranteed to that person under the *Charter* and provided also that if a government takes away a person's vested property rights it can do so only in legislation expressed in the clearest and most unambiguous terms.

32 The Supreme Court of Canada has expressed this notion in a number of cases, but perhaps put it best in *Wells v. Newfoundland* [7] when Major J, speaking for the court said:

> While the legislature may have the extraordinary power of passing a law to specifically deny compensation to an aggrieved individual with whom it has broken an agreement, clear and explicit statutory language would be required to extinguish existing rights previously conferred on that party. ...
>
> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations - rights of the highest importance to the individual - those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

33 The government's power is very broad, indeed. Its power has even extended to taking a "property claim from a vulnerable group, in disregard of the crown's fiduciary duty" to that vulnerable group. [8]

34 As to the overriding power of the *Charter*, section 32.(1) makes the governments of Canada the provinces and territories subject to the *Charter*. Section 32.(1) says:

> This Charter applies
>
> > (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
> >
> > (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

35 Ms. Clitheroe's position is simple. She says Bill 80 does not meet the necessary requirement of being clear and unambiguous in its effort to strip her of vested pension rights, and to do so retroactively. She says that even if Bill 80 does meet that threshold, it has still impermissibly breached her section 7 liberty rights under the *Charter*. As a result, Ms. Clitheroe says that in calculating her pension entitlement the provisions of her special arrangement under the supplemental plan, with all its enhanced benefits, must prevail.

36 Hydro One takes the position that the legislation is clear and unambiguous. It says the clear wording of Bill 80 retroactively changes Ms. Clitheroe's pension entitlement and limits it. Hydro One says there is nothing unclear or ambiguous in the legislation. On that basis, it says, Ms. Clitheroe's pension entitlement must be calculated on the basis of the terms of the registered pension plan, and the provisions of the supplementary plan that are applicable to all employees. It says Bill 80 limits her pension to these amounts and therefore clearly and unequivocally deprives her of any pension benefits calculated otherwise.

37 Ontario intervened in this action because Ms. Clitheroe raised the issue of the constitutionality of section 12 of Bill 80. She alleges that this provision of Bill 80 impermissibly breaches her *Charter* rights, namely her rights under section 7 of the *Charter* which guarantees her liberty rights. Ontario takes the position that the liberty rights protected under the *Charter* are not broad enough to include purely economic rights, and says that Ms. Clitheroe's contractual pension rights are nothing more or less than such purely economic rights. Ontario says Ms. Clitheroe's pension rights are therefore not protected under section 7, and the legislature has the power to extinguish these proprietary and contractual rights. Ontario says Ms. Clitheroe's constitutional challenge must therefore fail.

38 Clearly, the provisions of Bill 80 are critical to, and inform the discussion. For ease of reference I have reproduced the entire statute in Schedule A attached to these reasons.

Discussion:

39 As I have said, there are two aspects to Ms. Clitheroe's attack on Bill 80. The first relates to whether its provisions purporting to retroactively reduce her pension rights have been articulated in clear and unambiguous language. The second relates to whether the legislation has improperly infringed her liberty rights under section 7 of the *Charter*.

Is the legislation clear and unambiguous?

40 Ms. Clitheroe begins by pointing to the fact that she is essentially a blameless victim. There is no question she was a hard-working, dedicated employee of Hydro One. She fulfilled the requirements of her job and earned performance bonuses in accordance with the provisions of her contracts of employment. She says Bill 80 does not clearly take away the "two for one" pension credit rights she earned as a Deputy Minister with the Government of Ontario. She says it does not clearly take away the two for one credits she had earned prior to 1999 in the six years she worked at Ontario Hydro. She says that in going forward from 1999 Bill 80 does not clearly abrogate her contractual rights. Ms. Clitheroe's position, therefore, is that due to this lack of precision, her contractual pension rights are and must be unaltered by Bill 80.

41 In assessing Ms. Clitheroe's position, it is helpful to look at the specific wording of section 12 itself:

> **12.** (1) A designated officer is not entitled on or after January 1, 1999 to a pension or retirement income that exceeds the amount described in subsection (2).
>
> **Amount**
>
> (2) The maximum amount of pension and other retirement income payable to or in respect of a designated officer is the amount of his or her pension, if any, provided by the Hydro One Pension Plan and retirement income, if any, provided by the unregistered supplementary plan,
>
> (a) that provides benefits equal to the difference between the maximum pension benefits allowed under the *Income Tax Act* (Canada) and the benefits determined in accordance with the formula set out in the Hydro One Pension Plan; and
>
> (b) that provides those benefits in respect of all members of the Hydro One Pension Plan whose level of earnings results in such a difference.

42 First, there is no question Ms. Clitheroe is a "designated officer", since she held the position of Chief Executive Officer, one of those defined as a designated officer pursuant to section 1 of Bill 80 and to whom section 12 would apply.

43 There is also no question that Ms. Clitheroe's pension rights were contractual vested rights, and not contingent on the happening of any event, other than her reaching retirement age. In looking at whether Bill 80 has succeeded in divesting her of these rights, the court must follow some well established principles.

44 First, a fundamental rule is that statutes are prospective in nature unless their language clearly and unambiguously makes them retrospective. Clear and explicit statutory language is required to extinguish existing rights previously conferred on a party [9]. Second, if a statute's provisions are clearly aimed at one person, the legislature's obligation to make the provisions specific and unambiguous must be scrupulously followed. As the Supreme Court said in *Wells*, "the use of legislation to strip a specific individual of a legal right to compensation ... is a harsh and extraordinary use of governmental authority which, because it should not be done lightly, requires specific and unambiguous language."

45 The real question then is what is the scope of section subsection 12(1) when it says Ms. Clitheroe, as a designated officer, is not entitled "after January 1, 1999" to receive a pension that exceeds the amount set out in subsection (2). Ms. Clitheroe says it is not clear if this means her pension rights acquired and accumulated prior to that date are affected or not. She says the legislation on its face is unclear because it requires an understanding of the Hydro One pension plan in order to give it meaning. She suggests the words of the statute itself are not sufficiently clear to give it the effect Hydro One and Ontario propound. Given what she says are these kinds of ambiguities, she says the legislation must fail.

46 Hydro One says first, whether Ms. Clitheroe is blameless is immaterial. Hydro One points to the fact that in *Authorson* the war veterans in question were not only blameless, but also disabled, and were clearly a disadvantaged group. There, the Court also found the federal government had breached its fiduciary duty to the veterans in failing to invest their pension funds and earn interest on the money. Nevertheless, the Supreme Court of Canada held the legislation that retroactively absolved the government from any responsibility for this failure was valid, even though it harmed a blameless and vulnerable group.

47 Hydro One comes at the question by looking at both the wording of section 12 of Bill 80 and the case as Ms. Clitheroe has pleaded it. Hydro One points out that Ms. Clitheroe seeks a declaration that her years of credited service are 21.75 years. It says that if she seeks such a declaration, she must have interpreted the section in this fashion; if so, she cannot say the section is ambiguous.

48 Hydro One first asks what is the correct interpretation of the maximum amount set out in section 12. It then asks whether counting Ms. Clitheroe's years of credited service at 21.75 years, as she suggests, would result in her receiving pension or retirement income that exceeds that maximum. Last, Hydro One asks whether any entitlements to pension benefits survive beyond the section 12 maximum, and does the legislature have, and has it exercised a power to cancel any entitlements beyond the maximum it has set out.

49 Hydro One says section 12 is clear and unambiguous. The maximum amount of pension and retirement income set out in the section for a designated officer, such as Ms. Clitheroe, is the pension provided by the Hydro One pension plan, and the retirement income, if any, provided by the unregistered supplementary plan. The parties have admitted that the "Hydro One Pension Plan" referred to in section 12 is the registered plan found at tab 8 of Exhibit 3, and that "the unregistered supplementary plan" referred to in s. 12 is that found at Tab 10 of Exhibit 3.

50 January 1, 1999 was the date Hydro One was established. It is also the effective date that the Hydro One pension plans were established, and took over all the pension rights and obligations its employees had enjoyed under their Ontario Hydro pensions. Hydro One argues that from January 1, 1999 onward, Ms. Clitheroe had no pension rights under the Ontario Hydro pension plan, the Government of Ontario pension plan, or indeed the CIBC pension plan. All of her pension rights, past and future crystallized on that date in the Hydro One plans. Hydro One says one therefore looks at that date, and only at the Hydro One plans to determine Ms. Clitheroe's pension and retirement income entitlements.

51 Commencing January 1, 1999 Ms. Clitheroe had no other pension rights than those set out in the Hydro One plans, namely the registered plan and the supplementary plan. Bill 80 limits the amounts that can be paid out after January 1, 1999 under those two plans. The limiting language is clear. The calculation is clear. The entitlement is first limited to the amount payable under the RPP. There is no dispute as to what this sum is.

52 The second limit is on what can be paid out of the supplementary plan. Bill 80 limits what can be paid out of the supplementary plan to what is payable to all members of the supplementary plan. What is payable to all members of the supplementary plan, including Ms. Clitheroe? All are entitled to the top up payment, calculated according to the terms of the supplementary plan. This is clear and unambiguous.

53 There is also no question that under the terms of the supplementary plan only Ms. Clitheroe has a special arrangement under that plan. Her special arrangement includes both the general top up available to all supplementary plan members, as well as significant, additional enhanced benefits. Since her additional enhanced benefits are available only to her, and exceed the amounts payable under the supplementary plan's calculations for all members of the supplementary plan, they cannot be paid out pursuant to the legislation.

54 It therefore follows, clearly and unequivocally, that the maximum pension and retirement income Ms. Clitheroe may receive under section 12 is the amount calculated pursuant to the terms RPP and the terms of the supplementary plan that apply to all its members.

55 Hydro One then asks whether accepting Ms. Clitheroe's position and using 21.75 years of credited service for the purpose of calculating her entitlement under the supplementary plan would yield an amount greater than the maximum calculated under section 12. Clearly it would. Ms. Vines explained that tab 16 of Exhibit 3 sets out the total of the amounts that would have been paid under the registered plan if there had been no limit under the *Income Tax Act*. The component of the total that relates to the supplementary plan is described as the difference between the pension payable under the plan, and what would have been payable if there were no *Income Tax Act* limit. That calculation has been made on the basis of 14.74 years, because the registered plan counts only one year of credited service for each year worked.

56 As Ms. Vines said, and as Mr. Clausen's calculations show, if the formula used more years of credited service than 14.74 years, it would result in a benefit that exceeded simply the top up amount under the supplementary plan, and would thus exceed the maximum described in section 12 of Bill 80.

57 Since using 21.75 years of credited service would exceed the maximum set out in section 12 of Bill 80, the next question is whether Ms. Clitheroe had a contractual entitlement to use 21.75 years of credited service in the calculation of her pension, and if so, has Bill 80 effectively cancelled that contractual entitlement. As the parties acknowledge, the legislature has the power to do so, but if and only if it does so in clear unambiguous terms.

Has the legislation cancelled Ms. Clitheroe's contractual rights?

58 Hydro One says first Bill 80 delineates a maximum payment of pension and retirement income for designated officers. By expressly authorizing a maximum, it excludes amounts exceeding that maximum. Beginning on January 1, 1999, and on every date after that date, no designated officer has a right to, or may claim any amount more than the maximum. January 1, 1999 is the first date Ms. Clitheroe had any rights against Hydro One, and therefore one looks only at that date forward, in terms of her rights with Hydro One. All of her prior pension rights were assumed by Hydro One as of that date, and it is only from that date forward she has any contractual rights with Hydro One. When I consider the clear wording of the maximum calculated in s. 12, and look at that provision in conjunction with sections 13, 14, and 16 of Bill 80 I must conclude the legislature clearly intended Ms. Clitheroe's contractual pension entitlements in excess of the maximum to be cancelled.

59 I say this because section 13 prohibits any person from paying an amount exceeding the amount authorized by Bill 80. The only amount that is authorized is the maximum under s. 12. This is clear.

60 Similarly, section 14 provides that if any person receives an amount in excess of the authorized amount, it must be repaid. Lastly, section 16 prohibits any proceedings being commenced in relation to the restrictions to compensation set out in section 12 (in addition to sections 9-11) of Bill 80. These provisions make it clear that the legislature intended that no person should receive or be permitted to claim any amount in excess of the maximum authorized under section 12.

61 I therefore agree with Hydro One's interpretation, and find the statute is clear and unambiguous. The provisions of the statute must therefore govern, unless Ms. Clitheroe can show that her constitutional rights have been infringed.

Does the legislation infringe Ms. Clitheroe's Charter rights?

62 Section 7 of the *Charter* says:

> 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.

63 Ms. Clitheroe frames her position on the *Charter* in fairly simple terms. She characterizes the s. 7 liberty interest as separate from the security interest. She says the courts have held that the liberty interest protected by the *Charter* is more than simply freedom from restraint. She suggests that the right to liberty has and must be construed broadly and says the liberty interest is broad enough to protect what she describes as the right to make fundamental life choices. She suggests her choices to work to Hydro One, Ontario Hydro and the Province of Ontario before that, with their particular pension entitlements, constitute such a fundamental life choice. She relies on a number of cases that she says frame the liberty interest in such broad terms.

64 For example, in *Morgentaler* [10] , Wilson J (though speaking for herself alone) held section 251 of the *Criminal Code*, which limited a pregnant woman's access to abortion, violated her right to life, liberty and security of the person within the meaning of section 7 of the *Charter*, in a way that does not accord with the principles of fundamental justice. She interpreted the right to liberty to guarantee every individual a degree of personal autonomy over important decisions intimately affecting his or her private life. Wilson J. held that a woman's decision to terminate her pregnancy falls within this class of protected decisions. She described it as one that will have profound psychological, economic and social consequences for her. She characterized the decision to have an abortion is more than a medical decision; it is a profound social and ethical one as well.

65 The majority in *Morgentaler* did not embrace Wilson J's liberty analysis. Instead, they decided the case on the basis that section 251 infringes the right to security of the person, and not on the basis of an infringement of any liberty interest. Even accepting Wilson J's reasoning in the context of this case, I would be hard pressed to characterize Ms. Clitheroe's decision to work for Hydro One and negotiate her pension entitlement as a "profound social and ethical decision" on the same level as a woman's decision to terminate a pregnancy.

66 Ms. Clitheroe also relies on *New Brunswick (Minister of Health & Community Services) v. G. (J.)* [11] . It dealt with the issue of whether legal aid must be provided to parents in the context of a child welfare case where the parents faced the prospect of their children becoming crown wards. The case addressed whether the denial of legal aid in such circumstances breached the parents' guaranteed security of the person and liberty rights. There, the Supreme Court majority decided the parents' security of the person rights had been infringed and required the province to provide legal aid.

67 L'Heureux-Dube J, writing for the minority came to the same conclusion, but went further and found the parents' liberty interests had been infringed as well. She interpreted the s. 7 liberty interest more broadly and cited with approval the dissenting judgment of LaForest J in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [12] which said:

> 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.

68 The minority held that wardship proceedings also implicated these fundamental liberty interests of parents, and ordered the state to provide legal aid funding. They stated that "the principles of fundamental justice require that a parent be able to participate in the hearing adequately and effectively." [13] It is noteworthy, however, that the majority was not prepared to extend the liberty analysis this far.

69 Ms. Clitheroe also relies on the *Blencoe* [14] decision to support her position that her pension rights are liberty rights that are protected by the *Charter*. There, the Supreme Court quoted its earlier decisions in which it held that "liberty" is engaged "where state compulsions or prohibitions affect important and fundamental life choices." The court's comments, however, are *obiter*, since the case was decided on the basis of an infringement of the right to security of the person, and not the liberty right.

70 Ms. Clitheroe also points to the comments of LaForest J in *Godbout c. Longueuil (Ville)* [15] in which he said that the right to life, liberty and security of the person encompassed fundamental life choices. He said, at paragraph 66:

> ... 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.

71 Ms. Clitheroe says that what Bill 80 purports to do is nothing more than punishment, spite and vengeance, directed solely at her and no one else. She suggests that the legislation interferes with her personal autonomy and fundamental choices she made about where to work, and how to structure her life. She says she made a choice to leave private industry and join the public service. Part of her remuneration was paid in cash, and some was deferred in the form of a pension. She said the pension rights were an important component of her decision to join the government, and then Ontario Hydro and Hydro One. She characterizes these choices as going to the core of what it means to her to enjoy individual dignity and independence.

72 Ms. Clitheroe suggests that these choices she made are fundamental to her liberty in a free and democratic society, much like the protected freedoms to choose where to live, to have union meetings, and the like. Ms. Clitheroe says the government's attempts to divest her of this fundamental right to choose where to work, and for what form of remuneration infringes her liberty rights without doing so in accordance with principles of fundamental justice.

73 Ontario takes the position Ms. Clitheroe's contractual rights to a pension are purely economic property rights. It says these property rights were deliberately excluded from protection under the *Charter*. Unlike the United States, whose constitution protects "life, liberty and property" our Canadian *Charter* protects only "life, liberty and security of the person". In addressing the exclusion of "property", Ontario relies on the work of constitutional expert Professor Hogg, who explains:

> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with power over the purely economic interests of individuals or corporations. It also requires, as we have noticed in the earlier discussions of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back. [16]

74 Ontario points to various cases that support this interpretation. For example, in *Siemens v. Manitoba (Attorney General)* [17] the Supreme Court of Canada held that while section 7 protects certain fundamental life choices, those choices do not encompass purely economic interests, including the ability to generate business revenue by one's chosen means. The court refused to characterize an alleged right to operate video lottery terminals as such a fundamental life choice.

75 Similarly, in *Walker v. Prince Edward Island* [18] the Supreme Court of Canada upheld a ruling that section 7 does not extend to the right to exercise a chosen profession.

76 The most compelling case Ontario has referred to is *Charles v. Canada (Attorney General)* [19] There, the plaintiff, a judge of what was then called the Provincial Court, challenged legislation that would deprive him of previous pension contributions made to the Public Service Superannuation Plan upon the transfer of his pension to a new plan specifically established for Provincial Judges. There, the court held that section 7 was not engaged. The court characterized the interest in the pension plan as economic, and held that the liberty interest protected by section 7 does not include liberty or freedom of contract.

77 I agree with Ontario's position. I see Ms. Clitheroe's pension entitlement as a purely economic contractual right that is afforded no protection under section 7 of the *Charter*. Her right to a pension is simply deferred compensation. Salary or compensation (in whatever form they may take), are in my view a purely economic rights, and are not protected by section 7.

78 Having come to that conclusion, I need not address the question of whether any principles of fundamental justice have been infringed. As the court put it in *Blencoe*:

> before it is even possible to address the issue of whether ... s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, on must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7 ... if no interest in ... life, liberty or security of the person is implicated, the s. 7 analysis stops there. [20]

79 Thus, having found Ms. Clitheroe's section 7 liberty rights have not been infringed, I need go no further in my analysis.

Disposition:

80 For these reasons, the action is dismissed. If Ms. Clitheroe and Hydro One [21] are unable to agree on the issue of their costs, they may make brief written submissions to me. Hydro One's are to be delivered within 14 days of the release of these reasons, and Ms. Clitheroe's within 14 days following.

Schedule "A"
to Reasons for Decision in
Clitheroe v. Hydro One Inc.
Hydro One Inc. Directors and Officers Act, 2002 S.O. 2002, Chapter 3

Interpretation

Definitions

1. In this Act,

"designated officer" means a person employed by Hydro One Inc. who holds one of the following offices with Hydro One Inc. on June 4, 2002:

1. President and Chief Executive Officer.
2. Executive Vice President, Planning and Development.
3. Executive Vice President, Wires Operations.
4. Executive Vice President and General Counsel and Secretary.
5. Chief Financial Officer and Senior Vice President, Finance; ("dirigeant désigné")

"Minister" means the Minister of Environment and Energy or such other member of the Executive Council as may be assigned the administration of this Act under the *Executive Council Act*; ("ministre")

"subsidiary" has the same meaning as in the *Business Corporations Act*. ("filiale") 2002, c. 3, s. 1.

Board of Directors

Termination re directors of Hydro One Inc.

2. (1) This section applies to every person who holds office on June 3, 2002 as a member of the board of directors of Hydro One Inc. 2002, c. 3, s. 2 (1).

Termination of term of office

(2) The term of office of each member of the board of directors of Hydro One Inc. is hereby terminated, and the termination shall be deemed to have taken effect on June 4, 2002. 2002, c. 3, s. 2 (2).

Same, subsidiaries

(3) If a member of the board of directors of Hydro One Inc. is also a member of the board of directors of any subsidiary of Hydro One Inc. on June 3, 2002, his or her term of office as a member of the board of directors of the subsidiary is hereby terminated, and the termination shall be deemed to have taken effect on June 4, 2002. 2002, c. 3, s. 2 (3).

Payments

(4) A person is not entitled to any payment in respect of the termination of his or her term of office by subsection (2) or (3). 2002, c. 3, s. 2 (4).

Appointments to fill vacancies

3. (1) The Minister may make appointments to fill the vacancies created by subsections 2 (2) and (3), and may do so despite the articles and by-laws of the applicable corporation and despite any unanimous shareholders' agreement. 2002, c. 3, s. 3 (1).

Same

(2) The persons appointed by the Minister to fill those vacancies shall be deemed to have been appointed on June 4, 2002 to replace the persons whose term of office was terminated by subsections 2 (2) and (3). 2002, c. 3, s. 3 (2).

Term of office

(3) The persons appointed by the Minister hold office at the pleasure of the Minister, but their term of office expires no later than the end of the first annual meeting of shareholders of Hydro One Inc. or the subsidiary, as the case may be, that occurs after this Act receives Royal Assent. 2002, c. 3, s. 3 (3).

Other appointments to boards of directors

4. (1) The Minister may make appointments to the board of directors of Hydro One Inc. or any of its subsidiaries, and may do so despite the articles and by-laws of the applicable corporation and despite any unanimous shareholders' agreement. 2002, c. 3, s. 4 (1).

Restrictions

(2) The Minister is not entitled to make appointments that would result in the membership of the board being greater than the number of members authorized by the articles and by-laws of the applicable corporation and by any unanimous shareholders' agreement. 2002, c. 3, s. 4 (2).

Filling other vacancies

(3) The Minister may make appointments to fill any vacancy on the board of directors of Hydro One Inc. or any of its subsidiaries, and may do so despite the articles and by-laws of the applicable corporation and despite any unanimous shareholders' agreement. 2002, c. 3, s. 4 (3).

Term of office

(4) Subsection 3 (3) applies with respect to persons appointed under this section. 2002, c. 3, s. 4 (4).

Expiry of authority

(5) The Minister's authority to make appointments under this section expires at the end of the first annual meeting of shareholders of the applicable corporation that occurs after this Act receives Royal Assent. 2002, c. 3, s. 4 (5).

Additional power re board members

5. (1) The Minister may terminate the term of office of any member of a board of directors of a subsidiary of Hydro One Inc., and may do so despite the articles and by-laws of the subsidiary and despite any unanimous shareholders' agreement. 2002, c. 3, s. 5 (1).

Same

(2) The Minister may make appointments to fill vacancies created under subsection (1), and may do so despite the articles and by-laws of the applicable subsidiary and despite any unanimous shareholders' agreement. 2002, c. 3, s. 5 (2).

Term of office

(3) Subsection 3 (3) applies with respect to persons appointed under this section. 2002, c. 3, s. 5 (3).

Payment

(4) A person is not entitled to any payment in respect of the termination of his or her term of office under subsection (1). 2002, c. 3, s. 5 (4).

Expiry of authority

(5) The Minister's authority to make appointments under this section expires at the end of the first annual meeting of shareholders of the applicable subsidiary that occurs after this Act receives Royal Assent. 2002, c. 3, s. 5 (5).

Indemnification of board members

6. (1) Hydro One Inc. shall indemnify the members of its board of directors with respect to the matters described in section 136 of the *Business Corporations Act*. 2002, c. 3, s. 6 (1).

Same, subsidiaries

(2) Each subsidiary of Hydro One Inc. shall indemnify the board members appointed by the Minister in the same manner and to the same extent as it indemnifies other board members with respect to the matters described in section 136 of the *Business Corporations Act*. 2002, c. 3, s. 6 (2).

Application of Business Corporations Act

7. (1) Subsection 119 (9) of the *Business Corporations Act* does not apply with respect to persons appointed to a board of directors by the Minister under this Act. 2002, c. 3, s. 7 (1).

Vacancies on the board

(2) Section 124 of the *Business Corporations Act* does not apply with respect to Hydro One Inc. or a subsidiary of Hydro One Inc., as the case may be, until the end of the first annual meeting of shareholders of Hydro One Inc. or the subsidiary that occurs after this Act receives Royal Assent. 2002, c. 3, s. 7 (2).

Conflict

(3) This Act prevails over the *Business Corporations Act*. 2002, c. 3, s. 7 (3).

Designated Officers

Negotiations for new employment contracts

8. (1) The board of directors of Hydro One Inc. shall negotiate with each of the designated officers for a new employment contract that, in the opinion of the board, provides for a substantial reduction in the officer's remuneration and benefits. 2002, c. 3, s. 8 (1).

Restrictions replaced

(2) The restrictions imposed by sections 9 to 12 with respect to a designated officer cease to apply when Hydro One Inc. publishes a notice in *The Ontario Gazette* that it has entered into a new employment contract with the officer. 2002, c. 3, s. 8 (2).

Review of remuneration and benefits

(3) The board of directors of Hydro One Inc. shall conduct a review of the remuneration and benefits of its officers and shall ensure that the board of directors of each of its subsidiaries conducts a review of the remuneration and benefits of the officers of the subsidiary. 2002, c. 3, s. 8 (3).

Payments upon termination of office

9. (1) A designated officer is not entitled on or after January 1, 1999 to any payment in respect of the termination of his or her office as an officer. 2002, c. 3, s. 9 (1).

Same

(2) A designated officer who is a director of Hydro One Inc. or any of its subsidiaries is not entitled on or after January 1, 1999 to any payment in respect of the termination of his or her term of office as a director. 2002, c. 3, s. 9 (2).

Payments upon termination of employment

10. (1) A designated officer is not entitled on or after January 1, 1999 to be paid compensation that exceeds the amount authorized by subsection (2) relating to the termination of his or her employment. 2002, c. 3, s. 10 (1).

Amount

(2) Until the designated officer enters into a new employment agreement and the notice required by section 8 is published, the amount of compensation is the amount determined in accordance with the employment standards legislation applicable to the officer. 2002, c. 3, s. 10 (2).

Payments upon resignation

11. A designated officer is not entitled on or after January 1, 1999 to any payment in respect of his or her resignation from office, from the board of directors of Hydro One Inc. or any of its subsidiaries or from employment. 2002, c. 3, s. 11.

Pension and retirement income

12. (1) A designated officer is not entitled on or after January 1, 1999 to a pension or retirement income that exceeds the amount described in subsection (2). 2002, c. 3, s. 12 (1).

Amount

(2) The maximum amount of pension and other retirement income payable to or in respect of a designated officer is the amount of his or her pension, if any, provided by the Hydro One Pension Plan and retirement income, if any, provided by the unregistered supplementary plan,

(a) that provides benefits equal to the difference between the maximum pension benefits allowed under the *Income Tax Act* (Canada) and the benefits determined in accordance with the formula set out in the Hydro One Pension Plan; and

(b) that provides those benefits in respect of all members of the Hydro One Pension Plan whose level of earnings results in such a difference. 2002, c. 3, s. 12 (2).

Repayment of Excess Amounts

Prohibition re excess payments

13. (1) No person or entity shall pay an amount in respect of the termination of a person's term of office by subsection 2 (2) or (3). 2002, c. 3, s. 13 (1).

Same, designated officers

(2) No person or entity shall pay any amount to or in respect of a designated officer that exceeds the amount, if any, authorized by this Act,

(a) relating to the termination of his or her employment;

(b) in respect of his or her resignation from office, from the board of directors of Hydro One Inc. or any of its subsidiaries or from employment;

(c) as pension or retirement income. 2002, c. 3, s. 13 (2).

Duty to repay

14. (1) If a person receives an amount after this Act receives Royal Assent that exceeds the amount, if any, authorized by this Act, the person shall repay the excess amount within six months after receiving it. 2002, c. 3, s. 14 (1).

Duty to repay amounts received before Royal Assent

(2) If a person received an amount on or after January 1, 1999 and before this Act receives Royal Assent that exceeds the amount, if any, authorized by this Act, the person shall repay the excess amount within six months after this Act receives Royal Assent. 2002, c. 3, s. 14 (2).

Debt owing to the Crown

(3) If the person does not repay the excess amount within the period specified by subsection (1) or (2), as the case may be, the excess amount shall be deemed to be a debt owing to the Crown. 2002, c. 3, s. 14 (3).

Rights, Claims and Immunity

Rights terminated

15. (1) Any contractual or other right of a person to receive compensation or any other payment relating to the termination of his or her term of office as a director of Hydro One Inc. or any of its subsidiaries shall be deemed to have expired on June 4, 2002. 2002, c. 3, s. 15 (1).

Same, designated officers who are directors

(2) Despite subsection (1), any contractual or other right of a person to receive compensation or any other payment relating to the termination of the term of office of a designated officer as a director of Hydro One Inc. or any of its subsidiaries shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (2).

Same, designated officers as officers

(3) Any contractual or other right of a person to receive compensation or any other payment relating to the termination of a designated officer's office as officer shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (3).

Same, designated officers as employees

(4) Any contractual or other right of a person to receive compensation or any other payment relating to the termination of the employment of a designated officer shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (4).

Same, letter of credit

(5) Any obligation or requirement under a letter of credit or other financial instrument to make any payment to or on behalf of a director of Hydro One Inc. or any of its subsidiaries whose term of office is terminated under this Act relating to the termination of his or her term of office shall be deemed to have expired on June 4, 2002. 2002, c. 3, s. 15 (5).

Same, designated officers who are directors

(6) Despite subsection (5), any obligation or requirement under a letter of credit or other financial instrument to make any payment to or on behalf of a designated officer relating to the termination of his or her term of office as a director of Hydro One Inc. or any of its subsidiaries shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (6).

Same, designated officers as officers

(7) Any obligation or requirement under a letter of credit or other financial instrument to make any payment to or on behalf of a designated officer relating to the termination of his or her office as officer shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (7).

Same, designated officers as employees

(8) Any obligation or requirement under a letter of credit or other financial instrument to make any payment to or on behalf of a designated officer relating to the termination of his or her employment shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (8).

Same

(9) Any obligation or requirement under a letter of credit or other financial instrument to make any payment to or on behalf of a designated officer relating to a pension or retirement income, other than pension and retirement income authorized by section 12, shall be deemed to have expired on January 1, 1999. 2002, c. 3, s. 15 (9).

Claims, etc., nullified

(10) No person has any claim, demand or cause of action for compensation or any other payment relating to the termination of the term of office of a director of Hydro One Inc. or any of its subsidiaries. 2002, c. 3, s. 15 (10).

Same

(11) No person has any claim, demand or cause of action for compensation or any other payment relating to the termination of employment of a designated officer or the termination of his or her office as an officer. 2002, c. 3, s. 15 (11).

Immunity

16. (1) No proceeding shall be commenced against the Crown, Hydro One Inc., a subsidiary of Hydro One Inc. or any other person relating to or resulting from any of the following matters:

1. The termination under this Act of the term of office of a member of the board of directors of Hydro One Inc. or any of its subsidiaries.

2. The appointment of members of the board of directors of Hydro One Inc. or any of its subsidiaries by the Minister under this Act.

3. The restrictions imposed by sections 9 to 12 on compensation and other payments to or in respect of designated officers.

4. The prohibitions imposed by section 13.

5. The creation of the duty to repay an excess amount imposed by subsection 14 (1) or (2) or the deeming by subsection 14 (3) of an excess amount to be a debt owing to the Crown.

6. The termination of rights and obligations and other requirements and the nullification of a claim, demand or cause of action by section 15. 2002, c. 3, s. 16 (1).

Same

(2) Without limiting the generality of subsection (1), no application may be made for an order under section 248 of the *Business Corporations Act* in connection with any of the matters described in subsection (1). 2002, c. 3, s. 16 (2).

Same

(3) No damages, amount in lieu of damages or other amount is payable by the Crown, Hydro One Inc., a subsidiary of Hydro One Inc. or any other person for the termination of rights or of obligations and requirements by section 15. 2002, c. 3, s. 16 (3).

Collection of Debts Owing to the Crown

Lien, etc., on property

17. (1) Any amount that is a debt owing to the Crown under this Act by any person is, upon registration by the Minister in the proper land registry office of a notice claiming a lien and charge conferred by this section, a lien and charge on any interest the person has in the real property described in the notice. 2002, c. 3, s. 17 (1).

Lien on personal property

(2) Any amount that is a debt owing to the Crown under this Act by any person is, upon registration by the Minister with the registrar under the *Personal Property Security Act* of a notice claiming a lien and charge under this section, a lien and

charge on any interest in personal property in Ontario owned or held at the time of registration or acquired afterwards by the person. 2002, c. 3, s. 17 (2).

Amounts included and priority

(3) The lien and charge conferred by subsection (1) or (2) is in respect of all amounts owing to the Crown under this Act by the person at the time of registration of the notice or any renewal of it and all amounts that afterwards become debts owing to the Crown under this Act by the person while the notice remains registered and, upon registration of a notice of lien and charge, the lien and charge has priority over,

(a) any perfected security interest registered after the notice is registered;

(b) any security interest perfected by possession after the notice is registered; and

(c) any encumbrance or other claim that is registered against or that otherwise arises and affects the person's property after the notice is registered. 2002, c. 3, s. 17 (3).

Lien effective

(4) A notice of lien and charge under subsection (2) is effective from the time assigned to its registration by the registrar or branch registrar and expires on the fifth anniversary of its registration unless a renewal notice of lien and charge is registered under this section before the end of the five-year period, in which case the lien and charge remains in effect for a further five-year period from the date the renewal notice is registered. 2002, c. 3, s. 17 (4).

Same

(5) Where any amount that is a debt owing to the Crown under this Act remains outstanding and unpaid at the end of the period, or its renewal, referred to in subsection (4), the Minister may register a renewal notice of lien and charge; the lien and charge remains in effect for a five-year period from the date the renewal notice is registered, until the amount is fully paid, and shall be deemed to be continuously registered since the initial notice of lien and charge was registered under subsection (2). 2002, c. 3, s. 17 (5).

Where person not registered owner

(6) Where a person has an interest in real property but is not shown as its registered owner in the proper land registry office,

(a) the notice to be registered under subsection (1) shall recite the interest of the person in the real property; and

(b) a copy of the notice shall be sent to the registered owner at the owner's address to which the latest notice of assessment under the *Assessment Act* has been sent. 2002, c. 3, s. 17 (6).

Secured party

(7) In addition to any other rights and remedies, if any amount owing to the Crown under this Act remains outstanding and unpaid, the Minister has, in respect of a lien and charge under subsection (2),

(a) all the rights, remedies and duties of a secured party under sections 17, 59, 61, 62, 63 and 64, subsections 65 (4), (5), (6) and (7) and section 66 of the *Personal Property Security Act*;

(b) a security interest in the collateral for the purpose of clause 63 (4) (c) of that Act; and

(c) a security interest in the personal property for the purposes of sections 15 and 16 of the *Repair and Storage Liens Act*, if it is an article as defined in that Act. 2002, c. 3, s. 17 (7).

Registration of documents

(8) A notice of lien and charge under subsection (2) or any renewal of it shall be in the form of a financing statement or a financing change statement as prescribed under the *Personal Property Security Act* and may be tendered for registration at a branch office established under Part IV of that Act, or by mail addressed to an address prescribed under that Act. 2002, c. 3, s. 17 (8).

Errors in documents

(9) A notice of lien and charge or any renewal thereof is not invalidated nor is its effect impaired by reason only of an error or omission in the notice or in its execution or registration, unless a reasonable person is likely to be materially misled by the error or omission. 2002, c. 3, s. 17 (9).

Bankruptcy and Insolvency Act (Canada) unaffected

(10) Subject to Crown rights provided under section 87 of the *Bankruptcy and Insolvency Act* (Canada), nothing in this section affects or purports to affect the rights and obligations of any person under that Act. 2002, c. 3, s. 17 (10).

Definition

(11) In this section,

"real property" includes fixtures and any interest of a person as lessee of real property. 2002, c. 3, s. 17 (11).

Recovery of amounts payable

18. (1) Upon default of payment by a person of any amount owing to the Crown under this Act,

(a) the Minister may bring an action for the recovery thereof in any court in which a debt or money demand of a similar amount may be collected, and every such action shall be brought and executed in and by the name of the Minister or his or her name of office and may be continued by his or her successor in office as if no change had occurred, and shall be tried without a jury; and

(b) the Minister may issue a warrant, directed to the sheriff for any area in which any property of the person is located or situate, for any amount that is a debt owing to the Crown under this Act by the person, together with interest thereon from the date of the issue of the warrant and the costs, expenses and poundage of the sheriff, and such warrant has the same force and effect as a writ of execution issued out of the Superior Court of Justice. 2002, c. 3, s. 18 (1).

Compliance of Minister to be proved by affidavit

(2) For the purpose of any proceeding taken under this Act, the facts necessary to establish compliance on the part of the Minister with sections 17 to 21 as well as the failure of any person to comply with the requirements of sections 17 to 21 shall, unless evidence to the contrary satisfactory to the court is adduced, be sufficiently proven in any court of law by affidavit of the Minister or of any officer of the Ministry of the Minister. 2002, c. 3, s. 18 (2).

Security

19. The Minister may, if he or she considers it advisable, accept security for the payment of a debt owing to the Crown under this Act by way of a mortgage or other charge of any kind upon the property of the person or of any other person, or by way of a guarantee of payment by another person. 2002, c. 3, s. 19.

Costs of enforcement

20. Where the Minister, in the course of obtaining payment of any amount that is a debt owing to the Crown under this Act, incurs reasonable costs and charges upon,

(a) registration of a notice of lien and charge under section 17;

(b) the bringing of an action for payment under clause 18 (1) (a); and

(c) the issuance and execution of a warrant referred to in clause 18 (1) (b) to the extent not recovered by the sheriff upon execution thereof,

the costs and charges may be recovered from the person who owes the debt. 2002, c. 3, s. 20.

Costs of purchasing property

21. For the purpose of collecting a debt owing to the Crown under this Act by a person, the Minister may purchase or otherwise acquire any interest in the person's property that the Minister is given a right to acquire in legal proceedings or under a court order or that is offered for sale or redemption and may dispose of any interest so acquired in such manner as he or she considers reasonable. 2002, c. 3, s. 21.

Other remedies

22. The use of any of the remedies provided by sections 17 and 18 does not bar or affect any of the other remedies therein provided, and the remedies provided by this Act for the recovery or enforcement of the payment of any debt owing to the Crown under this Act are in addition to any other remedies existing by law, and no action or other proceeding taken in any way prejudices, limits or affects any lien, charge or priority existing under this Act or otherwise. 2002, c. 3, s. 22.

General

Information and reports

23. (1) The Minister may request Hydro One Inc., any of its subsidiaries and such other persons and entities the Minister considers appropriate to give him or her such information, including personal information, and reports as he or she considers necessary for the purpose of collecting debts owed to the Crown under this Act. 2002, c. 3, s. 23 (1).

Compliance

(2) A person or entity who receives a request from the Minister for information or a report shall comply with the request. 2002, c. 3, s. 23 (2).

Authorization

(3) The Minister may directly or indirectly collect personal information and use it for the purpose of collecting debts owed to the Crown under this Act. 2002, c. 3, s. 23 (3).

24. Omitted (provides for repeal of this Act). 2002, c. 3, s. 24.

25. Omitted (provides for coming into force of provisions of this Act). 2002, c. 3, s. 25.

26. Omitted (enacts short title of this Act). 2002, c. 3, s. 26.

Action dismissed.

Footnotes

* Additional reasons at *Clitheroe v. Hydro One Inc.* (2009), 2009 CarswellOnt 3881 (Ont. S.C.J.).

1 (1908), 18 O.L.R. 275 (Ont. K.B.) at 279, *per* Riddell J.

2 *Hydro One Inc. Directors and Officers Act, 2002*, S.O. 2002 c.3 [attached as Schedule A]

3 *Constitution Act, 1982*, Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Part I, *Canadian Charter of Rights and Freedoms*

4 Pursuant to section 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43

5 R.S.C. 1985 c.1 (5th Supp.) as amended

6 Exhibit 3, "Defendant's Brief of Admitted Documents" tab 12

7 [1999] 3 S.C.R. 199 (S.C.C.) at paragraphs 41 and 46

8 *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2003] 2 S.C.R. 40 (S.C.C.). There, the vulnerable group was a group of disabled war veterans.

9 *Wells v Newfoundland op cit.*; see also *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (U.K. H.L.); *Dikranian c. Québec (Procureur général)*, [2005] 3 S.C.R. 530 (S.C.C.)

10 *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.)

11 *New Brunswick (Minister of Health & Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (S.C.C.)

12 [1995] 1 S.C.R. 315 (S.C.C.)

13 *Op cit*, paragraph 119

14 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.)

15 [1997] 3 S.C.R. 844 (S.C.C.)

16 Peter Hogg, *Constitutional law of Canada*, 5th ed. Supplemented (loose-leaf ed.) Scarborough:Carswell, 2007) at 47-17 to 47-18 and note 84

17 (2002), [2003] 1 S.C.R. 6 (S.C.C.)

18 [1995] 2 S.C.R. 407 (S.C.C.)

19 (Ont. Gen. Div.), affirmed (Ont. C.A.)

20 *Blencoe, op cit.* paragraph 47

21 As intervenor, the Attorney General for Ontario advises it seeks no costs.

Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Premier Career Management Group et al.*, 2008 Comp. Trib. 18
File No.: CT-2007-006
Registry Document No.: 0152

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to certain marketing practices of Premier Career Management Group Corp. and Minto Roy;

AND IN THE MATTER of an application by the Commissioner of Competition for an order under section 74.1 of the *Competition Act*.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Premier Career Management Group Corp. and Minto Roy
(respondents)

Dates of hearing: 20080414 to 20080418, 20080421 to 20080423, 20080429 and 20080501
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: July 15, 2008
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER DISMISSING THE APPLICATION UNDER SECTION 74.1 OF THE COMPETITION ACT

TABLE OF CONTENTS

I. A BRIEF SUMMARY

[1] The Commissioner of Competition (the "Commissioner") alleges that the Respondents, Premier Career Management Group ("PCMG") and Minto Roy have engaged in reviewable conduct pursuant to paragraph 74.01(1)(*a*) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") by making oral representations to the public that are false or misleading in a material respect.

[2] By way of remedy, the Commissioner asks for a cease-and-desist order. She also asks the Tribunal to issue an order requiring:

(i) PCMG and Minto Roy to pay administrative monetary penalties of $100,000.00 and $50,000.00 respectively;
(ii) PCMG to publish a correction notice in both the Vancouver Sun and on the PCMG website; and
(iii) Minto Roy to read the correction notice at the beginning of his radio show.

[3] For the reasons described below, the Tribunal has concluded that Minto Roy and PCMG have made material misrepresentations as alleged. However, because those representations were not made to the public as required by the Act, no order was made.

II. THE PROCEDURAL HISTORY

[4] See Schedule A.

III. THE PARTIES

[5] The applicant is the Commissioner of Competition. She is appointed by the Governor in Council under section 7 of the Act and is responsible for its enforcement and administration.

[6] The Respondent, PCMG, is incorporated pursuant to the laws of British Columbia and commenced operations in October of 2004. It is engaged primarily in the business of providing individuals with career management services and career counselling. PCMG was not represented by counsel at the hearing.

[7] The Respondent, Minto Roy, is the sole shareholder and only director of PCMG. He was self-represented throughout the hearing but retained counsel to assist him and later PCMG with the preparation of final written argument. They also had counsel at the time they filed their Response, made disclosure and filed their witness statements.

IV. THE REPRESENTATIONS

[8] The representations at issue were allegedly made orally by Minto Roy and certain PCMG Senior Career Consultants during meetings with prospective clients. The Commissioner says that

the representations were false or misleading in that they conveyed the general impression that:

> (1) The Respondents screened prospective clients and accepted only those whom they considered to be highly qualified (the "Screening Representation").
>
> (2) The Respondents had an extensive network of personal contacts with senior executives at companies that were hiring. PCMG clients could use the contacts to arrange interviews or PCMG would arrange interviews on the clients' behalf (the "Contacts Representation").
>
> (3) Prospective PCMG clients would almost certainly find work quickly with its help, typically within 90 days, and their new positions would have salaries and benefits equal to or better than those associated with their previous positions (the "90-day/Good Job Representation").

[9] These representations will be described collectively as the "Representations".

V. THE EVIDENCE

[10] The parties agreed to introduce their evidence in chief in written statements. Eleven witnesses gave evidence on behalf of the Commissioner. They included nine former PCMG clients, one former PCMG Senior Career Consultant and a Senior Competition Law Officer employed by the Competition Bureau.

[11] Six witnesses testified on behalf of the Respondents including four former PCMG clients, one PCMG Senior Career Consultant (who is now a Career Coach) and the Respondent, Minto Roy.

VI. THE RESPONDENTS' BUSINESS

[12] PCMG has three divisions. PCMG Canada is the career coaching and career management division. Its clients are provided with customized career management services. They include an analysis of the client's skills, personality and aptitudes; assistance with the preparation of a high quality résumé focusing on the client's achievements; preparation of a distinctive cover letter; and help with networking, preparation for interviews and negotiating compensation packages. It is alleged that the Representations were made by Senior Career Consultants who worked for this division of PCMG.

[13] PCMG also has a recruitment division called "Careers Today". It functions as a headhunter and operates a website on which it posts job openings. The third division, "PCMG Executive", is a human resources consulting division which provides leadership management training.

[14] Approximately 60-70% of PCMG's revenue is earned by PCMG Canada, 25% of its revenue comes from Careers Today and 5% is generated by PCMG Executive.

[15] Minto Roy and PCMG's Senior Career Consultants were responsible for marketing PCMG Canada's services and securing contracts. Career Coaches (also described as Strategists) worked with clients after contracts were signed.

[16] The following Senior Career Consultants were mentioned in evidence:

- Ted Paxton – testified for the Respondents
- Joe Lapushinsky – did not testify
- Ravi Puri – did not testify
- Sean Hamilton – did not testify
- Steve Wills – testified for the Commissioner

[17] The following Career Coaches were mentioned in evidence:

- Ted Paxton – testified for the Respondents
- Tom Locke – did not testify
- Irene Mitchelson – did not testify
- Norma Axford-Couch – did not testify
- Alana Fero – did not testify
- Karen Cunningham – did not testify
- Karen Shankey – did not testify

[18] PCMG used a variety of techniques to recruit prospective clients. They included newspaper advertisements, articles and advertisements in the Canadian Immigrant magazine, Minto Roy's weekly radio show and postings on the Careers Today website. However, it is noteworthy that none of these media were the source of the Representations.

[19] PCMG also attracted many prospective clients by inviting unsuccessful applicants for positions posted by Careers Today to meet with a Senior Career Consultant.

[20] Once prospective clients were recruited, the marketing of PCMG's services usually involved two meetings with a Senior Career Consultant. The initial meeting (the "First Meeting") was typically an hour long discussion about the prospective client's career history, current status, current job search activities and career objectives. Clients were then provided with an overview of PCMG's career management services. Towards the end of the First Meeting, potential clients were invited to return for a second meeting (the "Second Meeting"). They were encouraged to bring their spouses or "significant others" to the Second Meeting.

[21] During that meeting, which also lasted approximately one hour, the Senior Career Consultant provided a step-by-step description of PCMG's services. The fees and payment options including financing were discussed and the prospective client was presented with PCMG's contract for signature.

[22] Both the First and the Second Meetings were held in private in the offices of Minto Roy or a Senior Career Consultant. Those offices were initially located on the 29th floor of the TD Bank Tower in downtown Vancouver. They were luxurious and had a beautiful view. PCMG

then moved to 1199 West Hastings. Those offices were described as average but they still had the beautiful view.

PCMG's Program

[23] PCMG clients were guided through the PCMG career management process (the "Program"). It involved three phases which are described as follows in PCMG's contract:

Phase I - Preparation

1. Conduct Functional Self-Analysis and Objective Setting;
2. Assess Client's personality type indicators and help Client evaluate workplace cultures where Client will best succeed;
3. Establish realistic short-term goals and identify suitable positions;
4. Explore career options and define target markets and industries;
5. Develop effective resume presentation and other collateral materials;
6. Instruct and activate Client in utilizing PCMG online database resources;
7. Develop a marketing plan between Client and Strategist to generate appropriate referral and job interviews;
8. Prepare Client to strategically interact in networking events, referral meetings, interviews and salary negotiations.

[my emphasis]

Phase II – Managing the Market Campaign

1. Provide one-on-one consultation with Client's Professional Development Strategist to evaluate and monitor the Client's overall marketing plan, strategy and progress;
2. Review and assess job offers;
3. Advise Client on effective negotiation of salary and benefits.

Phase III – Plan for the Future

1. Conduct follow-up review approximately 90 days after starting new position to develop intra-company advancement toward long-range goals;
2. Provide consultation, as needed, concerning intra-company development, promotions and salary review related to career advancement;
3. Re-activate the marketing campaign in the event of a job loss or need to change employers, career fields or industries.

[24] This description of the Program is from the most recent version of the PCMG contract. However, Ms. McClean, Ms. Threatful and Messrs. de Vaal, Nickson, Turenne and Warren, who all testified for the Commissioner, signed earlier versions of the contract in which Phase I, point 6 read:

> 6. Distribute your confidential profile in PCMG's Sourcebook to companies and recruiters in the local market area [Minto Roy acknowledged in his testimony that a confidential profile was a résumé.]

[25] When queried by the Chairperson as to whether or not there was an "s" missing at the end of the word referral found in Phase I, point 7 of the PCMG contract, Mr. Roy indicated that it could be read with or without the "s". This meant that Point 7 could have been understood to say that PCMG would work with a client to "generate appropriate referrals and job interviews".

VII. THE COMMISSIONER'S WITNESSES

[26] The evidence of the nine former PCMG clients who testified for the Commissioner will be described under the following headings:

(a) Backgrounds
(b) Encountering PCMG
(c) The Screening Representation
(d) The Contacts Representation
(e) The 90-day/Good Job Representation
(f) Signing PCMG's Contracts
(g) The Confidential Plan and
(h) The PCMG Program.

[27] The Commissioner also called Steve Wills, who was formerly a Senior Career Consultant with PCMG. His evidence will be considered separately. The evidence of the Senior Competition Law Officer dealt with Minto Roy's radio show transcripts and PCMG's corporate history. It is not further discussed.

(a) Backgrounds

[28] **William Warren** holds a master's degree in economics from McMaster University. He testified that he was born in 1957 and that, at the time of the hearing, he worked as a management consultant.

[29] **Tanya Threatful** holds a business administration diploma from Barkel Business College in British Columbia. At the time of the hearing, she was 37 years old and was employed as a customer service representative for Speedy Glass in Burnaby, British Columbia.

[30] **Marc Turenne** has a certification in electronics from Red River Community College and has also studied business management and human resources management at the British Columbia

Institute of Technology. When he testified, he was working as a sales representative for Precision Sound.

[31] **Bruce Nickson** testified that he had studied at the University of Dalhousie for four years but had not obtained his bachelor of arts degree because he "didn't pick it up". When he gave evidence, he was working as a program manager and was 56 years of age.

[32] **Johan de Vaal** is a Professional Engineer. He obtained a master's degree in engineering from the Cranfield Institute of Technology in the United Kingdom. At the time of the hearing, Mr. de Vaal was sixty-one years old and was employed as a senior project manager for Sandwell Engineering Inc.

[33] **Malia McClean** obtained a bachelor's degree from Simon Fraser University with a major in psychology. At the time of the hearing, she was 31 years old and worked as a residential support worker with the Children's Foundation of British Columbia.

[34] **René Navarro-Gonzalez** was born in Bolivia in 1951 and immigrated to Canada in 2004. He has an MBA from the University of Santiago de Chile, a post graduate degree in human resources management from Yale University and a juris doctorate degree in international labour law from the University of San Andres in La Paz, Bolivia. At the time of the hearing, he was working in Iceland for a B.C. company which manufactured airport equipment.

[35] **Christopher Graham** holds a two-year golf management diploma from the Professional Golfers Career College in Murrieta, California and a business diploma from Lethbridge Community College. At the time of the hearing, Mr. Graham was 37 years old and was employed as a special events coordinator for a children's charity. He had previously worked as a golf professional.

[36] **Raffaele Rocca** is Irish and came to Canada in November of 2006. At the time of the hearing, he was 28 years old and unemployed. He has a degree in marketing from the University of Limerick, and diplomas in business studies, computer applications and communications from HSI College in Ireland.

(b) Encountering PCMG

[37] **William Warren** submitted his cover letter and résumé in response to a PCMG internet advertisement. He was then contacted by PCMG to schedule a meeting to discuss the material he had submitted. At that time, he was working as an independent consultant. He had a First Meeting with Mr. Roy on December 15, 2004.

[38] **Tanya Threatful** was told in November 2004 that the cosmetic clinic where she was employed would be downsized and that she would be terminated at the end of the year. After she posted her résumé on several websites, she received a phone call from Joe Lapushinsky asking whether she was interested in PCMG's services. She had a First Meeting with him in late November 2004.

[39] **Marc Turenne** was contacted by PCMG in October of 2004 after he had posted his résumé on a website. Mr. Turenne indicated that he was unemployed and that his funds were running out.

[40] **Bruce Nickson** testified that he received a call from PCMG after having submitted his résumé and had a First Meeting with Sean Hamilton on December 13, 2004. At the time, he was unemployed. He stated that finding a job was an urgent matter.

[41] **Johan de Vaal** submitted his résumé to PCMG in response to a PCMG advertisement in the Vancouver Sun. He was subsequently called by PCMG to set up a First Meeting. Although he had been unemployed for approximately 7 months, he did not start his job search until September because he had received a severance payment from his former employer.

[42] **Malia McClean** submitted her résumé in response to an internet job posting on Monster in early June 2005. Thereafter, a PCMG employee contacted her and advised her that she had not made the short list for the position and indicated that PCMG was interested in speaking with her regarding other opportunities. At that time, Ms. McClean urgently needed employment.

[43] **René Navarro-Gonzalez** became interested in PCMG after he read an advertisement in the December 2005 issue of The Canadian Immigrant magazine. He called PCMG at a time when he was anxious to secure a position. The entries in PCMG's client file show that Mr. Navarro-Gonzalez sent his résumé to PCMG before his First Meeting.

[44] **Christopher Graham** contacted PCMG at the end of May 2007 in response to a job posting on the PCMG website. Mr. Graham submitted his résumé and was contacted by PCMG several days later. By then, his employment insurance payments were about to stop and he needed a job.

[45] **Raffaele Rocca** submitted his résumé to PCMG after seeing its website on the internet. Thereafter, he was contacted by Ravi Puri to schedule a First Meeting. At that time, Mr. Rocca was looking for assistance because he had found that, without previous employment in Canada, it was difficult to find a position. His First Meeting with Ravi Puri took place in December 2006.

(c) The Screening Representation

[46] **William Warren** testified that Minto Roy said during their First Meeting that "PCMG doesn't just take anybody and they only take high-calibre candidates that they can work with."

[47] **Tanya Threatful** testified that during her First Meeting, Mr. Lapushinsky told her that "PCMG doesn't take on just anyone as a client" and that "they look for people with certain credentials and a certain level of professionalism and accomplishment". She also testified that Mr. Lapushinsky indicated that he had seen her résumé on the Monster website and felt that she might be a good candidate for the Program. According to Ms. Threatful, the First Meeting was all about whether or not she qualified for PCMG's Program. Her background, skills and education were all discussed.

[48] Ms. Threatful and her boyfriend then attended a Second Meeting with Minto Roy in his office. She was impressed with his corner suite which she described as "huge" and "glamorous" and decorated with pictures of Mr. Roy and well-known people in the city. During the Second Meeting, Mr. Roy told her that she "had been carefully selected and screened" and that this was why she was meeting with him.

[49] **Marc Turenne** indicated that Minto Roy told him that part of the reason for the First Meeting was to "see how presentable he was". Mr. Roy said that, if he did not feel that he could get him a job in 8 to 10 weeks, he would not accept him as a client.

[50] **Bruce Nickson** indicated that after the First Meeting, Minto Roy called him to congratulate him about being selected to enter the Program. Mr. Nickson's impression was that not everyone was eligible to become a PCMG client.

[51] **Johan de Vaal** said that Minto Roy told him that PCMG personnel were "selective about who they took on as clients". Mr. Roy also indicated that he was well qualified for the types of positions PCMG was "looking to fill". Mr. de Vaal testified that he was flattered by Mr. Roy's comments.

[52] **Malia McClean** - The Commissioner does not allege that the Respondents made the Screening Representation to Ms. McClean.

[53] **René Navarro-Gonzalez** indicated that Minto Roy told him that PCMG was very selective about its clients and that PCMG was accepting him because of his qualifications. Mr. Navarro-Gonzalez further testified that Mr. Roy stated that PCMG only allowed professional and serious people to become clients.

[54] **Christopher Graham** – The Commissioner does not allege that the Respondents made the Screening Representation to Mr. Graham.

[55] **Raffaele Rocca** stated that, during the First Meeting, Ravi Puri told him that PCMG only selected people it found suitable as to do otherwise would reflect poorly on PCMG. Mr. Rocca further indicated that he felt that he was going through some sort of screening process, given the nature of the questions asked by Mr. Puri.

(d) The Contacts Representation

[56] **William Warren** stated that, during his Second Meeting on December 20, 2004, Minto Roy used his arm to gesture toward his office window with its view of downtown Vancouver (the "Sweeping Gesture") and said that he was well connected to the business community in British Columbia and that PCMG had "many links to top decision makers and leading employers". Mr. Roy specifically indicated he had a strong relationship with Bell Canada and a contact at London Drugs.

[57] **Tanya Threatful** testified that she was informed of Minto Roy's contacts during her Second Meeting with him on November 26, 2004. He told her that PCMG was unlike other

career management businesses because of his personal ties and contacts in the corporate world. He stated that he had relationships with people in the city who didn't advertise job openings and who relied on his recommendations.

[58] She also testified that Minto Roy made the Sweeping Gesture and said: "Do you ever wonder how anyone – there's so many places in all these buildings – how any of these people get their positions? All of those types of places come through people like me and my hard work in building relationships with a lot of these people."

[59] **Marc Turenne** said that Minto Roy told him that he "could pick up the phone and call any number of companies around the city and speak to decision – key decision makers" and that "those were the people that [they] had to get me in front of". He also testified that Mr. Roy told him that he would set up interviews for him with those decision makers.

[60] **Bruce Nickson** testified that Minto Roy assured him that PCMG had many contacts and that they would lead to job interviews.

[61] **Johan de Vaal** stated that during his First Meeting on December 15, 2004, Minto Roy indicated that PCMG had "links to the business community" and that PCMG's services would include providing him with "contact to senior officials in companies looking for key people" just like him. Mr. de Vaal expected recommendations. He further testified that in the Second Meeting, Mr. Roy repeated that PCMG had links with senior level contacts in companies that were hiring.

[62] **Malia McClean** stated that Ted Paxton indicated that PCMG had a purchased database. He said that it listed thousands of jobs to which she would have access as a PCMG client. Mr. Paxton also told Ms. McClean that he could set up so many interviews in her field of interest that she would be in a position to pick and choose the jobs she wanted. It was Ms. McClean's understanding that the database was the main source of PCMG's contacts.

[63] **René Navarro-Gonzalez** testified that during the First Meeting he was told by Minto Roy that PCMG had an extensive network of contacts with profitable companies across Canada. He was also told that PCMG would arrange interviews for him. He further stated that, during the First Meeting, Mr. Roy picked up the phone and called the Vice President of Bombardier to set up a date for an interview. Mr. Navarro-Gonzalez said that Mr. Roy made similar representations about his contacts during the Second Meeting.

[64] **Christopher Graham** stated that, during the First Meeting, Minto Roy told him that PCMG "talked, knew and worked with a lot of high ranking executives". He understood that PCMG would market his name to these high-ranking executives and that he would be provided with their names so that he could arrange interviews.

[65] **Raffaele Rocca** indicated that during the First Meeting, Ravi Puri told him that jobs advertised on the internet and in print media actually represented only 20% of the jobs available in Canada. He also said that PCMG had access to the remaining 80% unadvertised job market through its network of contacts in industries in B.C. and Canada. Mr. Puri used the expression

"hidden job market" to describe the unadvertised market. He said that PCMG would put him in contact with the decision makers in hiring companies and would set up interviews.

(e) The 90-day/Good Job Representation

[66] **William Warren** testified that Minto Roy said that he believed that PCMG's senior level contacts would lead Mr. Warren to a new job within 90 days. Mr. Roy also told Mr. Warren that he would have no problem finding a position for him with a salary of approximately $100,000.00.

[67] **Tanya Threatful** stated that Minto Roy advised her that "he felt that there would be no problem finding [her] a position paying $20,000 to $30,000 more than any of [her] previous jobs, with benefits and stock options, within 90 days". He also indicated that, in the past, she had been underpaid.

[68] **Marc Turenne** said that Minto Roy told him that he should have no problem finding a position that paid as much or more than his previous job within 8 to 10 weeks from the start of the Program.

[69] **Bruce Nickson** testifed that, during the Second Meeting, Minto Roy told him that "he would have no problem finding [him] a job within 6-10 weeks" and that "the new position would offer a salary of at least $60,000 per year".

[70] **Johan de Vaal** stated that, during the First Meeting, Minto Roy told him that through PCMG contacts, he could expect to find a senior position, at a competitive salary, within 90 days. Mr. Roy also indicated that it would not be difficult for Mr. de Vaal to find a position at his previous salary.

[71] **Malia McClean** said that, during the First Meeting, Ted Paxton assured her that she would have a job within three months. During the Second Meeting, he repeated that she would have no problem getting a job within three months and added that she could expect to earn between $35,000 and $40,000 annually.

[72] **René Navarro-Gonzalez** stated that, during both the First and the Second Meetings, Minto Roy guaranteed that he would have a job within 90 days with a minimum salary of $75,000.

[73] **Christopher Graham** testified that Minto Roy said that "most of their clients were successful in finding work after 60 to 90 days into [the] program". Mr. Graham further testified that he expected to be such a client.

[74] **Raffaele Rocca** indicated that Ravi Puri advised him that the Program was a 60 to 90 day process and that he could expect to find a job in that period that paid $60,000 per year.

(f) Signing PCMG's Contracts

[75] **William Warren** was provided with a copy of PCMG's contract at the Second Meeting. He indicated that he wanted to discuss it with his wife and Mr. Roy gave it to him to take home. Mr. Warren signed the contract on December 22, 2004 and paid $6,377.20.

[76] **Tanya Threatful** testified that during the Second Meeting she told Minto Roy that she could not afford the Program. He therefore suggested that she pay a retainer of $2,160.00 and the balance when she became employed. He estimated that she would have a new position in 30-60 days.

[77] Mr. Roy then presented her with a contract to read and sign. She read the contract but understood it to be only an outline of the structure of the Program.

[78] **Marc Turenne** stated that Minto Roy insisted that he sign the contract immediately following the First Meeting because the job market was going to wind down after Christmas. Mr. Turenne said that, although he felt Mr. Roy was creating a sense of urgency to motivate him to act quickly, he was deterred by the cost. However, after searching for a job on his own, he returned to PCMG, paid $5,200.00 and signed a contract on December 7, 2004.

[79] During his cross-examination, Mr. Turenne said the following about Mr. Roy's marketing approach "[…] your presentation is full of vagaries; you talk about the companies out there, the contacts out there, the salary similar or higher than what you are earning. Everything that you presented to me was vagaries but very tempting vagaries […]".

[80] **Bruce Nickson** entered into an agreement with PCMG on December 15, 2004. He had an opportunity to review the contract before signing it. He was charged $5,300.00.

[81] **Johan de Vaal** was presented with the contract during the Second Meeting on December 20, 2004. Mr. de Vaal felt pushed to enter into an agreement with PCMG. He advised Mr. Roy that he would like to think about it over the Christmas break but Mr. Roy insisted that time was of the essence since many companies were interviewing over the holiday period.

[82] Mr. de Vaal read the contract and signed it at the end of the Second Meeting. He paid $6,377.20.

[83] When asked during the hearing if there was anything in the contract that could be interpreted as meaning that PCMG would provide him with referrals to people who were hiring, Mr. de Vaal stated that points 6 and 7 in Phase I of his contract could be interpreted in that manner. They read:

> 6. Distribute your confidential profile in PCMG's Sourcebook to companies and recruiters in the local market area;
> 7. Develop a marketing plan between you and the advisor to generate appropriate referral and job interviews;

[84] **Malia McClean** testified that she told Mr. Paxton at her Second Meeting that she wanted to think about PCMG's services before signing a contract. Mr. Paxton responded that the deal would be off if she left the office without signing. Ms. McClean and her mother then read the contract. Ms. McClean recalled telling Ted Paxton that the contract was "fairly skeleton" in that it did not embrace all the things they had talked about during the First and Second Meetings. Ms. McClean said that Ted Paxton described the contract as merely a "basic understanding" of the services offered.

[85] **René Navarro-Gonzalez** was presented with the contract at the end of his Second Meeting on January 12, 2006. He read the contract before signing it and was concerned with the following terms:

> Client acknowledges and agrees that neither PCMG, nor any representative of PCMG, has represented or implied to Client that PCMG is an employment or placement agency.
>
> Further, Client acknowledges and agrees that PCMG has not, nor has any representative of PCMG, induced Client to enter into this engagement by implication, representation or guaranteeing to Client:
> […]
> (b) any verbal promises that are not part of the written agreement.

[86] Mr. Navarro-Gonzalez asked Minto Roy why these provisions were in the contract and was told they were there to protect PCMG from tax liability. Mr. Navarro-Gonzalez also stated that Mr. Roy advised him that PCMG normally charged between $15,000 and $20,000 for its services but was willing to charge him less because of his financial situation. Mr. Navarro-Gonzalez paid PCMG $6,377.20.

[87] **Christopher Graham** signed a contract with PCMG during his Second Meeting on May 31, 2007. He felt pressured to enter into an agreement because Minto Roy indicated to him that senior level executives would be away for the months of July and August and that, if he did not sign immediately, it would take him longer to find a suitable position.

[88] Mr. Graham did not read the contract. He signed it based on what he was told during the First and Second Meetings. Minto Roy handed the contract to Mr. Graham with the first page flipped back. This meant that the second page was open to sign. The fee was $5,151.20.

[89] **Raffaele Rocca** did not sign the contract at the end of the Second Meeting in December of 2006 because he could not pay the fee. Ravi Puri said that he could come back to PCMG at a later date. Mr. Rocca returned and signed a contract on June 18, 2007.

(g) The Confidential Plan

[90] Shortly after signing PCMG contracts, clients were asked to answer questions posed in a PCMG document entitled "Confidential Plan for Achievement" (the "Confidential Plan"). Of the ten questions listed, only two are relevant for present purposes. They are:

> Question 8
>
> Were you guaranteed any specific interviews with specific companies, salary, or time frame to obtain a new position or promotion?
>
> Question 10
>
> Were any verbal promises made to you that are not part of the written agreement?

[91] **William Warren** answered Question 8 and Question 10 in the negative. In cross-examination, he stated that he had not been promised specific interviews.

[92] **Tanya Threatful** answered "No" to Question 8. In cross-examination, she stated that she had answered no because she had completed this form after meeting with Ms. Axford-Couch and her answers meant that Ms. Axford-Couch had never made promises to her about specific interviews, salaries or timeframes to obtain a new position.

[93] Ms. Threatful also testified that, after she complained about PCMG's services, she received a letter from Mr. Roy's lawyer pointing to the Confidential Plan to justify PCMG's rejection of her complaints.

[94] **Marc Turenne** gave no evidence on this issue.

[95] **Bruce Nickson** answered "No" to Questions 8 and 10. He admitted that no promises were made regarding specific companies or specific interviews.

[96] **Johan de Vaal** completed his Confidential Plan and answered "No" to Questions 8 and 10. He was of the opinion that there were no inconsistencies between the verbal promises and PCMG's contract.

[97] **Malia McClean** answered both Question 8 and Question 10 in the negative. However, in her comments on the Confidential Plan, Ms. McClean stated as follows:

> No guarantees were made about specific interviews or salaries, but I was assured that job interviews in a salary range of $38,000 to $45,000 could be expected within the timeframe of 1-100 days.

[98] When queried as to why she answered Question 10 in the negative, Ms. McClean testified that she did not recall answering no and that if she were asked at this point, she would change her answer.

[99] **René Navarro-Gonzalez** answered "Yes" to Question 8 and "No" to Question 10. Mr. Navarro-Gonzalez further testified that Mr. Roy guaranteed him a job within 90 days.

[100] **Raffaele Rocca** answered Question 10 in the negative and provided the following answer for Question 8:

> I was made no guarantees but I was advised that with my qualifications and experience that I should be successful in getting a suitable position to best reflect my talents and experience.

[101] **Christopher Graham** answered "no" to Question 8 because no *specific* company names, names of executives, salary or timeframes were provided to him. He also answered "no" to Question 10.

[102] **Steve Wills** testified that PCMG's clients were routinely encouraged to answer questions 8 and 10 in the negative because, if problems later arose, the answers on the Confidential Plan would be used as a basis for rejecting clients' complaints. PCMG would question how a client could be dissatisfied with its services if he or she had provided positive feedback.

(h) The PCMG Program

[103] **William Warren** worked with Ms. Fero as his Career Coach. He met with her in December 2004 and January 2005. These meetings were devoted to strengthening his résumé, writing cover letters, networking and homework assignments. When Mr. Warren asked Ms. Fero about the promised contacts, she provided only vague responses and said that she would talk about them with Mr. Roy.

[104] At one point, Mr. Warren asked Ms. Fero about PCMG's contacts at Bell Canada because he wished to apply for a position with that company. After some discussion, he received an email from Minto Roy providing him with a name of a Bell Canada employee and an indication that she was a senior decision maker. However, when contacted, the employee advised Mr. Warren that she could not help him and he was later referred to another Bell employee. That individual, a manager, advised Mr. Warren that his initial contact had been a low-level employee in the Human Resources Department and that the position he sought had been filled.

[105] In January 2005, Mr. Warren attended a group networking meeting with several other PCMG clients (the "Networking Seminar"). Clients were encouraged to exchange contact information and share leads. Mr. Warren stated that the clients who attended the Networking Seminar later met to discuss their job search progress and eventually their dissatisfaction with PCMG's services.

[106] On March 27, 2005, in a letter to Minto Roy, several PCMG clients asked for a meeting to discuss their dissatisfaction (the "March Letter"). William Waren, Tanya Threatful, Marc Turenne, Bruce Nickson, and Johan de Vaal were among the signatories to the letter. It

read, in part, as follows:

> We, the undersigned, request a meeting to discuss our dissatisfaction with the services of PCMG. When each of us initially met with you to set up career counselling, you indicated very strongly that PCMG had extensive 'links to the corporate world', and could provide inside contacts at senior levels to most of the key companies in Vancouver. We recognize that you made no promises of actually securing positions for us, but for every one of us, it was your claim to these 'corporate links' that was the key factor in our decision to hand over several thousand dollars. PCMG has completely failed to deliver on these claims, thereby negating any benefit to us as clients.

[107] A meeting between the signatories and Minto Roy took place on April 7, 2005 (the "April Meeting"). However, Mr. Roy refused to negotiate with them collectively and said that he would respond to each client individually.

[108] Mr. Warren filed a claim against PCMG in the Small Claims Court of British Columbia ("Small Claims Court") and a complaint with the Better Business Bureau. The Small Claims Court decision in *William Warren v. Premier Career Management Group Corp. and Minto Roy* was issued on March 8, 2007 (the "Warren Decision"). Justice Pendleton ordered PCMG to pay Mr. Warren $5,377.20 plus certain fees. The Court held that Mr. Warren was not entitled to a full refund because he had received a benefit worth $1,000.00 from PCMG's Program.

[109] **Tanya Threatful** started the Program in December 2004. She met with her Career Coach, Norma Axford-Couch, five times in December 2004 and early January 2005. Each time she was asked to complete a personality test.

[110] In December 2004, Ms. Threatful was approached about a position as regional manager of a company called Mega Hair. She said that Ms. Axford-Couch and Minto Roy told her not to respond to the offer until she had completed the Program. Mr. Roy told her that "he knew the owner and his daughter and that he could call on [her] behalf at a later stage to negotiate on [her] behalf". He also said that he knew that the salary would be in the range they had discussed.

[111] Later in January 2005, Ms. Threatful contacted Mega Hair directly and accepted the position. By that time, no introductions or interviews had been arranged through PCMG.

[112] Ms. Threatful attended the Networking Seminar and the April Meeting.

[113] Ms. Threatful later filed a claim against PCMG in Small Claims Court. The claim was settled out of court based on the Warren Decision.

[114] **Marc Turenne** began working with Alana Fero and was given assignments which consisted of profile and personality assessments. A résumé was then created and submitted to a variety of companies. Mr. Turenne stated that Ms. Fero provided little help and that he felt that

she was not working on his behalf. He also said that the meetings were often short and totally unproductive.

[115] PCMG provided Mr. Turenne with only one contact and, after 10 weeks, he was still not employed. Mr. Turenne testified that he eventually became frustrated with the Program because of the lack of contacts. However, Ms. Fero would not address his concerns. Mr. Turenne signed the March Letter.

[116] In November of 2005, Mr. Turenne filed a claim in Small Claims Court. In April of 2007, he received an out-of-court settlement based on the Warren Decision.

[117] **Bruce Nickson** said that he and Alana Fero worked to improve his résumé. However, after two or three meetings, Ms. Fero apparently became disinterested. He was not provided with a single contact and, after approximately 6 weeks, he abandoned the Program.

[118] Mr. Nickson signed the March Letter and attended the April Meeting. In November of 2005, Mr. Nickson filed a claim in Small Claims Court. In April of 2007, he received a settlement based on the Warren Decision.

[119] **Johan de Vaal** had seven or eight meetings with Alano Fero. He acknowledged that she had a gift for writing and admitted that he did see some value in the Program.

[120] On January 14, 2005, Mr. de Vaal attended the Networking Seminar. He described the event as upbeat and said that the clients in attendance were not unhappy with PCMG.

[121] However, towards the end of February 2005, approximately 2 months after signing PCMG's contract, Mr. de Vaal became dissatisfied with the Program because no contacts had been made on his behalf.

[122] Mr. de Vaal also signed the March Letter and attended the April Meeting. On May 6, 2005, he filed a claim in Small Claims Court. Based on the Warren Decision, he received an out-of-court settlement of $5,900.00.

[123] **Malia McClean** became somewhat dissatisfied with PCMG's services after several meetings with Alana Fero. She stated that the meetings lasted about 20 minutes and that they basically consisted of taking in the previous week's homework and assigning new homework.

[124] Ms. McClean became completely dissatisfied with PCMG 5 or 6 weeks into the Program when she discovered that the database, which had been described by Ted Paxton, did not list employment opportunities.

[125] Ted Paxton and Alana Fero met with her to discuss her concerns but they were not resolved. Thereafter, Ms. McClean left the Program.

[126] **René Navarro-Gonzalez**'s first Career Coach was Irene Mitchelson. He enjoyed working with her. However, after five or six meetings, he was assigned to Alana Fero and meetings with her lasted no more than 15 minutes.

[127] Mr. Navarro-Gonzalez was concerned about the work assigned to him by Ms. Fero. He was asked to send letters to companies asking them for information. He was instructed to write that he was not looking for a job but that he was simply doing research on an industry. Mr. Navarro-Gonzalez refused to write such letters because he was of the opinion that it was dishonest to pretend that he was not seeking employment.

[128] Mr. Navarro-Gonzalez stated that he became more and more concerned about the services provided by PCMG as time passed. After 90 days he had not been provided with any contacts or interviews so he asked for a refund. When he told Minto Roy that he had misrepresented his services to him, Mr. Roy responded that he should read his contract more carefully.

[129] **Christopher Graham** began attending weekly meetings with Ted Paxton shortly after signing a contract. During the initial meetings, Mr. Graham worked on setting personal goals and providing background information. He then began developing a new résumé and cover letter. He said that he started asking for contacts approximately one month into the Program.

[130] Mr. Graham testified that PCMG gave him names of contacts at Big Brothers of Greater Vancouver, Tourism British Columbia, Junior Achievement, Canadian Tourism Corporation and the B.C. Sports Hall of Fame. However, after meeting with all the contacts, he discovered that only Junior Achievement was hiring and that he was overqualified for the position.

[131] Mr. Graham said that in early September of 2007 Minto Roy told him that the Chilliwack Golf and Country Club (the "Club") was looking for a general manager. Mr. Graham indicated that he was interested and Mr. Roy advised him that he would send his résumé to the Club. However, Mr. Graham testified that his résumé never arrived.

[132] Mr. Graham stated that on October 25, 2007, he met with Ted Paxton and Minto Roy to discuss PCMG's failure to provide the Club with his résumé and its failure to provide him with referrals to employers who were hiring. During the meeting, Mr. Graham asked what PCMG had done to market his name. Neither Mr. Paxton nor Mr. Roy answered his question. Mr. Graham asked for a refund and was refused.

[133] **Raffaele Rocca** worked with Karen Cunningham on his résumé for approximately one month. He also prepared cover letters, discussed interview skills and participated in mock interviews.

[134] Mr. Rocca stated that he was provided with two contacts during the Program. The first failed to reply to his overture and the second was his Career Coach's niece. Neither of these contacts led to employment. He became frustrated approximately 6 weeks into the Program and quit.

(i) Steve Wills' Testimony

[135] **Steve Wills** worked as a Senior Career Consultant with PCMG from September 2005 to December 2005. He explained that PCMG's typical prospective clients were individuals who had sent in résumés in response to job openings posted on the Careers Today website but had not been hired. After being advised that they had been unsuccessful, they would then be asked whether they would like an opportunity to meet with a Senior Career Consultant at PCMG.

[136] With respect to PCMG's sales strategy, Mr. Wills stated that Minto Roy "stressed that [one of] the key objectives of the first meeting was first to find the money, i.e. to determine the prospect's ability to pay and, if they did not have the money, where they could turn to get it." Mr. Wills testified that another objective of the First Meeting was to ensure that the prospective client would bring their spouse to the Second Meeting. He stated that the spouse's presence was required to facilitate closing the deal. The concern was that, if the client was told the price of the Program and had a chance to discuss it with a spouse who had not been exposed to the sales pitch, there would be little likelihood that a contract would be signed. Mr. Wills stated that it was part of the script to instill a sense of urgency.

[137] Regarding the Screening Representation, Mr. Wills said that he had not seen any assessment criteria used to qualify prospects for a Second Meeting. He noted, however, that during the First Meeting, the Senior Career Consultant would tell the prospective client that PCMG worked only with highly qualified candidates and that the purpose of that meeting was to enable PCMG to get to know the person a little better in order to decide if they were the type of person PCMG would want to "partner" with. In cross-examination, Mr. Wills stated that it "was very, very rare that [Mr. Roy] didn't offer a prospect the second meeting" and that "pretty much everybody got offered the second meeting".

[138] Mr. Wills gave the following evidence about the Contacts Representation:

> Minto Roy, PCMG's director, was very insistent that myself and other consultants follow the script provided by PCMG […] In this script, PCMG was to be characterized as the prospective client's friend and a powerful potential partner in helping them to find a new job. The script included statements to the effect that because every PCMG client becomes part of the PCMG network, PCMG has therefore built a vast network of contacts at the management and supervisory level, in every industry. The script indicated that upon signing on with PCMG, each new client gets access to PCMG's network of decision-makers. I was never shown any document that listed or described that network. The script did not promise that PCMG would put the client in touch with specific individuals or specific companies, but implied that PCMG had contacts and would arrange introductions to executives who could put the client in touch with decision-makers, people who could help the client get ahead.

[139] He added the following in response to the Tribunal's questions:

> **The Chairperson**: …You've told me that the script doesn't say that PCMG was offering to put them in touch with people who were hiring. And you said the script doesn't say that PCMG said they would set up interviews with those people who were hiring, and yet you say those promises were routinely made?
> **Mr. Wills**: Yeah. I think there's a disconnect between what's on paper and what's said. I mean in the same way as the contract that people sign spells out in legalese what their expectations are and puts in a statement that PCMG never promised you this, never promised you that and were offering you this. In the same way that's in the contract, well the legalese and the appropriate claims are, on the written materials, script and otherwise. But in effect, you are there to say what you need to say to move that prospect towards signing that contract, and I …
> **The Chairperson**: And if that includes making promises, you make them?
> **Mr. Wills**: That's correct.
> **The Chairperson**: And was that a direction from Mr. Roy?
> **Mr. Wills:** Well that was an example set by Mr. Roy.

VIII. THE RESPONDENTS' EVIDENCE

[140] **Neil Belenkie** was self-employed as an occupation consultant at the time of the hearing. However, when he met PCMG, he was a manager in the marketing department of a pharmaceutical company. He has a diploma from Mount Royal College in Calgary and an arts degree from the University of Calgary. Mr. Belenkie signed a contract with PCMG on January 19, 2007. He stated that he was given an opportunity to read the contract and that it was consistent with the services he received from PCMG. He testified that Minto Roy did not promise him access to his network of contacts or a new job within 90 days.

[141] Mr. Belenkie testified that it took him three months to complete the Program and that he had approximately 12 meetings with his Career Coach. Mr. Belenkie stated that using his own contacts, he found a job approximately seven weeks after completing the Program.

[142] **Jagdish Ruprell** is an operations manager. He has a bachelor's degree in business administration, a diploma in computer systems management and, he is currently pursuing his Facilities Management Administrator Designation. Mr. Ruprell immigrated to Canada from India in February of 2006 and met with Minto Roy in March 2006 after submitting his résumé to PCMG. At that time, Mr. Ruprell was employed as a customer service representative for a janitorial service. Mr. Ruprell stated that Mr. Roy advised him that PCMG only partnered with clients who were prepared to work very hard. He signed a contract with PCMG on March 17, 2006. Mr. Ruprell stated that Mr. Roy did not put pressure on him to sign and that PCMG worked out a payment structure that accommodated his financial situation. He further stated that Mr. Roy and the staff of PCMG did not make any misleading promises or guarantees. The services he was promised were those described in his contract. However, Mr. Ruprell did not provide the Tribunal with a copy of his contract.

[143] **Douglas Wicks** is an engineering technologist and is employed as a project manager. He graduated from the Saskatchewan Technical Institute in Moose Jaw, Saskatchewan. Mr. Wicks stated that Minto Roy did not promise him a job within 90 days and he did not promise to provide him with referrals or interviews. Mr. Wicks was employed when he signed a PCMG contract on September 7, 2007, but was looking for a career change. Mr. Wicks stated that he would highly recommend PCMG to anyone in his position.

[144] **Loretta James** is a project manager for an asset management software company. She testified that, after her education, she stayed home with her children for many years. She said that Mr. Roy did not promise her a job within 90 days and did not say that he would provide her with senior level contacts.

[145] **Minto Roy** testified that he is the sole shareholder and director of PCMG and described himself as an entrepreneur. His duties at PCMG include the marketing of PCMG's services. He also testified that he coaches the Senior Career Consultants and that he attends several networking events per week.

[146] Mr. Roy described PCMG's network of contacts as being comprised mainly of former clients who worked at all levels in many types of businesses.

[147] Mr. Roy denied making the Representations and denied the existence of a written script for the First and Second Meetings. However, he did acknowledge that a certain "protocol" was to be followed by the Senior Career Consultants.

[148] Mr. Roy explained that the Better Business Bureau of British Columbia falsely affiliated PCMG with a company known as Bernard Haldane Associates and that this was a major reason why PCMG clients lost faith in the Program. He also stated that the nine former PCMG clients who testified on behalf of the Commissioner were not representative of PCMG's 501 clients.

[149] Mr. Roy pointed out that he has taped over 200 radio shows, that the show is not scripted, that the host, Mannie Buzunis, is not paid by PCMG and that he has no control over the editing before the show is broadcast.

[150] **Ted Paxton** stated that he joined PCMG in March of 2005. He first worked as a Senior Career Consultant and then became a Career Coach. He is a certified professional coach and received his designation from the Coaching Technical Institute in California, in 2003. Mr. Paxton testified that he sat in on approximately 100 sales meetings and that he never witnessed anyone guarantee a client a job within 90 days or promise interviews with senior level contacts. He said, however, that clients typically do find jobs within 90 days. He further stated that PCMG does select clients who are committed to their careers and prepared for hard work.

[151] Mr. Paxton denied pressuring Malia McClean to sign a contract and denied telling her that PCMG had a database showing job openings that were not advertised to the public. However, Mr. Paxton admitted telling Ms. McClean that a salary between $38,000.00 and $42,000.00 was an appropriate target for her.

IX. THE RELEVANT PROVISIONS OF THE ACT

[152]

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(*a*) makes a representation to the public that is false or misleading in a material respect;

(*b*) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(*c*) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

[…]

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

(*a*) expressed on an article offered or displayed for sale or its wrapper or container,

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

c) ou bien des indications sous une forme qui fait croire qu'il s'agit :

(i) soit d'une garantie de produit,

(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,

si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

[…]

74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son

(*b*) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(*c*) expressed on an in-store or other point-of-purchase display,

(*d*) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(*e*) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).
[…]

emballage;

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

[…]

[153] Subsection 74.03(1) and its predecessor subsection 36(2) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as amended by *An Act to amend the Combines Investigation Act*, S.C. 1974-75-76, c. 76 will be referred to as the Deeming Provision.

X. THE LEGISLATIVE HISTORY

[154] In 1914, a provision was added to the *Criminal Code* which prohibited the publication of misleading advertisements (See: *An Act to amend the Criminal Code*, S.C. 1914, c. 24). It was amended several times and, in 1969, it was transferred from the *Criminal Code* to the *Combines Investigation Act*, R.S.C. 1952, c. 314.

[155] After the transfer, a number of unsuccessful attempts were made to substantially alter the provision by removing its limited focus on the publication of advertisements and expanding it to deal with false and misleading representations made "to the public" by any means. The Bills implementing this change included language proposed for a new section 36 of the *Combines Investigation Act* which, although a criminal provision, was almost identical to the present paragraph 74.01(1)(*a*) and subsection 74.03(1) of the Act. The only material difference was that the proposed Deeming Provision (paragraphs 36(2)(*d*) and (*e*)) initially referred in the plural to "persons" and "members" of the public. The proposals, in this form, first appeared in Bill C-256 (on June 29, 1971; *An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make*

consequential amendments to the Bank Act, 3rd Sess., 28th Parl.) but the Bill did not proceed past first reading.

[156] The next attempt at reform came with Bill C-227 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*,1st Sess., 29th Parl.) which was introduced on November 5, 1973. Again, it was identical to the present subsections 74.01(1) and 74.03(1) except that the plural was used in paragraphs (*d*) and (*e*) of the proposed Deeming Provision. This Bill also failed to proceed beyond first reading.

[157] Bill C-7 (*An Act to amend the Combines Investigation and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 2nd Sess., 29th Parl.) followed with similar provisions. The Bill passed second reading and was sent to the House of Commons Committee on Finance, Trade and Economic Affairs (the "Committee") for a clause-by-clause examination. The Consumers' Association of Canada submitted to the Committee that the words "to the public" in what is now paragraph 74.01(1)(*a*) (then paragraph 36(1)(*a*)) should be deleted. Such a deletion would have allowed the provision to cover representations which were not made to the public. However, the suggested change was not made. In my view, this indicates that Parliament did not intend the Act to apply to all deceptions. See: Canada, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue no. 30, March 21, 1975, 1st Sess., 30th Parl., p. 30:44. The Committee's deliberations were terminated on May 8, 1974 when Parliament was dissolved.

[158] On October 2, 1974, Bill C-7 was re-introduced as Bill C-2 (*An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess., 30th Parl.). Bill C-2 was ultimately enacted and came into force on January 1, 1976. As in the earlier Bills, Bill C-2 initially used the plural in the proposed Deeming Provision. However, amendments made during Committee deliberations resulted in the use of the singular so "persons" became "person" in 36(2)*(d*) and "members" of the public became "a member" of the public in 36(2)(*e*) (the "Amendments").

[159] André Ouellet, then Minister of Consumer and Corporate Affairs, introduced the Amendments before the Committee. At that time, he presented a document which set out the proposed amendments and his comments thereon. See Appendix J – Amendments and Comments to Bill C-2, an Act to Amend the Combines Investigation Act in Canada, House of Commons, Minutes of Proceedings and Evidence of the Committee, Issue no. 15, December 3, 1974, 1st Session, 30th Parl. pp. 15:70-71.

[160] Below, with my emphasis, I have reproduced paragraphs 36(2)(*d*) and (*e*) of the Deeming Provision as first proposed in which the plural was used:

> **36(2)** For the purpose of this section and section 36.1, a representation that is
>
> […]

> (d) made in the course of in-store, door-to-door or telephone selling to persons as ultimate users, or
> (e) contained in or on anything that is sold, sent, delivered, transmitted or made available to members of the public,
>
> shall be deemed to be made to the public by the person who caused the representation to be made […]

[161] Next I have reproduced 36(2)(*d*) and (*e*) of the Deeming Provision as amended after second reading to change the plural to the singular. Again I have added emphasis.

> **36(2)** For the purpose of this section and section 36.1, a representation that is
>
> […]
>
> (*d*) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or
>
> (*e*) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public.
>
> shall be deemed to be made to the public only by the person who caused the representation to be so expressed, made or contained […]

[162] Finally, I have reproduced the Minister's comment on the amendment of the proposed Deeming Provision which shows that a misrepresentation to an individual is sufficient to bring the situations described in paragraphs 36(2)(*d*) and (*e*) within the ambit of subsection 36(1).

> The words in 36(2)(*d*) are changed from "to persons as ultimate users" to "a person as ultimate user" because concern has been expressed that the plural words "persons", "users" and "members" used in sub-paragraphs (d) and (e) as they now stand in Bill C-2 might be construed to mean a plurality of persons, whereas a misrepresentation to a single person should be enough to attract the application of the section.

[163] However, despite these Amendments shifting from the plural to the singular, no change was made to "to the public" in 36(1)(*a*). In other words, the section was not amended to read to "a member of the public". This suggests that Parliament intended that "to the public" was and would remain plural.

XI. THE ISSUES

[164] Based on the Act, it is necessary to address the following questions to determine whether the Respondents have engaged in reviewable conduct under paragraph 74.01(1)(*a*) of the Act:

1. Were the Representations made?
2. If so, what was the purpose for which the Representations were made?
3. Were the Representations made to the public?
4. Were the Representations false or misleading?
5. If they were misrepresentations, were they material?

XII. DISCUSSION AND CONCLUSIONS

Issue 1 Were the Representations Made?

[165] I find that the evidence given by the Commissioner's witnesses was both credible and compelling. I am satisfied, on a balance of probabilities, that a significant number of prospective PCMG clients heard the Representations during their First and Second Meetings with Minto Roy and PCMG's Senior Career Consultants.

[166] I reached this conclusion despite Mr. Roy's submissions. Mr. Roy argued that based (i) on the answers given by the Commissioner's witnesses to Questions 8 and 10 of the Confidential Plan and (ii) on the disclaimer in PCMG's contracts and (iii) on the evidence of his witnesses, I should have concluded that the Representations were not made. I will deal with his submissions in turn.

(i) The Confidential Plan – Questions 8 and 10

[167] In my view, the negative answers to Question 8 given by the Commissioner's witnesses do not assist the Respondents because the question includes the word "specific". The witnesses acknowledged that they were not guaranteed specific interviews with specific companies, specific salaries or specific timeframes for obtaining a new position or a promotion so it is understandable that they answered "no" to Question 8. However, that answer does not mean that the Contacts and 90-day/Good Job Representations were not made in the First and Second Meetings. In most cases, the language used when those representations were made was not specific. Indeed, in my view, it was intentionally vague. The people who were to serve as contacts were not named and the 90-day period was often described as "typical" and was sometimes expressed in weeks rather than days. Most of the witnesses agreed that there were no guarantees, just timeframes and salary ranges.

[168] The negative answers to Question 10 are also understandable because, as Mr. de Vaal testified, there was no inconsistency between PCMG's contracts and the Contacts Representation. In Phase I point 7, PCMG undertook to work with the client to "Develop a marketing plan between client and strategist [i.e. career coach] to generate appropriate referral and job interviews." Mr. Roy acknowledged in his evidence that "referral" could reasonably be read as referrals.

[169] In my view, this provision, which appeared in the contracts signed by all the Commissioner's witnesses, could reasonably be read as a promise by PCMG to use its contacts both to refer clients to those who were hiring and to arrange job interviews.

[170] Further, the six witnesses who signed the older version of PCMG's contract also received the benefit of Phase I point 6 which bound PCMG to distribute clients' résumés to companies and recruiters in the local market. This provision could also reasonably be interpreted to include a responsibility on the part of PCMG to follow up on the contacts by booking or assisting with the booking of interviews. For these reasons, the answers to Question 10 cannot be used to suggest that the Contacts Representation was not made.

(ii) The Disclaimer

[171] The disclaimer appeared in all versions of the contract signed by the Commissioner's witnesses. It read:

> Client acknowledges and agrees that neither PCMG, nor any representative of PCMG has represented or implied to Client that PCMG is an employment or placement agency. Client understands that PCMG provides a full program of career counselling, career development, and contact development, which the client implements. Further, Client acknowledges and agrees that PCMG has not, nor has any representative of PCMG, induced Client to enter into this engagement by implication, representation or guaranteeing to Client (a) specific interviews with specific companies or individuals, salary or time frame to obtain a new position or promotion, (b) any verbal promises that are not part of the written agreement (c) salary or wages increase, bonus programs or other increased remuneration,
>
> [my emphasis]

[172] In my view, the disclaimer does not support Mr. Roy's argument that by signing PCMG's contract, the Commissioner's witnesses acknowledged that the Contacts and 90-day/Good Job Representations were not made.

[173] My reasoning is similar to that dealing with the answers to the questions in the Confidential Plan. The disclaimer does not apply because the Commissioner's witnesses were not guaranteed specific interviews, salaries or timeframes and because the Contacts Representation, as discussed above, is in the PCMG contract.

[174] The Screening Representation deserves separate attention because it was neither a promise nor a specific commitment. In my view, it was flattery used to make clients feel that they were special because they met PCMG's high standards. Neither the answers to Questions 8 and 10 in the Confidential Plan nor the disclaimer address whether flattery was used to market PCMG's services so the Respondents' arguments do not impact the Screening Representation.

(iii) The Respondents' Witnesses

[175] As noted earlier, Minto Roy called four former clients who appeared voluntarily. Three denied that they heard the Contacts and 90-day/Good Job Representations and the fourth denied being misled. However, even if I accept their evidence, it does not mean that the Commissioner's witnesses lied when they said they heard the Representations. It only means that the Representations were not made to all prospective clients. I have therefore accepted the Commissioner's evidence in spite of the testimony offered on behalf of the Respondents.

[176] Further, neither Minto Roy nor Ted Paxton were credible witnesses. I am satisfied, on the balance of probabilities, that Minto Roy encouraged PCMG's Senior Career Consultants to make the Representations and say whatever else they thought would convince prospective clients to sign a PCMG contract. In my view, Mr. Roy behaved in this manner because he believed that the answers to Questions 8 and 10 in the Confidential Plan and the disclaimer in the PCMG contracts would make it impossible for clients to complain when the Program failed to meet their expectations.

[177] This dishonest approach to marketing was reinforced by the fact that Senior Career Consultants received no salary from PCMG. Their remuneration was based entirely on commission. This meant that they had a huge incentive to say whatever was required to persuade clients to purchase PCMG's services.

Issue 2 What was the Purpose of the Representations?

[178] The Representations were made for the purpose of persuading prospective clients to purchase PCMG's services. All the Representations were made during the First and Second Meetings which were conducted by Mr. Roy and PCMG's Senior Career Consultants. They were the PCMG personnel who were responsible for marketing.

Issue 3 Were the Representations made "to the public"?

[179] Counsel for the Commissioner acknowledged that there is no precedent in the case law for the application of paragraph 74.01(1)(*a*) when oral representations are made during private discussions of personal matters.

[180] The Commissioner submitted that because there is no definition of "public" or "to the public" in the Act and because the evidence shows that the Representations were repeated to a number of prospective clients, I should conclude that they became Representations "to the public" within the meaning of 74.01(1)(*a*) of the Act.

[181] This submission was based, in part, on the Supreme Court of Canada's decision in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339. It was a case of alleged copyright infringement under paragraph 3(1)(*f*) of the *Copyright Act*, R.S.C. 1985, c. C-42 which protects communications of works "to the public" by telecommunication. One aspect of the decision concerned the Law Society's custom photocopying service which, on

request, faxed copies of judicial decisions and other published works to members of the legal profession and researchers.

[182] Although the Court concluded that single faxes were not communications to the public, the Commissioner relied on a statement made by the Chief Justice in *obiter* when she said that a series of fax transmissions of the same work to different recipients might constitute communication to the public (paragraph 78).

[183] The Commissioner argued that over time, as different prospective clients heard the Representations, they become the Respondents' "public". However, I have not been persuaded by this submission. In my view there is an important distinction between the facts in CCH and those in this case. In CCH, the Law Society's service was available to the public in the sense that members of the Law Society, the judiciary and authorized researchers were entitled to request the service and receive copies of the works. Further, each user understood that others had similar access and there was no personal content in the exchange of information between the Law Society and its customers. In contrast, in the present case no one had access to the discussions of personal matters which occurred during the First and Second Meetings.

[184] The Commissioner also relied on *Canadian Wireless Telecommunications Association et al v. Society of Composers, Authors and Music Publishers of Canada*, 2008 FCA 6, 290 D.L.R. (4^{th}) 753. It concerned the transmission of a selection of ring tones to mobile phone customers of Bell and Telus. The transmissions went directly from company to customer whenever customers requested access for the purpose of selecting a tone. The Federal Court of Appeal held that such transmissions were made "to the public" within the meaning of 3(1)(*f*) of the *Copyright Act*.

[185] Again, however I distinguish this decision from the case before me because the ring tone transmissions were accessible to the public and intended for public use. All that was required was a subscription to a mobile phone service. Further, the recipients were aware that others had the same choice of tones and there was no personal content in the communication. In contrast, in this case, there was no access on any basis to the Respondents' First and Second Meetings with prospective clients in which private matters were discussed.

[186] The Commissioner also says that the Tribunal should conclude that the Respondents' prospective customers to whom the Representations were made were a segment of the public because the Act is for the protection of the public.

[187] However, section 74.01 has been more precisely described as being for the protection of the marketplace composed of both consumers and merchants. False or misleading representations distort the information available in the market and lead to decisions by purchasers and competitors which are based on inaccurate information. This injures competition.

[188] This fact is acknowledged in a quotation taken from the Department of Consumer and Corporate Affairs Stage 1, Competition Policy, Background Paper of April 1976 at p. 38 (the "Background Paper"):

> …where there is a lack of complete information or where distorted information in relation to a product is fed into the marketplace, its functioning will be seriously affected and the distortion will be injurious to honest competitors.
>
> [my emphasis]

[189] In my view, the fact that paragraph 74.01(1)(*a*) is for the protection of consumers and competitors in the marketplace is consistent with a finding in this case that, because the alleged misrepresentations were not accessible to the marketplace, the Act does not apply.

[190] I have also had regard for the purpose of the Act as a whole. Its purpose clause reads as follows:

Purpose	Objet
1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.	**1.1** La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

[191] In my view, there is nothing in this provision which suggests that paragraph 74.01(1)*(a)* should apply in a situation in which the alleged misrepresentations could have had no impact on competition because they were not fed into the marketplace.

[192] Finally, in dealing with this aspect of the Commissioner's submissions, I have considered section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21 which provides as follows:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**12.** Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[193] Again, there is nothing in this section which requires me to give "to the public" in paragraph 74.01(1)*(a)* a meaning other than the one that makes sense in the context of both the

section and the Act. They indicate that Parliament intended "to the public" to mean "to the marketplace".

[194] I have applied the current approach to statutory interpretation which provides that 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. (See: *Rizzo & Rizzo Shoes Ltd. (Re*), [1998] 1 S.C.R. 27 at para. 21, and *AstraZeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, [2006] 2 S.C.R. 560, at para. 26.)

[195] With this approach in mind, I have concluded that there is no reason to suppose that the Act was intended to apply to all deceptions including misrepresentations made to individuals in private during discussions of personal matters. There is other relief available in such cases under tort or criminal law. Indeed, as a result of the Warren Decision, many of the Commissioner's witnesses have received refunds of part of the money they paid to PCMG.

[196] I have also accepted the Respondents' submission that because paragraphs 74.03(1)(*d*) and (*e*) of the Deeming Provision contain language which clearly describes an individual, it is reasonable to read "to the public" in paragraph 74.01(1)(*a*) as having a broader meaning which describes more than one person. Paragraphs 74.01(*d*) and (*e*) read as follows:

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is	**74.03** (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :
[…]	[…]
(*d*) made in the course of in-store, door-to-door or telephone selling <u>to a person</u> as ultimate user, or	*d*) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à <u>un usager</u> éventuel;
(*e*) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner <u>to a member of the public</u>,	*e*) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis <u>au public</u> ou mis à sa disposition de quelque manière que ce soit.
is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).	
[my emphasis]	[je souligne]

[197] In my view, if Parliament had meant to use the singular in 74.01(1)(*a*), it would have used descriptions in the singular similar to those in the Deeming Provision. In reaching this conclusion, I have rejected the Commissioner's submission that the Deeming Provision is a "stand alone" provision which should not be relied on to assist in the interpretation of "to the public" in paragraph 74.01(1)(*a*).

[198] In the alternative, the Commissioner suggests that if the Deeming Provision is relevant to the interpretation of 74.01(1)(*a*) then, because "to the public" in 74.01(1)(*a*) is written as "au public" in the French language version of 74.01(1)(*a*) and because "au public" appears again in paragraph (*e*) of the Deeming Provision which is in the singular in English, it is possible that "to the public" in 74.01(1)(*a*) is capable of referring to one person. This would mean that paragraph 74.01(1)(*a*) would apply to the Representations if made to only one prospective PCMG client.

[199] However, because of the legislative history which shows a clear intention to use the singular in the Deeming Provision, I have determined that it is not safe to base any conclusions on the use of "au public" in paragraph (*e*) of the Deeming Provision.

[200] The Commissioner also relies on the Deeming Provision in paragraph 74.03(1)(*d*) of the Act to submit that a single individual can constitute the "public" in this case.

[201] I accept that under paragraph 74.03(1)(*d*), one person could constitute the public for the purposes of 74.01(1)(*a*). The legislative history of the subsection makes it clear that that was Parliament's intent when it made the Amendments. The next question is whether the Deeming Provision is operative in this case.

[202] The Commissioner says that I should extend the meaning of paragraph (*d*) of the Deeming Provision to include the Representations made at PCMG. However, I can see no language such as the word "includes" which indicates that paragraph (*d*) was intended to be illustrative and applied in situations analogous to those listed.

[203] Further even if an analogy were appropriate, I do not see one that is apt. PCMG is nothing like a shop – which is a public place. Rather, it is a private place where people attend by invitation or under contract. It also seems to me that misrepresentations or false statements made during door to door and telephone sales were deemed to be "to the public" under paragraph (*d*) because both were seen as methods of mass marketing. PCMG did not function as a mass marketer.

[204] The Commissioner relied on *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ont. Dist. Ct.). Part of the case involved a criminal charge against Simpsons Ltd. under paragraph 36(1)(*a*) of the *Competition Act*, R.S.C. 1970, c. C-23. Simpsons ran a promotion in which it distributed 1,031,000 cards by mail and by hand in its stores. The cards falsely represented that cardholders could save 10% to 25% on practically everything in the store. In reality, 90% of the cardholders had no chance of obtaining anything more than the 10% discount.

In paragraph 10, the Judge said:

> To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90 % of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addresses of the mailing.
>
> [my emphasis]

[205] This statement does not assist the Commissioner for two reasons. First it is *obiter dicta*. Second, it is probably based on the Deeming Provision in 36(2)(*e*) which would have made Simpsons' conduct an offence if only one person saw the card. As discussed above, the Deeming Provision does not apply in this case.

[206] In conclusion on this issue, I find that the Commissioner has not met the onus of showing that the Representations were made to the public for the following reasons:

- Based on the Background Paper "to the public" means to the marketplace.
- The Deeming Provision in paragraph 74.03(1)(*d*) of the Act does not apply on the facts of this case.
- Personal matters were discussed: at the First Meeting, prospective clients reviewed personal matters including their employment histories, their expectations and their ability to pay PCMG's fees. In some situations, a partner or relative was invited to the Second Meeting in which similar personal topics were addressed.
- There was an expectation of privacy: both prospective clients and PCMG's Senior Career Consultants intended their discussions to be private. This mutual expectation of privacy was evidenced by the fact that the First and Second Meetings were held in offices behind closed doors.
- There was no public access: Mr. Wills confirmed that PCMG's practice was to invite candidates to First Meetings. They would usually be individuals who had not obtained positions after they had made their résumés available to PCMG via the internet. The First and Second Meetings were not accessible to the public. No one could pay a fee to receive, subscribe to overhear or in any way listen in on the conversations between the prospective clients and PCMG's Senior Career Consultants. In my view without accessibility, it cannot be said that misinformation was "fed into the marketplace".

[207] In view of this conclusion, the application will be dismissed. However, to provide a complete analysis, I will consider the remaining issues.

Issue 4 *Were the Representations False or Misleading?*

[208] The Commissioner's allegation is that the Representations were false and misleading. In considering this issue, I have focussed on what could reasonably have been understood by the average prospective PCMG client who heard the Representations during the First and Second Meetings. See: *Canada (Commissioner of Competition) v. P.V.I. International Inc.*, 2002 Comp. Trib. 24, 9 C.P.R. (4th) 129; aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.), at para. 24. The attributes of the intended audience are an important aspect of this consideration.

[209] The evidence from several of the Commissioner's witnesses discloses that prospective PCMG clients may urgently require employment. On the other hand, the Respondents' witnesses were all working when they approached PCMG. It therefore appears that PCMG has two categories of prospective clients – those who are unemployed and in need of work and those who are employed and want a change.

[210] In my view, it is reasonable to assume that urgency could exist in either situation.

[211] The evidence suggests that the prospective clients are likely to have some post-secondary education, some work experience and access to the funds necessary to pay PCMG's fees. Often, they will have experienced unsuccessful job searches before they encounter PCMG.

[212] Accordingly, although average members of the intended audience in this case were not normally gullible they were likely to accept what was reasonably implied without critical analysis because, to varying degrees, they were needy.

[213] In my view, against this background, the Contacts Representation was misleading. The references to contacts during the First and Second Meetings created the misleading impression that they would be used for the benefit of PCMG's clients in practical ways. In other words, PCMG's clients would be told about relevant positions and recommended for job interviews with senior decision-makers who were hiring.

[214] The 90-day/Good Job Representation was also misleading. Clients were flattered about their excellent qualifications during the First and Second Meetings and in those circumstances when they were told that PCMG clients "typically" secured comparable or improved positions in approximately 90 days they were led to believe that they were typical and would have the same experience as the typical client.

[215] The Screening Representation was also misleading in that it gave the prospective clients the impression that they had been measured against high standards. However, Mr. Wills' evidence showed that there were no such standards and that if you were presentable and could pay, you were encouraged to sign a contract.

Issue 5 Were the Misrepresentations Material?

[216] Misrepresentations are material if they are so pertinent, germane or essential that they could affect the prospective customer's decision to purchase PCMG's services (See: *Apotex Inc. v. Hoffman La-Roche Ltd.* (2000), 195 D.L.R. (4th) 244 (Ont. C.A.) at para. 16).

[217] All the Commissioner's witnesses who were former PCMG clients testified that the Contacts Representation was an important factor in their decision to retain PCMG. For example:

- **Marc Turenne** stated that he signed the PCMG contract to obtain access to key decision-makers.
- **Johan de Vaal** stated that he signed with PCMG on the understanding that Minto Roy would provide him with contacts which would give him a "foot in the door" and put him on shortlists for job interviews.

[218] As well, the March Letter emphasized that the signatories had relied on the Contacts Representation.

[219] This evidence suggests and I conclude that the Contacts Representation would be material for the average person who was looking for employment.

[220] The 90-day/Good Job Representation was also important for some of the Commissioner's witnesses. For example:

- **Tanya Threatful** indicated that she was both excited and relieved when she was approved for a Second Meeting. She further indicated that she "was impressed with the promises that [she] would be getting another job within 90 days, at a higher salary, with stock options and benefits."

[221] Again, based on this evidence and my assessment of the impact of this representation on an average person seeking employment, I have concluded that it is material.

[222] Lastly, in my view, the Screening Representation is not material because, on the evidence, it did not motivate any of the Commissioner's witnesses to engage the services of PCMG. I therefore find that it would be unlikely to motivate an average prospective client.

XIII. ORDER DISMISSING THE APPLICATION

[223] Upon reviewing the material filed and hearing the testimony of the witnesses and the submissions of counsel for the Commissioner and of Minto Roy on his own behalf, no one appearing for PCMG, in a 10 day hearing in Vancouver, B.C. in April and May 2008;

[224] Now this Tribunal orders that, for the reasons given above, this application is hereby dismissed.

[225] The issue of costs remains under reserve in the hope that a settlement can be achieved.

DATED at Ottawa, this 15th day of July 2008.

SIGNED on behalf of the Tribunal by the Chairperson

(s) Sandra J. Simpson

COUNSEL:

For the applicant:

The Commissioner of Competition

Stéphane Lilkoff
Stéphane Lamoureux

For the respondents:

Premier Career Management Group Corp.

Not represented

Minto Roy

Self-represented

[226] SCHEDULE A: THE PROCEDURAL HISTORY

1. On May 8, 2007, the Commissioner filed her Notice of Application with the Tribunal. Shortly thereafter, the Tribunal granted the Commissioner's Motion for Alternative Service of the Notice.

2. PCMG and Mr. Roy failed to respond within the time period set out in the *Competition Tribunal Rules*, SOR/94-290, and, on July 23, 2007, the Commissioner moved for an *ex parte* order in default of response. The Commissioner sought, in particular, directions about what evidence the Tribunal wanted to hear concerning the merits of her application.

3. On July 31, 2007, the Tribunal ordered the Commissioner to prepare a revised motion record containing submissions and affidavit evidence. The Tribunal ordered that the revised motion record be served. The Respondents were given 20 days to respond failing which the motion would proceed without further notice.

4. On September 14, 2007, the Commissioner filed her revised motion record. One day before the expiry of the 20-day period, newly retained counsel for PCMG and Mr. Roy wrote to the Tribunal seeking an extension of the time to serve a responding motion record.

5. The request was granted and after some discussion, the Commissioner agreed to abandon her Motion for an Order in Default of Response. Counsel for the Respondents served and filed a response and attended case management conferences on behalf of the Respondents in the fall of 2007.

6. However, on February 14, 2008, the solicitors for the Respondents moved to be removed as solicitors of record. It is not disputed that the solicitors had advised Mr. Roy in December 2007 of the fact that they would withdraw unless their fees were paid.

7. Since the Respondents' witness statements were due on February 25, 2008, Respondents' counsel was ordered to stay on the record until the statements were prepared. Mr. Roy was informed that he could not represent the corporate respondent without leave from the Tribunal and that he could retain counsel to act on behalf of PCMG and himself.

8. Seven days before the commencement of the hearing, Mr. Michael Osborne of Affleck, Greene, McMurtry wrote to the Tribunal indicating that he had been asked to represent PCMG and Mr. Roy at the hearing. He asked that it be rescheduled because he was not available in April.

9. The Tribunal denied the request the same day and noted, in particular, that Mr. Roy had known for many months that the hearing had been scheduled for the month of April 2008.

10. The Respondents did not retain counsel who could attend the hearing so Mr. Roy was self-represented and PCMG was unrepresented.

11. Minto Roy's final written argument, which was filed on May 1, 2008, showed that, although Mr. Osborne did not appear at the hearing, he reviewed the transcripts and assisted Mr. Roy with the preparation of his initial final argument. Mr. Osborne then acted for both Respondents when he prepared Minto Roy's Supplementary Argument dated May 9, 2008.

PUBLIC

Reference: *Commissioner of Competition v. Sears Canada Inc*., 2005 Comp. Trib. 2
File no.: CT2002004
Registry document no.: 0158b

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subparagraph 10(1)(*b*)(ii) of the *Competition Act* relating to certain marketing practices of Sears Canada Inc.;

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.01 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

Sears Canada Inc.
(respondent)

Dates of hearing: 20031020 to 20031024, 20031027 to 20031031, 20031103 to 20031107, 20031112 to 20031114, 20040116, 20040119 to 20040122, 20040202 to 20040203, 20040628 to 20040629, 20040819 to 20040820
Final written submissions filed: September 10, 2004; September 24, 2004 and October 1, 2004
Judicial Member: Dawson J. (presiding)
Date of Reasons: January 11, 2005

REASONS FOR ORDER

I. INTRODUCTION

[1] The Commissioner of Competition ("Commissioner") alleges that, during three sales events held in November and December of 1999, Sears Canada Inc. ("Sears") employed deceptive marketing practices in connection with price representations Sears made concerning five kinds, or lines, of all-season tires that Sears promoted and sold to the public. The Commissioner asserts that this constituted reviewable conduct contrary to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act").

[2] Specifically at issue are representations made in advertisements about the regular selling price of the five lines of tires. The advertisements contained "save" and "percentage off" statements. For example, Sears advertised "Save 45% Our lowest prices of the year on Response RST Touring '2000' tires", and advertised comparisons between Sears' regular prices and its sale prices. The Commissioner asserts that the prices referred to by Sears as being its regular prices were inflated because: i) Sears did not sell a substantial volume of these tires at the regular price featured in the advertisements within a reasonable period of time before making the representations; and, ii) Sears did not offer these tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

[3] The Commissioner states that Sears did not offer the tires at its regular prices in good faith because Sears had no expectation that it would sell a substantial volume of the tires at its regular prices, and because Sears' regular prices for the tires were not comparable to, and were much higher than, the regular prices for comparable tires offered by Sears competitors. The Commissioner says that the regular prices were set by Sears at inflated levels with the ulterior motive of attracting customers and generating sales by creating the impression that, when promoted as being "on sale", the tires represented a greater value than was really the case.

[4] The remedies sought by the Commissioner include an order prohibiting such reviewable conduct for a period of 10 years, the publication of corrective notices, and the payment of an administrative monetary penalty in the amount of $500,000.00.

[5] Sears contests the Commissioner's application with vigour. Sears asserts that the representations contained in its advertisements with respect to its regular or ordinary selling prices were not misleading in any, or in any material, respect. Sears says that the regular prices referred to in the advertisements were reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area where Sears competed. As well, Sears argues that the remedies sought by the Commissioner are unavailable at law and inappropriate. Finally, Sears says that subsection 74.01(3) of the Act is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Sears seeks a determination that subsection 74.01(3) of the Act is inconsistent with the Charter and, therefore, of no force or effect.

[6] The Commissioner has conceded that subsection 74.01(3) of the Act ("impugned legislation") infringes Sears' constitutionally guaranteed right of commercial speech. The Commissioner submits, however, that this infringement is justified under section 1 of the Charter as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

[7] These reasons are lengthy. In them I find that: (i) subsection 74.01(3) of the Act is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society; (ii) Sears conceded that it failed to comply with the volume test ; (iii) Sears' regular prices for the Tires were not offered in good faith as required by the time test; (iv) Sears did not meet the frequency requirement of the time test for 4 of the 5 lines of tires; (v) Sears failed to establish that its OSP representations were not false or misleading in a material respect; (vi) a prohibition order should issue; and (vii) no order should issue requiring publication of a corrective notice. The issues of payment of an administrative monetary penalty and costs are reserved pending further submissions. The following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

Index

II. BACKGROUND FACTS

[8] The parties agree that Sears is one of Canada's largest and most trusted retailers. It sells

general merchandise to the public through various business channels, including retail outlets located across Canada. In 1999, Sears supplied 28 lines of tires to the public through 67 Retail Automotive Centres located across Canada.

(i) The Tires

[9] At issue are the following five tire lines (together the "Tires"):

i) RoadHandler "T" Plus (manufactured by Michelin)

ii) BF Goodrich Plus (manufactured by BF Goodrich)

iii) Weatherwise R H Sport (manufactured by Michelin)

iv) Response RST Touring '2000' (manufactured by Cooper)

v) Silverguard Ultra IV (manufactured by Bridgestone)

[10] The Tires are all-season passenger tires. Together they represented approximately **[CONFIDENTIAL]** % of the all-season passenger tire sold by Sears in 1999 and about **[CONFIDENTIAL]** % of the passenger vehicle tires sold by Sears in 1999. In dollar terms, the Tires represented approximately **[CONFIDENTIAL]** % of the total sales generated by Sears with respect to the sale of all of its tires. No other retailer in Canada promoted the Tires or supplied the Tires to the public in 1999. Each line was exclusive to Sears.

(ii) Sears' pricing strategy

[11] Sears is an "off-price" (also called a "high-low") retailer, which means that Sears relies on discounting and promotions to build in-store traffic and generate sales. An off-price or high-low retailer typically charges a higher "regular" price for its merchandise and then, from time to time, offers merchandise "on-sale" at event-driven discount sales.

[12] During 1999, Sears offered the Tires for sale at the following four price points:

a) Sears' "regular" price was the price of a single unit of any Tire offered by Sears, when that particular tire was not promoted as being "on sale". This was the price used as the reference price in advertisements when the Tires were promoted as being "on sale" by Sears.

b) Sears' "2For" price was the price at which Sears would sell two or more of a given tire to consumers when that tire was not being offered at a "sale" price. In 1999, Sears' "2For" price for a given tire was always lower than its regular price for a single unit. Sears did not use its "2For" price as a reference price in any of the sales representations at issue

and did not advertise its "2For" price when promoting retail sales. The "2For" price came into effect when a customer bought more than one tire and the customer was only informed of the discount on a purchase of multiple tires by the sales associate at the store.

c) Sears' "normal promotional" price was the usual sale price advertised by Sears, which was a set percentage off the "regular" price for each tire. The amount of the discount depended on the line of tire. When "normal promotional" prices were advertised in 1999, they were always compared to the "regular" price for the relevant tire, and not to the "2For" price. These discounts were referred to by Sears as "Save Stories".

d) Sears' "Great Item", "Big News", "Lowest Prices of the Year" or other similar expressions refer to a further discounted promotional price where the discount consumers received was greater than the discount obtained with the "normal promotional" price. When "Great Item" style promotional prices were advertised in 1999, they were always compared to the "regular" price for a single relevant tire and not the "2For" price.

[13] The following illustrates the relationship between the four price levels. For the Response RST Touring '2000' tire (size P215/70R14), Sears' pricing in 1999 was as follows:

i) Regular (single unit) price - $133.99;

ii) 2For price - $87.99 (each);

iii) Normal promotional price - $79.99 (each, representing a 40 % discount off the regular single unit price);

iv) Great Item price - $72.99 (each, representing a 45 % discount off the regular single unit price).

[14] Sears' regular single unit prices for tires in 1999 were set in the Fall of 1998 and were not altered in 1999. Sears' 2For, normal promotional, and Great Item prices were also set in the Fall of 1998 and those prices remained largely unchanged in 1999. As a general rule, Sears' prices were set nationally so that the Tires sold for the same price at each Sears Retail Automotive Centre.

(iii) The promotion of the Tires

[15] Throughout 1999, Sears advertised the Tires through various media, including flyers (or "pre-prints"), newspapers, in-store leaflets, and corporate-wide, national events, which were advertised in various newspapers across Canada. Sears' advertisements contained representations of the price at which the Tires were ordinarily sold by Sears, compared with the sale prices on the Tires being promoted. The advertisements were placed in newspapers published across the country including, for example, the Vancouver Sun, the Montreal Gazette and the Calgary Sun.

[16] This application puts in issue the ordinary selling price representations made during three different national sales events in 1999, the first in effect between November 8 and November 14, the second in effect between November 22 and November 28, and the final event in effect on December 18 and 19.

[17] For the first sales event, Sears distributed nationally a flyer entitled "SEARS Shop Wish and Win" that advertised sale prices on the Response RST Touring '2000' and the Michelin RoadHandler "T" Plus tires. The following is an example of the advertisement found in the flyer promoting the sale:

> **MICHELIN®**
>
> **RoadHandler T Plus Tires**
>
> | **Size** | **Sears reg.** | **Sale, each** |
> |---|---|---|
> | P175/70R13 | 153.99 | 91.99 |
> | P185/70R14 | 168.99 | 99.99 |
> | P205/70R14 | 190.99 | 113.99 |
> | P205/70R15 | 203.99 | 121.99 |
> | P185/65R14 | 179.99 | 107.99 |
> | P195/65R15 | 188.99 | 112.99 |
> | P205/65R15 | 199.99 | 119.99 |
> | P225/60R16 | 219.99 | 131.99 |
>
> Other sizes also on sale
>
> **save 40%**
> **ALL MICHELIN ALL-SEASON PASSENGER TIRES**
> Shown: RoadHandler® T Plus tire is made for Sears by Michelin.
> Backed by a 6-year unlimited mileage Tread Wearout Warranty;
> details in store. #51000 series

[18] In support of the first sales event, Sears also published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring '2000' in a number of large circulation newspapers across the country (including, for example, the Vancouver Sun and the Montreal Gazette). These newspaper advertisements were 5.625" x 9.625" in size or larger.

[19] The second sales event ran between November 22 and November 28, 1999. The event promoted a sale on Silverguard Ultra IV tires which was advertised in a weekly flyer, in newspaper advertisements and in leaflets distributed in-store at all Sears Retail Automotive Centres. The weekly flyer contained the following advertisement:

Silverguard Ultra IV Tires

Size	Sears reg.	Sale, each
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P235/75R15XL	149.99	74.49
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99
P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes also on sale

½ PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km Tread Wearout Warranty: details in store. #68000 ser. From **45**[**49**] each. P155/80R13. Sears reg. 90.99

[20] The third sales event was held on December 18 and 19, 1999. The BF Goodrich Plus and Weatherwise tires were promoted during this event. The event was advertised in a weekend flyer which was distributed nationally. The BF Goodrich Plus tire was advertised as "save 25%" while the flyer described the Weatherwise tire price as "save 40%".

(iv) Tire sales

[21] The parties agree that the following table represents the sales numbers and percentages of the Tires sold at Sears' regular selling price in the 12 month period preceding the relevant regular selling price representations:

Table 1: Summary of Sales volumes

		1	2	3	4	5
Line	Time-frame	Total number of the Tires sold by Sears in the year before the relevant Representation	Tires sold as "singles", that is, not as a part of a bundle of two or more	Percentage of the total number of Tires sold, which were sold singly (col. 2 as a % of col. 1)	Of all singles sold, the number sold at the Regular, Single Unit Selling Price	Percentage of the total Tires sold at the Regular, Single Unit Selling Price (col. 4 as a % of col. 1)
BF Goodrich Plus	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	6.53%	**[CONFIDENTIAL]**	**2.29%**
Michelin Roadhandler 'T' Plus	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.84%	**[CONFIDENTIAL]**	**1.30%**
Michelin Weatherwise RH Sport	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.81%	**[CONFIDENTIAL]**	**0.82%**
Response RST Touring 2000	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	2.19%	**[CONFIDENTIAL]**	**0.51%**
Silverguard Ultra IV	11/22/98 - 11/22/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.22%	**[CONFIDENTIAL]**	**1.21%**
Totals		**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	4.03%	**[CONFIDENTIAL]**	**1.28%**

[22] The following two tables show the number of days that the Tires were offered by Sears at

Sears' regular price, compared to the number of days the Tires were offered at a price below Sears' regular price. The first table reflects the six month period that preceded the representations, the second table reflects the prior twelve month period.

Table 2: Summary of Time Analysis
(For the Six Month Period Preceding the Relevant Representations)

	BF Goodrich Plus	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring '2000'	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 6 month period	June 18 to Dec. 17, 1999	May 9 to Nov.7, 1999	June 18 to Dec. 17, 1999	May 9 to Nov. 7, 1999	May 23 to Nov. 21, 1999
Total of Days	183	183	183	183	183
Number of days at reduced prices	100	113	148	99	73
% of days at reduced prices	**55%**	**62%**	**81%**	**54%* or 50.35%**	**40%**
Number of days at Regular Prices	83	70	35	84	110
% of Time at Regular Prices	**45%**	**38%**	**19%**	**46%* or 49.65%**	**60%**

* Sears argues that the correct figures are the second ones shown with respect to the Response RST Touring '2000'.

Table 3: Summary of Time Analysis
(For the Twelve Month Period Preceding the Relevant Representations)

	BF Goodrich	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring 2000	Silverguard Ultra IV
Date of Representation	Dec. 18, 1999	Nov. 8, 1999	Dec. 18, 1999	Nov. 8, 1999	Nov. 22, 1999
Start and End of 12 month period	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov.7, 1999	Dec. 19, 1998 to Dec. 17, 1999	Nov. 9, 1998 to Nov. 7, 1999	Nov. 23, 1998 to Nov. 21, 1999
Total of Days	365	365	365	365	365
Number of days at reduced prices	181	246	283	121	184
% of days at reduced prices	**49.59%**	**67.40%**	**77.53%**	**33.15%**	**50.41%**
Number of days at Regular Prices	184	119	82	244	181
% of Time at Regular Prices	**50.41%**	**32.60%**	**22.47%**	**66.85%**	**49.59%**

III. THE APPLICABLE LEGISLATION

[23] Subsection 74.01(3) of the Act is found in Part VII.1 of the Act which is entitled "Deceptive Marketing Practices". Part VII.1 of the Act permits the Commissioner to pursue administrative remedies, rather than criminal prosecution, in relation to deceptive marketing practices including misleading advertising.

[24] Under section 74.01 of the Act, a person engages in reviewable conduct where the person, for the purpose of promoting any product or business interest, makes a representation to the public that is false or misleading in a material respect. The general impression conveyed by a representation as well as its literal meaning is to be taken into account when determining whether or not the representation is false or misleading in a material respect.

[25] Subsection 74.01(3) of the Act deals with misleading representations with respect to a seller's own ordinary selling price. Subsection 74.01(3) reads as follows:

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit,

indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

[26] An ordinary selling price (“OSP”) representation will not constitute reviewable conduct under subsection 74.01(3) if either one of the following tests is satisfied:

(a) a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation (“volume test”); or

(b) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation (“time test”).

In the present case, the period of time to be considered is the period before the making of the representations at issue because the representations relate to the price at which the Tires were previously sold (subsection 74.01(4) of the Act).

[27] The requirement that any false or misleading representation must be material is found in subsection 74.01(5) of the Act which provides:

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[28] The remedies available for a breach of subsection 74.01(3) of the Act are prescribed in section 74.1 of the Act. Subsection 74.1(1) provides that a court (defined to include the

Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

[29] No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

[30] Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. THE CONSTITUTIONAL CHALLENGE

[31] As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(*b*) of the Charter. In my view, this is an appropriate concession.

[32] The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

(i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).

(ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, particularly at pages 967-979.

[33] Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(*b*) of the Charter. See: *RJR Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at paragraph 58.

[34] In the present case, Sears' OSP representations convey or attempt to convey meaning.

Those representations therefore have expressive content so as to fall, *prima facie*, within the sphere of conduct protected by subsection 2(*b*) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

[35] It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(*b*) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

[36] To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

[37] The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103. There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:

    a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.

    b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.

    c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's

negative impact.

See also: *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519.

[38] Relevant considerations when conducting the analysis articulated in *Oakes, supra* are that:

1. The onus of proving that a limit on a right or freedom protected by the Charter is reasonable and demonstrably justified is borne by the party seeking to uphold the limitation. See: *Oakes* at page 137.

2. The standard of proof is the civil standard. Where evidence is required in order to prove the constituent elements of the section 1 analysis, the test for the existence of a balance of probabilities must be applied rigorously, recognizing, however, that within the civil standard of proof there exist different degrees of probability depending upon the case. See: *Oakes* at page 137.

3. The analysis taught in *Oakes* is not to be applied in a rigid or mechanical fashion. It is to be applied flexibly. See: *RJR Macdonald, supra,* at paragraph 63.

4. The analysis must be undertaken with close attention to the contextual factors. This is because the objective of the impugned measure can only be established by canvassing the nature of the problem it addresses, and the proportionality of the means used can only be evaluated in the context of the entire factual setting. See: *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877 at paragraph 87.

5. The context will also impact upon the nature of the proof required to justify the measure. While some matters are capable of empirical proof, others (for example, matters involving philosophical or social considerations) are not. In those latter cases, "it is sufficient to satisfy the reasonable person looking at all of the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". Common sense and inferential reasoning may be applied to supplement the evidence. See: *Sauvé, supra,* at paragraph 18.

6. With respect to the minimal impairment test, where a legislative provision is challenged, the Supreme Court of Canada has held that Parliament need not choose the absolutely least intrusive means to attain its objectives, but rather must come within a range of means which impair guaranteed rights as little as reasonably possible.

(ii) A limit prescribed by law

[39] Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

[40] Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms "substantial volume", "reasonable period of time", "substantial period of time" or "recently", which are all used in the impugned legislation. While subsection 74.01(3) provides that the nature of the product and the relevant geographic market are factors to be considered in determining whether a person engages in reviewable conduct, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament's intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

[41] With respect to the Information Bulletin entitled "Ordinary Price Claims", published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act ("Guidelines"), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears' contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

[42] In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

[43] Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears' submissions.

[44] In *Irwin Toy, supra,* at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, "if at all". He said that the question to be asked is whether the legislation at issue provides 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". However, where there is "no intelligible standard" and a "plenary discretion" has been given to do what "seems best", there is no limit prescribed by law.

[45] Subsequently, in *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the

Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

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* and the *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* and *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* and *Osborne*).

4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference* and *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 over breadth (*Committee for the Commonwealth of Canada* and *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* and *Osborne*).

[46] Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a "law" is relatively high.

[47] With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

[48] The Court concluded its comments about vagueness in the following terms at pages 638-640:

> 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.
>
> 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.
>
> 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 ECHR 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 and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone, supra*, at pp.32-33.
>
> 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. [underlining added]

[49] With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a "law". Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

[50] As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word "substantial" has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just *de minimus*. (See: *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Competition Tribunal); aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.)). As the Commissioner argues, there is no reason to conclude that the

Tribunal is not equally capable of interpreting and applying the meaning of "substantial" in the context of subsection 74.01.(3). The word "reasonable" is widely used in Canadian statutes and has an understood meaning at common law. Similarly, the word "recently" has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Canada (Minister of National Revenue)* (1994), 78 F.T.R. 259 at paragraph 12 "an inherently present tense connotation". It is defined in the Oxford English Dictionary to mean "at a recent date; not long before or ago; lately, newly". Thus, the terms about which Sears complains do carry commonly understood meanings.

[51] Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society, supra,* the Supreme Court considered whether paragraph 32(1)*(c)* of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to "prevent, or lessen, unduly, competition". The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

[52] In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is "to maintain and encourage competition in Canada" in order, among other things, "to provide consumers with competitive prices and product choices". Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

[53] Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

[54] While Sears argues that neither the term "nature of the product" nor the term "relevant geographic market" are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

[55] It follows, in my view, that the words used in the impugned legislation, when considered

in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society*, *supra*, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

[56] Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the "Report of the Consultative Panel on Amendments to the *Competition Act*" ("Consultative Panel") and in the legislation from other jurisdictions, put in evidence before the Tribunal.

[57] On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the *Competition Act*. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 ("report").

[58] The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

> Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.
>
> However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a

> product.
>
> Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

[59] After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions "should explicitly identify two alternative tests. A price comparison that complied with either test would not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty". In its report, the Consultative Panel went on to say at page 26:

> Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place, *or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.
>
> Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.
>
> [...]
>
> The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms. [underlining added]

[60] The following model provision was recommended by the Consultative Panel at page 28 of its report:

> (ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:
>
> > (A) recently sold a substantial volume of the product, or
> >
> > (B) recently offered the product for sale in good faith for a substantial period of time prior to the sale. [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

[61] In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view

that the use of terms such as “recently”, “substantial volume”, and “substantial period of time” provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society*, *supra* at pages 626-627).

[62] With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

[63] Over the Commissioner’s objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka’s expertise within the federal sphere.

[64] Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida’s Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were “repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute”.

[65] New York’s General Business Law makes false advertising in the conduct of any business unlawful. “False advertising” is defined as advertising that is misleading in a material respect.

[66] Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a “substantial number of sales” were made in the “recent regular course of business”; (2) the former price was the price at which such goods or services or “substantially similar” goods or services were openly and actively offered for sale for a “reasonably substantial period of time” in the “recent regular course of business” honestly, in good faith and not for the

purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which "substantial sales" were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner. Mr. Mahinka testified that the term "substantial sales" is further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison in the supplier's trade area" but that the other terms used are not further defined.

[67] I find this evidence to confirm that other legislators have recognized the need for flexibility in regulating deceptive trade practices in general and OSP representations in particular. This less specific legislation establishes general boundaries of non-permissible conduct which is adequate for enforcement purposes. The existence of such general legislation in my view supports the view that the impugned legislation is capable of adequately giving rise to legal debate.

[68] It is true that Mr. Mahinka's evidence included examples of very specific state legislation. However, the fact that some legislation attaches consequences to more precisely-defined acts does not lead to the conclusion that more general provisions are not capable of constituting a limit prescribed by law.

[69] In rejecting Sears' position that the legislation is not a limit prescribed by law, I have also considered its submission based on the existence of the Guidelines. In *Irwin Toy, supra at* page 983, the majority of the Supreme Court noted that one could not infer from the existence of guidelines, (in that case, promulgated by the Quebec Office of Consumer Protection in order to help advertisers comply with advertising restrictions) that there was no intelligible standard to apply. In the view of the majority, one could only infer that the Office of Consumer Protection found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism. Similarly, I do not infer from the existence of the Guidelines that there are no intelligible standards for a court or the Tribunal to apply. I note that the report of the Consultative Panel included a recommendation that the Competition Bureau issue enforcement guidelines in draft form at the same time as the new legislation was introduced. One can infer that the Commissioner considered this recommendation to be reasonable and the Guidelines helpful.

(iii) Is the infringement reasonable and demonstrably justified?

[70] Having found the impugned legislation to be a limit prescribed by law, the next step is to apply the principles articulated in *Oakes* to the evidence before the Tribunal.

(a) Contextual considerations

[71] As already noted, in *Oakes*, the Supreme Court noted that the analysis is to be conducted with close attention to the contextual factors. The contextual factors are relevant to establishing the objective of the impugned legislation and to evaluating the proportionality of the means used to fulfil the pressing and substantial objectives of the legislation. Characterizing the context of the impugned provision also touches upon the nature of the evidence required at each stage of the analysis in order to establish demonstrable justification.

[72] I believe that the relevant contextual considerations are as follows.

[73] First, it is relevant to consider the nature of the activity which is infringed. This is necessary because, where the right to expression is violated, the value of the expression that is limited affects the degree of constitutional protection (*Thomson Newspapers, supra* at paragraph 91).

[74] Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.

[75] The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald, supra* at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.

[76] In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(*b*) of the Charter is intended to protect. In the result, a lower a standard of justification is required.

[77] Second, it is a relevant contextual factor to consider the vulnerability of the group the legislation seeks to protect: *Thomson Newspapers*, at paragraphs 90 and 112.

[78] Both the Consultative Panel and the Guidelines recognize that OSP claims are a powerful and legitimate marketing tool. Sears, in its own document entitled "Guidelines for Savings Claims", notes that "[s]avings claims, properly used, are a powerful selling tool".

[79] Dr. Donald Lichtenstein testified as an expert for the Commissioner. He is a Professor of Marketing at the Leeds School of Business at the University of Colorado in Boulder. He holds a Ph. D. with a major in Marketing obtained in 1984 from the University of South Carolina. Dr. Lichtenstein has lectured extensively about Marketing at the graduate and undergraduate level. He has served on the Editorial Review Board of the Journal of Marketing, the Journal of Consumer Research, and the Journal of Business Research. He is a member of the Editorial Review Board for the Journal of Public Policy and Marketing. In 2001, he received the

Outstanding Reviewer Award from the Journal of Consumer Research. Dr. Lichtenstein continues to be an ad hoc reviewer for the Journal of Marketing and other publications. As well, has presented numerous papers relating to marketing at conferences, has applied research experience, and has been published extensively in refereed publications and nationally refereed proceedings.

[80] The Tribunal ruled that Dr. Lichtenstein was qualified to provide opinion evidence on two topics. The first was marketing matters, and particularly consumer behaviour as it relates to pricing and other stimuli. The second topic was research design and methodology within the social sciences. Dr. Lichtenstein provided two separate written opinions, one pertaining to the constitutional question, the other pertaining to the Commissioner's deceptive marketing allegations. He testified with respect to both issues.

[81] I was impressed by Dr. Lichtenstein's expertise. Much of his testimony with respect to marketing matters was unchallenged and I accept his testimony given with respect to the constitutional issue. Relevant to the contextual factors at issue was his evidence that:

- OSPs have a powerful influence on consumers.

- OSP advertising creates a general impression of savings for the average consumer, positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.

- The average consumer has low levels of price knowledge and engages in very little pre-purchase search to gain this knowledge,
  even for expensive items. Thus, the average consumer is vulnerable to deceptive OSP advertising.

- By signalling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some customers into the market sooner than otherwise would be the case.

- Misleading OSP advertising can lead consumers to believe that, by purchasing the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.

- The average consumer who purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that he or she was mislead, and thus, he or she remains susceptible to subsequent reference price deceptions.

- Receiving a "good deal" in and of itself is a significant motivation for purchase

for many consumers who purchase OSP advertised items. This is referred to as "transaction utility".

- Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.

- The deceptive OSP advertisements from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner. In Dr. Lichtenstein's words:

> For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from [whom] they purchased.

- A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the beneficial effect also extends to other non-promoted product/service categories. When the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on the item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but for all items that the consumer purchases.

- When advertiser behaviour results in consumers purchasing products that provide less value for money, it motivates manufacturers to allocate factors of production to those items instead of to items that would otherwise be produced (i.e., those that "truly" provide higher value for money). This harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased.

[82] A third related contextual factor, conceded in oral argument by Sears to be relevant, is the objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

[83] Sears argues that a centrally important contextual factor is that, prior to the enactment of the impugned legislation, stakeholders had "explicitly and forcefully lamented the vagueness and

lack of precision, certainty and understanding relating to the ordinary selling price legislation". I agree that clarity of legislation is relevant to considerations of vagueness (as that relates both to the "prescribed by law" and minimal impairment requirements) and, in that sense, clarity touches on the proportionality of the legislation. I am not satisfied on the evidence that clarity and certainty are otherwise relevant contextual factors, or that clarity is an over-arching contextual factor.

(b) Does the infringement achieve a constitutionally valid purpose or objective?

[84] Having set out the relevant contextual considerations, I move to the first step of the *Oakes* analysis. The question to be answered at this stage is whether the objective of the impugned legislation is sufficiently important that it is, in principle, capable of justifying a limitation on Sears' freedom of expression.

[85] Sears concedes that the objective is sufficiently important. Notwithstanding that concession, it is important at this stage to properly state, and not over-state, the objective of the impugned legislation. Improperly stating the objective of the legislation will compromise the analysis.

[86] Sears describes the objectives of the impugned legislation as follows:

> The evidence before the Tribunal in this proceeding has confirmed that the objectives of the Act include, *inter alia*, setting and making known the rules or parameters governing competition in Canada and, importantly, having the Act judicially enforced in a manner that is fair to all and in accordance with the rules previously established. Other objectives include the improvement of the quality and accuracy of marketplace information and discouraging deceptive marketing practices.

[87] In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation. It is described below.

[88] In 1960, a criminal prohibition on the making of misleading ordinary price representations was added to what was then the *Combines Investigation Act*. The initial provision read as follows:

33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.

(2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

33c.(1) Quiconque, afin de favoriser la vente ou l'emploi d'un article fait au public un exposé essentiellement trompeur, de quelque façon que ce soit, en ce qui concerne le prix auquel ledit article ou des articles, semblables ont été, sont ou seront ordinairement vendus, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.

(2) Le paragraphe (1) ne s'applique pas à une personne qui fait paraître une annonce publicitaire qu'elle accepte de bonne foi en vue de la publication dans le cours de son entreprise.

[89] An explanation of the purpose of the criminal prohibition is found in remarks made to the House of Commons by the then Minister of Justice when he moved the second reading of the bill to amend the *Combines Investigation Act* to add the criminal prohibition. He said:

> The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.
>
> In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a manufacturer some right to prevent his product from being abused or used as a come-on device; and finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself. [underlining added]

House of Commons Debates, Vol. IV (30 May 1960) at 4349 (Mr. Fulton).

[90] In 1976, the criminal prohibition was amended to read as follows:

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.

[...]	[...]
(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.	(d) donner au public des indications notablement trompeuses sur le prix auquel un produit, ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au nom de laquelle elles sont données.

It was subsequently re-enacted as paragraph 52(1)(*d*) of the Act.

[91] As described in detail above, a discussion paper was released in 1995 seeking comments from interested persons with respect to amendments to the Act, including the appropriate definition of OSP. The Consultative Panel which was created to review the responses to the discussion paper made recommendations. Those recommendations are largely reflected in subsection 74.01(3) of the Act, which was originally contained in Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, 1st Sess., 36th Parl., 1997, (1st reading 20 November 1997). A dual track regime of civil and criminal enforcement procedures and remedies was created.

[92] The summary to Bill C-20 specifically provided that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity". The then Minister of Industry described the amendments in more detail in the following terms when he moved second reading to the bill:

> The regular price claims provisions of the Act will be amended for greater clarity and to better reflect what consumers and retailers understand by them. The legitimacy of regular price claims would be determined by an objective standard, a test based either on sales volume or the pricing of an article over time.
>
> Consumers will benefit from this clarification of the rules and merchants will have more freedom of choice in selecting pricing strategies and will be encouraged to innovate in ways beneficial to consumers and retailers alike.

House of Commons Debates, Edited Hansard, No. 074 (16 March 1998) (Hon. John Manley).

[93] On the basis of the legislative history and the evidence before the Tribunal, I am satisfied that the Commissioner has established, on a balance of probabilities, that the objectives of subsection 74.01(3) of the Act are to: i) protect consumers from deceptive ordinary selling price representations; ii) protect businesses from the anti-competitive effects of deceptive ordinary selling price representations; and, iii) protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These were the expressed objectives of the original criminal prohibitions and I am satisfied that the original

purpose remained pressing when the civil remedy was enacted. As Sears noted in its written argument, since the 1970's concerns were expressed about the inefficiencies associated with the criminal prosecution of misleading advertising. The Consultative Panel recommended that misleading advertising should normally be addressed through a civil regime but that a criminal regime should exist for egregious cases. Both regimes were directed at the same purpose.

[94] These legislative objectives are to be viewed in light of the evidence before the Tribunal concerning the significant harm caused to consumers, business and competition by deceptive OSP advertising (particularly the evidence of Dr. Lichtenstein described above).

[95] I conclude, on the totality of the evidence before the Tribunal, that Sears has fairly and properly conceded that the objectives of the impugned legislation are of sufficient importance that, in principle, they are capable of justifying a limitation on Sears' freedom of expression.

(c) The rational connection

[96] The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required. In *RJR Macdonald, supra* at paragraphs 86, 156-158, and 184, the Supreme Court held that a causal relationship between advertising and tobacco consumption could be established based upon common sense, reason or logic.

[97] In *Irwin Toy, supra* at page 991, Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

[98] In finding the impugned legislation to be rationally connected to the objectives of the legislation, I also rely upon the opinion of Dr. Lichtenstein. As noted above, I generally accept his testimony. I found him to be extremely knowledgeable on the subject of marketing and particularly consumer behaviour as it relates to pricing and other stimuli. I also found that he gave his testimony is an unhesitating, candid, clear and even-handed manner. His obvious enthusiasm for the subject matter left no suggestion of partisanship. His opinion, as it related to marketing in the context of the constitutional question, was not, in my view, effectively challenged or limited on cross-examination.

[99] Sears' expert, Mr. Mahinka, dealt with a review of the scope of U.S. legislation and the factors to be considered at law by sellers when making OSP representations. However, since Mr. Mahinka was not qualified to opine, and did not opine, on marketing matters, his evidence did not contradict that of Dr. Lichtenstein.

[100] The following evidence, taken from Dr. Lichtenstein's written expert report, is relevant to the issue of rational connection:

> 62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price [is] relate to two factors: (1) how long the product [has] been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus). Consequently, in my opinion, there is definitely a rational [connection] between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.
>
> 63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumers were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real *bona fide* "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.
>
> 64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as *bona fide* selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective. [footnotes omitted]

[101] In finding there to be a rational connection between the impugned legislation and its objectives, I reject Sears' submission that the impugned legislation fails the rational connection test because it is excessively vague, uncertain and imprecise, and has application to an unnecessary broad range of activity. In my view, those arguments are better considered when determining whether the legislation is over broad so that it does not minimally impair Sears' rights. Indeed, in oral argument, counsel for Sears dealt with the evidence that supported his submission that unclear legislation defeats the objective of accurate marketplace information (and so was not rationally connected to the legislative purpose) in the context of his submission on minimal impairment.

[102] I am satisfied that the impugned legislation, on its face, cannot be viewed as being so vague or arbitrary that it is not rationally connected to its objectives.

(d) Minimal impairment

[103] The next stage of the *Oakes* analysis requires consideration of whether the impugned legislation, while rationally connected to its objectives, impairs Sears' freedom of expression as little as reasonably possible in order to achieve the legislative objectives.

[104] The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 95. In *Sharpe*, the majority of the Court described the required analysis in the following terms:

> 96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].
>
> 97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry – one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...]. [emphasis in original] [jurisprudence and citations omitted]

[105] Sears argues that the impugned legislation fails the minimal impairment test in two respects. First, Sears says that the legislation is over broad because it uses excessively vague, imprecise and broad terms (including "substantial volume", "reasonable period of time", "substantial period of time" and "recently"). Further, the legislation fails to include specific guidelines, standards, criteria or definitions concerning the volume of product sold or offered for sale, and the periods of time to be considered for the volume and time tests. The scope of the impugned legislation will, it is said, therefore frustrate or defeat its objectives. Second, Sears says that subsection 74.01(3) of the Act does not minimally impair its freedom of expression because there are practical legislative alternatives to the impugned legislation as it is now drafted. Those alternatives would, Sears argues, give greater clarity, advance the objectives of the legislation more effectively, and interfere less with Sears' right to commercial free speech.

[106] Turning to the first ground advanced by Sears in support of its argument that the

impugned legislation will frustrate or defeat the objectives sought to be achieved, Sears points to the evidence of the Commissioner's expert, Dr. Lichtenstein, that:

a) Placing the percentage requirement for sales and time tests at 51 % or higher (as the Guidelines do) is objectionable as a per se or equivalent per se rule;

b) Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some customers from receiving non-deceptive information that they may, in fact, value in making decisions. In turn, retailing efficiency would be adversely affected because retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers;

c) Requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to the price may deprive some customers of important information about both the product and the retailer;

d) If consumers believed that there was a time test at 51 % or higher, that test is objectionable;

e) Uncertain or unclear OSP advertising rules hinder OSP price advertising;

f) If the regulations are not clear, some retailers may choose not to engage in OSP advertising as much or at all;

g) If retailers chose not to engage in OSP advertising as much or at all, that could hinder price reduction;

h) If price reduction is hindered, that could result in competitors not having any pressure to lower their prices; and

i) If competitors do not lower their prices, the consumer will be harmed by higher prices.

[107] One legislative option available to deal with OSP claims is legislation that imposes specific per se standards, for example, the number of days a product must be on sale at a regular price, or the percentage of sales accepted as "substantial" for the volume test. Mr. Mahinka identified a number of state enactments in the U.S. which contained per se standards. It was Dr. Lichtenstein's opinion that such per se rules are not effective in addressing deception. He endorsed the following statement:

> "Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all

> non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost? Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice."

[108] Dr. Lichtenstein advanced a "Rule of Reason" analysis of a retailer's prices and advertising and effect on consumers, described as follows:

> "Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive".

[109] Dr. Lichtenstein went on to state:

> The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following [of] per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

[110] Noting that, under the impugned legislation, the volume and time tests are not determined in a vacuum, but rather recognize both the market-based attributes of the product and the geographic market, Dr. Lichtenstein concluded that, in his opinion, subsection 74.01(3) of the Act could not be less burdensome and still be effective.

[111] In this context, I do not find that the portions of Dr. Lichtenstein's testimony relied upon by Sears fundamentally undermine his expert opinion that the legislation could not be less

burdensome and still be effective, or his opinion that clearer per se rules will neither detect all deception nor exculpate all non-deceptive OSP advertising. Because the impugned legislation is not per se legislation but rather requires consideration of good faith and materiality, I believe the impugned legislation meets the concerns of Dr. Lichtenstein articulated at points (a) through (d) in paragraph 106 above.

[112] Put another way, Sears relied on the portions of Dr. Lichtenstein's evidence which criticised the enactment of per se rules. However, his views do not support the conclusion that the impugned legislation, which is not per se legislation, is over broad.

[113] To the extent that Dr. Lichtenstein agreed that uncertain or unclear OSP advertising regulations hinder and discourage OSP advertising, the evidence before the Tribunal does not in my view establish that the impugned legislation has prevented or discouraged accurate OSP advertising.

[114] Turning to Sears' argument that there are other, more effective legislative options, Sears points to the legislation of 12 American states and argues orally as follows:

> Now, in terms of the 12 states that are highlighted here, it is set out, Your Honour - - I can tell you that, in terms of the criteria that are set out here, it really is a menu of alternative ways to enact a provision like the impugned legislation and, from that menu, Your Honour will note that there are various tests that are enunciated here, set out, which involve different volume tests, different time tests.
>
> You have got percentages that vary. You have got "reasonable" set at 5 per cent. You have got "reasonably substantial" set at 10 per cent. You have got time periods and volume periods anywhere from more than 10 per cent to - - well, it runs to 31.1 per cent, which is 28 out of 90 days in a few cases that is required to have it at that regular price.
>
> And you have got 51.6 per cent in the case of Ohio, which is 31 out of 60 days, and you have got South Dakota, for example, 7 out of 60 days, 11.6 per cent.
>
> The point of it is, is that I am not suggesting you have to pick a percentage here or a criteria that you feel should be imposed here. That is not your job and, frankly, it is not my job either.
>
> What the point here is is that there are other legislative alternatives which do provide for that certainty and clarity and that also provide for that flexibility that we are looking for here, in that there are also exceptions to these fixed criteria.
>
> There are exceptions for clearance sales, for example. There are exceptions for providing for rebuttable presumptions and that, therefore, Your Honour has before you clear evidence that Parliament could have done the same and that, had it done the same, Sears' rights would not have infringed as much as they have been.

[115] However, there was no evidence before the Tribunal that such legislation was either less intrusive or more effective in targeting OSP representations. With respect to whether more

precise legislation is less intrusive, it was Mr. Mahinka's evidence that it has been his experience (which has formed the basis of his advice to clients) that, where sellers carry on business in more than one jurisdiction, sellers will "commonly seek to comply with a more specific, relevant state statute or regulation governing price comparisons as this practice can be expected to result in compliance with more general state statutes". This evidence leads me to conclude that either the general and specific legislation are co-extensive, or the specific legislation is more intrusive. Otherwise, compliance with the specific legislation would not result in compliance with the more general legislation. Mr. Mahinka's evidence does not support Sears' contention that more specific legislation is less intrusive.

[116] With respect to the effectiveness of legislation regulating OSP claims, the following exchange in oral argument is illustrative. In response to a question from the Tribunal as to how the evidence of Mr. Mahinka, and particularly the state legislation he referenced, supports the submission that more precise legislation is more effective, counsel for Sears ultimately acknowledged that Mr. Mahinka's evidence did not say that precise legislation was more effective. The transcript on this point is as follows:

> **MR. M.J. HUBERMAN:** Well, if you are asking: Is that the approach he uses when he is dealing with a general statute only? He did not address that but, again, the general approach is illustrative and, I think, helpful in the sense that he is using precise standards and criteria to shape his advice to sellers who want to know what to do.
>
> The idea is that, if they know what to do, if they are going to comply with the specific standards, they are likely going to comply with the more general ones also.
>
> So to the extent that that advice would be appropriate in those circumstances, I take it that that is what the advice would be as well.
>
> **THE CHAIRPERSON:** But I don't recall his evidence to say that specific legislation is more effective than general legislation.
>
> **MR. M.J. HUBERMAN:** Well, it's more effective in letting the sellers know what to do in the sense of advertising. It is more effective in that sense.
>
> **THE CHAIRPERSON:** But he doesn't touch on whether it is more effective in discouraging objectionable advertising that is misleading with respect to ordinary selling price.
>
> **MR. M.J. HUBERMAN:** No.
> His point was a different point. His point was, I would suggest, the first branch of the unintelligible standard rationale, which is the fair notice part that we talked about yesterday.
>
> His point was, by looking at the more specific standards criteria tests, the citizen, i.e. the seller, would have greater guidance and knowledge of the law so that it could comply better with it. That was the gist of what he was saying and, in fact, that would, in my submission, show its effectiveness in accomplishing some of the objectives, certainly, of the Act that we talked about. [underlining added]

[117] Sears also complains that the Commissioner failed to explain why the model provision recommended by the Consultative Panel was not enacted. It is said by Sears to have been less intrusive and equally effective because of its "clarity and brevity".

[118] The model proposed by the Consultative Panel is set out at paragraph 60 above. The model provision proposed the use of terms such as "recently sold a substantial volume", "recently" and "substantial period of time". Regard was to be had to the nature of the product and the relevant market. I am not satisfied that the "clarity and brevity" of this model provision shows it to be less intrusive or more effective than the impugned legislation.

[119] Returning to the dicta of the Supreme Court of Canada in *Sharpe* quoted above, Parliament need not adopt the least restrictive measure. It is sufficient that the means adopted fall within a range of reasonable solutions, and the law must be reasonably tailored to its objectives.

[120] The evidence of Dr. Lichtenstein and the wording of the impugned legislation persuade me that the impugned legislation is reasonably tailored to its objectives. The legislation sets out time and volume tests which relate to consumer perceptions of a seller's ordinary price. An affirmative defence is provided whereby any representation that is not false or misleading in a material respect does not constitute reviewable conduct. There is a due diligence defence to most of the remedial measures.

[121] I am satisfied, on a balance of probabilities, that the impugned legislation falls within a range of reasonable alternatives. While the Act does not establish with precision whether any particular OSP representation will satisfy the time and volume test, the impugned legislation provides the necessary flexibility to ensure that it neither captures non-deceptive OSP advertising nor fails to capture deceptive OSP advertising.

(e) Proportionality of effects

[122] The final stage of the *Oakes* analysis requires:

> ... there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures. [Emphasis in original.]

See: *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at page 889; and *Thomson Newspapers*, *supra* at paragraph 59.

[123] I accept, based upon the report of the Consultative Panel, the evidence of Dr. Lichtenstein, and the existence of legislation in numerous American jurisdictions restricting OSP advertising, that subsection 74.01(3) of the Act addresses the pressing and substantial objective preventing of harm caused by deceptive ordinary price claims. False OSP claims, on the evidence of Dr. Lichtenstein, (unchallenged on this point) can harm consumers, business competitors and competition in general.

[124] In comparison, the negative effects of the restrictions which result from subsection 74.01(3) of the Act are not great. The speech that is restricted is commercial speech that is materially false or misleading.

[125] Sears points to its experience when it eliminated its "2-For" price as evidence of the deleterious effect of the impugned legislation. At that time, when Sears lowered and set its regular single unit price at the "2-For" price, sales declined. When Sears then increased its regular prices, its promotional sales substantially increased. I do not understand this to be evidence of a chill caused by the regulation of OSP claims, as Sears argues, particularly since Sears continued to use OSP claims.

[126] I therefore conclude that the negative effects of the restriction on commercial speech are outweighed by the benefits that ensue from sanctioning deceptive OSP representations.

(f) Conclusion

[127] For the reasons set out above, I have concluded that subsection 74.01(3) of the Act is: i) a limit "prescribed by law"; ii) addresses pressing and substantial objectives; iii) is rationally connected to its objectives; iv) restricts freedom of expression as little as is reasonably possible; and, v) carries salutary benefits that outweigh the restriction on freedom of expression.

[128] It follows that, while it is conceded that subsection 74.01(3) does infringe subsection 2(*b*) of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.

[129] Sears' request for constitutional remedies will, therefore, be dismissed.

V. THE ALLEGATION OF REVIEWABLE CONDUCT

(i) Standard of proof

[130] Having dismissed Sears' request for constitutional remedies, I now turn to consider whether the Commissioner has met the onus upon her to establish that Sears employed deceptive marketing practises which constitute reviewable conduct under subsection 74.01(3) of the Act.

[131] Neither party, in their written arguments, addressed submissions to the Tribunal with respect to the standard of proof. In oral argument, counsel agreed that the Commissioner must prove her case on a balance of probabilities, and acknowledged that within the civil standard of proof there exist different degrees of probability, depending upon the nature of the case. See also: *Oakes*, *supra*, at page 137. Counsel for the Commissioner agreed that, within the civil standard, the Commissioner would be obliged to prove her case at the higher end of the balance of probabilities.

[132] In light of the serious nature of the conduct alleged against Sears I am satisfied that, within the balance of probabilities, I should scrutinize the evidence with greater care and consider carefully the cogency of the evidence. See: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164 at page 170.

(ii) The elements of reviewable conduct and the issues to be determined

[133] For ease of reference, I repeat subsections 74.01(3) and 74.01(5) here :

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,	74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and	a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
(b) has not offered the product at that price or a higher price in good faith for a substantial period of	b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante

time recently before or immediately after the making of the representation, as the case may be.	précédant de peu ou suivant de peu la communication des indications.
[...]	[...]
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.	74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

[134] Sears acknowledges that the evidence before the Tribunal establishes Sears to be: (i) a person; (ii) who, for the purpose of promoting, directly or indirectly, the supply or use of tires and for the purpose of promoting, directly or indirectly, its business interests generally; (iii) in 1999, made representations to the public as to tire prices that were clearly specified to be the prices at which the Tires were ordinarily supplied.

[135] Sears also acknowledges that the evidence establishes that Sears did not comply with the volume test contained in paragraph 74.01(3)(*a*) of the Act.

[136] Accordingly, the issues to be determined are:

i) Were Sears' regular prices for the Tires offered in good faith as required by the time test?

ii) Did Sears meet the frequency requirement of the time test?

iii) If Sears did not meet the good faith or frequency requirements of the time test, has Sears established that the representations were not false or misleading in a material respect?

iv) If Sears engaged in reviewable conduct, what administrative remedies should be ordered?

(iii) The witnesses

[137] Before turning to the substance of the deceptive marketing case, it will be helpful to introduce and describe briefly the witnesses who testified before the Tribunal.

(a) The expert witnesses

[138] Seven individuals testified as experts before the Tribunal, three on behalf of the Commissioner and four on behalf of Sears. The Commissioner's experts were Dr. Donald Lichtenstein, Dr. Sridhar Moorthy and Mr. Donald Gauthier.

[139] Dr. Lichtenstein's qualifications and area of expertise have already been described.

When Dr. Lichtenstein re-attended to give his opinion with respect to the deceptive marketing case, Sears agreed that he need not be re-qualified and that he could provide expert testimony with respect to "marketing and consumer behaviour and response to pricing advertised stimuli" and "research design and methodology within social sciences".

[140] Dr. Moorthy is the Manny Rotman Professor of Marketing at the Rotman School of Management, University of Toronto, and is a Research Associate at the Institute for Policy Analysis, University of Toronto. Sears did not challenge Dr. Moorthy's expertise to testify about "marketing and the use of economic principles and/or theory to understand marketing", "consumer response to marketing stimuli" and "marketing study design and implementation".

[141] Mr. Gauthier has worked in the tire industry in Canada since 1984 when he joined a company that was the predecessor corporation of Uniroyal Goodrich Canada Inc. He worked from 1984 to 1990 as its National Advertising Manager. In his later years with the company, he took on the additional role of Sales Manager for Atlantic Canada. From 1990 through 1995, Mr. Gauthier was with Michelin Tires Canada Inc. (after it acquired Uniroyal Goodrich), initially as National Advertising and Promotions Manager, then as Ontario Sales Manager for the Uniroyal Goodrich sales team, and finally as a Sales Manager in Ontario for the merged Michelin, Uniroyal and Goodrich lines. From 1995 to 2000, Mr. Gauthier was with Bridgestone/Firestone Canada Inc. successively as Director of Sales and Marketing, Vice-President Sales and Marketing, and Senior Vice-President Sales. From 2001, and at the time he testified before the Tribunal, Mr. Gauthier worked as the Sales and Marketing Manager/Vice-President of Retread Division of Al's Tire Service. Mr. Gauthier was found by the Tribunal to be qualified to provide opinion evidence touching upon "the practical application of marketing and retail strategies in the Canadian tire industry and Canadian tire market", "the marketing and sale of original equipment and replacement tires in Canada" and "the structure of the tire market in general in Canada", such expertise being recognized as being in existence as of 1999.

[142] While Sears did not challenge Mr. Gauthier's knowledge or expertise, it did object that Mr. Gauthier lacked the necessary independence because he now works for a company that sells tires in Ontario where Sears also sells tires.

[143] Without doubt, expert evidence must be seen as the independent product of an expert who is uninfluenced by the litigation, and an expert should provide independent assistance by objective, unbiased opinion. While Mr. Gauthier's employer does sell tires, Mr. Gauthier testified that he is paid a straight salary without performance bonuses, that he did not know where Sears Auto Centres were located, that, in his time with Al's Tires, no operator of any of its stores cited Sears as a competitor, and that, while he had dealt with some competitive situations (one example being competition from a Canadian Tire store), none of the competitive situations he had dealt with involved Sears.

[144] On that evidence, and on the basis of observing how Mr. Gauthier gave his evidence touching on his qualifications, I concluded that Mr. Gauthier had the required independence in

order to provide expert testimony. It was, and remains, my view that it is too tenuous for Sears to argue that Mr. Gauthier's testimony would be or was biased or coloured by the potential benefit to his employer of having Sears restricted in the content of its OSP advertising. My assessment of Mr. Gauthier's objectivity did not change, and was reinforced, as I observed his testimony in chief and his later testimony as a rebuttal witness.

[145] Sears' expert witnesses were Denis DesRosiers, John Winter, Dr. Kenneth Deal and Professor Michael Trebilcock.

[146] Mr. DesRosiers is the President of DesRosiers Automotive Consultants Inc. ("DAC"), an automotive market research and consulting group. The Commissioner argued that Mr. DesRosiers was not qualified to provide expert testimony. After hearing the examination and cross-examination of Mr. DesRosiers upon his qualifications, the Tribunal ordered that Mr. DesRosiers could testify and give opinion evidence touching upon "survey methodology and analysis relating to the Canadian after tire market", but that the Tribunal would reserve its decision as to whether he was properly qualified to give such testimony.

[147] In this regard, Mr. DesRosiers worked from 1974 to 1976 doing economic analysis for the Ontario Government related to the automotive sector. From 1976 to 1979, Mr. DesRosiers was the Senior Automotive Industry Analyst with the Economic Policy Branch of the Ministry of Treasury and Economics in Ontario. From 1979 to 1986, he was the Director of Research at the Automotive Parts Manufacturers Association of Canada. In 1985, Mr. DesRosiers started DAC. Since 1989, DAC has conducted annually a "Light Vehicle Study" in which 2,500 people across Canada are surveyed with respect to their automotive maintenance practices. Mr. DesRosiers wrote the original questionnaire used in this survey, with some professional advice as to how to properly ask a question for the purpose of a survey. Mr. DesRosiers testified that he understands the automotive industry "cold" so that he is able to design the "Light Vehicle Survey" and other surveys and to interpret the information collected. The interpretation he personally provides may include complex, strategic reports as to how a client company should respond to the market. Since its inception, DAC has conducted upwards of 200 surveys relating to the automotive sector, and every year, or second year, 3 or 4 tire companies buy tire survey data collected by DAC.

[148] Mr. DesRosiers initially provided an expert opinion for the Commissioner in this proceeding but, when the Commissioner decided not to call Mr. DesRosiers, Sears subpoenaed him and later commissioned a second expert report from him.

[149] I am satisfied that Mr. DesRosiers' involvement in the automotive sector, and specifically his involvement in the creation of surveys relevant to the automotive market and the interpretation of the results generated, allows Mr. DesRosiers to provide expert advice to the Tribunal based upon his own knowledge of Canadian consumers' buying habits and preferences, relating primarily to the Canadian after market for tires. I am satisfied that Mr. DesRosiers is, on the basis of his experience, a properly qualified expert to opine upon survey methodology and

analysis relating to the Canadian automotive industry, and specifically the after market for tires.

[150] John Winter is a retail consultant with expertise in advising retailers, institutions and governmental bodies on retail, development and commercial strategies. He has been previously qualified as an expert in these areas and has testified on at least 50 occasions before numerous tribunals, regulatory bodies and the Ontario Court of Justice. The Commissioner conceded that Mr. Winter's qualifications enabled him to provide expert evidence on "issues relating to retailing in Canada, including pricing strategies employed by retailers".

[151] Dr. Kenneth Deal is the Chairman of Marketing, Business Policy and International Business in the Michael G. DeGroote School of Business at McMaster University. He is also the President of marketPOWER research inc., a market research company. The Commissioner accepted the qualifications of Dr. Deal to provide expert testimony in the area of "the methodology and conduct of market research surveys and the analysis of data resulting from such surveys".

[152] Professor Michael Trebilcock is the Director of the Law and Economics Program, Professor of Law and cross-appointed to the Department of Economics at the University of Toronto. He has written extensively on competition policy, trade and economic regulation during his career. For the past 20 years, he has consulted widely to government and the private sector on matters of competition policy and economic and social regulations. The Commissioner accepted Professor Trebilcock to be qualified to give testimony as an expert on competition policy and economic regulation.

(b) The lay witnesses

[153] Each party called 3 lay witnesses. The Commissioner's lay witnesses were Mr. Christian Warren, Mr. Jim King and Mr. William Merkley. Sears called Mr. Paul Cathcart, Mr. Harry McKenna and Mr. William McMahon.

[154] Mr. Warren is a Competition Bureau Officer, through whom the Commissioner tendered documents gathered in her investigation.

[155] Mr. King was first employed by Bridgestone/Firestone Canada Inc. in October of 1997 as its Sales Manager for associate brands. In August of 1999, he became the Sales Manager for Corporate Accounts and Original Equipment. The corporate accounts he was responsible for were mass merchandisers such as Sears, Canadian Tire, Costco and Wal-Mart. Mr. King had provided an affidavit in response to an order obtained by the Commissioner under section 11 of the Act which was directed to Bridgestone/Firestone Canada Inc.

[156] Mr. Merkley has been employed by Michelin Canada since 1977, and in 1999, he was its National Director of Sales for the Corporate Accounts Group. Mr. Merkley provided an affidavit in response to a section 11 order obtained by the Commissioner directed to Michelin North

America (Canada) Inc.

[157] Mr. Cathcart has been employed by Sears since 1973. From 1997 through 2000, he served as the Retail Marketing Manager and 190 Service Operations Manager. As such, he was responsible for building a marketing plan for the Tires. At the time he testified, Mr. Cathcart was the Group Operations Manager and Process Improvement Manager for Sears Canada Home and Hardline.

[158] Mr. McKenna has been employed by Sears since 1981. From 1998 through to 2000, he was the Category Logistics Manager/Inventory Analyst for the Automotive Department. As such, he was responsible for supporting the buyer in visits to tire manufacturers and other vendors, and was responsible for ensuring the flow of merchandise to Sears Automotive Centres and the maintenance of proper inventory levels. When he testified, he was the Manager of Sales and Promotions for the off-mall channel of Sears.

[159] Mr. McMahon has been employed by Sears since 1977. In 1999, he was the Group Retail Marketing Manager of Group 700 - 2 at Sears. As such, he worked with the Corporate Marketing and Advertising Department and the Business Team in order to develop marketing strategies and events for merchandise which included the Tires at issue. At the time he testified, Mr. McMahon was the General Manager of Sears Automotive.

[160] Having introduced the witnesses, this may be the most convenient point to provide the Tribunal's reasons for its oral order, given during the course of the hearing, with respect to the Commissioner's request to adduce certain rebuttal evidence.

VI. RULING WITH RESPECT TO NON-EXPERT REBUTTAL EVIDENCE

[161] Near the conclusion of the evidence adduced by Sears in response to the Commissioner's allegations, the Commissioner advised Sears that, upon the close of Sears' case, she intended to introduce non-expert rebuttal evidence through Mr. Warren. Sears responded that it objected to such evidence being given and the Tribunal was advised of this dispute. In consequence, the Tribunal directed that the Commissioner serve Sears with a rebuttal will-say statement before Sears closed its case and advised that the Tribunal would hear argument on the issue of the admissibility of the proposed non-expert rebuttal evidence after Sears closed its case when the Commissioner endeavoured to call such evidence.

[162] The rebuttal will-say statement was served on Sears on January 27, 2004. On Monday, February 2, 2004 Sears closed its case and the Tribunal then heard submissions as to whether the proposed rebuttal evidence should be received. For reasons to be delivered later in writing, the Tribunal ruled during the hearing that a portion of the proposed rebuttal evidence could be admitted and a portion could not. What follows are the reasons for that ruling.

(i) The proposed rebuttal evidence

[163] The Commissioner sought to respond to two portions of the testimony of Mr. Cathcart.

[164] The first portion of Mr. Cathcart's testimony which the Commissioner sought to rebut was as follows ("the timing explanation"):

> MR. McNAMARA: Turning back to the checkerboards, there has been evidence before the Tribunal that some of the five tires that we are talking about were offered at regular prices for less than 50 per cent of the time, or were offered at sales prices for more than 50 per cent of the time.
>
> I am referring specifically to the RoadHandler T Plus and the Weatherwise tire.
>
> Can you offer any explanation as to why that would have been the case?
>
> And I am talking about 1999, of course.
>
> MR. CATHCART: Yes, I can.
>
> About mid-year of 1999 I began to receive communication from the field that when we advertised the Michelin T Plus it was not available in an 80 aspect ratio size. So beginning in about the third quarter, I chose to advertise the Weatherwise, not necessarily at the same price but at the same time as the T Plus.
>
> There were a number of customers who were coming in. We would advertise the Michelin tire, and in our advertising we could not indicate every size that was available in those tires. So they would come into our auto centres expecting to buy a Michelin tire, although if they had an 80 aspect ratio size requirement we were unable to sell them the AT Plus. It just was not available in that size.
>
> In a response to that, I offered the Weatherwise as a "go to" in the 80 aspect size for our sales associates and our customers.
>
> I knew very well that I would sell some. It certainly wasn't going to be the driving number of tires. Our T Plus would historically outsell the Weatherwise.
>
> What it did was it responded to the customer's request to have a Michelin tire in an 80 aspect ratio when we advertised it. That was my choice, and I did that for that reason.
>
> Second, there was in the fourth quarter of 1999 a situation around service and supply. What I mean by that is on snow tires we would place our orders and stagger our shipments, because on the Bridgestone snow tires they were made in the Orient. So we would have the first shipment arrive in August-September, a second shipment in October and a third shipment in November.
>
> In the fourth quarter of 1999 there were some labour issues in the Orient where we were unable to receive our third shipment, our promotional shipment -- because the deeper you get into that year obviously that is when the promotions start to happen of these snow tires.
>
> We found out very late in the year that we were not going to be able to get them because of labour issues in the Orient.

The problem was I had already booked space, newspaper space, preprint space. These were all completed programs in essence. So even in the preprints, if we were to pull out of there we would in essence be running a company-wide vehicle with a blank page.

What we did was I approached Stan and asked if he would approach Michelin, because they were the only other supplier that could give us a quantity of tires. That was our hope. They did respond and were able to switch the tires, the snow tire ads to Michelin.

What I mean when I say switch, when we advertise tires we would have a feature item on the page and then we would have sub-features. Historically the feature item, the lion's share of sales were created from that.

But because we had some snow tires in stock from our first and second shipment, we moved the feature item to a sub-feature, being the snow tire, and then featured the Michelin tires. That ran us over frequency in that fourth quarter.

It was purely in response to an offshore issue.

[165] The Commissioner proposed to rebut the timing explanation through testimony that the RoadHandler T Plus and the Weatherwise tires were on sale over 50 per cent of the time in each six-month period which preceded every day from July 3, 1999 to December 31, 1999. The Commissioner also sought to introduce into evidence a table entitled “Time Analysis-1999-Substantial Period” which illustrated this.

[166] The second portion of Mr. Cathcart’s testimony the Commissioner sought to rebut was as follows (“the third week of May advertising and promotions testimony”):

MR. McNAMARA: I would ask you to turn to Tab 9, to the checkerboard for the month of May.

MR. CATHCART: I am there, sir.

MR. McNAMARA: I would ask you to look at the Michelin T Plus tire and the Week 3 time column.

MR. CATHCART: Yes, sir.

MR. McNAMARA: Can you tell us what is going on there.

MR. CATHCART: In Week 3 the Michelin T Plus –

MR. McNAMARA: There is a reference there that says "NP" and then "ALB/BC" and the same thing for the Weatherwise.

MR. CATHCART: Yes. That was referring to a newspaper ad in Alberta and B.C. for those two lines of tires. But it was a newspaper ad only for those two provinces during that week.

MR. McNAMARA: Why was that?

MR. CATHCART: We would have promotions that would differ coast to coast

> depending on the market and the seasons.
>
> We would have snow tires running in Quebec in a newspaper ad in the fall, where we would have passenger tires in B.C. We wouldn't advertise snow tires in the Lower Mainland of B.C., although in northern B.C. and in Prince George we would have snow tires.
>
> We called them alts. We would alt our advertising, depending on the geographics of the product and of the country, weather and that.
>
> In this time frame we advertised these two tires only in Alberta and B.C. at these prices.

[167] The Commissioner proposed to rebut the third week of May advertising and promotions testimony by tendering, through the competition law officer, newspaper proofs and Sears pre-prints and flyers, all relating to the advertising and promotion of tires by Sears during the third week of May, 1999.

(ii) The objection to the rebuttal evidence

[168] Sears argued that the proposed rebuttal evidence should not be permitted because:

1. The Commissioner had failed to follow the procedure mandated by the rules of the Tribunal.

2. The proposed evidence was not proper rebuttal evidence.

3. The Commissioner had failed to cross-examine Mr. Cathcart upon that portion of his evidence which the Commissioner sought to rebut.

(iii) The ruling

[169] After hearing argument, the Tribunal ruled that the Commissioner would not be permitted to lead rebuttal evidence with respect to the timing explanation, but would be entitled to lead as rebuttal evidence Sears' newspaper proofs, pre-prints and flyers in order to rebut the third week of May advertising and promotions testimony.

(iv) The procedural objection

[170] Sears argued that before delivering the rebuttal will-say statement, which was in substance an amended will-say statement of the competition law officer, the Commissioner was obliged to bring a motion for leave to amend her disclosure statement. It was argued that, as the respondent, Sears puts in its case on the basis of the evidence adduced by the Commissioner as disclosed in her disclosure statement and in her rebuttal expert reports. Sears had adduced the bulk of its lay and expert evidence before it learned that the Commissioner sought to adduce rebuttal fact evidence. Requiring the Commissioner to move to amend her disclosure statement in this circumstance was said to be in accordance with the regulatory objectives of the Tribunal's rules, particularly the objective that the Commissioner's investigation be completed and her case be in final form at the time her application is filed with the Tribunal and the objective that the issues be clearly defined at the outset by having them set out in the parties' respective disclosure statements.

[171] In my view, the Commissioner was not obliged to move to amend her disclosure statement in order to adduce non-expert rebuttal evidence. The obligation of the Commissioner to file a disclosure statement is contained in section 4.1 of the *Competition Tribunal Rules*, SOR/94-290 which is as follows:

4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).

(2) The disclosure statement shall set out

(a) a list of the records on which the Commissioner intends to rely;

(b) the will-say statements of non-expert witnesses; and

(c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.

(3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).

(4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make

4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.

(2) La déclaration relative à la communication de renseignements comporte :

a) la liste des documents sur lesquels le commissaire entend se fonder;

b) un sommaire de la déposition des témoins non experts;

c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.

copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.

(4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

[172] The obligation to apply for leave to amend the Commissioner's disclosure statement is contained in subsection 4.1(3) of the *Competition Tribunal Rules* which provides that leave shall be sought where "new information that is relevant to the issues in the application arises before the hearing" [underlining added].

[173] The parallel obligation upon a respondent to file a disclosure statement is contained in section 5.1 of the *Competition Tribunal Rules*, which similarly provides that the obligation to apply for leave to amend the disclosure statement arises when new information arises before the hearing.

[174] Together, these rules function to ensure that, prior to the commencement of the hearing, each side knows both the documents and the factual, non-expert testimony upon which the opposite side intends to rely. Section 47 of the *Competition Tribunal Rules* operates to ensure that, prior to the commencement of the hearing, each side knows the expert testimony the opposite party intends to rely upon, including any expert rebuttal evidence.

[175] With respect to non-expert rebuttal evidence, as discussed in more detail below, as a matter of law an applicant may only call rebuttal evidence after completion of the respondent's case where the respondent has raised some new matter which the applicant had no opportunity to deal with and which the applicant could not reasonably have anticipated. The fact that the need for rebuttal evidence becomes apparent only after the Commissioner has closed her case makes it inappropriate, in my view, to require amendment of the applicant Commissioner's disclosure statement.

[176] Instead, in my view, the right of the Commissioner to adduce rebuttal evidence is properly governed by application of the common-law rules governing rebuttal evidence.

[177] Further, in the present case the Tribunal's direction that the Commissioner serve Sears with a rebuttal will-say statement prior to Sears closing its case prevented any element of improper surprise or prejudice to Sears. In my view it does not follow, however, that in another case the failure to provide such a will-say statement on a timely basis would, by itself, preclude calling what would otherwise be proper rebuttal evidence.

(v) Applicable principles of law with respect to rebuttal evidence

[178] The general principles applicable to rebuttal evidence were set out by Mr. Justice McIntyre for the Supreme Court of Canada in *R. v. Krause*, [1986] 2 S.C.R. 466 at paragraphs 15, 16 and 17. There, Mr. Justice McIntyre wrote:

> 15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see R. v. Bruno (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd., [1967] 1 O.R. 18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page 74] the full case for the Crown so that it is known from the outset what must be met in response.
>
> 16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.
>
> 17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. [underlining added]

[179] In *Halford v. Seed Hawk Inc.*, 2003 FCT 141; 24 C.P.R. (4th) 220 Mr. Justice Pelletier, then sitting in what was the Trial Division of the Federal Court, re-stated the principles governing the admissibility of rebuttal evidence. At paragraph 16, Mr. Justice Pelletier noted that evidence, which otherwise would be excluded because it should have been led as part of a plaintiff's case in chief, would nonetheless be examined in order to determine if it should be admitted in the exercise of the judge's discretion.

[180] Similarly, in *DRG v. Datafile Ltd.* (1987), 16 C.P.R. (3d) 155 (F.C.T.) Mr. Justice McNair observed that a judge has discretion to admit further confirmatory evidence in rebuttal either for the judge's own enlightenment or where the interests of justice require it.

(vi) Proposed rebuttal of the timing explanation

[181] Turning to the application of these principles to the proposed evidence, the nature of the proposed rebuttal evidence with respect to the timing explanation did not purport to contradict Mr. Cathcart's evidence that there was an issue in the last half of 1999 with respect to the availability of Michelin tires in an 80 aspect ratio size. Nor did it directly contradict his evidence that in the last quarter of 1999 there were labour issues which prevented Sears from receiving a promotional shipment. Rather, the Commissioner sought to adduce evidence with respect to the frequency with which RoadHandler T Plus and Weatherwise tires were on sale in the first two quarters of 1999 in order to attack Mr. Cathcart's conclusion that, in the last half of 1999, those tires were offered at sale prices for more than 50 per cent of the time because of the 80 aspect ratio size issue and the labour issues.

[182] With respect to the length of time tires were offered at sale prices, it is an essential element of the Commissioner's case to establish that Sears did not offer the Tires at the regular single unit price in good faith for substantial period of time recently before or immediately after making the representations in issue. The parties substantially agreed about the volume of tires sold by Sears both in the six months preceding the representations and in the 12 months preceding the representations. As part of her case the Commissioner adduced evidence (see for example Exhibits A-97 and CA98 - 102) with respect to the period of time each relevant tire was on sale.

[183] The evidence which the Commissioner wished to adduce in rebuttal was described by counsel for the Commissioner as an analysis of that data. Counsel further advised that there was "admittedly some overlap between what is on the record" and the proposed evidence, but stated that there "is added value [in the rebuttal evidence] in the sense that it explains and articulates in greater detail, significantly greater detail, what is, in a sense, beneath the documents that are now [in evidence]". Counsel for the Commissioner also noted that more evidence had not been adduced by the Commissioner in chief because of the agreement between the parties as to the volume of tires sold and the times the Tires were on promotion.

[184] In my view, the nature of the evidence which the Commissioner proposed to call to rebut the timing explanation is the type of evidence which should not be permitted as rebuttal evidence. When calling evidence in chief, the Commissioner was obliged to exhaust her evidence with respect to the length of time that the Tires were offered at sale prices. She ought not split her case by relying on some evidence with respect to when the Tires were on sale and closing her case, and then after Sears adduces evidence, seek to introduce further evidence confirming the time the Tires were offered for sale at sale prices.

[185] To the extent that there is, or may be, a discretion to allow confirmatory evidence in rebuttal, there is one significant factor which militates against the exercise of such discretion. That factor is the failure of the Commissioner to cross-examine Mr. Cathcart upon the evidence which the Commissioner sought to rebut. If the Commissioner sought to contradict Mr. Cathcart's testimony, fairness required that he be cross-examined on his testimony so that he could provide any available explanation.

(vii) Proposed rebuttal of the third week of May advertising and promotions testimony

[186] The representations at issue in this application were made in November and December of 1999. Whether two lines of tires were promoted as being on sale only in Alberta and British Columbia in the third week of May of 1999 is relevant to the issue of the appropriate geographic market. As noted below, the Commissioner asserts that Sears marketed its tires nationally, while Sears asserts that it marketed tires in local, geographic markets.

[187] In its pleading, Sears asserts that:

> 56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
>
> 57. Generally, there were no regional variations in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.
>
> [...]
>
> 59. Sears Automotive offered the Tires for sale at the same prices in each specific market area in which a Retail Automotive Centre competed.

[188] I am satisfied that, on the state of its pleading where Sears admitted that generally there were no regional variations in its advertisements, it was not incumbent upon the Commissioner to lead evidence as part of her own case with respect to the advertisement and promotion of two specific lines of tires in the third week of May, 1999. Further, the Commissioner argued, and Sears did not dispute, that there was nothing in the will-say statement of Mr. Cathcart to suggest that the Commissioner ought to have reasonably anticipated that the advertising and promotion of two lines of tires in the third week of May would be disputatious. Thus, subject to one concern addressed in the next paragraph, I was satisfied that rebuttal evidence ought to be received on this issue in order to ensure that, at the end of the hearing, each party would have the same opportunity to hear and respond to the full case of the other.

[189] The one remaining concern arose from the failure of the Commissioner to cross-examine Mr. Cathcart upon his evidence that the two specific tire lines were only advertised on sale in

Alberta and British Columbia and that different promotions were offered during that week. This concern arose because the rule in *Browne v. Dunn* (1893), 6 R 67 at pages 70-71 requires that where a party intends to contradict an opponent's witness by presenting contradictory evidence, such evidence should be put to the witness. It is unfair to a witness for a court or tribunal to receive evidence that casts doubt on his or her veracity when the witness has not been given an opportunity to deal with the contradictory evidence and offer any explanation. Requiring that a witness be challenged with contradictory evidence also assists the trier of fact in the process of weighing the evidence.

[190] I have no doubt that the Commissioner ought to have put the newspaper proofs, pre-prints and flyers she sought leave to adduce as rebuttal evidence to Mr. Cathcart when he was cross-examined.

[191] Notwithstanding, the failure to comply with the rule in *Browne v. Dunn* is not necessarily determinative of the right to tender contradictory evidence. The extent and manner to which the rule is applied is to be determined by the trier of fact in light of all of the circumstances. See, for example, *Palmer v. R.*, [1980] 1 S.C.R. 759 at pp. 781-72.

[192] In the present case, the circumstances which I considered to be significant with respect to this rebuttal evidence are the nature of the rebuttal evidence (Sears' own advertising material) and the fact that the documents were disclosed in both parties' disclosure statements. In my view allowing Sears' own advertising documents, previously disclosed in this proceeding, to be tendered would not be prejudicial to Sears, would clarify testimony which was somewhat unclear, and would be in the interests of justice.

[193] For these reasons, the Commissioner was permitted to introduce into evidence the newspaper proofs, pre-prints and flyers relating to the third week of May, 1999.

VII. ANALYSIS OF THE ISSUES

[194] As discussed above, subsection 74.01(3) of the Act specifies two factors to be considered when applying the volume and the time tests. Therefore, before considering whether Sears' regular prices for the Tires were offered in good faith as required by the time test, one must consider the nature of the product and the relevant geographic market.

VIII. THE NATURE OF THE PRODUCT

[195] The Commissioner argues that the Tires have certain characteristics that are relevant to the analysis under subsection 74.01(3). Those characteristics are said to be:

i) Almost all tires are sold in multiples.

ii) Tire sales are fairly stable over time.

iii) Consumers do not spend much time searching for tires or evaluating alternative products.

iv) Consumers have a limited ability to evaluate the intrinsic qualities of tires.

v) Consumers engage in a passive search over time for tires.

[196] Each factor will be considered in turn.

(i) How tires are sold

[197] Tires are complementary goods in the sense that, for passenger cars, one tire must be used with three others. The following, in my view uncontroversial, facts flow from this:

- Tires are typically purchased in pairs, either one pair or two pairs at a time.
  Mr. DesRosiers expert report, paragraph 13
  Mr. Gauthier expert report, paragraph 38

- Survey data showed that in 1999, 89% of consumers purchased either two or four tires at the same time.
  Mr. DesRosiers expert report, paragraph 13

- Within the tire industry, at most, between 5% and 10% of tires are sold singly.
  Mr. Gauthier expert report, paragraph 38

- In 1999, Sears knew that it would sell between 5% and 10% of the Tires as single units.
  Mr. Cathcart, volume 14 at page 2486

- Consumers purchase a single tire for reasons that include tire failure (due to blow out, road hazard or defect) and the replacement of a space saver (or dummy) spare tire.
  Mr. DesRosiers expert report, paragraph 15
  Mr. McKenna, volume 19 page 3055
  Mr. Merkley, volume 10 page 1713

- Consumers who purchase single tires are typically constrained to purchase a model of tire that matches the tire which is on the same axle because, for safe handling, it is important to maintain the same traction capability on the axle.
  Dr. Lichtenstein expert report, paragraph 17
  Mr. Gauthier expert report, paragraph 38

- Where a tire is to be replaced due to a blow out or other damage, there may be a sense of urgency about replacing the tire.
  Mr. McKenna, volume 19, page 3055
  Dr. Lichtenstein expert report, paragraph 17.

(ii) Are tire sales stable over time?

[198] Dr. Lichtenstein testified that:

- by their nature, sales of "all-season" tires (such as those at issue) are less sensitive to seasonal variation.
  expert report paragraph 21

- tires are not a product category which people typically buy in advance to stockpile.
  expert report paragraphs 18 and 19

- while a sale price may pull a consumer into the market sooner than they would otherwise enter the market, a sale price will not lead to increased tire consumption.
  expert report paragraphs 18 and 19.

[199] This evidence was essentially unchallenged and I accept it.

[200] At the same time, as Dr. Lichtenstein acknowledged, there is an increase in tire sales in the Spring and Fall seasons. Mr. McKenna described this as a moderate increase in March, April and May, and a more dramatic shift in October and November.

[201] Mr. Winter also described a distinctive seasonal pattern based upon his analysis of Sears' retail daily tire sales data and from an analysis of a monthly retail trade survey conducted by Statistics Canada. It is important to note, however, that Mr. Winter's analysis of Sears' daily tire sales data included data with respect to the sale of winter tires, and that the Statistics Canada survey was based upon sales of tires, batteries, parts and accessories. Mr. Winter agreed that the sale of winter tires is more seasonal and he did not know if batteries exhibit a seasonal selling pattern. In consequence, while I accept Mr. Winter's evidence generally that tire sales increase in the Spring and Fall, I am concerned that his conclusion as to the magnitude of the fluctuation is flawed because it included data related to winter tires and non-tire products.

[202] On the whole, from all of this, I find that the sales of all-season tires are relatively stable

and predictable, with some predictable seasonal pattern.

(iii) Do consumers spend much time searching for tires or evaluating alternate products?

[203] In asserting that consumers do not spend much time searching for tires or evaluating alternatives, the Commissioner relies upon the evidence of Dr. Lichtenstein. Dr. Lichtenstein testified that consumers spend different amounts of time and effort searching for products, considering brand alternatives and comparing prices, depending on the nature of the item to be purchased. He said that items described as "convenience goods" are found at one end of a continuum and their purchases involve relatively little investigation. The purchase of "specialty goods", which are found at the other end of the continuum, involves a great deal of investigation. He describes tires as "shopping goods" and says that they fall at the mid-point of the continuum. This means, in his opinion, that many consumers of "shopping goods" have a pre-disposition for low levels of search and effort which means that a large number of consumers are not vigilant shoppers even when the shopping goods are expensive.

[204] Sears rejects this opinion and asserts that the best evidence on this point is that of Mr. DesRosiers and Dr. Deal. In Mr. DesRosiers' opinion, there is a significant opportunity for consumers to shop around for tire replacements. From August 27, 2003 to September 3, 2003, Dr. Deal surveyed Sears' customers who bought new replacement tires from Sears in 1999 in order to: survey their behaviour when buying tires in 1999 from Sears and when buying tires in general; determine their attitude toward purchasing tires; and, assess their perception of value of the 1999 tire purchases, their satisfaction with their purchases and their intention to consider Sears for future tire purchases. Dr. Deal's survey found that 57% of survey respondents said that they compared tire prices prior to purchasing their tires at Sears.

[205] I do not find Mr. DesRosiers' evidence to be of assistance on this point because the research he relied upon did not examine whether consumers actually exercised any opportunity available to them to shop around.

[206] When I compare the evidence of Drs. Lichtenstein and Deal, I am not satisfied that their evidence is that divergent. Dr. Lichtenstein does not quantify the proportion of consumers who, in his view, engage in a low level of search effort for goods such as tires. Dr. Deal's study would suggest that 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears.

[207] Dr. Deal's study results must, in my view, be approached with some caution for the following reasons. At the time Dr. Deal conducted his survey and swore his first expert affidavit, he believed that the persons surveyed were selected from among all the persons who bought the Tires in 1999. Put another way, the target population intended to be surveyed was consumers from all 67 Sears Retail Automotive Centres and Dr. Deal assumed that he had received data from all or almost all of the centres. By "all or almost all" of the centres, Dr. Deal

believed he had received data from 90 to 95% of the Sears stores that sold the Tires. Dr. Deal later became aware that he had only received data from the 28 stores that kept electronic records. Thus, the survey was not based upon a random probability sample of purchasers from all 67 Retail Automotive Centres.

[208] Dr. Deal agreed that results based upon non-probability sampling were less generalizable to the parent population but observed that sometimes one does obtain an accurate representation of the target population even when one does not abide by the strict rules of statistical inference and takes a non-random sample.

[209] In the present case, Dr. Deal did not undertake a formal analysis to determine whether the customers from the 28 stores were similar to or different from the customers of the other 39 stores (although such an analysis could have been performed). In his view, based upon a large number of other surveys he has done, there would not likely be significant differences between the customers. Thus, while, pursuant to principles of statistics, his survey would have to be limited to be representative of Sears' customers who bought tires in 1999 from the 28 stores for which he received records, in Dr. Deal's view, the findings between the 28 stores and the other 39 stores would not be significantly different.

[210] Obviously, the fact that the data provided to Dr. Deal emanated from only 28 of the 67 stores (and not from all or almost all of the stores) impairs the ability of Dr. Deal to scientifically generalize the survey results. I accept, however, his general expertise to provide an opinion as to whether it was more or less likely that the survey results would have been different had consumers from all, or almost all, of the Sears stores that sold the Tires been included as part of the target sample.

[211] Thus, while I approach Dr. Deal's survey results with caution, and am prepared to accept that the overall accuracy of the survey's findings may not be accurate within plus or minus four percentage points in 19 out of 20 samples, I do generally accept Dr. Deal's conclusions.

[212] I am therefore satisfied by the evidence of Drs. Lichtenstein and Deal that a very significant percentage of consumers, in the order of 42% (plus or minus at least 4%), do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores.

(iv) Do consumers have a limited ability to evaluate the intrinsic qualities of tires?

[213] The intrinsic attributes of tires are their physical attributes such as tread pattern and tire construction. It was Dr. Lichtenstein's opinion that most consumers do not have the ability to evaluate the quality of tires based on their intrinsic attributes. His opinion was based upon his experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. He believed that he could reasonably generalize that experience to tires. His opinion was also supported, in his view, by reference to the evidence of both

Mr. Cathcart (given during his examination conducted under section 12 of the Act) and Mr. McMahon (given in his affidavit filed pursuant to section 11 of the Act).

[214] Mr. McMahon explained in his affidavit how Sears set its prices for its private label and flag brand tires. Flag brand tires are tires made by a manufacturer whose name appears on the sidewall of the tire (for example, the BF Goodrich Plus). A private label tire does not show the name of the manufacturer, but only shows the trade name owned by the retailer (for example, Silverguard Ultra IV and Response RST Touring). A tire is dual branded when it bears both the name of the manufacturer and the retailer's private name (for example, Michelin Weatherwise and Michelin RoadHandler T Plus). In the context of describing how private label prices were set, Mr. McMahon swore that:

> 251. For example, Sears Automotive compared its "BF Goodrich Plus" Relevant Product with **[CONFIDENTIAL]** "**[CONFIDENTIAL]**" tire. The BF Goodrich Plus tire was superior to the **[CONFIDENTIAL]** tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than **[CONFIDENTIAL]** for the inferior **[CONFIDENTIAL]** tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of **[CONFIDENTIAL]** tire.

[215] During Mr. Cathcart's examination, he confirmed that what had happened with the BF Goodrich Plus was that, even though Sears perceived, and he believed, the tire to be a superior tire to the comparable Canadian Tire offering, consumers were unable to perceive the qualities that justified the greater price for the superior tire.

[216] Mr. Cathcart also diminished the importance of needing to refresh Sears' tire product line, stating that people would not stop shopping because Sears was selling the same lines of tires. In Mr. Cathcart's words, "In tires, it – – you know, they are black and they are round, and there is not a lot of exciting tires". This is consistent with the view that consumers have a limited ability to evaluate tire's intrinsic qualities.

[217] In my view, Sears did not seriously impeach Dr. Lichtenstein's opinion as to the ability of consumers to evaluate tire quality for money based on the intrinsic qualities of the tire. Supported as it was by the evidence of Messrs. McMahon and Cathcart where they referred to Sears' own experience that consumers were unable to appreciate the intrinsic qualities of a specific tire and therefore compare true value for money, I accept Dr. Lichtenstein's opinion that consumers have a limited ability to evaluate the intrinsic attributes of tires.

[218] Before leaving this point, I also note that Sears tendered as an exhibit its Fall 2000 Automotive Review. When describing Sears' private label or brand structure, the Review described the assortment as "A quality private Brand structure that is totally Sears, allowing little comparison with competitor product". For this to be true, Sears must have been of the view that consumers lack the ability to assess the intrinsic qualities of non-identical tires.

(v) Do consumers engage in a passive search over time for tires?

[219] Dr. Lichtenstein opined that tires are usually replaced only when a consumer's existing tires become worn so that, except for the case of the purchase of a single tire, the timing of new tire purchases occurs on a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Dr. Lichtenstein further opined that as consumers notice that their tires are becoming worn, they would likely go into a passive search mode during which they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

[220] This opinion was not challenged and I accept it.

IX. RELEVANT GEOGRAPHIC MARKET

[221] Subsection 74.01(3) requires the Tribunal to have regard to the relevant geographic market when applying the time and volume tests. While the Commissioner asserts that the relevant geographic market for assessing the representation is Canada, Sears argues that, in the retail tire business, competition occurs at the local level so that the geographic market should be defined on no more than a regional basis.

[222] In support of this argument, Sears relies upon the evidence of a number of witnesses that, in 1999, the Canadian after tire market was highly competitive, with various channels of distribution, and the competitive nature of the after tire market varied across the country. Sears also relies upon the expert opinion of Professor Trebilcock to the effect that markets are more appropriately determined by considering the alternatives available to consumers, or by adopting a demand-side perspective. By asking what range of choices any given consumer would consider he or she had available to them, Professor Trebilcock concluded that the relevant geographic market for tires is a local, regional market. The analysis that led to this conclusion was based upon: a review of regional newspaper advertising that showed that the list of tire retailers is very different from one city to the next; a review of yellow pages listings for tire retailers in different regions which showed that retailers differed radically from one market to another; the DesRosiers' tire market study which showed that independent tire retailers are the most common source of tires and those retailers varied dramatically from one local market to the next; and information from Bridgestone/Firestone and Michelin that shows that the top dealers to vary significantly from one region to the next. Thus, the question of "where can I go to buy tires" is answered differently from one local market to the next.

[223] In considering the interpretation to be given to the term "relevant geographic market", I begin from the premise that "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" (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21).

[224] I have previously found, at paragraph 93, that the objectives of subsection 74.01(3) are:

to protect consumers from deceptive OSP representations; to protect businesses from the anti-competitive effects of such misrepresentations; and to protect competition from the anti-competitive effects and inefficiencies that result from such misrepresentations. The provision is designed to effect those objectives on the basis that, if acting in good faith, meeting the time or volume test will bring retailer practices in line with consumer expectations that an advertised OSP would relate to the seller's own ordinary selling price. The time and volume tests are to be applied having regard to the relevant geographic market.

[225] In light of the objectives of the provision, it is relevant to look at where Sears marketed the Tires and how Sears marketed the Tires in that geographic area so as to inform the view of whether an advertised OSP was really Sears' ordinary selling price. Because this is a misleading advertising case in which it is Sears' conduct that is at issue, I do not find, with respect, that Professor Trebilcock's traditional competition law approach to the definition of geographic market is relevant.

[226] In the traditional competition law context, geographic markets are defined as part of a determination about whether there has been a substantial lessening of competition. Dr. Trebilcock agreed, on cross-examination, that the concept of substantial lessening of competition is not relevant to the assessment of whether a representation is misleading.

[227] Turning to Sears' own conduct, I find the following to be relevant to the determination of the relevant geographic market:

- Sears' regular and promotional prices were set on a national basis without regional variation;

- Sears' internal documents, particularly its Spring and Fall Automotive Reviews, contained no discussion relating to local markets. These reviews were produced twice a year in order to present Sears' marketing strategy and tire product line to Sears' Chief Executive Officer and other executive officers;

- Sears did not produce or distribute separate marketing and promotional material for each region (with the exception of material relating to snow tires);

- The representations in issue were contained in flyers that were distributed nationally, without regional variation;

- Sears published advertisements in newspapers and there was no regional variation in the advertisements, except with respect to snow tires. The advertisements were distributed nationally through different newspapers;

- Sears tracked its pre-print distribution rates on a national basis; it could not track pre-prints on a regional basis;

- Sears determined what tires to offer for sale in a Sears' pre-print based upon factors which included "the current market trends and consumer preferences in Canada with respect to the sale of tires" [underlining added];

- Mr. Cathcart created "checkerboards" to, among other things, monitor the frequency with which tires were on promotion. Those checkerboards tracked sales volumes and promotional periods on a national basis only.

[228] In light of that evidence as to how Sears priced and marketed the Tires, and, in particular, that the regular prices for the Tires were set and advertised on a national basis, I find that it is most appropriate to consider Sears' compliance with the time test in the context of a geographic market that is Canada.

[229] This was also the conclusion reached by Drs. Lichtenstein and Moorthy.

[230] Having considered the nature of the product and the relevant geographic market, I turn to consider whether Sears' regular prices for the Tires were offered in good faith as required by the time test.

X. GOOD FAITH AS REQUIRED BY THE TIME TEST

[231] The Commissioner observes that the Act does not define "good faith", there are no other provisions in the Act that use the phrase, and there is no Canadian jurisprudence that has considered the concept of "good faith" in the context of OSP representations. There is, however, Canadian jurisprudence, which the Commissioner relies upon, which has considered the meaning of "good faith" in other legislative contexts.

(i) The subjective nature of "good faith"

[232] In *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271, the British Columbia Court of Appeal considered whether a Crown employee was exempt from civil liability by virtue of legislation which exempted liability "for anything done or omitted to be done by a person acting reasonably and in good faith" while discharging certain responsibilities. The British Columbia Court of Appeal noted that the leading Supreme Court of Canada authority was *Chaput v. Romain*, [1955] S.C.R. 834 where the Supreme Court considered a provision that immunized police officers from liability where the officer exceeds his powers or jurisdiction but acts "in good faith in the execution of his duty". Mr. Justice Taschereau defined "good faith" to be "a state of mind consisting of the false belief that one's actions are in accordance with the law". Six judges of the Court adopted this definition. Mr. Justice Kellock, with Mr. Justice Rand concurring, wrote at page 856 that:

> What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in

> acting as he did.

[233] Having reviewed this jurisprudence, the British Columbia Court of Appeal concluded, at paragraph 69, that:

> 69 Kellock J.'s formulation clearly tends towards a subjective understanding of honest belief, but Taschereau J.'s formulation removes all doubt. There is good faith when there is "a state of mind" that the acts are authorized. Kellock J.'s reasons give content to what this "state of mind" is: a "belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did." As was noted in Hermann, the reasonableness of the belief is a factor to consider in determining whether the belief was honestly held, but reasonableness is not the issue.

[234] To similar effect is the recent decision of the Saskatchewan Court of Queen's Bench in *Nelson v. Saskatchewan* (2003), 235 Sask. R. 250 at paragraphs 102-109.

[235] The principle that good faith is inherently subjective is consistent with its dictionary definition. Blacks Law Dictionary, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as follows:

> **good faith,** *n.* A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. - Also termed *bona fides*. - **good-faith,** *adj.* Cf. BAD FAITH.

[236] A subjective view of good faith is also consistent with American jurisprudence that has considered legislative provisions similar to subsection 74.01(3) of the Act. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 76 F. Supp. 2d 868 (N.D. Ill. 1999) the U.S. District Court had before it a regulatory provision that provided:

> It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, [...] unless one of the following criteria is met:
>
> > (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
> >
> > (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s). [underlining added]

[237] The Court found that the defendant Finlay did not, in good faith, intend to sell the relevant products at the regular price because:

> Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in

> fact, intentionally chose not to monitor information of the number of gold jewelry items sold on a given day and at what price. Finlay calculates the regular and sale prices of its gold jewelry simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.

[238] Implicit in that finding is that the existence of a good faith intent to sell product is determined subjectively.

[239] I conclude therefore that good faith is to be determined on a subjective basis. In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and *bona fide* prices, set with the expectation that the market would validate those regular prices. As noted by the Court in *Dorman*, *supra*, the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether Sears truly believed its regular prices were genuine and *bona fide*.

[240] I believe this conclusion to be consistent with the description found in the Commissioner's Guidelines concerning the assessment of good faith in the context of the time test.

[241] I also understand Sears generally to accept that good faith is subjective. In oral argument, counsel for Sears observed that:

> The bottom line is that the Competition Bureau's Guidelines, the Commissioner's Guidelines, tell us that the analysis of good faith is going to be broadly based and will have regard for market conditions, not only those things perhaps, but those things will certainly be part of the mix. And the reason for that, in my submission, is - - the reason for that approach, I think, is obvious. <u>If there is no direct evidence of a subjective belief or ambivalent evidence of a subjective belief, or unclear evidence of a subjective belief, the Court will obviously refer to objective factors, or extrinsic factors which constitute evidence or can constitute evidence of the reasonableness of a subjective belief.</u> [volume 30, page 4811 line 23 to page 4812 line 10, underlining added]

[242] Counsel for Sears framed the question to be determined as follows:

> The only issue, in our submission, for Your Honour to decide is whether Sears reasonably expected to sell single tires at its regular single tire price and whether [it set] those prices in an intelligent manner, having regard to the regular prices of similar tires in the marketplace.

[243] However, the latter part of counsel's formulation is more objective. Shortly thereafter, counsel for Sears argued:

> In our submission, at the end of the day a good faith regular price is one which is reasonably credible and by that I mean looked at through the eyes of a reasonable person, is

credible given market conditions and is recognized as such by the market. And we submit that the Sears regular price clearly meets this definition.

[244] Sears cited no jurisprudence relevant to determining the nature of good faith.

[245] I remain satisfied, however, inspite of Sears' submissions about the reasonable person, that good faith is to be assessed on a subjective basis. I now move to consider the relevant evidence.

(ii) Sears' internal documents

[246] The Commissioner placed into evidence a number of documents provided by Sears to the Commissioner in response to a section 11 order. Documents that are particularly relevant to the assessment of good faith are:

a) Sears' competitive profiles for each of the Tires in issue; and

b) Sears' Automotive Reviews for the Spring and Fall of 1999.

[247] Section 69 of the Act provides that:

69(1) In this section, "agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

69(1) "participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

69(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;
(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received,

69(1) Les définitions qui suivent s'appliquent au présent article. «agent d'un participant» Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant.
69(1) «participant» Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction.
69(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :
a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce

as the case may be, with the authority of that participant; and
(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof
(i) that the participant had knowledge of the record and its contents,
(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and
(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant. [underlining added]

participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :
(i) que le participant connaissait le document et son contenu,
(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,
(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant. [Le souligné est de moi.]

[248] Sears concedes that all of the elements of subsection 69(2) of the Act are met but argues, correctly, that section 69 creates a limited, and rebuttable presumption to be applied to its documents and, in the case of paragraph 69(2)(*c*), the reference to *prima facie* proof speaks to proof absent credible evidence to the contrary.

[249] I accept that, as submitted by Sears, it is for the Tribunal to interpret Sears' documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.

[250] This means, I believe, that Sears' documents tendered in evidence are properly before the Tribunal and are *prima facie* proof that Sears said, did and agreed to the matters set out in the documents. For example, to the extent the automotive review sets out marketing strategies prepared by Mr. Cathcart and Sears' tire buyer, Mr. Keith, to be presented to Sears' chief executive officer for approval or ratification, the document is *prima facie* proof that such strategies were agreed upon to be presented to Sears' chief executive officer and that the Spring and Fall 1999 automotive reviews set out Sears' assessment of its significant competition and its responsive marketing strategy.

[251] To further illustrate, the Commissioner relies upon the buying plans prepared by the late Stan Keith, Sears' tire buyer, for the relevant period. The Commissioner argues that the year

2000 buying plans, created on June 19, 2000, and based on 1999 data for the Tires, did not forecast any sales at Sears' regular prices.

[252] It is true that the documents appear to be premised on the assumption that (based upon 1999 sales data) 10% of the Tires in each tire line would be sold at the 2For price and 90% would be sold on promotion. However, the Tribunal received credible evidence from Mr. McKenna that touched upon the interpretation to be given to the buying plans.

[253] Mr. McKenna identified "R & P Reports" which reported upon the regular and promotional sales of each line of a tire by month for 1999. The documents were tendered and received as exhibit CR-133 without objection. Mr. McKenna advised that he would receive this type of report on a monthly basis, as would Mr. Keith. Reviewing exhibit CR-133, Mr. McKenna testified that the breakdown between regular sales and 2For sales on the one hand, and promotional sales on the other, was as follows:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
BF Goodrich Plus	20-25%	75-80%
Michelin RoadHandler T Plus	25%	75%

The R & P Reports (to the extent they are wholly legible) reflect the following percentages for the remaining three tire lines:

Tire Line	**Regular and 2For Sales**	**Promotional Sales**
Michelin Weatherwise	13%	87%
Response RST Touring	20%	80%
Silverguard Ultra IV	23%	77%

[254] Turning then to the buying plans relied upon by the Commissioner, Mr. McKenna testified that he considered the buying plans with Mr. Keith in 2000 and that they were prepared in June 2000 as Mr. Keith prepared for the Fall presentation to Sears' chief executive officer. The buying plans, according to Mr. McKenna, were used to generate a conservative estimate of margin because "Stanley certainly was not one to want to position himself on being unable to deliver so he wouldn't [...] pigeon-hole himself on promising or committing to a margin that he wouldn't be able to deliver".

[255] Considering Mr. McKenna's explanation of the purpose of the buying plans, supported by the "R & P Reports" that showed the buying plans not to be based upon actual prior sales data, I am satisfied that Sears has provided credible evidence to displace any *prima facie* proof

based upon the buying plans that Sears was not forecasting sales at its regular, single unit, prices.

(iii) The competitive profiles

[256] Mr. Keith was acknowledged within Sears as "the expert" with respect to the tire market in Canada and tire pricing. Mr. Cathcart acknowledged that Mr. Keith "most certainly" knew the tire market better than he did and that, arguably, Mr. Keith knew the tire market better than the manufacturer's representatives from whom he bought tires. As the tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

[257] One document prepared for each tire line was a "competitive profile" which compared, for each tire, Sears' pricing at the 2For, normal promotional and great item prices, with a competitive tire offering identified by Mr. Keith. No comparison was made in these competitive profiles to Sears regular prices. To illustrate, the competitive profile for the Silverguard Ultra IV compared it with Canadian Tire's Motomaster Touring LXR tire. For tire size P185/75R14, Canadian Tire's every day low price was $67.99. Sears' prices and the percentage comparisons with the competitive offering were as follows for this tire size:

Price		**Percentage price comparison to competitive tire**
Regular	$109.99	no comparison
2For	$ 72.99	107.35%
Promotional	$ 65.99	97.06%
Great Item	$ 59.99	88.23%

[258] The Commissioner argues that Mr. Keith created these competitive profiles as he built Sears' tire line structure and that they evinced Sears' competitive response to what it identified as its major competitor. Because Sears' regular, single unit, price formed no part of the competitive response, the Commissioner submits that Sears could not have in good faith believed that the market would validate its regular, single unit, prices.

[259] In response, Sears argues that the competitive profiles are contained in a document entitled "1999 Automotive Training Program" and that the program and the competitive profiles contained therein were prepared by Mr. Keith to explain to Sears' field associates Sears' tire lines and its pricing strategies. The competitive profiles were not intended to show how the regular price stood up against the broad range of retailers, but rather to show how Sears would respond to competition from both EDLP and hi-low retailers.

[260] I do not accept Sears' submission that the competitive profiles were simply training tools on the basis of this excerpt from the cross-examination of Mr. Cathcart wherein he was speaking about the competitive profiles:

> We have some comparisons where he has shown the AW+ to a Sears brand, and he would

compare. The comparison was built to inform the associates how to respond to the Canadian Tire pricing.

So he would pick a Canadian Tire tire - - he could use one of their tires - - as a compare to say we are at this price in our tire, with a far better warranty package. And this is what Canadian Tire will be offering for the tire that closely resembles our tire.

These documents were his documents that he used as a response to our field people to inform them on how to respond to the competition, be it Canadian Tire, be it dealers, whomever.

He would never reference regular price in them, because they already knew the regular prices. They would have that information.

2:30 p.m.

MR. SYME: So is it your evidence, sir, that these were prepared solely to take on training missions, these cross-Canada training missions?

MR. CATHCART: Well, they are his documents, Mr. Syme. I recall them being in this cross-country package, but Stan - - Stan would create these documents as part of his own comparer during his line structure building and he would use these documents as part of the training package.

He would take those - - he would build these documents as he would build his lines because we would have to have - - he would have to have some sort of strategy in response to what the competition is doing. Canadian Tire, by sheer volumes, was our largest competitor - -

MR. SYME: Right.

MR. CATHCART: - - so he would build them for that. He would take them on the training mission, but I can't for sure say - - no, I would say he didn't build them specifically just for that reason.

MR. SYME: He built them as a competitive analysis to position Sears pricing and Sears product opposite the comparable Canadian Tire product. I think you have just said it.

MR. CATHCART: Right. He would build it to compare our product to Canadian Tire's product, but we know the pricing - - and the pricing would reflect that.

MR. SYME: Right. And he would come to you with a proposal with respect to a tire and he would show you these profiles, wouldn't he?

MR. CATHCART: Not usually. He would just provide me with the buying plan.

[underlining added]

[261] From this, I conclude that the competitive profiles were used by Mr. Keith when building Sears' tire line structure. At the least, the competitive profiles indicate Sears' knowledge that:

i) With respect to the BF Goodrich Plus, Silverguard Ultra IV, and RST Touring 2000 (which were compared with competitive Canadian Tire offerings), the regular price was not competitive

with the prices of Sears' largest competitor; and

ii) With respect to the Weatherwise and RoadHandler T Plus, the regular price was not competitive with the comparable competitive offerings selected by Mr. Keith.

[262] I also note, in passing, that the competitive profiles for the two tires manufactured by Michelin were in its possession and were produced in response to a section 11 order. The competitive profiles were produced as being documentation exchanged with Sears in relation to the development and establishment of retail prices. This, in my view, lends credence to the conclusion that the competitive profiles were strategic, competitive documents.

[263] Sears' beliefs about the nature of its competition and its competitive response are more clearly found in the Spring and Fall Automotive Reviews for 1999.

(iv) Automotive reviews

[264] The 1999 automotive reviews were prepared by Mr. Keith and Mr. Vince Power, the national business manager, for the purpose of presenting, twice yearly, Sears' strategies and product line to Sears' chief executive officer. In Mr. Cathcart's words:

> "Basically this whole communication to the CEO was to detail [...] what we were going to introduce as new commodities possibly and how we were going to address the competition".

[265] Contained in the Spring 1999 review were separate strategies for private label tires and national brand tires. Identical wording is found in the Fall 1999 review with respect to the strategies. Oral evidence confirmed that the reviews were presented to Sears' executives. There was no evidence that the strategies contained in the reviews were rejected.

[266] Sears argues that the Commissioner's reliance upon the 1999 automotive reviews is misplaced and points to Mr. Cathcart's evidence that he found more than one portion of the reviews to be confusing, and that, in places, he could not understand why Mr. Keith wrote what he did.

[267] I found such testimony to be incredible and unpersuasive when it was given, and remain unpersuaded by Mr. Cathcart's testimony as it touched on the automotive reviews for 1999. I so conclude because it is to be remembered that the automotive reviews formed part of a large and important presentation to Sears' chief executive officer (and others) about how Sears was to address the competition. In the past, some who had made presentations to the chief executive officer were summarily reassigned or let go if their presentations were found wanting. Mr. Keith was acknowledged to have a compendious knowledge of the tire market. Language contained in the Spring 1999 automotive review was repeated in the Fall 1999 automotive review. Weighing those facts against Mr. Cathcart's testimony that certain aspects of the automotive reviews were

confusing or incomprehensible, I reject Mr. Cathcart's testimony. I accept, as discussed below, that the 1999 automotive reviews set out Sears' assessment of its significant competition in the tire market and Sears' responsive marketing strategies for private label tires and national brand tires.

[268] I will deal first with Sears' strategy with respect to private label tires.

(a) Private label strategy

[269] Sears' strategy was expressed to be:

> "To increase our market share in Private Brand tires which represents almost 50% of the replacement tires sales in Canada. To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[270] Among the tactics listed to implement this strategy was the following:

> "Index our every day pricing to **[CONFIDENTIAL]** (**[CONFIDENTIAL]** Private Brand retailer) to be equal to or within **[CONFIDENTIAL]** % of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at **[CONFIDENTIAL]**."

[271] **[CONFIDENTIAL]**, the competitive profiles built by Mr. Keith for the Silverguard Ultra IV and Response RST Touring compared each with Canadian Tire's comparable competitive offering. So too did the competitive profile for the BF Goodrich Plus. This was an entry-level tire, exclusive to Sears, that Mr. Keith compared to the Motomaster AW+. I accept, therefore, that while the BF Goodrich Plus was a flag brand tire, Sears chose internally to market it as if it were a private label tire.

[272] Mr. Cathcart admitted that Sears' "every day" strategy (**[CONFIDENTIAL]**) involved its 2For price, and not its regular price, because Sears' regular price was not competitive with Canadian Tire. Sears' 2For price was generally within 10% of Canadian Tire's pricing. Mr. Cathcart also confirmed that the "plan to sell price" referred to in the automotive review (for example at pages 1485-1488 and at page 1493) was the 2For price.

(b) National brand strategy

[273] The national brand strategy was expressed as follows:

> "To increase our market share in National Brands which represents over 50% of the Canadian replacement tire sales.
>
> To differentiate our product from our competitors which affords the opportunity to maximize our profitability."

[274] The tactics to implement this strategy included:

> "Continue to index our every day pricing to be 90 to 95% of the equivalent National Brand normal discounted price. When on sale indexed to be **[CONFIDENTIAL]** to **[CONFIDENTIAL]** % of the National Brand price. In the case of **[CONFIDENTIAL]** [**[CONFIDENTIAL]**] equivalent items we will match price".

[275] Mr. Cathcart admitted that:

- Sears' dual branded tires (including the Weatherwise and RoadHandler T Plus) were marketed under the national brand strategy;
- the competitive profiles for each of these tires reflect the national brand strategy in terms of pricing;
- Sears' regular prices were close to or lower than the relevant manufacturer's suggested list price ("MSLP");
- with respect to the competitive profile for the Weatherwise that referenced the competitive offering to be the Michelin RainForce MXA and that showed a comparison price described as "35% off list 9/1/97": Sears' regular prices for tire size P155/80R13 would be in the order of 147.92% of the comparison price; and
- the 2For price was 95.53% of the comparison price. Thus the 2For price was how Sears responded to a dealer who was selling at 35% off the MSLP.

(c) Sears' view of the pricing structure of its competitors

[276] Mr. Keith, in the automotive review, described the pricing structure of Canadian Tire and the independent tire stores as follows:

Canadian Tire:	"Value priced every day with occasional off price promos"
Tire Stores:	"Value priced off list with off price promo and gimmick promos"

[277] Sears' pricing strategy was described in the same document to be "**[CONFIDENTIAL]**".

(d) The MSLP

[278] Sears relies heavily upon the existence of MSLPs as constituting an objective, independent mechanism to verify the *bona fides* of its regular prices for the Michelin Weatherwise, Michelin RoadHandler T Plus, and the BF Goodrich Plus tire. However, on the basis of the following evidence, I find as a fact that, in 1999, MSLPs were not widely or commonly used by tire dealers as their regular selling price.

[279] First, Mr. Gauthier testified that:

- tire retailers set their own prices in the marketplace and, based on his experience, they tended to establish this price as a percentage of the MSLP;
- dealer prices so set represented a typical everyday selling price;
- tire retail selling prices in 1999 were not at the list price level;
- MSLPs were used to establish the tire dealer's acquisition price from the manufacturer and then by the dealer to set the dealer's retail price;
- in his experience, transactions did not occur at or close to MSLP.

[280] Second, Mr. King testified that:

- the MSLP would serve as the starting point, or the starting price, that independent tire retailers would use in selling tires to individual consumers;
- in 1999, dealers typically sold for 35% off list;
- that 35% discount was arrived at either because it was the dealer's offering price or because it was the finally negotiated price;
- to his knowledge, tires were not sold to consumers at MSLP.

[281] Third, Mr. Merkley testified that:

- various dealers would use the MSLP in different ways;
- in 1999 the norm, within Michelin's dealer channel, was to sell tires 30% to 35% off Michelin's list price.

[282] Fourth, as noted above, in the Spring Automotive Review Mr. Keith described the pricing strategy of "Tire Stores" to be "Value priced off list with off price promo and gimmick promotions". The competitive profile for the Weatherwise tire compared that tire with the Michelin RainForce at a price described to be "35% off list 9/1/97" and the competitive profile for the RoadHandler T Plus compared that tire with the Michelin X One at a price described to be "New List less disc 40%". Mr. Cathcart confirmed these references to "list" in the competitive profiles to be to Michelin's MSLP. I take the Spring Automotive Review to evidence Mr. Keith's knowledge or belief that tire stores generally sold tires at a percentage off the MSLP. For the two Michelin tires it would appear that Sears' pricing, to be competitive, must compete with pricing 35% and 40% off Michelin's MSLP.

[283] Professor Trebilcock's expert report sheds some light on the use of the MSLP by tire dealers as well. At paragraph 37, he notes that:

> The *Toronto Star* article also suggests that discounting off the manufacturers' suggested retail prices was common practice in tire retailing. The retailers referred to in the *Toronto Star* article discounted off manufacturers' suggested retail prices by about 30-35%.

[284] Professor Trebilcock also appends to his expert report an article dated January 17, 2000 written by Chris Collins and published in "Tire Business". The article quoted the following statement by John Goodwin, the Executive Director of the Ontario Tire Dealers Association ("OTDA"):

> Mr. Goodwin said the OTDA has a committee investigating the ads auto makers and mass merchandisers are running. Some ads claim to sell tires at 50 percent off list price, but he asks rhetorically, "Who sells at list?"

[285] In my view, the weight of the evidence leads to the conclusion that MSLPs were not commonly used by tire dealers as a selling price, and that in 1999, tire dealers typically sold national brand tires at a price in the order of 35% off the MSLP.

[286] Sears argues that Mr. King's evidence should be discounted because neither he nor his employer sold tires at the retail level so that his evidence is "anecdotal at best". Mr. Gauthier's evidence is also discounted by Sears as being "anecdotal, overly broad, unsubstantiated and [...] not credible". Sears also argues that Mr. Gauthier is not truly an independent expert and, in oral argument, took great exception to his evidence, on cross-examination, that he disagreed with Mr. Winter when Mr. Winter concluded that Canadian Tire did not dominate the marketplace. In Mr. Gauthier's view, Canadian Tire is the dominant influence in the tire market in Canada.

[287] I have previously described, generally, the background of these gentlemen in the tire industry. Mr. Gauthier has extensive experience dating since 1984 with respect to the promotion and wholesale sale of tires to tire retailers and I reject the suggestion that his testimony was partial or biased. Mr. King has two years of experience as Bridgestone's sales manager for associate brands and, since 1999, he has worked as its sales manager for Corporate Accounts and

Original Equipment. He was responsible for the sale of tires to merchandisers such as Sears, Canadian Tire and Costco. In my view, their knowledge of the use dealers make of an MSLP can not be dismissed as anecdotal. Their evidence is confirmed to a significant extent by Mr. Merkley, and by Mr. Keith's description of the manner in which tire dealers priced tires and by the use he made of the MSLP in the two competitive profiles referred to above.

[288] To the extent it was argued that Mr. Gauthier's view that Canadian Tire was the dominant influence in the tire market was not credible, I note that, at paragraph 83 of Sears' responding statement of grounds and material facts, Sears asserted that "Canadian Tire was a dominant tire retailer in Canada (enjoying approximately a twenty-two per cent share of tire sales in Canada during the Relevant Period)".

(v) Conclusion: Good faith - private label tires

[289] Did Sears truly believe that its regular price for the Silverguard Ultra IV, Response RST Touring and BF Goodrich tires were genuine and *bona fide* prices set with the expectation that the market would validate them? The following evidence touches on Sears' belief:

i) Mr. Cathcart admitted that, going into 1999, Sears would have expected that it would only sell between 5 and 10% of the Tires at their regular price. This was because between 90 to 95% of the Tires would be sold as multiples. This made the regular price irrelevant to 90 to 95% of the Tires Sears expected to sell because, when a tire was not on promotion, a purchaser would be offered, without requesting it, the 2For price.

ii) Sears viewed Canadian Tire as its main competitor in the private label segment. The competitive profiles prepared for these three tires only compared Sears' 2For, normal promotional and great item pricing to the Canadian Tire pricing. Sears' regular price was known not to be competitive with Canadian Tire and fell well outside the range of price which Sears believed to be competitive with its main competitor in the private label market.

iii) Sears' 2For prices were described as its "every day pricing" in Sears' private label strategy. The Sears regular price was not.

iv) Sears did not and could not track the number of tires it sold at the regular price.

v) With respect to the 5 to 10% of tires that Sears expected to sell singly, if the distribution of single unit tire sales was constant over time, Sears could expect to sell a percentage of single tires on promotion equal to the percentage of time the Tires were offered on promotion. For example, if a tire was on sale 25% of the time, Sears could expect 25% of the single tires to be sold at a promotional price.

For the six month period preceding the representations at issue, the following tires were offered for sale at regular single unit prices for the indicated percentage of time:

Response RST Touring	46%
Silverguard Ultra IV	60%
BF Goodrich Plus	45%

Thus, Sears could only have expected to sell the following:

Response RST Touring	between 2.3 and 4.6% at its regular price
Silverguard Ultra IV	between 3 and 6% at its regular price
BF Goodrich Plus	between 2.25 and 4.5% at its regular price.

[290] On the basis of that evidence, I find that Sears could not have truly believed that its regular prices for the Response RST Touring, Silverguard Ultra IV, and BF Goodrich Plus tires were genuine and *bona fide* prices that the market would validate.

[291] Turning to the objective factor of actual sales at their regular prices, for each of these three tires respectively, for the 12 month period preceding the representations at issue, only 0.51%, 1.21% and 2.29% of the Tires sold were sold at their regular prices.

[292] On the whole of the evidence, I find that Sears' private label tires were not offered for sale at Sears' regular prices in good faith.

(vi) Conclusion: Good faith - national brands

[293] Did Sears truly believe that the regular prices for the Michelin Weatherwise and RoadHandler T Plus were genuine *bona fide* prices set with the expectation that the market would validate them? The following is relevant evidence:

i) Again, 90 to 95% of these tires were expected to be sold as multiples and so the regular price would be expected to be irrelevant to 90 to 95% of these tires sold by Sears.

ii) I have found that, in 1999, flag brand tires were typically being sold by tire dealers at 35% off the MSLP and were not generally being sold at list price. Sears knew this, as evidenced by Mr. Keith's description of tire store pricing. Sears' competitive pricing was its 2For price which was referred to as its "every day pricing" in its national brand strategy. Sears' regular prices were greatly in excess of what it knew to be the competitive price range.

iii) Sears did not and could not track the number of tires it sold at the regular price.

iv) In the six month period preceding the representations at issue, the Weatherwise and RoadHandler T Plus tires were offered for sale at their regular prices respectively at 19% and 38% of the time. It follows that, knowing that only 5 to 10% of the Tires would be sold singly, Sears could only have expected to sell (if single tire sales were constant over time)

- between 0.95 and 1.9% of the Weatherwise tire at its regular price
- between 1.9% and 3.8% of the RoadHandler T Plus at its regular price.

[294] On the basis of that evidence, I similarly find that Sears could not have truly believed that its regular prices for the Weatherwise and RoadHandler T Plus were genuine and *bona fide* prices that the market would validate.

[295] Turning again to actual sales, in the 12 month period preceding the representations, only 1.3% and 0.82% respectively of sales by Sears of the RoadHandler T Plus and the Weatherwise tire were made at their regular price.

[296] On the whole of the evidence I find that Sears' national brand tires were not offered for sale at Sears' regular prices in good faith.

(vii) The opposing view

[297] In concluding that neither Sears' private label nor national brand tires were offered for sale at Sears' regular prices in good faith, I have had regard to the expert evidence of Professor Trebilcock, noting that he was not qualified as an expert in marketing. It was his opinion that:

> The information available on regular prices in 1999 indicates that Sears' regular prices were similar to or less than the regular prices of some [not all] of its competitors for comparable tires. At least some of Sears' regular prices were also similar to or less than manufacturers' suggested retail prices for comparable tires. Such observations are not consistent with a claim that Sears' regular prices did not make economic sense.

[298] In Professor Trebilcock's view, comparison between Sears' regular prices and those of its competitors should include Sears' regular 2For prices. This is because the 2For price was always available on all multiple sales of regular priced tires; it was not a sale price.

[299] For the following reasons, I have not found Professor Trebilcock's opinion to be of assistance.

[300] To the extent Professor Trebilcock opined that Sears' regular prices were similar to or less than the regular prices of some, not all, of its competitors, he acknowledged that limited data was available. No data was available to him for either the Response RST Touring or the

Michelin RoadHandler Plus tires. For the other three tire lines at issue, for only one tire (the BF Goodrich Plus) was Sears' regular single unit price lower than that of its competitors. For both the Michelin Weatherwise and Silverguard Ultra IV, Sears' regular single unit prices were significantly higher than its competitors' prices for comparable tires (eg. for the Weatherwise, Sears' regular price of $181.99 compared to competitive offerings of $110, $98 and $99; for the Silverguard Ultra IV, Sears' regular price of $133.99 compared with a competitive offering of $105). The reference prices quoted by Professor Trebilcock were all prices that were discounted off the MSLP by 30% or more.

[301] Professor Trebilcock acknowledged that Canadian Tire's regular prices were consistently lower than Sears' regular prices, but referred to add-ons that Sears' included in its prices. However, he did not have any information that would allow him to quantify how much consumers might be prepared to pay for those add-ons.

[302] Professor Trebilcock concluded that Sears' regular prices were genuine in that approximately 21% of all of its tire sales took place at regular prices; such calculation included sales at both Sears' regular and 2For prices. However, subsection 74.01(3) of the Act is concerned only with the reference price. In this case, the reference price was Sears' regular single unit price.

[303] With respect to the absence of consumer harm referred to by Professor Trebilcock, as noted below, consumer harm is not relevant to the consideration of the materiality of any misrepresentations and hence is not relevant to the existence of reviewable conduct.

XI. DID SEARS MEET THE FREQUENCY REQUIREMENTS OF THE TIME TEST?

[304] There are two elements contained in the time test: the goods must be offered at the alleged OSP (or a higher price) in "good faith" for "a substantial period of time recently before" the making of the representation as to price. Both elements of the test must be met.

[305] My finding that the Tires were not offered at Sears' regular single unit price in good faith is, therefore, dispositive of the time test. However, for completeness, and in the event that I am in error in my conclusion as to good faith, I will deal briefly with the frequency requirements of the time test.

[306] The parties agree, I believe, that the first step in the application of the time test is to select the time frame within which to examine Sears' conduct. Sears says that the appropriate time frame is 12 months. The Commissioner argues that the appropriate period is six months. Once the appropriate time frame is selected, the next step is to determine within that time frame whether Sears offered the Tires at their regular prices for a substantial period of time.

(i) The reference period

[307] For the following reasons, I accept the submission of the Commissioner that the appropriate reference period is six months.

[308] First, paragraph 74.01(3)(*b*) of the Act requires the good faith offering to have occurred "recently" before the representation at issue. This means that there must be, as the Commissioner argues, reasonable temporal proximity between the impugned representations and the offering of the Tires at regular prices.

[309] The word "recent" is commonly understood to mean "that has lately happened or taken place" (The Shorter Oxford English Dictionary, 3rd ed. vol. II) or "not long passed" (The Concise Oxford Dictionary, 7th ed.). A 12 month time frame would not, in my view, be in accordance with the requirement that the reference period be in reasonable temporal proximity to the making of the representation.

[310] Second, after subsection 74.01(3) of the Act came into effect, Sears' legal department circulated a memorandum dated May 11, 1999 to all Sears vice presidents which described amendments to the Act. The memorandum advised that, with respect to the time test, in general "the time period to be considered will be the six months prior to [...] the making of the representation (this time period can be shorter if the product is seasonal in nature)". Thus, Sears did not posit internally the need for a 12 month reference period. Further, Mr. McMahon confirmed that, when he applied the policy set out in the May 11, 1999 memorandum, he looked to see whether the Tires were on sale at or above the comparison price more than 50% of the time in the six month period that pre-dated the representations at issue. While Sears now argues that a 12 month reference period is more appropriate in order to capture the seasonal nature of tire sales, in my view, its own internal practice of monitoring sale frequency over a six month period belies this argument.

[311] Finally, I accept the opinion of Dr. Lichtenstein that six months is an appropriate reference period as it provides an accurate picture of Sears' OSP behaviour. In his view, the substantial period of time provision relates to the amount of time a product should be offered at an OSP such that it has the opportunity to be verified by the market as the "regular price". A six month period would provide such opportunity, in Dr. Lichtenstein's view, because:

i) there is not much seasonal variation with respect to all-season tires;

ii) to the extent there are sales increases in the Spring and the Fall, any contiguous six month period would capture some of the higher and lower periods; and

iii) there is little reason to expect month-to-month variation in the percentage of tires sold at the OSP.

[312] I do not find Dr. Lichtenstein's opinion on this point to have been impaired in cross-examination.

(ii) The frequency with which the Tires were not on promotion.

[313] Having concluded that a six month reference period is appropriate, Table 2, which follows paragraph 22 above, depicts that, for the six month period preceding the relevant representations, the Tires were offered for sale at their regular single unit price as follows:

Tire	Percentage of time offered at Regular Prices
BF Goodrich Plus	45%
RoadHandler T Plus	38%
Weatherwise RH Sport	19%
Response RST Touring	46 or 49.65%
Silverguard Ultra IV	60%

[314] With respect to the Response RST Touring tire and the dispute with respect to the percentage of time that the tire was not on promotion, Sears' planning documents (that is the checkerboard and monthly pocket planners) show that the Response RST Touring tire was offered at regular prices 49.65% of the time. However, Sears' actual sales reports show that the Response RST Touring tire was sold at sale prices for one additional week. This would reduce the time the tire was offered at its regular price to 46% of the time. Mr. McKenna was unable to explain the discrepancy in these Sears' documents. Given his testimony that if Sears sold the product at promotional prices the product was on promotion, I find the information contained in the sales reports to provide the most accurate evidence as to when the Tires were actually on sale. It follows that the Response RST Touring tire was offered at regular prices 46% of the time.

(iii) "Substantial Period of Time"

[315] In order to determine what is meant by the phrase "substantial period of time", regard must be had to the statutory context. The time test functions to assess whether a specified price actually constitutes a price at which a product was "ordinarily supplied" by the person making the representation for a "substantial period of time".

[316] In this context, it seems to me that if a product is on sale half, or more than half, of the time, it can not be said that the product has been offered at its regular price for a substantial period of time. This conclusion is consistent with the decision of the Ontario County Court in *Regina v. T. Eaton Co. Ltd.* (1973), 11 C.C.C. (2d) 74. In the context of a prosecution under paragraph 33(*C*)(1) of the *Combines Investigation Act*, the Court there observed that, if a product was on sale 50% of the time, or thereabouts, the product could not be said to be ordinarily sold

for a regular, or any other price.

[317] In the present case, the following four lines of tires were on sale more than 50% of the time in the 6 month period pre-dating the relevant representations:

Tire	Percentage of time on sale
Weatherwise RH Sport	81%
RoadHandler T Plus	62%
BF Goodrich Plus	55%
Response RST Touring	54%

[318] I find, therefore, that Sears failed to offer those tires to the public at the regular price for a substantial period of time recently before making the representations.

[319] Having found that Sears did not meet the good faith requirement for all of the Tires, and did not meet the frequency requirements of the time test for four of the five tire lines, it is necessary to consider whether Sears has established that the representations were not false or misleading in a material respect.

XII. WERE THE REPRESENTATIONS FALSE OR MISLEADING IN A MATERIAL RESPECT?

[320] As an alternative to its position that it complied with the time test, Sears relies upon subsection 74.01(5) of the Act which relieves a person from liability under subsection 74.01(3) where the person establishes, in the circumstances, that a representation as to price is not false or misleading in a material respect. Subsection 74.01(5) must be read in conjunction with subsection 74.01(6) which requires that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect".

(i) What were the representations?

[321] Sears argues that subsection 74.01(3) deals only with a representation as to price so that the general impression conveyed by a representation must be confined to a representation as to price. I agree. This means that any aspect of the advertisements at issue not related to price, for example warranty information, is not relevant.

[322] Sears argues as well that the savings messages, or save stories, are also irrelevant because they are not representations as to price. I disagree. In my view, representations such as "save 40%" and "½ price" are properly characterized as representations as to price.

(ii) Were the representations false or misleading?

[323] Sears asserts that the representations as to price were neither false nor misleading. Therefore, it is necessary to first determine what impression the representations at issue created. This is consistent with the approach taken by the Court in *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ontario County Court). In *Kenitex*, the accused was charged under paragraph 36(1)(*a*) of the *Combines Investigation Act* which made it an offence to make any representation to the public that was false or misleading in a material respect. Subsection 36(4) of the *Combines Investigation Act* provided that:

36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.	36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[324] Thus, the legislation considered by the Court in *Kenitex* is substantially the same as that now before the Tribunal.

[325] At page 107 of *Kenitex*, the Court considered the elements of the offence and wrote:

> In my view [...] the representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

[326] As to the concept of "ordinary citizen", the Court wrote:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

[327] Turning to the representations in this case, I find that the general impression conveyed by them to an ordinary citizen is that consumers who purchased the Tires at Sears' promotional prices would realize substantial savings over what they would have paid for the Tires had they not been on promotion. This impression is consistent with the literal meaning conveyed by the representations. For example, turning to the advertisement set out at paragraph 17 above, the advertisement stated that one could "save 40%" on Michelin RoadHandler T Plus tires. For the smallest size shown, Sears' regular price of $153.99 was compared with the promotional price of $91.99. For the largest size, the regular price of $219.99 was compared with the promotional price of $131.99.

[328] As to whether that impression was false or misleading, it is necessary to remember that:

- when the Tires were not on promotion, Sears' 2For price was always available if more than one tire was purchased;

- Sears' 2For price was always substantially lower than the regular (single unit) price;

- 90% to 95% of tires were sold in multiples; and

- Sears' regular (single unit) price would never have applied to sales of multiple tires.

[329] It follows, as conceded by Mr. Cathcart in cross-examination, that for tires purchased in multiples at Sears' promotional events, the savings realized by customers would not have been the difference between Sears' regular price and the promotional price. Rather, the savings would be the difference between the 2For price and the promotional price.

[330] Sears bears the onus under subsection 74.01(5) of the Act. It says that its representations as to price were not false or misleading because:

1. The representations accurately set out Sears' prices for a single unit of the Tires, and those were prices at which genuine sales took place.

2. The representations as to price were available to, and benefited, customers who purchased a single tire.

3. Averaged over the five Tires, 11% of purchasers would buy only one tire.

4. Any tire consumer to whom the representations were directed might choose to buy a single tire, so that the representations were true for 100% of the intended readers of the representations.

5. The representations as to price reflected prices that Sears used as a basis for calculating warranty adjustments and refunds.

[331] All of these points are literally correct. However, the general impression conveyed by the representations is that consumers (not just 11% of consumers) who purchased the Tires at Sears at promotional prices would realize substantial savings. For 89% of consumers and 90 to 95% of the Tires sold, this was not correct. I find, therefore, that representations as to price contained in both the regular/promotional price comparison and in the save stories were false or misleading.

[332] Before leaving this point, I note that a similar conclusion was reached in somewhat similar circumstances in *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ontario District Court).

There, Simpsons caused a number of "mini casino" cards to be printed and distributed. The cards advertised "you could save 10% to 25%" on practically everything in the store, and that the possible discounts were 10%, 15%, 20% or 25%. The mini casino cards each contained four tabs, under each tab was printed a symbol. When a tab was lifted, the symbol was revealed. There were four symbols, corresponding to each of the four percentage discounts available. Each card instructed a customer to lift one tab only in order to reveal the discount level available to them. Of the cards printed, 90% had the 10% discount symbol printed under all four tabs. The remaining 10% of the cards each contained all four symbols. On those facts, the Court found that the representation "you could save 10% to 25% on practically everything in the store" was
manifestly false and misleading. The Court wrote at pages 37-38:

> The cards had been printed in such a way as to ensure that 9 out of 10 of the recipients of the cards had no chance to obtain other than the minimum discount of 10%. Each card displayed all four discount symbols, and it is obvious from the get-up of the card that it was designed to leave the impression that a different symbol lay concealed under each of the four tabs. As a consequence of the design of the promotion, the representation that "you could save 10% to 25%" was false as to nine tenths of the cards. The recipients of those cards were misled and intentionally so.
>
> To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90% of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addressees of the mailing.
>
> The fact that the representation was true as to one-tenth of the recipients of the randomly distributed cards does nothing more than reduce the magnitude of the deception.

(iii) Were the representations as to price false or misleading in a material respect?

[333] Prior jurisprudence in the context of criminal prosecutions under the Act or its predecessor has interpreted what is meant by "misleading in a material respect". As noted above, in *Kenitex*, the Court found that a materially false or misleading impression would be conveyed if the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."

[334] In *R. v. Tege Investments Ltd.* (1978), 51 C.P.R. (2d) 216 (Alberta Provincial Court), the Court applied the dictionary meaning of "material" which was "much consequence or important or pertinent or germane or essential to the matter". The Court noted that it was not necessary to establish that any person was actually mislead by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

[335] Finally, in *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (Vancouver Magistrate's

Court, B.C.), the Court concluded that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase. Whether or not a consumer in fact obtained a bargain and may have paid less than he would ordinarily have paid was not the relevant criteria.

[336] The question to be determined, therefore, is whether the impression created by the price comparisons and/or the save stories would constitute a material influence in the mind of a consumer. Put another way, I accept the submission of Sears that the relevant inquiry is not whether the type of representation is a material one, but whether the element of misrepresentation is material.

[337] I believe that the following are relevant considerations.

[338] First, the magnitude of the exaggerated savings. Returning to the Michelin RoadHandler T Plus advertisement set out at paragraph 17 above, for the smallest tire size advertised, an ordinary citizen considering the purchase of four tires would reasonably believe, in my view, their savings to be $248.00 or ($153.99 - $91.99) x 4. In fact, the 2For price for each tire was $94.99. Accordingly, the actual savings would be $12.00 or ($94.99 - $91.99) x 4. In this example, the savings were substantially exaggerated. Because Sears' 2For price was always substantially lower than its regular price, it follows that the savings were similarly substantially overstated in every OSP representation made concerning the Tires.

[339] In my view, that magnitude of advertised savings would be a material influence or consideration upon a consumer.

[340] Second, I look to Sears' experience when it eliminated its 2For pricing on January 1, 2001 and lowered its regular prices for tires. Sears' Great Item and normal promotional prices remained unchanged. Following the reduction of its regular prices, Sears' sales volumes at promotional prices decreased. Mr. McMahon acknowledged in cross-examination that it was probably true that promotional sales decreased because Sears could not use as favourable save stories. As Sears argued, if savings are represented at all, consumers expect them to be of a certain magnitude and if the represented savings are incongruous with consumers' expectations concerning the deals typically offered, or typically offered by the particular retailer, the promotion will be less effective. In the circumstances where Sears was recognized to be a high-low retailer, where tires were sold in a competitive market, and where national brand tires were typically sold by tire dealers at a price 35% off the MSLP, I find that Sears' misrepresentation of the extent of the savings to be realized by purchasing the Tires on promotion was, more probably than not, likely to influence a consumer. This means that Sears' misrepresentation of the extent of the savings to be realized was misleading in a material respect.

[341] Finally, I have found that consumers have a limited ability to evaluate the intrinsic attributes of tires, and it is admitted that the five lines of Tires were exclusive to Sears. In those circumstances, the following evidence from Dr. Lichtenstein's expert report is germane:

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.

46. However, where intrinsic product attributes are difficult for consumes to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes *and* competing retailers carry brands unique to them, neither of these strategies is open to consumers.

47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts", i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

[342] Having regard to those circumstances, as required by subsection 74.01(5) of the Act, I accept that Sears' OSP representations are more likely to be relied upon to reflect quality or value so misrepresentation of the OSP is more likely to impact upon or influence a consumer.

[343] Similarly, I have found that a very significant percentage of consumers do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores. Dr. Deal's study suggested that approximately 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears. This evidence also supports the conclusion that Sears' OSP representations and save stories were more likely to influence consumers.

[344] Thus, on the whole of the evidence, Sears has failed to establish that its OSP representations were not false or misleading in a material respect.

(iv) Sears' arguments about materiality

[345] In so concluding, I have had regard to Sears' submissions that the representations as to price were not false or misleading in a material respect because:

a) consumers are recognized to consistently discount OSP representations by about

25%;

b) Sears is a promotional retailer, and because its reference price is identified as "Sears reg.", consumers would interpret the reference price differently than OSP representations made by an EDLP marketer or suppliers generally;

c) Sears' ads that did not feature Sears' regular price representations produced more of an uplift in sales levels from non-promotional periods;

d) Mr. Winter testified that, in 1999, tires were sold in a highly competitive and highly promotional context which included a variety of pricing frameworks in which no single pricing framework or competitor dominated the market. Further, Dr. Deal found approximately 63% of consumers comparison shop even where they see ads that indicate reduced tire prices;

e) factors such as warranties, roadside assistance and the provision of a "satisfaction guaranteed or your money refunded" guarantee could enhance a consumer's perception of value and positively impact the decision to purchase a tire; and

f) Dr. Deal found that 78% of survey respondents were satisfied with the value they received and 93% were satisfied with their tire purchase.

[346] I will deal with each item in turn.

(a) Consumers consistently discount OSP representation by about 25%

[347] It is correct that it was Dr. Lichtenstein's opinion that consumers mentally discount advertised reference prices and that one study found that consumers consistently discount OSP offerings by about 25%. However, it remained Dr. Lichtenstein's opinion that:

> 33. However, even though knowledgeable/skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price ... even though, on the whole, they were skeptical of its validity... Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference price." Also, Urbany et al. (1988) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.

> 34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much... and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions. [underlining added]

[348] Moreover, on cross-examination it was Dr. Lichtenstein's evidence that there would be less discounting of a reference price where the OSP representation is made by a credible retailer such as Sears.

[349] Thus, I do not find Dr. Lichtenstein's evidence with respect to discounting of OSP representations establishes that Sears' OSP representations were not material.

(b) Sears' regular price representations must be seen in the context of consumers' knowledge that Sears is a promotional retailer

[350] Sears says that because it is known to be a promotional retailer, its customers would interpret its OSP representations in a different fashion from their interpretation of OSP representations made by ordinary suppliers or EDLP retailers. No evidence was cited to support this submission.

[351] It would seem to be equally likely that if influenced by Sears' reputation as a promotional retailer, a consumer would be influenced by its OSP representations and find them to be very material as signalling an appropriate time to purchase in order to obtain substantial savings from the price consumers would ordinarily pay at Sears if the Tires were not on promotion.

(c) Sears' ads that did not feature OSP representations

[352] Sears argues that:

> 172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did *not* feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.
>
> 173. Mr. McKenna's reasonable conclusion was:
>
> > *That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.*
>
> 174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

[353] Mr. McKenna testified that, with respect to the Michelin Weatherwise and the Silverguard ST (not one of the tires at issue), he compared sales for those tires when they were not on promotion to their sales during a period when they were on promotion. The Silverguard ST had no regular price, it was simply priced based on rim size, starting at $44.99. Thus, the Silverguard ST was advertised with no regular comparison price or save story. The Michelin Weatherwise was advertised with its regular price shown together with a 40% save story.

[354] When the Michelin Weatherwise was advertised, its unit sales increased by approximately **[CONFIDENTIAL]** times over sales when it was not advertised. Sales volumes of the Silverguard ST, when advertised, increased by **[CONFIDENTIAL]** times over sales when not advertised. In this context, Mr. McKenna concluded that customers recognized value.

[355] This evidence is anecdotal, relating to a tire that had no regular price, and is in conflict with Mr. McMahon's evidence and Mr. Cathcart's evidence about Sears' experience with the BF Goodrich Plus tire set out at paragraphs 214 and 215 above.

[356] For this reason, I do not find the evidence relating to the Silverguard ST establishes that Sears' OSP representations were not material.

[357] To the extent that Sears relies on Mr. Merkley's acknowledgement in cross-examination that a "Tireland" advertisement relied upon a consumer's ability to discern value without reference to a save story, Mr. Merkley simply responded "I guess, yes" to the suggestion that the retailer in question assumed that his potential customers would recognize value. Further, the

particular price advertised by Tireland was sufficiently low that it caused Sears to write to Michelin expressing its concern and caused Michelin to respond to Sears that it shared Sears' concern at the pricing. However, Michelin said that it found this to be an isolated case where the dealer intended to have a weekend sale for the fifth consecutive year.

[358] This evidence does not establish that Sears' OSP representations were immaterial.

(d) Mr. Winter's and Dr. Deal's evidence

[359] Sears relies upon Mr. Winter's evidence that, in 1999, tires were sold in a highly competitive and promotional context and Dr. Deal's evidence that his survey found that 63% of consumers comparison shop even when they see ads that show reduced tire prices.

[360] However, comparison shopping would seem to be directed to final transaction prices, and not necessarily the materiality of OSP representations. For those consumers who say they comparison shop, the OSP representations could nonetheless have: drawn the consumer into the market; attracted the consumer to Sears; and caused the consumer to purchase from Sears if no lower final transaction price was located in the consumer's search.

(e) The consumers' perception of value based upon factors such as warranties and the guarantee of satisfaction

[361] Sears relies upon Dr. Lichtenstein's acknowledgement that factors such as warranties, roadside assistance programs, and Sears' guarantee could enhance consumers' perception of value and positively impact upon the decision to purchase a tire. This is said to reduce the effect of Sears' OSP representations because response to price is context dependent.

[362] Given Professor Trebilcock's acknowledgement that he did not have information that would allow him to quantify how much consumers might be willing to pay for add-ons provided by Sears relative to add-ons provided by Canadian Tire, and the rather amorphous nature of Dr. Lichtenstein's acknowledgement, I am not persuaded that the value consumers attach to add-ons is sufficient to make Sears' OSP representations immaterial. Even with add-ons, the extent of the savings misrepresentation could still be influential to the consumer's decision to purchase.

(f) Sears' consumer satisfaction

[363] Sears says that even if consumers purchased their tires from Sears solely upon the strength of the representations at issue, 78% of respondents to Dr. Deal's survey indicated that they had received good value for their money.

[364] There are, I believe, two responses to this.

[365] First, harm is not a necessary element of reviewable conduct. As the Court noted in *Kellys on Seymour, supra*, at page 26, the "criteria is, did in fact the person think that what he was buying was, to the ordinary purchaser, in the ordinary market, worth the price it is purported to be worth, and from which it is reduced". Whether or not a consumer in fact got a bargain or paid less than what the consumer would ordinarily have paid is not the criteria. See also: *R. v. J. Pascal Hardware Co. Ltd.* (1972), 8 C.P.R. (2d) 155 at page 159 (Ont. Co. Crt).

[366] Second, I accept Dr. Lichtenstein's evidence, which I find was not substantially challenged on the point, that:

> 39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.
>
> 40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995). [underlining added]

[367] Thus, for all these reasons, Sears failed to establish that its OSP representations were not false or misleading to a material extent.

(v) Conclusion

[368] Sears admitted that it did not meet the requirements of the volume test and I have found that the Tires were not offered at Sears' regular price in good faith and that Sears failed to meet requirements of the time test for four of the five tire lines. I have also found that Sears failed to establish that the representations at issue were not false or misleading in a material respect. It follows that the allegations of reviewable conduct have been made out and the Tribunal finds Sears to have engaged in reviewable conduct. It is therefore necessary to consider what administrative remedies should be ordered.

XIII. WHAT ADMINISTRATIVE REMEDIES SHOULD BE ORDERED?

[369] Section 74.1 of the Act sets out the range of remedies available and the circumstances in which the remedies may be ordered. Section 74.1 of the Act is as follows:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and
(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.
74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement susceptible d'examen,
(ii) la période et le secteur géographique auxquels le comportement est afférent,
(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;
c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :
(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,
(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.
74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.
74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.
74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.
74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

(a) the reach of the conduct within the relevant geographic market;
(b) the frequency and duration of the conduct;
(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;
(d) the materiality of any representation;
(e) the likelihood of self-correction in the relevant geographic market;
(f) injury to competition in the relevant geographic market;
(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.
74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or
(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part. [underlining added]

a) la portée du comportement sur le marché géographique pertinent;
b) la fréquence et la durée du comportement;
c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;
d) l'importance des indications;
e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
f) le tort causé à la concurrence sur le marché géographique pertinent;
g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
h) toute autre circonstance pertinente.
74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :
a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;
b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;
c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;
d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie. [Le souligné est de moi.]

[370] Each of the three available remedies shall be considered in turn.

(i) An order not to engage in the conduct or substantially similar reviewable conduct

[371] The Commissioner seeks an order prohibiting Sears and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns, or any other person or corporation acting on its behalf, from engaging in conduct contrary to subsection 74.01(3) of the Act for a period of 10 years.

[372] In support of this submission, the Commissioner relies upon:

- Sears' admission that it is primarily a hi-low retailer which relies extensively on OSP representations in its advertising;

- Sears used hi-low marketing for 27 of the 28 lines of tires it sold in 1999 and continues to use hi-low marketing techniques to sell automotive products;

- Sears continues to use hi-low marketing techniques generally throughout its business;

- Sears has engaged in deceptive marketing behaviour in the past as reflected in the following decisions:

  R. v. Simpsons-Sears Ltd. (1969), 58 C.P.R. 56 (Ont. Prov. Ct. (Crim. Div.));
  R. v. Simpsons-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. County Ct. (Crim. Div.)); and
  R. v. Simpsons-Sears Limited and H. Forth and Co. Limited (1983), unreported (Ont. County Ct.).

[373] Sears argues that no administrative remedy is warranted. It points to the following:

- The representations at issue were made in November and December of 1999. Section 74.01 of the Act came into force in March of that year. The Guidelines were not published until late September, 1999, and there was no interpretive jurisprudence relating to the time and volume tests.

- OSP advertising is a legitimate practice and Sears should not be punished for depending upon promotional events to market its products.

- Sears turned its mind to complying with subsection 74.01(3) of the Act. It created and distributed a written policy and Mr. Cathcart maintained a checkerboard for planning and promoting the sale of the Tires.

- The convictions the Commissioner relies upon are old, going back 21, 28 and 35 years. The last two mentioned convictions relate to a catalogue advertisement for multi-vitamins and to the advertisement of a particular refrigerator in Ottawa.

- It is reasonable to assume that there have been significant changes in Sears' ownership, management and control since the early 1980's when the most recent conviction was entered.

[374] In the alternative, Sears says that any cease and desist order should relate only to tires. Sears points to the Tribunal's decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129; aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.) wherein the order prohibited the making of misrepresentations related to "PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device".

[375] In light of the false or misleading impression given by Sears in its advertisements with respect to the OSP representations at issue concerning the Tires, I have concluded that it is appropriate to issue an order pursuant to paragraph 74.1(1)(*a*) of the Act. Such an order will address the harm subsection 74.01(3) was created to address. As the order will be directed only to OSP representations which do not conform with the Act, and will not be directed to all OSP representations, it cannot be said that such an order "punishes" Sears for depending upon promotional events.

[376] I am satisfied by virtue of Sears' internal memorandum of May 11, 1999 to its vice-presidents concerning the amendments to the Act that the timing of the enactment of the relevant statutory provision and the issuance of the Guidelines gave sufficient notice to Sears' employees of the requirements of the Act. Therefore, it is not inappropriate to make an order under paragraph 74.1(1)(*a*).

[377] As to the duration of the order, I see no reason to depart from the general provision found

in subsection 74.1(2) of the Act that an order under paragraph 74.1(1)(*a*) applies for a period of 10 years unless otherwise specified. That 10 year period will commence when an order is issued. In this regard see paragraph 389 of these reasons.

[378] As to the scope of the order, I believe that it construes the intent of the Act too narrowly to limit any order so as to apply only to Sears' promotion of tires. The scope of the order issued by the Tribunal in *P.V.I., supra,* is distinguishable, in my view, because there misrepresentations as to the performance of a product relating to fuel savings, emission reduction and government approval were at issue. There was no basis on which the order should have applied to any other product other than an allegedly similar gas-saving, emission-reducing and/or performance-enhancing device (as the orders provided).

[379] Equally, however, I have not been persuaded that it is necessary that the order to apply to all goods marketed by Sears through its various business channels. In this regard, I note the relatively long period of time that has elapsed since Sears was last convicted of deceptive marketing behaviour.

[380] Here Sears has stated in its responding statement of grounds and material facts, at paragraph 39, that Sears automotive is the business division of Sears responsible for the supply of the Tires and other automotive-related products and services and for the operation of Sears' retail automotive centres. From this I conclude that it is appropriate for the order to be directed to the business division which was responsible for the misrepresentations at issue. Therefore, the order will apply only to tires and other automotive-related products and services.

(ii) A corrective notice

[381] The Commissioner requests an order requiring Sears to publish or otherwise disseminate a corrective notice or notices that shall:

a. bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to the Application, including:

   i. a description of the reviewable conduct,
   ii. the time period and geographical area to which it relates, and
   iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.

b. be published in the following media:

   i. <u>in flyers</u> ("pre-prints") by the Respondent as follows:

      (1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.

   (2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:
      (a) 84% to be distributed through newspapers;
      (b) 15% to be distributed door-to-door; and
      (c) 1% to be distributed in-store.

   (3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches X 9.5 inches in size.

   ii. <u>in newspapers</u> by the Respondent as follows:

      (1) in the language appropriate to the newspaper;
      (2) within the first nine pages of the Wednesday edition of each of the newspapers listed in paras. 26 and 27 of ***Exhibit CA-9***, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said

newspaper;

(3) the newsprint advertisements shall be no less than 5.625 inches X 9.625 inches in size.

[382] Sears submits that temporal concerns alone mitigate against the publication of a written notice. Sears also points to the evidence of Dr. Trebilcock that consumers who purchased the Tires at Sears during the sales events at issue received very good deals. Finally, Sears submits that it exercised due diligence in order to prevent the reviewable conduct from occurring.

[383] In *PVI, supra*, the Federal Court of Appeal, at paragraph 26, considered that the time elapsed from the making of false or misleading representations was a relevant factor to consider when assessing the appropriateness of a corrective notice.

[384] In the present case, five years have elapsed since the representations at issue were made. In my view, that length of time alone militates against the issuance of a corrective notice.

[385] The report of the Consultative Panel contemplated that the purpose of a corrective notice was to inform marketplace participants about deceptive practices where those practices may have left residual mistaken impressions in the marketplace. I do not accept that, after 5 years, any residual mistaken impression exists which arises from the representations at issue. To require a corrective notice in that circumstance would, in my view, be punitive and not remedial.

[386] In view of this conclusion, it is not necessary for me to consider, and I do not consider, whether Sears has established that it exercised due diligence in order to prevent the reviewable conduct from occurring.

(iii) An administrative monetary penalty

[387] By its reasons for order and order dated August 5, 2004, the Tribunal ordered that, if it determined that Sears had engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears was given leave to present evidence and make submissions at a future hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act. Accordingly, the issues of whether an administrative monetary penalty should be imposed, and if so, its amount are reserved. See in this regard, paragraph 390 of these reasons.

XIV. COSTS

[388] The issue of costs is also reserved.

XV. ORDER

[389] Once the issues of administrative monetary penalty and costs are finally decided by the

Tribunal, an order will issue reflecting these reasons together with the Tribunal's rulings with respect to an administrative monetary penalty and costs.

XVI. DIRECTIONS TO THE PARTIES

[390] In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Wednesday, January 19, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

2) If there is any disagreement, the parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from the reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 21, 2005.

3) Following the issuance of these reasons the Registry will contact counsel to set a date for a case management conference to address the following:

   i) The time required for the further hearing concerning the factors relevant to subsection 74.1(5) of the Act.

   ii) The number of any proposed witnesses to be called.

   iii) The provision of any required will-say statements and or expert reports.

   iv) The extent of the Commissioner's participation in this further hearing.

   v) Potential dates for such hearing.

   vi) The manner, nature and timing of the submissions as to costs.

   DATED at Edmonton, this 11th day of January 2005.

   SIGNED on behalf of the Tribunal by the presiding judicial member.

Public

XVII. APPENDIX

[391] Sections 74.01, 74.09 and 74.1 are as follows:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
(a) makes a representation to the public that is false or misleading in a material respect;
(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or
(c) makes a representation to the public in a form that purports to be
(i) a warranty or guarantee of a product, or
(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,
if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

74.01(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
a) ou bien des indications fausses ou trompeuses sur un point important;
b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, don’t la preuve incombe à la personne qui donne les indications;
c) ou bien des indications sous une forme qui fait croire qu'il s'agit :
(i) soit d'une garantie de produit,
(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,
si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.
74.01(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :
a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au

representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
74.01(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to
(a) the price at which products have been or are supplied; or
(b) the price at which products will be supplied.
74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.
74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[...]

74.09 In sections 74.1 to 74.14 and 74.18, "court" means the Tribunal, the Federal Court or the superior court of a province.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
(a) not to engage in the conduct or substantially similar reviewable conduct;
(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
(i) a description of the reviewable conduct,

public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;
b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.
74.01(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.
74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[...]

74.09 Dans les articles 74.1 à 74.14 et 74.18, « tribunal » s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

74.1(1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :
a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;
b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :
(i) l'énoncé des éléments du comportement

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) le tort causé à la concurrence sur le marché géographique pertinent;

g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;

h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02,

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

APPEARANCES:

For the applicant:

The Commissioner of Competition

John L. Syme
Leslie Milton
Arsalaan Hyder
Geneviève Léveillée

For the respondent:

Sears Canada Inc.

William W. McNamara
Philip J. Kennedy
Martin J. Huberman
Teresa J. Walsh
Stephen A. Scholtz
Martha A. Healey
Susan Rothfels

1910 CarswellOnt 258
Ontario Divisional Court

Dale v. Blanchard (Township)

1910 CarswellOnt 258, 16 O.W.R. 349, 21 O.L.R. 497 at 502

Re Dale and Blanchard

Meredith, C.J.

Judgment: June 29, 1910

Proceedings: reversed *Dale v. Blanchard (Township)* ((1910)), 1910 CarswellOnt 205, 21 O.L.R. 497, 16 O.W.R. 86 ((Ont. Ex. Ct.))

Counsel: *C. C. Robinson*, for the appellant.
J. S. Fullerton, K.C., and *J. W. Graham*, for the respondent municipality.

Subject: Public
Related Abridgment Classifications
Municipal law
VIII By-laws
VIII.4 Enactment
VIII.4.b By plebiscite
VIII.4.b.ii Practice and procedure
VIII.4.b.ii.A Voters' lists
Statutes
II Interpretation
II.4 Construction
II.4.a Liberal
Headnote
Municipal Election — Voting on Money By-law — Revision of Voters' List — Assessment Act s. 62 — Voters' List Act — Quashing By-law.
An application to quash a money by-law of the Township of Blanchard, granting $20,000 aid to the St. Mary's and Western Ontario Rw. Co. At trial the objections in substance resolved themselves into two: (1) that the by-law did not receive a majority of the votes of persons qualified to vote thereon; (2) that the voting was not conducted in accordance with the principles laid down in the Municipal Act. The majority for the by-law was 4.
Mulock, C.J.Ex.D., *held*, that whether the Court omits to hold a legal meeting, or holding a legal meeting omits to try all complaints as required by s. 62 of the Assessment Act, in either case an appeal lies to the County Judge, and if no appeal is taken, the Voters' List Act applies. In this case no appeal was taken, therefore the objection to use of 1909 list failed. That it is not competent to the application to call in question the findings of the County Court Judge as to the qualifications of the persons whose names he placed upon the voters' list. This objection therefore failed; the evidence shewed that the election was conducted substantially in accordance with the principles laid down in the statute, and that the result of the election was not affected by any non-compliance, mistake, or irregularities. Motion dismissed, but, under the circumstances, without costs.
Divisional Court *held*, that it was unnecessary to express an opinion upon any of the grounds urged against the by-law except whether (1) the voters' list upon which the voting took place was by force of s. 24 of the Voters' Lists Act, or for any other reason, conclusive as to the right of the persons named in it to vote on the by-law; and whether (2), if it was not conclusive as to their right to vote, the appellant had succeeded in establishing that a sufficient number of unqualified persons voted to overcome the majority which was cast in favour of the by-law.

Their Lordships answered the first question in the negative and on finding that five votes had been cast which were bad, they quashed the by-law, respondents to pay costs throughout.

This is an appeal by the applicant, William Dale, the younger, from an order of Sir Wm. Mulock, C.J.Ex.D. (1910), 16 O. W. R. 86, dated 5th May, 1910, dismissing his motion to quash By-law No. 8 of the township of Blanchard, entitled "A by-law to authorize the issue of debentures of the township of Blanchard to the amount of $20,000 for the purpose of granting aid to the extent of $20,000 to the St. Mary's and Western Ontario Railway Co."

The appeal to Divisional Court was heard by Sir Wm. Meredith, C.J.C.P., Hon. Mr. Justice Teetzel and Hon. Mr. Justice Middleton.

Their Lordships' judgment was delivered by *Sir Wm. Meredith, C.J.C.P.*:

1 In the view we take, it is unnecessary to express an opinion upon any of the grounds urged against the by-law, except two, viz., whether (1) the voters' list upon which the voting took place is by force of sec. 24 of the Voters' Lists Act or for any other reason conclusive as to the right of the persons named in it to vote on the by-law; and whether (2) if it is not conclusive as to their right to vote, the appellant has succeeded in establishing that a sufficient number of unqualified persons voted to overcome the majority which was cast in favour of the by-law.

2 The voters' list which sec. 24 makes upon a scrutiny, final and conclusive evidence that all persons named therein and no others were qualified to vote, is the voters' list which was, or was the proper list to be, used at the election.

3 The voters' list with which the Act deals is made up in three parts, the first containing the names of all male persons entitled to vote at both Provincial and municipal elections; the second, the names of all other male persons and of all widows and unmarried women appearing by the assessment roll to be voters at municipal elections, but not at provincial elections; and the third, the names of all other male persons appearing by the assessment roll to be voters at provincial but not at municipal elections.

4 The voters' list to be used when a vote is being taken on a money by-law is provided for by secs. 348 and 349 of the Consolidated Municipal Act, 1903, and this list the clerk of the municipality is to prepare from the last revised assessment roll, and the only use he is required to make of the voters' list prepared under the Voters' List Act is to see that every person entered on his list is named or intended to be named on the voters' list.

5 All the municipal electors are not entitled to vote on a money by-law, but only those of them who are mentioned in sec. 353, which deals with freeholders, and sec. 354, which deals with leaseholders, and it is not, as has been seen, from the last certified voters' list but from the last revised assessment roll that the clerk is to prepare a list of those entitled to vote.

6 Section 348 was amended 8 Edw. VII., ch. 48, sec. 4, by striking out the reference to Schedule C., and sec. 354 was amended by 9 Edw. VII., ch. 73, sec. 10, by adding the following proviso: "and provided further that he has at least ten days next preceding the day of polling filed in the office of the clerk of the municipality a statutory declaration stating that his lease meets the above requirements, and the clerk shall insert or otherwise designate the names of such tenants in the voters' list prepared in accordance with the provisions of sec. 348 of this Act, and the notice required by sub-sec. 3 of sec. 338 of this Act shall also contain a statement that the names of leaseholders neglecting to file such a declaration shall not be placed on the voters' list for such voting."

7 The certified list mentioned in sec. 24 of the Voters' List Act was not the list used or proper to be used in taking the vote on the by-law, but the list to be used was that prepared by the clerk from the assessment roll, and the first question must therefore be answered in the negative.

8 As to the second question, we are bound by the decision of the Court of Appeal in In re Flatt (1890), 18 A. R. 1, to hold that B. F. Doupe, Wesley Shier and Richard Selves were not qualified voters.

9 Assuming everything in favour of the respondent, their highest position was that of persons who were in possession of the land, as freeholders of whoch they voted, under parol agreements with the owners entitling them on doing something which

had not yet been done to a conveyance of the land, and such persons were held by the Court of Appeal not to be freeholders within the meaning of sec. 9 of the then Municipal Act, R. S. O. 1887, ch. 184.

10 Street, J., had decided after inquiry that the persons whose right to petition as freeholders was questioned were in a position to compel specific performance by their vendors and were therefore equitable freeholders and entitled to petition, so that the decision of the Court of Appeal reversing his decision is conclusive against the right of the three persons I have named to vote unless the case can be distinguished on the ground that in the enactment which was then under consideration the term "freeholder" is used in a sense different from that in which it is used in sec. 353, and I can find no reason for coming to that conclusion. The purpose of the petition in that case was to obtain the incorporation of a village, and the purpose of the by-law in question is to impose an indebtedness upon the municipality, in the one case on the initiative, and in the other by the vote of a part only of the ratepayers and against the will of a minority.

11 It is perhaps to be regretted that the Court was unable to put a more liberal construction on the statute, but that is now a matter for the legislature, if the construction given to it does not accord with the intention of the legislature in passing it.

12 The vote of R. C. Hunter is clearly bad. He had no estate in the land in respect of which he voted. It belonged to a company in which he was a shareholder, and that was his only interest in it; and Homer Doupe's vote was admittedly bad.

13 The by-law was carried by a majority of four only, and these five votes being bad, it follows that it did not receive the assent of the majority of the voters and must be quashed.

14 The appeal will therefore be allowed and there will be substituted for the order of the learned Chief Justice an order quashing the by-law with costs, and the respondents must pay the costs throughout.

113 S.Ct. 2786
Supreme Court of the United States

William DAUBERT, et ux., etc., et al., Petitioners,
v.
MERRELL DOW PHARMACEUTICALS, INC.

No. 92–102
|
Argued March 30, 1993
|
Decided June 28, 1993.

Synopsis

Infants and their guardians ad litem sued pharmaceutical company to recover for limb reduction birth defects allegedly sustained as result of mothers' ingestion of antinausea drug Bendectin. The United States District Court for the Southern District of California, 727 F.Supp. 570, granted company's motion for summary judgment, and plaintiffs appealed. The Court of Appeals, 951 F.2d 1128, affirmed. Plaintiffs filed petition for writ of certiorari, which was granted. The Supreme Court, Justice Blackmun, held that: (1) "general acceptance" is not necessary precondition to admissibility of scientific evidence under Federal Rules of Evidence, and (2) Rules assign to trial judge the task of ensuring that expert's testimony both rests on reliable foundation and is relevant to task at hand.

Vacated and remanded.

Chief Justice Rehnquist filed opinion concurring in part and dissenting in part in which Justice Stevens joined.

****2789** *Syllabus*[*]

Petitioners, two minor children and their parents, alleged in their suit against respondent that the children's serious birth defects had been caused by the mothers' prenatal ingestion of Bendectin, a prescription drug marketed by respondent. The District Court granted respondent summary judgment based on a well-credentialed expert's affidavit concluding, upon reviewing the extensive published scientific literature on the subject, that maternal use of Bendectin has not been shown to be a risk factor for human birth defects. Although petitioners had responded with the testimony of eight other well-credentialed experts, who based their conclusion ****2790** that Bendectin can cause birth defects on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies, the court determined that this evidence did not meet the applicable "general acceptance" standard for the admission of expert testimony. The Court of Appeals agreed and affirmed, citing *Frye v. United States,* 54 App.D.C. 46, 47, 293 F. 1013, 1014, for the rule that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community.

Held: The Federal Rules of Evidence, not *Frye,* provide the standard for admitting expert scientific testimony in a federal trial. Pp. 2792–99.

(a) *Frye*'s "general acceptance" test was superseded by the Rules' adoption. The Rules occupy the field, *United States v. Abel,* 469 U.S. 45, 49, 105 S.Ct. 465, 467, 83 L.Ed.2d 450, and, although the common law of evidence may serve as an aid to their application, *id.,* at 51–52, 105 S.Ct., at 468–469, respondent's assertion that they somehow assimilated *Frye* is unconvincing. Nothing in the Rules as a whole or in the text and drafting history of Rule 702, which specifically governs expert testimony, gives any indication that "general acceptance" is a necessary precondition to the admissibility of scientific evidence. Moreover, such a rigid standard would be at odds with the Rules' liberal thrust and their general approach of relaxing the traditional barriers to "opinion" testimony. Pp. 2792–94.

(b) The Rules—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial ***580** judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to "scientific ... knowledge," since the adjective "scientific" implies a grounding in science's methods and procedures, while the word " knowledge" connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony "assist the trier of fact to understand the evidence or to determine a fact in issue" goes primarily to relevance by demanding a valid scientific

connection to the pertinent inquiry as a precondition to admissibility. Pp. 2794–96.

(c) Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable Rules. Pp. 2796–98.

(d) Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, rather than wholesale exclusion under an uncompromising "general acceptance" standard, is the appropriate means by which evidence based on valid principles may be challenged. That even limited screening by the trial judge, on occasion, will prevent the jury from hearing of authentic scientific breakthroughs is simply a consequence of the fact that the Rules are not designed to seek cosmic understanding but, rather, to resolve legal disputes. Pp. 2798–99.

951 F.2d 1128 (CA9 1991), vacated and remanded.

****2791** BLACKMUN, J., delivered the opinion for a unanimous Court with respect to Parts I and II–A, and the opinion of the Court with respect to Parts II–B, II–C, III, and IV, in which WHITE, O'CONNOR, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which STEVENS, J., joined, *post,* p. ——.

Attorneys and Law Firms

***581** Michael H. Gottesman, Washington, DC, for petitioners.

Charles Fried, Cambridge, MA, for respondent.

Opinion

***582** Justice BLACKMUN delivered the opinion of the Court.

In this case we are called upon to determine the standard for admitting expert scientific testimony in a federal trial.

I

Petitioners Jason Daubert and Eric Schuller are minor children born with serious birth defects. They and their parents sued respondent in California state court, alleging that the birth defects had been caused by the mothers' ingestion of Bendectin, a prescription antinausea drug marketed by respondent. Respondent removed the suits to federal court on diversity grounds.

After extensive discovery, respondent moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that petitioners would be unable to come forward with any admissible evidence that it does. In support of its motion, respondent submitted an affidavit of Steven H. Lamm, physician and epidemiologist, who is a well-credentialed expert on the risks from exposure to various chemical substances.[1] Doctor Lamm stated that he had reviewed all the literature on Bendectin and human birth defects—more than 30 published studies involving over 130,000 patients. No study had found Bendectin to be a human teratogen (*i.e.,* a substance capable of causing malformations in fetuses). On the basis of this review, Doctor Lamm concluded that maternal use of Bendectin during the first trimester of pregnancy has not been shown to be a risk factor for human birth defects.

***583** Petitioners did not (and do not) contest this characterization of the published record regarding Bendectin. Instead, they responded to respondent's motion with the testimony of eight experts of their own, each of whom also possessed impressive credentials.[2] These experts had concluded that Bendectin can cause birth defects. Their conclusions were based upon "in vitro" (test tube) and "in vivo" (live) animal studies that found a link between Bendectin and malformations; pharmacological studies of the chemical structure of Bendectin that purported to show similarities between the structure of the drug and that of other substances known to cause birth defects; and the "reanalysis"

of previously **2792 published epidemiological (human statistical) studies.

The District Court granted respondent's motion for summary judgment. The court stated that scientific evidence is admissible only if the principle upon which it is based is " 'sufficiently established to have general acceptance in the field to which it belongs.' " 727 F.Supp. 570, 572 (S.D.Cal.1989), quoting *United States v. Kilgus,* 571 F.2d 508, 510 (CA9 1978). The court concluded that petitioners' evidence did not meet this standard. Given the vast body of epidemiological data concerning Bendectin, the court held, expert opinion which is not based on epidemiological evidence *584 is not admissible to establish causation. 727 F.Supp., at 575. Thus, the animal-cell studies, live-animal studies, and chemical-structure analyses on which petitioners had relied could not raise by themselves a reasonably disputable jury issue regarding causation. *Ibid.* Petitioners' epidemiological analyses, based as they were on recalculations of data in previously published studies that had found no causal link between the drug and birth defects, were ruled to be inadmissible because they had not been published or subjected to peer review. *Ibid.*

The United States Court of Appeals for the Ninth Circuit affirmed. 951 F.2d 1128 (1991). Citing *Frye v. United States,* 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923), the court stated that expert opinion based on a scientific technique is inadmissible unless the technique is "generally accepted" as reliable in the relevant scientific community. 951 F.2d, at 1129–1130. The court declared that expert opinion based on a methodology that diverges "significantly from the procedures accepted by recognized authorities in the field ... cannot be shown to be 'generally accepted as a reliable technique.' " *Id.,* at 1130, quoting *United States v. Solomon,* 753 F.2d 1522, 1526 (CA9 1985).

The court emphasized that other Courts of Appeals considering the risks of Bendectin had refused to admit reanalyses of epidemiological studies that had been neither published nor subjected to peer review. 951 F.2d, at 1130–1131. Those courts had found unpublished reanalyses "particularly problematic in light of the massive weight of the original published studies supporting [respondent's] position, all of which had undergone full scrutiny from the scientific community." *Id.,* at 1130. Contending that reanalysis is generally accepted by the scientific community only when it is subjected to verification and scrutiny by others in the field, the Court of Appeals rejected petitioners' reanalyses as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." *Id.,* at 1131. The *585 court concluded that petitioners' evidence provided an insufficient foundation to allow admission of expert testimony that Bendectin caused their injuries and, accordingly, that petitioners could not satisfy their burden of proving causation at trial.

We granted certiorari, 506 U.S. 914, 113 S.Ct. 320, 121 L.Ed.2d 240 (1992), in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony. Compare, *e.g., United States v. Shorter,* 257 U.S.App.D.C. 358, 363–364, 809 F.2d 54, 59–60 (applying the "general acceptance" standard), cert. denied, 484 U.S. 817, 108 S.Ct. 71, 98 L.Ed.2d 35 (1987), with *DeLuca v. Merrell Dow Pharmaceuticals, Inc.,* 911 F.2d 941, 955 (CA3 1990) (rejecting the "general acceptance" standard).

II

A

In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. See E. Green & C. Nesson, Problems, Cases, and Materials on Evidence 649 (1983). Although under increasing attack of late, the rule continues to be followed by a **2793 majority of courts, including the Ninth Circuit.[3]

The *Frye* test has its origin in a short and citation-free 1923 decision concerning the admissibility of evidence derived from a systolic blood pressure deception test, a crude precursor to the polygraph machine. In what has become a famous (perhaps infamous) passage, the then Court of Appeals for the District of Columbia described the device and its operation and declared:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages *586 is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the*

particular field in which it belongs." 54 App.D.C., at 47, 293 F., at 1014 (emphasis added).

Because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made," evidence of its results was ruled inadmissible. *Ibid.*

The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion.[4] ***587** Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence.[5] We agree.

We interpret the legislatively enacted Federal Rules of Evidence as we would any statute. *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 163, 109 S.Ct. 439, 446, 102 L.Ed.2d 445 (1988). Rule 402 provides the baseline:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, ****2794** by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

"Relevant evidence" is defined as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The Rule's basic standard of relevance thus is a liberal one.

Frye, of course, predated the Rules by half a century. In *United States v. Abel,* 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), we considered the pertinence of background common law in interpreting the Rules of Evidence. We noted that the Rules occupy the field, *id.,* at 49, 105 S.Ct., at 467, but, quoting Professor Cleary, the Reporter, ***588** explained that the common law nevertheless could serve as an aid to their application:

> " 'In principle, under the Federal Rules no common law of evidence remains. "All relevant evidence is admissible, except as otherwise provided...." In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.' " *Id.,* at 51–52, 105 S.Ct., at 469.

We found the common-law precept at issue in the *Abel* case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. *Id.,* at 50–51, 105 S.Ct., at 468–469. In *Bourjaily v. United States,* 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), on the other hand, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.

Here there is a specific Rule that speaks to the contested issue. Rule 702, governing expert testimony, provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Nothing in the text of this Rule establishes "general acceptance" as an absolute prerequisite to admissibility. Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a "general acceptance" standard. The drafting history makes no mention of *Frye,* and a rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Beech Aircraft Corp. v. Rainey,* 488 U.S., at 169, 109 S.Ct., at 450 (citing Rules 701 to 705). See also Weinstein, ***589** Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended, 138 F.R.D. 631 (1991) ("The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts"). Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention " 'general acceptance,' " the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.[6]

B

That the *Frye* test was displaced by the Rules of Evidence does not mean, ****2795** however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence.[7] Nor is the trial judge disabled from screening such

evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "*If scientific,* technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue" an expert "may testify *thereto*." (Emphasis added.) The subject of an expert's testimony must ***590** be "scientific ... knowledge."[8] The adjective " scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." Webster's Third New International Dictionary 1252 (1986). Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. See, *e.g.,* Brief for Nicolaas Bloembergen et al. as *Amici Curiae* 9 ("Indeed, scientists do not assert that they know what is immutably 'true'—they are committed to searching for new, temporary, theories to explain, as best they can, phenomena"); Brief for American Association for the Advancement of Science et al. as *Amici Curiae* 7–8 ("Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a *process* for proposing and refining theoretical explanations about the world that are subject to further testing and refinement" (emphasis in original)). But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation—*i.e.,* "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to " scientific knowledge" establishes a standard of evidentiary reliability.[9]

***591** Rule 702 further requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." This condition goes primarily to relevance. " Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." 3 Weinstein & Berger ¶ 702[02], p. 702–18. See also *United States v. Downing,* 753 F.2d 1224, 1242 (CA3 1985) ("An additional consideration ****2796** under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute"). The consideration has been aptly described by Judge Becker as one of "fit." *Ibid.* "Fit" is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes. See Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 258 (1986). The study of the phases of the moon, for example, may provide valid scientific "knowledge" about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's "helpfulness" ***592** standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

That these requirements are embodied in Rule 702 is not surprising. Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of firsthand knowledge—a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information,' " Advisory Committee's Notes on Fed.Rule Evid. 602, 28 U.S.C.App., p. 755 (citation omitted)—is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a),[10] whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.[11] This entails a preliminary assessment of whether the reasoning or methodology ***593** underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.

Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will

assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. See also C. Hempel, Philosophy of Natural Science 49 (1966) ****2797** ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted).

Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability, see S. Jasanoff, The Fifth Branch: Science Advisors as Policymakers 61–76 (1990), and in some instances well-grounded but innovative theories will not have been published, see Horrobin, The Philosophical Basis of Peer Review and the Suppression of Innovation, 263 JAMA 1438 (1990). Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. See J. Ziman, Reliable Knowledge: An Exploration ***594** of the Grounds for Belief in Science 130–133 (1978); Relman & Angell, How Good Is Peer Review?, 321 New Eng.J.Med. 827 (1989). The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, see, *e.g.*, *United States v. Smith*, 869 F.2d 348, 353–354 (CA7 1989) (surveying studies of the error rate of spectrographic voice identification technique), and the existence and maintenance of standards controlling the technique's operation, see *United States v. Williams*, 583 F.2d 1194, 1198 (CA2 1978) (noting professional organization's standard governing spectrographic analysis), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979).

Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." *United States v. Downing*, 753 F.2d, at 1238. See also 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42. Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," *Downing*, 753 F.2d, at 1238, may properly be viewed with skepticism.

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.[12] Its overarching subject is the scientific validity ***595** and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. Rule 703 provides that expert opinions based on otherwise inadmissible ****2798** hearsay are to be admitted only if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing. Finally, Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." Weinstein, 138 F.R.D., at 632.

III

We conclude by briefly addressing what appear to be two underlying concerns of the parties and *amici* in this case. Respondent expresses apprehension that abandonment of "general acceptance" as the exclusive requirement for admission will result in a "free-for-all" in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions. ***596** In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous

cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. See *Rock v. Arkansas,* 483 U.S. 44, 61, 107 S.Ct. 2704, 2714, 97 L.Ed.2d 37 (1987). Additionally, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a), and likewise to grant summary judgment, Fed.Rule Civ.Proc. 56. Cf., *e.g., Turpin v. Merrell Dow Pharmaceuticals, Inc.,* 959 F.2d 1349 (CA6) (holding that scientific evidence that provided foundation for expert testimony, viewed in the light most favorable to plaintiffs, was not sufficient to allow a jury to find it more probable than not that defendant caused plaintiff's injury), cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992); *Brock v. Merrell Dow Pharmaceuticals, Inc.,* 874 F.2d 307 (CA5 1989) (reversing judgment entered on jury verdict for plaintiffs because evidence regarding causation was insufficient), modified, 884 F.2d 166 (CA5 1989), cert. denied, 494 U.S. 1046, 110 S.Ct. 1511, 108 L.Ed.2d 646 (1990); Green 680–681. These conventional devices, rather than wholesale exclusion under an uncompromising "general acceptance" test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702.

Petitioners and, to a greater extent, their *amici* exhibit a different concern. They suggest that recognition of a screening role for the judge that allows for the exclusion of "invalid" evidence will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth. See, *e.g.,* Brief for Ronald Bayer et al. as *Amici Curiae.* It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest ***597** for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly. The scientific project is advanced by broad and wide-ranging consideration of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so, and that in itself is an advance. Conjectures that are probably wrong are of little use, however, in the project of reaching a quick, final, and binding legal judgment—often of great consequence—about a particular set of events in the past. We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic ****2799** insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.[13]

IV

To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, ***598** the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice STEVENS joins, concurring in part and dissenting in part.

The petition for certiorari in this case presents two questions: first, whether the rule of *Frye v. United States,* 54 App.D.C. 46, 293 F. 1013 (1923), remains good law after the enactment of the Federal Rules of Evidence; and second, if *Frye* remains valid, whether it requires expert scientific testimony to have been subjected to a peer review process in order to be admissible. The Court concludes, correctly in my view, that the *Frye* rule did not survive the enactment of the Federal Rules of Evidence, and I therefore join Parts I and II–A of its opinion. The second question presented in the petition for certiorari necessarily is mooted by this holding, but the Court nonetheless proceeds to construe Rules 702 and 703 very much in the abstract, and then offers some "general observations." *Ante,* at 2796.

"General observations" by this Court customarily carry great weight with lower federal courts, but the ones offered here suffer from the flaw common to most such observations—they are not applied to deciding whether particular testimony

was or was not admissible, and therefore they tend to be not only general, but vague and abstract. This is particularly unfortunate in a case such as this, where the ultimate legal question depends on an appreciation of one or more bodies of knowledge not judicially noticeable, and subject to different interpretations in the briefs of the parties and their *amici.* Twenty-two *amicus* briefs have been filed in the case, and indeed the Court's opinion contains no fewer than 37 citations to *amicus* briefs and other secondary sources.

***599** The various briefs filed in this case are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language—the sort of material we customarily interpret. Instead, they deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review—in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how Rule 703 should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

But even if it were desirable to make "general observations" not necessary to decide ****2800** the questions presented, I cannot subscribe to some of the observations made by the Court. In Part II–B, the Court concludes that reliability and relevancy are the touchstones of the admissibility of expert testimony. *Ante,* at 2794–95. Federal Rule of Evidence 402 provides, as the Court points out, that "[e]vidence which is not relevant is not admissible." But there is no similar reference in the Rule to "reliability." The Court constructs its argument by parsing the language "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, ... an expert ... may testify thereto...." Fed.Rule Evid. 702. It stresses that the subject of the expert's testimony must be "scientific ... knowledge," and points out that "scientific" "implies a grounding in the methods and procedures of science" and that the word "knowledge" "connotes more than subjective belief or unsupported speculation." *Ante,* at 2794–95. From this it concludes that "scientific knowledge" must be "derived by the scientific method." *Ante,* at 2795. Proposed testimony, we are told, must be supported by "appropriate validation." *Ante,* at 2795. Indeed, in footnote 9, the Court decides that "[i]n a case involving scientific evidence, evidentiaryreliability ***600** will be based upon *scientific validity.*" *Ante,* at 2795, n. 9 (emphasis inoriginal).

Questions arise simply from reading this part of the Court's opinion, and countless more questions will surely arise when hundreds of district judges try to apply its teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of "technical or other specialized knowledge"—the other types of expert knowledge to which Rule 702 applies—or are the "general observations" limited only to "scientific knowledge"? What is the difference between scientific knowledge and technical knowledge; does Rule 702 actually contemplate that the phrase "scientific, technical, or other specialized knowledge" be broken down into numerous subspecies of expertise, or did its authors simply pick general descriptive language covering the sort of expert testimony which courts have customarily received? The Court speaks of its confidence that federal judges can make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Ante,* at 2796. The Court then states that a "key question" to be answered in deciding whether something is "scientific knowledge" "will be whether it can be (and has been) tested." *Ante,* at 2796. Following this sentence are three quotations from treatises, which not only speak of empirical testing, but one of which states that the " 'criterion of the scientific status of a theory is its falsifiability, or refutability, or testability,' " *Ante,* at 2796–97.

I defer to no one in my confidence in federal judges; but I am at a loss to know what is meant when it is said that the scientific status of a theory depends on its "falsifiability," and I suspect some of them will be, too.

I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think ***601** it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role. I think the Court would be far better advised in this case to decide only the questions presented, and to leave the further development of this important area of the law to future cases.

All Citations

509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, 61 USLW 4805, 27 U.S.P.Q.2d 1200, 23 Envtl. L. Rep. 20,979, 37 Fed. R. Evid. Serv. 1, Prod.Liab.Rep. (CCH) P 13,494

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Doctor Lamm received his master's and doctor of medicine degrees from the University of Southern California. He has served as a consultant in birth-defect epidemiology for the National Center for Health Statistics and has published numerous articles on the magnitude of risk from exposure to various chemical and biological substances. App. 34–44.

2 For example, Shanna Helen Swan, who received a master's degree in biostatistics from Columbia University and a doctorate in statistics from the University of California at Berkeley, is chief of the section of the California Department of Health and Services that determines causes of birth defects and has served as a consultant to the World Health Organization, the Food and Drug Administration, and the National Institutes of Health. *Id.,* at 113–114, 131–132. Stuart A. Newman, who received his bachelor's degree in chemistry from Columbia University and his master's and doctorate in chemistry from the University of Chicago, is a professor at New York Medical College and has spent over a decade studying the effect of chemicals on limb development. *Id.,* at 54–56. The credentials of the others are similarly impressive. See *Id.,* at 61–66, 73–80, 148–153, 187–192, and Attachments 12, 20, 21, 26, 31, and 32 to Petitioners' Opposition to Summary Judgment in No. 84–2013–G(I) (SD Cal.).

3 For a catalog of the many cases on either side of this controversy, see P. Giannelli & E. Imwinkelried, Scientific Evidence § 1–5, pp. 10–14 (1986 and Supp.1991).

4 See, *e.g.,* Green, Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of *Agent Orange* and Bendectin Litigation, 86 Nw.U.L.Rev. 643 (1992) (hereinafter Green); Becker & Orenstein, The Federal Rules of Evidence After Sixteen Years—the Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 Geo.Wash.L.Rev. 857, 876–885 (1992); Hanson, James Alphonzo Frye is Sixty–Five Years Old; Should He Retire?," 16 West.St.U.L.Rev. 357 (1989); Black, A Unified Theory of Scientific Evidence, 56 Ford.L.Rev. 595 (1988); Imwinkelried, The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony, 67 N.C.L.Rev. 1 (1988); Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J. 235 (1986); Giannelli, The Admissibility of Novel Scientific Evidence: *Frye v. United States,* a Half–Century Later, 80 Colum.L.Rev. 1197 (1980); The Supreme Court, 1986 Term, 101 Harv.L.Rev. 7, 119, 125–127 (1987).

Indeed, the debates over *Frye* are such a well-established part of the academic landscape that a distinct term—"*Frye*–ologist"—has been advanced to describe those who take part. See Behringer, Introduction, Proposals for a Model Rule on the Admissibility of Scientific Evidence, 26 Jurimetrics J. 237, 239 (1986), quoting Lacey, Scientific Evidence, 24 Jurimetrics J. 254, 264 (1984).

5 Like the question of *Frye'* s merit, the dispute over its survival has divided courts and commentators. Compare, *e.g., United States v. Williams,* 583 F.2d 1194 (CA2 1978) (*Frye* is superseded by the Rules of Evidence), cert. denied, 439 U.S. 1117, 99 S.Ct. 1025, 59 L.Ed.2d 77 (1979) with *Christophersen v. Allied–Signal Corp.,* 939 F.2d 1106, 1111, 1115–1116 (CA5 1991) (en banc) (*Frye* and the Rules coexist), cert. denied, 503 U.S. 912, 112 S.Ct. 1280, 117 L.Ed.2d 506 (1992), 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[03], pp. 702–36 to 702–37 (1988) (hereinafter Weinstein & Berger) (*Frye* is dead), and M. Graham, Handbook of Federal Evidence § 703.2 (3d ed. 1991) (*Frye* lives). See generally P. Giannelli & E. Imwinkelried, Scientific Evidence § 1–5, at 28–29 (citing authorities).

6 Because we hold that *Frye* has been superseded and base the discussion that follows on the content of the congressionally enacted Federal Rules of Evidence, we do not address petitioners' argument that application of the *Frye* rule in this diversity case, as the application of a judge-made rule affecting substantive rights, would violate the doctrine of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

7 THE CHIEF JUSTICE "do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility," *post,* at 2800, but would neither say how it does so nor explain what that role entails. We believe the better course is to note the nature and source of the duty.

8 Rule 702 also applies to "technical, or other specialized knowledge." Our discussion is limited to the scientific context because that is the nature of the expertise offered here.

9 We note that scientists typically distinguish between "validity" (does the principle support what it purports to show?) and "reliability" (does application of the principle produce consistent results?). See Black, 56 Ford.L.Rev., at 599. Although "the difference between accuracy, validity, and reliability may be such that each is distinct from the other by no more than a hen's kick," Starrs, *Frye v. United States* Restructured and Revitalized: A Proposal to Amend Federal Evidence Rule 702, 26 Jurimetrics J. 249, 256 (1986), our reference here is to *evidentiary* reliability—that is, trustworthiness. Cf., *e.g.,* Advisory Committee's Notes on Fed.Rule Evid. 602, 28 U.S.C.App., p. 755 (" '[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information' " (citation omitted)); Advisory Committee's Notes on Art. VIII of Rules of Evidence, 28 U.S.C.App., p. 770 (hearsay exceptions will be recognized only "under circumstances supposed to furnish guarantees of trustworthiness"). In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity.*

10 Rule 104(a) provides:

"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [pertaining to conditional admissions]. In making its determination it is not bound by the rules of evidence except those with respect to privileges." These matters should be established by a preponderance of proof. See *Bourjaily v. United States,* 483 U.S. 171, 175–176, 107 S.Ct. 2775, 2778–2779, 97 L.Ed.2d 144 (1987).

11 Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well-established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.

12 A number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors. See, *e.g., Downing,* 753 F.2d, at 1238–1239 (on which our discussion draws in part); 3 Weinstein & Berger ¶ 702[03], pp. 702–41 to 702–42 (on which the *Downing* court in turn partially relied); McCormick, Scientific Evidence: Defining a New Approach to Admissibility, 67 Iowa L.Rev. 879, 911–912 (1982); and Symposium on Science and the Rules of Evidence, 99 F.R.D. 187, 231 (1983) (statement by Margaret Berger). To the extent that they focus on the reliability of evidence as ensured by the scientific validity of its underlying principles, all these versions may well have merit, although we express no opinion regarding any of their particular details.

13 This is not to say that judicial interpretation, as opposed to adjudicative factfinding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral.... In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B. Cardozo, The Nature of the Judicial Process 178, 179 (1921).

1943 CarswellOnt 219
Ontario Seventh Division Court of the County of Essex

Doyle Clinic Ltd. v. Newton

1943 CarswellOnt 219, [1943] O.W.N. 411

Doyle Clinic Limited v. Newton

Gordon Co. Ct. J.

Judgment: May 27, 1943

Counsel: *Don Brown*, for the plaintiff.
L.H. Swartz, for the defendant.

Subject: Public
Related Abridgment Classifications
Health law
III Provincial matters
III.3 Regulation of health professionals
III.3.f Physicians
III.3.f.i Relationship with patient
Health law
III Provincial matters
III.3 Regulation of health professionals
III.3.f Physicians
III.3.f.ii Right to practice
Statutes
II Interpretation
II.1 General principles
II.1.b Ambiguity
Headnote
Health Law --- Physicians and surgeons — Organization of profession — Right to practice — Unlawful practice — Corporations
Health Law --- Physicians and surgeons — Relationship with patient — Fees — Right to sue
Statutes --- Interpretation — Role of court — Language clear
Medicine and Surgery — Right to Recover Professional Fees — Registration — Incorporated Clinic — The Medical Act, R.S.O. 1937, c. 225, s. 50 — The Interpretation Act, R.S.O. 1937, c. 1, s. 32(ze).

An action for "the amount owing on account of professional and medical services rendered".

The plaintiff was an incorporated company, and the defendant pleaded s. 50 of The Medical Act, R.S.O. 1937, c. 225, which reads in part as follows:

> 50. No person shall be entitled to recover any charge in any court for any medical or surgical advice, or for attendance, or for the performance of any operation, or for any medicine which he may have prescribed or supplied, unless he produces to the court a certificate that he was registered under the Act at the time the services were rendered.

Gordon Co. Ct. J. **[after quoting s. 50, *supra*]:**

1 The Interpretation Act, R.S.O. 1937, c. 1, provides, in s. 32(*ze*) that the word "person" shall include any body corporate.

2 No evidence was offered at the trial, but the plaintiff produced a certificate from the assistant secretary of the Ontario Medical Association, to the effect that "Drs. W.C. Doyle and John Weinstock were duly qualified medical practitioners, licensed to practise in the Province of Ontario in the year 1939". The alleged services were rendered during the year 1939.

3 There is no evidence to show any connection between Dr. Doyle and Dr. Weinstock and Doyle Clinic Limited, but that fact does not affect my judgment. I am assuming that both doctors are shareholders in the plaintiff corporation and that either or both of them rendered the services in question.

4 In my opinion the plaintiff cannot succeed, because it has not shown it was registered under the Act when the alleged services were rendered. Impossibility of such registration may be apparent, but that does not assist the plaintiff.

5 The plaintiff relies on *Calgary Associate Clinic v. Johnston*, 25 Alta. L.R. 470, [1931] 2 W.W.R. 716, [1931] 4 D.L.R. 247, but I feel that that case is clearly distinguishable. In that case the statement of claim alleged that the plaintiff was a partnership consisting of seven named doctors, "all of whom are members in good standing of the College of Physicians and Surgeons of the Province of Alberta, carrying on business as physicians and surgeons in the city of Calgary." It further alleged that the claim was for an account due the plaintiff for professional services *rendered by one of the named doctors*, at the defendant's request.

6 In my opinion the Alberta case simply reaffirms the right of partners to sue in the firm name. The defence in this connection seems to have been that the individual partners should have been named as plaintiffs, probably with this addition: "carrying on business in partnership under the firm name of Calgary Associate Clinic". The point is that in the above case the doctor who rendered the services was in fact a plaintiff regardless of which style of cause was employed. But it is entirely different where the plaintiff is a body corporate, not a partnership.

7 In his judgment in the Alberta case, Harvey C.J.A. says:

> But I am of opinion that the section does not mean that only a registered doctor can be plaintiff in an action for medical services. If it did, no assignee and no personal representative of a deceased doctor, unless himself a doctor, could recover for services performed by the assignor or the deceased.

8 I agree that an assignee of a doctor's account cannot successfully sue thereon, unless, of course, the doctor be a party to the action. But, with great respect, I cannot agree that the section (the corresponding section in the Alberta statute, The Medical Profession Act, R.S.A. 1922, c. 209, s. 63, is very similar to our s. 50) would prevent the executor or administrator of a doctor's estate from recovering books debts of the deceased doctor, although he might be required to show that the doctor was in good standing, etc., when he rendered the services. The personal representative of a deceased person is not in the same class as an assignee; in law he is the deceased.

9 In the present case I feel that the doctor who rendered the services should have been a party to the action, or should have sued in his own name.

10 *Johnston v. Pepler* (1932), 41 O.W.N. 207, is not in point but I refer to it because it involved s. 50, and the Court held that it was not at liberty to disregard the plain and unambiguous words of the section. I, too, feel that way. The words of the section are decidedly clear; if it was not intended that it should affect a case like this, then I think it might well be amended.

11 Action dismissed with costs.

MANITOBA HYDRO v. DVORAK et al.

Manitoba Court of Appeal, Freedman C.J.M., Monnin and Matas JJ.A.

Heard — December 10, 1980.
Judgment — December 31, 1980.

A. J. Sato, for Manitoba Hydro.

T. G. Haque, as amicus curiae for Attorney General of Manitoba.

FREEDMAN C.J.M. (MATAS J.A. concurring):—I have read the judgment of my brother Monnin. I think there may be cases in which we will be called upon to consider whether the principle set forth by Shaw L.J. in *Food Controller v. Cork*, [1923] A.C. 647 (H.L.), should be applied. That principle declares that an ordinary commercial claim of an agent of the Crown does not attract the protection of the royal prerogative so as to give it priority over other commercial debts similarly arising.

But here we have an express provision of a statute, namely, s. 189(2)(*a*)(i) of the Bankruptcy Act, R.S.C. 1970, c. B-3, in the following words:

"(3) Notwithstanding subsection (1), this Part does not apply to the following classes of debts:

"(*a*) a debt due, owing or payable

"(i) to Her Majesty in right of Canada or a province".

The learned trial judge, P. D. Ferg Co. Ct. J., directed that the debt due to Manitoba Hydro be included in the consolidation order under Pt. X of the Bankruptcy Act. Part X deals with orderly payment of debts, and s. 189 is part thereof. Since Manitoba Hydro is an agent of Her Majesty in right of Manitoba, the debt due to it could not be so included. The statute does not leave room for examining whether the debt arose from a commercial transaction or otherwise. The exclusion under s. 189 is total.

I would allow the appeal and dispose of the matter as Monnin J.A. has directed.

MONNIN J.A.:—Pursuant to s. 191(2) of the Bankruptcy Act, R.S.C. 1970, c. B-3, the deputy clerk of the County Court of Winnipeg issued a notice to creditors, to the effect that Mr. and Mrs. Dvorak had applied for a consolidation order under Pt. X of the Act providing for orderly payment of debts.

Manitoba Hydro, a creditor to the extent of $174.40, objected to this consolidation and so informed the court. Its objection was based upon s. 189(2)(*a*)(i), which is to the effect that Pt. X does not apply to a debt due, owing or payable to Her Majesty in right of Manitoba. The clerk referred the matter to the court. P.D. Ferg Co. Ct. J. rejected Hydro's argument and ordered that the debt be included in the consolidation order.

The question is one of priority and whether a debt due to Hydro for the purpose of consumption of electricity is a debt due, owing or payable to Her Majesty in right of Manitoba. The point is important and not free from doubt, as there appear to be two judicial opinions on the matter. It has raised such interest that the Attorney General of Manitoba applied for and obtained the status of amicus curiae in order to argue the opposite of Hydro. Hydro alleges that it is, for all purposes, an agent of Her Majesty. The Attorney General of Manitoba replies not so. The wording "a debt due, owing or payable to Her Majesty" is not wide enough to cover commercial debts and sale of hydro-electric power.

There are numerous decisions on this subject, with two patterns clearly established. There is even one case, namely, *Kawneer Co. v. Bank of Can.* (1975), 9 O.R. (2d) 468, 60 D.L.R. (3d) 636, which holds that the Bank of Canada is not the servant or agent of the Crown, whilst other courts have held that the Industrial Development Bank, another creature of Parliament doing similar business, is an agent of the Crown. I have difficulty, in all these cases, to find a clear rationale for these various findings.

Under Pt. V of the Bankruptcy Act, s. 107 sets out the priorities of the scheme of distribution in the event of bankruptcy and, subject to the rights of secured creditors, it states in s. 107(1):

"(*j*) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary."

In that section, it speaks of the "claims of the Crown", whilst in s. 189(2)(*a*) it speaks of "a debt due, owing or payable. . . to Her Majesty in right of . . . a province". The language is obviously different, but basically it means the same thing, namely, that moneys owing to the federal or provincial Crown have, under certain circumstances, a priority; whether this priority arises by prerogative of the Crown or by statute is of little effect.

I hasten to state that in Manitoba we do not have a Government Companies Operation Act, R.S.C. 1970, c. G-7, such as Parliament has passed, or a Crown Agency Act, R.S.O. 1970, c. 100, such as the Ontario legislature has passed. We must therefore look only at the Act incorporating Manitoba Hydro and the established jurisprudence on the subject.

Section 4(3) of the Manitoba Hydro Act, C.C.S.M., c. H190, reads as follows:

"4(3) The corporation is an agent of Her Majesty; but, subject to subsection (5), may sue and be sued, contract and be contracted with, in and by its corporate name as in the case of any other corporation."

Subsection (5) has no bearing on this issue.

The wording of s. 4(3) is clear. Hydro is an agent of Her Majesty, although it does not specify that it is, so for all purposes whatsoever I do not see any limitation in the wording.

Let us now look at the authorities referred to us and others which have come to my attention. In *Re Spartan Air Services Ltd.*, 1 C.B.R. (N.S.) 33, [1960] O.W.N. 431, affirmed 1 C.B.R. (N.S.) 149, [1960] O.W.N. 471, F.G. Cook, Registrar, and subsequently Smily J., held that Eldorado Aviation Limited and Northern Transportation Company Limited, two companies incorporated by the federal Crown, in the ordinary course of business, under the Government Companies Operation Act, R.S.C. 1952, c. 133, by letters patent and not by special legislation, were agents of the Crown and, as such, moneys owing to them were owed to their

principal, namely, the Crown, and that both companies were therefore entitled to the priority established under s. 95(1)(*j*), now s. 107(1)(*j*), of the Act. Smily J. did not accept the argument that the claims of these two companies related solely to commercial transactions taking place between them and the debtor Spartan Air Services Limited.

In *Re Sure Brake & Muffler Ltd.* (1972), 17 C.B.R. (N.S.) 103 (Ont.), Houlden J., following the *Spartan* case, held that a claim of the Manitoba Telephone System was a claim of the Crown in right of Manitoba and entitled to preference. Section 52 of the Manitoba Telephone Act, R.S.M. 1970, c. T40 (also C.C.S.M., c. T40), simply stated that:

"52 The Commission is an agent of Her Majesty in right of the province."

He reiterated what Smily J. had said in *Spartan*, that moneys owing as a result of a transaction with an agent may be claimed by the principal, and that since the principal is the Crown, the Manitoba Telephone System was entitled to the priority given to the Crown's claim.

A similar result followed in *Re McGruer & Clark Ltd.* (1976), 13 O.R. (2d) 385, 22 C.B.R. (N.S.) 164, 71 D.L.R. (3d) 175 (Ont. H.C.); *Re Titeley; Alta. Opportunity Co. v. Cuthbertson* (1977), 24 C.B.R. (N.S.) 224, 2 Alta. L.R. (2d) 369, affirmed 27 C.B.R. (N.S.) 174, 5 Alta. L.R. (2d) 193, 11 A.R. 469 (T.D.). The registrar stated the issue thus at (C.B.R.) p. 226:

"The consideration, in my opinion, becomes whether or not the claim of the Alberta Opportunity Company is of a commercial nature and for that reason not subject to priority over the other creditors in the estate."

On appeal, Cavanagh J. held that the right to priority sprung from s. 107(1)(*j*) of the Bankruptcy Act, which does not differentiate between claims that are of a commercial nature and claims of any other nature.

This court in *Radych v. Man. Power Commn.*, 50 Man. R. 54, [1942] 1 W.W.R. 89, [1942] 1 D.L.R. 445, affirmed 50 Man. R. at 60, [1942] 1 W.W.R. 866, [1942] 2 D.L.R. 776, affirming a decision of McPherson C.J.K.B., wherein the commission, relying on the prerogative of the Crown, refused to submit to examination for discovery and took the position that it was the Crown. On the

Manitoba Power Commission Act, R.S.M. 1940, c. 166, as it then stood, McPherson C.J.K.B. held that the commission was not the Crown. In the 1940 text, there is no mention whatsoever that the commission acted as agent of the Crown; therefore, the *Radych* case has no application to the present issue, as I must examine the legislation as it now stands.

The views expressed by McPherson C.J.K.B. were followed by Trueman J.A. in a dissenting judgment in *Oatway v. Can. Wheat Bd.*, 52 Man. R. 283, [1944] 3 W.W.R. 337 at 356, [1944] 4 D.L.R. 381, affirmed without disposing of that issue at [1945] S.C.R. 204, [1945] 2 D.L.R. 145.

A different view was taken by the Saskatchewan Court of Appeal in *Re Sask. Govt. Ins. Office and Saskatoon*, [1947] 2 W.W.R. 1028, [1948] 2 D.L.R. 30, wherein the court unanimously held that the Saskatchewan Government Insurance Office, functioning through a manager, created as a corporation sole and subject to the control of the Crown, either exercised through the Lieutenant-Governor in Council or by the minister responsible, was an agent of the Crown and not assessable for business tax purposes. In a situation very similar, with nearly identical powers, the Manitoba Court of Appeal held on the wording of the Act, as it then stood, that the Manitoba Power Commission was not an agent of the Crown whilst the Saskatchewan Court of Appeal held the opposite view with respect to the Saskatchewan Government Insurance Office. These two decisions and others of similar nature cannot be reconciled and no principle can be readily obtained from a reading of them.

The Judicial Committee of the Privy Council in *St. Catherines v. H.E.P.C.*, 61 O.L.R. 465, affirmed 62 O.L.R. 301, which was affirmed [1930] 1 D.L.R. 409, held that the Ontario Power Commission was a statutory corporation created by the legislature of Ontario with limited powers and that it could not be regarded as a government department, so that an agreement with the commission can be treated as an agreement with the Crown. This case also requires a careful examination of the wording of the Hydro-Electric Act, 1924 (Ont.), c. 26. Again, though binding, this decision does not give much light on the subject because the Manitoba legislation is differently worded.

The other view, namely, that the Crown's prerogative cannot be claimed in ordinary commercial transactions, has found favour

in the following decisions: *R. v. Workmen's Comp. Bd. and Edmonton* (1963), 39 W.W.R. 291, 36 D.L.R. (2d) 166, varied 42 W.W.R. 226, 40 D.L.R. (2d) 243 (Alta. C.A.); *Alta. Govt. Telephones v. Selk*, [1974] 4 W.W.R. 205 (Alta.).

The basis of these decisions is a dicta of Shaw L.J. in *Food Controller v. Cork*, [1923] A.C. 647 (H.L.), which reads as follows [p. 667]:

"My opinion is now delivered with the most complete reservation of the point whether facts of such a nature could ever permit of the debt which has arisen being treated as a Crown debt within the scope of the royal prerogative.

"How is this a Crown debt? It springs out of no power vested in the Crown by way of the imposition of a duty or a tax. It is not in the ordinary enumeration of debts incurred for the service of the country. It is an instance simply of a debt arising under ordinary transactions of principal and agent. A Government Department, in the course of realizing Government property, appointed an agent to conduct a transaction. That agent defaulted to the extent of nearly £10,000 and then became bankrupt. The debt arises purely in commercio.

"It is unnecessary in this case to commit oneself to the proposition that when Departments of Government enter into the commercial or industrial sphere they do so with such an enormous leverage against all competitors or subjects of the Crown.

"As at present advised, I can imagine nothing more damaging to the royal prerogative. As time proceeds, the Government does no doubt increasingly enter into the commercial or industrial sphere; but if the argument suggested be sound, it would further appear as a consequence that as spheres of Government action widen, the prerogative of the Crown grows larger and larger and the escape from obligations or the use of preference over the rights of the ordinary citizens would in a greater and greater measure extend. These questions are enormously important; they will have, unless Parliament itself interposes to clarify the situation, to be decided some day."

In the *Food Controller* case, the insolvent company was employed by the controller acting under some war emergency measures during World War I. The now insolvent company agreed to sell on commission and to distribute large quantities of frozen rabbits which the board of trade, to meet threatening shortages of

food, had purchased in Australia and had imported into the United Kingdom. The bankrupt company, acting on behalf of the food controller, sold and delivered these rabbits to the purchasers and collected the purchase moneys, which it was bound to pay over, less its commission, to the controller. When the company went into liquidation it owed a large sum of money to the controller which it ought to have paid regularly from the sale price of the rabbits. This, therefore, was the type of debt for which the Crown then claimed priority by virtue of the royal prerogative. The insolvent company, it is obvious, was never an agent of the Crown as, at best, it was transacting business with the controller, a creation of the United Kingdom Parliament. It is on that factual underpinning that the Privy Council held that this debt was not one for which the Crown could claim priority. I find very little resemblance between that situation and the situation of Hydro. The dicta of Shaw L.J. is very appealing no doubt, and it provided the basis for Buchanan C.J.D.C. in *R. v. Workmen's Comp. Bd. and Edmonton,* supra, to hold that the debt owing to the Provincial Treasurer of Alberta was a debt arising out of an ordinary commercial contract entered into by a government department in the course of carrying on business.

Smith C.J.A. in *R. v. Workmen's Comp. Bd. and Edmonton* stated, at (W.W.R.) pp. 227-28, as follows:

"I am in agreement with the learned trial judge and for the reasons stated by him, that Her Majesty the Queen in the right of the province of Alberta, represented by the provincial treasurer, is not entitled to succeed by virtue of the royal prerogative.

"Upon the authority of the decisions referred to by the trial judge and *Fox v. Nfld.*, [1898] A.C. 667, 67 L.J.P.C. 77; *Metro. Meat Indust. Bd. v. Sheedy,* [1927] A.C. 899, 97 L.J.P.C. 1; and *St. Catherines v. H.E.P.C.* [supra], I agree with his conclusion that the nature, powers and administrative procedures of the workmen's compensation board as established by its incorporating Act lead to the conclusion that it cannot be described as a servant or agent of the crown and therefore has no priority by virtue of the royal prerogative."

Thereafter Smith C.J.A. concluded that none of the three parties therein involved had priority over any of the others and held that all three parties shared the funds pro rata.

Crossley D.C.J., relying on the aforesaid decision of the Alberta Court of Appeal, also ruled against Alberta Government

Telephones in *Selk,* supra. He quoted the pertaining provincial legislation, which was then as follows:

"39.(1) The commission is for all purposes of this Act an agent of the Crown in right of the Province and its powers under this Act may be exercised only as an agent of the Crown.

"(2) An action, suit or other legal proceeding in respect of any right or obligation acquired or incurred by the commission on behalf of the Crown in right of the Province, whether in its name or in the name of the Crown, may be brought or taken by or against the commission, in the name of the commission, in any court that would have jurisdiction if the commission were not an agent of the Crown."

He concluded from that that the lien was to the effect that the telephone commission was an agent of the Crown in right of the province, but since the section did not specifically state that the commission has no prerogative whatsoever, that it was necessary for him to look at the existing authorities on the subject. He quoted large portions of *R. v. Workmen's Comp. Bd. and Edmonton,* supra, and *Food Controller v. Cork,* supra, and concluded using the opening phrase of Shaw L.J., "now is this a Crown debt", and held that the claim of the telephone company was not a debt of the Crown, but a claim of a government agency arising from an ordinary mercantile transaction. He therefore ruled that the telephone company had no priority.

In *Westeel-Rosco Ltd. v. Bd. of Governors of South Sask. Hospital Centre,* [1977] 2 S.C.R. 238, [1976] 5 W.W.R. 688, 69 D.L.R. (3d) 334, 11 N.R. 514, Ritchie J., speaking for the court, held that the hospital board was not an agent of the Crown, since, in the Act incorporating the board, nothing stated that it was an agent of the Crown. Under such circumstances, Ritchie J. continued that whether or not a particular body was an agent of the Crown depends upon the nature and control which the Crown exercises over it. I accept that principle, but it cannot be applied here since the Manitoba legislature has spelled out that Hydro is an agent of Her Majesty. I do not need to go behind such precise language to find the nature of the body created and the control which the Crown exercises over it.

Under Pt. X of the Bankruptcy Act, it is specifically stated that the part does not apply to certain classes of debts, namely, "a debt due, owing or payable . . . to Her Majesty in right of . . . a

province". Section 4(3) of the Manitoba Hydro Act specifically states that the corporation is an agent of Her Majesty. I take that to mean that for all purposes whatsoever, the Crown is an agent of Her Majesty and there is no limitation upon this agency. Therefore, reading these two sections, I can only conclude that Hydro, being an agent of Her Majesty in right of Manitoba, is entitled to the exemption granted to it by s. 189(2)(*a*)(i), namely, that Pt. X does not apply to Hydro since it is an agent of Her Majesty.

To do otherwise would be to import into the plain language of these sections the notion that if the transaction is merely a commercial one, then it is unfair that the Crown would have a priority over other creditors who also had commercial transactions with the debtors. The rhetorical question "how is this a Crown debt" offers to judges the possibility of many solutions. Attractive as that proposition may be, it cannot be accepted as laying a foundation for a new principle that ordinary commerce and debts due to the Crown are not to benefit from the exemption provided to whoever carries the status of agent of the Crown.

The language of the section provides no leeway. Parliament, in its wisdom, and if it is so minded, can decide that moneys owing to the Crown in commercial transactions should not attract the priority normally reserved to moneys which are the property of the public, but Parliament will have to legislate in that manner. It has not done so. In a case such as this I must apply the test of strict interpretation of the language.

I therefore conclude that Manitoba Hydro is an agent of Her Majesty for all purposes whatsoever including that of selling hydro-electric power. As a result, it is entitled to the benefit of s. 189(2)(*a*)(i) of the Bankruptcy Act and the debt of $174.40 owing to it by Mr. and Mrs. Dvorak is not to be included in the consolidation order.

The appeal is allowed. Since both counsel are representatives of the Crown, this is not a case for costs.

Appeal allowed.

Robert Stewart Pierre Marcotte *Appellant*;

and

The Deputy Attorney General for Canada

and

The Warden of Joyceville Federal Institution *Respondents.*

1974: November 13; 1974: November 27.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Statutes—Interpretation—Ambiguity—Legislative history—Forfeiture of remission on revocation of parole—Penitentiary Act, 1960-61 (Can.), ss. 22, 25—Parole Act, 1958 (Can), ss. 2, 16, 18.

The appellant was serving sentences totalling 15 years imposed on February 28, 1962. He was released on parole but the parole was suspended 45 days later and later revoked. There were 582 days of statutory remission to his credit at the time of his release but upon revocation this accumulated statutory remission was taken by the authorities to have been forfeited. An application for *habeas corpus* with *certiorari* in aid was granted but later set aside by the Court of Appeal.

Held (Martland, Judson, Ritchie and de Grandpré JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Spence, Dickson and Beetz JJ.: Whether a paroled inmate whose parole is revoked thereby loses his entitlement to statutory remission standing to his credit at the time of his release on parole depends on the proper construction of the *Penitentiary Act*, as of the date of parole revocation. Section 22 of the Act contains an entire code governing grant and forfeiture of statutory remission. The credit of statutory remission is not a deferred credit but a real and immediate entitlement. Subsections (3) and (4) of s. 22 alone provide for forfeiture of such remission, but then only for conviction in a disciplinary court for a disciplinary offence or conviction in a criminal court for escape or attempted escape. Even in these cases the extent of the forfeiture is subject to certain limitations and controls. Thus a recommitted parolee is required to serve the term that remained unexpired at the time of parole but is

Robert Stewart Pierre Marcotte *Appelant*;

c.

Le sous-procureur général du Canada

et

Le Directeur de l'Institution fédérale de Joyceville *Intimés.*

1974: le 13 novembre; 1974: le 27 novembre.

Présents: Le juge en chef Laskin et les juges Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz et de Grandpré.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Lois—Interprétation—Ambiguïté—Historique de la législation—Annulation de réduction de peine par révocation de libération conditionnelle—Loi sur les pénitenciers, 1960-61 (Can.), art. 22, 25—Loi sur la libération conditionnelle de détenus, 1958 (Can.), art. 2, 16, 18.

L'appelant purgeait une peine cumulative de 15 ans qui lui avait été infligée le 28 février 1962. Il a été mis en liberté conditionnelle mais celle-ci a été suspendue 45 jours plus tard et ensuite révoquée. Il y avait 582 jours de réduction statutaire de peine inscrits à son crédit au moment de sa mise en liberté, mais lorsque sa libération conditionnelle a été révoquée, cette réduction statutaire accumulée a été considérée par les autorités comme ayant été annulée. Une demande d'*habeas corpus* accompagnée d'un *certiorari* a été accordée, mais par la suite la Cour d'appel l'a écartée.

Arrêt (les juges Martland, Judson, Ritchie et de Grandpré étant dissidents): le pourvoi doit être accueilli.

Le juge en chef Laskin et *les* juges Spence, Dickson et Beetz: la solution du litige, à savoir si un libéré conditionnel dont la libération a été révoquée a ainsi perdu son droit à la réduction statutaire de peine inscrite à son crédit au moment de sa mise en liberté conditionnelle, dépend de la juste interprétation de la *Loi sur les pénitenciers* telle qu'elle existait à l'époque de la révocation de la libération conditionnelle. L'article 22 de la Loi constitue un code complet régissant l'octroi et le retrait de la réduction statutaire. Le crédit de réduction statutaire n'est pas un crédit différé mais un droit véritable et immédiat. Seuls les par. (3) et (4) de l'art. 22 prévoient le retrait d'une telle réduction mais uniquement dans le cas de déclaration de culpabilité prononcée par un tribunal disciplinaire en raison d'une infraction à la discipline ou de déclaration de culpabilité prononcée par un tribunal criminel en raison d'une infraction relative à l'éva-

entitled to the statutory remission standing to his credit unless forfeited in whole or in part pursuant to s. 22(3) or (4) of the *Penitentiary Act*. Section 25 of the *Penitentiary Act* does not apply to s. 16(1) of the *Parole Act*. Its purpose is only to define the term of imprisonment while the parolee is at large. The legislative history supports this conclusion. There was a provision for forfeiture of remission which was not carried forward when the *Ticket of Leave Act* was replaced by the *Parole Act*.

Per Pigeon J.: Under the law in force when appellant's parole was revoked the revocation did not involve forfeiture of statutory remission standing to his credit.

Per Martland, Judson, Ritchie and de Grandpré JJ., *dissenting*: For the reasons given by Martin J.A. in the Court of Appeal, with which Gale C.J.O. agreed, the appeal should be dismissed.

[*Re Morin* (1968), 66 W.W.R. 566; *R. v. Howden* [1974] 2 W.W.R. 461; *Ex parte Hilson* (1973), 12 C.C.C. (2d) 343; *Re Abbott* (1970), 1 C.C.C. (2d) 147; *Ex parte Kolot* (1973), 13 C.C.C. (2d) 417; *Ex parte Rae* (1973), 14 C.C.C. (2d) 5, referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario[1] allowing an appeal pursuant to s. 719 of the *Criminal Code* from a judgment of Henderson J.[2] releasing the appellant on a *habeas corpus* application. Appeal allowed, Martland, Judson, Ritchie and de Grandpré JJ. dissenting.

R. R. Price, and *A. D. Gold*, for the appellant.

A. C. Pennington, and *P. Evraine*, for the respondents.

[1] (1973), 13 C.C.C. (2d) 114.
[2] (1973), 10 C.C.C. (2d) 441.

sion ou à la tentative d'évasion. Même dans ces cas, le retrait demeure sujet à certaines réserves et à certains contrôles quant à sa portée. Un détenu dont la libération conditionnelle octroyée a été révoquée doit donc purger la partie de sa peine qui n'était pas encore expirée au moment de l'octroi de sa libération mais il a droit à la réduction statutaire de peine inscrite à son crédit au moment de sa réception à un pénitencier, à moins qu'il n'y ait eu déchéance en tout ou en partie conformément aux par. (3) et (4) de l'art. 22 de la *Loi sur les pénitenciers*. L'article 25 de cette même loi ne s'applique pas au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*. L'article 25 traite seulement des fins de la loi relative à la libération conditionnelle alors que le libéré conditionnel est en liberté. L'historique de la législation appuie la conclusion ci-dessus. Lorsque la loi antérieure a été remplacée par la loi actuelle sur la libération conditionnelle de détenus, on n'a pas reproduit une disposition qui prévoyait l'annulation de toute remise de peine antérieurement gagnée.

Le juge Pigeon: Suivant le droit en vigueur lorsque la libération conditionnelle de l'appelant a été révoquée, la révocation n'a pas entraîné la déchéance de la réduction statutaire de peine inscrite à son crédit.

Les juges Martland, Judson, Ritchie et de Grandpré, *dissidents*: Pour les motifs énoncés par le juge d'appel Martin en Cour d'appel, motifs auxquels le juge en chef de l'Ontario, le juge Gale, a souscrit, le pourvoi devrait être rejeté.

[Arrêts mentionnés: *Re Morin* (1968), 66 W.W.R. 566; *R. v. Howden*, [1974] 2 W.W.R. 461; *Ex parte Hilson* (1973), 12 C.C.C. (2d) 343; *Re Abbott* (1970), 1 C.C.C. (2d) 147; *Ex parte Kolot* (1973), 13 C.C.C. (2d) 417; *Ex parte Rae* (1973), 14 C.C.C. (2d) 5.]

POURVOI interjeté à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1] qui a accueilli un appel interjeté en conformité des dispositions de l'art. 719 du *Code criminel* à l'encontre d'un jugement du juge Henderson[2] libérant l'appelant à la suite de sa demande d'*habeas corpus*. Pourvoi accueilli, les juges Martland, Judson, Ritchie et de Grandpré étant dissidents.

R. R. Price et *A. D. Gold*, pour l'appelant.

A. C. Pennington et *P. Evraine*, pour les intimés.

[1] (1973), 13 C.C.C. (2d) 114.
[2] (1973), 10 C.C.C. (2d) 441.

The judgment of The Chief Justice and Spence, Dickson and Beetz JJ. was delivered by

DICKSON J.—In my view this appeal should succeed. The issue is whether a paroled inmate whose parole was revoked on August 29, 1968, thereby lost his entitlement to statutory remission standing to his credit at the time of his release on parole. The resolution of the issue depends on the proper construction, as of that date (the legislation having since been amended), of s. 22(1), (3), (4), s. 24 and s. 25 of the *Penitentiary Act*, 1960-61 (Can.), c. 53, reading:

22. (1) Every person who is sentenced or committed to penitentiary for a fixed term shall, upon being received into a penitentiary, be credited with statutory remission amounting to one-quarter of the period for which he has been sentenced or committed as time off subject to good conduct.

. . .

(3) Every inmate who, having been credited with remission pursuant to subsection (1) or (2), is convicted in disciplinary court of any disciplinary offence is liable to forfeit, in whole or in part, the statutory remission that remains to his credit, but no such forfeiture of more than thirty days shall be valid without the concurrence of the Commissioner, nor more than ninety days without the concurrence of the Minister.

(4) Every inmate who is convicted by a criminal court of the offence of escape or attempt to escape forthwith forfeits three-quarters of the statutory remission standing to his credit at the time that offence was committed.

24. Every inmate may, in accordance with the regulations, be credited with three days' remission of his sentence in respect of each calendar month during which he has applied himself industriously to his work, and any remission so earned is not subject to forfeiture for any reason.

25. Where, under the *Parole Act*, authority is granted to an inmate to be at large during his term of imprisonment, the term of imprisonment, for all purposes of that Act, includes any period of statutory remission standing to his credit when he is released but does not include any period of earned remission standing to his credit at that time.

Le jugement du Juge en chef et des juges Spence, Dickson et Beetz a été rendu par

LE JUGE DICKSON—A mon avis, le présent appel devrait être accueilli favorablement. La question en litige est de savoir si un libéré conditionnel dont la libération a été révoquée le 29 août 1968, a ainsi perdu son droit à la réduction statutaire de peine inscrite à son crédit au moment de sa mise en liberté conditionnelle. La solution du litige dépend de la juste interprétation des par. (1), (3) et (4) de l'art. 22, de l'art. 24 et de l'art. 25 de la *Loi sur les pénitenciers*, 1960-61, (Can.) c. 53, tels qu'ils existaient alors (la loi ayant été depuis modifiée),et qui se lisent comme suit:

22. (1) Quiconque est condamné ou envoyé au pénitencier pour une période déterminée doit, dès sa réception à un pénitencier, bénéficier d'une réduction statutaire de peine équivalant au quart de la période pour laquelle il a été condamné ou envoyé au pénitencier, à titre de remise de peine sous réserve de bonne conduite.

. . .

(3) Chaque détenu qui, ayant bénéficié d'une réduction de peine conformément au paragraphe (1) ou (2), est déclaré coupable devant un tribunal disciplinaire d'une infraction à la discipline encourt la déchéance, en tout ou en partie, de son droit à la réduction statutaire de peine inscrite à son crédit, mais une telle déchéance ne peut être valide à l'égard de plus de trente jours sans l'assentiment du commissaire, ni à l'égard de plus de quatre-vingt-dix jours sans l'assentiment du Ministre.

(4) Chaque détenu déclaré coupable par un tribunal criminel de l'infraction d'évasion ou de tentative d'évasion est immédiatement déchu de son droit aux trois quarts de la réduction statutaire de peine, inscrite à son crédit au moment où l'infraction a été commise.

24. Chaque détenu peut, en conformité avec les règlements, bénéficier d'une réduction de peine de trois jours pour chaque mois civil durant lequel il s'est adonné assidûment à son travail et toute semblable réduction de peine ainsi méritée n'est pas susceptible d'annulation pour quelque motif que ce soit.

25. Lorsque, en vertu de la *Loi sur les libérations conditionnelles*, il est accordé à un détenu l'autorisation d'être en liberté pendant la période de son emprisonnement, la durée de l'emprisonnement comprend, à toutes les fins de cette loi, les périodes de réduction statutaire de peine inscrites à son crédit lorsqu'il est mis en liberté mais ne comprend pas une période quelconque de réduction de peine méritée alors inscrite à son crédit.

and of s. 16(1) of the *Parole Act*, 1958 (Can.), c. 38, reading:

16. (1) Where the parole granted to an inmate has been revoked, he shall be recommitted to the place of confinement to which he was originally committed to serve the sentence in respect of which he was granted parole, to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted.

This Court has had the benefit, if I may say so, of two excellent judgments delivered in the Court of Appeal for Ontario, one by Mr. Justice Martin with whom Chief Justice Gale agreed, the other by Mr. Justice Estey. Mr. Justice Martin concluded that the appellant, upon revocation of his parole, was not entitled to the benefit of statutory remission standing to his credit at the time of his release on parole. Mr. Justice Estey, for reasons which I find persuasive, reached the opposite conclusion.

Section 22 of the *Penitentiary Act* contains, in my opinion, an entire code governing the grant and the forfeiture of statutory remission. Every person sentenced to penitentiary for a fixed term is entitled as of right to be credited with statutory remission, "upon being received into a penitentiary". With great respect for those holding the contrary view, I cannot find in the language of s. 22 any substantial support for the contention that the statutory remission assured by s. 22(1) is a deferred credit which does not accrue to the inmate until such time as statutory remission, earned remission and time served equal the length of the sentence. It seems to me from s. 22(3) and (4) that the credit of statutory remission upon entering penitentiary is a real and immediate entitlement and not an elusive expectation, for one cannot forfeit what one does not have. It is true that the time off for which s. 22(1) provides is subject to good conduct but the conduct giving rise to forfeiture of remission credited, indeed the only conduct which the *Penitentiary Act* recognizes expressly as giving rise to forfeiture, is that spelled out in s. 22(3), conviction in a disciplinary court for a disciplinary offence, and in s. 22(4), escape or attempted escape. Parenthetically it may be observed that no forfeiture under s. 22(3) of more

ainsi que du par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*, 1958 (Can.) c. 38, et qui se lit comme suit:

16. (1) Lorsque la libération conditionnelle octroyée à un détenu a été révoquée, celui-ci doit être envoyé de nouveau au lieu d'incarcération où il a été originairement condamné à purger la sentence à l'égard de laquelle il s'est vu octroyer la libération conditionnelle, afin qu'il y purge la partie de sa période originaire d'emprisonnement qui n'était pas encore expirée au moment de l'octroi de cette libération.

Cette Cour a pu profiter, si je puis m'exprimer ainsi, de deux excellents jugements rendus en Cour d'appel de l'Ontario, l'un par M. le juge Martin, auquel le juge en chef Gale a souscrit, l'autre par M. le juge Estey. M. le juge Martin a conclu que l'appelant, lorsque sa libération conditionnelle a été révoquée, n'avait pas le droit de bénéficier de la réduction statutaire inscrite à son crédit au moment de sa mise en liberté conditionnelle. M. le juge Estey, se fondant sur des motifs que je trouve convaincants, en est arrivé à la conclusion opposée.

A mon avis, l'art. 22 de la *Loi sur les pénitenciers* constitue un code complet régissant l'octroi et le retrait de la réduction statutaire. Quiconque est condamné au pénitencier pour une période déterminée a le droit de bénéficier d'une réduction statutaire, «dès sa réception à un pénitencier». Avec le plus grand respect pour ceux qui soutiennent le point de vue opposé, je ne puis trouver dans le texte de l'art. 22 aucun fondement réel à la prétention que la réduction statutaire garantie par le par. (1) de l'art. 22 est un crédit différé qui ne peut profiter au détenu avant que la période de réduction statutaire, la période de réduction de peine méritée et la période de la sentence purgée, n'équivalent à la durée de la sentence. Il me semble qu'il découle des par. (3) et (4) de l'art. 22 que le crédit de réduction statutaire, dès l'admission au pénitencier, est un droit véritable et immédiat et non une probabilité, car on ne peut retirer à quelqu'un ce qu'il n'a pas. Il est vrai que la réduction de peine prévue par le par. (1) de l'art. 22 est subordonnée à la bonne conduite, mais la conduite qui peut entraîner le retrait de la réduction de peine créditée, la seule conduite que la *Loi sur les pénitenciers* reconnaît de façon expresse comme pouvant entraîner la déchéance, est celle énoncée au par. (3) de l'art. 22, soit être déclaré

than thirty days is valid without the concurrence of the Commissioner of Penitentiaries, nor more than ninety days without the concurrence of the Minister of Justice, and that an escape or attempt to escape results in forfeiture of three-quarters of the statutory remission standing to the credit of the inmate; yet if the contentions of the respondent are correct, a person whose parole has been revoked loses the entire statutory remission to his credit at the time of revocation. Parole may be suspended whenever a member of the Board or any person designated by the Board is satisfied that the arrest of the inmate is necessary or desirable in order to prevent a breach of any term or condition of the parole, and may be revoked in the untrammelled discretion of the Board.

Turning to s. 16 of the *Parole Act*, where parole has been revoked the inmate is recommitted to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted. If, as I conceive it, the statutory remission is truly credited upon the person being received into a penitentiary, then, unless forfeited in whole or in part pursuant to s. 22(3) or (4) of the *Penitentiary Act*, that credit must be taken into account in computing the unexpired portion of the original term of imprisonment.

The difficulty to which the legislation has given rise would seem to originate in s. 25 of the *Penitentiary Act* and more particularly in the words "for all purposes of that Act", *i.e.*, the *Parole Act*. The argument briefly is that for all purposes of the *Parole Act* the term of imprisonment of an inmate released on parole includes any period of statutory remission standing to his credit when he is released. In my opinion s. 25 of the *Penitentiary*

coupable devant un tribunal disciplinaire d'une infraction à la discipline, et au par. (4) de l'art. 22, soit l'évasion ou la tentative d'évasion. On peut remarquer entre parenthèses qu'en vertu du par. (3) de l'art. 22, aucune déchéance n'est valide à l'égard de plus de trente jours sans l'assentiment du commissaire des pénitenciers ni à l'égard de plus de quatre-vingt-dix jours sans l'assentiment du ministre de la Justice et qu'une évasion ou une tentative d'évasion entraîne la déchéance du droit aux trois quarts de la réduction statutaire de peine inscrite au crédit du détenu; malgré cela, si les prétentions de l'intimé sont justifiées, une personne dont la libération conditionnelle est révoquée perd la totalité de la réduction statutaire de peine inscrite à son crédit au moment de la révocation. La libération conditionnelle peut être suspendue toutes les fois qu'un membre de la Commission, ou une personne désignée par celle-ci, est convaincu que l'arrestation du détenu est nécessaire ou souhaitable en vue d'empêcher la violation d'une modalité de la libération conditionnelle et elle peut être révoquée à la discrétion absolue de la Commission.

Passons à l'art. 16 de la *Loi sur la libération conditionnelle de détenus*, selon lequel lorsque la libération conditionnelle octroyée à un détenu a été révoquée, celui-ci doit purger la partie de sa période originaire d'emprisonnement qui n'était pas encore expirée au moment de l'octroi de sa libération. Si, comme je le conçois, la réduction statutaire est véritablement créditée au détenu dès sa réception à un pénitencier, alors, à moins qu'il n'y ait eu déchéance en tout ou en partie conformément aux par. (3) et (4) de l'art. 22 de la *Loi sur les pénitenciers*, on doit tenir compte de ce crédit en calculant la partie de la période originaire d'emprisonnement qui n'est pas expirée.

Les problèmes qu'ont suscités les textes législatifs semblent découler de l'art. 25 de la *Loi sur les pénitenciers* et plus particulièrement des mots «à toutes les fins de cette loi», c.-à-d., la *Loi sur la libération conditionnelle de détenus*. Brièvement, la prétention est qu'à toutes les fins de la *Loi sur la libération conditionnelle de détenus*, la durée de l'emprisonnement d'un détenu en liberté conditionnelle comprend toute période de réduction statu-

Act does not apply to s. 16(1) of the *Parole Act*. The *Parole Act* empowers the Board to review the cases of inmates, grant parole where the Board considers that reform and rehabilitation will be aided by the grant of parole, and revoke parole where necessary. The length of the remaining term on the recommitment is a consequence of the revocation; it does not appear to be a purpose of the enactment. It should be noted also that the only section of the *Parole Act* purporting to touch upon sentence is s. 18 (whipping) which is significantly found under a different heading "Additional Jurisdiction". It is not one of the purposes of the *Parole Act* to effect changes in sentences. Mr. Justice Martin finds that revocation generally is the partial purpose of the *Act* and that the additional loss of statutory remission is further incentive to abide by the parole conditions. But as intimated by Mr. Justice Estey, the loss of liberty and the necessity of re-serving parole time are sufficient incentives to the parolee without the added burden of loss of statutory remission. Mr. Justice Estey also draws attention to the disincentive to parole which would be created if the potential parolee were faced with the prospect of losing all statutory remission referable to time served in the event his parole is revoked.

In determining whether s. 25 of the *Penitentiary Act* affects s. 16(1) of the *Parole Act*, the words "where ... authority is granted ... to be at large ...." must be given effect. Section 25 is confined to the purposes of the parole legislation while the parolee is at large. This is understandable. The purpose is to ensure an extended period of supervision while at large and also, when the authorities

taire de peine inscrite à son crédit lorsqu'il est mis en liberté. A mon avis, l'art. 25 de la *Loi sur les pénitenciers* ne s'applique pas au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*. La *Loi sur la libération conditionnelle de détenus* donne à la Commission le pouvoir d'examiner les cas des détenus, d'accorder la liberté conditionnelle si la Commission considère que l'octroi de la libération conditionnelle facilitera le redressement et la réhabilitation, et de révoquer la libération conditionnelle si nécessaire. La durée de la période d'emprisonnement que le détenu a à purger lorsqu'il est incarcéré de nouveau est une conséquence de la révocation; elle n'apparaît pas être une des fins visées par la loi. Il faudrait également remarquer que le seul article de la *Loi sur la libération conditionnelle de détenus* visant la question de la sentence est l'art. 18 (peine de fouet) qui, de façon significative, se retrouve sous un en-tête différent «Juridiction additionnelle». Ce n'est pas l'une des fins de la *Loi sur la libération conditionnelle de détenus* de modifier les sentences. M. le juge Martin conclut que généralement la révocation est partiellement la fin de la Loi et que la perte additionnelle de la réduction statutaire est une incitation supplémentaire à se conformer aux conditions de la libération. Mais comme le donne à entendre M. le juge Estey, la perte de liberté et l'obligation de purger à nouveau la partie de la peine passée en libération conditionnelle sont des incitations suffisantes pour le libéré conditionnel sans qu'il soit nécessaire d'y ajouter le fardeau de la perte de réduction statutaire. M. le juge Estey a également fait remarquer qu'on pourrait créer un désintéressement pour la libération conditionnelle si les libérés conditionnels éventuels étaient placés dans la perspective de perdre tous leurs droits à la réduction statutaire acquise pour la période purgée en prison au cas où leur libération conditionnelle est révoquée.

Pour déterminer si l'art. 25 de la *Loi sur les pénitenciers* touche le par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus*, il faut donner un effet aux mots «lorsque ... il est accordé ... l'autorisation d'être en liberté ...». L'article 25 traite seulement des fins de la loi relative à la libération conditionnelle alors que le libéré conditionnel est en liberté. Ceci est compré-

contemplate revocation of a parole, they must know the date on which the sentence expires (*vide* ss. 11 and 12 of the *Parole Act*). The relevant sections speak in terms of "inmate", defined by s. 2 as a person under "sentence of imprisonment". Section 25 of the *Penitentiary Act* supplies the required definition of this "term of imprisonment". I conclude that s. 16(1) is quite independent of and unaffected by s. 25.

The legislative history supports the foregoing conclusion. If one examines the *Penitentiary Act* R.S.C. 1952, c. 206, s. 69, it will be seen that provision was made there for a convict earning remission not exceeding six days for every month of good conduct and in addition, when the convict had at his credit seventy-two days of remission, he might be allowed, for every subsequent month during which his conduct and industry were satisfactory, ten days' remission per month. Subsection (4) of s. 69 then provided:

(4) Every convict who escapes, attempts to escape, breaks prison, attempts to break prison, breaks out of his cell, or makes any breach therein with intent to escape, or assaults any officer or servant of the penitentiary, or being the holder of a licence under the Ticket of Leave Act, forfeits such licence, shall forfeit the whole of the remission which he has earned. (Emphasis added)

A licence under the *Ticket of Leave Act* was the equivalent of parole, 1958 (Can.), c. 38, s. 24. The significance of the earlier legislation, in my opinion, lies in the fact that under that legislation there was express provision for forfeiture of remission on forfeiture of a licence under the *Ticket of Leave Act*, but when the legislation was changed and the present ss. 22 to 25 of the *Penitentiary Act* were enacted, the provision was not carried forward into the new legislation. It is, therefore, I think, fair to conclude that Parliament did not intend any forfeiture by ss. 22 to 25 of the new legislation and that nothing in these sections affects the plain and

hensible. L'article vise à étendre la période de surveillance du détenu pendant qu'il est en liberté et aussi, lorsque les autorités envisagent la révocation d'une libération conditionnelle, ils doivent connaître la date de l'expiration de la sentence (*vide* art. 11 et 12 de la *Loi sur la libération conditionnelle de détenus*). Les articles pertinents traitent du «détenu», tel que défini à l'art. 2, désignant une personne «condamnée à une peine d'emprisonnement». L'article 25 de la *Loi sur les pénitenciers* fournit la définition requise de cette «période d'emprisonnement». J'en conclus que le par. (1) de l'art. 16 est tout à fait indépendant de l'art. 25 et qu'il n'est pas visé par ce dernier.

L'historique de la législation appuie la conclusion ci-dessus. Si l'on examine la *Loi sur les pénitenciers*, S.R.C. 1952, c. 206, art. 69, on verra qu'on y dispose qu'un détenu peut gagner une remise de peine n'excédant pas six jours pour chaque mois de bonne conduite et qu'en plus, lorsque le détenu a à son crédit une remise de peine de soixante-douze jours, il peut obtenir pour chaque mois subséquent durant lequel il continue à donner satisfaction par sa conduite et son application une remise de dix jours pour chaque mois qui suit. Le par. (4) de l'art. 69 prescrit ensuite:

(4) Tout détenu qui s'évade, tente de s'évader, effectue ou tente un bris de prison, s'échappe par bris de sa cellule, ou fait à sa cellule quelque dégradation dans le but de s'échapper, ou qu'il se livre à des voies de fait sur un fonctionnaire ou préposé du pénitencier, ou qui, étant porteur d'un permis prévu par la Loi sur la libération conditionnelle, est déchu de ce permis, perd toute la remise de peine par lui gagnée. (Les soulignés sont de moi)

Un permis octroyé selon la *Loi sur les libérations conditionnelles* équivalait à une libération conditionnelle, 1958 (Can.), c. 38, art. 24. L'importance du texte législatif antérieur réside, à mon avis, dans le fait que dans ce texte législatif il y avait une disposition expresse relative à la perte de remise de peine dans le cas de déchéance du permis octroyé en vertu de la *Loi sur les libérations conditionnelles* mais lorsque la loi a été modifiée et que les présents art. 22 à 25 de la *Loi sur les pénitenciers* ont été adoptés, la disposition n'a pas été reproduite dans la nouvelle loi. Par conséquent, je pense qu'il est juste de conclure que

ordinary meaning of the words used in s. 16(1) of the *Parole Act* (the earlier counterpart of which was s. 9(1) of the *Ticket of Leave Act*).

Even if I were to conclude that the relevant statutory provisions were ambiguous and equivocal—a conclusion one could reach without difficulty on reading *Re Morin*[3], *R. v. Howden*[4], *Ex Parte Hilson*[5], *Re Abbott*[6], and then reading *Ex Parte Kolot*[7] and *Ex Parte Rae*[8]—I would have to find for the appellant in this case. It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced. If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

I would allow the appeal, set aside the judgment of the Court of Appeal and reinstate the judgment of Henderson J.

The judgment of Martland, Judson, Ritchie and de Grandpré JJ. was delivered by

MARTLAND J. (*dissenting*)—I agree with the reasons given by Martin J.A. in the Court of Appeal, with which Gale C.J.O. agreed. I would dismiss this appeal.

PIGEON J.—I agree with Dickson J.'s conclusion on his view that under the law in force when appellant's parole was revoked this did not involve

[3] (1968), 66 W.W.R. 566.
[4] [1974] 2 W.W.R. 461.
[5] (1973), 12 C.C.C. (2d) 343.
[6] (1970), 1 C.C.C. (2d) 147.
[7] (1973), 13 C.C.C. (2d) 417.
[8] (1973), 14 C.C.C. (2d) 5.

le Parlement n'a pas voulu inclure aucune mesure de déchéance dans les art. 22 à 25 de la nouvelle loi et que rien dans ces articles ne peut toucher le sens clair et ordinaire des mots employés au par. (1) de l'art. 16 de la *Loi sur la libération conditionnelle de détenus* (dont le par. (1) de l'art. 9 de la *Loi sur les libérations conditionnelles* était antérieurement l'équivalent).

Même si je devais conclure que les dispositions pertinentes sont ambiguës et équivoques—une conclusion à laquelle on peut arriver sans difficulté en lisant les arrêts *Re Morin*[3], *R. v. Howden*[4], *Ex Parte Hilson*[5], *Re Abbott*[6], et en lisant ensuite *Ex Parte Kolot*[7], et *Ex Parte Rae*[8]—je devrais conclure en faveur de l'appelant en l'espèce. Il n'est pas nécessaire d'insister sur l'importance de la clarté et de la certitude lorsque la liberté est en jeu. Il n'est pas besoin de précédent pour soutenir la proposition qu'en présence de réelles ambiguïtés ou de doutes sérieux dans l'interprétation et l'application d'une loi visant la liberté d'un individu, l'application de la loi devrait alors être favorable à la personne contre laquelle on veut exécuter ses dispositions. Si quelqu'un doit être incarcéré, il devrait au moins savoir qu'une loi du Parlement le requiert en des termes explicites, et non pas, tout au plus, par voie de conséquence.

Je serais d'avis d'accueillir l'appel, d'infirmer l'arrêt de la Cour d'appel et de rétablir le jugement du juge Henderson.

Le jugement des juges Martland, Judson, Ritchie et de Grandpré a été rendu par

LE JUGE MARTLAND (*dissident*)—Je souscris aux motifs énoncés par le juge d'appel Martin en Cour d'appel, motifs auxquels le juge en chef de l'Ontario, le juge Gale, a souscrit. Je suis d'avis de rejeter cet appel.

LE JUGE PIGEON—Je souscris à la conclusion du juge Dickson en adoptant son avis que, suivant le droit en vigueur lorsque la libération condition-

[3] (1968), 66 W.W.R. 566.
[4] [1974] 2 W.W.R. 461.
[5] (1973), 12 C.C.C. (2d) 343.
[6] (1970), 1 C.C.C. (2d) 147.
[7] (1973), 13 C.C.C. (2d) 417.
[8] (1973), 14 C.C.C. (2d) 5.

forfeiture of statutory remission standing to his credit.

Appeal allowed, MARTLAND, JUDSON, RITCHIE *and* DE GRANDPRÉ JJ. *dissenting.*

Solicitors for the appellant: Pomerant, Pomerant & Greenspan, Toronto and R. R. Price, Kingston.

Solicitor for the respondent: The Deputy Attorney General, Ottawa.

nelle de l'appelant a été révoquée, la révocation n'a pas entraîné la déchéance de la réduction statutaire de peine inscrite à son crédit.

Appel accueilli, les JUGES MARTLAND, JUDSON, RITCHIE *et* DE GRANDPRÉ *étaient dissidents.*

Procureurs de l'appelant: Pomerant, Pomerant & Greenspan, Toronto; R. R. Price, Kingston.

Procureur des intimés: Le sous-procureur général, Ottawa.

Re McINTYRE PORCUPINE MINES Ltd. and MORGAN.

Ontario Supreme Court, Appellate Division, Meredith, C.J.O., Magee, Hodgins, and Ferguson, JJ.A. January 31, 1921.

Ont.

App. Div.

McINTYRE PORCUPINE MINES LIMITED AND MORGAN.

Meredith,C.J.O.

McGregor Young, K.C., for appellants.
R. S. Robertson and *J. Y. Murdoch*, for respondents.

MEREDITH, C.J.O.:—The main question for decision is as to the meaning of sub-sec. 4 of sec. 40 of the Assessment Act, R.S.O. 1914, ch. 195, and there is a subsidiary question as to the liability of the respondents to business assessment in respect of part of their operations. Sub-section 4 provides that:—

"(4) The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to sub-section 8, the minerals in, on or under such land, shall not be assessable."

Sub-section 8 does not affect the question: it relates only to cases in which petroleum mineral rights have been reserved.

The policy of the Legislature, as indicated by its enactments, is to impose a provincial tax on the profits of mines in excess of a stated sum: The Mining Tax Act, R.S.O. 1914, ch. 26, sec. 5. These profits are ascertained and fixed in the following manner, "that is to say: The gross receipts from the year's output of the mine, or in case the ore, mineral or mineral-bearing substance or any part thereof is not sold, but is treated by or for the owner, tenant, holder, lessee, occupier, or operator of the mine upon the premises or elsewhere, then the actual market value of the output, at the pit's mouth, or if there is no means of ascertaining the market value, or if there is no established market price or value, the value of the same as appraised by the Mine Assessor, shall be ascertained . . . " (sub-sec. 3).

From the value thus ascertained, certain deductions, which it is not necessary to mention, are to be made.

Section 14 provides that where the mine-owner has to pay a

municipal tax on income derived from the mine it is to be deducted from the amount of the provincial tax payable by him.

By the provisions of the Assessment Act, sec. 40 (6), "the income from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to the municipality in which such mine or mineral work is situate;" but "no income tax shall be payable to any municipality upon a mine or mineral work liable to taxation under section 5 of the Mining Tax Act, in excess of . . . one-third . . . of the tax payable in respect of annual profits from such mine or mineral work under the provisions of the said section and amendments thereto" (sec. 40 (9)).

I see no reason for confining the operation of these sub-sections to income derived from the mineral according to its value when brought to the surface. In my opinion, they extend to the income derived from the mining operations, including the crushing, reducing, smelting, refining, and treating of the ore. See the Mining Tax Act, sec. 5 (3), and the Mining Act of Ontario, R.S.O. 1914, ch. 32, sec. 2 (*k*).

If I am right in this view, the mining business is not subject to a business tax. The business tax was substituted for a tax on income, as to the businesses in respect of which that tax is imposed, but in the case of mines the Legislature had left them to be taxed on the income from them. This is clear, I think—otherwise a person engaged in the mining business would be doubly taxed for the same thing.

It is true that the annual profits of a mine for the purposes of sec. 5 of the Mining Tax Act are the value of the output at the pit's mouth, subject to certain deductions for the expenses incurred in winning the ore; but there is no such provision in the Assessment Act, and what is taxable under it is "the income from" the "mine."

This has no bearing on the main question for decision; it applies only to the contention that the respondents are liable for business tax in respect of a part of their operations. The solution of the main question depends upon the meaning to be attached to the word "concentrators" as used in sub-sec. 4.

The proper conclusion upon the evidence is, I think, that the

Ont.
App. Div.
RE McINTYRE PORCUPINE MINES LIMITED AND MORGAN.
Meredith, C.J.O

word has no scientific or technical meaning, but is a colloquial expression signifying a process for separating metal from the rock or dross in which it is found. I see no reason for confining it to a mechanical process. All the processes in use by the respondents are designed to produce the same result—the separation of the valuable mineral from the dross—and the concentration that takes place is the concentration of this valuable mineral by the separation of it from the dross. It is rather a process of separation than of concentration, though the latter is the name that has been given to it.

To give effect to the contention of the appellants would mean the penalising of the operators of mines producing low grade ore. With that class of ore, as I understood the evidence, it is necessary for commercial success to combine chemical with mechanical means for the separation of the valuable mineral from the dross, and the result would be that the buildings and plant used for that purpose would be liable to municipal taxation, from which, in the case of richer ore where the mechanical process sufficed, the buildings and plant would be exempt.

I rest my judgment upon this branch of the case on the ground that any process the purpose of which is the separation of the valuable mineral from the dross is a concentrating process, and that the building and plant used for that purpose is, within the meaning of sub-sec. 4, a concentrator.

I would dismiss the appeals with costs.

MAGEE and FERGUSON, JJ.A., agreed with MEREDITH, C.J.O.

HODGINS, J.A.:—The Ontario Railway and Municipal Board have reached a conclusion in this case that should not be disturbed. Their finding that the buildings, machinery, and appliances which had been assessed both by the local assessor and by the District Court Judge, under the designation of "concentrators," are not subject to taxation, is the view taken by the Court of Revision, and is in accord with what I take to be the true meaning of the statute.

The sole point of difference seems to be that the Board gave a wider meaning to the descriptive term "Concentrators" than does the District Court Judge, who limits its scope to mechanical

means of concentration. Undoubtedly the word in question was originally sometimes confined, as evidenced by what I mention below, to the meaning adopted by the learned Judge. But it does not in itself involve any such limited idea, and must therefore be construed so as to include that which, in the march of progress, falls properly within its ordinary meaning. In Murray's New English Dictionary, vol. 2, published in 1893, "Concentrator" is defined as "an apparatus for concentrating solutions or other products of manufacture . . . An apparatus by which mechanical concentration of ores is performed." In the Encyclopædia Britannica, 11th ed., 1910-1911, vol. 20, at p. 238, "Ore-dressing" is defined thus: "The province of the ore-dresser is to separate the 'values' from the waste—for example, quartz, felspar, calcite—by mechanical means, obtaining thereby 'concentrates' and 'tailings.' The province of the metallurgist is to extract the pure metal from the concentrates by chemical means, with or without the aid of heat." But in similar and later works and in some of the earlier publications a more extended meaning is found. Thus in "The Americana" (a Universal Reference Library), last edition, 1911, "Concentration," in chemistry, is defined as "the act of increasing the strength of solutions. This is effected in different ways: by evaporating off the solvent, as is done in the separation of salt from sea-water; by distilling off the more volatile liquid, as in the rectification of spirit of wine; by the use of low temperatures, as in the purification of benzol; by difference of fusibility, as in Pattinson's process for desilverizing lead." In a "Thesaurus Dictionary of the English Language," by Francis A. March, published about 1902, under the head of "Chemistry," "Concentration forces" is defined as "Chemical forces or actions which reduce to one bulk or mass."

In Funk & Wagnall's New Standard Dictionary, 1913, "Concentrator" is said to mean, in mining, "a machine or device used to concentrate or separate ore;" while in the Century Dictionary, last edition (1913), "Concentrator" is thus spoken of: "In mining, the name frequently given, especially in the United States, to any complicated form of machine used in ore-dressing, or in separating the particles of ore or metal from the gangue or rock with which they are associated."

The rule laid down in the Interpretation Act, R.S.O. 1914,

Ont.

App. Div.

RE McINTYRE PORCUPINE MINES LIMITED AND MORGAN.

Hodgins, J.A.

ch. 1, sec. 10, is that statutes shall "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." It is therefore open to the Court to adopt the larger or later meaning of the word in question, if it be true, as I think it is, that the Assessment Act in this particular aims at exempting such means as may be adopted at the mining location to aid in the concentration of the ore-mass, even if that progresses to the point of using chemical means as well as those mechanical, and in so doing draws within its scope some part of what may be alternatively described as amalgamation or reduction: see *Attorney-General* v. *Salt Union Limited*, [1917] 2 K.B. 488, *per* Lush, J. In this connection I refer to the language of Cozens-Hardy, M.R., in *Camden (Marquis)* v. *Inland Revenue Commissioners*, [1914] 1 K.B. 641, at pp. 647 and 648: "The duty of this Court is to interpret and give full effect to the words used by the Legislature, and it seems to me really not revelant to consider what a particular branch of the public may or may not understand to be the meaning of those words. It is for the Court to interpret the statute as best they can. In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. But to say we ought to allow evidence to be given as to whether there is any such technical meaning, to be followed up, of course, by evidence as to what that special meaning is, would I think be going entirely contrary to that which seems to be the settled rule of interpretation."

There is one point, however, in the judgment of the Board to which attention should be drawn so as to avoid misconception in the future. It is that which treats the whole question as one of fact and as not embracing any question of law. It is only upon questions of law that an appeal lies to this Court; and, while care should be taken not to trench upon the final authority of the Board upon questions of fact, it is equally important that the limited right of review should not be ignored or diminished.

The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact: *Elliott* v. *South Devon R.W. Co.* (1848), 2 Ex. 725; *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.*, [1919] A.C. 999, 48 D.L.R. 147. This distinction clearly runs through the decision of this Court in *Re Hiram Walker & Sons Limited and Town of Walkerville* (1917), 40 O.L.R. 154 where it is said (p. 156): "The case was argued by Mr. Anglin as if the legislation imposed taxation in respect of a 'distillery.' The question in such a case would be a very different one from that which arises when the taxation is in respect of 'the business of a distiller.' The Court cannot, I think, know judicially what such a business is, and the question of what it is must therefore be a question of fact."

The case just quoted is in line with the decision, upon somewhat similar words, in *Re S. H. Knox & Co. Assessment* (1909), 18 O.L.R 645. It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the particular thing in question. But that is no reason for confusing two separate matters, in one of which an appeal lies and in the other the decision of the Board is final. See *Re Bruce Mines Limited and Town of Bruce Mines*, 20 O.L.R. 315, and the dissenting judgment of Meredith, J.A., in *Re S. H. Knox & Co. Assessment, supra.*

I would dismiss the appeals.

Appeals dismissed with costs.

Re Municipality of Metropolitan Toronto and Paul Magder Furs Ltd. et al.

Indexed as: Metropolitan Toronto (Municipality) v. Paul Magder Furs Ltd.
(C.A.)

72 O.R. (2d) 155
[1990] O.J. No. 351
Action No. 804/89

ONTARIO
Court of Appeal
Morden, Grange and Carthy JJ.A.
March 8, 1990.

Statutes -- Interpretation -- Rules of interpretation -- Penal statutes -- Amendments to statute prohibiting opening of retail businesses on holidays but permitting municipal council to provide otherwise by by-law -- Providing for penalty for contravention of by-law -- Statute permitting Attorney-General or municipality to make application for order that businesses close on holidays to ensure compliance with Act or by-law -- Municipality entitled to seek order in absence of by-law -- Retail Business Holidays Act, R.S.O. 1980, c. 453, ss. 2(1), 4(1), 7(2), 8(1), (2).

The Retail Business Holidays Act, R.S.O. 1980, c. 453, was amended by S.O. 1989, c. 3. Of the amendments, s. 2(1) provides that no retail business may be open on a holiday; s. 4(1) allows a municipal council to enact a by-law to permit retail businesses to be open or closed on holidays; and s. 7(2) provides a penalty for contravention of such a by-law. The applicant municipality had not enacted a by-law, but applied under s. 8(1) of the Act for an order that the respondents close on Sundays. The section provides that the Attorney-

General or a municipality may apply for such an order to ensure compliance with the Act or a by-law. Section 8(2) provides that the order is in addition to any other penalty that may be imposed. The application was dismissed at first instance on the ground that s. 8(1) was ambiguous and punitive.

On appeal, held, the appeal should be allowed.

By its plain wording, s. 8(1) permits either the Attorney-General or a municipality to make application for an order to enforce the Act. The fact that the municipality had not passed a by-law under s. 4(1) was irrelevant. A municipality does not need to enact a by-law in order to have the right accorded by s. 8(1).

Statutes referred to

Municipal Act, R.S.O. 1980, c. 302, s. 103(1)
Municipality of Metropolitan Toronto Act, R.S.O. 1980, c. 314, s. 3(1)
Retail Business Holidays Act, R.S.O. 1980, c. 453, ss. 2(1) [rep. & sub. 1989, c. 3, s. 2], 3 [am. 1986, c. 64, s. 62(12); 1987, c. 36, s. 1; 1989, c. 3, s. 3], 4(1) to (3) [rep. & sub. idem, s. 4], 7(1), (2) [rep. & sub. idem, s. 6], 8(1), (2) [rep. & sub. idem]

APPEAL from a judgment of Potts J., 71 O.R. (2d) 1, dismissing an application for an order that certain retail businesses close on Sundays.

George S. Monteith and Robert O. Avinoam, for appellant.

Timothy S.B. Danson and Julian N. Falconer, for respondent, Paul Magder Furs Ltd.

Hart Schwartz, for intervener, Attorney-General of Ontario.

BY THE COURT:-- The Municipality of Metropolitan Toronto

appeals from an order of Mr. Justice Potts dismissing its application under s. 8(1) of the Retail Business Holidays Act, R.S.O. 1980, c. 453, as amended, for an order against the respondents that they close their retail business establishments operating in Metropolitan Toronto on Sundays, and for other similar relief. Section 8(1) reads:

> 8(1) Upon the application of counsel for the Attorney General or of a municipality to the Supreme Court, the court may order that a retail business establishment close on a holiday to ensure compliance with this Act or a by-law or regulation under this Act.

Potts J.'s reasons are reported at 71 O.R. (2d) 1. In dismissing the application he gave effect to a preliminary objection raised by the respondent Paul Magder Furs Limited that the municipality had no authority to bring the application since it had not passed a by-law under s. 4(1) of the Act with respect to closing on holidays.

In general terms, the scheme of the Act is as follows. Section 2(1) provides:

> 2(1) No person carrying on a retail business in a retail business establishment shall,
>
> (a) sell or offer for sale any goods or services therein by retail; or
>
> (b) admit members of the public thereto,
>
> on a holiday.

Section 3 then provides for several exemptions from the application of s. 2.

Section 4(1) provides:

> 4(1) Despite sections 2 and 3, the council of a municipality may by by-law permit retail business establishments to be open on any holiday or may require that

retail business establishments be closed on any holiday.

Section 4(2) sets forth the procedural requirements relating to a by-law passed under s. 4(1).

Section 4(3) relates to territories without municipal organization. It provides:

> 4(3) The Lieutenant Governor in Council may by regulation, in respect of retail business establishments in territory without municipal organization, exercise the same powers that a council of a municipality may by by-law exercise under subsection (1).

Section 7(1) and (2) relate to offences under the legislation. They read:

> 7(1) Every person who contravenes section 2 or a regulation under section 4 is guilty of an offence and on conviction is liable to a fine of not more than the greater of,
>
> (a) $50,000; or
>
> (b) the gross sales in the retail business establishment on the holiday on which the contravention occurred.
>
> (2) A by-law under subsection 4(1) requiring a retail business establishment to be closed on a holiday shall provide that any person who contravenes the by-law is guilty of an offence and on conviction is liable to a fine of not more than the greater of,
>
> (a) $50,000; or
>
> (b) the gross sales in the retail business establishment on the holiday on which the contravention occurred.

Finally, s. 8(2) which relates to an order made under s. 8(1), provides:

> 8(2) An order under subsection (1) is in addition to any

other penalty that may be imposed and may be made whether or not proceedings have been commenced in the Provincial Offences Court for a contravention of section 2 or of a by-law or regulation under this Act.

Potts J. was of the view that s. 8(1) was ambiguous and vague and, since it was punitive, he resolved the preliminary issue against the municipality.

With respect, we do not agree with his interpretation. In our view, in so far as it bears on the matters to be resolved in this proceeding, s. 8(1), in its own terms and in the context of the scheme of the Act, is not ambiguous or vague. By its plain wording s. 8(1) enables either the Attorney-General or a municipality to make an application for an order to ensure compliance with the Act, a by-law, or a regulation. Accepting this, we have no doubt that Metropolitan Toronto in the present case has the authority to make an application for an order that the Act be complied with within the confines of Metropolitan Toronto.

We need not consider what the power of the municipality might be with respect to ensuring compliance with the Act, or a regulation, outside the municipality. This would involve a consideration of the effect of s. 3(1) of the Municipality of Metropolitan Toronto Act, R.S.O. 1980, c. 314, which provides that "[e]xcept where otherwise provided, the jurisdiction of the Metropolitan Council is confined to the municipality that it represents". Section 103(1) of the Municipal Act, R.S.O. 1980, c. 302, is to the same effect with respect to municipalities generally. This question does not bear on the plain meaning of s. 8(1) with respect to its application in this case, nor does it incline us to the view that s. 8(1) should be read as confining the power of municipalities to that of ensuring compliance with its by-laws.

In coming to this conclusion we have taken into account the consideration referred to in Potts J.'s reasons that "traditionally" municipalities enforce only their own by-laws. It is clear that they are not confined to this if a statute confers additional powers on them.

The legal regime contemplated by ss. 2, 3 and 4 of the Act is such that we do not think it can be called exclusively provincial or exclusively municipal. Municipalities which do not enact by-laws under s. 4(1) may be taken to have accepted, within their confines, the regime of the Act. If they enact by-laws these may have the effect of modifying the Act to some extent but not completely supplanting it. With these considerations in mind we can appreciate the sense of conferring jurisdiction on each of the Attorney-General and the municipality to enforce both the Act and by-laws made under it.

We think there is much force in the submission that, if it were intended that municipalities enforce only their own by-laws, the grammatical structure of s. 8(1) would have been different and reflected this intention -- probably in the form of separate clauses for the Attorney-General's and municipalities' powers.

For these reasons, we allow the appeal, set aside the order of Potts J. and direct that the application be remitted for hearing by a judge of the Supreme Court. The costs of the application and of this appeal will be paid by the respondent Paul Magder Furs Limited to the appellant.

Appeal allowed.

2022 CAF 145, 2022 FCA 145
Federal Court of Appeal

Mohr v. National Hockey League

2022 CarswellNat 3155, 2022 CarswellNat 5078, 2022 CAF 145, 2022 FCA 145, 2022 A.C.W.S. 2108, 472 D.L.R. (4th) 431

KOBE MOHR (Appellant) and NATIONAL HOCKEY LEAGUE, AMERICAN HOCKEY LEAGUE INC., ECHL INC., CANADIAN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., ONTARIO HOCKEY LEAGUE, WESTERN CANADA HOCKEY LEAGUE AND HOCKEY CANADA (Respondents)

David Stratas, Donald J. Rennie, Anne L. Mactavish JJ.A.

Heard: January 12, 2022
Judgment: August 17, 2022
Docket: A-182-21

Proceedings: affirming *Mohr v. National Hockey League* (2021), 2021 CF 488, 2021 FC 488, 2021 CarswellNat 2810, 2021 CarswellNat 2809, Paul S. Crampton C.J. (F.C.)

Counsel: Edward J. Babin, Brendan Monahan for Appellant
Stephen J. Shamie, John C. Field, Sean M. Sells, Gabrielle Lemoine, Linda Plumpton for Respondent, National Hockey League
Jean-Michel Boudreau for Respondent, American Hockey League Inc.
Karine Chênevert, Alexander L. De Zordo for Respondent, ECHL Inc.
Eric C. Lefebvre, Christopher A. Guerreiro, Erika Woolgar for Respondents, Canadian Hockey League, Quebec Major Junior Hockey League Inc., Ontario Hockey League, Western Canada Hockey League
Casey Halladay, Akiva Stern for Respondent, Hockey Canada

***Donald J. Rennie J.A.*:**

Background

1 The Court is seized with two questions of statutory interpretation. The provisions in question are sections 45 and 48 of the Competition Act, R.S.C. 1985, c. C-34, the full text of which is found in Annex A to these reasons.

2 In broad terms, section 45 of the Competition Act prohibits conspiracies, agreements or arrangements between competitors to fix or maintain prices, allocate markets or customers, or restrict markets for the production or supply of a product. If established, the anti-competitive effect of the agreement is presumed, giving rise to both criminal sanctions and civil remedies.

3 Section 48 addresses conspiracies or arrangements in the context of professional sport. Again, in broad terms, section 48 prohibits agreements or arrangements which unreasonably limit the opportunities of a player to participate in professional sport, impose unreasonable terms on players, or unreasonably limit the ability of players to negotiate with and play with a team of their choice. The purpose of section 48 is to protect freedom of employment for players (John Barnes, *The Law of Hockey* (LexisNexis, 2010) at p. 322 [Barnes]). Like section 45, a breach of section 48 gives rise to criminal sanctions and civil remedies.

4 There are two key differences between conspiracies under sections 45 and 48. If established, a conspiracy under section 45 is deemed anti-competitive. In contrast, under section 48, a court must take certain matters into account before determining that a conspiracy has been established. This includes the desirability of maintaining a balance among teams competing in the same league. In effect, section 48 exempts certain agreements or arrangements made in the context of professional sport from the general prohibition against anti-competitive agreements in section 45 of the Competition Act.

5 The scope of these two provisions and their interrelationship lies at the heart of the interpretive questions before us.

6 The appellant commenced a class proceeding alleging that the respondents conspired, contrary to paragraphs 48(1)(a) and (b), to limit the opportunities of hockey players to play in Canadian major junior and professional hockey leagues. The appellant sought damages under paragraph 36(1)(a) of the Competition Act for economic losses suffered as a result of the alleged conspiracy.

7 The respondents moved to strike the appellant's statement of claim on the basis that it disclosed no reasonable cause of action. They argued that section 48 of the Act did not, and could not, apply to the facts as framed in the statement of claim.

8 In response to the motion to strike, the appellant moved to amend the statement of claim, adding an allegation of a conspiracy under section 45 of the Act. The notice of motion seeking leave to amend referred to "both intra- and interleague ... [conspiracies that] ... may perhaps be governed by one or the other of sections 45 and 48."

9 The Federal Court (*per* Crampton C.J., 2021 FC 488) found that it was plain and obvious that the appellant's claim did not disclose a cause of action under section 48. The Court also dismissed the motion for leave to amend to advance the claim under section 45 on the ground that the amendments did not plead a conspiracy within the scope of section 45.

10 In this context, questions of statutory interpretation are subject to a correctness standard of review, and I agree with the appellant that the Federal Court made errors (Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 72). The Court misunderstood its role on a motion to strike. There were also errors in the method of statutory interpretation; to be precise, in the use of extrinsic evidence on a motion to strike and the role of ambiguity in statutory interpretation. The Court also erred in its understanding of a component of subsection 48(3).

11 I will discuss these errors later. However, it is sufficient to note at this point that they are of no consequence. The result reached by the Federal Court was nevertheless correct and so I would dismiss the appeal.

12 The statement of claim, alleging as it does a conspiracy between leagues and between leagues and other organizations, has no reasonable prospect of success. The prohibition on anti-competitive arrangements in section 48 is limited to arrangements or agreements between clubs or teams in the same league. The proposed amended statement of claim, asserting as it does a conspiracy with respect to the *purchase or acquisition* of players' services, also has no reasonable prospect of success. The prohibition in section 45 is restricted to agreements or arrangements with respect to the *supply or sale* of products.

The interpretation of section 48

13 A statute is to be read in its entire context, in its grammatical and ordinary sense, harmonious with the scheme and object of the statute. Sometimes legislative history can shed light on the matter. When the words of a statute are unequivocal, the ordinary meaning plays a dominant role in the interpretative process (Canada Trustco Mortgage Co. v. Canada, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10; Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150 at para. 88).

14 The Court's task is to discern the meaning of the words used by Parliament when it chose to enact its policy preferences. There is no room for the Court to inject its own policy preferences into the analysis. In this case, it is not for this Court to say whether section 48 is or is not a good thing. Our task is just to discern what Parliament chose to enact (TELUS Communications Inc. v. Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144).

15 Section 48 cannot be read, consistent with these principles, to mean that the prohibitions against anti-competitive arrangements in subsection 48(1) apply to interleague conspiracies as pleaded in the statement of claim. To properly understand the scope of subsection 48(1) we must look to plain text of subsection 48(3) which reads as follows:

> **(3)** This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and

between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

(3) Le présent article s'applique et l'article 45 ne s'applique pas aux accords et arrangements et aux dispositions des accords et arrangements conclus entre des équipes et clubs qui pratiquent le sport professionnel à titre de membres de la même ligue et entre les administrateurs, les dirigeants ou les employés de ces équipes et clubs, lorsque ces accords, arrangements et dispositions se rapportent exclusivement à des sujets visés au paragraphe (1) ou à l'octroi et l'exploitation de franchises dans la ligue; toutefois, c'est l'article 45 et non le présent article qui s'applique à tous les autres accords, arrangements et dispositions d'accords ou d'arrangements conclus entre ces équipes, clubs et personnes.

16 The phrase "as members of the same league" must be given its plain, ordinary and otherwise clear meaning. The subsection also refers to "the granting and operation of franchises in the league ...". Coherence within the subsection is reinforced by understanding the phrase in its plain and ordinary sense. While there could be some discussion around the boundaries of what constitutes a "league", this point was not argued before us (Barnes at p. 322).

17 Subsection 48(3) allocates agreements and provisions "between or among teams and clubs...of the same league" that "relate exclusively to matters described in subsection [48](1)" to "appl[y]" under section 48 only. Conversely, it allocates "all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons" to section 45 only. Thus, subsection 48(3) evidences a clear parliamentary intention to avoid overlapping or conflicting applications of section 45 and 48. Every agreement or provisions must "appl[y]" under either section 45 or 48.

18 interleague agreements are not "between or among teams and clubs engaged in professional sport as members of the same league." Parliament clearly did not intend to apply two contradicting penal standards to interleague conspiracies. But if interleague agreements were caught by section 48, this is exactly what could happen. This demonstrates that Parliament did not intend to apply section 48 to interleague agreements.

19 Parliament was also consistent in the language and design of section 48. Paragraphs 48(2)(a) and (b) describe criteria to be considered in determining whether the prohibition against anti-competitive arrangements in subsection 48(1) has been violated. This includes, in paragraph 2(b) "the desirability of maintaining a reasonable balance among the teams or clubs participating *in the same league*" (emphasis added).

20 Two points may be said about this. First, consistent with subsection (3), the focus of paragraph (2)(*b*) is on teams "in the same league". The second is that paragraph (2)(*b*) would be redundant, if not nonsensical, if the scope of subsection 48(3) were widened to include other leagues and umbrella organizations such as the respondent Hockey Canada, as argued by the appellant. The rule against tautological interpretations would be breached (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at § 8.23 [*Sullivan*]).

21 Other provisions in the Act support the conclusion that subsection 48(3) means what it says. Section 6 of the Competition Act addresses amateur sport. Subsection 6(1) states: "This Act does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport."

22 By its terms, subsection 6(1) applies to both intra-league and interleague agreements, whereas subsection 48(3) references only intra-league agreements. By the choice of words "between or among" teams, clubs and leagues in subsection 6(1), Parliament demonstrated an understanding of the distinction between intra-league and interleague agreements. It chose in subsection 6(1) to reference both, and in subsection 48(3) to reference only intraleague agreements. The principle of implied exclusion or *expressio unius est exclusio alterius* is engaged: the legislature's failure to mention something can be a ground for inferring it was deliberately excluded (*Sullivan* at § 8.89-8.91).

23 To conclude, where the words are precise and unequivocal, as they are here, the ordinary meaning plays a dominant role in the interpretation. As I will explain, the arguments advanced by the appellant do not shake the conclusion that the conspiracy provisions of section 48, when given their ordinary meaning, are confined to intraleague agreements.

The appellant's arguments on the interpretation of section 48

24 The appellant contends that subsection 48(3) does not limit subsection 48(1) to intraleague conspiracies; rather, subsection 48(3) simply removes those types of conspiracies from the general conspiracy prohibition in section 45 and makes them subject to the mitigating considerations outlined in subsection 48(2). Consequently, "what has not been removed from section 45, namely conspiracies that are not confined to teams within a single league, remains within the purview of subsection 48(1)" (Reasons at para. 71).

25 This argument fails. I agree with the Federal Court when it concluded that to interpret subsection 48(1) in this manner would defeat the ordinary meaning of the language of subsection 48(3) which explicitly limits the application of section 48 to teams that are members of the same league. I also agree with the Federal Court that this interpretation would lead to an absurd bifurcation of the conspiracy provisions in the context of professional sport (Reasons at para. 74).

26 Next, the appellant argues that the Federal Court erred in its understanding of the requirement in subsection 48(3) that the agreement, arrangement or provision "relate exclusively to matters described in subsection (1)" (Competition Act, s. 48(3)). Here, I agree with the appellant that the Federal Court erred in striking the claim on the basis that allegations did not relate exclusively to the matters in subsection 48(1).

27 The general prohibition against conspiracies in subsection 48(1) is subject to a caveat in subsection 48(3), which requires that intraleague agreements, arrangements and provisions "relate exclusively to matters described in subsection (1)."

28 The aim of section 48 is to protect the economic freedom of hockey players (Barnes at pp. 322-24). To this end, section 48 identifies three behaviours that are anti-competitive: unreasonable limits on opportunities to participate (para. 48(1)(*a*)), unreasonable terms and conditions imposed on participants (para. 48(1)(*a*)), and unreasonable limits on the opportunity to negotiate with and play for the team of choice (para. 48(1)(*b*)). These are the anti-competitive practices to which the agreements or arrangements must relate exclusively.

29 The Federal Court referenced allegations in the statement of claim which, in its view, were beyond the remit of paragraphs 48(1)(a) and (b) and in so doing erred (Reasons at paras. 68, 70-75, 85).

30 A description of how the conspiracy works does not offend the requirement that the allegations "relate exclusively". The means are not to be confused with the effect. A description of the corporate, partnership and other organizations and the arrangements put in place by which the anti-competitive terms and conditions are imposed on the players does not fall within the scope of what must "relate exclusively". What must "relate exclusively" pertains to the asserted anti-competitive allegations. Concerns relating to the terms and conditions of the standard player agreement, including provisions for equipment, scholarships, travel (proposed amended statement of claim at para. 28.4), for training and development (at para. 47.5), provisions relating to trading of players, and consequences of non-performance all fall within the ambit of paragraphs 48(1)(a) or (b).

31 There remains a final argument raised by the appellant. He contends that the introductory words of subsection 48(1), which make it an offence for "[e]very one" to unlawfully conspire to limit the opportunities of players, demonstrate that Parliament intended to cast a wide net, including persons and corporations not part of the same league, but who or which have agreements with a league.

32 I do not agree. In the specific context of the *Competition Act*, "[e]very one" reflects Parliament's intention to make corporations, partnerships, individuals, leagues, clubs, teams, governing bodies, and umbrella organizations subject to the civil and criminal sanctions of the sports conspiracy provision. But the breadth of that word does not override subsection 48(3), where, by its plain terms, Parliament deliberately limited the sports conspiracy provision to intraleague agreements.

The interpretation of section 45

33 Section 45 applies where the anti-competitive agreement is between teams of different leagues or between umbrella organizations and teams or leagues. There is, however, an important caveat to the sweep of this provision. Section 45 is limited to agreements between competitors to fix prices or allocate markets relating to "the production or supply" of a product or a service — otherwise known as "sell-side" conspiracies.

34 The plain meaning of *production or supply* leads to the conclusion that section 45 is limited to conspiracies relating to the provision, sale and distribution of products or services. It stands in contrast to *purchase and acquire*. While, as noted by the Federal Court, there may be circumstances in which section 45 could capture purchasers, that is not in issue before us (Reasons at para. 43). As the proposed amended statement of claim describes a conspiracy relating to the terms and conditions under which the leagues and teams purchased or acquired services of the players, the allegation under section 45 has no hope of success (see, *e.g.*, proposed amended statement of claim at para. 2.7).

35 This understanding of section 45 is confirmed by its legislative history. (Later in these reasons I will explain how legislative history informs the statutory interpretation exercise.)

36 In March 2010, paragraph 45(1)(c) of the Competition Act was amended. The provision, prior to amendment, read:

> **Conspiracy**
>
> **45(1)** Every one who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
>
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
>
> (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 on persons or property, or
>
> (d) to otherwise restrain or injure competition unduly,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.
>
> **Complot**
>
> **45(1)** Commet un acte criminel et encourt un emprisonnement maximal de cinq ans et une amende maximale de dix millions de dollars, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne:
>
> a) soit pour limiter, indûment, les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un produit quelconque;
>
> b) soit pour empêcher, limiter ou réduire, indûment, la fabrication ou production d'un produit ou pour en élever déraisonnablement le prix;
>
> c) soit pour empêcher ou réduire, indûment, la concurrence dans la production, la fabrication, l'achat, le troc, la vente, l'entreposage, la location, le transport ou la fourniture d'un produit, ou dans le prix d'assurances sur les personnes ou les biens;

d) soit, de toute autre façon, pour restreindre, indûment, la concurrence ou lui causer un préjudice indu.

37 Section 45, post amendment, reads:

Conspiracies, agreements or arrangements between competitors

45(1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

. . .

Definitions

(8) The following definitions apply in this section.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

Complot, accord ou arrangement entre concurrents

45(1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement:

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Définitions

(8) Les définitions qui suivent s'appliquent au présent article.

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)

prix S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

38 Gone from the current version is the requirement that the agreement "unduly" affect competition. It is no longer necessary to establish that these agreements have anti-competitive effects. Agreement alone is now sufficient — the anti-competitive effect is presumed. Gone too is the word "purchase" from paragraph 45(1)(c), confining the scope of section 45 to supply or sell-side conspiracies. Lest there be any doubt, the words "for the supply of the product" were added to the new paragraph

45(1)(a) (price-fixing) and the words "production or supply of the product" to paragraphs 45(1)(b) and (c) offences (market and supply restrictions).

39 Contemporaneous with the amendments to section 45, section 90.1 was added to provide civil recourse, at the instance of the Competition Bureau, for any arrangements or agreements which have anti-competitive effects. While section 90.1 is generic in scope, it could encompass buy-side conspiracies, such as those that are founded on the purchase and acquisition of goods and services.

40 Section 45 has been considered by two courts: Dow Chemical Canada ULC v. NOVA Chemicals Corporation, 2018 ABQB 482, 17 Alta. L.R. (7th) 83 [Dow Chemical] and Latifi v. The TDL Group Corp.,2021 BCSC 2183, 2021 CarswellBC 3523 at paras. 72 and 73 [. In both cases the courts also reached the conclusion that section 45 only prohibits arrangements between suppliers and not buy-side or purchaser agreements.

The appellant's arguments with respect to section 45

41 The appellant does not mount a credible argument in response to either the language of the section or its legislative history. In his memorandum of fact and law, the appellant argues that the legislative history is inconclusive on the point (para. 24), the language itself is not conclusive (paras. 25 and 134) and "it is not plain and obvious that Parliament intended that section 90.1, but not section 45, would apply to Buy-Side Conspiracies" (para. 133).

42 These arguments are not persuasive. When given its plain meaning, section 45 does not apply to the agreements which form the foundation of the conspiracy pleaded in the proposed amended statement of claim. In light of this conclusion, it is unnecessary to deal with the subsidiary arguments concerning whether the Federal Court erred in its findings concerning the particularity of the pleading. It is also unnecessary to deal with the Federal Court's finding that the duplication in the statement of claim of two allegations also advanced in class actions in other courts constituted an abuse of process.

43 During oral argument, the Court asked questions about whether the appellant, also a class member in those other class proceedings, could bring his own class proceeding — effectively opting out of those proceedings or affecting its potential finality — after the opt-out period in those proceedings had expired. This concern, effectively another variant of abuse of process, was not considered by the Federal Court and the parties were not prepared to argue it and so the Court will not discuss it further. In the future, on similar facts, the parties may well wish to address it. In making this observation I note that the claim in this case was for statutory damage under section 36 of the Competition Act, a claim not advanced in the other courts.

44 I now turn to the errors in the reasons of the Federal Court.

The role of a judge on a motion to strike

45 The appellant contends that the judge conflated the role of the court on a motion to strike with the role of the court on the merits. He argues that the judge reached his own conclusion on a contested point of statutory interpretation rather than answering the question of whether the plaintiff's proposed interpretation had a reasonable chance of success. The point is reflected in paragraph 72 of the Reasons:

> I acknowledge that the language in subsection 48(3) is capable of being interpreted in the manner advanced by the Responding Defendants as well as in the manner asserted by the plaintiff. However, for the following reasons, I agree with the interpretation advanced by the Responding Defendants.

46 I agree with the appellant. This is an incorrect analytical approach to a motion to strike. The error in paragraph 72 is continued in paragraph 73 where the Federal Court concludes that "the interpretation advanced by the Responding Defendants fits more comfortably with the overall scheme of section 48 ...".

47 Once a judge finds that legislation is capable of being interpreted in at least two different ways, it is not open to the judge to conclude that it is plain and obvious that the action has no reasonable chance of success.

48 Courts must be careful not to inhibit the development of the law by applying too strict an approach to motions to strike. The law must be allowed to evolve to respond to new issues and factual matrices. Therefore, statements of claim are to be read generously with a view to accommodating any inadequacies in the allegations. The fact that the law has not yet recognized a particular claim, interpretation, or cause of action is not determinative of the outcome of the motion. Novel but arguable claims must be allowed to proceed to trial as new developments in the law often find their provenance in surviving motions to strike (*R. v.* Imperial Tobacco Canada Ltd.,2011 SCC 42, [2011] 3 S.C.R. 45 at para. 21 [). As an example of how restraint in the application of motions to strike contributes to the evolution of the law, see the treatment of the plea of non-infringing alternative in patent litigation: Merck & Co., Inc. v. Apotex Inc., 2012 FC 454, 408 F.T.R. 139 (Eng.); Apotex Inc. v. Merck & Co., 2015 FCA 171, 387 D.L.R. (4th) 552.

49 There is, however, a countervailing principle. Motions to strike serve an important screening or gatekeeping function. They are essential to effective and fair litigation and prevent unnecessary effort and expense being devoted to cases that have no reasonable prospect of success. This is particularly true in the context of class actions, where plaintiffs may have fundraised to cover their expenses and where they are relieved from paying costs when they are unsuccessful on interlocutory matters along the way.

50 There is also a broad cost to access to justice. The diversion of scarce judicial resources to cases which have no substance diverts time away from cases that require attention. The point was well made by Stratas J.A. in Coote v. Lawyers' Professional Indemnity Company, 2013 FCA 143, 229 A.C.W.S. (3d) 935 at paragraph 13 when he wrote that "[d]evoting resources to one case for no good reason deprives the others for no good reason."

51 The appellant contends that as the interpretive questions before the Federal Court had not been previously considered, they could not be conclusively considered to be bereft of success. The appellant presses the proposition further and, relying on the decision of this Court in Arsenault v. Canada, 2008 FC 299, 330 F.T.R. 8 at para. 27, aff'd., 2009 FCA 242, 395 N.R. 377 [Arsenault], says that to succeed on a motion to strike, there must be a binding decision which has definitively determined the point in question. In this case there has been no judicial consideration of section 48 and limited tangential consideration of section 45. This, he contends, required that the motion to strike be dismissed.

52 As a general proposition, definitive legal pronouncements on the meaning of legislation should not be made on a motion to strike where there are competing, credible interpretations. A motions judge should not reach a conclusion on an honestly disputed point of statutory interpretation — there is no "correct" or preferred interpretation on a motion to strike. The only task is to determine whether there is a conflicting interpretation worth considering or that has a reasonable prospect of success. The low bar for determining whether a claim has a reasonable prospect of success applies equally where a question of statutory interpretation is at the heart of the motion to strike (Apotex Inc. v. Laboratoires Servier, 2007 FCA 350, 286 D.L.R. (4th) 1 at para. 34).

53 That said, a cause of action is not presumptively "reasonable" simply because it has no antecedence in jurisprudence. Some legal analysis may be needed to determine if a claim has any reasonable prospect of success (McCain Foods Limited v. J.R. Simplot Company, 2021 FCA 4, [2021] F.C.J. No. 37 (QL) at para. 21; Das v. George Weston Limited, 2018 ONCA 1053, 43 E.T.R. (4th) 173 at para. 75; Merck & Co. Inc. v. Apotex Inc., 2014 FC 883, 128 C.P.R. (4th) 410 at para. 38). There is a duty to assess the reasonableness or viability of a plea and separate the wheat from the chaff. This aligns with the obligation of courts to improve the affordable, timely and just adjudication of civil claims (Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87 at paras. 2, 28-29, 31-33).

54 Therefore to insist, as does the appellant, that the absence of a definitive precedent on the meaning of sections 45 and 48 would significantly reduce the utility of motions to strike in cases of statutory interpretation. It would mean that every case which raised a point of interpretation for the first time, no matter how futile the argument, would survive a motion to strike, as there would never be a precedent, let alone a binding precedent. Although the judge used incorrect terminology, he did not err in conducting some legal analysis to determine whether the claim had any reasonable prospect of success, and that analysis supported his conclusion that the claim had no reasonable prospect of success.

Evidence on motions to strike

55 The Federal Court concluded that section 45 only prohibited supply-side conspiracies. It reached this conclusion after a review of the text of section 45, its legislative history, Parliamentary committee reports and policy statements by the Competition Bureau (Department of Consumer and Corporate Affairs, *Proposals for a New Competition Policy for Canada* (November, 1973) and Standing Senate Committee on Banking, Trade and Commerce, Issue No. 61 (19 November 1975) at 18-19).

56 Rule 221(2) of the Federal Courts Rules, S.O.R./98-106, provides that no evidence shall be heard on a motion to strike for an order under paragraph (1)(*a*).

57 This legislative prohibition against the use of evidence on a motion to strike is underlined by solid policy considerations. There are no affidavits or cross-examinations. The Court has neither the assurance that it has the complete picture nor that the "evidence" that it does have is credible. Relying on extrinsic evidence on a motion to strike makes it unclear as to whether the result was reached as a matter of law following the application of the principles of statutory interpretation, or whether it was reached based on the extrinsic evidence. The line between jurisprudence and evidence blurs. The waters become muddy. That is the case before us.

58 A motion to strike pleadings is different from other creatures under the Rules: a ruling on a question of law or a summary judgment motion. Each of these motions has its proper place and for good reasons they should not be smudged together.

59 To allow evidence in a pleadings motion would quickly make it just an early summary judgment motion, but stripped of the requirements for summary judgment motions (*i.e.* leading the best case, filing the motion only after defence). The parties would be filing evidence before all of the issues are on the table (no defence has been filed). The evidence could be wrong or incomplete.

60 The error of the Federal Court was to treat the extrinsic evidence as relevant to the statutory interpretation issue before us. Policy statements of the regulator do not tell us what a statute means. Our focus is the statute, not how people have been using it. The Federal Court used the debates and proceedings not as context to inform the statutory interpretation analysis but instead as corroboration of its interpretation.

61 As noted, section 45 has been previously considered (*Dow Chemical* and *Latifi*). In both cases the court reached the conclusion that section 45 only applied to prohibit arrangements between suppliers, and in both cases the court reached that conclusion without regard to the extrinsic evidence. In fact, in *Latifi*, the Court questioned the appropriateness of the Federal Court's reliance on extrinsic evidence to understand the meaning of section 45, and concluded that "even if ... admissible" it was of little weight (*Latifi* at paras. 73-74).

62 In other words, the Federal Court could have reached the same result without relying on the extrinsic evidence.

63 I accept that legislative history may be used on a motion to strike as it may inform the purpose of the legislation (Alberta (Attorney General) v. British Columbia (Attorney General), 2021 FCA 84, 41 C.E.L.R. (4th) 157 at para. 127). But even here, care must be taken not to confuse the evolution of the legislation, which is law, with what individual politicians or regulators think or hope the legislation says. There is a substantive difference between committee proceedings that shed light on the evolution and legislative history of a law on the one hand and on the other hand the testimony of academics and public servants which may be aspirational, disputable or of arguable relevance. While perhaps self-evident, if it is necessary to resort to Hansard to discern the meaning of a statute, it is difficult to conclude that it is plain and obvious that a plaintiff's case has no reasonable prospect of success.

64 In *Imperial Tobacco*, the Supreme Court considered the admissibility of evidence in the context of statutory interpretation on a motion to strike, holding that it was proper to rely on Hansard on a motion to strike a pleading. The appeal was from the British Columbia Court of Appeal, and the motion to strike was governed by the British Columbia Supreme Court Rules, B.C. Reg. 221/90 [BCSC Rules], as they then were. Like the *Federal Courts Rules*, Rule 19(27) of the BCSC Rules (now Rule

9-5(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009) provided that no evidence was admissible on a motion to strike a statement of claim for failure to disclose a reasonable cause of action. Nonetheless, the Court opined that courts "may" consider all evidence relevant to statutory interpretation in order to discern legislative intent (*Imperial Tobacco* at para. 128).

65 Two points can be said about *Imperial Tobacco*.

66 First, and at risk of repetition, if a court must resort to material beyond the statute and its legislative history to answer the question as to its scope and application, it is difficult to conclude that the interpretation which forms the foundation of the claim has no reasonable prospect of success. In this context, yellow lights should be flashing before any judge who needs extrinsic evidence to answer a question of statutory interpretation on a motion to strike.

67 Second, in *Imperial Tobacco*, the Supreme Court was not asked to consider the range of procedural options available to parties in the Federal Court to resolve preliminary legal issues, several of which provide for the admission of the type of extrinsic evidence in issue here. Put otherwise, the prohibition on the use of evidence in Rule 221(2) is best understood when situated in the broader architecture of the *Federal Courts Rules*.

68 Rule 221(1)(a) is the beginning point on a continuum of procedural options available to parties to resolve questions of interpretation. Rule 213 provides for summary judgment, Rule 220 allows for the determination of preliminary questions of law, and should a matter reach trial, a trial judge has the discretion to direct the parties to address a questions of law. Unlike Rule 221, evidence is admissible under each of these rules to determine a question of statutory interpretation, with all of the guarantees of completeness and credibility associated with the adversarial process. It is for the judge to determine whether there is a sufficient evidentiary foundation to answer the question.

Ambiguity and statutory interpretation

69 Sections 45 and 48 are dual provisions — they give rise to both civil remedies and criminal prosecutions. The fact that they may be enforced criminally was a factor in the Federal Court's interpretation:

> To the extent that the words in subsection 45(1) might somehow be said to permit a broader interpretation that would bring within its scope the sorts of agreements alleged in the Amended Statement of Claim, the penal nature of that provision would entitle the defendants to the benefit of any ambiguity: *R v McLaughlin*, [1980] 2 SCR 331 at 335*;* *R v McIntosh*, [1995] 1 SCR 686 at 702 and 705.
>
> (Reasons at para. 47)
>
> . . .
>
> To the extent that there is any ambiguity in section 48, which is a penal provision, the Responding Defendants are entitled to the benefit of their narrower interpretation: see paragraph 47 above.
>
> (Reasons at paras. 85 and 139)

70 There is no presumption or rule of interpretation that the benefit of the doubt on a question of statutory interpretation goes to the defendant.

71 The principle of strict construction of penal statutes exists as a subsidiary interpretive device applicable only where there is a finding of a genuine ambiguity as to the meaning of a provision (Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 28 [).

72 A genuine ambiguity arises only where there are two equally plausible interpretations to choose between following the interpretation exercise. A difficulty of interpretation is not necessarily an ambiguity (*Bell ExpressVu* at paras. 54-55). A restrictive interpretation may be warranted where an ambiguity cannot be resolved by means of the usual principles of interpretation. But it is a principle of last resort that does not supersede a purposive and contextual approach to interpretation.

73 As Professor Sullivan explains, the strict constructionist approach to the interpretation of penal statutes developed in the eighteenth century when criminal law sanctions were severe and invariably triggered incarceration. But by the 1990s that presumption began to erode to the point where it is engaged only in the limited circumstances which I have described (R. v. Jaw, 2009 SCC 42, [2009] 3 S.C.R. 26 at para. 38 citing R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 472-74; *R. v.* Big River First Nation, 2019 SKCA 117, 28 C.E.L.R. (4th) 218).

74 In the absence of a finding of a true ambiguity, the principle of strict construction ought not to have been invoked. For the reasons I have explained, there is no ambiguity in section 45.

Appeal of the costs order

75 The appellant appeals the award of costs against him made by the Federal Court with respect to the motion to strike. He notes that class proceedings in the Federal Court are a no-costs regime (Rule 334.39 of the Federal Courts Rules). The Court did not award costs on the motion to amend as the defendants did not request costs on that motion.

76 As a general rule, the no-costs rule in class actions is engaged the moment that the defendants are made parties to a certification motion (Campbell v. Canada (Attorney General),2012 FCA 45, [2013] 4 F.C.R. 234 [). The policy objectives of the no-costs regime reflected in Rule 334.39 and why they do not apply prior to certification are fully discussed by Pelletier J.A. in *Campbell*, where this Court rejects the argument that no-costs regime attaches to the proceeding itself, as contended by the appellant.

77 Although the Federal Court did not consider the jurisprudence or Rule 334.39, no error was made in awarding costs against the appellant. The certification motion had not been filed, consequently the award of costs was not prohibited by Rule 334.39.

78 Therefore, I would dismiss the appeal. Although the appellant was unsuccessful in the result, the appeal was an understandable response to the Federal Court's errors that I have identified. In light of this, I would not make an award of costs.

***David Stratas J.A.*:**

I agree.

***Anne L. Mactavish J.A.*:**

I agree.

Appeal dismissed.

AnnexA

Competition Act, R.S.C., 1985, c. C-34

> **Conspiracies, agreements or arrangements between competitors**
>
> **45** (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges
>
> > (a) to fix, maintain, increase or control the price for the supply of the product;
> >
> > (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
> >
> > (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.
>
> **Penalty**

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) is in respect only of the supply of services that facilitate the export of products from Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

(a) is entered into only by parties each of which is, in respect of every one of the others, an affiliate;

(b) is between federal financial institutions and is described in subsection 49(1); or

(c) is an *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the conspiracy, agreement or arrangement is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Definitions

(8) The following definitions apply in this section.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

Where application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

Conspiracy relating to professional sport

48 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Matters to be considered

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

(a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

Application

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association *Interveners*

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

INDEXED AS: ORPHAN WELL ASSOCIATION *v.* GRANT THORNTON LTD.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

RÉPERTORIÉ : ORPHAN WELL ASSOCIATION *c.* GRANT THORNTON LTD.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

associated with them or to satisfy secured creditors' claims ahead of company's environmental liabilities — Whether regulator's use of powers under provincial legislation to enforce bankrupt company's compliance with end-of-life obligations conflicts with trustee's powers under federal bankruptcy legislation or with the order of priorities under such legislation — If so, whether provincial regulatory regime inoperative to extent of conflict by virtue of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, s. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, s. 1(1)(n).

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas (typically, a mineral lease with the Crown, which Canadian courts classify as a *profit à prendre*), surface rights and a licence issued by the Alberta Energy Regulator ("Regulator"). Under provincial legislation, the Regulator will not grant a licence to extract, process or transport oil and gas in Alberta unless the licensee assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These end-of-life obligations are known as "abandonment" and "reclamation".

The Licensee Liability Rating Program is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio, the licensee is required to bring its LMR back up to the prescribed level by paying a security deposit, performing end-of-life obligations, or transferring licences with the Regulator's approval. If either the transferor or the transferee would have a post-transfer LMR below 1.0,

responsabilité des biens pétroliers et gaziers inexploités de la société et tentant de se soustraire aux engagements environnementaux associés à ces biens ou d'acquitter les réclamations des créanciers garantis avant les engagements environnementaux de la société — L'exercice par l'organisme de réglementation des pouvoirs que lui confère la législation provinciale pour contraindre la société faillie à respecter les obligations de fin de vie entre-t-il en conflit avec les pouvoirs accordés au syndic par la loi fédérale sur la faillite ou avec l'ordre de priorités fixé par cette loi? — Dans l'affirmative, le régime de réglementation provincial est-il inopérant dans la mesure du conflit par application de la doctrine de la prépondérance fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, art. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, art. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, art. 1(1)(n).

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz (habituellement un bail d'exploitation minière avec la Couronne que les tribunaux canadiens qualifient de profit à prendre), des droits de surface et d'un permis délivré par l'Alberta Energy Regulator (« organisme de réglementation »). Selon la législation provinciale, l'organisme de réglementation n'accordera pas le permis voulu pour extraire, traiter ou transporter du pétrole et du gaz en Alberta à moins que le titulaire de permis n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations de fin de vie sont appelées l'« abandon » et la « remise en état ».

Le Programme d'évaluation de la responsabilité du titulaire de permis constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit, le titulaire de permis doit la ramener en versant un dépôt de garantie, en exécutant les obligations

the Regulator will normally refuse to approve the licence transfer.

The insolvency of an oil and gas company licensed to operate in Alberta engages Alberta's comprehensive licensing regime, which is binding on companies active in the oil and gas industry, and the *Bankruptcy and Insolvency Act* ("*BIA*"), federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. Alberta's *Environmental Protection and Enhancement Act* ("*EPEA*") ensures that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim and by providing that an order to perform reclamation work may be issued to a trustee. However, it expressly limits a trustee's liability in relation to such an order to the value of the assets in the bankrupt estate, absent gross negligence or wilful misconduct. The *Oil and Gas Conservation Act* ("*OGCA*") and the *Pipeline Act* take a more generic approach: they simply include trustees in the definition of "licensee". As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee. The Regulator has delegated the authority to abandon and reclaim "orphans" — oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings — to the Orphan Well Association ("OWA"), an independent non-profit entity. The OWA has no power to seek reimbursement of its costs, but it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans once it has completed its environmental work.

Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the

de fin de vie ou en transférant des permis avec l'approbation de l'organisme de réglementation. Si le cédant ou le cessionnaire devait avoir une CGR inférieure à 1,0 après le transfert, l'organisme de réglementation refusera normalement d'approuver le transfert de permis.

L'insolvabilité d'une société pétrolière et gazière autorisée à exercer ses activités en Alberta met en jeu le régime complet de délivrance de permis de l'Alberta qui lie les sociétés actives dans l'industrie pétrolière et gazière, ainsi que la *Loi sur la faillite et l'insolvabilité* (« *LFI* »), une loi fédérale qui régit l'administration de l'actif d'un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. L'*Environmental Protection and Enhancement Act* (« *EPEA* ») de l'Alberta garantit que les obligations réglementaires d'un titulaire de permis continuent d'être respectées pendant qu'il fait l'objet d'une procédure d'insolvabilité en incluant le syndic d'un titulaire de permis dans la définition d'« exploitant » pour l'application de l'obligation de remettre en état et en prévoyant la possibilité qu'une ordonnance de remise en état soit adressée à un syndic. Cependant, faute de négligence grave ou d'inconduite délibérée, elle limite expressément la responsabilité du syndic à l'égard d'une telle ordonnance à la valeur des éléments de l'actif du failli. L'*Oil and Gas Conservation Act* (« *OGCA* ») et la *Pipeline Act* adoptent une approche plus générique : elles incluent simplement le syndic dans la définition de « titulaire de permis ». En conséquence, tout pouvoir que ces lois confèrent à l'organisme de réglementation à l'encontre d'un titulaire de permis peut, en théorie, s'exercer également contre un syndic. L'organisme de réglementation a délégué à l'Orphan Well Association (« OWA »), une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais, mais elle peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin une fois ses travaux environnementaux terminés.

Redwater, une société pétrolière et gazière cotée en bourse, s'est vu octroyer ses premiers permis par l'organisme de réglementation en 2009. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables, mais la majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en

end-of-life obligations associated with Redwater's assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. Grant Thornton Limited ("GTL") was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and had 84 wells, 7 facilities and 36 pipelines, 72 of which were inactive or spent, but, since Redwater's LMR did not drop below the prescribed ratio until after it went into receivership, it never paid any security deposits to the Regulator.

Upon being advised of Redwater's receivership, the Regulator notified GTL that it was legally obligated to fulfill abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations, and that the transfer would not cause a deterioration in Redwater's LMR. GTL concluded that it could not meet the Regulator's requirements because the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. Based on this assessment, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells, 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets. In response, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The Regulator imposed short deadlines, as it considered the Renounced Assets an environmental and safety hazard.

The Regulator and the OWA then filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, and for orders requiring GTL to comply with the Abandonment Orders and to fulfill the end-of-life obligations associated with Redwater's licensed properties.

état qui excèdent leur valeur. En 2013, ATB, qui avait pleinement connaissance des obligations de fin de vie associées aux biens de Redwater, lui a avancé des fonds et, en contrepartie, s'est vu accorder une sûreté sur ses biens actuels et futurs. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Grant Thornton Limited (« GTL ») a été nommé séquestre de Redwater en 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB et comptait 84 puits, 7 installations et 36 pipelines, dont 72 étaient inactifs ou taris, mais, comme la CGR de Redwater n'est tombée sous le ratio prescrit qu'après la mise sous séquestre de cette dernière, elle n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

Après avoir été informé de la mise sous séquestre de Redwater, l'organisme de réglementation a avisé GTL qu'il était légalement tenu de remplir les obligations d'abandon pour tous les biens visés par des permis avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires, et que le transfert n'occasionnerait pas une détérioration de la CGR de Redwater. GTL a conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation car le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Sur la base de cette évaluation, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater, ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation. L'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). L'organisme de réglementation a imposé des délais serrés parce qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité.

L'organisme de réglementation et l'OWA ont alors déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, de même qu'une ordonnance obligeant GTL à se conformer aux ordonnances

The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application seeking approval to pursue a sales process excluding the Renounced Assets and an order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or Redwater's outstanding debts to the Regulator. A bankruptcy order was issued for Redwater and GTL was appointed as trustee. GTL invoked s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets.

The chambers judge and a majority of the Court of Appeal agreed with GTL and held that the Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy conflicted with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the provable claims of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors. The dissenting judge in the Court of Appeal would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*.

Held (Moldaver and Côté JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ.: The Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) of the *BIA* is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. Furthermore, the Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's

d'abandon et à remplir les obligations de fin de vie associées aux biens de Redwater visés par des permis. L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. GTL a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation ainsi qu'une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. Une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a invoqué le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en cabinet et les juges majoritaires de la Cour d'appel ont donné raison à GTL et décidé que l'utilisation proposée par l'organisme de réglementation des pouvoirs que lui confère la loi pour contraindre Redwater à respecter les obligations d'abandon et de remise en état au cours de la faillite était incompatible avec la *LFI* de deux façons : (1) elle imposait à GTL les obligations d'un titulaire de permis relativement aux biens de Redwater auxquels GTL avait renoncé, ce qui est contraire au par. 14.06(4) de la *LFI*; (2) elle renversait le régime de priorité établi par la *LFI* pour le partage des biens d'un failli en exigeant que le paiement de ses réclamations prouvables, en tant que créancier ordinaire, soit effectué avant celui des réclamations des créanciers garantis de Redwater. La juge dissidente de la Cour d'appel aurait accueilli l'appel de l'organisme de réglementation au motif qu'il n'y avait pas de conflit entre la législation environnementale de l'Alberta et la *LFI*.

Arrêt (les juges Moldaver et Côté sont dissidents) : Le pourvoi est accueilli.

Le juge en chef Wagner et les juges Abella, Karakatsanis, Gascon et Brown : L'utilisation par l'organisme de réglementation des pouvoirs que lui confère la loi ne crée pas de conflit avec la *LFI* de façon à mettre en jeu la doctrine de la prépondérance fédérale. Le paragraphe 14.06(4) de la *LFI* intéresse la responsabilité personnelle du syndic et il ne l'investit pas du pouvoir de se soustraire aux engagements environnementaux liant l'actif qu'il administre. De plus, l'organisme de réglementation ne fait valoir aucune réclamation prouvable en matière de faillite, et le régime de priorité de la *LFI* n'est pas renversé. Donc, le statut

regulatory regime can coexist with and apply alongside the *BIA*.

Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws but, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails. The *BIA* as a whole is intended to further two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation. As Redwater is a corporation that will never emerge from bankruptcy, only the former purpose is relevant here.

The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. There is no conflict between the Alberta regulatory scheme and s. 14.06 of the *BIA*, because, under s. 14.06(4), a trustee's disclaimer of real property when there is an order to remedy any environmental condition or damage affecting that property protects the trustee from personal liability, while the ongoing liability of the bankrupt estate is unaffected. This interpretation is supported by the plain language of the section, the Hansard evidence, a previous decision of this Court and the French version of the section. The same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which also specifically state that the trustee is not personally liable — it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

Even assuming that GTL had successfully disclaimed in this case, no operational conflict or frustration of purpose would result from the fact that the Regulator requires GTL, as a licensee, to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict would be caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the

de GTL en tant que titulaire de permis au sens de la loi albertaine n'est à l'origine d'aucun conflit. Le régime de réglementation de l'Alberta peut coexister et s'appliquer conjointement avec la *LFI*.

La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. Par exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales mais, en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte. La *LFI* dans son ensemble est censée favoriser l'atteinte de deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli. Puisque Redwater est une société qui ne s'extirpera jamais de la faillite, seul le premier objectif est pertinent en l'espèce.

Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et l'art. 14.06 de la *LFI* parce que, suivant le par. 14.06(4), la renonciation du syndic à un bien réel en cas d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant ce bien dégage le syndic de toute responsabilité personnelle, alors que la responsabilité continue de l'actif du failli n'est pas touchée. Cette interprétation est étayée par le texte clair de l'article, les débats parlementaires, un arrêt de notre Cour et la version française de l'article. On retrouve également le même concept aux par. 14.06(1.2) et (2), lesquels disposent expressément que le syndic est dégagé de toute responsabilité personnelle. Il est impossible d'interpréter de manière cohérente le par. 14.06(2) comme mentionnant la responsabilité personnelle tout en interprétant le par. 14.06(4) comme renvoyant d'une façon ou d'une autre à la responsabilité de l'actif du failli.

À supposer même que GTL ait renoncé avec succès à des biens en l'espèce, l'organisme de réglementation ne cause aucun conflit d'application ni n'entrave la réalisation d'un objet fédéral en exigeant de GTL, à titre de titulaire de permis, qu'il se serve d'éléments de l'actif pour abandonner les biens faisant l'objet de la renonciation. En outre, il n'y aurait aucun conflit du fait que ces biens soient

restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a licensee for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) of the *BIA* is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

The end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy. Not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. The test set out by the Court in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("*Abitibi*"), must be applied to determine whether a particular regulatory obligation amounts to a claim provable in bankruptcy: (1) there must be a debt, a liability or an obligation to a creditor; (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and (3) it must be possible to attach a monetary value to the debt, liability or obligation. Only the first and third parts of the test are at issue in the instant case.

With respect to the first part of the test, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Here, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. It is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. The public is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Strictly speaking, this is sufficient to dispose of this aspect of the appeal.

As it may prove helpful in future cases, under the third part of the test, a court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed

toujours inclus dans le calcul de la CGR de Redwater. Enfin, vu la retenue avec laquelle il faut appliquer la doctrine de la prépondérance, et vu que l'organisme de réglementation n'a pas tenté de tenir GTL personnellement responsable, en tant que titulaire de permis, des frais d'abandon, aucun conflit avec les par. 14.06(2) ou (4) de la *LFI* n'est causé par la simple possibilité théorique de responsabilité personnelle en application de la *OGCA* ou de la *Pipeline Act*.

Les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater. Les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. Il faut appliquer le critère énoncé par la Cour dans *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite : (1) on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un créancier; (2) la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne devienne failli; et (3) il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. Seules les première et troisième parties du critère sont en litige dans la présente affaire.

Pour ce qui est de la première partie du critère, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. L'organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. Il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater. C'est le public qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi.

Comme cela pourrait se révéler utile à l'avenir, à la troisième partie du critère, le tribunal doit décider s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un

to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement. In the instant case, the Abandonment Orders and the LMR requirements fail to satisfy this part of the test. It is not established by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. This claim is too remote and speculative to be included in the bankruptcy process. Furthermore, the Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater.

In crafting the priority scheme of the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate the effect of s. 14.06(7) in this case. Furthermore, Redwater's only substantial assets were affected by environmental conditions or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

Per Moldaver and Côté JJ. (dissenting): GTL and ATB have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test, namely operational conflict and frustration of purpose. Accordingly, the appeal should be dismissed.

organisme de réglementation. Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais. Dans le cas présent, les ordonnances d'abandon et les exigences relatives à la CGR ne satisfont pas à cette partie du critère. La preuve n'établit pas qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. Cette réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite. En outre, le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que les exigences relatives à la CGR aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater.

Au moment d'élaborer le régime de priorité de la *LFI*, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tirent une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

Les juges Moldaver et Côté (dissidents) : GTL et ATB se sont acquittés de leur fardeau de démontrer qu'il existe une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance, à savoir le conflit d'application et l'entrave à la réalisation d'un objet fédéral. Par conséquent, il y a lieu de rejeter le pourvoi.

Because Alberta's statutory regime does not recognize the disclaimers by trustees of assets encumbered by environmental liabilities as lawful by virtue of the fact that receivers and trustees are regulated as licensees who cannot disclaim assets, there is an unavoidable conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers. An operational conflict arises where it is impossible to comply with both laws. An operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. This interpretation exercise takes place within the guiding confines of cooperative federalism, which operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. Courts should favour an interpretation of the federal legislation that allows the concurrent operation of both laws; however, where the proper meaning of the provision cannot support a harmonious interpretation, it is beyond a court's power to create harmony where Parliament did not intend it.

In the instant case, reliance on cooperative federalism must not result in an interpretation of s. 14.06(4) of the *BIA* that is inconsistent with its language, context and purpose. The natural meaning which appears when s. 14.06(4) is simply read through is that it assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency. This right is in keeping with the fundamental objective of trustees, which is the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. It enables trustees to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. Parliament did not intend to condition the right to disclaim property on the actual existence of a risk of personal liability. Although the opening words of s. 14.06(4) refer to the personal liability of the trustee, when the words of the provision are 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, their meaning becomes apparent. Avoiding personal liability is not the only effect of the appropriate exercise of this power. By properly disclaiming certain properties, the trustee is relieved of

Étant donné que le régime législatif albertain ne reconnaît pas la légalité des renonciations des syndics à des biens grevés d'engagements environnementaux en raison du fait que les séquestres et les syndics sont réglementés comme des titulaires de permis qui ne peuvent renoncer à des biens, il y a un conflit inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaît pas l'effet juridique des renonciations de GTL. Il y a conflit d'application lorsqu'il est impossible de respecter les deux lois. L'analyse relative au conflit d'application relève de l'interprétation des lois : la Cour doit déterminer le sens de chaque loi concurrente afin de décider s'il est possible de respecter les deux lois. Cette démarche d'interprétation s'effectue à l'intérieur du cadre directeur du fédéralisme coopératif, lequel fait office de simple présomption en matière d'interprétation — qui appuie, sans la supplanter, la méthode moderne d'interprétation des lois. Les tribunaux doivent favoriser une interprétation de la loi fédérale permettant une application concurrente des deux lois; cependant, lorsque le sens qu'il convient de donner à la disposition ne peut appuyer une interprétation harmonieuse, un tribunal n'a pas le pouvoir de créer l'harmonie là où le Parlement n'a pas eu l'intention de le faire.

En l'espèce, le recours au principe du fédéralisme coopératif ne doit pas donner lieu à une interprétation du par. 14.06(4) de la *LFI* qui est incompatible avec son libellé, son contexte et son objet. Le sens naturel qui se dégage de la simple lecture du par. 14.06(4) dans son ensemble est qu'il présume et incorpore un droit préexistant en common law de renoncer à des biens dans le contexte de la faillite et de l'insolvabilité. Ce droit est en accord avec l'objectif fondamental poursuivi par les syndics : maximiser le recouvrement au bénéfice de l'ensemble des créanciers par la réalisation des éléments de valeur de l'actif. Il permet aux syndics d'administrer l'actif le plus efficacement possible et leur épargne des frais considérables d'administration qui réduiraient le recouvrement pour les créanciers. Le paragraphe 14.06(4) exprime le droit de renonciation en des termes qui ne comportent aucune restriction et fait ressortir que le syndic ne peut être tenu responsable quand ce droit est exercé. Le Parlement ne voulait pas rendre le droit de renoncer à un bien tributaire de l'existence d'un risque de responsabilité personnelle. Bien que le début du par. 14.06(4) parle de la responsabilité personnelle du syndic, lorsqu'on lit les termes de la disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur, leur sens devient apparent. La protection contre

any liabilities associated with the disclaimed property and loses the ability to sell it for the benefit of the estate. The disclaimer right allows the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's objective of maximizing recovery. However, s. 14.06(4) does not relieve the estate of its liabilities or environmental obligations once a trustee exercises the disclaimer power. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability.

In accordance with the predominant and well-established modern approach to statutory interpretation, courts must read statutory provisions in their entire context, as parts of a coherent whole. In s. 14.06(4) of the *BIA*, Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purpose. Courts must read statutory provisions in their entire context, and Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole. The immediate statutory context surrounding s. 14.06(4), specifically, ss. 14.06(2), (5), (6) and (7), as well as the Hansard evidence, confirms that a trustee's right to disclaim property is not limited to protecting itself from personal liability.

The power to disclaim assets provided to trustees by s. 14.06(4) of the *BIA* was available to GTL on the facts of this case. The statutory conditions to the exercise of this power were met: the Abandonment Orders clearly relate to the remediation of an environmental condition. Additionally, the right of disclaimer is applicable in the context of the statutory regime governing the oil and gas industry. In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language: the trustee is permitted to disclaim "any interest" in "any real property". GTL sought to disclaim *profits à prendre* and surface leases, which can be characterized as real property interests.

The requirement by the Regulator that GTL satisfy Redwater's environmental liabilities ahead of the estate's

toute responsabilité personnelle n'est pas le seul effet de l'exercice régulier de ce pouvoir. En renonçant à bon droit à certains biens, le syndic est dégagé de toute responsabilité associée aux biens faisant l'objet de la renonciation et ne peut plus vendre les biens au profit de l'actif. Le droit de renonciation permet au syndic de ne pas réaliser des biens qui ne seraient pas profitables aux créanciers de l'actif et compromettraient par le fait même son objectif de maximiser le recouvrement. Cependant, le par. 14.06(4) ne décharge pas l'actif de ses obligations ou engagements environnementaux une fois que le syndic exerce le pouvoir de renonciation. Le bien visé par une renonciation retourne ultimement dans l'actif du failli à l'issue du processus de faillite, comme c'est le cas pour les biens non réalisés. La question de savoir si les éléments d'actif sont suffisants pour satisfaire à ces engagements à ce moment précis est une question distincte qui n'a aucun rapport avec le fait sous-jacent de la responsabilité continue.

D'après la méthode prédominante et bien établie d'interprétation des lois, les tribunaux doivent lire les dispositions législatives dans leur contexte global, comme un tout cohérent. Au paragraphe 14.06(4) de la *LFI*, le Parlement a mentionné expressément ce pouvoir de renonciation et exposé les effets particuliers découlant de son exercice approprié. Il a incorporé ainsi à dessein à son régime législatif le pouvoir de renonciation pour en réaliser l'objectif visé. Les tribunaux doivent lire les dispositions législatives dans leur contexte global, et le Parlement est présumé rédiger les articles et paragraphes d'une loi comme un tout cohérent. Le contexte immédiat du par. 14.06(4), plus précisément les par. 14.06(2), (5), (6) et (7), ainsi que les débats parlementaires, confirme que le droit du syndic de renoncer à des biens ne se limite pas à se prémunir contre une responsabilité personnelle.

Le pouvoir de renoncer à des biens que confère aux syndics le par. 14.06(4) de la *LFI* pouvait être exercé par GTL à la lumière des faits de la présente affaire. Les conditions statutaires préalables à l'exercice de ce pouvoir étaient réunies : les ordonnances d'abandon se rapportent clairement à la réparation d'un fait lié à l'environnement. En outre, le droit de renonciation s'applique dans le contexte du régime législatif régissant l'industrie pétrolière et gazière. En décidant des intérêts auxquels peut renoncer un syndic en vertu du par. 14.06(4), le Parlement a utilisé des mots exceptionnellement larges : il est permis au syndic de renoncer à « tout intérêt » sur « le bien réel ». GTL a tenté de renoncer aux profits à prendre et aux droits de surface, qui peuvent être qualifiés d'intérêts sur des biens réels.

L'exigence de l'organisme de réglementation voulant que GTL acquitte les engagements environnementaux de

other debts contravenes the *BIA*'s priority scheme. The Province's licensing scheme therefore should be held inoperative under the second prong of the paramountcy test, frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose. The focus of the analysis is on the effect of the provincial legislation or provision, not its purpose. In the instant case, if the environmental claims asserted by the Regulator (i.e., the Abandonment Orders) are provable in bankruptcy, the Regulator will not be permitted to assert those claims outside the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme.

In *Abitibi*, the Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy. The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. The language of *Abitibi* admits of no ambiguity, uncertainty or doubt: the only determination that has to be made is whether the regulatory body has exercised its enforcement power against a debtor. Most environmental regulatory bodies can be creditors, and government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties. In the instant case, the first prong is satisfied. There is no doubt that the Regulator exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. It is neither appropriate nor necessary in this case to attempt to redefine the first prong of the *Abitibi* test by narrowing the broad definition of "creditor" as the majority does.

There is no dispute that the second prong of the *Abitibi* test, which requires that the debt, liability or obligation be incurred before the debtor becomes bankrupt, is satisfied. The third prong asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. In this case, it is sufficiently certain that either the Regulator or its delegate, the OWA, will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers

Redwater avant les autres dettes de l'actif contrevient au régime de priorité établi par la *LFI*. Le régime provincial de délivrance de permis devrait donc être déclaré inopérant suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. Même lorsqu'il est à proprement parler possible de se conformer à la fois à la loi fédérale et à la loi provinciale, la loi ou les dispositions provinciales seront néanmoins rendues inopérantes dans la mesure où elles ont pour effet d'entraver la réalisation d'un objet valide d'une loi fédérale. L'analyse est axée sur l'effet de la loi ou de la disposition provinciale, et non sur son objet. En l'espèce, si les réclamations environnementales que fait valoir l'organisme de réglementation (c.-à-d. les ordonnances d'abandon) sont prouvables en matière de faillite, il n'est pas autorisé à faire valoir ces réclamations en dehors du processus de faillite et avant les créanciers garantis de Redwater, car cela entraverait la réalisation de l'objet du régime de priorité fédéral.

Dans *Abitibi*, la Cour a établi un test à trois volets, fondé sur le libellé de la *LFI*, pour déterminer si une réclamation est prouvable en matière de faillite. Le premier volet du test *Abitibi* pose la question de savoir si la dette, l'engagement ou l'obligation en cause sont dus par une entité faillie à un créancier. Le texte de cet arrêt ne laisse place à aucune ambiguïté, incertitude ou doute à cet égard : la seule question à trancher est de savoir si l'organisme de réglementation a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. La plupart des organismes de réglementation environnementaux peuvent agir à titre de créanciers, et les entités gouvernementales ne sauraient systématiquement se soustraire aux exigences en matière de priorité de la loi fédérale sur la faillite sous le couvert de l'obligation de faire respecter les devoirs publics. Dans la présente affaire, il est satisfait au premier volet. Il ne fait aucun doute que l'organisme de réglementation a exercé son pouvoir d'appliquer la loi à l'encontre d'une débitrice lorsqu'il a rendu les ordonnances enjoignant à Redwater d'accomplir les travaux environnementaux sur les biens inexploités. Il n'est ni approprié ni nécessaire en l'espèce d'essayer de redéfinir ce volet du test *Abitibi* en restreignant le large sens attribué par la majorité au mot « créancier ».

Personne ne conteste qu'il est satisfait au second volet du test *Abitibi*, lequel exige que la dette, l'engagement ou l'obligation ait pris naissance avant que le débiteur ne devienne failli. Le troisième volet pose la question de savoir s'il est suffisamment certain que l'organisme de réglementation exécutera les travaux et présentera une demande de remboursement. En l'espèce, il est suffisamment certain que l'organisme de réglementation ou sa délégataire, l'OWA, effectuera ultimement les travaux d'abandon et de remise en état et fera valoir une réclamation pécuniaire

judge made three critical findings of fact that easily support this conclusion. First, he found that GTL was not in possession of the disclaimed properties and, in any event, had no ability to perform any kind of work on these assets because the environmental liabilities exceeded the value of the estate itself and Redwater had no working interest participants that would step in to perform the work. As a result, he concluded that there was no other party who could be compelled to carry out the work. Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, the chambers judge found as a fact that the Regulator will ultimately be responsible for the abandonment costs, since it has the power to seek recovery of abandonment costs and has actually performed the work on occasion, and has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets. Third, the chambers judge found that the Regulator's only realistic alternative to performing the remediation work itself was to deem the renounced assets to be orphan wells. In this circumstance, he found that the legislation and evidence shows that if the Regulator deems a well an orphan, then the OWA will perform the work. In light of these factual determinations, the chambers judge rightly concluded that the sufficient certainty standard of *Abitibi* was satisfied because at a minimum, either the Regulator or the OWA will complete the abandonment work.

The majority elevates form over substance in concluding that the sufficient certainty standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. Considering the salient features of the OWA and its relationship with the Regulator, one must conclude that they are inextricably intertwined. When the Regulator exercises its statutory powers to declare a property an "orphan" under s. 70(2) of Alberta's *Oil and Gas Conservation Act*, it effectively delegates the abandonment work to the OWA. The majority's alternative conclusion that it is not sufficiently certain that even the OWA will perform the abandonment work would permit the Regulator to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets.

afin d'obtenir un remboursement. Il est donc satisfait au dernier volet du test *Abitibi*. Le juge en cabinet a tiré trois conclusions de fait cruciales qui appuient aisément cette conclusion. Premièrement, il a conclu que GTL n'était pas en possession des biens visés par les renonciations et, de toute façon, qu'il ne peut pas exécuter de travaux sur ces biens parce que les engagements environnementaux dépassaient la valeur de l'actif même et Redwater ne comptait aucun participant en participation directe qui se chargerait d'exécuter les travaux. Il a donc conclu qu'il n'existe aucune autre partie susceptible d'être contrainte d'exécuter les travaux. Deuxièmement, compte tenu du fait que ni GTL ni les participants en participation directe de Redwater ne voudraient (ou ne pourraient) entreprendre ces travaux, le juge en cabinet a tiré la conclusion de fait selon laquelle l'organisme de réglementation sera en fin de compte responsable des frais d'abandon, car il a le pouvoir de tenter de recouvrer les frais d'abandon et a réellement exécuté les travaux à l'occasion. Il a aussi expressément manifesté l'intention de demander le remboursement des frais liés à l'abandon des biens faisant l'objet de la renonciation. Troisièmement, le juge en cabinet a conclu que la seule solution réaliste qui s'offre à l'organisme de réglementation autre que celle d'effectuer lui-même les travaux de décontamination était de considérer les biens faisant l'objet de la renonciation comme des puits orphelins. Il a conclu qu'en pareil cas, les dispositions législatives et les éléments de preuve démontrent que, si l'organisme de réglementation considère un puits comme orphelin, l'OWA exécutera les travaux. À la lumière de ces conclusions de fait, le juge en cabinet a eu raison de conclure qu'il était satisfait à la norme de certitude suffisante énoncée dans *Abitibi* parce qu'à tout le moins, l'organisme de réglementation ou l'OWA mènerait à terme les travaux d'abandon.

La majorité fait passer la forme avant le fond en concluant qu'il n'est pas satisfait à la norme de certitude suffisante lorsque le délégataire de l'organisme de réglementation, et non l'organisme de réglementation lui-même, effectue les travaux. Vu les caractéristiques saillantes de l'OWA et de sa relation avec l'organisme de réglementation, force est de constater qu'ils sont inextricablement liés. Lorsque l'organisme de réglementation exerce le pouvoir de déclarer un bien « orphelin » que lui confère le par. 70(2) de l'*Oil and Gas Conservation Act* de l'Alberta, il délègue effectivement l'exécution des travaux d'abandon à l'OWA. La conclusion subsidiaire de la majorité selon laquelle il n'est pas suffisamment certain que même l'OWA exécutera les travaux d'abandon permettrait à l'organisme de réglementation de tirer profit de manœuvres stratégiques en manipulant le moment de son intervention afin de se soustraire au régime d'insolvabilité et de dépouiller Redwater de ses biens.

Since it is sufficiently certain that the Regulator (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Regulator's Abandonment Orders constitute "claims provable in bankruptcy". It would undermine the *BIA*'s priority scheme and therefore frustrate an essential purpose of the *BIA* if the Regulator could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

Cases Cited

By Wagner C.J.

Applied: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443; **approved:** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinguished:** *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **referred to:** *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624; *Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner v. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *R. v. Elshaw*, [1991] 3 S.C.R. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB

Comme il est suffisamment certain que l'organisme de réglementation (ou l'OWA, sa délégataire) achèvera les travaux d'abandon et de remise en état, il est satisfait aux trois volets du test *Abitibi*. Les ordonnances d'abandon de l'organisme de réglementation constituent des « réclamations prouvables en matière de faillite ». Ce serait saper le régime de priorités établi par la *LFI* et entraver la réalisation d'un objet essentiel de la *LFI* que de permettre à l'organisme de réglementation de faire valoir ces réclamations en dehors du processus de faillite — et en priorité par rapport aux créanciers garantis de l'actif — que ce soit en obligeant GTL à exécuter ces ordonnances ou en faisant dépendre la vente des biens de valeur de Redwater de l'acquittement de ces obligations.

Jurisprudence

Citée par le juge en chef Wagner

Arrêts appliqués : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443; **arrêts approuvés :** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinction d'avec les arrêts :** *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **arrêts mentionnés :** *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624; *Peters c. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner c. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536; *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123; *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781; *M. c. H.*, [1999] 2 R.C.S. 3; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686; *R. c. Elshaw*, [1991] 3 R.C.S. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R.

794, 261 D.L.R. (4th) 221; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336; *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37.

By Côté J. (dissenting)

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; *Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156.

Statutes and Regulations Cited

Alberta Energy Regulator Administration Fees Rules, Alta. Reg. 98/2013.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy, provable claim or claim

(5th) 1; *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336; *Alberta Energy Regulator c. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L. R. (6th) 37.

Citée par la juge Côté (dissidente)

Terre-Neuve-et-Labrador c. AbitibiBowater Inc., 2012 CSC 67, [2012] 3 R.C.S. 443; *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48, [2018] 3 R.C.S. 189; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. Canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280; *Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. c. L.T.H.*, 2008 CSC 49, [2008] 2 R.C.S. 739; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *Teva Canada Ltd. c. TD Canada Trust*, 2017 CSC 51, [2017] 2 R.C.S. 317; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; *Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156.

Lois et règlements cités

Alberta Energy Regulator Administration Fees Rules, Alta. Reg. 98/2013.

Conservation and Reclamation Regulation, Alta. Reg. 115/93.

provable", "creditor", 14.06, (2), (4) [am. 1997, c. 12, s. 15(1)], 16 to 38, 40, 69.3(1), (2), 72(1), 80, 121 to 154, 169(4), 197(3).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.8(8).

Conservation and Reclamation Regulation, Alta. Reg. 115/93.

Constitution Act, 1867, ss. 91(21), 92(13), 92A(1)(c).

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, ss. 1(ddd), 112 to 122, 134(b), 137, 140, 142(1)(a)(ii), 227 to 230, 240, 245.

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, ss. 1(1)(a), (w), (cc), (eee), 11(1), 12(1), 18(1), 24(2), 25, 27 to 30, 68(d), 70(1), (2), 73(1), (2), 74, 106, 108, 110.

Oil and Gas Conservation Rules, Alta. Reg. 151/71, ss. 1.100(2), 3.012.

Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001, ss. 3(2)(b), 6.

Pipeline Act, R.S.A. 2000, c. P-15, ss. 1(1)(a), (n), (t), 6(1), 9(1), 23 to 26, 51 to 54.

Responsible Energy Development Act, S.A. 2012, c. R-17.3, ss. 2(1)(a), 2(2)(h), 3(1), 28, 29.

Surface Rights Act, R.S.A. 2000, c. S-24, ss. 1(h), 15.

Authors Cited

Alberta. Energy Resources Conservation Board. *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, March 12, 2013.

Alberta Energy Regulator. *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online: https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_1_eng.pdf).

Bankes, Nigel. *Majority of the Court of Appeal Confirm Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online: https://ablawg.ca/2017/05/03/majority-of-the-court-of-appeal-confirms-chief-justice-wittmanns-redwater-decision; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_2_eng.pdf).

Bennett, Frank. *Bennett on Creditors' and Debtors' Rights and Remedies*, 5th ed. Toronto: Thomson Carswell, 2006.

Canada. House of Commons. Standing Committee on Industry. *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996.

Canada. House of Commons. Standing Committee on Industry. *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996.

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, art. 1(ddd), 112 à 122, 134(b), 137, 140, 142(1)(a)(ii), 227 à 230, 240, 245.

Loi constitutionnelle de 1867, art. 91(21), 92(13), 92A(1)c).

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 2 « réclamation prouvable en matière de faillite ou réclamation prouvable », « créancier », 14.06, (2), (4) [mod. 1997, c. 12, s. 15(1)], 16 à 38, 40, 69.3(1), (2), 72(1), 80, 121 à 154, 169(4), 197(3).

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11.8(8).

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, art. 1(1)(a), (w), (cc), (eee), 11(1), 12(1), 18(1), 24(2), 25, 27 à 30, 68(d), 70(1), (2), 73(1), (2), 74, 106, 108, 110.

Oil and Gas Conservation Rules, Alta. Reg. 151/71, art. 1.100(2), 3.012.

Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001, art. 3(2)(b), 6.

Pipeline Act, R.S.A. 2000, c. P-15, art. 1(1)(a), (n), (t), 6(1), 9(1), 23 à 26, 51 à 54.

Responsible Energy Development Act, S.A. 2012, c. R-17.3, art. 2(1)(a), 2(2)(h), 3(1), 28, 29.

Surface Rights Act, R.S.A. 2000, c. S-24, art. 1(h), 15.

Doctrine et autres documents cités

Alberta. Energy Resources Conservation Board. *Directive 006 : Licensee Liability Rating (LLR) Program and Licence Transfer Process*, March 12, 2013.

Alberta Energy Regulator. *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (en ligne : https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_1_eng.pdf).

Bankes, Nigel. *Majority of the Court of Appeal Confirm Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (en ligne : https://ablawg.ca/2017/05/03/majority-of-the-court-of-appeal-confirms-chief-justice-wittmanns-redwater-decision; version archivée : https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_2_eng.pdf).

Bennett, Frank. *Bennett on Creditors' and Debtors' Rights and Remedies*, 5th ed., Toronto, Thomson Carswell, 2006.

Canada. Chambre des communes. Comité permanent de l'industrie. *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996.

Canada. Chambre des communes. Comité permanent de l'industrie, *Témoignages*, nº 21, 2e sess., 35e lég., 25 septembre 1996.

Canada. Senate. *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996.

Goode, Roy. *Principles of Corporate Insolvency Law*, 4th ed. London: Sweet & Maxwell/Thomson Reuters, 2011.

Grand Robert de la langue française, 2e éd. Paris: Le Robert, 2001, "*ès*".

Klimek, Jennifer. *Insolvency and Environment Liability*. Toronto: Carswell, 1994.

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 5th ed. Markham, Ont.: LexisNexis, 2018.

Lund, Anna J. "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: a New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 *Sask. L. Rev.* 157.

Oxford English Dictionary (online: http://www.oed.com), "probably".

Robert & Collins (online: https://grc.bvdep.com/login_.asp), "*ès qualités*".

Silverstein, Lee. "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev*. 467.

Stewart, Fenner L. "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2017*. Toronto: Thomson Reuters, 2018, 163.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, Schutz and Martin JJ.A.), 2017 ABCA 124, 47 C.B.R. (6th) 171, [2017] 6 W.W.R. 301, 8 C.E.L.R. (4th) 1, 50 Alta. L.R. (6th) 1, [2017] A.J. No. 402 (QL), 2017 CarswellAlta 695 (WL Can.), affirming a decision of Wittmann C.J., 2016 ABQB 278, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 33 Alta. L.R. (6th) 221, [2016] A.J. No. 541 (QL), 2016 CarswellAlta 994 (WL Can.). Appeal allowed, Moldaver and Côté JJ. dissenting.

Ken Lenz, *Q.C.*, *Patricia Johnston*, *Q.C.*, *Keely R. Cameron*, *Brad Gilmour* and *Michael W. Selnes*, for the appellants.

Canada. Sénat. *Délibérations du comité sénatorial permanent des Banques et du commerce*, no 13, 2e sess., 35e lég., 4 novembre 1996.

Goode, Roy. *Principles of Corporate Insolvency Law*, 4th ed. London, Sweet & Maxwell/Thomson Reuters, 2011.

Grand Robert de la langue française, 2e éd., Paris, Le Robert, 2001, "ès".

Klimek, Jennifer. *Insolvency and Environment Liability*. Toronto, Carswell, 1994.

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 5th ed. Markham (Ont.), LexisNexis, 2018.

Lund, Anna J. « Lousy Dentists, Bad Drivers, and Abandoned Oil Wells : a New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law » (2017), 80 *Sask. L. Rev*. 157.

Oxford English Dictionary (en ligne : http://www.oed.com), « *probably* ».

Robert & Collins (en ligne : https://grc.bvdep.com/login_.asp), « ès qualités ».

Silverstein. Lee. « Rejection of Executory Contracts in Bankruptcy and Reorganization » (1964), 31 *U. Chi. L. Rev.* 467.

Stewart, Fenner L. « How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy », in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2017*, Toronto, Thomson Reuters, 2018.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed., Toronto, Irwin Law, 2016.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed., Markham (Ont.), LexisNexis, 2014.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Slatter, Schutz et Martin), 2017 ABCA 124, 47 C.B.R. (6th) 171, [2017] 6 W.W.R. 301, 8 C.E.L.R. (4th) 1, 50 Alta. L.R. (6th) 1, [2017] A.J. No. 402 (QL), 2017 CarswellAlta 695 (WL Can.), qui a confirmé une décision du juge en chef Wittmann, 2016 ABQB 278, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 33 Alta. L.R. (6th) 221, [2016] A.J. No. 541 (QL), 2016 CarswellAlta 994 (WL Can.). Pourvoi accueilli, les juges Moldaver et Côté sont dissidents.

Ken Lenz, *c.r.*, *Patricia Johnston*, *c.r.*, *Keely R. Cameron*, *Brad Gilmour* et *Michael W. Selnes*, pour les appelants.

Kelly J. Bourassa, *Jeffrey Oliver*, *Tom Cumming*, *Ryan Zahara*, *Danielle Maréchal*, *Brendan MacArthur-Stevens* and *Chris Nyberg*, for the respondents.

Josh Hunter and *Hayley Pitcher*, for the intervener the Attorney General of Ontario.

Gareth Morley, *Aaron Welch* and *Barbara Thomson*, for the intervener the Attorney General of British Columbia.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Robert Normey and *Vivienne Ball*, for the intervener the Attorney General of Alberta.

Adrian Scotchmer, for the intervener Ecojustice Canada Society.

Lewis Manning and *Toby Kruger*, for the intervener the Canadian Association of Petroleum Producers.

Nader R. Hasan and *Lindsay Board*, for the intervener Greenpeace Canada.

Christine Laing and *Shaun Fluker*, for the intervener Action Surface Rights Association.

Caireen E. Hanert and *Adam Maerov*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Howard A. Gorman, *Q.C.*, and *D. Aaron Stephenson*, for the intervener the Canadian Bankers' Association.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain

Kelly J. Bourassa, *Jeffrey Oliver*, *Tom Cumming*, *Ryan Zahara*, *Danielle Maréchal*, *Brendan MacArthur-Stevens* et *Chris Nyberg*, pour les intimées.

Josh Hunter et *Hayley Pitcher*, pour l'intervenante la procureure générale de l'Ontario.

Gareth Morley, *Aaron Welch* et *Barbara Thomson*, pour l'intervenant le procureur général de la Colombie-Britannique.

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Robert Normey et *Vivienne Ball*, pour l'intervenant le procureur général de l'Alberta.

Adrian Scotchmer, pour l'intervenante Ecojustice Canada Society.

Lewis Manning et *Toby Kruger*, pour l'intervenante l'Association canadienne des producteurs pétroliers.

Nader R. Hasan et *Lindsay Board*, pour l'intervenante Greenpeace Canada.

Christine Laing et *Shaun Fluker*, pour l'intervenante Action Surface Rights Association.

Caireen E. Hanert et *Adam Maerov*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Howard A. Gorman, *c.r.*, et *D. Aaron Stephenson*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement du juge en chef Wagner et des juges Abella, Karakatsanis, Gascon et Brown rendu par

LE JUGE EN CHEF —

I. Introduction

[1] L'industrie pétrolière et gazière est une composante lucrative et importante de l'économie albertaine et canadienne. Cette industrie entraîne

unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("*EPEA*"), s. 1(ddd), and *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*"), s. 1(1)(a)).

[2] The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

[3] The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the

également certains coûts et certaines conséquences inévitables pour l'environnement. Pour y faire face, l'Alberta a mis en place un régime complet de délivrance de permis du berceau à la tombe qui lie les sociétés actives dans l'industrie. Une société n'obtiendra pas les permis dont elle a besoin pour extraire, traiter ou transporter du pétrole et du gaz en Alberta, à moins qu'elle n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations sont appelées la [TRADUCTION] « remise en état » et l'« abandon » (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (« *EPEA* »), al. 1(ddd) et *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (« *OGCA* »), al. 1(1)(a)).

[2] La question en l'espèce est de savoir ce qu'il advient de ces obligations lorsqu'une société est en faillite et qu'un syndic de faillite est chargé de répartir ses biens entre divers créanciers conformément aux règles prévues dans la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). Redwater Energy Corporation (« Redwater ») est la société en faillite au cœur du présent pourvoi. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables. La majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en état qui excèdent leur valeur.

[3] L'Alberta Energy Regulator (« organisme de réglementation ») et l'Orphan Well Association (« OWA ») sont les appelants devant notre Cour (pour simplifier, je les appellerai l'organisme de réglementation au moment d'analyser la position des appelants, sauf indication contraire). L'organisme de réglementation administre le régime de délivrance de permis de l'Alberta et assure le respect, par les titulaires de permis, des obligations relatives à l'abandon et à la remise en état. L'organisme de réglementation a délégué à l'OWA, une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés ou non réclamés sans

remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

[4] Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the *BIA* empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

[5] The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité. L'organisme de réglementation affirme que, d'une façon ou d'une autre, la valeur restante de l'actif de Redwater doit être utilisée pour satisfaire aux obligations d'abandon et de remise en état qui sont associées à ses biens visés par des permis.

[4] Le syndic de faillite de Redwater, Grant Thornton Limited (« GTL »), et le principal créancier garanti de Redwater, Alberta Treasury Branches (« ATB »), s'opposent au pourvoi (pour simplifier, je les appellerai GTL au moment d'analyser la position des intimées, sauf indication contraire). GTL soutient que, comme il a renoncé aux biens pétroliers et gaziers inexploités de Redwater, le par. 14.06(4) de la *LFI* l'investit du pouvoir de les délaisser et de se soustraire aux engagements environnementaux qui s'y rattachent et de s'occuper uniquement des biens pétroliers et gaziers productifs de Redwater. GTL soutient subsidiairement que, d'après le régime de priorité établi dans la *LFI*, il faut acquitter les réclamations des créanciers garantis de Redwater avant de respecter ses engagements environnementaux. Invoquant la doctrine de la prépondérance, GTL affirme que la législation environnementale de l'Alberta réglementant l'industrie pétrolière et gazière est constitutionnellement inopérante dans la mesure où elle autorise l'organisme de réglementation à se mêler de cet arrangement.

[5] Le juge siégeant en cabinet (2016 ABQB 278, 37 C.B.R. (6th) 88) et les juges majoritaires de la Cour d'appel (2017 ABCA 124, 47 C.B.R. (6th) 171) ont donné raison à GTL. L'utilisation proposée par l'organisme de réglementation des pouvoirs que lui confère la loi pour contraindre Redwater à respecter les obligations d'abandon et de remise en état au cours de la faillite a été jugée incompatible avec la *LFI* de deux façons : (1) elle imposait à GTL les obligations d'un titulaire de permis relativement aux biens de Redwater auxquels GTL avait renoncé, ce qui est contraire au par. 14.06(4) de la *LFI*; (2) elle renversait le régime de priorité établi par la *LFI* pour le partage des biens d'un failli en exigeant que le paiement de ses « réclamations prouvables », en tant que créancier ordinaire, soit effectué avant celui des réclamations des créanciers garantis de Redwater.

[6] Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the *BIA* did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

[7] For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. *Alberta's Regulatory Regime*

[8] The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

[9] In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land.

[6] La juge d'appel Martin, maintenant juge de notre Cour, n'était pas d'accord. Elle aurait accueilli l'appel de l'organisme de réglementation au motif qu'il n'y avait pas de conflit entre la législation environnementale de l'Alberta et la *LFI*. La juge Martin a estimé que : (1) l'art. 14.06 de la *LFI* n'a pas eu pour effet de libérer GTL des obligations de Redwater à l'égard de ses biens visés par des permis; (2) l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la *LFI* n'était pas renversé.

[7] Pour les motifs qui suivent, j'accueillerais le pourvoi. Bien que mon analyse diffère de la sienne à certains égards, je conviens avec la juge Martin que l'utilisation par l'organisme de réglementation des pouvoirs que lui confère la loi ne crée pas de conflit avec la *LFI* de façon à mettre en jeu la doctrine de la prépondérance fédérale. Le paragraphe 14.06(4) intéresse la responsabilité personnelle du syndic et il ne l'investit pas du pouvoir de se soustraire aux engagements environnementaux liant l'actif qu'il administre. L'organisme de réglementation ne fait valoir aucune réclamation prouvable en matière de faillite, et le régime de priorité de la *LFI* n'est pas renversé. Donc, le statut de GTL en tant que titulaire de permis au sens de la loi albertaine n'est à l'origine d'aucun conflit. Le régime de réglementation de l'Alberta peut coexister et s'appliquer conjointement avec la *LFI*.

II. Contexte

A. *Le régime de réglementation de l'Alberta*

[8] Le règlement des questions constitutionnelles et l'issue finale du présent pourvoi reposent sur une compréhension adéquate du régime complexe de réglementation qui régit l'industrie pétrolière et gazière de l'Alberta. Je vais donc décrire ce régime de façon très détaillée.

[9] Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin de trois choses : un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et un permis délivré par l'organisme de réglementation. En Alberta, les droits miniers sont

About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

[10] A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

[11] Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

généralement soustraits des droits de propriété sur les terres. Environ 90 p. 100 des droits miniers de l'Alberta sont détenus par la Couronne au nom du public.

[10] L'intérêt de propriété d'une société dans le pétrole ou le gaz qu'elle cherche à exploiter prend généralement la forme d'un bail d'exploitation minière avec la Couronne (mais parfois avec un propriétaire privé). La société a également besoin de droits de surface, afin de pouvoir accéder au terrain physique situé au-dessus du pétrole et du gaz, de l'occuper, ainsi que d'installer l'équipement nécessaire pour pomper, stocker et transporter le pétrole de même que le gaz. On obtient les droits de surface au moyen d'un bail avec le propriétaire foncier, dans bien des cas un agriculteur ou un éleveur (mais parfois la Couronne). Lorsqu'un propriétaire foncier n'accorde pas volontairement des droits de surface, la loi albertaine autorise le Surface Rights Board (Conseil des droits de surface) à rendre une ordonnance d'accès aux terres en faveur d'un [TRADUCTION] « exploitant », soit la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1h) et art. 15).

[11] Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387). Un profit à prendre est entièrement cessible et il a été défini comme [TRADUCTION] « un intérêt foncier sans possession, comme une servitude, qui peut être transmis de génération en génération et qui reste avec la terre, indépendamment des changements de propriétaire » (F. L. Stewart, « How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2017* (2018), 163 (« Stewart »), p. 193). Les sociétés, qu'elles soient solvables ou insolvables, détiennent souvent des profits à prendre tant dans les puits productifs que dans les puits inexploités ou épuisés. Il existe une foule d'ententes potentielles de « participation directe » par lesquelles plusieurs parties peuvent partager un intérêt dans des ressources pétrolières et gazières.

[12] The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The *Pipeline Act*, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (*OGCA*, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (*OGCA*, s. 12(1)).

[13] The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled . . . for the production of oil or gas" (*OGCA*, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (*Pipeline Act*, s. 1(1)(t)).

[14] The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource

[12] La troisième chose — celle qui se rapporte le plus au présent pourvoi — dont une société a besoin pour avoir accès aux ressources pétrolières et gazières de l'Alberta ainsi que pour les exploiter, c'est un permis délivré par l'organisme de réglementation. L'*OGCA* interdit à toute personne non titulaire d'un permis de commencer le forage d'un puits, y compris les activités préparatoires ou accessoires à cette fin, ou d'amorcer la construction ou l'exploitation d'une installation (par. 11(1) et 12(1)). La *Pipeline Act*, R.S.A. 2000, c. P-15, interdit également la construction de pipelines sans permis (par. 6(1)). Le profit à prendre dans des gisements de pétrole et de gaz peut être acheté et vendu sans approbation réglementaire. Cependant, cela n'a qu'une utilité pratique restreinte en soi, puisque, sans le permis associé à un puits, l'acheteur ne peut pas [TRADUCTION] « poursuivre une opération de forage, d'exploitation ou d'injection » (*OGCA*, par. 11(1)), et sans le permis associé à une installation, l'acheteur ne peut pas [TRADUCTION] « poursuivre la construction ou l'exploitation » (*OGCA*, par. 12(1)).

[13] Les trois biens visés par des permis pertinents dans l'industrie pétrolière et gazière de l'Alberta sont les puits, les installations et les pipelines. Le « puits » est défini, entre autres, comme [TRADUCTION] « un orifice dans le sol complété ou en cours de forage pour la production de pétrole ou de gaz » (*OGCA*, al. 1(1)(eee)). L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières (*OGCA*, al. 1(1)(w)). Le « pipeline » est défini comme [TRADUCTION] « un tuyau utilisé pour transporter une substance ou une combinaison de substances », y compris les installations connexes (*Pipeline Act*, al. 1(1)(t)).

[14] Les permis dont une société a besoin pour récupérer, traiter ainsi que transporter le pétrole et le gaz sont délivrés par l'organisme de réglementation. Ce dernier n'est pas un mandataire de la Couronne. Il est constitué en société par le par. 3(1) de la *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 (« *REDA* »). L'organisme de réglementation exerce un large éventail de pouvoirs en vertu de l'*OGCA*

activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

et de la *Pipeline Act*. Il agit également à titre d'organisme de réglementation des activités liées aux ressources énergétiques sous le régime de l'*EPEA*, la loi albertaine plus générale sur la protection de l'environnement (*REDA*, al. 2(2)(h)). Le mandat de l'organisme de réglementation est énoncé dans la *REDA* et comprend [TRADUCTION] « la mise en valeur efficiente, sûre, ordonnée et respectueuse de l'environnement des ressources énergétiques en Alberta » (al. 2(1)(a)). L'organisme de réglementation est financé presque entièrement par l'industrie qu'il réglemente et il recueille ses recettes budgétaires au moyen de frais administratifs (Stewart, p. 219; *REDA*, art. 28 et 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

[15] The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (*OGCA*, s. 18(1); *Pipeline Act*, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

[15] L'organisme de réglementation jouit d'un large pouvoir discrétionnaire lorsqu'il s'agit de délivrer des permis d'exploitation de puits, d'installations et de pipelines. À la réception d'une demande de permis, l'organisme de réglementation peut accorder le permis sous réserve de certaines conditions, restrictions et stipulations, ou il peut refuser le permis (*OGCA*, par. 18(1); *Pipeline Act*, par. 9(1)). Les permis d'exploitation d'un puits, d'une installation ou d'un pipeline sont accordés sous réserve d'obligations qui se manifesteront un jour d'abandonner le bien sous-jacent et de remettre en état le terrain sur lequel il est situé.

[16] "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation . . . in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings . . . land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty

[16] Le terme [TRADUCTION] « abandon » désigne « le démantèlement permanent d'un puits ou d'une installation de la manière prescrite par les règlements ou les règles » pris par l'organisme de réglementation (*OGCA*, al. 1(1)(a)). Plus précisément, l'abandon d'un puits a été défini comme [TRADUCTION] « l'obturation d'un trou qui a été foré pour le pétrole ou le gaz, à la fin de sa vie utile, afin de le rendre sûr sur le plan environnemental » (*Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta L.R. (2d) 45 (« *Northern Badger* »), par. 2). L'abandon d'un pipeline fait référence à sa [TRADUCTION] « mise hors service permanente [. . .] de la manière prescrite par les règles » (*Pipeline Act*, al. 1(1)(a)). La remise en état comprend [TRADUCTION] « l'enlèvement des bâtiments et de l'équipement », « la décontamination des bâtiments, du terrain ou de l'eau », ainsi que

binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

[17] A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12,

la « stabilisation, l'établissement des courbes de niveau, l'entretien, le conditionnement ou la reconstruction de la surface du terrain » (*EPEA*, al. 1(ddd)). Une autre obligation qui incombe à ceux qui œuvrent dans l'industrie pétrolière et gazière de l'Alberta est celle de la décontamination, qui prend naissance lorsqu'une substance nocive ou potentiellement nocive a été rejetée dans l'environnement (*EPEA*, art. 112 à 122). Puisque l'on ne connaît pas l'étendue des obligations de décontamination, s'il en est, qui peuvent être associées aux biens de Redwater, je ne traiterai pas la décontamination séparément de la remise en état, sauf indication contraire. Comme cela a été fait tout au long du présent litige, je qualifierai conjointement l'abandon et la remise en état d'obligations de fin de vie.

[17] Le titulaire de permis doit abandonner un puits ou une installation lorsque l'organisme de réglementation le lui ordonne, ou lorsque les règles ou les règlements l'exigent. L'organisme de réglementation peut ordonner l'abandon lorsqu'il [TRADUCTION] « l'estime nécessaire pour protéger le public ou l'environnement » (*OGCA*, par. 27(3)). Selon les règles, le titulaire de permis est tenu d'abandonner un puits ou une installation, notamment, à la résiliation du bail d'exploitation minière, du bail de surface ou de l'accès aux terres, lorsque l'organisme de réglementation annule ou suspend le permis, ou lorsqu'il avise le titulaire de permis que le puits ou l'installation peut constituer un danger pour l'environnement ou la sécurité (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, art. 3.012). L'article 23 de la *Pipeline Act* oblige les titulaires de permis à abandonner des pipelines dans des situations semblables. L'obligation de remise en état est prévue par l'art. 137 de l'*EPEA*. Cette obligation s'impose à un « exploitant », terme plus large qui englobe le titulaire d'un permis délivré par l'organisme de réglementation (*EPEA*, al. 134(b)). La remise en état est régie par les exigences procédurales fixées dans le règlement (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] Le Programme d'évaluation de la responsabilité du titulaire de permis, qui était, au moment de l'insolvabilité de Redwater, établi dans la *Directive 006 : Licensee Liability Rating (LLR) Program and*

2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

License Transfer Process (12 mars 2013) (« Directive 006 ») constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie, au lieu que celles-ci soient en fin de compte assumées par le public albertain. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout, sans isolement ou morcellement des biens. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit (1,0 à l'époque de l'insolvabilité de Redwater), le titulaire de permis est tenu de verser un dépôt de garantie. Le dépôt de garantie est ajouté aux [TRADUCTION] « biens réputés » du titulaire de permis, qui doit ramener sa CGR au ratio prescrit par l'organisme de réglementation. Si le dépôt de garantie requis n'est pas payé, l'organisme de réglementation peut annuler ou suspendre les permis de la société (*OGCA*, art. 25). Comme solution de rechange au versement d'une garantie, le titulaire de permis peut exécuter les obligations de fin de vie ou transférer des permis (avec approbation), afin de ramener sa CGR au niveau prescrit.

[19] Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or

[19] Les permis ne peuvent être transférés qu'avec l'approbation de l'organisme de réglementation. Ce dernier utilise le Programme d'évaluation de la responsabilité du titulaire de permis pour éviter que les transferts de permis aient un effet néfaste sur les obligations de fin de vie. À la réception d'une demande de transfert d'un ou de plusieurs permis, l'organisme de réglementation évalue la façon dont le transfert, s'il est approuvé, influerait sur la CGR du cédant et du cessionnaire. À l'époque de l'insolvabilité de Redwater, si le cédant et le cessionnaire devaient avoir, après le transfert, des CGR égales ou supérieures à 1,0, l'organisme de réglementation approuverait le transfert en l'absence d'autres préoccupations. Après la décision du juge siégeant en cabinet dans

higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

[20] As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version, required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

[21] The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the

la présente affaire, l'organisme de réglementation a apporté des changements à ses politiques, y compris l'exigence selon laquelle les cessionnaires devaient avoir une CGR de 2,0 ou plus immédiatement après tout transfert de permis : Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, 20 juin 2016 (en ligne). Pour les besoins du présent pourvoi, je ferai référence au régime de réglementation tel qu'il existait à l'époque de l'insolvabilité de Redwater.

[20] Comme il est expliqué plus en détail ci-dessous, si le cédant ou le cessionnaire devait avoir une CGR inférieure à 1,0 après le transfert, l'organisme de réglementation refuserait d'approuver le transfert de permis. Dans une telle situation, l'organisme de réglementation insisterait pour que certaines mesures correctives soient prises afin de s'assurer qu'aucune des deux CGR ne descende en dessous de 1,0. Même si la Directive 006, dans sa version de 2013, exigeait que le cessionnaire ainsi que le cédant aient des CGR d'au moins 1,0 après le transfert, au cours de ce litige, l'organisme de réglementation a déclaré que, lorsque les titulaires de permis sont sous séquestre ou en faillite, sa règle pratique est d'approuver les transferts tant qu'ils n'entraînent pas une détérioration de la CGR du cédant, même si la CGR du cédant demeurerait inférieure à 1,0 après le transfert. L'explication donnée pour cette règle pratique est qu'elle vise à faciliter les achats. L'organisme de réglementation fait valoir que le Programme d'évaluation de la responsabilité du titulaire de permis continue de s'appliquer au transfert de permis dans le cadre de la procédure d'insolvabilité.

[21] L'*OGCA*, la *Pipeline Act* ainsi que l'*EPEA* envisagent toutes que les obligations réglementaires d'un titulaire de permis continuent d'être respectées pendant qu'il fait l'objet d'une procédure d'insolvabilité. L'*EPEA* y parvient en incluant le syndic d'un titulaire de permis dans la définition d'« exploitant » pour l'application de l'obligation de remettre en état (sous-al. 134(b)(vi)). L'*EPEA* prévoit aussi expressément la possibilité qu'une ordonnance de remise en état (appelée [TRADUCTION] « ordonnance de protection de l'environnement ») soit adressée à un syndic

terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (*OGCA*, s. 1(1)(cc); *Pipeline Act*, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

[22] Despite this, Alberta's regulatory regime does contemplate the possibility that some of a licensee's end-of-life obligations will remain unfulfilled when the insolvency process has run its course. The Regulator may designate wells, facilities, and their sites as "orphans" (*OGCA*, s. 70(2)(a)). A pipeline is defined as a "facility" for the purposes of the orphan regime (*OGCA*, s. 68(d)). Directive 006 stated that "a well, facility, or pipeline in the LLR program is eligible to be declared an orphan where the licensee of that licence becomes insolvent or defunct" (s. 7.1). An "orphan fund" has been established for the purpose of paying for, *inter alia*, the abandonment and reclamation of orphans (*OGCA*, s. 70(1)). The orphan fund is financed by an annual industry-wide levy paid by licensees of wells, facilities and unreclaimed sites (s. 73(1)). The amount of the levy is prescribed by the Regulator based on the estimated cost of abandoning and reclaiming orphans in a given fiscal year (s. 73(2)).

[23] The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (*Orphan Fund Delegated Administration Regulation*,

(art. 140 et sous-al. 142(1)(a)(ii))). L'*EPEA* impose la responsabilité d'exécuter une ordonnance de protection de l'environnement à la personne visée par l'ordonnance (art. 240 et 245). Cependant, faute de négligence grave ou d'inconduite délibérée, la responsabilité du syndic à l'égard d'une telle ordonnance est expressément limitée à la valeur des éléments de l'actif du failli (par. 240(3)). L'*OGCA* et la *Pipeline Act* adoptent une approche plus générique pour appliquer les diverses obligations d'un titulaire de permis aux syndics dans le contexte de l'insolvabilité; elles incluent simplement le syndic dans la définition de [TRADUCTION] « titulaire de permis » (*OGCA*, al. 1(1)(cc); *Pipeline Act*, al. 1(1)(n)). En conséquence, tout pouvoir que ces lois confèrent à l'organisme de réglementation à l'encontre d'un titulaire de permis peut, en théorie, s'exercer également contre un syndic.

[22] Malgré cela, le régime de réglementation de l'Alberta envisage la possibilité qu'une partie des obligations de fin de vie d'un titulaire de permis demeure insatisfaite à la fin du processus d'insolvabilité. L'organisme de réglementation peut désigner des puits, des installations et leurs sites comme [TRADUCTION] « orphelins » (*OGCA*, al. 70(2)(a)). Un pipeline est défini comme une « installation » pour l'application du régime relatif aux orphelins (*OGCA*, al. 68(d)). La Directive 006 disposait qu'un [TRADUCTION] « puits, une installation ou un pipeline visé par le Programme d'évaluation de la responsabilité du titulaire de permis peut être déclaré orphelin lorsque le titulaire de ce permis devient insolvable ou est liquidé » (art. 7.1). Un « fonds pour les puits orphelins » a été créé dans le but de payer, entre autres choses, l'abandon et la remise en état des puits orphelins (*OGCA*, par. 70(1)). Le fonds pour les puits orphelins est financé au moyen d'une redevance annuelle, à l'échelle de l'industrie, payée par les titulaires de permis de puits et d'installations ainsi que de sites non remis en état (par. 73(1)). Le montant de la redevance est prescrit par l'organisme de réglementation en fonction du coût estimatif de l'abandon et de la remise en état des puits orphelins au cours d'un exercice donné (par. 73(2)).

[23] L'organisme de réglementation a délégué le pouvoir que lui confère la loi d'abandonner et de remettre en état les puits orphelins à l'OWA (*Orphan*

Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years.

Fund Delegated Administration Regulation, Alta. Reg. 45/2001), un organisme sans but lucratif supervisé par un conseil d'administration indépendant. Cette entité est presque entièrement financée par la redevance décrite ci-dessus qui a été établie dans toute l'industrie, et la totalité de cette redevance est remise à l'OWA par l'organisme de réglementation. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais. Toutefois, une fois ses travaux environnementaux terminés, l'OWA peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin. Au cours des dernières années, le nombre de puits orphelins a augmenté rapidement en Alberta. Par exemple, le nombre de nouveaux puits orphelins est passé de 80 en 2013-2014 à 591 en 2014-2015.

[24] At issue in this appeal is the applicability during bankruptcy of two powers conferred on the Regulator by the provincial legislation. Both are designed to ensure that licensees satisfy their end-of-life obligations.

[24] Ce qui est en cause dans le présent pourvoi, c'est l'applicabilité, durant la faillite, de deux pouvoirs conférés à l'organisme de réglementation par la législation provinciale. Les deux sont conçus pour garantir que les titulaires de permis remplissent les obligations de fin de vie qui leur incombent.

[25] The first power at issue in this appeal is the Regulator's power to order a licensee to abandon licensed assets, which is accompanied by statutory powers for the enforcement of such orders. Where a well or facility has not been abandoned in accordance with a direction of the Regulator or the rules or regulations, the Regulator may authorize any person to abandon the well or facility or may do so itself (*OGCA*, s. 28). Where the Regulator or the person it has designated performs the abandonment, the costs of doing so constitute a debt payable to the Regulator. An order of the Regulator showing these costs may be filed with and entered as a judgment of the Alberta Court of Queen's Bench and then enforced according to the ordinary procedure for enforcement of judgments of that court (*OGCA*, s. 30(6)). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 23 to 26).

[25] Le premier pouvoir en cause dans le présent pourvoi est celui dont dispose l'organisme de réglementation d'ordonner à un titulaire de permis d'abandonner des biens visés par des permis, auquel s'ajoutent les pouvoirs que la loi confère pour faire exécuter de telles ordonnances. Lorsqu'il y a eu délaissement d'un puits ou d'une installation sans que le processus d'abandon ait été effectué conformément aux directives de l'organisme de réglementation, ou aux règles et règlements, l'organisme peut autoriser toute personne à effectuer ce processus à l'égard du puits ou de l'installation, ou s'en charger lui-même (*OGCA*, art. 28). Quand l'organisme de réglementation ou la personne qu'il a désignée procède à l'abandon, les frais liés à cette opération constituent une dette payable à l'organisme de réglementation. Une ordonnance de l'organisme de réglementation indiquant ces frais peut être déposée à la Cour du Banc de la Reine de l'Alberta, inscrite comme un jugement de cette cour, puis exécutée conformément à la procédure ordinaire d'exécution des jugements de cette cour (*OGCA*, par. 30(6)). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 23 à 26).

[26] A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (*OGCA*, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (*OGCA*, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

[26] Le titulaire de permis qui contrevient ou ne se conforme pas à une ordonnance de l'organisme de réglementation, ou qui a une dette impayée envers ce dernier relativement aux frais d'abandon ou de remise en état, est assujetti à un certain nombre de mesures d'exécution potentielles. L'organisme de réglementation peut suspendre les activités, refuser d'étudier des demandes de permis ou de transfert de permis (*OGCA*, al. 106(3)(a), (b) et (c)), ou exiger le paiement des dépôts de garantie, de façon générale ou comme condition à l'octroi d'autres permis, approbations ou transferts (*OGCA*, al. 106(3)(d) et (e)). Lorsqu'un titulaire de permis contrevient à la Loi, aux règlements ou aux règles, à toute ordonnance ou directive de l'organisme de réglementation ou à toute condition d'un permis, l'organisme de réglementation peut intenter une poursuite contre le titulaire de permis pour infraction réglementaire, et ce dernier est passible d'une amende en guise de pénalité, bien qu'il puisse invoquer la défense de diligence raisonnable (*OGCA*, art. 108 et 110). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 51 à 54). L'*EPEA* contient elle aussi des dispositions similaires relatives à la création de dettes et afférentes aux ordonnances de protection de l'environnement, en plus de prévoir la poursuite d'infractions réglementaires en cas d'inobservation, avec la possibilité d'invoquer une défense de diligence raisonnable. Toutefois, comme il a été mentionné, la responsabilité du syndic en ce qui concerne les ordonnances de protection de l'environnement se limite aux éléments de l'actif, sauf s'il est responsable de négligence flagrante ou d'inconduite délibérée (*EPEA*, art. 227 à 230, 240 et 245).

[27] The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (*OGCA*, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to

[27] Le second pouvoir en cause dans le présent pourvoi est celui que possède l'organisme de réglementation d'imposer des conditions au transfert, par un titulaire, d'un ou de plusieurs de ses permis. Tout comme au moment où il octroie un permis au départ, l'organisme de réglementation jouit de vastes pouvoirs pour consentir au transfert d'un permis sous réserve de conditions, restrictions et stipulations, ou pour rejeter le transfert (*OGCA*, par. 24(2)). Suivant la Directive 006 et le texte qui l'a remplacée en 2016, l'organisme peut rejeter un transfert, même si les deux parties auraient la CGR requise après le transfert, ou même quand un dépôt de garantie

approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

[28] Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

[29] During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, at para. 24). The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of

peut être versé conformément aux exigences relatives à la CGR. Plus particulièrement, l'organisme de réglementation peut décider qu'il n'est pas dans l'intérêt public d'approuver le transfert de permis compte tenu des antécédents de conformité de l'une des parties, ou des deux, ou de leurs administrateurs, dirigeants ou détenteurs de titres, ou encore du risque que présenterait le transfert à l'égard du fonds pour les puits orphelins.

[28] Lorsqu'une transaction proposée entraînerait une détérioration de la CGR du cédant en deçà de 1,0 (ou simplement une détérioration dans le cas d'un cédant insolvable), l'organisme de réglementation insiste sur le respect d'une des conditions suivantes avant d'approuver la transaction : (i) que le cédant effectue les processus d'abandon et/ou de remise en état, réduisant ainsi ses passifs réputés; (ii) que le cédant verse un dépôt de garantie, augmentant ainsi ses biens réputés. La transaction pourrait également être structurée de manière à éviter toute détérioration de la CGR du cédant par le « regroupement » des permis relatifs aux puits épuisés et de ceux liés aux puits productifs. Une transaction au cours de laquelle on conserve les permis des puits épuisés tandis que les permis des puits productifs sont transférés entraînerait presque toujours une détérioration considérable de la CGR d'une société.

[29] Au cours du présent pourvoi, il a été beaucoup question d'autres régimes de réglementation que l'Alberta aurait *pu* adopter pour éviter que les coûts environnementaux associés à l'industrie pétrolière et gazière ne soient passés au public. Ce que l'Alberta *a* choisi, c'est un régime de permis qui fait de ces coûts une partie inhérente de la valeur des biens visés par les permis. Ce régime a l'avantage de s'accorder avec le principe du pollueur-payeur, un précepte bien reconnu du droit canadien de l'environnement. Ce principe attribue aux pollueurs la charge de réparer les dommages environnementaux dont ils sont responsables, ce qui incite les sociétés à se soucier de l'environnement dans le cadre de leurs activités économiques (*Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24). Le Programme d'évaluation de la responsabilité des titulaires de permis exige essentiellement que les titulaires de permis

the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

[30] Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources . . . in the province" (*Constitution Act, 1867*, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

[31] However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament's constitutional authority over bankruptcy and insolvency (*Constitution Act, 1867*, s. 91(21)). Just as Alberta's regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas extraction, the *BIA* reflects Parliament's considered choice about how to balance important policy objectives when a bankrupt's assets are, by definition, insufficient to meet all of its various obligations. To the extent that there is an operational conflict between the Alberta regulatory regime and the

appliquent la valeur dérivée des biens pétroliers et gaziers pendant les parties productives du cycle de vie des biens au coût inévitable de l'abandon de ces biens et de la remise en état de leurs sites à la fin de ce cycle de vie.

[30] En fin de compte, il ne revient pas à notre Cour de décider de la meilleure approche réglementaire pour l'industrie pétrolière et gazière. Ce qui n'est pas contesté, c'est qu'en adoptant son régime de réglementation actuel, l'Alberta a agi dans les limites de sa compétence constitutionnelle en matière de propriété et de droits civils dans la province ainsi que dans le domaine de l'« exploitation, [de la] conservation et [de la] gestion des ressources naturelles non renouvelables [. . .] de la province » (*Loi constitutionnelle de 1867*, par. 92(13) et al. 92A(1)c)). L'Alberta a mis au point un appareil réglementaire complexe pour régler d'importantes questions de politique concernant le moment où, par qui et de quelle manière les coûts environnementaux inévitables associés à l'extraction du pétrole et du gaz doivent être payés. Sa solution est un régime d'octroi de permis qui fait baisser la valeur des principaux éléments d'actif de l'industrie pour refléter les coûts environnementaux, lequel est soutenu par une redevance sur l'industrie sous forme de fonds pour les puits orphelins. L'Alberta voulait que cet appareil continue à fonctionner lorsqu'une société pétrolière et gazière fait l'objet d'une procédure d'insolvabilité.

[31] Par contre, l'insolvabilité d'une société pétrolière et gazière autorisée à exercer ses activités en Alberta met aussi en jeu la *LFI*, une loi fédérale qui régit l'administration de l'actif d'un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. Elle a été valablement promulguée dans l'exercice de la compétence constitutionnelle du Parlement en matière de banqueroute et de faillite (*Loi constitutionnelle de 1867*, par. 91(21)). Tout comme le régime de réglementation de l'Alberta témoigne de son choix réfléchi quant à la façon d'aborder les questions de politique importantes soulevées par les risques environnementaux liés à l'extraction du pétrole et du gaz, la *LFI* témoigne du choix réfléchi du Parlement concernant la manière d'équilibrer des objectifs de politique importants lorsque les biens d'un failli sont, de par leur nature, insuffisants

BIA, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. *The Relevant Provisions of the BIA*

[32] Here, I simply wish to note the sections of the *BIA* at issue in this appeal. These sections will determine whether the doctrine of paramountcy applies. I will discuss the purposes of the *BIA* and the various issues raised by s. 14.06 in greater detail below.

[33] The central concept of the *BIA* is that of a "claim provable in bankruptcy". Several provisions of the *BIA* form the basis for delineating the scope of provable claims. The first is the definition provided in s. 2:

claim provable in bankruptcy, ***provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor . . .

[34] "Creditor" is defined in s. 2 as "a person having a claim provable as a claim under this Act".

[35] The definition of "claim provable" is completed by s. 121(1):

All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[36] A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA

pour satisfaire à toutes ses obligations diverses. Et, pour autant qu'il y ait un conflit d'application entre le régime de réglementation de l'Alberta et la *LFI*, ou que le régime de réglementation de l'Alberta entrave la réalisation de l'objet de la *LFI*, la doctrine de la prépondérance commande que la *LFI* l'emporte.

B. *Les dispositions applicables de la Loi sur la faillite et l'insolvabilité*

[32] À ce stade-ci, je tiens simplement à souligner les articles de la *LFI* qui sont en cause dans le présent pourvoi. Ce sont ces articles qui détermineront si la doctrine de la prépondérance s'applique. J'analyserai plus en détail ci-après les objets de la *LFI* ainsi que les différentes questions soulevées par l'art. 14.06.

[33] Le concept central de la *LFI* est celui d'une « réclamation prouvable en matière de faillite ». Plusieurs dispositions de la *LFI* servent de fondement pour circonscrire la portée des réclamations prouvables. La première est la définition que l'on trouve à l'art. 2 :

réclamation prouvable en matière de faillite *ou* ***réclamation prouvable*** *Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité* de *la présente loi par un créancier.*

[34] Le terme « créancier » est défini à l'art. 2 comme une « [p]ersonne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi ».

[35] La définition de « réclamation prouvable » se termine au par. 121(1) :

Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

[36] Une réclamation peut être prouvable dans une procédure de faillite même s'il s'agit d'une réclamation éventuelle. Une [TRADUCTION] « réclamation éventuelle est "une réclamation qui peut ou non se transformer en une créance, selon qu'un événement

5, 49 C.B.R. (4th) 273, at para. 23, quoting *Garner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

121 (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

. . .

135 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

[37] In *Newfoundland and Labrador v. Abitibi-Bowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("*Abitibi*"), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"):

First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

[38] I will address the *Abitibi* test in greater detail below.

[39] Once bankruptcy has been declared, creditors of the bankrupt must participate in one collective bankruptcy proceeding if they wish to enforce their provable claims. Section 69.3(1) of the *BIA* thus provides for an automatic stay of enforcement of provable claims outside the bankruptcy proceeding, effective as of the first day of bankruptcy.

futur se produit ou non" » (*Peters c. Remington*, 2004 ABCA 5, 49 B.C.R. (4th) 273, par. 23, citant *Garner c. Newton* (1916), 29 D.L.R. 276, (B.R. Man.), p. 281. Les paragraphes 121(2) et 135(1.1) donnent des indications sur le moment où une réclamation éventuelle deviendra une réclamation prouvable :

121 (2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

. . .

135 (1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[37] Dans l'arrêt *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), par. 26, notre Cour a interprété les dispositions précédentes de la *LFI* et a formulé un critère tripartite afin de décider quand une obligation environnementale imposée par un organisme de réglementation sera une réclamation prouvable pour l'application de la *LFI* et de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* ») :

Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original.]

[38] J'aborderai le critère de l'arrêt *Abitibi* plus en détail ci-dessous.

[39] Une fois la faillite déclarée, les créanciers du failli doivent participer à l'unique procédure collective de faillite s'ils souhaitent faire valoir leurs réclamations prouvables. Le paragraphe 69.3(1) de la *LFI* prévoit donc une suspension automatique de l'exécution des réclamations prouvables en dehors de la procédure de faillite, à compter du premier jour de la faillite.

[40] The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at paras. 32-35).

[41] Essential to this appeal is s. 14.06 of the *BIA*, which deals with various environmental matters in the bankruptcy context. I will now reproduce s. 14.06(2) and s. 14.06(4), the two portions of the s. 14.06 scheme that are directly implicated in this appeal. The balance of s. 14.06 can be found in the appendix at the conclusion of these reasons.

[42] Section 14.06(2) reads as follows:

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

[40] La *LFI* établit un régime de priorité complet pour l'acquittement des réclamations prouvables présentées contre le failli dans la procédure collective. L'article 141 énonce la règle générale, à savoir que tous les créanciers ont un rang égal et une part proportionnelle des biens du failli. Toutefois, la règle énoncée à l'art. 141 s'applique « [s]ous réserve des autres dispositions de [la *LFI*] ». Le paragraphe 136(1) énumère les réclamations des « créanciers privilégiés » et fixe l'ordre de priorité dans lequel ils doivent recevoir leur paiement. Cet ordre établi par le par. 136(1) l'est « [s]ous réserve des droits des créanciers garantis ». Selon le par. 69.3(2), la suspension des procédures n'empêche pas les créanciers garantis de réaliser leur garantie. La *LFI* instaure donc un régime de priorité pour le versement des réclamations prouvables en matière de faillite, les créanciers garantis étant payés en premier, les créanciers privilégiés en deuxième et les créanciers non garantis en dernier (voir *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 32-35).

[41] L'article 14.06 de la *LFI*, qui traite de diverses questions environnementales dans le contexte de la faillite, est essentiel pour statuer sur le présent pourvoi. Je vais maintenant reproduire les par. 14.06(2) et 14.06(4), les deux parties du régime prévu à l'art. 14.06 qui sont directement en cause dans le présent pourvoi. Le reste de l'art. 14.06 se trouve en annexe à la fin des présents motifs.

[42] Voici le texte du par. 14.06(2) :

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

[43] Section 14.06(4) reads as follows:

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

[44] As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property".

[43] Voici le texte du par. 14.06(4) :

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

[44] Comme je l'expliquerai, un point de discorde important entre les parties tient aux interprétations fort différentes qu'elles donnent au par. 14.06(4) de la *LFI*. Je remarque que le sous-al. 14.06(4)a)(ii), sur lequel s'appuie GTL, parle du syndic qui « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose

The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

[45] I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. *The Events of the Redwater Bankruptcy*

[46] Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately $5.1 million.

[47] Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline Act* included both receivers and trustees in the definition of "licensee". The Regulator stated that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership". Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater's licensed properties and that it was taking steps to comply with all of Redwater's regulatory obligations.

ou s'en dessaisit ». Dans les présents motifs, le mot « renoncer » sert à raccourcir ces termes, comme cela a été le cas tout au long du litige qui nous occupe.

[45] Je vais maintenant procéder à une brève analyse des faits entourant la faillite de Redwater.

C. *Les faits entourant la faillite de Redwater*

[46] Redwater était une société pétrolière et gazière cotée en bourse. L'organisme de réglementation lui a octroyé ses premiers permis en 2009. Le 31 janvier et le 19 août 2013, ATB a avancé des fonds à Redwater et, en contrepartie, s'est vu accorder une sûreté sur les biens actuels et futurs de Redwater. ATB a prêté des fonds à Redwater en pleine connaissance des obligations de fin de vie associées à ses biens. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Sur demande d'ATB, GTL a été nommé séquestre de Redwater le 12 mai 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB.

[47] Après avoir été informé de la mise sous séquestre, l'organisme de réglementation a envoyé à GTL une lettre datée du 14 mai 2015 exposant sa position. L'organisme de réglementation a fait remarquer que l'*OGCA* et la *Pipeline Act* incluaient à la fois les séquestres et les syndics dans la définition d'un « titulaire de permis ». L'organisme de réglementation a déclaré qu'il n'était pas un créancier de Redwater et qu'il ne faisait pas valoir une [TRADUCTION] « réclamation prouvable dans le cadre de la mise sous séquestre ». Ainsi, malgré la mise sous séquestre, Redwater demeurait tenue de se conformer à toutes les exigences réglementaires, y compris les obligations d'abandon, pour tous les biens visés par des permis. L'organisme de réglementation a déclaré que GTL était légalement tenu de remplir ces obligations avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires. Il a demandé la confirmation que GTL avait pris possession des biens de Redwater visés par des permis et qu'il prenait des mesures pour se conformer à toutes les obligations réglementaires de Redwater.

[48] At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

[49] By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative $553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of $4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative $4.705 million. Given that Redwater was in receivership, the Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

[50] In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated

[48] À l'époque où elle a connu des difficultés financières, Redwater avait des permis délivrés par l'organisme de réglementation concernant 84 puits, 7 installations et 36 pipelines, tous situés dans le centre de l'Alberta. La grande majorité de ses éléments d'actif étaient ces biens pétroliers et gaziers. Au moment de la nomination de GTL comme séquestre, 19 des puits ou installations étaient productifs, tandis que les 72 autres étaient inactifs ou taris. Il y avait des participants en participation directe dans plusieurs puits et installations. La CGR de Redwater n'est tombée en dessous de 1,0 qu'après la mise sous séquestre de celle-ci et, en conséquence, Redwater n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

[49] En septembre 2015, la CGR de Redwater avait chuté à 0,93. La valeur nette de ses biens réputés moins ses passifs réputés était égale à un montant négatif de 553 000 $. Les 19 puits et installations productifs pour lesquels Redwater était titulaire de permis avaient une CRG de 2,85 et une valeur nette réputée de 4,152 millions de dollars. Les 72 autres puits ou installations pour lesquels Redwater était titulaire de permis auraient eu une CGR de 0,30 et une valeur nette réputée négative de 4,705 millions de dollars. Puisque Redwater était sous séquestre, l'organisme de réglementation a mentionné qu'il n'approuverait le transfert des permis de Redwater que si cela n'occasionnait pas une détérioration de sa CGR.

[50] Dans son Deuxième rapport à la Cour du Banc de la Reine de l'Alberta daté du 3 octobre 2015, GTL a expliqué pourquoi il avait conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation. D'après GTL, le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Il considérait comme improbable la vente des puits inexploités, même s'ils étaient regroupés avec les puits productifs. Si une telle vente était possible, le prix d'achat serait réduit au regard des obligations de fin de vie, annulant ainsi le bénéfice pour l'actif. Sur la base de cette évaluation, par lettre datée du 3 juillet 2015, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater (y compris un puits

pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

[51] In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the *Oil and Gas Conservation Rules* required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the *OGCA* and ss. 23 to 26 of the *Pipeline Act*. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction Redwater through the use of s. 106 of the *OGCA*. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the *EPEA*.

[52] On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL

qui fuyait et qui a été abandonné par la suite), ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'en vertu du par. 3a) de l'ordonnance de mise sous séquestre, il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation.

[51] Le 15 juillet 2015, l'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). Les ordonnances exigeaient que l'abandon soit effectué sur-le-champ dans les cas où il n'y avait pas d'autres participants en participation directe, et, au plus tard le 18 septembre 2015, dans ceux où il y avait d'autres participants en participation directe. L'organisme de réglementation a déclaré qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité, et que l'al. 3.012(d) des *Oil and Gas Conservation Rules* obligeait le titulaire de permis à abandonner ces puits ou installations. Lorsqu'il a rendu les ordonnances d'abandon, l'organisme de réglementation s'est également fondé sur les art. 27 à 30 de l'*OGCA* et sur les art. 23 à 26 de la *Pipeline Act*. Si les ordonnances d'abandon n'étaient pas respectées, l'organisme de réglementation menaçait d'effectuer lui-même le processus d'abandon des biens et de sanctionner Redwater par l'application de l'art. 106 de l'*OGCA*. L'organisme a ajouté qu'une fois qu'il y avait eu abandon, la surface devait être remise en état et il fallait obtenir des certificats de remise en état conformément à l'art. 137 de l'*EPEA*.

[52] Le 22 septembre 2015, l'organisme de réglementation et l'OWA ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant GTL à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à GTL de [TRADUCTION] « remplir les obligations légales en tant que titulaire de permis concernant l'abandon,

liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

[53] A bankruptcy order was issued for Redwater on October 28, 2015, and GTL was appointed as trustee. GTL sent another letter to the Regulator on November 2, 2015, this time invoking s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets. The Abandonment Orders remain outstanding.

D. *Judicial History*

(1) Court of Queen's Bench of Alberta

[54] The chambers judge concluded that s. 14.06 of the *BIA* was designed to permit trustees to disclaim property where this was a rational economic decision in light of the environmental condition affecting the property. Personal liability of the trustee was not a condition precedent to the power to disclaim. The chambers judge accordingly found an operational conflict between s. 14.06 of the *BIA* and the definition of "licensee" in the *OGCA* and the *Pipeline Act*. Under s. 14.06 of the *BIA*, GTL could renounce assets and not be responsible for the associated environmental obligations. However, under the *OGCA* and the *Pipeline Act*, GTL could not renounce licensed assets because the definition of "licensee"

la remise en état et la décontamination » de tous les biens de Redwater visés par des permis (A.R., vol. II, p. 41). L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. Le 5 octobre 2015, GTL a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. GTL a demandé au tribunal de rendre une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. GTL n'a pas cherché à exclure la possibilité que l'organisme de réglementation ait un autre motif valable de rejeter un transfert proposé.

[53] Le 28 octobre 2015, une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a envoyé une autre lettre à l'organisme de réglementation le 2 novembre 2015, dans laquelle il invoquait cette fois le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation. Les ordonnances d'abandon sont toujours pendantes.

D. *Historique judiciaire*

(1) La Cour du Banc de la Reine de l'Alberta

[54] Le juge siégeant en cabinet a conclu que l'art. 14.06 de la *LFI* visait à permettre aux syndics de renoncer à un bien lorsqu'il s'agissait d'une décision économique rationnelle compte tenu du fait lié à l'environnement et touchant le bien. La responsabilité personnelle du syndic n'était pas une condition préalable au pouvoir de renonciation. Le juge siégeant en cabinet a donc conclu à un conflit d'application entre l'art. 14.06 de la *LFI* et la définition de « titulaire de permis » que l'on trouve dans l'*OGCA* et la *Pipeline Act*. En vertu de l'art. 14.06 de la *LFI*, GTL pouvait renoncer aux biens et ne pas être responsable des obligations environnementales qui y étaient associées. Cependant, aux termes de l'*OGCA*

included receivers and trustees, so GTL remained liable for environmental obligations.

[55] Applying the test from *Abitibi*, the chambers judge concluded that, although in a "technical sense" it was not sufficiently certain that the Regulator or the OWA would carry out the Abandonment Orders and assert a monetary claim to have its costs reimbursed, the situation met what was intended by the Court in *Abitibi* because the Abandonment Orders were "intrinsically financial" (para. 173). Forcing GTL, as a "licensee", to comply with the Abandonment Orders would therefore frustrate the *BIA*'s overall purpose of equitable distribution of the bankrupt's assets, as the Regulator's claim would be given a super priority to which it was not entitled, ahead of the claims of secured creditors. It would also frustrate the purpose of s. 14.06, by which Parliament had legislated as to environmental claims in bankruptcy and had specifically chosen not to give them a super priority. The conditions imposed by the Regulator on transfers of the licences for the Retained Assets further frustrated s. 14.06 by including the Renounced Assets in the calculation for determining the approval of a sale.

[56] The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline Act* were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the *BIA*. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the

et de la *Pipeline Act*, GTL ne pouvait renoncer aux biens visés par des permis parce que la définition de « titulaire de permis » comprenait le séquestre et le syndic, si bien que GTL demeurait responsable des obligations environnementales.

[55] Appliquant le critère de l'arrêt *Abitibi*, le juge siégeant en cabinet a conclu que, bien qu'au [TRADUCTION] « sens technique », il n'était pas suffisamment certain que l'organisme de réglementation ou l'OWA exécuteraient les ordonnances d'abandon et feraient valoir une réclamation pécuniaire pour obtenir le remboursement de leurs frais, la situation répondait à l'intention de la Cour dans *Abitibi* car les ordonnances d'abandon étaient « intrinsèquement financières » (par. 173). Forcer GTL en tant que « titulaire de permis » à se conformer aux ordonnances d'abandon irait donc à l'encontre de l'objectif global de la *LFI* de partage équitable des biens du failli, puisque l'organisme de réglementation se verrait accorder, pour sa réclamation, une superpriorité à laquelle il n'avait pas droit, avant les réclamations des créanciers garantis. Cela entraverait aussi la réalisation de l'objet de l'art. 14.06, par lequel le Parlement a légiféré sur les réclamations environnementales en cas de faillite et a expressément fait le choix de ne pas leur accorder une superpriorité. Les conditions imposées par l'organisme de réglementation sur les transferts de permis relatifs aux biens conservés ont contrecarré davantage l'article 14.06 en incluant les biens faisant l'objet de la renonciation dans le calcul pour décider de l'approbation d'une vente.

[56] Le juge siégeant en cabinet a approuvé la procédure de vente proposée par GTL. Il a déclaré que l'*OGCA* et la *Pipeline Act* étaient inopérantes dans la mesure où elles entraient en conflit avec la *LFI*, en considérant GTL comme le « titulaire des permis » relatifs aux biens faisant l'objet de la renonciation, que GTL avait le droit de renoncer à ces biens au titre du sous-al. 14.06(4)a)(ii) et de l'al. 14.06(4)c), et qu'il n'était assujetti à aucune obligation à l'égard de ces biens, que les ordonnances d'abandon étaient inopérantes dans la mesure où elles obligeaient GTL à s'y conformer ou à fournir des dépôts de garantie et que la Directive 006 était inopérante dans la mesure où elle entrait en conflit avec l'art. 14.06 de la *LFI*.

licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) *Majority Reasons*

[57] Slatter J.A., for the majority, dismissed the appeals. He stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the *BIA*. Section 14.06 did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7), which would rarely, if ever, have any application to oil and gas wells. Section 14.06(4) did not "limit the power of the trustee to renounce . . . properties to those circumstances where it might be exposed to personal liability" (para. 68). Additionally, the word "order" in s. 14.06(4) had to be given a wide meaning.

[58] Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce

Enfin, il a déclaré que l'organisme de réglementation, dans l'exercice de son pouvoir discrétionnaire d'approuver un transfert des permis relatifs aux biens conservés, ne pouvait pas tenir compte des biens faisant l'objet de la renonciation pour le calcul de la CGR de Redwater, avant ou après le transfert, ni tenir compte de toute autre question liée aux biens faisant l'objet de la renonciation.

(2) La Cour d'appel de l'Alberta

a) *Les motifs majoritaires*

[57] Le juge Slatter, au nom des juges majoritaires, a rejeté les appels. Il a déclaré que les questions constitutionnelles des appels étaient complémentaires à la question principale, l'interprétation de la *LFI*. L'article 14.06 n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue au par. 14.06(7), qui s'appliquerait rarement, voire jamais, aux puits de pétrole et de gaz. Le paragraphe 14.06(4) n'a pas [TRADUCTION] « limité le pouvoir du syndic de renoncer [. . .] aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle » (par. 68). En outre, il fallait donner un sens large au mot « ordonnance » qui figure au par. 14.06(4).

[58] Le juge Slatter a décidé que la question essentielle était de savoir [TRADUCTION] « si les obligations environnementales de Redwater satisf[aisaient] au critère de la réclamation prouvable » (par. 73). Il était d'accord avec le juge siégeant en cabinet quant au respect du troisième volet du critère d'*Abitibi*, mais il a conclu que ce critère avait été respecté « tant sur le plan technique que sur le fond » (par. 76). Les politiques de l'organisme de réglementation ont essentiellement privé l'actif du failli d'une valeur suffisante pour respecter les obligations environnementales. Exiger le dépôt d'une garantie, ou détourner la valeur de l'actif du failli, répond clairement à la norme de « certitude ». Les politiques de l'organisme de réglementation exigeaient que la pleine valeur des biens du failli soit d'abord appliquée aux engagements environnementaux, créant ainsi une superpriorité pour les réclamations environnementales. Le juge Slatter a estimé que, « [n]onobstant leur effet

assets, all of which [were] governed by the *BIA*" (para. 86).

[59] In terms of constitutional analysis, Slatter J.A. concluded that the role of GTL as a "licensee" under the *OGCA* and the *Pipeline Act* was "in operational conflict with the provisions of the *BIA*" that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims (para. 89). It also frustrated the *BIA*'s purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them" (para. 89). As such, the Regulator could not "insist that the Trustee devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor" (para. 91).

(b) *Dissenting Reasons*

[60] Martin J.A. dissented. In contrast to the majority, she stressed the constitutional dimensions of the case, in particular the need for co-operative federalism in the area of the environment, and noted that the doctrine of paramountcy should be applied with restraint. She concluded that the Regulator was not asserting a provable claim within the meaning of the *Abitibi* test. It was not enough for a regulatory order to be "intrinsically financial" for it to be a claim provable in bankruptcy (para. 185, quoting the chambers judge's reasons, at para. 173). There was not sufficient certainty that the ordered abandonment work would be done, either by the Regulator or by the OWA, and there was "no certainty at all that a claim for reimbursement would be made" (para. 184). Martin J.A. was also of the view that the Regulator was not a creditor of Redwater — or, if it was a creditor in issuing the Abandonment Orders, it was at least not one in enforcing the conditions for the transfer of licences. The Regulator had to be able to maintain control over the transfer of licences during

prévu en tant que conditions associées aux permis, les politiques de l'organisme de réglementation ont eu un effet direct sur les biens, les priorités et le droit du Syndic de renoncer à des biens, qui étaient tous régis par la *LFI* » (par. 86).

[59] Sur le plan de l'analyse constitutionnelle, le juge Slatter a conclu que le rôle de GTL en tant que « titulaire de permis » au sens de l'*OGCA* et de la *Pipeline Act* était [TRADUCTION] « en conflit d'application avec les dispositions de la *LFI* » qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales (par. 89). Ce rôle entravait également la réalisation de l'objet de la *LFI* consistant à « gérer la liquidation des sociétés insolvables et à régler la priorité des réclamations à leur encontre » (par. 89). Ainsi, l'organisme de réglementation ne pouvait pas « insister pour que le syndic consacre une partie substantielle de l'actif du failli à l'acquittement des réclamations environnementales, par priorité sur les réclamations du créancier garanti » (par. 91).

b) *Les motifs dissidents*

[60] La juge Martin a exprimé sa dissidence. Contrairement aux juges majoritaires, elle a souligné les dimensions constitutionnelles de l'affaire, en particulier la nécessité d'un fédéralisme coopératif dans le domaine de l'environnement, et a fait remarquer que la doctrine de la prépondérance devait être appliquée avec retenue. Elle a conclu que l'organisme de réglementation ne faisait pas valoir de réclamation prouvable au sens du critère d'*Abitibi*. Il ne suffisait pas qu'une ordonnance réglementaire soit [TRADUCTION] « intrinsèquement financière » pour qu'il s'agisse d'une réclamation prouvable en matière de faillite (par. 185, citant les motifs du juge siégeant en cabinet, par. 173). Il n'était pas suffisamment certain que les travaux d'abandon ordonnés soient accomplis, soit par l'organisme de réglementation soit par l'OWA, et il n'y avait « aucune certitude qu'une demande de remboursement soit présentée » (par. 184). La juge Martin estimait elle aussi que l'organisme de réglementation n'était pas un créancier de Redwater — ou, s'il était un créancier au moment de rendre les ordonnances

a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

[61] With regard to s. 14.06, Martin J.A. accepted the Regulator's argument that s. 14.06(4) allowed a trustee to renounce real property in order to avoid personal liability but did not prevent the assets of the bankrupt estate from being used to comply with environmental obligations. However, she went beyond this. In her view, s. 14.06(4) to (8) were enacted together as a statutory compromise. Martin J.A. concluded that a trustee's power to disclaim assets under s. 14.06 simply had no applicability to Alberta's regulatory regime. The ability to renounce under s. 14.06(4) had to be read in conjunction with the other half of the compromise — the Crown's super priority over the debtor's real property established by s. 14.06(7). Licence conditions were not the sort of "order" contemplated by s. 14.06(4), nor were licences the kind of "real property" contemplated by that provision. The balance struck by s. 14.06 was not effective when there was no "real property of the debtor" in which the Crown could take a super priority (para. 210).

[62] As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

d'abandon, il ne l'était pas dans l'application des conditions de transfert des permis. L'organisme de réglementation devait être en mesure de conserver la maîtrise du transfert des permis pendant une faillite, et il n'y avait aucune raison pour que de telles exigences réglementaires ne puissent pas coexister avec le partage de l'actif du failli.

[61] En ce qui concerne l'article 14.06, la juge Martin a retenu l'argument de l'organisme de réglementation selon lequel le par. 14.06(4) permettait à un syndic de renoncer aux biens réels afin d'éviter d'engager sa responsabilité personnelle, mais n'empêchait pas que l'on se serve des éléments de l'actif du failli pour se conformer aux obligations environnementales. Cependant, elle est allée plus loin. Selon elle, les par. 14.06(4) à (8) ont été adoptés ensemble à titre de compromis d'ordre législatif. La juge Martin a conclu que le pouvoir du syndic de renoncer aux biens en vertu de l'art. 14.06 n'était tout simplement pas applicable dans le régime de réglementation de l'Alberta. La faculté de renoncer en vertu du par. 14.06(4) devait être interprétée en corrélation avec l'autre moitié du compromis, la superpriorité de la Couronne sur les biens réels du débiteur établie par le par. 14.06(7). Les conditions relatives aux permis n'étaient pas le genre d'« ordonnance » envisagé par le par. 14.06(4), ni les permis le genre de « bien réel » envisagé par cette disposition. L'équilibre atteint par l'art. 14.06 n'était pas solide lorsqu'il n'y avait pas de [TRADUCTION] « bien réel du débiteur » à l'égard duquel la Couronne pouvait prendre une superpriorité (par. 210).

[62] Comme il n'y avait aucun droit, aux termes de la *LFI*, de renoncer aux obligations de fin de vie imposées par le régime de réglementation [de l'Alberta], aucun conflit d'application ne résultait de l'exécution de ces obligations sous le régime du droit provincial. Et il n'existait pas non plus d'entrave à la réalisation d'un objet fédéral. L'organisme de réglementation ne faisait valoir aucune réclamation prouvable en matière de faillite : [TRADUCTION] « L'application continue du régime de réglementation [de l'Alberta] après la faillite n'a pas fixé ou réarrangé les priorités parmi les créanciers, mais a plutôt donné lieu à une évaluation juste des biens pouvant être répartis » (par. 240).

III. Analysis

A. *The Doctrine of Paramountcy*

[63] As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

[64] The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point,

III. Analyse

A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 3).

[65] Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the

que le Parlement légifère en vertu de sa compétence exclusive en matière de faillite et d'insolvabilité. La loi provinciale devient alors inopérante dans la mesure du conflit (voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 3).

[65] Au fil du temps, deux formes distinctes de conflit ont été reconnues. La première est le *conflit d'application*, qui survient lorsqu'il est impossible de se conformer en même temps à une loi fédérale valide et à une loi provinciale valide. Il y a conflit d'application lorsqu'« une loi dit "oui" et l'autre dit "non", de sorte que "l'observance de l'une entraîne l'inobservance de l'autre" » (*Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 18, citant *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191). La seconde est l'*entrave à la réalisation d'un objet fédéral*, qui se produit lorsque l'application d'une loi provinciale valide est incompatible avec l'objet d'une loi fédérale. L'effet d'une loi provinciale peut contrecarrer la réalisation de l'objet de la loi fédérale, « sans toutefois entraîner une violation directe de ses dispositions » (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 73). La partie qui invoque l'entrave à la réalisation d'un objet fédéral « doit d'abord établir l'objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » (*Lemare*, par. 26, citant *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536, par. 66).

[66] Aux deux volets de la prépondérance, la charge de la preuve incombe à la partie qui allègue l'existence du conflit. Il n'est pas facile de s'en acquitter, puisque la doctrine de la prépondérance doit être appliquée avec retenue. Le conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective. « [L]es tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu'une interprétation qui donne lieu à une incompatibilité [. . .] [e]n l'absence d'un texte législatif "clair" à cet effet » (*Lemare*, par. 21 et 27). « On présume que le Parlement a l'intention de faire coexister ses lois avec les lois provinciales » (*Moloney*, par. 27).

doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

[67] The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

[68] GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

[69] The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt

Comme le conclut notre Cour aux par. 22 et 23 de l'arrêt *Lemare*, l'application de la doctrine de la prépondérance devrait également tenir dûment compte du principe du fédéralisme coopératif. Ce principe permet l'interaction ainsi que le chevauchement entre les lois fédérales et provinciales. Bien que le fédéralisme coopératif n'impose pas de limites à l'exercice par ailleurs valide du pouvoir législatif, cela signifie que les tribunaux devraient éviter de donner à l'objet de la loi fédérale une interprétation large qui le mettrait en conflit avec la loi provinciale.

[67] La jurisprudence a établi que la *LFI* dans son ensemble est censée favoriser l'atteinte de « deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli » (*Moloney*, par. 32, citant *Husky Oil*, par. 7). En l'espèce, la faillie est une société qui ne s'extirpera jamais de la faillite. Donc, seul le premier objectif est pertinent. Comme je vais l'expliquer ci-dessous, le juge siégeant en cabinet a également affirmé que l'objet de l'art. 14.06 se distinguait des objets plus larges de la *LFI*. Notre Cour a analysé l'objet de certaines dispositions de la *LFI* dans des décisions antérieures (voir, par exemple, *Lemare*, par. 45).

[68] GTL a relevé deux conflits entre la législation albertaine établissant les pouvoirs contestés de l'organisme de réglementation pendant la faillite et la *LFI*, et l'un ou l'autre aurait constitué, selon lui, un fondement suffisant pour l'ordonnance rendue par le juge siégeant en cabinet.

[69] Le premier conflit avancé par GTL découle de l'ajout des syndics à la définition de « titulaire de permis » qui figure dans l'*OGCA* et la *Pipeline Act*. GTL affirme que le par. 14.06(4) le soustrait à tout engagement environnemental associé aux biens faisant l'objet d'une « renonciation » valide. Toutefois, comme il est « titulaire de permis », l'organisme de réglementation peut l'obliger à s'acquitter de toutes les obligations et de tous les engagements légaux de Redwater, faisant ainsi abstraction de la « renonciation » aux biens en cause. GTL souligne en outre la possibilité qu'il soit tenu personnellement responsable en tant que « titulaire de permis ». L'organisme de réglementation réplique que le par. 14.06(4) a pour objectif premier de mettre les syndics à l'abri de toute

estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

[70] The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

[71] I will consider each alleged conflict in turn.

B. *Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?*

[72] As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on

responsabilité personnelle à l'égard des ordonnances environnementales et que cette disposition n'a aucune incidence sur les responsabilités continues de l'actif du failli. Ainsi, tant qu'un syndic est à l'abri de toute responsabilité personnelle, son statut de « titulaire de permis » et le fait que l'actif d'un failli demeure responsable, aux termes du droit provincial, des obligations environnementales continues associées aux éléments le composant et faisant l'objet de la renonciation ne sont à l'origine d'aucun conflit.

[70] Le second conflit allégué par GTL est que, même si le par. 14.06(4) ne porte que la responsabilité personnelle d'un syndic, l'exercice par l'organisme de réglementation des pouvoirs que lui confère la loi réarrange de fait les priorités établies par la *LFI* en matière de faillite. Un tel réarrangement serait imputable au fait que l'organisme de réglementation exige la dépense d'éléments d'actif pour respecter les ordonnances d'abandon ainsi que pour libérer ou garantir les engagements environnementaux associés aux biens faisant l'objet de la renonciation avant d'approuver un transfert des permis liés aux biens conservés (conformément aux exigences relatives à la CGR). Ces obligations de fin de vie sont considérées par GTL comme étant une créance ordinaire de l'organisme de réglementation, que la *LFI* ne permet pas d'acquitter de préférence aux réclamations des créanciers garantis de Redwater. L'organisme de réglementation réplique que, si l'on applique correctement le critère d'*Abitibi*, ces obligations réglementaires environnementales ne sont pas des réclamations prouvables en matière de faillite. En conséquence, selon l'organisme de réglementation, les lois provinciales exigeant que l'actif de Redwater satisfasse à ces obligations avant le partage, entre les créanciers garantis, des éléments dont il est composé n'entre pas en conflit avec le régime de priorité de la *LFI*.

[71] J'examinerai chacun des conflits allégués, l'un après l'autre.

B. *Y a-t-il un conflit entre le régime de réglementation albertain et l'art. 14.06 de la LFI?*

[72] En tant que régime législatif, l'art. 14.06 de la *LFI* soulève de nombreuses questions d'interprétation. Comme l'a fait remarquer la juge Martin, le seul

which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

[73] At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the *BIA*, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline Act*, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the *BIA* based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

[74] I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

point concernant l'art. 14.06 sur lequel toutes les parties au présent litige ont pu s'entendre est le fait que ce [TRADUCTION] « n'est pas un modèle de clarté » (motifs de la Cour d'appel, par. 201). Vu la confusion semée par les tentatives d'interpréter l'art. 14.06 comme un régime cohérent lors du présent litige, le Parlement pourrait fort bien vouloir réexaminer cet article durant sa prochaine étude de la *LFI*.

[73] Fondamentalement, le présent pourvoi porte sur la question de savoir s'il existe un conflit entre une loi albertaine en particulier et la *LFI*. GTL soutient que oui et affirme que, comme il a « renoncé » aux biens faisant l'objet de la renonciation en vertu du par. 14.06(4) de la *LFI*, il peut cesser d'assumer toute responsabilité ou obligation ou tout engagement à l'égard de ces biens. Pourtant, aux dires de GTL, en tant que « titulaire de permis », il reste chargé de les abandonner. De plus, ceux-ci sont toujours inclus dans le calcul de la CGR de Redwater. GTL prétend qu'il y a un autre conflit avec le par. 14.06(2) de la *LFI* du fait que sa responsabilité personnelle comme « titulaire de permis » peut être engagée relativement aux frais d'abandon des biens faisant l'objet de la renonciation.

[74] J'ai conclu à l'absence de conflit. Différents arguments ont été présentés lors du pourvoi au sujet des éléments disparates du régime instauré par l'art. 14.06. Cependant, la disposition qu'invoque en fait GTL pour affirmer avoir le droit d'échapper à ses responsabilités en tant que « titulaire de permis » en application de la législation albertaine est le par. 14.06(4). Rappelons que GTL et l'organisme de réglementation proposent des interprétations fort différentes du par. 14.06(4). Toutefois, à la simple lecture de ses termes, le par. 14.06(4) est clair et sans équivoque : lorsqu'il est invoqué par un syndic, « le syndic est dégagé de toute responsabilité personnelle » découlant du non-respect de certaines ordonnances environnementales ou relativement aux frais engagés par toute personne exécutant ces ordonnances. La disposition ne dit rien à propos de la responsabilité du « failli » ou de l'« actif », des notions distinctes mentionnées à maintes reprises dans la *LFI*. Le texte même du par. 14.06(4) n'étaye pas l'interprétation que GTL nous exhorte à retenir.

[75] In my view, s. 14.06(4) sets out the result of a trustee's "disclaimer" of real property when there is an order to remedy any environmental condition or damage affecting that property. Regardless of whether "disclaimer" is understood as a common law power or as a power deriving from some other statutory source, the result of a trustee's "disclaimer" of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. The interpretation of s. 14.06(4) as being concerned with the personal liability of the trustee and not with the liability of the bankrupt estate is supported not only by the plain language of the section, but also by the Hansard evidence, a previous decision of this Court and the French version of the section. Furthermore, not only is the plain meaning of the words "personally liable" clear, but the same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which specifically state that the trustee is not personally liable. In particular, in my view, it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

[76] Given that s. 14.06(4) dictates that "disclaimer" only protects trustees from personal liability, then, even assuming that GTL successfully "disclaimed" in this case, no operational conflict or frustration of purpose results from the fact that the Regulator requires GTL, as a "licensee", to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict is caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a "licensee" for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

[75] À mon avis, le par. 14.06(4) expose le résultat d'une « renonciation » du syndic à un bien réel en cas d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant ce bien. Que l'on voit la « renonciation » comme un pouvoir reconnu par la common law ou un pouvoir découlant d'une quelconque autre source législative, la « renonciation » d'un syndic à des biens réels en réaction à une ordonnance environnementale visant ces biens dégage le syndic de toute responsabilité personnelle, alors que la responsabilité continue de l'actif du failli n'est pas touchée. L'idée que le par. 14.06(4) vise la responsabilité personnelle du syndic, et non celle de l'actif du failli, est étayée non seulement par le texte clair de l'article, mais également par les débats parlementaires, un arrêt de notre Cour et la version française de l'article. De plus, non seulement le sens ordinaire des mots « responsabilité personnelle » est-il clair, mais on retrouve également le même concept aux par. 14.06(1.2) et (2), lesquels disposent expressément que le syndic est dégagé de toute responsabilité personnelle. En particulier, il me paraît impossible d'interpréter de manière cohérente le par. 14.06(2) comme mentionnant la responsabilité personnelle tout en interprétant le par. 14.06(4) comme renvoyant d'une façon ou d'un autre à la responsabilité de l'actif du failli.

[76] Comme le par. 14.06(4) dispose que la « renonciation » dégage uniquement le syndic de toute responsabilité personnelle, à supposer même que GTL ait « renoncé » avec succès à des biens en l'espèce, l'organisme de réglementation ne cause aucun conflit d'application ni n'entrave la réalisation d'un objet fédéral en exigeant de GTL à titre de « titulaire de permis » qu'il se serve d'éléments de l'actif pour abandonner les biens faisant l'objet de la renonciation. En outre, il n'y a aucun conflit du fait que ces biens soient toujours inclus dans le calcul de la CGR de Redwater. Enfin, vu la retenue avec laquelle il faut appliquer la doctrine de la prépondérance, et vu que l'organisme de réglementation n'a pas tenté de tenir GTL personnellement responsable en tant que « titulaire de permis » des frais d'abandon, aucun conflit avec les par. 14.06(2) ou (4) n'est causé par la simple possibilité théorique de responsabilité personnelle en application de la *OGCA* ou de la *Pipeline Act*.

[77] In what follows, I will begin by interpreting s. 14.06(4) and explaining why, based on its plain wording and other relevant considerations, the provision is concerned solely with the personal liability of the trustee, and not with the liability of the bankrupt estate. I will then explain how, despite their superficial similarity, s. 14.06(4) and s. 14.06(2) have different rationales, and I will demonstrate that, on a proper understanding of the scheme crafted by Parliament, s. 14.06(4) does not affect the liability of the bankrupt estate. To conclude, I will demonstrate that there is no operational conflict or frustration of purpose between the Alberta legislation and s. 14.06 of the BIA in this case, with particular reference to the question of GTL's protection from personal liability.

(1) The Correct Interpretation of Section 14.06(4)

(a) *Section 14.06(4) Is Concerned With the Personal Liability of Trustees*

[78] I have concluded that s. 14.06(4) is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. I emphasize here the well-established principle that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Canadian Western Bank*, at para. 75, quoting *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356).

[79] Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it

[77] Dans les paragraphes qui suivent, je vais d'abord interpréter le par. 14.06(4) et expliquer pourquoi, compte tenu de sa formulation claire et d'autres considérations pertinentes, la disposition ne concerne que la responsabilité personnelle du syndic, et non la responsabilité de l'actif du failli. Je vais ensuite expliquer en quoi, malgré leur similitude superficielle, la raison d'être du par. 14.06(4) diffère de celle du par. 14.06(2), et démontrer que, si l'on comprend bien le régime conçu par le Parlement, le par. 14.06(4) n'influe pas sur la responsabilité de l'actif du failli. Pour conclure, je démontrerai qu'il n'y a aucun conflit d'application ni aucune entrave à la réalisation d'un objet fédéral entre la législation albertaine et l'art. 14.06 de la *LFI* dans la présente affaire, particulièrement en ce qui a trait à la protection de GTL contre toute responsabilité personnelle.

(1) L'interprétation juste du par. 14.06(4)

a) *Le paragraphe 14.06(4) s'attache à la responsabilité personnelle du syndic*

[78] J'ai conclu que le par. 14.06(4) s'attache à la responsabilité personnelle du syndic et non à la responsabilité de l'actif du failli. Je souligne ici le principe bien établi selon lequel « [c]haque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit » (*Banque canadienne de l'Ouest*, par. 75, citant *Procureur général du Canda c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 356).

[79] Le paragraphe 14.06(4) est muet à propos de « l'actif du failli » qui évite l'applicabilité d'une loi provinciale valide. Lorsqu'il a rédigé le par. 14.06(4), le Parlement aurait pu aisément parler de la responsabilité de l'actif du failli. Le Parlement a plutôt choisi de mentionner uniquement la responsabilité personnelle du syndic. Fait à noter, les par. 14.06(7) et (8) parlent tous deux du « débiteur ». Ce choix du Parlement ne peut être ignoré. Je conviens avec la juge d'appel Martin qu'il n'y aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant

is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

[80] The Hansard evidence leads to the same conclusion. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry Canada, noted the following during the 1996 debates preceding the enactment of s. 14.06(4) in 1997:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.

(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners . . . because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."

(*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave

au par. 14.06(4) visent la responsabilité de l'actif du failli. Comme l'a signalé la juge Martin, il ressort des termes exprès choisis par le Parlement que le 14.06(4) découlait du souci de protéger les syndics et se voulait une réponse à ce souci, et non de protéger la pleine valeur de l'actif au bénéfice des créanciers. Le texte du par. 14.06(4) ne porte aucunement à croire qu'il devait s'étendre à la responsabilité de l'actif.

[80] Les débats parlementaires mènent à la même conclusion. Jacques Hains, directeur de la Direction de la politique des lois commerciales au ministère d'Industrie Canada, a souligné ce qui suit pendant les débats tenus en 1996 avant l'adoption du par. 14.06(4) l'année suivante :

> L'objectif est de mieux définir la responsabilité des professionnels de l'insolvabilité, des praticiens de façon à les encourager à accepter des mandats où il pourrait peut-être y avoir des problèmes en matière d'environnement, de façon à réduire le nombre de sites abandonnés au pays, pour le bénéfice de l'environnement et la sauvegarde des entreprises et des emplois qui en dépendent.

(Comité permanent de l'industrie, *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996, entre 15 h 49 et 15 h 55, cité dans les motifs de la Cour d'appel, par. 197.)

Plusieurs mois plus tard, M. Hains a mentionné que :

> [L]es dispositions [ont été] adoptées par le Parlement en 1992 en vue d'alléger le fardeau de ceux qui travaillent dans le domaine de l'insolvabilité [. . .] parce que le mandat de liquider une entreprise insolvable leur impose des risques. En vertu du droit environnemental, par conséquent, ils auraient pu être tenus personnellement responsables d'un accident environnemental et obligés de verser les dommages-intérêts.

(*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e lég., 4 novembre 1996, p. 16)

M. Hains a ensuite expliqué en quoi les modifications de 1997 visaient à améliorer la réforme de la *LFI* en 1992 qui comprenait la première version du par. 14.06(2) (comme nous le verrons plus loin), mais

no indication that the focus had somehow shifted away from a trustee's "personal liability".

[81] Prior to the enactment of the 1997 amendments, G. Marantz, Legal Advisor to the Department of Industry Canada, noted that they were intended to "provide the trustee with protection from being chased with deep-pocket liability" (Standing Committee on Industry, *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996, at 17:15, as cited in C.A. reasons, at para. 198). I agree with the Regulator that the legislative debates give no hint of any intention by Parliament to immunize bankrupt estates from environmental liabilities. The notion that s. 14.06(4) was aimed at encouraging trustees in bankruptcy to accept mandates, and not at limiting estate liability, is further supported by the fact that the provision was inserted under the general heading "Appointment and Substitution of Trustees".

[82] Furthermore, in drafting s. 14.06(4), Parliament chose to use exactly the same concept it had used earlier in s. 14.06(2): by their express wording, where either provision applies, a trustee is not "personally liable". This cannot have been an oversight given that s. 14.06(4) was added to the *BIA* some five years after the enactment of s. 14.06(2). Since both provisions deal expressly with the protection of trustees from being "personally liable", it is very difficult to accept that they could be concerned with different kinds of liability. By their wording, s. 14.06(2) and s. 14.06(4) are clearly both concerned with the same concept. Indeed, if one interprets s. 14.06(4) as extending to estate liability, then there is no principled reason not to interpret s. 14.06(2) in the same way. However, it is undisputed that this was not Parliament's intention in enacting s. 14.06(2).

[83] Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is

il n'a pas laissé entendre que l'accent n'était plus mis sur la « responsabilité personnelle » du syndic.

[81] Avant l'adoption des modifications de 1997, Gordon Marantz, conseiller juridique au ministère d'Industrie Canada, a fait remarquer qu'elles visaient à « empêcher le syndic d'être poursuivi pour de fortes sommes » (Comité permanent de l'industrie, *Témoignages*, nº 21, 2e sess., 35e lég., 25 septembre 1996, à 17 h 15, cité dans les motifs de la Cour d'appel, par. 198)). Je conviens avec l'organisme de réglementation que les débats législatifs ne donnent aucun indice d'une intention du Parlement de mettre les biens des faillis à l'abri de toute responsabilité environnementale. L'idée que le par. 14.06(4) avait pour objectif d'inciter les syndics de faillite à accepter des mandats, et non de limiter la responsabilité de l'actif, est étayée davantage par l'insertion de la disposition sous la rubrique générale « Nomination et remplacement des syndics ».

[82] De plus, au moment de rédiger le par. 14.06(4), le Parlement a décidé d'utiliser la même notion qu'il avait employé précédemment au par. 14.06(2) : de par leur libellé explicite, lorsque l'une ou l'autre disposition s'applique, le syndic est dégagé de toute « responsabilité personnelle ». Il ne peut s'agir d'une erreur, car le par. 14.06(4) a été inséré dans la *LFI* quelque cinq ans après l'adoption du par. 14.06(2). Puisque les deux dispositions visent expressément à protéger les syndics contre toute « responsabilité personnelle », il est très difficile d'accepter qu'elles puissent concerner différents types de responsabilité. D'après leurs termes, le par. 14.06(2) et le par. 14.06(4) traitent manifestement du même concept. En effet, si l'on considère que le par. 14.06(4) s'étend à la responsabilité de l'actif, il n'y a aucune raison de principe de ne pas donner la même interprétation au par. 14.06(2). Toutefois, personne ne conteste que ce n'était pas l'intention qu'avait le Parlement au moment d'adopter le par. 14.06(2).

[83] Dans le même ordre d'idées, le Parlement a aussi choisi d'utiliser la même notion figurant aux par. 14.06(4) et 14.06(2) dans une troisième partie du régime établi par l'art. 14.06, soit le par. 14.06(1.2). Selon cette disposition, le syndic qui continue l'exploitation de l'entreprise du débiteur ou lui succède

not "personally liable" in respect of certain enumerated liabilities, including as a successor employer. Although this provision is not directly raised in this litigation, by its own terms, it clearly does not and cannot refer to the liability of the bankrupt estate. Again, it is difficult to conceive of how Parliament could have specified that a trustee is not "personally liable", using the ordinary, grammatical sense of that phrase, in both s. 14.06(1.2) and s. 14.06(2), but then intended the phrase to be read in a completely different and illogical manner in s. 14.06(4). All three provisions refer to the personal liability of a trustee, and all three must be interpreted consistently. Indeed, I note that the concept of a trustee being "not personally liable" is also used consistently in other parts of the *BIA* unrelated to the s. 14.06 scheme — see, for example, s. 80 and s. 197(3).

comme employeur est dégagé de toute « responsabilité personnelle » à l'égard de certains engagements énumérés, notamment comme successeur de l'employeur. Bien qu'elle n'ait pas été directement soulevée en l'espèce, cette disposition, de par ses propres termes, ne traite manifestement pas et ne peut traiter de la responsabilité de l'actif du failli. Là encore, il est difficile de concevoir comment le Parlement aurait pu préciser qu'un syndic est « dégagé de toute responsabilité personnelle » suivant le sens ordinaire et grammatical de cette expression au par. 14.06(1.2) et au par. 14.06(2), et souhaiter par la suite que l'on donne à cette expression une interprétation tout à fait différente et illogique au par. 14.06(4). Les trois dispositions traitent toutes de la responsabilité personnelle d'un syndic et il faut les interpréter uniformément. En effet, je signale que l'idée selon laquelle le syndic est « dégagé de toute responsabilité personnelle » est aussi reprise systématiquement dans d'autres parties de la *LFI* étrangères au régime de l'art. 14.06, par exemple l'art. 80 et le par. 197(3).

[84] This interpretation of s. 14.06(4) is also bolstered by the French wording of s. 14.06. The French versions of both s. 14.06(2) and s. 14.06(4) refer to a trustee's protection from personal liability "*ès qualités*". This French expression is defined by *Le Grand Robert de la langue française* (2nd ed. 2001) dictionary as referring to someone acting "*à cause d'un titre, d'une fonction particulière*", which, in English, would mean acting by virtue of a title or specific role. The *Robert & Collins* dictionary (online) translates "*ès qualités*" as in "one's official capacity". In using this expression in s. 14.06(4), Parliament is therefore stating that, where "disclaimer" properly occurs, a trustee, is not personally liable, in its capacity as trustee, for orders to remedy any environmental condition or damage affecting the "disclaimed" property. These provisions are clearly not concerned with the concept of estate liability. The French versions of s. 14.06(2) and s. 14.06(4) thus utilize identical language to describe the limitation of liability they offer trustees. It is almost impossible to conceive of Parliament using identical language in two such closely related provisions and yet intending different meanings. Accordingly, a trustee is not personally liable in its

[84] L'interprétation qui précède du par. 14.06(4) est également renforcée par la version française de l'art. 14.06. Les versions françaises des par. 14.06(2) et (4) indiquent que le syndic est, « ès qualités », dégagé de toute responsabilité personnelle. Selon le dictionnaire *Le Grand Robert de la langue française* (2e éd. 2001), cette expression française désigne la personne qui agit « à cause d'un titre, d'une fonction particulière »; en anglais, elle désigne la personne agissant « *by virtue of a title or specific role* ». Dans le dictionnaire *Robert & Collins* (en ligne), cette expression décrit la personne qui agit en « *one's official capacity* ». En utilisant cette expression au par. 14.06(4), le Parlement prévoit ainsi qu'en cas de « renonciation » valide, le syndic est, ès qualités, dégagé de toute responsabilité personnelle à l'égard d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant le bien auquel il a été « renoncé ». Ces dispositions ne portent manifestement pas sur la notion de responsabilité de l'actif. Les versions françaises des par. 14.06(2) et (4) emploient donc les mêmes mots pour décrire la limitation de responsabilité qu'elles offrent aux syndics. Il est presque impossible de concevoir que le Parlement emploie les mêmes termes dans deux

official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

[85] Prior to this litigation, the case law on s. 14.06 was somewhat scarce. However, this Court has considered the s. 14.06 scheme once before, in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. In that case, comments made by both the majority and the dissenting judge support my conclusion that s. 14.06(4) is concerned only with the personal liability of trustees. Abella J., writing for the majority, explained that "where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly" (para. 67). As examples of this principle, she referred to 14.06(1.2) and, most notably for our purposes, to s. 14.06(4), which she described as follows: "trustee immune in certain circumstances from environmental liabilities" (para. 67). In her dissent, Deschamps J. explained that a "trustee is not personally bound by the bankrupt's obligations" (para. 91). She noted that trustees are protected by the provisions that confer immunity upon them, including s. 14.06 (1.2), (2) and (4).

[86] Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made,

dispositions aussi intimement liées et leur attribue pourtant des sens différents. En conséquence, le syndic est dégagé de toute responsabilité personnelle en sa qualité officielle de représentant de l'actif du failli lorsqu'il invoque le par. 14.06(4).

[85] Avant le présent litige, la jurisprudence sur l'art. 14.06 était relativement peu abondante. Notre Cour a cependant examiné le régime de l'art. 14.06 une fois auparavant, dans *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123. Dans cet arrêt, les commentaires de la majorité et de la juge dissidente étayent ma conclusion selon laquelle le par. 14.06(4) ne porte que sur la responsabilité personnelle des syndics. La juge Abella a expliqué, au nom des juges majoritaires, que « lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement » (par. 67). À titre d'exemples de manifestation de ce principe, elle a cité le par. 14.06(1.2) et, notamment pour les fins qui nous occupent, le par. 14.06(4), qu'elle a décrits ainsi : « protection du syndic dans certaines circonstances contre les ordonnances en matière environnementale » (par. 67). Dans ses motifs dissidents, la juge Deschamps a expliqué que le « [syndic] n'est pas tenu personnellement aux obligations du failli » (par. 91). Elle a signalé que les syndics étaient protégés par les dispositions qui leur conférait une immunité, dont les par. 14.06 (1.2), (2) et (4).

[86] Bien que les motifs dissidents mettent l'accent sur la source du pouvoir de « renonciation » prévu au par. 14.06(4), la présente affaire ne porte aucunement sur la source de ce pouvoir ou sur la question de savoir si GTL a « renoncé » avec succès aux biens faisant l'objet de la renonciation. Je me contente de signaler brièvement que, même si les juges dissidents s'appuient sur un supposé pouvoir de « renonciation » en common law, les parties n'ont renvoyé à la Cour aucune décision — et les juges dissidents n'en ont cité aucune — attestant l'existence d'un pouvoir en common law qui permet au syndic de « renoncer » à un *bien réel*. Quoi qu'il en soit, peu importe la source de ce pouvoir, rien dans le par. 14.06(4) ne donne à penser que le syndic « renonçant » à des biens réels peut tout simplement se soustraire aux ordonnances

the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

[87] Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the *BIA*. Section 20 of the *BIA* was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

[88] The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no

environnementales qui s'appliquent à eux. Bien au contraire, la disposition prévoit clairement que, si une ordonnance environnementale a été rendue, la « renonciation » emporte la cessation de la responsabilité personnelle. On ne fait état d'aucun effet de la renonciation sur la responsabilité de l'actif du failli. Si le Parlement avait voulu investir les syndics du pouvoir de délaisser entièrement les biens visés par des engagements environnementaux, il aurait pu le faire aisément.

[87] En outre, comme je l'ai mentionné, le par. 14.06(4) ne vise pas uniquement la « renonciation » au sens formel. D'après le sous-al. 14.06(4)(a)(ii), le syndic est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale lorsqu'il « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit ». Le présent pourvoi ne nous oblige cependant pas à décider ce qui constitue l'abandon, la disposition ou le dessaisissement d'un bien réel pour l'application du par. 14.06(4), et je remets le règlement de ce point à une autre occasion. Le pourvoi ne nous oblige pas non plus à décider des effets d'une renonciation réussie en vertu de l'art. 20 de la LFI. GTL n'a pas invoqué cet article ni soutenu qu'il lui accordait le pouvoir d'abandonner toute responsabilité ou obligation ou tout engagement applicable aux biens faisant l'objet de la renonciation.

[88] D'après les juges dissidents, d'autres parties du régime de l'art. 14.06 sont plus sensées si le par. 14.06(4) limite la responsabilité de l'actif. À l'exception du par. 14.06(2), aucune de ces dispositions n'était en litige dans la présente affaire et aucune d'elles n'a été invoquée par GTL. Quoi qu'il en soit, étant donné le libellé clair et sans équivoque de ce paragraphe, le poids à accorder à son contexte législatif est amoindri. Cela est d'autant plus vrai que l'autre interprétation proposée obligerait la Cour à écarter des mots comme « personnelle » du paragraphe. Tel qu'il a été mentionné, lorsque le libellé d'une disposition est précis et sans équivoque, le sens ordinaire des mots joue un rôle primordial dans le processus d'interprétation (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). En dernière analyse, les conséquences de la « renonciation » du syndic sont claires : l'immunité contre la responsabilité personnelle, et non celle de l'actif.

option other than to accede to the clear intention of Parliament.

[89] I turn now to the relationship between s. 14.06(2) and (4).

(b) *How Section 14.06(4) Is Distinguishable From Section 14.06(2)*

[90] In this case, GTL relied solely on s. 14.06(4) in purporting to "disclaim" the Renounced Assets. However, as I will explain, GTL is fully protected from personal liability for the environmental liabilities associated with those assets whether it is understood as having "disclaimed" the Renounced Assets or not. However, it cannot simply "walk away" from the Renounced Assets in either case.

[91] Regardless of whether GTL can access s. 14.06(4) (in other words, regardless of whether it has "disclaimed"), it is already fully protected from personal liability in respect of environmental matters by s. 14.06(2). Section 14.06(2) protects trustees from personal liability for "any environmental condition that arose or environmental damage that occurred", unless it is established that the condition arose or the damage occurred after the trustee's appointment and as a result of their gross negligence or wilful misconduct. In this case, it is not disputed that the environmental condition or damage leading to the Abandonment Orders arose or occurred prior to GTL's appointment. Section 14.06(2) provides trustees with protection from personal liability as broad as that provided by s. 14.06(4). Although, on the face of the provisions, there are two ways in which s. 14.06(4) may appear to offer broader protection, neither of them withstands closer examination.

[92] First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage

Le paragraphe 14.06(4) ne souffre à première vue d'aucune ambiguïté. Notre Cour n'a d'autre choix que d'accéder à l'intention manifeste du Parlement.

[89] Je passe maintenant au rapport entre les par. 14.06(2) et (4).

b) *La manière dont le par. 14.06(4) se distingue du par. 14.06(2)*

[90] En l'espèce, GTL s'est fondé uniquement sur le par. 14.06(4) pour prétendre « renoncer » aux biens faisant l'objet de la renonciation. Or, comme je l'expliquerai, que l'on considère ou non que GTL a « renoncé » aux biens en question, il est entièrement protégé contre toute responsabilité personnelle à l'égard des engagements environnementaux associés à ces biens. Toutefois, il ne peut tout simplement pas les « délaisser » dans un cas comme dans l'autre.

[91] Que GTL puisse ou non se prévaloir du par. 14.06(4) (autrement dit, qu'il ait « renoncé » ou non aux biens en question), il est déjà entièrement à l'abri de toute responsabilité personnelle en matière environnementale par application du par. 14.06(2). Ce paragraphe dégage les syndics de toute responsabilité personnelle découlant de « tout fait ou dommage lié à l'environnement », sauf celui causé par sa négligence grave ou son inconduite délibérée après sa nomination. En l'espèce, personne ne conteste que le fait ou dommage lié à l'environnement à l'origine des ordonnances d'abandon est survenu avant la nomination de GTL. Le paragraphe 14.06(2) offre aux syndics une protection contre toute responsabilité personnelle aussi large que celle fournie par le par. 14.06(4). Bien qu'à la lecture des dispositions, le par. 14.06(4) semble offrir de deux manières une protection plus large, aucune d'entre elles ne résiste à un examen plus approfondi.

[92] En premier lieu, l'organisme de réglementation soutient qu'il y a lieu de distinguer la protection offerte par le par. 14.06(4) de celle accordée par le par. 14.06(2) car le premier concerne les « ordonnances » tandis que le deuxième intéresse les obligations environnementales en général. Je conviens avec les juges dissidents qu'il est impossible d'établir une distinction convaincante entre la responsabilité d'un

(purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

[93] It follows that s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2). Despite this, in my view, Parliament had good reasons for enacting s. 14.06(4) in 1997. The first was to make it clear to trustees that they had complete protection from personal liability in respect of environmental conditions and damage (absent wilful misconduct or gross negligence), especially in situations where they have "disclaimed". The Hansard evidence shows that one of the impetuses for the 1997 reforms was the desire of trustees for further certainty. The second was to clarify the effect of a trustee's "disclaimer", on the liability of the *bankrupt estate* for orders to remedy an environmental condition or damage. In other words, s. 14.06(4) makes it clear not just that a trustee who "disclaims" real property is exempt from personal liability under environmental orders applicable to that property, but also that the liability of the bankrupt estate is unaffected by such "disclaimer".

fait ou dommage lié à l'environnement (prétendument visé par le par. 14.06(2)) et celle découlant du non-respect d'une ordonnance de réparation du fait ou dommage en question (prétendument visé par le par. 14.06(4)). Comme l'indiquent les motifs dissidents, « [c]ette distinction est tout à fait artificielle » (par. 212). La responsabilité sous-jacente sur laquelle portent les ordonnances environnementales découle du « fait ou dommage lié à l'environnement » et est prévue au par. 14.06(2). En second lieu, à la lecture du par. 14.06(4), celui-ci ne prévoit aucune exception pour négligence grave ou inconduite délibérée après la nomination, contrairement au par. 14.06(2). Le paragraphe 14.06(4) s'applique toutefois expressément « sous réserve du paragraphe (2) ». Je suis d'accord avec les juges dissidents pour dire que, d'après la seule interprétation que l'on peut donner à cette disposition, le syndic ayant causé un fait ou un dommage lié à l'environnement par son inconduite délibérée ou sa négligence grave engagerait toujours sa responsabilité personnelle même s'il invoque le par. 14.06(4).

[93] Ainsi, le par. 14.06(4) n'offre pas aux syndics une protection contre la responsabilité personnelle plus large que celle fournie par le par. 14.06(2). Malgré cela, j'estime que le Parlement avait de bonnes raisons d'adopter le par. 14.06(4) en 1997. La première était de préciser aux syndics qu'ils étaient entièrement dégagés de toute responsabilité personnelle à l'égard des faits et dommages liés à l'environnement (en l'absence d'inconduite délibérée ou de négligence grave), surtout dans des cas où ils ont « renoncé » à des biens. Les débats parlementaires indiquent que la réforme de 1997 prenait sa source notamment dans le vœu des syndics d'obtenir une certitude accrue. La réforme visait aussi à clarifier l'effet qu'a la « renonciation » d'un syndic sur la responsabilité de l'*actif du failli* relativement aux ordonnances de réparation d'un fait ou dommage lié à l'environnement. En d'autres termes, il ressort du par. 14.06(4) non seulement que le syndic « renonçant » à des biens réels échappe à toute responsabilité personnelle à l'égard des ordonnances environnementales qui visent ces biens, mais aussi que pareille renonciation n'a aucune incidence sur la responsabilité de l'actif du failli.

[94] In 1992, Parliament turned its attention to the potential liability of trustees in the environmental context and enacted s. 14.06(2). The provision originally stated that trustees were protected from personal liability for any environmental condition that arose or any environmental damage that occurred "(a) before [their] appointment . . . or (b) after their appointment except where the condition arose or the damage occurred as a result of their failure to exercise due diligence". The Hansard evidence demonstrates that trustees were unhappy with the original language of s. 14.06(2). As Mr. Hains explained, they complained that the due diligence standard was "too vague. No one knows what it does and it may vary from one case to another. With the vagueness of the standard and what may be required to satisfy it, and with the risk of personal liability, the trustees were not even interested in investigating how they might exercise due diligence" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at pp. 15-16).

[95] As a result, Parliament made reforms to the *BIA* in 1997. These reforms not only changed the standard of protection offered to trustees by s. 14.06(2) by adopting the current language, but also introduced s. 14.06(4). As is evident from their shared language, the provisions were intended to work together to clarify a trustee's protection from personal liability for any environmental condition or damage. Section 14.06(4) provided the certainty that trustees had been seeking in the years prior to 1997. For the first time, it explicitly linked the concept of "disclaimer" to the scheme protecting trustees from environmental liability. Whether it is understood as a common law power or as a reference to other statutory provisions, the concept of "disclaimer" predates s. 14.06(4) itself, as well as the 1992 version of s. 14.06(2). "Disclaimer" is also applicable in other contexts, such as in relation to executory contracts, as discussed in *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328.

[94] En 1992, le Parlement s'est penché sur la responsabilité potentielle des syndics en matière environnementale et a édicté le par. 14.06(2). Cette disposition prévoyait au départ que le syndic était dégagé de toute responsabilité personnelle découlant d'un fait ou dommage lié à l'environnement survenu « a) avant sa nomination [. . .]; ou b) après sa nomination, sauf d'un fait ou dommage causé par son omission d'agir avec la prudence voulue ». Il appert des débats parlementaires que les syndics étaient insatisfaits du libellé initial du par. 14.06(2). Comme l'explique M. Hains, ils se sont plaints que la norme de diligence raisonnable était « trop vague. Nul ne sait comment l'interpréter, et les interprétations peuvent varier d'une affaire à l'autre. Étant donné le libellé trop vague de la norme, le fait que l'on ignore ce qu'il faut faire pour y satisfaire et le risque de responsabilité personnelle, les syndics ne cherchaient même pas à savoir de quelle manière ils pourraient faire preuve de diligence raisonnable. » (*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e lég., 4 novembre 1996, p. 15-16).

[95] En conséquence, le Parlement a réformé la *LFI* en 1997. Cette réforme a non seulement modifié la norme visant la protection que le par. 14.06(2) offre aux syndics par l'adoption du texte actuel, mais elle a aussi introduit le par. 14.06(4). Comme le montrent à l'évidence les termes qu'ils ont en commun, les dispositions étaient censées s'appliquer ensemble pour clarifier l'immunité de responsabilité personnelle dont bénéficient les syndics à l'égard de tout fait ou dommage lié à l'environnement. Le paragraphe 14.06(4) leur offre la certitude qu'ils recherchaient avant 1997. Pour la première fois, il établissait en termes exprès un lien entre la notion de « renonciation » et le régime dégageant les syndics de toute responsabilité environnementale. Qu'on le voit comme un pouvoir de common law ou un renvoi à d'autres dispositions légales, le concept de « renonciation » précède le par. 14.06(4) lui-même ainsi que la version de 1992 du par. 14.06(2). Il peut aussi y avoir « renonciation » dans différents contextes, tel celui des contrats exécutoires étudiés dans *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328.

[96] Prior to 1997, the effects of a "disclaimer" of real property on environmental liability was unclear. In particular, it was unclear what effect "disclaimer" might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee (see J. Klimek, *Insolvency and Environment Liability* (1994), at p. 4-19). By enacting s. 14.06(4), Parliament clarified that the effect of the "disclaimer" of real property was to limit the personal liability of the trustee for orders to remedy any environmental condition or damage, but not to limit the liability of the bankrupt estate. Parliament could have merely updated the language of s. 14.06(2) in 1997, but this would have left the question of "disclaimer" and estate liability unaddressed. Knowledge of the impact of "disclaimer" could be important to a trustee who is deciding whether to accept a mandate. Section 14.06(4) thus went a considerable way towards resolving the vagueness of which trustees had complained prior to 1997.

[97] A notable aspect of the scheme crafted by Parliament is that s. 14.06(4) applies "[n]otwithstanding anything in any federal or provincial law". In enacting s. 14.06(4), Parliament specified the effect of the "disclaimer" of real property solely in the context of *environmental orders*. The effect of "disclaimer" on liability in other contexts was not addressed. Parliament was concerned with orders to remedy any environmental condition or damage, where, liability frequently attaches based on the status of owner, party in control, or licensee. Parliament did not want trustees to think that they could avoid the estate's environmental liability through the act of "disclaiming". Accordingly, it used specific language indicating that the effect of the "disclaimer" of real property on orders to remedy an environmental condition or damage is merely that the trustee is not personally liable. It is possible that the effect of "disclaimer" on the liability of the bankrupt estate might be different in other contexts.

[96] Avant 1997, on ne savait pas quels effets la « renonciation » à des biens réels avait sur la responsabilité environnementale. Plus précisément, on ne connaissait pas l'effet que pouvait avoir la renonciation sur la responsabilité de l'actif du failli, vu que la législation environnementale imposait une responsabilité fondée sur l'acquisition du statut de propriétaire, de partie en possession du bien ou de titulaire de permis (voir J. Klimek, *Insolvency and Environment Liability* (1994), p. 4-19). En adoptant le par. 14.06(4), le Parlement a précisé que la « renonciation » à des biens réels avait pour effet de limiter la responsabilité personnelle du syndic, et non celle de l'actif du failli, aux ordonnances de réparation de tout fait ou dommage lié à l'environnement. Le Parlement aurait pu se contenter d'actualiser le texte du par. 14.06(2) en 1997, mais cela aurait laissé en suspens la question de la « renonciation » et de la responsabilité de l'actif. La connaissance de l'incidence de la « renonciation » pourrait avoir de l'importance pour le syndic qui décide d'accepter ou non un mandat. Le paragraphe 14.06(4) a donc dissipé considérablement l'imprécision dont se plaignaient les syndics avant 1997.

[97] Un aspect digne de mention du régime conçu par le Parlement est l'application du par. 14.06(4) « [p]ar dérogation au droit fédéral et provincial ». En adoptant ce paragraphe, le Parlement a précisé l'effet de la « renonciation » à des biens réels uniquement dans le contexte des *ordonnances environnementales*. L'effet de la « renonciation » sur la responsabilité dans d'autres contextes n'a pas été abordé. Le Parlement se souciait des ordonnances de réparation de tout fait ou dommage lié à l'environnement où la responsabilité est fréquemment engagée en raison du statut de propriétaire, de partie ayant le contrôle du bien ou de titulaire de permis. Le Parlement ne voulait pas que les syndics croient pouvoir échapper à la responsabilité environnementale de l'actif par la « renonciation ». Il a donc utilisé des termes précis pour indiquer que le seul effet de la « renonciation » à des biens réels sur des ordonnances de réparation d'un fait ou dommage lié à l'environnement est que le syndic est dégagé de toute responsabilité personnelle. Il se peut que la « renonciation » ait un effet différent sur la responsabilité de l'actif du failli dans d'autres contextes.

[98] Section 14.06(4) thus makes it clear that "disclaimer" by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The liability of the bankrupt estate is, of course, an issue with which s. 14.06(2) is absolutely unconcerned. Thus, it can be seen that s. 14.06(4) and s. 14.06(2) are not in fact the same — they may provide trustees with the same protection from personal liability, but only the former has any relevance to the question of estate liability. Section 14.06(2) protects trustees without having to be invoked by them — it does not speak to the results of a trustee's "disclaimer".

[99] Where a trustee has "disclaimed" real property, it is not personally liable under an environmental order applicable to that property, but the bankrupt estate itself remains liable. Of course, the fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the *Abitibi* test, as I will discuss below.

[100] Accordingly, regardless of whether GTL is properly understood as having "disclaimed", the result is the same. Given that the environmental condition or damage arose or occurred prior to GTL's appointment, it is fully protected from personal liability by s. 14.06(2). However, "disclaimer" does not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate has been ordered to remedy any environmental condition or damage. The environmental liability of the bankrupt estate remains unaffected.

[101] I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme.

[98] Le paragraphe 14.06(4) établit donc clairement que la « renonciation » du syndic n'a aucun effet sur la responsabilité continue de l'*actif du failli* pour ce qui est des ordonnances de réparation de tout fait ou dommage lié à l'environnement. Bien entendu, il n'est absolument pas question de la responsabilité de l'actif du failli au par. 14.06(2). Ainsi, on constate que les par. 14.06(4) et (2) sont effectivement différents : ils fournissent peut-être aux syndics la même protection contre la responsabilité personnelle, mais seul le premier se rapporte à la responsabilité de l'actif. Le paragraphe 14.06(2) protège les syndics sans qu'ils aient à l'invoquer; il est muet sur les résultats de la « renonciation » d'un syndic.

[99] Le syndic ayant « renoncé » à des biens réels est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale applicable à ces biens, mais l'actif du failli lui-même demeure responsable. Bien sûr, le fait que la responsabilité de l'actif du failli demeure engagée même lorsque le syndic invoque le par. 14.06(4) ne veut pas nécessairement dire que le syndic doit respecter les obligations environnementales et qu'elles ont priorité sur toutes les autres réclamations. La priorité d'une réclamation environnementale dépend de la bonne application du critère d'*Abitibi*, comme je l'expliquerai plus loin.

[100] En conséquence, peu importe si l'on considère que GTL a « renoncé » ou non à des biens, le résultat est le même. Puisque le fait ou dommage lié à l'environnement est survenu avant la nomination de GTL, ce dernier est entièrement protégé contre toute responsabilité personnelle par le par. 14.06(2). En revanche, la « renonciation » n'habilite pas le syndic à tout simplement délaisser les biens faisant l'objet de la renonciation quand on l'enjoint à réparer un fait ou dommage lié à l'environnement. La responsabilité environnementale de l'actif du failli demeure inchangée.

[101] J'aimerais faire de brèves observations sur le reste du régime de l'art. 14.06 même si, comme je l'ai mentionné, aucune de ces dispositions n'est de fait en litige devant notre Cour. Les juges dissidents soutiennent que l'on créerait des problèmes d'interprétation avec le reste du régime de l'art. 14.06 si on interprétait le par. 14.06(4) comme visant uniquement

In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the *BIA* and the Alberta Regulatory Scheme

[102] The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

[103] Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may

la responsabilité personnelle des syndics. À mon avis, ces difficultés ne justifient pas que l'on fasse abstraction du sens clair du par. 14.06(4). Aucun principe d'interprétation législative ne requiert que l'on déforme le sens clair d'une disposition pour en rendre le régime plus cohérent. Notre Cour s'est vu confier la tâche d'interpréter le par. 14.06(4) et j'estime que son libellé ne permet qu'une seule interprétation.

(2) Il n'y a pas de conflit d'application ni d'entrave à la réalisation d'un objet fédéral entre les par. 14.06(2) et (4) de la *LFI* et le régime de réglementation de l'Alberta

[102] Les conflits d'application entre la *LFI* et la législation albertaine allégués par GTL résultent de sa qualité de « titulaire de permis » au sens de l'*OGCA* et de la *Pipeline Act*. Comme je viens de le démontrer, le par. 14.06(4) n'investit pas le syndic du pouvoir de se soustraire à l'ensemble des responsabilités, obligations ou engagements à l'égard de biens auxquels il a été « renoncé ». Il clarifie plutôt l'exonération de responsabilité personnelle dont jouit le syndic et précise que sa « renonciation » n'a aucune incidence sur la responsabilité environnementale de l'actif du failli. Que GTL ait bel et bien « renoncé » ou non aux biens faisant l'objet de la renonciation, il ne peut les délaisser. Vu l'interprétation qu'il convient de donner au par. 14.06(4), aucun conflit d'application n'est imputable au fait que, suivant le droit albertain, GTL demeure, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif de Redwater. De même, le fait que les obligations de fin de vie associées aux biens faisant l'objet de la renonciation sont toujours prises en compte dans le calcul de la CGR de Redwater ne donne lieu à aucun conflit d'application.

[103] Donc, qu'il ait « renoncé » effectivement ou non aux biens, GTL est entièrement protégé par le par. 14.06(2) contre toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif de Redwater. GTL signale qu'à première vue, l'*OGCA* et la *Pipeline Act* n'empêchent aucunement en termes exprès l'organisme de réglementation de le tenir personnellement responsable, à titre de « titulaire de permis », du coût d'exécution

be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

[104] There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline Act*. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

[105] I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

des ordonnances d'abandon. Toujours selon GTL, la simple possibilité que la législation albertaine l'oblige à effectuer l'abandon crée un conflit d'application avec l'exonération de responsabilité personnelle qu'accorde le par. 14.06(2) de la *LFI*.

[104] Les syndics ne peuvent être personnellement tenus de remplir des obligations de remise en état ou de décontamination — ils sont expressément exonérés de cette responsabilité par l'*EPEA* en l'absence d'inconduite délibérée ou de négligence grave de leur part. GTL a raison de dire que son éventuelle obligation, en tant que « titulaire de permis », de procéder à l'abandon n'est pas, de façon similaire, limitée aux éléments de l'actif en application de l'*OGCA* et de la *Pipeline Act.* L'organisme de réglementation fait valoir que, [TRADUCTION] « [b]ien que la définition de "titulaire de permis" ne prévoit pas explicitement que la responsabilité du séquestre se limite aux éléments de l'actif du failli, cette exigence fédérale figure manifestement par interprétation dans la disposition et est explicitement prévue dans une autre loi, à savoir [l'*EPEA*], qu'applique [l'organisme de réglementation] » (m.a., par. 104 (note en bas de page omise)). Pour sa part, GTL affirme que la pratique de l'organisme de réglementation de n'imposer une responsabilité que jusqu'à concurrence de la valeur de l'actif ne constitue pas une réponse valable, étant donné que, comme le prétend ATB, faute d'une disposition légale expresse, [TRADUCTION] « [l]es pratiques peuvent changer sans préavis » (mémoire d'ATB, par. 106).

[105] Je rejette la proposition selon laquelle l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* devrait être déclaré inopérant en raison de la simple possibilité théorique de conflit avec le par. 14.06(2). Une telle issue serait incompatible avec le principe de la retenue qui sous-tend celui de la prépondérance fédérale, ainsi qu'avec le principe du fédéralisme coopératif. L'ajout des syndics à la définition de « titulaire de permis » constitue un aspect important du régime de réglementation albertain. Il leur confère le privilège d'exploiter les biens des faillis qui sont visés par des permis, tout en s'assurant que les professionnels de l'insolvabilité sont encadrés au cours des longues périodes pendant lesquelles ils gèrent les biens pétroliers et gaziers.

[106] Importantly, the situation in this case is completely different from the one before the Court in *Moloney*. In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in *Moloney*, at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

[107] According to the evidence in this case, the *OGCA* and the *Pipeline Act* have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

[106] Fait important, la situation en l'espèce est complètement différente de celle dont a été saisie notre Cour dans *Moloney*. Dans cette affaire, le juge Gascon a rejeté l'argument selon lequel il n'y avait pas de conflit d'application parce que le failli pouvait volontairement payer une dette provinciale postérieure à la libération ou choisir de ne pas conduire. Le juge Gascon a signalé que « l'analyse relative au conflit d'application ne saurait se limiter à la question de savoir si l'intimé peut se conformer aux deux lois en renonçant soit à la protection que lui offre la loi fédérale, soit au droit dont il bénéficie en vertu de la loi provinciale » (par. 60). Dans l'affaire qui nous occupe, GTL conserve à la fois la protection que lui confère la loi fédérale (aucune responsabilité personnelle) et le privilège auquel il a droit en vertu de la loi provinciale (faculté d'exploiter l'actif du failli dans une industrie réglementée). On ne demande pas à GTL de renoncer à faire quelque chose ni de payer volontairement quoi que ce soit. On ne soutient pas non plus que l'organisme de réglementation puisse éviter le conflit en refusant d'appliquer les mesures législatives contestées pendant la faillite (comme dans *Moloney*, par. 69). Nous ne sommes pas en présence d'une situation où l'organisme de réglementation pourrait refuser d'appliquer la loi provinciale, mais d'une situation où la loi provinciale peut être appliquée — et l'a été — pendant la faillite sans qu'il y ait de conflit.

[107] Selon la preuve produite en l'espèce, les définitions de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* incluent depuis une vingtaine d'années les syndics et, durant cette période, l'organisme de réglementation n'a jamais essayé d'engager la responsabilité personnelle d'un syndic. L'organisme de réglementation ne va pas au-delà des éléments qui font encore partie de l'actif du failli en recherchant le respect de ses obligations environnementales. Si l'organisme de réglementation devait tenter d'obliger personnellement GTL à se conformer aux ordonnances d'abandon, cela engendrerait un conflit d'application entre, d'une part, l'*OGCA* et la *Pipeline Act* et, d'autre part, le par. 14.06(2) de la *LFI*, ce qui rendrait les deux premières lois inopérantes dans la mesure de ce conflit. Or, à l'heure actuelle, GTL peut à la fois être dégagé de toute responsabilité personnelle en vertu du par. 14.06(2) et respecter le régime albertain en administrant l'actif de Redwater à titre de « titulaire de permis ».

[108] The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

[109] I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

[110] The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

[108] La suggestion faite dans les motifs dissidents selon laquelle l'organisme de réglementation tente d'engager la responsabilité personnelle de GTL est inexacte. Personne ne conteste que l'actif de Redwater a toujours une grande valeur. Bien que le droit de l'organisme de réglementation soit naturellement tributaire des priorités établies par la *LFI*, l'historique du régime de réglementation en cause démontre que l'organisme de réglementation dispose de moyens pour obtenir cette valeur sans engager la responsabilité personnelle de GTL. Il n'appartient pas à notre Cour de prescrire un mécanisme en particulier à cette fin. Même si ce n'était pas le cas, le fait que les biens de Redwater ont déjà été vendus et qu'ils sont actuellement détenus en fiducie signifie que la responsabilité personnelle ne pose plus problème. Il n'y a pas de conflit d'application.

[109] Je me penche maintenant sur l'entrave à la réalisation d'un objet fédéral. Le juge siégeant en cabinet a relevé dans ses motifs un certain nombre d'objets de l'art. 14.06. GTL s'appuie sur trois d'entre eux, à savoir : [TRADUCTION] « limiter la responsabilité des professionnels de l'insolvabilité, afin qu'ils acceptent des mandats en dépit des problèmes environnementaux »; « réduire le nombre de sites délaissés dans le pays »; et « permettre aux séquestres et aux syndics de procéder à des évaluations économiques rationnelles des coûts de réparation des faits liés à l'environnement, et donner aux séquestres ainsi qu'aux syndics le pouvoir discrétionnaire de déterminer s'il y a lieu de se conformer aux ordonnances de décontamination des biens touchés par ces faits » (motifs du juge siégeant en cabinet, par. 128-129).

[110] Il incombe à GTL d'établir les objectifs précis des par. 14.06(2) et (4) s'il souhaite démontrer qu'il y a conflit. Notre Cour a qualifié ce fardeau d'« élevé » et ajouté qu'il faut « une preuve claire de l'objet » (*Lemare*, par. 26). À mon avis, compte tenu du libellé clair des par. 14.06(2) et (4) (« le syndic est, ès qualité, dégagé de toute responsabilité personnelle ») et des débats parlementaires, l'objectif de ces dispositions est manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent.

[111] This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the *BIA*.

[112] In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

[113] Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least

[111] Cet objectif n'est pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act*. L'organisme de réglementation a soutenu qu'il n'essaierait jamais d'engager la responsabilité personnelle d'un syndic. Les syndics sont considérés comme des « titulaires de permis » dans ces lois depuis plus de 20 ans et ils n'ont pas encore été confrontés au fléau de la responsabilité personnelle. Déclarer inopérante une partie essentielle du régime de réglementation de l'Alberta en raison de la possibilité théorique d'entrave à un objectif fédéral irait à l'encontre des principes de la prépondérance fédérale et du fédéralisme coopératif. Jusqu'à présent, le régime de réglementation albertain fonctionne de la manière prévue sans entraver l'objectif des par. 14.06(2) ou (4) de la *LFI*.

[112] Pour soutenir que l'art. 14.06 a comme objectif général de réduire le nombre de sites abandonnés (au sens non technique du terme) et d'encourager les syndics à accepter des mandats, GTL se fonde sur ce qu'il appelle [TRADUCTION] « la preuve extrinsèque disponible et le libellé de cette disposition » (mémoire de GTL, par. 91). À mon avis, les arguments qu'il avance ne lui permettent pas de s'acquitter du fardeau élevé qui lui incombe et de démontrer que l'objectif des par. 14.06(2) et (4) devrait être défini de manière à inclure ces objectifs généraux. Réduire le nombre de sites délaissés et encourager les syndics à accepter des mandats peuvent être des effets secondaires positifs des par. 14.06(2) et (4), mais il serait exagéré de dire qu'il s'agit des objectifs de ces dispositions. Comme dans le cas de la disposition en litige dans *Lemare*, il est plus plausible que ces dispositions aient un « simple et restreint » (par. 45).

[113] Quoi qu'il en soit, même si l'on tient pour acquis que les par. 14.06(2) et (4) ont de tels objectifs généraux, la preuve ne démontre pas que la réalisation de ces objectifs est entravée par l'ajout des syndics à la définition légale de « titulaire de permis ». S'appuyant sur des affirmations de GTL dans le Deuxième rapport, ATB prétend que, si les syndics sont toujours considérés comme des « titulaires de permis » et les réclamations environnementales continuent de lier l'actif, les syndics refuseront la nomination dans des situations semblables à celle de l'insolvabilité de Redwater. À cette prétention

Northern Badger that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

sommaire il faut opposer le fait qu'avant le présent litige, il était établi en Alberta, depuis au moins l'arrêt *Northern Badger*, que certaines obligations environnementales continues dans l'industrie pétrolière et gazière liaient toujours l'actif du failli. Il était aussi bien établi que l'organisme de réglementation n'aurait jamais essayé de tenir les professionnels de l'insolvabilité personnellement responsables de telles obligations. Comme l'a fait remarquer l'Association canadienne des producteurs pétroliers, rien n'indique que cet état de fait bien établi a conduit les professionnels de l'insolvabilité à refuser la nomination ou augmenté le nombre de sites orphelins. Il n'y a aucune raison pour laquelle l'organisme de réglementation et les syndics ne peuvent pas poursuivre leur collaboration, comme ils le font depuis de nombreuses années, pour assurer le respect des obligations de fin de vie tout en maximisant le recouvrement au profit des créanciers.

(3) Conclusion on Section 14.06 of the *BIA*

[114] There is no conflict between the Alberta legislation and s. 14.06 of the *BIA* that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

(3) Conclusion sur l'art. 14.06 de la *LFI*

[114] Il n'y a aucun conflit entre la législation albertaine et l'art. 14.06 de la *LFI* par suite duquel la définition de « titulaire de permis » dans la première est inapplicable dans la mesure où elle vise GTL. Ce dernier conserve les responsabilités et obligations d'un « titulaire de permis » tant qu'il reste des éléments dans l'actif de Redwater. GTL plaide néanmoins que, même s'il ne peut délaisser les biens faisant l'objet de la renonciation en invoquant le par. 14.06(4), les obligations environnementales qui y sont associés sont des réclamations non garanties de l'organisme de réglementation pour l'application de la *LFI*. GTL affirme que l'ordre de priorités fixé dans la *LFI* l'oblige à acquitter les réclamations des créanciers garantis de Redwater avant celles de l'organisme de réglementation, lesquelles occupent le même rang que les réclamations des autres créanciers ordinaires. D'après GTL, les tentatives de l'organisme de réglementation d'utiliser les pouvoirs que lui accorde la loi pour faire primer ses réclamations environnementales entrent en conflit avec la *LFI*. Je vais maintenant me pencher sur ce conflit allégué, qui fait intervenir le critère d'*Abitibi*.

C. *The Abitibi Test: Is the Regulator Asserting Claims Provable in Bankruptcy?*

[115] The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

[116] It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* — such was the conclusion in *Husky Oil*, at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*.

[117] GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims

C. *Le critère d'Abitibi : L'organisme de réglementation fait-il valoir des réclamations prouvables en matière de faillite?*

[115] La répartition équitable des biens du failli est l'un des objectifs de la *LFI*. Elle est réalisée par le truchement du modèle de la procédure collective. Les créanciers du failli souhaitant faire valoir une réclamation prouvable en matière de faillite doivent participer à la procédure collective. Leurs réclamations recevront en fin de compte la priorité qui leur a été attribuée par la *LFI*. Cela assure la répartition équitable des biens du failli. Ce modèle évite l'inefficacité et le chaos, maximisant ainsi le recouvrement global au profit de tous les créanciers. Pour que le modèle de la procédure collective soit viable, les créanciers ayant des réclamations prouvables ne doivent pas être autorisés à les faire valoir en dehors de la procédure collective.

[116] Il est bien établi qu'une loi provinciale devient inopérante dans le contexte d'une faillite si elle a pour effet d'entrer en conflit avec l'ordre de priorité établi par la *LFI*, de le réarranger ou de le modifier. La juge Martin et le juge siégeant en cabinet ont tous les deux traité de la modification des priorités en matière de faillite en fonction du volet « entrave à la réalisation d'un objet fédéral » de la doctrine de la prépondérance. À mon avis, il pourrait aussi être plausiblement avancé qu'une loi provinciale ayant pour effet de réarranger les priorités en matière de faillite est en conflit d'application avec la *LFI*; telle était la conclusion dans *Husky Oil*, au par. 87. Pour les besoins du présent pourvoi, il n'est pas nécessaire de décider quel serait le bon volet de l'analyse relative à la prépondérance. Dans l'un ou l'autre volet, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la *LFI*.

[117] GTL affirme que, même si le fait d'invoquer le par. 14.06(4) ne lui permet pas de délaisser les biens faisant l'objet de la renonciation, les obligations imposées à l'actif de Redwater par l'organisme de réglementation au moyen de l'exercice des pouvoirs que lui confère la loi font exactement cela. Le

that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the *BIA* does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the *BIA*. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

[118] However, only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In *Abitibi*, this Court clearly stated that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The Regulator says that it is not asserting any claims provable in the bankruptcy, so the Redwater estate must comply with its environmental obligations, to the extent that assets are available to do so.

[119] The resolution of this issue turns on the proper application of the *Abitibi* test for determining whether a particular regulatory obligation amounts to a claim provable in bankruptcy. To reiterate:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original; para. 26.]

Parlement a attribué un rang donné aux réclamations environnementales qui sont prouvables en matière de faillite. Il est admis que la superpriorité limitée créée par le par. 14.06(7) de la *LFI* pour les réclamations de cette nature ne s'applique pas en l'espèce et, en conséquence, affirme GTL, l'organisme de réglementation est un créancier ordinaire à l'égard de ces réclamations, c'est-à-dire qu'il n'est ni un créancier garanti ni un créancier privilégié. Les réclamations environnementales de l'organisme de réglementation doivent donc être acquittées au prorata avec celles des autres créanciers ordinaires de Redwater en application de l'art. 141 de la *LFI*. GTL soutient que, pour respecter les ordonnances d'abandon ou les exigences relatives à la CGR, il devra dépenser des fonds avant de partager ses biens entre les créanciers garantis. Cela équivaut, pour l'organisme de réglementation, à utiliser les pouvoirs que lui confère la loi pour se créer une priorité en matière de faillite à laquelle il n'a pas droit.

[118] Toutefois, on doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans l'arrêt *Abitibi*, notre Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. En principe, la faillite n'équivaut pas à une autorisation de faire fi des règles. L'organisme de réglementation dit qu'il ne fait valoir aucune réclamation prouvable dans la faillite et que l'actif de Redwater doit respecter ses obligations environnementales dans la mesure des biens dont il dispose.

[119] Le règlement de cette question requiert que l'on applique correctement le critère d'*Abitibi* pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite. Il y a lieu de réitérer ce critère :

> Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original; par. 26.]

[120] There is no dispute that in this appeal, the second part of the test is met. Accordingly, I will discuss only the first and the third parts of the test.

[121] In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

[122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain

[120] Il est incontestable que, dans le présent pourvoi, la deuxième partie du critère est respectée. En conséquence, je ne traiterai que des première et troisième parties.

[121] Devant notre Cour, l'organisme de réglementation, avec l'appui de divers intervenants, a soulevé deux préoccupations quant à la façon dont le critère d'*Abitibi* avait été appliqué, tant par les tribunaux d'instance inférieure que par les cours en général. La première préoccupation concerne le fait que l'étape « créancier » du critère a reçu une interprétation trop large dans des affaires analogues à celle en l'espèce et *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (« *Nortel* CA ») et qu'en réalité, cette étape du critère est si aisément franchie qu'elle n'est appliquée que pour la forme et qu'elle n'a pratiquement plus de sens. La seconde préoccupation a trait à l'application de l'étape « valeur pécuniaire » du critère d'*Abitibi* par le juge siégeant en cabinet et le juge Slatter. Cette étape reçoit généralement le nom de « certitude suffisante », compte tenu des directives données dans *Abitibi*. On soutient par là que les tribunaux d'instance inférieure sont allés au-delà du critère établi dans l'arrêt *Abitibi* en se concentrant sur la question de savoir si les obligations réglementaires de Redwater étaient « intrinsèquement financières ». Suivant l'arrêt *Abitibi*, l'analyse de la certitude suffisante aurait dû être axée sur la question de savoir si l'organisme de réglementation effectuerait lui-même, au bout du compte, les travaux environnementaux et ferait valoir une réclamation pécuniaire pour le remboursement.

[122] Les deux préoccupations exprimées par l'organisme de réglementation me paraissent fondées. Comme je vais le démontrer, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. D'après le sens qu'il convient de donner à l'étape « créancier », il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater.

financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

C'est le public, et non l'organisme de réglementation ou le fonds d'administration du gouvernement, qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Bien que cette conclusion suffise pour trancher cet aspect du pourvoi, par souci d'exhaustivité, je vais aussi démontrer que le juge siégeant en cabinet a eu tort de conclure qu'au vu des faits de l'espèce, il est suffisamment certain que l'organisme de réglementation exécutera au bout du compte les travaux environnementaux et présentera une demande de remboursement. Pour conclure, je me prononcerai brièvement sur les raisons pour lesquelles les *effets* des obligations de fin de vie n'entrent pas en conflit avec le régime de priorité établi dans la *LFI*.

(1) The Regulator Is Not a Creditor of Redwater

(1) L'organisme de réglementation n'est pas un créancier de Redwater

[123] The Regulator and the supporting interveners are not the first to raise issues with the "creditor" step of the *Abitibi* test. In the six years since *Abitibi* was decided, concerns about the "creditor" step and the fact that, as it is commonly understood, it will seemingly be satisfied in all — or nearly all — cases have also been expressed by academic commentators, such as A. J. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 *Sask. L. Rev.* 157, at p. 178, and Stewart. This Court has not had an opportunity to comment on *Abitibi* since it was decided. However, the interpretation of the "creditor" step adopted by lower courts, including the majority of the Court of Appeal in this case, has focused on certain comments found at para. 27 of *Abitibi*, and the "creditor" step has accordingly been found to be satisfied whenever a regulator exercises its enforcement powers against a debtor (see, for example, C.A. reasons, at para. 60; *Nortel* CA, at para. 16).

[123] L'organisme de réglementation et les intervenants qui l'appuient ne sont pas les premiers à cerner des problèmes relativement à l'étape « créancier » du critère d'*Abitibi*. Pendant les six années qui ont suivi l'arrêt *Abitibi*, des problèmes au sujet de cette étape et le fait que, dans son acception courante, cette étape sera toujours — ou presque toujours — franchie ont aussi été énoncés par des commentateurs universitaires tels que A. J. Lund, « Lousy Dentists, Bad Drivers, and Abandoned Oil Wells : A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law » (2017), 80 *Sask L. Rev.* 157, p. 178, et M. Stewart. Notre Cour n'a pas eu l'occasion de commenter l'arrêt *Abitibi* depuis qu'il a été rendu. Par contre, l'interprétation de l'étape « créancier » retenue par des juridictions inférieures, notamment la majorité de la Cour d'appel en l'espèce, a mis l'accent sur certaines remarques faites au par. 27 de l'arrêt *Abitibi*. Sur cette base, ces tribunaux ont conclu que l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce à l'encontre d'un débiteur son pouvoir d'appliquer la loi (voir, par exemple, les motifs de la Cour d'appel, par. 60; *Nortel* CA, par. 16).

[124] GTL submits that these lower courts have correctly interpreted and applied the "creditor" step.

[124] Selon GTL, les juridictions inférieures susmentionnées ont bien interprété et appliqué l'étape

It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the "creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met . . . but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

[125] Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24, at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for

« créancier ». Il ajoute qu'à la suite de l'arrêt *Abitibi*, l'arrêt *Northern Badger* rendu en 1991 par la Cour d'appel de l'Alberta n'est d'aucun secours pour analyser la question du créancier. À l'inverse, l'organisme de réglementation soutient avec vigueur qu'il faut situer l'arrêt *Abitibi* dans le contexte des faits qui lui sont propres, et qu'il n'a pas infirmé *Northern Badger*. Se fondant sur cet arrêt, l'organisme de réglementation plaide qu'un organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. À l'instar de la juge Martin, je partage l'avis de l'organisme de réglementation sur ce point. Si, comme l'exhorte GTL et le concluent les juges majoritaires de la Cour d'appel, l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce ses pouvoirs d'application à l'encontre d'un débiteur, il est difficile d'imaginer une situation où les actes d'un organisme de réglementation ne franchiraient pas l'étape « créancier ». Monsieur Stewart avait raison de supposer que [TRADUCTION] « la Cour ne souhaitait sûrement pas ce résultat » (p. 189). Pour que l'étape « créancier » ait un quelconque sens [TRADUCTION] « il doit y avoir des situations dans lesquelles les deux autres étapes du critère d'*Abitibi* sont franchies […], mais l'ordonnance [ou l'obligation] environnementale n'est toujours pas une réclamation prouvable car l'organisme de réglementation n'est pas un créancier du failli » (mémoire de la procureure générale de l'Ontario, par. 39).

[125] Avant d'expliquer davantage ma conclusion sur ce point, je dois traiter d'une question préliminaire : l'organisme de réglementation a concédé devant les juridictions inférieures qu'il était un créancier. Il est bien établi que les concessions de droit ne lient pas notre Cour : voir *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control & Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781, par. 44; *M. c. H.*, [1999] 2 R.C.S. 3, par. 45; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686, par. 62). Comme l'a fait remarquer la juge L'Heureux-Dubé (dissidente, mais non sur ce point) dans *R. c. Elshaw*, [1991] 3 R.C.S. 24, p. 48, « un aveu fait devant une instance inférieure ne signifie rien en soi ». Bien que l'on se fonde souvent

this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

[126] First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

[127] Returning to the analysis, I note that the unique factual matrix of *Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently,

sur les concessions des parties, il revient en fin de compte à notre Cour de statuer sur des points de droit. Pour plusieurs raisons, on ne suscite aucune préoccupation en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation en l'espèce.

[126] Premièrement, dans une lettre adressée à GTL en date du 14 mai 2015, l'organisme de réglementation soutient qu'il était [TRADUCTION] « non pas un créancier de [Redwater] », mais avait plutôt « pour mandat légal de réglementer l'industrie pétrolière et gazière de l'Alberta » (dossier de GTL, vol. 1, p. 78). Je constate qu'il s'agissait de la première communication entre l'organisme de réglementation et GTL et qu'elle est survenue seulement deux jours après la nomination de ce dernier comme séquestre des biens de Redwater. Deuxièmement, les parties ont traité dans leurs mémoires de la question de savoir si l'organisme de réglementation est un créancier. Troisièmement, au cours de sa plaidoirie devant notre Cour, l'organisme de réglementation a été interrogé à propos de sa concession. L'avocate a signalé le point non contesté que les tribunaux supérieurs ne sont pas liés par de telles concessions, et a soutenu que, si l'on interprète correctement l'arrêt *Abitibi*, l'organisme de réglementation n'était pas un créancier. Quatrièmement, quand le statut de l'organisme de réglementation en tant que créancier a été évoqué devant notre Cour, les avocats des parties adverses n'ont pas prétendu qu'ils auraient présenté des éléments de preuve supplémentaires sur ce point s'il avait été soulevé devant les juridictions inférieures. Enfin, le sens qu'il convient de donner à l'étape « créancier » du critère d'*Abitibi* est d'une importance fondamentale pour le bon fonctionnement du régime national de faillite et des régimes environnementaux provinciaux partout au Canada. Je conclus qu'il est indiqué en l'espèce de ne pas tenir compte de la concession faite par l'organisme de réglementation devant les juridictions inférieures.

[127] Pour revenir à l'analyse, je signale qu'il ne faut pas oublier la matrice factuelle unique de l'arrêt *Abitibi*. Dans cette affaire, Terre-Neuve-et-Labrador a exproprié la plupart des biens d'AbitibiBowater dans la province, sans indemnisation. Par la suite,

AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

AbitibiBowater s'est vu accorder une suspension en vertu de la LACC. Elle a ensuite déposé un avis d'intention de soumettre une réclamation à l'arbitrage au titre de l'*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis mexicains et le gouvernement des États-Unis d'Amérique*, R.T. Can. 1994 nº 2 (« ALENA »), pour les pertes résultant de l'expropriation. En réponse, le ministre de l'Environnement et de la Conservation de Terre-Neuve a ordonné à AbitibiBowater de décontaminer cinq sites conformément à l'*Environmental Protection Act*, S.N.L. 2002, c. E-14.2 (« *EPA* »). Trois des cinq sites avaient été expropriés par la province. La preuve a mené à la conclusion que « la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux [de décontamination] » (*Abitibi*, par. 54) et qu'elle cherchait plutôt à faire valoir une réclamation qui pourrait être utilisée à titre compensatoire au regard de la demande d'indemnisation d'AbitibiBowater fondée sur l'ALENA. Autrement dit, la province voulait tirer un avantage financier des ordonnances de décontamination.

[128] In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in *Abitibi*. The distinction between the facts of this appeal and those of *Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

[128] En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. L'objectif ultime de l'organisme de réglementation est de faire exécuter les travaux environnementaux au profit des tiers propriétaires terriens et de la population en général. L'organisme de réglementation n'a pas fait de tentative déguisée de recouvrer une créance et il n'y avait pas de motif oblique de sa part, comme c'était le cas dans *Abitibi*. La distinction entre les faits du présent pourvoi et ceux de l'affaire *Abitibi* ressort encore plus clairement lorsqu'on examine les motifs exhaustifs du juge siégeant en cabinet dans *Abitibi*. Le cœur des conclusions du juge Gascon (maintenant juge de notre Cour) se trouve aux par. 173-176 :

. . . the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's

[TRADUCTION] . . . la province bénéficie directement, d'un point de vue financier, du respect par Abitibi des ordonnances fondées sur l'EPA. En d'autres termes, l'exécution en nature des ordonnances fondées sur l'EPA se traduirait

own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.

With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.

From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

[129] This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of *Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

par un crédit certain au propre « bilan » de la province. Le passif d'Abitibi à cet égard constitue un actif de la province elle-même.

Soit dit en tout respect, il ne s'agit pas d'une affaire de nature réglementaire; il s'agit plutôt en fait d'une affaire purement financière. Cela s'apparente effectivement davantage à une relation créancier-débiteur qu'à autre chose.

Nous sommes assez loin du cas de l'organisme de réglementation ou d'application de la loi qui a rendu de manière objective une ordonnance dans l'intérêt public. En l'espèce, la province elle-même tire directement l'avantage pécunaire du respect obligatoire, par Abitibi, des ordonnances EPA. La province peut tirer profit du résultat. Aucune des affaires soumises par la province ne ressemble un tant soit peu aux faits à l'origine de la présente instance.

Sous cet angle, la province a agi plus comme un créancier que comme un organisme de réglementation désintéressé.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

[129] Notre Cour a reconnu dans *Abitibi* qu'il était « facile [pour la province] de répondre » à l'exigence relative au créancier (par. 49). Il n'était donc pas nécessaire d'analyser en profondeur le sens de l'étape « créancier » ou la manière dont elle s'appliquerait dans d'autres situations factuelles. Or, même au par. 27 de l'arrêt *Abitibi*, le paragraphe sur lequel se fondent les juges majoritaires de la Cour d'appel, la juge Deschamps a pris soin de souligner que « [l]a plupart des organismes administratifs *peuvent agir* à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois » (italiques ajoutés). L'interprétation de l'étape « créancier » qu'ont retenue les juges majoritaires de la Cour d'appel et que GTL nous a exhortés à faire nôtre exclut la possibilité qu'un organisme de réglementation faisant respecter des obligations ne soit pas un créancier, alors que cette possibilité a été clairement envisagée au par. 27 de l'arrêt *Abitibi*. Comme je l'ai mentionné ci-dessus, l'interprétation de GTL prive l'étape « créancier » de toute fonction indépendante.

[130] *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that *Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, at paras. 23-25, and *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[131] I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174). *Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under certain circumstances. It does not stand for the

[130] L'arrêt *Northern Badger* a établi qu'un organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier. Je rejette la prétention faite dans les motifs dissidents selon laquelle *Northern Badger* devrait recevoir une interprétation différente. Premièrement, je souligne que le point de savoir si l'organisme de réglementation a une réclamation éventuelle relève du critère de la certitude suffisante, lequel suppose au préalable que l'organisme de réglementation est un créancier. Je ne peux accepter la proposition énoncée dans les motifs dissidents selon laquelle *Northern Badger* porte sur ce qui allait devenir le troisième volet du critère d'*Abitibi*. Dans *Northern Badger*, après avoir reconnu que l'abandon constituait une responsabilité, le juge d'appel Laycraft a dit qu'il s'agissait de savoir [TRADUCTION] « si cette responsabilité appartient à l'Office, ce qui fait de lui le créancier » (par. 32). Deuxièmement, le scénario sous-jacent en l'espèce quant aux obligations de fin de vie qui incombent à Redwater est exactement le même que dans *Northern Badger* : un organisme de réglementation ordonne à une entité de se conformer à ses obligations légales pour le bien public. Ce raisonnement exact tiré de *Northern Badger* a été adopté par la suite dans des décisions telles *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, par. 23-25, et *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[131] Je ne puis souscrire à l'opinion des juges majoritaires de la Cour d'appel en l'espèce selon laquelle *Northern Badger* [TRADUCTION] « n'est guère utile » dans l'application du critère d'*Abitibi* (par. 63). Je partage plutôt l'avis de la juge Martin voulant que l'arrêt *Abitibi* n'ait pas infirmé le raisonnement de *Northern Badger*, et qu'il ait au contraire « mis en relief le besoin de prendre en considération la teneur du règlement provincial pour déterminer s'il crée une réclamation prouvable en matière de faillite » (par. 164). Comme l'a signalé la juge Martin, même depuis l'arrêt *Abitibi*, l'état du droit reste inchangé : « les obligations publiques ne sont pas des réclamations prouvables qui peuvent être comptabilisées ou compromises dans la faillite » (par. 174). L'arrêt *Abitibi* a éclairci la

proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

[132] In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in *Strathcona County v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

[133] The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while *Abitibi* discussed *Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

portée de *Northern Badger* en confirmant que les réclamations environnementales d'un organisme de réglementation seront des réclamations prouvables dans certains cas. Il ne permet pas d'affirmer qu'un organisme de réglementation exerçant ses pouvoirs d'application est toujours un créancier. Le raisonnement de l'arrêt *Northern Badger* ne s'appliquait tout simplement pas aux faits de l'affaire *Abitibi*, étant donné les agissements de la province décrits précédemment.

[132] Dans *Abitibi*, la juge Deschamps a signalé que la législation en matière d'insolvabilité avait évolué au cours des années qui ont suivi *Northern Badger*. Cette évolution législative n'a en revanche pas modifié le sens à attribuer au terme « créancier ». À cet égard, je souscris à la conclusion du juge Burrows dans *Strathcona County c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, suivant laquelle les modifications en matière d'environnement qui ont été apportées à la *LFI* au cours des années suivant *Northern Badger* ne peuvent être interprétées comme ayant infirmé le raisonnement de cet arrêt. Tel qu'il devrait ressortir clairement de mon analyse précédente de l'art. 14.06, les modifications à la *LFI* ne traitent pas des cas où un organisme de réglementation faisant valoir une réclamation environnementale est un créancier.

[133] Les écrits de commentateurs universitaires appuient également la conclusion voulant que le raisonnement de l'arrêt *Northern Badger* conserve sa pertinence depuis *Abitibi* et les modifications à la loi sur l'insolvabilité. Monsieur Stewart estime que, même si l'arrêt *Abitibi* traite de *Northern Badger*, il ne l'a pas infirmé. Il exhorte notre Cour à préciser qu'il subsiste une distinction entre [TRADUCTION] « l'organisme de réglementation qui agit comme créancier car il recouvre une dette et celui qui n'est pas un créancier car il applique la loi » (p. 221). De même, M^me^ Lund fait valoir qu'un tribunal devrait [TRADUCTION] « prendre en considération l'importance que revêtent les intérêts publics protégés par l'obligation réglementaire au moment de décider si le débiteur a une dette, un engagement ou une obligation envers un créancier » (p. 178).

[134] For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life . . . But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

[135] Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in *Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR

[134] Pour les motifs qui précèdent, on ne peut juger que l'arrêt *Abitibi* a modifié le droit, comme l'a résumé le juge en chef Laycraft. Je fais miennes les remarques qu'il fait au par. 33 de *Northern Badger* :

> [TRADUCTION] Les dispositions légales qui exigent l'abandon de puits de pétrole et de gaz font partie du droit commun de l'Alberta et lient chaque citoyen de la province. Toutes les personnes qui acquièrent un permis d'exploitation de puits de pétrole ou de gaz doivent les respecter. Des obligations légales semblables lient les citoyens dans bien d'autres secteurs de la vie moderne [. . .] Mais l'obligation incombant au citoyen n'est pas envers l'agent de la paix ou l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application du droit commun. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

[135] Étant donné l'analyse effectuée dans *Northern Badger*, il est clair que l'organisme de réglementation n'est pas un créancier de l'actif de Redwater. Les obligations de fin de vie que l'organisme de réglementation veut imposer à Redwater sont de nature publique. Ni l'organisme de réglementation ni le gouvernement de l'Alberta ne peuvent bénéficier financièrement de l'exécution de ces obligations. Ces obligations à caractère public sont non pas envers un créancier, mais envers les concitoyens et échappent donc à la portée des « réclamations prouvables ». Je ne veux toutefois pas laisser entendre par là qu'un organisme de réglementation n'est un créancier que s'il se comporte d'une manière identique à la province dans *Abitibi*. Il peut fort bien exister des situations où les agissements d'un organisme de réglementation se situent quelque part entre ceux dans *Abitibi* et ceux en l'espèce. Signalons que, contrairement à certains cas antérieurs, l'organisme de réglementation n'a exécuté aucuns travaux environnementaux lui-même. Je laisse aux tribunaux disposant de dossiers factuels

requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

[136] I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed *Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained, *Abitibi* clearly contemplates a place for regulators who are not creditors.

[137] Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and

complets le soin de résoudre pareilles situations à l'avenir. Dans la présente affaire, il est clair que l'organisme de réglementation cherche à faire respecter les devoirs à caractère public de Redwater, que ce soit en rendant les ordonnances d'abandon ou en maintenant les exigences relatives à la CGR. L'organisme de réglementation n'est pas un créancier au sens du critère d'*Abitibi*.

[136] Je rejette la thèse voulant que l'analyse qui précède écarte d'une façon ou d'une autre le premier volet du critère d'*Abitibi*. Les faits de l'affaire *Abitibi* n'étaient pas comparables à ceux de l'espèce. Bien que notre Cour ait examiné l'arrêt *Northern Badger* dans *Abitibi*, elle s'est contentée de mentionner les modifications subséquentes à la *LFI* et n'a pas infirmé l'arrêt antérieur. La Cour a été claire : l'issue finale « doit être fondée sur les faits de chaque affaire » (par. 48). Selon les motifs dissidents, vu l'analyse exposée précédemment, il sera presque impossible de juger que des organismes de réglementation sont des créanciers. L'arrêt *Abitibi* démontre lui-même que ce n'est pas le cas. De plus, comme je l'ai dit, il peut fort bien exister des cas qui se situent entre l'affaire *Abitibi* et celle qui nous occupe. Par contre, si l'on considère qu'*Abitibi* exige uniquement que le tribunal décide si l'organisme de réglementation a exercé un pouvoir d'application, il sera en fait impossible pour un organisme de réglementation de *ne pas* être un créancier. Les motifs dissidents ne nient pas sérieusement cette opinion et donnent seulement à penser que les organismes de réglementation peuvent publier des lignes directrices ou délivrer des permis. L'organisme de réglementation fait les deux mais, selon l'approche adoptée dans les motifs dissidents, il est dépourvu de moyens pour prendre quelque mesure concrète que ce soit dans l'intérêt public à propos de ses lignes directrices ou de permis sans avoir le statut de créancier. Comme je l'ai expliqué, l'arrêt *Abitibi* accorde clairement une place aux organismes de réglementation qui ne sont pas des créanciers.

[137] Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi. Cependant, d'autres indications sur l'analyse de la certitude suffisante pourraient se révéler utiles à l'avenir. En conséquence, je passe maintenant à l'analyse de l'étape

of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test. *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

[138] The "sufficient certainty" test articulated in paras. 30 and 36 in *Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the *BIA*. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

[139] Before the third step of the *Abitibi* test can even be reached, a regulator must already have been shown to be a creditor. I have concluded that, on the facts of this case, the Regulator is not a creditor of Redwater. However, for the purpose of explaining how I differ from the chambers judge on the "sufficient certainty" analysis, I will proceed as if the Regulator were, in fact, a creditor of Redwater in respect of the Abandonment Orders and LMR requirements. These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*. As discussed in *Abitibi*, if the Regulator were in fact a creditor, end-of-life obligations would be its contingent claims.

[140] What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether

de la « certitude suffisante » et des raisons pour lesquelles les ordonnances d'abandon et les conditions liées à la CGR ne franchissent pas cette étape du critère d'*Abitibi.*

(2) Il n'est pas suffisamment certain que l'organisme de réglementation exécutera les travaux environnementaux et présentera une demande de remboursement

[138] Le critère de la « certitude suffisante » énoncé aux par. 30 et 36 de l'arrêt *Abitibi* ne fait essentiellement que restructurer et reformuler les exigences des dispositions applicables de la *LFI*. Selon le par. 121(2), des réclamations éventuelles peuvent constituer des réclamations prouvables. Autrement dit, les dettes que devra peut-être le failli à un créancier peuvent constituer des réclamations prouvables, mais pas nécessairement l'être. Le paragraphe 135(1.1) prévoit l'évaluation d'une réclamation éventuelle, qui doit être évaluable suivant cette disposition; elle ne doit pas être trop éloignée ou conjecturale pour constituer une réclamation prouvable au sens du par. 121(2).

[139] Avant de pouvoir atteindre la troisième étape du critère d'*Abitibi*, il faut déjà avoir fait la démonstration que l'organisme de réglementation est un créancier. Au vu des faits de l'espèce, j'ai conclu que l'organisme de réglementation n'est pas un créancier de Redwater. Toutefois, afin d'expliquer pourquoi je me dissocie du juge siégeant au cabinet à l'égard de l'analyse de la « certitude suffisante », je vais procéder comme si l'organisme de réglementation était effectivement un créancier de Redwater en ce qui concerne les ordonnances d'abandon et les exigences de la CGR. Ces obligations de fin de vie n'exigent pas directement de Redwater qu'elle fasse un paiement à l'organisme de réglementation. Elles l'obligent plutôt à *faire quelque chose*. Comme l'indique l'arrêt *Abitibi*, si l'organisme de réglementation était en fait un créancier, les obligations de fin de vie constitueraient ses réclamations éventuelles.

[140] Ce que le tribunal doit décider, c'est s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un organisme de réglementation.

a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

[141] I will now discuss the Abandonment Orders and the LMR requirements in turn and demonstrate how they fail to satisfy the "sufficient certainty" step of the *Abitibi* test.

(a) *The Abandonment Orders*

[142] The Regulator has issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to abandon the Renounced Assets. Even if the Regulator were a creditor of Redwater, the Abandonment Orders would still have to be capable of valuation in order to be included in the bankruptcy process. In my view, it is not established either by the chambers judge's factual findings or by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process.

[143] The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a

Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais.

[141] Je vais maintenant analyser les ordonnances d'abandon de même que les exigences relatives à la CGR à tour de rôle et démontrer en quoi elles ne franchissent pas l'étape de la « certitude suffisante » du critère d'*Abitibi*.

a) *Les ordonnances d'abandon*

[142] L'organisme de réglementation a rendu, au titre de l'*OGCA* et de la *Pipeline Act*, des ordonnances enjoignant à Redwater d'abandonner les biens faisant l'objet de la renonciation. Même si l'organisme de réglementation était un créancier de Redwater, les ordonnances d'abandon doivent tout de même pouvoir faire l'objet d'une évaluation pour être incluses dans le processus de faillite. À mon avis, ni les conclusions de fait du juge siégeant en cabinet ni la preuve n'établissent qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. La réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite.

[143] Le juge siégeant en cabinet a reconnu qu'il n'était [TRADUCTION] « pas clair » si l'organisme de réglementation effectuerait lui-même le processus d'abandon ou s'il considérerait les puits assujettis aux ordonnances d'abandon comme orphelins (par. 173). Il a dit que, dans ce dernier cas, l'OWA se chargerait probablement de l'abandon, mais on ne savait pas quand cette tâche serait menée à terme. En effet, le juge siégeant en cabinet a admis qu'étant donné les ressources de l'OWA, cela pourrait lui prendre jusqu'à 10 ans avant qu'elle amorce les travaux environnementaux nécessaires sur la propriété de Redwater. Il a conclu néanmoins que, même

"technical sense" — the situation met what had been intended in *Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

si l'étape de la « certitude suffisante » n'a pas été franchie au « sens technique », la situation répondait à la norme voulue dans *Abitibi*. Cette conclusion reposait, du moins en partie, sur la sienne voulant que les ordonnances d'abandon soient « intrinsèquement financières » (par. 173).

[144] In my view, the chambers judge did not make a finding of fact that the Regulator would carry out the abandonments *itself*. As noted, he acknowledged that it was "unclear" whether the Regulator would perform the abandonments. This can hardly be deemed a finding of fact deserving of deference. In my view, considered as a whole, the evidence in this case leads to the conclusion that the Regulator will not abandon the Renounced Assets itself.

[144] À mon avis, le juge siégeant en cabinet n'a pas tiré la conclusion de fait que l'organisme de réglementation se chargerait *lui-même* des travaux d'abandon. Je le rappelle, il a reconnu qu'il n'était « pas clair » si l'organisme de réglementation s'en occuperait. On peut difficilement dire qu'il s'agit qu'une conclusion de fait qui commande la déférence. Prise dans son ensemble, la preuve en l'espèce me semble mener à la conclusion selon laquelle l'organisme de réglementation ne procèdera pas lui-même à l'abandon des biens auxquels il a été renoncé.

[145] The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. The affiant stated that the Regulator had no intention of abandoning Redwater's licensed assets. As noted by the chambers judge, it is true that, in its letter to GTL dated July 15, 2015, the Regulator threatened to perform the abandonments itself, but the Regulator subsequently took no steps to follow up on that threat. Even if this letter should be accorded any weight, the contradiction between it and the Regulator's subsequent affidavits at the very least makes it difficult to say with anything approaching sufficient certainty that the Regulator intends to carry out the abandonments. These facts distinguish this case from *Abitibi*, in which the restructuring judge's findings were based on the premise that the province would most likely perform the remediation work itself.

[145] Dans le cadre de ses activités, l'organisme de réglementation n'effectue pas lui-même les travaux d'abandon. Il n'est pas tenu par la loi de le faire. Il s'agit plutôt d'une obligation incombant au titulaire de permis. Dans son affidavit, le déposant de l'organisme de réglementation a déclaré que celui-ci procédait très rarement à l'abandon de biens au nom des titulaires de permis et qu'il ne le faisait pratiquement jamais dans le cas d'un titulaire de permis sous séquestre ou en faillite. Le déposant a déclaré que l'organisme de réglementation n'avait pas l'intention d'abandonner les biens de Redwater visés par des permis. Comme l'a signalé le juge siégeant en cabinet, il est vrai que, dans sa lettre adressée à GTL en date du 15 juillet 2015, l'organisme de réglementation a menacé d'effectuer lui-même ces processus, mais il n'a rien fait par la suite pour mettre cette menace à exécution. Même si l'on devrait accorder de l'importance à cette lettre, la contradiction entre elle et les affidavits subséquents de l'organisme de réglementation font en sorte à tout le moins qu'il est difficile de dire avec quoi que ce soit de comparable à une certitude suffisante que l'organisme de réglementation compte effectuer le processus d'abandon. Ces faits distinguent la présente affaire d'*Abitibi*, où les conclusions du juge chargé de la restructuration reposaient sur la prémisse que la province exécuterait fort probablement elle-même les travaux de décontamination.

[146] Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

. . . As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

[146] J'expliquerai ci-après pourquoi l'intervention de l'OWA est insuffisante pour satisfaire au critère de la « certitude suffisante ». Premièrement, je constate que le juge siégeant en cabinet a eu tort de tabler sur le caractère « intrinsèquement financier » des ordonnances d'abandon. Je suis entièrement d'accord avec la juge Martin sur ce point. Se demander si une ordonnance est « intrinsèquement financière » constitue une interprétation erronée de la troisième étape du critère d'*Abitibi*. Elle est trop large et conduirait à la conclusion qu'il y a une « réclamation prouvable » même lorsque l'existence d'une réclamation pécuniaire en matière de faillite ne relève que de la conjecture. Ainsi, dans l'arrêt *Nortel* CA, le juge Juriansz a rejeté à juste titre l'argument selon lequel le critère d'*Abitibi* n'exigeait pas qu'il soit décidé que l'organisme de réglementation exécuterait les travaux environnementaux et demanderait un remboursement, et qu'il suffisait qu'il y ait une ordonnance environnementale exigeant une dépense de fonds par l'actif du failli. Il a déclaré ce qui suit, aux par. 31-32 :

[TRADUCTION] . . . Selon moi, la décision de la Cour suprême est claire : les obligations continues de décontamination environnementale peuvent être réduites à des réclamations pécuniaires pouvant être compromises dans des procédures fondées sur la LACC seulement lorsque la Province a exécuté les travaux de décontamination et qu'elle présente une demande de remboursement, ou lorsque l'obligation peut être considérée comme une réclamation éventuelle ou future, parce qu'il est « suffisamment certain » que la Province fera le travail et cherchera ensuite à obtenir un remboursement.

L'approche des intimées n'est pas seulement incompatible avec celle de l'arrêt *Abitibi*, elle est trop large. Il en résulterait que pratiquement toutes les ordonnances réglementaires en matière d'environnement soient considérées comme des réclamations prouvables. Comme l'a fait remarquer la juge Deschamps, une société peut exercer des activités qui comportent des risques. Lorsque ces risques se matérialisent, les coûts sont supportés par ceux qui détiennent une participation dans la société. Un risque qui entraîne une obligation environnementale n'est soumis au processus d'insolvabilité que lorsqu'il est en substance pécuniaire et qu'il constitue en substance une réclamation prouvable.

[147] As the chambers judge correctly acknowledged, the fact that the Regulator would not conduct the abandonments itself does not mean that it would wash its hands of the Renounced Assets. Rather, if necessary, it would designate them as orphans pursuant to the *OGCA* and leave them for the OWA. I am not suggesting that a regulator can strategically avoid the "sufficient certainty" test simply by delegating environmental work to an arm's length organization. I would not decide, as the Regulator urges, that the *Abitibi* test *always* requires that the environmental work be performed by the regulator itself. However, the OWA's true nature must be emphasized. There are strong grounds to conclude that, given the particular features of this regulatory context, the OWA is not the regulator.

[148] The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons

[147] Comme l'a reconnu à bon droit le juge siégeant en cabinet, ce n'est pas parce que l'organisme de réglementation n'effectuerait pas lui-même les travaux d'abandon qu'il se laverait les mains des biens faisant l'objet de la renonciation. Il les qualifierait plutôt, au besoin, d'orphelins conformément à l'*OGCA* et les confiera à l'OWA. Je ne prétends pas qu'un organisme de réglementation puisse stratégiquement éviter le critère de la « certitude suffisante » en déléguant simplement des travaux environnementaux à une organisation indépendante. Je ne déciderai pas, comme l'organisme de réglementation nous a exhortés à le faire, que le critère d'*Abitibi* exige *toujours* que les travaux environnementaux soient exécutés par l'organisme lui-même. Cependant, la véritable nature de l'OWA doit être soulignée. Il y a des motifs sérieux de conclure que, vu les caractéristiques propres à ce contexte réglementaire, l'OWA n'est pas l'organisme de réglementation.

[148] La création de l'OWA ne représentait pas une tentative de l'organisme de réglementation pour éviter l'ordre de priorité fixé en matière de faillite par la *LFI*. C'est un organisme sans but lucratif doté de son propre mandat et de son propre conseil d'administration indépendant, et il fonctionne comme une entité financièrement indépendante en vertu du pouvoir qui lui est délégué par la loi. Bien qu'un représentant de l'organisme de réglementation et un représentant d'Alberta Environment and Parks siègent au conseil d'administration de l'OWA, son indépendance n'est pas mise en question. Le rapport annuel 2014-2015 de l'OWA indique que cinq des six directeurs votants représentent l'industrie. L'OWA se sert d'un outil d'évaluation des risques pour décider, en ordre de priorité, quand et de quelle manière elle exécutera des travaux environnementaux sur les centaines de puits orphelins de l'Alberta. Personne ne prétend que l'organisme de réglementation a son mot à dire sur l'ordre dans lequel l'OWA décide d'exécuter des travaux environnementaux. Le rapport annuel 2014-2015 ajoute que, depuis 1992, 87 p. 100 de l'argent recueilli et investi pour financer les activités de l'OWA est fourni par l'industrie via la redevance pour les puits orphelins. Au paragraphe 99 de son mémoire, l'organisme de réglementation laisse

that the Regulator and the OWA are "inextricably intertwined" (para. 273).

[149] Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the "sufficient certainty" test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets.

[150] The dissenting reasons suggest that the facts of this appeal are more akin to those of *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, than to those of *Nortel* CA, arguing that the "sufficient certainty" test is satisfied because, as in *Northstar*, there is no purchaser to take on Redwater's assets and the debtor itself is insolvent, so only the OWA can perform the work. In my view, *Northstar* is easily distinguishable. In that case, the bankrupt had been voluntarily carrying out remediation prior to its bankruptcy. After it made its assignment into bankruptcy, the Ministry of the Environment ("MOE") took over the remediation activities itself, purporting to do so on a without prejudice basis. Jurianz J.A. found that the fact that the MOE had already undertaken remediation activities made it sufficiently certain that it would do so. As I will now demonstrate, the facts here are very different.

[151] At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that

entendre indirectement que la province ou le gouvernement fédéral pourrait accorder à l'avenir des fonds supplémentaires à l'OWA mais, même si cette possibilité se concrétise, les fonds seront presque entièrement consentis sous forme de prêts. Je ne peux accepter la proposition des juges dissidents selon laquelle l'organisme de réglementation et l'OWA sont « inextricablement liés » (par. 273).

[149] À supposer même que l'abandon par l'OWA des biens de Redwater visés par des permis puisse satisfaire au critère de la « certitude suffisante », je conviens avec la juge Martin qu'il est difficile de conclure à la certitude suffisante que l'OWA se chargera effectivement des travaux d'abandon et qu'il n'y a aucune certitude qu'une demande de remboursement sera présentée si l'OWA finit par abandonner les biens.

[150] Les motifs dissidents laissent croire que les faits de l'espèce s'apparentent davantage à ceux de l'affaire *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, qu'à ceux de *Nortel* CA, faisant valoir qu'il est satisfait au critère de la « certitude suffisante » car, tout comme dans *Northstar*, personne ne veut acheter les biens de Redwater et la débitrice elle-même est insolvable; en conséquence, seule l'OWA peut exécuter les travaux. Il me semble facile de distinguer l'affaire *Northstar* de celle qui nous occupe. Dans cette affaire, le failli effectuait de son plein gré des travaux de décontamination avant sa faillite. Après que le failli eu fait cession de ses biens, le ministre de l'Environnement (« ME ») a pris lui-même la relève des activités de décontamination et il entendait le faire sans préjudice. Selon le juge Jurianz, comme le ME avait déjà entrepris des activités de décontamination, il était suffisamment certain qu'il s'en occuperait. Comme je le démontrerai maintenant, les faits de l'espèce sont fort différents.

[151] Au début du présent litige, l'OWA a estimé qu'il lui faudrait de 10 à 12 ans pour résorber l'arriéré d'orphelins. Cet arriéré augmentait rapidement en 2015 et il peut fort bien avoir continué de croître tout aussi ou encore plus rapidement au cours des années suivantes, comme le soutient l'organisme de réglementation. Cela tend plutôt à établir que l'arriéré pourrait encore augmenter. Rien n'indique

the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

[152] The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

[153] Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the *OGCA*, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will

qu'une priorité particulièrement grande serait accordée dans l'arriéré aux biens faisant l'objet de la renonciation. Même si la possibilité d'attribuer des fonds supplémentaires se concrétise, l'organisme de réglementation fait valoir que cela prendra une génération ou plus avant que l'OWA ne puisse s'occuper de son inventaire actuel d'orphelins.

[152] Les motifs dissidents se fondent sur la conclusion du juge siégeant en cabinet selon laquelle l'OWA effectuerait « probablement » le processus d'abandon, tout en minimisant le fait qu'il a également conclu que l'OWA ne le ferait pas « nécessairement dans un délai précis » (par. 261 et 278, citant les motifs du juge siégeant en cabinet, par. 173). Vu l'échéancier le plus conservateur — celui de 10 ans dont a parlé le juge siégeant en cabinet —, il est difficile de prédire quoi que ce soit avec une certitude suffisante. La donne pourrait changer considérablement au cours de la prochaine décennie, tant au chapitre de la politique gouvernementale qu'à celui de la volonté de l'industrie pétrolière et gazière de l'Alberta de s'acquitter de ses responsabilités environnementales. Il ne s'agit pas du tout de la même situation que dans *Northstar*, où le ME avait déjà amorcé les travaux environnementaux.

[153] Plus particulièrement, ce long échéancier garantit que, s'il finit par exécuter les travaux, l'OWA ne présentera pas de demande de remboursement. La présentation de la demande est un élément tout aussi essentiel du critère que l'exécution des travaux. L'OWA lui-même ne peut faire rembourser ses frais par les titulaires de permis et, même si les coûts des processus d'abandon effectués par la personne autorisée par l'organisme de réglementation constituent une dette payable à cet organisme suivant le par. 30(5) de l'*OGCA*, on n'a produit aucune preuve montrant que l'organisme de réglementation a exercé son pouvoir de recouvrer ces frais dans des cas analogues, et pour cause : le fait est qu'au moment où l'OWA en arriverait à abandonner l'un ou l'autre des puits de Redwater, la liquidation de l'actif serait terminée et GTL serait libéré depuis longtemps. En somme, le juge siégeant en cabinet a eu tort de ne pas se demander si l'OWA peut être assimilé à l'organisme de réglementation et en ne

in fact perform the abandonments and advance a claim for reimbursement.

[154] Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) *The Conditions for the Transfer of Licenses*

[155] I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney*, at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

[156] In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but

considérant pas que, même s'il peut l'être, il n'est pas suffisamment certain qu'il effectuera dans les faits le processus d'abandon et présentera une demande de remboursement.

[154] En conséquence, même si l'organisme de réglementation avait agi comme un créancier en rendant les ordonnances, on ne saurait dire avec une certitude suffisante qu'il effectuerait les processus d'abandon et présenterait une demande de remboursement.

b) *Les conditions liées au transfert de permis*

[155] Je traiterai brièvement des conditions relatives à la CGR dont est assorti le transfert de permis. Une grande partie de l'analyse qui précède concernant les ordonnances d'abandon vaut tout autant pour ces conditions. Comme l'a souligné la juge Martin, il est difficile de comparer directement la nécessité d'obtenir une approbation réglementaire pour les transferts de permis et les ordonnances de décontamination en litige dans *Abitibi*. Or, notre Cour a confirmé aux par. 54-55 de *Moloney* que le critère d'*Abitibi* s'applique à une catégorie d'obligations réglementaires plus large que les « ordonnances ». Les conditions relatives à la CGR forment une « obligation non pécuniaire » de l'actif de Redwater, car elles doivent être remplies avant que l'organisme de réglementation n'approuve le transfert de tout permis de Redwater. Cependant, il convient de noter que, même mises à part les conditions relatives à la CGR, les permis sont loin d'être librement transférables. L'organisme n'approuvera pas le transfert des permis si le cessionnaire n'est pas un titulaire de permis au sens de l'*OGCA* ou de la *Pipeline Act* ou des deux. L'organisme de réglementation se réserve également le droit de rejeter un transfert proposé lorsqu'il juge que le transfert n'est pas dans l'intérêt public, comme dans un cas où le cessionnaire a des problèmes non résolus touchant à la conformité.

[156] En un sens, les facteurs laissant croire qu'il n'y a pas de certitude suffisante militent encore plus fortement en faveur des exigences relatives à la CGR que des ordonnances d'abandon. L'*OGCA* et la *Pipeline Act* prévoient un régime de recouvrement

there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

[157] Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336, which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

[158] The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to

de créances en matière d'abandon, mais il n'existe aucun régime de ce genre pour les exigences liées à la CGR. Le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que ces exigences aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater. Certes, le respect des exigences relatives à la CGR entraîne une diminution de la valeur de l'actif du failli. Toutefois, comme nous l'avons vu plus tôt, toute obligation qui diminue la valeur de l'actif du failli, et donc la somme que peuvent recouvrer les créanciers garantis, ne franchit pas nécessairement l'étape de la « certitude suffisante ». Il ne s'agit pas de savoir si une obligation est intrinsèquement financière.

[157] Le respect des conditions liées à la CGR avant le transfert des permis reflète la valeur inhérente des biens détenus par l'actif du failli. Sans les permis, les profits à prendre appartenant à Redwater ont, au mieux, peu de valeur. Tous les permis détenus par Redwater ont été reçus par elle, sous réserve d'obligations de fin de vie qui prendraient naissance un jour. Ces obligations constituent une part fondamentale de la valeur des biens visés par des permis, comme si les frais connexes avaient été payés d'emblée. Ayant reçu le bénéfice des biens faisant l'objet de la renonciation pendant la période productive de leur cycle de vie, Redwater ne peut plus éviter les engagements connexes. Cette interprétation concorde avec l'arrêt *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336, qui portait sur les obligations légales de reboisement des détenteurs de tenures forestières en Alberta. Notre Cour a conclu à l'unanimité que les obligations relatives au reboisement constituaient « un coût futur inhérent à la tenure forestière qui a pour effet d'en diminuer la valeur au moment de la vente » (par. 29).

[158] La possibilité que des exigences réglementaires coûtent de l'argent ne les transforme pas en régimes de recouvrement de créances. Comme l'a fait remarquer la juge Martin, les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis, peu importe leur solvabilité. GTL ne conteste pas le fait que les permis de Redwater ne peuvent être transférés qu'à

reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the *Abitibi* test

[159] Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims

d'autres titulaires de permis, ni le fait que l'organisme de réglementation conserve le pouvoir, dans les situations qui s'y prêtent, de rejeter les transferts proposés en raison de préoccupations relatives à la sécurité ou à la conformité. Il n'y a aucune différence entre ces conditions et celle voulant que l'organisme de réglementation n'approuve pas les transferts qui laisseraient en suspens l'exigence de satisfaire aux obligations de fin de vie. Toutes ces conditions réglementaires font baisser la valeur des biens visés par des permis. Aucune ne donne naissance à une réclamation pécuniaire en faveur de l'organisme de réglementation. Les exigences en matière de permis subsistent pendant la faillite, et il n'y a aucune raison pour laquelle GTL ne peut s'y conformer.

(3) Conclusion sur le critère d'*Abitibi*

[159] En conséquence, les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater et n'entrent donc pas en conflit avec le régime de priorité général instauré dans la *LFI*. Ce n'est pas une simple question de forme, mais de fond. Obliger Redwater à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbe pas le régime de priorité établi dans la *LFI*. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination (voir le par. 14.06(7)). Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tire une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, il importe de souligner que les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait

in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

[160] Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney*, the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

[161] Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

[162] There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a

ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

[160] La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. À titre d'exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Tel qu'il est signalé dans *Moloney*, la *LFI* indique clairement que « [l]a propriété de certains biens et l'existence de dettes particulières relèvent du droit provincial » (par. 40). Les obligations de fin de vie sont imposées par des lois provinciales valides qui définissent les contours de l'actif du failli susceptible d'être partagé.

[161] Enfin, rappelons que l'objet général de la *LFI* de favoriser la réhabilitation financière ne concerne pas une société comme Redwater. Les sociétés n'ayant pas assez de biens pour satisfaire leurs créanciers ne seront jamais libérées de leur faillite puisqu'elles ne peuvent acquitter entièrement toutes les réclamations de leurs créanciers (*LFI*, par. 169(4)). Ainsi, la conclusion selon laquelle les obligations de fin de vie incombant à Redwater ne sont pas des réclamations prouvables n'est à l'origine d'aucun conflit avec cet objet.

IV. Conclusion

[162] Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la *LFI* en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que GTL demeure entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du

proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

[163] Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37, Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

[164] As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

The reasons of Moldaver and Côté JJ. were delivered by

Côté J. (dissenting) —

I. Introduction

[165] Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing

failli en invoquant le par. 14.06(4). D'après une juste application du critère d'*Abitibi*, l'actif de Redwater doit respecter les obligations environnementales continues qui ne sont pas des réclamations prouvables en matière de faillite.

[163] En conséquence, le pourvoi est accueilli. Dans *Alberta Energy Regulator c. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37, le juge Wakeling a refusé de suspendre l'effet de précédent de l'arrêt rendu par la Cour d'appel. Comme il l'a fait remarquer, les intérêts de l'organisme de réglementation lui-même étaient déjà protégés. Conformément aux ordonnances rendues auparavant par les tribunaux albertains, GTL avait déjà vendu l'ensemble des biens de Redwater ou y avait renoncé et le produit de la vente a été détenu en fiducie. Ainsi, la Cour rend l'ordonnance demandée par l'organisme de réglementation selon laquelle le produit de la vente des biens de Redwater doit être utilisé pour satisfaire aux obligations de fin de vie de Redwater. En outre, les déclarations du juge siégeant en cabinet qui figurent aux par. 3 et 5-16 de son ordonnance sont annulées.

[164] Puisqu'il a gain de cause dans le cadre de ce pourvoi, l'organisme de réglementation aurait normalement droit aux dépens. Toutefois, il a expressément mentionné ne pas les demander. C'est pourquoi aucune ordonnance ne sera rendue à cet égard.

Version française des motifs des juges Moldaver et Côté rendus par

La juge Côté (dissidente) —

I. Introduction

[165] Redwater Energy Corporation (« Redwater ») est une société pétrolière et gazière en faillite. Son actif se compose principalement de deux types de biens : des puits de pétrole et des installations pétrolières de valeur productifs qui sont encore susceptibles de générer un revenu; et des biens inexploités ayant une valeur négative, notamment des puits taris auxquels se rattachent de lourds engagements environnementaux. Le séquestre et syndic de faillite de Redwater, Grant Thornton Limited (« GTL »),

assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

[166] However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

[167] The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of the estate, preventing it from realizing *any* value for *any* of Redwater's creditors, including the AER. And the AER's position effectively leaves the valuable and producing wells in limbo, creating a real risk that

prétend avoir renoncé à la propriété des biens inexploités, et ce, afin de vendre séparément les puits de valeur productifs — non grevés des engagements se rattachant aux biens visés par les renonciations — et de répartir le produit de cette vente entre les créanciers de l'actif.

[166] Toutefois, la loi albertaine ne reconnaît pas de force exécutoire aux renonciations de GTL. Peu de temps après la nomination de GTL à titre de séquestre, l'Alberta Energy Regulator (« AER ») a rendu des « ordonnances d'abandon » à l'égard des biens visés par les renonciations, ordonnant à Redwater et à ses participants en participation directe d'exécuter des travaux environnementaux sur ceux-ci. En particulier, l'AER souhaitait que GTL « abandonne » les biens inexploités, ce qui signifie rendre les puits sûrs pour l'environnement, selon les directives de l'AER. Il a ensuite avisé GTL qu'il refuserait d'approuver toute vente des biens de valeur de Redwater à moins que GTL ne fasse l'une des trois choses suivantes : vendre les biens visés par les renonciations avec les puits et les installations productifs comme un tout unique; achever elle-même les travaux d'abandon et de remise en état; ou verser un dépôt de garantie pour couvrir les engagements environnementaux liés aux biens visés par les renonciations.

[167] La preuve révèle qu'aucune de ces possibilités n'est viable sur le plan économique. La valeur nette des 127 biens de Redwater qui sont visés par des permis est négative, de sorte qu'aucun acheteur sensé n'accepterait de les acquérir ensemble. C'est précisément pour cette raison que GTL a choisi de renoncer aux biens représentant un fardeau en premier lieu. Quant aux autres possibilités, GTL ne peut ni exécuter les travaux d'abandon et de remise en état ni en garantir l'exécution parce que les engagements environnementaux se rattachant aux biens visés par les renonciations dépassent la valeur de réalisation de l'actif et que, de toute façon, GTL ne pourrait obtenir les sommes nécessaires pour satisfaire à ces engagements qu'après avoir procédé à la vente des biens de valeur se trouvant dans l'actif. La position de l'AER a donc pour effet d'entraver GTL dans son administration de l'actif, l'empêchant de réaliser une *quelconque* valeur pour *l'un ou l'autre* des créanciers

they, too, will become "orphans" — assets that are unable to be sold to another company and are left entirely unrealized.

[168] According to Wagner C.J., GTL is without recourse because federal law enables it only to protect itself from personal liability and because the AER was entitled to assert its environmental liability claims outside of the bankruptcy process. I disagree on both points. In my view, two aspects of Alberta's regulatory regime conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). This result flows from a proper and accurate understanding of fundamental principles of constitutional and insolvency law.

[169] First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition is that insolvency professionals are subject to the same obligations and liabilities as Redwater itself — including the obligation to comply with the AER's Abandonment Orders and the risk of personal liability for failing to do so. The *BIA*, however, permits a trustee in bankruptcy to disclaim assets encumbered by environmental liabilities. This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

de Redwater, y compris l'AER. La position de l'AER place de fait les puits de valeur productifs dans une situation incertaine, créant un risque réel qu'ils deviennent, eux aussi, des [TRADUCTION] « orphelins » — des biens qui ne peuvent être vendus à une autre société et dont la valeur demeure entièrement non réalisée.

[168] Selon le juge en chef Wagner, GTL est sans recours parce que la loi fédérale ne l'autorise qu'à se dégager de toute responsabilité personnelle, et que l'AER avait le droit de faire valoir ses réclamations environnementales en dehors du processus de faillite. Je suis en désaccord sur les deux points. À mon avis, deux aspects du régime de réglementation albertain entrent en conflit avec la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). Une compréhension adéquate et fidèle des principes fondamentaux du droit constitutionnel et du droit de l'insolvabilité conduit à ce résultat.

[169] D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme [TRADUCTION] « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition a pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que Redwater elle-même — notamment l'obligation de se conformer aux ordonnances d'abandon de l'AER et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. La *LFI*, par contre, autorise le syndic de faillite à renoncer aux éléments d'actif grevés d'engagements environnementaux. GTL disposait de ce pouvoir dans les circonstances de l'espèce et elle a valablement renoncé aux biens inexploités. Elle n'est donc plus assujettie aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaît pas la légalité de ces renonciations (en raison du fait que les séquestres et les syndics sont réglementés comme des titulaires de permis, qui ne peuvent renoncer à des biens), il y a un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaît pas l'effet juridique des renonciations de GTL.

[170] Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

[170] Ensuite, l'AER a exigé que GTL acquitte les engagements environnementaux de Redwater avant les autres dettes de l'actif, ce qui contrevient au régime de priorité établi par la *LFI*. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour dans l'arrêt *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 — test dont notre Cour ne devrait pas s'écarter explicitement ou implicitement — l'AER ne peut faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la *LFI* : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'AER ne peut pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de Redwater. Le régime provincial de délivrance de permis sert en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite : il empêche GTL de s'acquitter de ses obligations à titre de syndic si les réclamations environnementales de l'AER ne sont pas réglées. Par conséquent, il devrait être déclaré inopérant en ce qui concerne Redwater, suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral.

II. Background

II. Contexte

[171] Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

[171] Redwater était une société pétrolière et gazière cotée en bourse qui exploitait des puits, des pipelines et d'autres installations dans le centre de l'Alberta. Au milieu de l'année 2014, elle a connu plusieurs déboires financiers à la suite d'une série d'acquisitions et d'initiatives de forage infructueuses. Elle n'a donc plus été en mesure de respecter ses obligations envers son plus important créancier garanti, ATB Financial, qui a introduit une procédure d'exécution.

[172] GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not

[172] Le 12 mai 2015, GTL a été nommé séquestre de Redwater. Après sa nomination, mais avant de prendre possession de quelconque bien visé par un permis délivré par l'AER, GTL a procédé à une analyse de la viabilité économique et de la valeur commerciale des biens de Redwater. Elle a déterminé que seule une partie des biens de la

be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

[173] According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

[174] The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

[175] The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL

société était réellement vendable, et qu'il ne serait pas dans l'intérêt supérieur de Redwater — ni dans l'intérêt de ses créanciers — que GTL, à titre de séquestre, prenne possession des biens inexploités. Elle a donc informé l'AER le 3 juillet 2015 qu'elle prendrait possession de seulement 20 des 127 puits et installations de Redwater visés par un permis. Le 2 novembre 2015, peu après sa nomination à titre de syndic, GTL a encore une fois renoncé aux biens inexploités auxquels elle avait déjà renoncé en sa qualité de séquestre.

[173] Selon l'estimation de GTL, les biens de valeur de Redwater valaient 4,152 millions de dollars et créeraient une valeur importante pour les créanciers de l'actif s'ils étaient vendus aux enchères. Par contre, la valeur nette des biens inexploités était de -4,705 millions de dollars, reflétant les engagements énormes relatifs à l'abandon et à la remise en état envers l'AER. La valeur nette de l'ensemble de l'actif était de -0,553 million de dollars. C'est pourquoi, selon le jugement d'affaire de GTL, une vente de l'ensemble des biens de l'actif n'était tout simplement pas réaliste.

[174] L'AER a répondu au premier avis de renonciation de GTL en rendant les ordonnances d'abandon qui obligeaient Redwater à exécuter des travaux environnementaux sur les biens inexploités auxquels GTL avait renoncé. Mais les mesures d'exécution prises par l'AER ne visaient pas uniquement l'actif de la débitrice en tant que tel. Dans sa demande initiale ayant donné naissance au présent litige, l'AER a intenté une poursuite contre GTL, sollicitant trois mesures de réparation principales : (1) un jugement déclaratoire portant que les renonciations de GTL sont nulles et non exécutoires; (2) une ordonnance obligeant GTL, en sa qualité de séquestre, à se conformer aux ordonnances d'abandon rendues à l'égard d'une partie des biens de Redwater; et (3) une ordonnance contraignant GTL à respecter les obligations que lui impose la loi albertaine en tant que titulaire de permis, concernant plus précisément l'abandon, la remise en état et la décontamination des biens de Redwater visés par des permis.

[175] Le présent litige tire donc son origine d'un effort manifeste et vigoureux de l'AER dans le but

to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*") and the *Pipeline Act*, R.S.A. 2000, c. P-15 ("*PLA*"), the term "licensee" is defined to include receivers and trustees in bankruptcy (*OGCA*, s. 1(1)(cc); *PLA*, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (*OGCA*, s. 27; *PLA*, s. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (*OGCA*, ss. 29 and 30; *PLA*, s. 25); to pay the orphan fund levy for any of the debtor's assets (*OGCA*, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (*OGCA*, ss. 108 and 110(1); *PLA*, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

d'obliger GTL à acquitter les obligations environnementales de Redwater. Pour comprendre pourquoi l'AER a agi de la sorte, il est important de souligner que l'AER avait la loi provinciale de son côté. Aux termes de l'*Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (« *OGCA* »), et de la *Pipeline Act*, R.S.A. 2000, c. P-15 (« *PLA* »), le terme [TRADUCTION] « titulaire de permis » est défini de façon à inclure les séquestres et les syndics de faillite (*OGCA*, al. 1(1)(cc); *PLA*, al. 1(1)(n)). Les professionnels de l'insolvabilité deviennent par le fait même assujettis aux mêmes obligations réglementaires que le débiteur insolvable lui-même, en se mettant de fait à sa place. Ils peuvent donc être contraints d'exécuter des travaux d'abandon et de remise en état sur ordre de l'AER (*OGCA*, art. 27; *PLA*, art. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 (« Règles prises en vertu de l'*OGCA* »), art. 3.012), de rembourser n'importe qui d'autre effectue les travaux d'abandon (*OGCA*, art. 29 et 30; *PLA*, art. 25), de payer au fonds pour les puits orphelins la redevance requise à l'égard de n'importe lequel des biens du débiteur (*OGCA*, art. 74), de verser un dépôt de garantie, dans certaines circonstances, à la demande de l'AER (Règles prises en vertu de l'*OGCA*, par. 1.100(2)) et de payer une amende pour avoir omis de se conformer à une ordonnance de l'AER (*OGCA*, art. 108 et par. 110(1); *PLA*, par. 52(2) et 54(1)). Ces obligations sont toutes de nature personnelle. D'autres lois comparables limitent expressément la responsabilité des professionnels de l'insolvabilité. Par exemple, l'*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, prévoit que la responsabilité du séquestre ou du syndic à l'égard d'une ordonnance de protection environnementale [TRADUCTION] « ne dépasse pas la valeur des biens qu'administre cette personne », en l'absence de « négligence grave ou d'inconduite délibérée » (par. 240(3)). Le régime législatif albertain en matière de pétrole et de gaz ne contient toutefois aucune disposition semblable visant à protéger les séquestres et les syndics. Et, comme il ressort de sa demande initiale, l'AER considérait lui-même ces obligations comme des obligations personnelles. C'est pourquoi il a poursuivi GTL afin de le contraindre, notamment, à respecter les obligations que lui impose la loi provinciale en tant que titulaire de permis.

[176] The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

[177] Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221; 2017 ABCA 124, 50 Alta. L.R. (6th) 1). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

[178] The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see *BIA*, ss. 16 to 38 and 121 to 154).

[179] Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney*, at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or

[176] L'AER a également exercé son pouvoir de faire appliquer la loi à un autre titre. En plus de rendre les ordonnances d'abandon, l'AER a imposé des restrictions et conditions à la vente des biens de Redwater — conditions qui obligent en fait GTL à satisfaire auxdites obligations avant même qu'une vente puisse être approuvée. Par conséquent, même si GTL n'accédait pas à la demande de l'AER visant l'abandon des biens inexploités, il ne serait toujours pas en mesure de s'acquitter de ses obligations à titre de séquestre et de syndic.

[177] Le juge en cabinet et les juges majoritaires de la Cour d'appel ont tous donné raison à GTL quant à chacun des volets du test de la prépondérance, concluant qu'il existe un conflit d'application et une entrave à la réalisation d'un objet fédéral (2016 ABQB 278, 33 Alta. L.R. (6th) 221; 2017 ABCA 124, 50 Alta. L.R. (6th) 1). Ils ont convenu avec GTL et ATB Financial que les dispositions du régime législatif albertain permettant à l'AER d'assurer le respect des obligations d'abandon et de remise en état de Redwater étaient constitutionnellement inopérantes durant une faillite. L'AER et l'Orphan Well Association (« OWA ») se sont ensuite pourvus devant la Cour.

III. Analyse

[178] La *Loi constitutionnelle de 1867* confère au gouvernement fédéral la compétence exclusive pour réglementer la faillite et l'insolvabilité (par. 91(21)). Dans l'exercice de cette compétence, le Parlement a édicté la *LFI*, « un code complet en matière de faillite » (*Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 40; voir aussi *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 85). La *LFI* expose notamment les pouvoirs, obligations et attributions des séquestres et syndics chargés d'administrer l'actif du failli ou l'actif insolvable ainsi que la portée des réclamations qui relèvent du processus de faillite (voir *LFI*, art. 16 à 38 et 121 à 154).

[179] Quoique l'application de la *LFI* « dépend[e] de la subsistance de divers droits provinciaux » (*Moloney*, par. 40), ce n'est vrai que dans la mesure où « les dispositions de droit substantif d'une [. . .] loi ou

statute relating to property . . . are not in conflict with [the *BIA*]" (*BIA*, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney*, at paras. 16 and 29; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 32).

[180] The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

[181] Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

[182] In my view, GTL and ATB Financial have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. In what follows, I first discuss the operational conflict that arises between Alberta's regulatory regime and s. 14.06(4) of the *BIA*. I then turn to the second

règle de droit [provinciale] concernant la propriété [. . .] [ne sont pas] incompatibles avec la [*LFI*] » (*LFI*, par. 72(1)). Lorsqu'il y a un conflit, la *LFI* doit prévaloir (*Moloney*, par. 16 et 29; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 16). Cela reflète le principe constitutionnel selon lequel les lois fédérales sont prépondérantes (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 32).

[180] Les intimées en l'espèce — GTL et ATB Financial — plaident qu'il existe deux conflits distincts entre la législation fédérale et la législation provinciale. D'abord, ils soutiennent que la *LFI* confère aux séquestres et aux syndics le pouvoir de renoncer à tout intérêt sur un bien réel, même lorsque le séquestre ou le syndic ne risque pas d'engager sa responsabilité personnelle du fait qu'il est en possession du bien. Ce pouvoir de renonciation permet aux syndics de renoncer aux biens sans valeur et grevés d'engagements du failli en vue d'atteindre leur objectif premier : maximiser le recouvrement global pour tous les créanciers. Les intimées soutiennent que GTL a valablement renoncé aux biens inexploités et qu'il ne peut donc être tenu responsable de l'exécution des ordonnances d'abandon; l'AER ne peut pas non plus faire dépendre la vente des biens de Redwater de l'acquittement d'obligations à l'égard des biens faisant l'objet de la renonciation.

[181] Ensuite, ils soutiennent que les ordonnances d'abandon de l'AER constituent des « réclamations prouvables en matière de faillite ». À leur avis, ce serait saper le régime de priorités établi par la *LFI* que de permettre à l'AER de faire valoir ces réclamations en dehors du processus de faillite — et en priorité par rapport aux créanciers garantis de l'actif — que ce soit en obligeant GTL à exécuter ces ordonnances, ou en faisant dépendre la vente des biens de valeur de Redwater de l'acquittement de ces obligations.

[182] À mon avis, GTL et ATB Financial se sont acquittés de leur fardeau de démontrer qu'il existe une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. Dans les paragraphes qui suivent, j'analyse d'abord le conflit d'application qui existe entre le régime de réglementation albertain et le

branch of the paramountcy analysis, frustration of purpose.

A. *Operational Conflict*

[183] The first branch of the paramountcy test is operational conflict. An operational conflict arises where "it is impossible to comply with both laws" (*Moloney*, at para. 18) — "where one enactment says 'yes' and the other says 'no'", or where "the same citizens are being told to do inconsistent things" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; see also *Lemare Lake*, at para. 18).

[184] In essence, an operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. Although this interpretation exercise takes place within the guiding confines of cooperative federalism, a concept that allows for some interplay and overlap between federal and provincial legislation, this Court recently set out the limits to this concept:

> [C]ooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Châteauguay (City)*, [2016 SCC 23, [2016] 1 S.C.R. 467] at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015 SCC 14, [2015] 1 S.C.R. 693] at para. 19; *Reference re Securities Act*, [2011 SCC 66, [2011] 3 S.C.R. 837] at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).

(*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 18)

[185] Properly understood, cooperative federalism operates as a straightforward interpretive

par. 14.06(4) de la *LFI*. J'examine ensuite le second volet de l'analyse relative à la prépondérance, l'entrave à la réalisation d'un objet fédéral.

A. *Conflit d'application*

[183] Le premier volet du test de la prépondérance est le conflit d'application. Il y a conflit d'application lorsqu'« il est impossible de respecter les deux lois » (*Moloney*, par. 18) — « lorsqu'une loi dit "oui" et que l'autre dit "non" », ou lorsque l'« on demande aux mêmes citoyens d'accomplir des actes incompatibles » (*Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191; voir aussi *Lemare Lake*, par. 18).

[184] L'analyse relative au conflit d'application relève essentiellement de l'interprétation des lois : la Cour doit déterminer le sens de chaque loi concurrente afin de décider s'il est possible de respecter les deux lois. Bien que cette démarche d'interprétation s'effectue à l'intérieur du cadre directeur du fédéralisme coopératif, une notion qui permet une certaine interaction et un certain chevauchement entre la loi fédérale et la loi provinciale, notre Cour a récemment fixé les limites de cette notion :

> [L]e fédéralisme coopératif ne peut servir « ni [à] l'emporter sur le partage [des compétences] lui-même ni [à] le modifier » (*Rogers Communications Inc. c. Châteauguay (Ville)*, [2016 CSC 23, [2016] 1 R.C.S. 467] par. 39), pas plus qu'il ne peut imposer « des limites à l'exercice par ailleurs valide d'une compétence législative » (*Québec (Procureur général) c. Canada (Procureur général)*, [2015 CSC 14, [2015] 1 R.C.S. 693] par. 19; *Renvoi relatif à la Loi sur les valeurs mobilières*, [2011 CSC 66, [2011] 3 R.C.S. 837] par. 61-62). Il ne peut donc servir à rendre *intra vires* une loi *ultra vires*. En favorisant la coopération entre le Parlement et les législatures à l'intérieur des limites constitutionnelles existantes, le fédéralisme coopératif appuie le partage des compétences législatives au lieu de le supplanter : voir *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 22.

(*Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48, [2018] 3 R.C.S. 189, par. 18)

[185] Interprété correctement, le fédéralisme coopératif fait office de simple présomption en matière

presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. This Court recognized as much in *Moloney*, where Gascon J. wrote that courts should "favour an interpretation of the federal legislation that allows the concurrent operation of both laws" on the basis of a presumption "that Parliament intends its laws to co-exist with provincial laws" (para. 27). But where "the proper meaning of the provision" — one that is not limited to "a mere literal reading of the provisions at issue" — cannot support a harmonious interpretation, it is beyond this Court's power to create harmony where Parliament did not intend it (para. 23; see also *Pan-Canadian Securities Regulation*, at para. 18; *Lemare Lake*, at paras. 78-79, per Côté J., dissenting, but not on this point).

[186] In my view, my colleague places undue reliance on the principle of cooperative federalism to narrow the scope of federal law and find a harmonious interpretation where no plausible one exists. Courts must be especially careful about using cooperative federalism to interpret legislative provisions narrowly in a case like this where Parliament expressly envisioned that the disclaimer right could come into conflict with provincial law. This is evident from the very first line of s. 14.06(4), which states that the disclaimer power applies "[n]otwithstanding anything in any federal or provincial law". The notion that judicial restraint should compel a different interpretation is therefore belied by the fact that Parliament considered, acknowledged and *accepted* the potential for conflict. To rely on judicial restraint, then, to avoid a conflict between federal and provincial law is to disregard Parliament's express instruction. Simply put, this is not a case where a drastic power is to be assumed from the statute; it is one where such a power is clearly provided for. In my view, reliance on cooperative federalism must never result in an interpretation of s. 14.06(4) that is inconsonant with its language, context and purpose.

d'interprétation — qui appuie, sans la supplanter, la méthode moderne d'interprétation des lois. La Cour l'a reconnu dans l'arrêt *Moloney*, où le juge Gascon a écrit que les tribunaux doivent « favoris[er] une interprétation de la loi fédérale permettant une application concurrente des deux lois » en se fondant sur la présomption « que le Parlement a voulu que ses lois coexistent avec les lois provinciales » (par. 27). Mais lorsque « le sens qu'il convient de donner à la disposition » — sens qui ne se limite pas à « une lecture littérale de la disposition en cause » — ne peut appuyer une interprétation harmonieuse, la Cour n'a pas le pouvoir de créer l'harmonie là où le Parlement n'a pas eu l'intention de le faire (*Moloney*, par. 23; voir aussi *Réglementation pancanadienne des valeurs mobilières*, par. 18; *Lemare Lake*, par. 78-79, la juge Côté, dissidente, mais non sur ce point).

[186] À mon avis, mon collègue se fonde indûment sur le principe du fédéralisme coopératif pour limiter la portée d'une loi fédérale et trouver une interprétation harmonieuse là où il n'en existe aucune qui soit plausible. Les tribunaux doivent être très prudents lorsqu'il s'agit de se fonder sur le fédéralisme coopératif pour interpréter étroitement des dispositions législatives dans un cas comme l'espèce, où le Parlement a expressément prévu que le droit de renonciation pouvait entrer en conflit avec le droit provincial. Cela ressort à l'évidence de la toute première ligne du par. 14.06(4), qui énonce que le pouvoir de renonciation s'applique « [p]ar dérogation au droit fédéral et provincial ». L'idée selon laquelle la retenue judiciaire devrait commander une interprétation différente est donc contredite par le fait que le Parlement a envisagé, reconnu et *accepté* la possibilité de conflit. Recourir à la retenue judiciaire pour éviter un conflit entre le droit fédéral et le droit provincial équivaut donc à faire fi de la directive expresse du Parlement. Autrement dit, il ne s'agit pas en l'espèce d'un cas où un pouvoir draconien doit être déduit de la loi; il s'agit d'un cas où un tel pouvoir est clairement prévu. À mon avis, le recours au principe du fédéralisme coopératif ne doit jamais donner lieu à une interprétation du par. 14.06(4) qui est incompatible avec son libellé, son contexte et son objet.

[187] It is undisputed in this appeal that Alberta law does not recognize GTL's disclaimers of assets licensed by the AER as enforceable to the extent that they relieve GTL of the obligation to satisfy the environmental liabilities associated with the assets. As receiver and trustee, GTL steps into Redwater's shoes as a "licensee" under provincial law; and, GTL submits, it can therefore, without the disclaimers, be held liable for the debtor's abandonment and reclamation obligations in the same manner as Redwater itself. The question, then, is whether the *BIA* permits GTL to disclaim these properties and what legal effect results from such disclaimer.

[188] Section 14.06 of the *BIA*, reproduced in full in the appendix, outlines a trustee's powers and duties with respect to environmental liabilities and the disclaimer of property. Specifically, s. 14.06(4) states that the trustee is "not personally liable for failure to comply" with an order requiring it to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy", provided that the trustee "abandons, disposes of or otherwise releases any interest in any real property . . . affected by the condition or damage" within the statutory timeframes. The timing of GTL's disclaimers is not at issue here.

[189] My colleague concludes that, regardless of whether GTL could have properly invoked the disclaimer power in this case, the effect of any such disclaimer would simply be to protect it from personal liability. He states that, in any event, the exercise of the disclaimer power was unnecessary in this case because GTL was already fully protected from personal liability through the operation of s. 14.06(2). Further, he argues, because the AER has not sought to hold GTL personally liable, there is no conflict between federal and provincial law on the facts of this case. With respect, I disagree with this approach to the language of the *BIA*, which does not properly account for fundamental principles of constitutional and insolvency law. I will begin by addressing the proper scope of the disclaimer power provided to trustees, explaining that the actual existence of a risk of personal liability is not a necessary condition for

[187] Il n'est pas contesté en l'espèce que la loi albertaine ne reconnaît pas de force exécutoire aux renonciations de GTL à des biens visés par un permis délivré par l'AER dans la mesure où elles soustraient GTL à l'obligation de respecter les engagements environnementaux liés aux biens. À titre de séquestre et de syndic, GTL remplace Redwater en tant que « titulaire de permis » selon la loi provinciale, et GTL soutient qu'il peut par conséquent, en l'absence des renonciations, être tenu responsable des obligations d'abandon et de remise en état de la débitrice au même titre que Redwater elle-même. Il s'agit donc de savoir si la *LFI* autorise GTL à renoncer à ces biens et quel est l'effet de cette renonciation en droit.

[188] L'article 14.06 de la *LFI*, reproduit intégralement en annexe, décrit les pouvoirs et responsabilités du syndic quant aux engagements environnementaux et à la renonciation aux biens. Plus précisément, le par. 14.06(4) prévoit que le syndic est « dégagé de toute responsabilité personnelle découlant du non-respect » d'une ordonnance l'obligeant à « répar[er] [. . .] tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite », pourvu que le syndic « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit » dans les délais prévus par la loi. Le moment des renonciations de GTL n'est pas en litige en l'espèce.

[189] Mon collègue conclut que, peu importe si GTL avait pu invoquer à juste titre le pouvoir de renonciation en l'espèce, cette renonciation a simplement pour effet de le dégager de toute responsabilité personnelle. Selon lui, en tout état de cause, il était inutile d'exercer le pouvoir de renonciation dans la présente affaire parce que GTL était déjà entièrement à l'abri de toute responsabilité personnelle par application du par. 14.06(2). Il soutient en outre que, comme l'AER n'a pas cherché à tenir GTL personnellement responsable, il n'y a aucun conflit entre la loi fédérale et la loi provinciale en l'espèce. Avec égards, je ne suis pas d'accord avec cette interprétation du libellé de la *LFI*, qui ne tient pas dûment compte des principes fondamentaux du droit constitutionnel et du droit de l'insolvabilité. Je commencerai par traiter de la portée que doit avoir le pouvoir de renonciation accordé aux syndics, en

the exercise of this power and that, while protection from personal liability is one effect of a valid disclaimer, it is not the only one. In my view, this interpretation makes s. 14.06(4) consistent with the remainder of the section and is therefore to be preferred. With respect, I do not accept that Parliament intended s. 14.06(4) simply to protect trustees from the exact same liability that it had already addressed through s. 14.06(2). Subsection (4) must have a meaningful role to play within Parliament's bankruptcy and insolvency regime; I reject the suggestion that Parliament crafted a superfluous provision. I will also deal briefly with the AER's argument that the disclaimer power is not available at all in the context of Alberta's oil and gas statutory regime. In my view, it is available in this context.

(1) The Power to Disclaim Under Section 14.06(4)

[190] The "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735) is that s. 14.06(4) assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency (see L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev.* 467, at pp. 468-72; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328, at paras. 24-31; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007 (Ont. S.C. (App. Div.), at p. 1008). This right is in keeping with the fundamental objective of court officers in insolvencies: the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. By allowing trustees to disclaim assets with substantial liabilities, this power enables them to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4)

expliquant que l'existence d'un risque de responsabilité personnelle ne constitue pas une condition essentielle à l'exercice de ce pouvoir et que, même si la protection contre toute responsabilité personnelle est un effet d'une renonciation valide, ce n'est pas le seul. À mon avis, cette interprétation fait en sorte que le par. 14.06(4) s'accorde avec le reste de l'article et il convient donc de la privilégier. Avec égards, je n'accepte pas que le Parlement voulait par ce paragraphe mettre simplement les syndics à l'abri de la même responsabilité, ce qu'il avait déjà fait au par. 14.06(2). Le paragraphe (4) doit avoir un rôle significatif à jouer dans le régime de faillite et d'insolvabilité du Parlement; je rejette la thèse selon laquelle le Parlement a conçu une disposition superflue. Je me pencherai aussi brièvement sur l'argument de l'AER selon lequel il n'est pas du tout possible d'exercer le pouvoir de renonciation dans le contexte du régime législatif de l'Alberta en matière de pétrole et de gaz. J'estime qu'il peut être exercé dans ce contexte.

(1) Le pouvoir de renonciation en vertu du par. 14.06(4)

[190] Le « sens naturel qui se dégage de la simple lecture de la disposition dans son ensemble » (*Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735) est que le par. 14.06(4) présume et incorpore un droit préexistant en common law de renoncer à des biens dans le contexte de la faillite et de l'insolvabilité (voir L. Silverstein, « Rejection of Executory Contracts in Bankruptcy and Reorganization » (1964), 31 *U. Chi. L. Rev.* 467, p. 468-472; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328, par. 24-31; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007 (C.S. Ont. (Div. app.), p. 1008). Ce droit est en accord avec l'objectif fondamental poursuivi par les officiers de la cour en insolvabilité : maximiser le recouvrement au bénéfice de l'ensemble des créanciers par la réalisation des éléments de valeur de l'actif. En permettant aux syndics de renoncer à des biens grevés d'engagements substantiels, ce pouvoir donne aux syndics la faculté d'administrer l'actif le plus efficacement

recognizes and supports this foundational principle of insolvency law.

[191] This reading offers the clearest and most obvious explanation for the manner in which the provision is drafted, in that it plainly describes a result or legal effect of disclaimer: a trustee "is not personally liable for failure to comply" with an environmental order "if . . . the trustee . . . abandons, disposes of or otherwise releases any interest in any real property" (s. 14.06(4)). We should interpret s. 14.06(4) as authorizing the act of disclaimer in light of the principle that "[t]he legislator does not speak in vain" (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 37, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838). If a trustee did not have the power to disclaim property, and if that power were not recognized and provided for in the statute, a provision describing the effect of such a disclaimer would serve no purpose.

[192] The AER submits that property may be disclaimed only where it is necessary for a trustee to avoid personal liability with respect to an environmental order. This interpretation entirely inverts the language of the provision, turning a stated *effect* of disclaimer into a necessary condition that circumscribes the exercise of the power. The operative clauses are neither written nor ordered in this manner. Rather, s. 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. If Parliament truly intended to condition the right to disclaim property on the actual existence of a risk of personal liability, "it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms" (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 124).

possible et leur épargne des frais considérables d'administration qui réduiraient le recouvrement au profit des créanciers. Le paragraphe 14.06(4) reconnaît et appuie ce principe fondamental du droit de l'insolvabilité.

[191] Cette interprétation offre l'explication la plus claire et la plus évidente de la façon dont la disposition est rédigée, en ce qu'elle décrit simplement un résultat ou effet juridique d'une renonciation : le syndic est « dégagé de toute responsabilité personnelle découlant du non-respect » d'une ordonnance environnementale « si [. . .] il abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit » (al. 14.06(4)). Nous devons interpréter le par. 14.06(4) comme autorisant l'acte de renonciation à la lumière du principe selon lequel « le législateur ne parle pas pour ne rien dire » (*Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, par. 37, citant *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831, p. 838). Si le syndic n'avait pas le pouvoir de renoncer à des biens et si ce pouvoir n'était pas reconnu et prévu dans la loi, une disposition décrivant l'effet d'une telle renonciation n'aurait aucune utilité.

[192] L'AER soutient qu'il est possible de renoncer à un bien uniquement lorsque cela est nécessaire pour que le syndic échappe à toute responsabilité personnelle à l'égard d'une ordonnance environnementale. Cette interprétation inverse complètement le libellé de la disposition, transformant un *effet* énoncé de la renonciation en condition essentielle circonscrivant l'exercice du pouvoir. Les dispositions applicables ne sont ni rédigées ni ordonnées de cette façon. Le paragraphe 14.06(4) exprime plutôt le droit de renonciation en des termes qui ne comportent aucune restriction et fait ressortir que le syndic ne peut être tenu responsable quand ce droit est exercé. Si le Parlement avait vraiment voulu rendre le droit de renoncer à un bien tributaire de l'existence d'un risque de responsabilité personnelle, « il est difficile d'imaginer une façon plus compliquée et sibylline d'exprimer quelque chose qui pouvait être dit si facilement dans des termes clairs et directs » (*Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85, p. 124).

[193] My colleague adopts a slightly different approach. Rather than accepting the argument that the risk of personal liability is a necessary condition to the exercise of the disclaimer power in s. 14.06(4), he concludes that protection from personal liability for non-compliance with environmental orders is the only consequence of a valid disclaimer. Therefore, he says, the bankrupt's estate is not relieved of its obligations under the environmental orders and the trustee can be compelled to expend the entirety of the estate's assets on compliance. With respect, this also cannot be the correct reading of the subsection. Nor do I believe that the brief references to s. 14.06(4) in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 — a case in which this subsection was not directly in issue and this Court was not tasked with interpreting it in any meaningful way — provide much assistance in this case.

[193] Mon collègue adopte une approche légèrement différente. Au lieu d'accepter l'argument selon lequel le risque d'engager la responsabilité personnelle est une condition essentielle à l'exercice du pouvoir de renonciation prévu au par. 14.06(4), il conclut que la protection contre toute responsabilité personnelle pour non-respect d'ordonnance environnementale est l'unique conséquence d'une renonciation valide. Par conséquent, dit-il, l'actif du failli n'est pas déchargé des obligations que lui imposent les ordonnances environnementales et on peut contraindre le syndic à consacrer la valeur entière de l'actif au respect des ordonnances. Avec égards, il ne peut s'agir de la lecture correcte du par. 14.06(4). Je ne crois pas non plus que les brèves mentions de ce paragraphe dans *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123, une affaire où le par. 14.06(4) n'était pas directement en cause et où notre Cour n'avait pas à l'interpréter de façon significative, se révèlent fort utiles en l'espèce.

[194] I accept that the opening words of s. 14.06(4) refer to the personal liability of the trustee. However, when the words of the subsection are 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", as the courts are required to do (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Bell ExpressVu*, at para. 26, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87), their meaning becomes apparent.

[194] Certes, le début du par. 14.06(4) parle de la responsabilité personnelle du syndic. Cependant, lorsqu'on lit les termes du paragraphe « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du législateur », tel que doivent le faire les tribunaux (voir *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Bell ExpressVu*, par. 26, citant E. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87), leur sens devient apparent.

[195] Section 14.06(4) both assumes and relies on the common law power of trustees to disclaim assets, a power that the majority of the Court of Appeal described as "commonplace" (para. 47). Even my colleague appears to accept that this disclaimer power "predates" s. 14.06(4) itself (at para. 95). Indeed, the majority of the Court of Appeal recognized that "[s]ection 14.06 does not appear to create a right in a trustee to abandon properties without value, but rather assumes that one exists upon bankruptcy" (para. 63). This is the only rational explanation for why Parliament made the effects of s. 14.06(4) available when the trustee "abandons, disposes of or otherwise releases any interest in any real property". While avoiding personal liability is one effect

[195] Le paragraphe 14.06(4) tient pour acquis et repose sur le pouvoir des syndics en common law de renoncer à des biens, un pouvoir dont l'exercice est [TRADUCTION] « monnaie courante », affirment les juges majoritaires de la Cour d'appel (par. 47). Même mon collègue semble accepter que ce pouvoir de renonciation « précède » le par. 14.06(4) lui-même (par. 95). En effet, les juges majoritaires de la Cour d'appel ont reconnu que « [l]'article 14.06 ne semble pas créer le droit du syndic d'abandonner des biens sans valeur; il en tient plutôt l'existence pour acquise en cas de faillite » (par. 63). C'est la seule explication logique pour laquelle le Parlement a laissé le par. 14.06(4) produire ses effets lorsque le syndic « abandonne [. . .] tout intérêt sur le bien

of the appropriate exercise of this power, it is not the only effect. Disclaimer operates to "determine, as from the date of the disclaimer, the rights, interests and liabilities" in the disclaimed property (R. Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), at p. 202). By properly disclaiming certain assets, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell the property for the benefit of the estate. The author Frank Bennett, writing about the administration of the bankrupt's real property, explains that "[w]here the trustee disclaims its interest, the disclaimer releases and disclaims any and all right, title and interest to the property" (*Bennett on Creditors' and Debtors' Rights and Remedies* (5th ed. 2006), at p. 482 (footnote omitted)).

[196] The majority asserts that s. 14.06(4) does not allow a trustee to "walk away" from assets and the environmental liabilities associated with them (paras. 86, 100 and 102). However, *disclaiming* property does have precisely this effect. It permits the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's fundamental objective. A recognized purpose of the disclaimer power is to "avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation, to the detriment of unsecured creditors" (Goode, at p. 200 (footnote omitted)). These principles are no less valid in relation to valueless real property than they are in relation to unprofitable and burdensome executory contracts. Indeed, there has been no suggestion in this appeal, including from the AER and the OWA, that trustees can never disclaim onerous real property.

[197] This explanation of the disclaimer power is borne out by GTL's actions in the instant case. After assessing the economic viability and marketability of Redwater's assets, GTL determined that it would be most beneficial to Redwater's creditors as a whole if it disclaimed the non-producing, liability-laden assets.

réel en cause, en dispose ou s'en dessaisit ». Bien que la protection contre toute responsabilité personnelle soit un effet de l'exercice régulier de ce pouvoir, ce n'est pas le seul. La renonciation sert à [TRADUCTION] « déterminer, à partir de sa date, les droits, intérêts et engagements » sur le bien auquel le syndic a renoncé (R. Goode, *Principles of Corporate Insolvency Law* (4e éd. 2011), p. 202). En renonçant à bon droit à certains biens, le syndic est dégagé de toute responsabilité associée aux biens faisant l'objet de la renonciation et ne peut plus vendre les biens au profit de l'actif. Dans le contexte de l'administration des biens réels du failli, l'auteur Frank Bennett explique que [TRADUCTION] « [l]orsque le syndic renonce à son intérêt, la renonciation emporte dessaisissement de tout droit, titre et intérêt sur le bien en question » (*Bennett on Creditors' and Debtors' Rights and Remedies* (5e éd. 2006), p. 482 (note en bas de page omise)).

[196] Les juges majoritaires font valoir que le par. 14.06(4) n'autorise pas le syndic à « délaisser » des biens ou à se soustraire aux engagements environnementaux qui s'y rattachent (par. 86, 100 et 102). Or, c'est exactement ce qu'entraîne la *renonciation* à des biens. Elle permet au syndic de ne pas réaliser des biens qui ne seraient pas profitables aux créanciers de l'actif et compromettraient par le fait même son objectif principal. Le pouvoir de renonciation a pour objet reconnu [TRADUCTION] « [d']éviter la poursuite des engagements à l'égard de biens onéreux qui seraient payables aux dépens de la liquidation, et ce, au détriment des créanciers non garantis » (Goode, p. 200 (note en bas de page omise)). Ces principes valent tout autant dans le cas des biens réels sans valeur que dans celui des contrats exécutoires non rentables et contraignants. En fait, personne n'a laissé entendre en l'espèce, pas même l'AER ou l'OWA, que les syndics ne peuvent jamais renoncer à des biens réels onéreux.

[197] Cette explication du pouvoir de renonciation est confirmée par les agissements de GTL en l'espèce. Après avoir estimé la viabilité économique et la qualité marchande des biens de Redwater, GTL a décidé que ce qui serait le plus profitable aux créanciers de Redwater dans leur ensemble, ce serait qu'il renonce aux biens inexploités et grevés d'engagements.

[198] Parliament's recognition of this common law disclaimer power in s. 14.06(4) is not new. The power is also referred to in another section, albeit in a broader context. Section 20(1) of the *BIA*, provides trustees with the ability to "divest" themselves of "any real property or immovable of the bankrupt" generally. However, the disclaimer power itself does not derive from this section. Nor is a trustee required to invoke s. 20(1) in order to exercise the disclaimer power described in s. 14.06(4), which incorporates that power and spells out the particular effects of its exercise in the specific context of environmental remediation orders. In any event, this Court is not required in this appeal to comment on the full effects of s. 20(1).

[199] Under my colleague's interpretation, it is unclear why Parliament chose to enact the disclaimer mechanism. It is surely true that Parliament could have achieved the same outcome through the use of simpler language. Had it merely intended to protect trustees from personal liability for failure to comply with environmental orders, it could have easily done so directly — in fact, it had already done so in s. 14.06(2). There is no reason why Parliament would have attempted to achieve this relatively straightforward result through the convoluted mechanism of requiring trustees to disclaim property while at the same time not intending such disclaimer to have its "commonplace" common law effects. There is a reason why Parliament has referred to the power to disclaim in s. 14.06(4); we must give effect to this choice and to the words that Parliament has used.

[200] It follows, then, that I respectfully disagree that s. 14.06(4) only protects trustees from specific types of personal liability. But it does not follow that the *estate* is relieved of its liabilities once a trustee exercises the disclaimer power — a misconception that is pervasive in the AER's submissions and the majority's analysis. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets (see *BIA*, s. 40; see also Bennett, at

[198] La reconnaissance par le Parlement, au par. 14.06(4), de ce pouvoir de renonciation en common law n'a rien de nouveau. Le pouvoir est aussi mentionné dans une autre disposition, quoique dans un contexte plus général. Le paragraphe 20(1) de la *LFI* donne au syndic la possibilité de « renoncer » à « un immeuble ou [à] un bien réel du failli » en général. Le pouvoir de renonciation lui-même ne découle cependant pas de cette disposition. Le syndic n'est pas non plus obligé d'invoquer le par. 20(1) pour exercer le pouvoir de renonciation décrit au par. 14.06(4), lequel incorpore ce pouvoir et expose certains effets de son exercice dans le contexte précis des ordonnances de décontamination environnementale. Quoi qu'il en soit, notre Cour n'a pas à commenter en l'espèce tous les effets du par. 20(1).

[199] Suivant l'interprétation de mon collègue, la raison pour laquelle le Parlement a choisi d'instaurer le mécanisme de renonciation n'est pas claire. Il ne fait aucun doute que le Parlement aurait pu atteindre le même résultat en employant un langage plus simple. Si le Parlement comptait simplement protéger les syndics contre toute responsabilité personnelle découlant du non-respect d'ordonnances environnementales, il aurait pu aisément le faire directement; en fait, il l'avait déjà fait au par. 14.06(2). Il n'y a aucune raison pour laquelle le Parlement aurait tenté d'obtenir ce résultat relativement simple par le mécanisme alambiqué consistant à exiger des syndics qu'ils renoncent aux biens, tout en évitant que cette renonciation ait « couramment » des effets en common law. Il y a une raison pour laquelle le Parlement a mentionné le pouvoir de renonciation au par. 14.06(4); nous devons donner effet à ce choix et aux mots qu'il a utilisés.

[200] Par conséquent, avec égards, je ne suis pas d'accord pour dire que le par. 14.06(4) protège les syndics uniquement contre certains types de responsabilité personnelle. Mais cela ne signifie pas que l'*actif* est déchargé de ses engagements une fois que le syndic exerce son pouvoir de renonciation — une idée fausse qui est omniprésente dans les observations de l'AER et l'analyse de la majorité. Le bien visé par une renonciation retourne ultimement dans l'actif à l'issue du processus de faillite, comme c'est

p. 528). The estate remains liable for the remediation obligations attached to the land. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability. In any case, the regulatory scheme continues to apply with respect to the retained assets. In referring repeatedly to the idea that disclaimer does not "immunize bankrupt estates from environmental liabilities" (para. 81), the majority misunderstands the impact and purpose of the disclaimer power. The estate itself is not relieved of environmental obligations. As I have noted, the trustee does not take possession of the bankrupt's assets in order to continue the life of the bankrupt indefinitely. The trustee's function is to realize on the estate's valuable assets and maximize global recovery for all creditors. Allowing the trustee to deal only with the value-positive assets to achieve this goal does not relieve the *estate* of its environmental obligations. As a result, the disclaimer power, and its incorporation into s. 14.06(4), is entirely consistent with the foundational principles of insolvency law.

[201] In s. 14.06(4), Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purposes.

[202] My interpretation of s. 14.06(4) finds ample support in the Hansard evidence. In the debates preceding the enactment of s. 14.06(4) in 1997, Jacques Hains, a director in the Department of Industry Canada who had been involved in drafting the amendments to the *BIA*, discussed the new options being provided to trustees when faced with an environmental remediation order:

First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.

le cas pour les biens non réalisés (voir *LFI*, art. 40; voir aussi Bennett, p. 528). L'actif demeure responsable des obligations de décontamination qui se rattachent au terrain. La question de savoir si les éléments d'actif sont suffisants pour satisfaire à ces engagements à ce moment précis est une question distincte qui n'a aucun rapport avec le fait sous-jacent de la responsabilité continue. Dans tous les cas, le régime de réglementation continue de s'appliquer aux biens conservés. En exprimant maintes fois l'idée que la renonciation ne met pas « les biens des faillis à l'abri de toute responsabilité environnementale » (par. 81), la majorité se méprend sur l'incidence et l'objet du pouvoir de renonciation. L'actif en soi n'est pas libéré des obligations environnementales. Comme je l'ai noté, le syndic ne prend pas possession des biens du failli en vue de poursuivre indéfiniment la vie du failli. Il a pour fonction de réaliser les biens de valeur de l'actif et de maximiser le recouvrement global au profit de tous les créanciers. Permettre au syndic de s'occuper uniquement des biens de valeur pour atteindre cet objectif ne libère pas l'*actif* de ses obligations environnementales. Ainsi, le pouvoir de renonciation et son incorporation au par. 14.06(4) s'accordent parfaitement avec les principes fondamentaux du droit de l'insolvabilité.

[201] Au paragraphe 14.06(4), le Parlement a mentionné expressément ce pouvoir de renonciation et exposé les effets particuliers découlant de son exercice approprié. Il a incorporé ainsi à dessein à son régime législatif le pouvoir de renonciation pour en réaliser les objectifs visés.

[202] Mon interprétation du par. 14.06(4) est amplement étayée par les débats parlementaires. Lors des débats qui ont précédé l'adoption du par. 14.06(4) en 1997, Jacques Hains, directeur au ministère d'Industrie Canada qui avait participé à la rédaction des modifications à la *LFI*, a discuté des nouvelles solutions qui s'offraient aux syndics aux prises avec des ordonnances de décontamination environnementale :

Premièrement, ils pourraient décider de se conformer à l'ordonnance et d'effectuer la dépollution, dont les coûts seraient des coûts d'administration des actifs du failli.

The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.

The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.

As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies. [Emphasis added.]

(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:45 to 15:50)

The above passage makes no reference to the personal liability of a trustee who is considering whether to invoke the "fourth option" and disclaim the property. Mr. Hains was clear that the decision to disclaim is based on the "economic viability" of complying with the remediation orders, specifically "whether the assets are sufficient to cover the clean up costs". This makes sense only in the context of the trustee's obligation to maximize economic recovery for creditors.

[203] Several months later, Mr. Hains reiterated this fourth option, explaining that, after assessing the economic viability of complying with the order and "knowing that the bill will be too expensive and will not be economically viable, the trustees are then out of it and can abandon that piece of property subject to the order" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 13:68 (emphasis added)). This description plainly reflects the function of the disclaimer power, which does indeed allow trustees to "walk away" from liability-laden assets that will not contribute to maximizing creditor recovery.

[204] Mr. Hains' answers to questions from the House of Commons Standing Committee further

Comme deuxième option, ils pourraient contester devant les tribunaux compétents cette ordonnance de dépollution; ces deux options sont déjà prévues dans les lois en matière d'environnement.

La troisième option du praticien consisterait à demander à un tribunal compétent du temps de réflexion pour évaluer s'il est économique de se conformer à l'ordonnance ou non, si cela en vaut la peine et si les actifs sont suffisants pour couvrir les frais de dépollution.

Comme quatrième option, s'il croit que ce n'est absolument pas une décision économique, il pourra signifier qu'il abandonne les sites faisant l'objet de l'ordonnance. [Je souligne.]

(Comité permanent de l'industrie, *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996, entre 15 h 45 et 15 h 50)

Le passage précité ne mentionne aucunement la responsabilité personnelle du syndic qui se demande s'il y a lieu de se prévaloir de la « quatrième option » et de renoncer au bien. M. Hains a clairement affirmé que la décision de renoncer repose sur la viabilité « économique » du respect des ordonnances de décontamination, tout particulièrement sur la question de savoir « si les actifs sont suffisants pour couvrir les frais de dépollution ». Cela n'est logique que dans le contexte de l'obligation du syndic de maximiser le recouvrement au profit des créanciers.

[203] Plusieurs mois plus tard, M. Hains a répété cette quatrième option, expliquant qu'après avoir évalué s'il est économique de se conformer à l'ordonnance et « sachant que la facture sera trop élevée et que la proposition ne sera donc pas économiquement viable, le syndic peut s'en laver les mains et abandonner la propriété visée par l'ordonnance » (*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e leg., 4 novembre 1996, p. 13:68 (je souligne)). Cette description traduit clairement la fonction du pouvoir de renonciation, qui permet au syndic de « délaisser » les biens grevés d'engagement qui ne contribuent pas à maximiser le recouvrement au profit des créanciers.

[204] Les réponses de M. Hains aux questions du Comité permanent de la Chambre des communes

confirms this interpretation of the disclaimer power. The following exchange is very telling:

Mr. Lebel [Member of Parliament for Chambly]: When a trustee decides to give up the land and realize[s] assets elsewhere, for example by making a profit from the sale of assets, having released himself from the obligation to clean up the land, he would be sharing a dividend realized from other profitable assets and telling the creditors to manage as best they can with the real property. If the creditors are not willing to touch it, he will then tell the government to clean it up. In such a case, each of the bankruptcy creditors would also . . . stand to earn a small dividend, as it is referred to in Bankruptcy Law.

Do you not think that your bill should require the trustee to carry out a clean-up from the assets of the bankruptcy before the dividends are distributed?

Mr. Hains: It's an excellent question that was put to me only three weeks ago by colleagues from the Department of the Environment of Quebec, whom I was meeting to discuss this subject. There were a number of matters of interest to them, particularly the one raised by Mr. Lebel. [Emphasis added.]

(Standing Committee on Industry, June 11, 1996, at 16:55)

Mr. Hains went on to reference various other features of the scheme to assuage Mr. Lebel's concerns and noted that provincial environmental agencies would be responsible for performing the remediation work. Significantly, at no point did Mr. Hains contradict Mr. Lebel's understanding of the bill's provisions. Nor did he take issue with the premise underlying the question: that the new legislation does not "require the trustee to carry out a clean-up from the assets of the bankruptcy" before they are distributed to creditors. Mr. Hains did not claim that provincial regulators might still enforce such a requirement.

[205] This exchange between Mr. Lebel and Mr. Hains clearly demonstrates the collective understanding of all parties that the proposed amendments, containing what would become s. 14.06(4), specifically *did not* require the trustee to expend

confirment elles aussi cette interprétation du pouvoir de renonciation. L'échange qui suit est fort éloquent :

M. Lebel [député de Chambly] : Lorsque le syndic décide de renoncer au terrain et réalise des actifs par ailleurs, par exemple en faisant un profit par la vente d'actifs, s'étant libéré de son obligation de dépolluer le terrain, il partage un dividende réalisé sur d'autres actifs rentables et dit aux créanciers de s'organiser avec le terrain. Si les créanciers ne veulent pas y toucher, il dit au gouvernement de le dépolluer. À ce moment-là, chacun des autres créanciers de la faillite ressort avec un petit dividende. C'est ainsi qu'on appelle cela en droit de la faillite.

Ne pensez-vous pas que votre projet de loi devrait forcer le syndic à faire la décontamination à même les actifs de la faillite avant de distribuer des dividendes?

M. Hains : C'est une excellente question qui m'a été posée il y a à peine trois semaines par des collègues du ministère de l'Environnement du Québec, que j'ai rencontrés pour parler de ce sujet-là. Il y avait des questions qui les intéressaient, notamment celle que M. Lebel soulève. [Je souligne.]

(Comité permanent de l'industrie, 11 juin 1996, à 16 h 55)

M. Hains a ensuite mentionné plusieurs autres caractéristiques du régime pour dissiper les préoccupations de M. Lebel et a fait remarquer que les organismes de réglementation environnementaux provinciaux devraient exécuter les travaux de décontamination. Fait important, M. Hains ne contredit jamais la conception que M. Lebel se fait des dispositions du projet de loi. Il ne conteste pas non plus la prémisse qui sous-tend la question : la nouvelle loi ne « force [. . .] pas le syndic à faire la décontamination à même les actifs de la faillite » avant leur répartition entre les créanciers. M. Hains ne prétend pas que les organismes de réglementation provinciaux peuvent toujours assurer le respect d'une telle exigence.

[205] Cet échange entre MM. Lebel et Hains démontre clairement que toutes les parties s'entendent pour dire que les modifications proposées, lesquelles contiennent ce qui allait devenir le par. 14.06(4), *n'*obligeaient *pas* expressément le syndic à dépenser

the estate's assets to comply with environmental remediation orders. The drafters of s. 14.06(4) thus turned their minds directly to this issue, and their understanding of the provision's effects was contrary to that proposed by the majority.

[206] Based on these references to Hansard, I cannot agree with the majority's statement that the legislative debates provide "no hint" of a parliamentary intention to relieve trustees of the obligation to expend estate assets on environmental remediation (para. 81). This intention was clearly expressed on multiple occasions.

[207] As courts must read statutory provisions in their entire context, and as Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole, it is important to carefully examine the other subsections of s. 14.06. This is true regardless of whether a party to litigation seeks to apply them or to put them directly in issue (majority reasons, at paras. 88 and 101). Significantly, the immediate statutory context surrounding s. 14.06(4) confirms that a trustee's right to disclaim property is not limited in the manner suggested by the AER or my colleague. Four provisions adjacent to s. 14.06(4) support this conclusion.

[208] First, s. 14.06(5) provides that a court may stay an environmental order "for the purpose of enabling the trustee to assess the economic viability of complying with the order". Assessing "economic viability" is, on its face, broader than assessing the risk of personal liability. This provision indicates that a trustee is entitled to disclaim assets based on a rational economic analysis geared toward maximizing the value of the estate, and not merely in order to protect itself from personal liability. Otherwise, there would be no reason for Parliament to permit a court to grant a stay for the purpose of assessing economic viability. This understanding is consistent with the fundamental principles of insolvency law and with the Hansard evidence, as noted above, as well as with one of the recognized justifications for the disclaimer power more generally: to allow a trustee

les biens de l'actif pour respecter les ordonnances de décontamination environnementale. Les rédacteurs du par. 14.06(4) se sont ainsi directement attardés à cette question et leur conception des effets de la disposition contredisait celle proposée par les juges majoritaires.

[206] Étant donné les extraits précédents des débats parlementaires, je ne peux souscrire à l'affirmation des juges majoritaires selon laquelle les débats législatifs ne donnent « aucun indice » d'une intention du Parlement de relever les syndics de l'obligation de consacrer des biens de l'actif à la décontamination environnementale (par. 81). Le Parlement a clairement manifesté cette intention à maintes reprises.

[207] Puisque les tribunaux doivent lire les dispositions législatives dans leur contexte global, et que le Parlement est présumé rédiger les articles et paragraphes d'une loi comme un tout cohérent, il importe d'examiner avec soin les autres paragraphes de l'art. 14.06. Il en est ainsi, peu importe qu'une partie au litige cherche à les appliquer ou à les mettre directement en cause (motifs des juges majoritaires, par. 88 et 101). Fait révélateur, le contexte immédiat du par. 14.06(4) confirme que le droit du syndic de renoncer à des biens n'est pas limité de la façon suggérée par l'AER ou mon collègue. Quatre dispositions adjacentes au par. 14.06(4) étayent cette conclusion.

[208] Premièrement, le par. 14.06(5) prévoit que le tribunal peut suspendre une ordonnance environnementale « [e]n vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance ». Évaluer les « conséquences économiques » a, à première vue, une portée plus large qu'évaluer le risque de responsabilité personnelle. Cette disposition indique que le syndic a le droit de renoncer à des biens en se fondant sur une analyse économique rationnelle visant à maximiser la valeur de l'actif, et non simplement afin de se prémunir contre une responsabilité personnelle. Sinon, le Parlement n'aurait aucune raison d'autoriser le tribunal à accorder une suspension en vue de permettre l'évaluation des conséquences économiques. Cette interprétation s'accorde avec les principes fondamentaux du droit de l'insolvabilité et les débats parlementaires, tel que

"to complete the administration of the liquidation without being held up by continuing obligations on the company under . . . continued ownership and possession of assets which are of no value to the estate" (Goode, at p. 200).

[209] Second, s. 14.06(7) grants the government a super priority for environmental claims in cases where it has already taken action to remedy the condition or damage. This provision would serve little purpose if a government regulator could assert a super priority for *all* environmental claims, as the AER effectively purports to do here by refusing to recognize GTL's disclaimers as lawful. It also suggests that Parliament specifically envisioned that the government could obtain a super priority and leapfrog other creditors, but *only* where the government itself has already remediated the environmental damage. An analogous argument was central to the reasoning in *Abitibi*, where this Court observed that the existence of a Crown priority limited to the contaminated property and certain related property under s. 11.8(8) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, undercut the argument that Parliament "intended that the debtor always satisfy all remediation costs" in circumstances where that express priority was inapplicable and where the Crown had no further priority with respect to the totality of the estate's assets (para. 33).

[210] Third, s. 14.06(6) provides that claims for costs of remedying an environmental condition or environmental damage cannot rank as costs of administration if the trustee has disclaimed the property in question. Again, if the AER could effectively assert a super priority by compelling GTL to use all of Redwater's assets to satisfy its outstanding environmental liabilities, this provision would be unnecessary, because the costs of environmental

je l'ai signalé précédemment, de même qu'avec l'une des justifications reconnues du pouvoir de renonciation de façon plus générale : permettre au syndic [TRADUCTION] « de mener à terme la liquidation sans être freiné par les obligations permanentes de la société [. . .] en conservant la propriété et la possession de biens qui n'augmentent en rien la valeur de l'actif » (Goode, p. 200).

[209] Deuxièmement, le par. 14.06(7) accorde au gouvernement une superpriorité à l'égard des réclamations environnementales dans les cas où il a déjà pris des mesures pour réparer le fait ou le dommage. Cette disposition serait fort peu utile si un organisme de réglementation gouvernemental pouvait faire valoir une superpriorité à l'égard de *toutes* les réclamations environnementales, comme l'AER a effectivement la prétention de le faire en l'espèce, en refusant de reconnaître la légalité des renonciations de GTL. Elle donne également à penser que le Parlement a expressément prévu que le gouvernement pouvait obtenir une superpriorité et devancer les autres créanciers, mais *seulement* lorsqu'il a lui-même déjà réparé le dommage lié à l'environnement. Un argument analogue a constitué l'élément central du raisonnement dans *Abitibi*, où la Cour a fait remarquer que l'existence d'une priorité de la Couronne portant uniquement sur les biens contaminés et certains biens connexes en vertu du par. 11.8(8) de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36, mine l'argument selon lequel le Parlement a eu « l'intention d'obliger le débiteur à supporter dans tous les cas tous les coûts des travaux de décontamination » dans les situations où ce droit de priorité exprès était inapplicable et où la Couronne ne disposait d'aucune autre priorité sur l'ensemble des biens de l'actif (par. 33).

[210] Troisièmement, le par. 14.06(6) prévoit que les réclamations visant les frais de réparation du fait ou dommage lié à l'environnement ne peuvent faire partie des frais d'administration si le syndic a renoncé au bien en question. Encore une fois, si l'AER pouvait effectivement faire valoir une superpriorité en obligeant GTL à utiliser tous les biens de Redwater pour satisfaire aux engagements environnementaux non acquittés de celle-ci, cette disposition

remediation would rank *ahead* of administrative costs in the priority structure. Moreover, s. 14.06(6) highlights the potential for a direct conflict between federal and provincial law. A trustee cannot comply with the AER's instruction to pay environmental costs as part of its administration of the estate while simultaneously complying with the *BIA*'s requirement that such costs *not* be included in the trustee's administrative costs. This further raises the spectre of bankruptcy professionals being forced to expend their own funds under Alberta's regulatory regime — a notion that Parliament clearly rejected by amending the *BIA* in response to *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (see C.A. reasons, at para. 63). This is a risk that is not adequately addressed under my colleague's interpretation.

ne serait pas nécessaire parce que les frais de décontamination environnementale passeraient *avant* les frais d'administration dans l'ordre de priorité. De plus, le par. 14.06(6) fait ressortir la possibilité d'un conflit direct entre la loi fédérale et la loi provinciale. Le syndic ne peut pas obtempérer à la directive de l'AER lui indiquant de supporter les frais environnementaux dans le cadre de son administration de l'actif tout en respectant l'exigence de la *LFI* selon laquelle ces frais *ne* font *pas* partie des frais d'administration du syndic. Cela fait également apparaître le spectre de l'obligation pour les professionnels de la faillite de dépenser leurs propres fonds en application du régime de réglementation albertain, une idée que le Parlement a clairement rejetée en modifiant la *LFI* en réaction à l'arrêt *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (voir motifs de la Cour d'appel, par. 63). C'est un risque auquel l'interprétation de mon collègue ne répond pas adéquatement.

[211] Fourth, s. 14.06(2) already deals with the circumstances in which a trustee can be held personally liable for a bankrupt's environmental liabilities. Under this provision, personal liability can arise only where environmental damage occurs as a result of the trustee's gross negligence or wilful misconduct. If a risk of personal liability is, in fact, a necessary condition to disclaim under s. 14.06(4), or if protection from personal liability is the only effect of disclaimer, this would mean that the disclaimer power is available or useful only in cases where the underlying environmental condition arises after the trustee's appointment and the trustee is responsible for gross negligence or wilful misconduct.

[211] Quatrièmement, le par. 14.06(2) traite déjà des circonstances dans lesquelles le syndic peut être tenu personnellement responsable des engagements environnementaux du failli. Selon cette disposition, la responsabilité personnelle du syndic ne peut être engagée que si le dommage lié à l'environnement est imputable à sa négligence grave ou à son inconduite délibérée. Si le risque de responsabilité personnelle constitue, en fait, une condition essentielle à la renonciation prévue par le par. 14.06(4), ou si la protection contre toute responsabilité personnelle est le seul effet de la renonciation, cela signifie que le pouvoir de renonciation ne peut être exercé ou n'est utile que dans les cas où le fait sous-jacent lié à l'environnement prend naissance après la nomination du syndic et où ce dernier est responsable de négligence grave ou d'inconduite délibérée.

[212] This obvious absurdity cannot be sidestepped by trying to distinguish between liability for environmental *damage* (purportedly covered by s. 14.06(2)) and liability for *a failure to comply with an order* to remedy such damage (purportedly covered by s. 14.06(4)). This distinction is entirely artificial. If the AER issues an abandonment order in relation to a licensed property, it effectively creates liability for

[212] On ne saurait contourner ce résultat manifestement absurde en tentant d'établir une distinction entre la responsabilité découlant d'un *dommage* lié à l'environnement (qui serait visée par le par. 14.06(2)) et la responsabilité découlant du *non-respect de toute ordonnance* de réparation de ce dommage (qui serait visée par le par. 14.06(4)). Cette distinction est tout à fait artificielle. Si l'AER rend une ordonnance

the underlying condition itself — liability that would still be encompassed by s. 14.06(2). This is evident from the marginal note for s. 14.06(2), "[l]iability in respect of environmental matters", which is capacious enough to include liability that flows from a failure to comply with an environmental order. In any event, it is difficult to imagine why Parliament would intend to immunize a trustee from personal liability for an environmental *condition*, but still hold the trustee liable for a failure to comply with an *order* to remedy that exact same condition — and then further, permit the trustee to avoid that very liability by disclaiming the property, but either not permit the trustee to disclaim that property in any other circumstance or make it pointless to do so. This convoluted reasoning not only misreads s. 14.06(4), but also rewrites s. 14.06(2) in the process. It effectively creates a sector specific exemption from bankruptcy law that would prohibit many receivers and trustees that operate in the oil and gas industry from disclaiming assets (see N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online)).

[213] I also cannot accept that Parliament enacted s. 14.06(4) simply to protect trustees from personal liability in the narrow subset of circumstances not already covered by s. 14.06(2) — namely where an environmental condition or environmental damage arises after a trustee's appointment and as a result of the trustee's gross negligence or wilful misconduct — for two main reasons. Firstly, the terms of the provision itself belie this theory. The opening lines of s. 14.06(4) expressly make the limitation of liability "subject to subsection (2)". This indicates that Parliament deliberately intended subs. (2) to supersede subs. (4) in the determination of liability. Thus, where a trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee *will still be personally liable*, despite any valid disclaimer

d'abandon à l'égard d'un bien visé par un permis, il crée effectivement une responsabilité découlant du fait sous-jacent lui-même — une responsabilité qui serait toujours visée par le par. 14.06(2). Cela ressort clairement de la note marginale du par. 14.06(2), « [r]esponsabilité en matière d'environnement », qui est suffisamment vaste pour englober la responsabilité découlant du non-respect d'une ordonnance environnementale. Quoi qu'il en soit, il est difficile d'imaginer pourquoi le Parlement voudrait mettre le syndic à l'abri d'une responsabilité personnelle découlant d'un *fait* lié à l'environnement, tout en tenant néanmoins le syndic responsable du non-respect d'une *ordonnance* de réparation concernant exactement le même fait — pour ensuite permettre au syndic d'être dégagé de cette même responsabilité en renonçant au bien, mais en ne permettant pas au syndic de renoncer à ce bien dans d'autres circonstances ou en rendant inutile cette renonciation. Non seulement ce raisonnement alambiqué constitue-t-il une mauvaise interprétation du par. 14.06(4), mais il équivaut en même temps à une reformulation du par. 14.06(2). Cela revient en fait à créer une exemption sectorielle à l'application du droit de la faillite qui empêcherait les séquestres et les syndics qui exercent leurs activités dans l'industrie pétrolière et gazière de renoncer à des biens (voir N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, 3 mai 2017 (en ligne)).

[213] Je ne peux non plus accepter que le Parlement a adopté le par. 14.06(4) dans le simple but de protéger les syndics contre toute responsabilité personnelle dans le sous-ensemble restreint de circonstances qui ne sont pas déjà visées par le par. 14.06(2) — à savoir celles où un fait ou dommage lié à l'environnement survient après la nomination du syndic et à cause de sa négligence grave ou de son inconduite délibérée — pour deux raisons principales. Tout d'abord, le texte de la disposition contredit lui-même cette théorie. Les premières lignes du par. 14.06(4) limitent expressément la responsabilité « sous réserve du paragraphe (2) ». Le Parlement tenait donc à ce que le par. (2) l'emporte sur le par. (4) pour ce qui est de déterminer la responsabilité. Ainsi, le syndic ayant causé un fait ou dommage lié à l'environnement par son inconduite délibérée ou sa négligence grave

under subs. (4). Secondly, there is no evidence, or indeed any rationale, to explain why Parliament would have drafted s. 14.06(4) to protect trustees in such narrow circumstances, through the method of disclaiming property, and to shield them from liability where they cause environmental issues through their own wrongdoing.

[214] The majority of this Court accepts that, on its interpretation, no meaningful distinction can be drawn between the protection from personal liability provided by subs. (2) and that provided by subs. (4). Indeed, the majority appears to believe that such a distinction is not even necessary, accepting that "s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2)" (para. 93). However, the effect of this interpretation is to render subs. (4) entirely meaningless and redundant. Trustees would have no reason to exercise their power to disclaim assets, as the only effect of doing so would be to protect them from personal liability from which they are already fully shielded by subs. (2). Section 14.06(4) would therefore serve no purpose whatsoever within Parliament's bankruptcy regime. I cannot understand the logic of Parliament explicitly referring to, and incorporating, the ability of trustees to disclaim assets — and specifically outlining one consequence of that power — simply to mandate that such an action has no meaningful effect. We must presume that Parliament does not speak in vain and did not craft a pointless provision (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 87). It is a trite principle of statutory interpretation that every provision of a statute should be given meaning:

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; . . . it does not make the same point twice.
>
> (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43)

engagera toujours sa responsabilité personnelle, malgré toute renonciation dûment effectuée en vertu du par. (4). Ensuite, aucune preuve, ni raison en fait, n'explique pourquoi le Parlement aurait rédigé le par. 14.06(4) afin de protéger les syndics dans des situations aussi particulières, par la renonciation à des biens, et de les mettre à l'abri de leur responsabilité lorsqu'ils endommagent l'environnement par leurs propres actes répréhensibles.

[214] Les juges majoritaires reconnaissent que, d'après leur interprétation, on ne peut établir de distinction utile entre l'immunité de responsabilité personnelle accordée par le par. (2) et celle fournie par le par. (4). En effet, ils semblent croire que cette distinction n'est même pas nécessaire, acceptant que « le par. 14.06(4) n'offre pas aux syndics une protection contre la responsabilité personnelle plus large que celle fournie par le par. 14.06(2) » (par. 93). Cette interprétation a cependant pour effet de rendre le par. (4) tout à fait dénué de sens et redondant. Le syndic n'aurait aucune raison d'exercer son pouvoir de renoncer à des biens, car cette mesure ne servirait qu'à le protéger contre la responsabilité personnelle dont le par. (2) le met déjà entièrement à l'abri. Ainsi, le par. 14.06(4) n'aurait absolument aucune utilité dans le régime de faillite du Parlement. Je ne peux saisir la logique, pour le Parlement, de mentionner explicitement et d'incorporer le pouvoir du syndic de renoncer à ces biens — et d'énoncer en termes exprès une conséquence de ce pouvoir — simplement pour disposer que cette mesure n'a aucun effet utile. Nous devons présumer que le Parlement ne parle pas pour ne rien dire et qu'il n'a pas rédigé une disposition inutile (*Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610, par. 87). Un principe reconnu d'interprétation législative veut que chaque disposition d'une loi reçoive un sens :

> [TRADUCTION] On présume que chaque caractéristique d'un texte de loi a été délibérément choisie et a un rôle précis à jouer dans le cadre législatif. Le législateur n'emploie pas de termes inutiles ou dénués de sens dans ses lois; [. . .] il ne dit pas la même chose deux fois.
>
> (R. Sullivan, *Statutory Interpretation* (3e éd. 2016), p. 43)

[215] This evident absurdity cannot be avoided by suggesting that s. 14.06(4) was created to clarify to trustees that they may be required to expend the entire value of a bankrupt estate to comply with environmental orders, despite valid disclaimers. If Parliament's intent was truly to undermine the disclaimer power in this way, it is difficult to conceive of a more convoluted, tortuous and unclear method to achieve this result than s. 14.06(4). Had Parliament simply sought to make clear to trustees that disclaimer would not allow them to relieve themselves from satisfying environmental liabilities, it could easily have done so directly rather than enacting a provision that describes protection from personal liability they do not actually face.

[216] Section 14.06, when read as a whole, indicates that subs. (4) does more than merely protect trustees from personal liability. My colleague has declined to even consider the remaining subsections of s. 14.06 that I have discussed, other than subs. (2). Nonetheless, he says that the plain meaning of a provision cannot be "contorted to make its scheme more coherent" (para. 101). The conclusion that would result from such an approach would be that Parliament simply intended to craft a largely incoherent framework. I disagree that we should reach this conclusion here. As Dickson J. (as he then was) stated in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 676: "We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities." A determination that Parliament designed s. 14.06 as an incoherent whole is inconsistent with the role of the courts in statutory interpretation, which is to read the words of a statute in their entire context, harmoniously with the scheme of the statute. As Ruth Sullivan has noted:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically,

[215] Il est impossible d'éviter cette absurdité évidente en affirmant que le par. 14.06(4) visait à préciser au syndic qu'il devait dépenser toute la valeur de l'actif d'un failli pour se conformer à des ordonnances environnementales en dépit de renonciations valides. Si le Parlement avait vraiment eu l'intention de miner ainsi le pouvoir de renonciation, il est difficile d'imaginer un moyen plus alambiqué, tortueux et vague d'atteindre ce résultat que le par. 14.06(4). Si le Parlement avait simplement voulu préciser au syndic que la renonciation ne leur permettrait pas d'être dégagés de l'obligation de respecter les engagements environnementaux, il lui aurait été facile de le faire directement, plutôt que d'adopter une disposition décrivant une immunité de responsabilité personnelle dont le syndic n'a pas besoin.

[216] Lu dans son ensemble, l'art. 14.06 indique que le par. (4) ne se borne pas à dégager les syndics de toute responsabilité personnelle. Mon collègue a même refusé d'examiner les autres paragraphes de l'art. 14.06 dont j'ai parlé, sauf le par. (2). Peu importe, dit-il, on ne peut « déforme[r] le sens clair d'une disposition pour en rendre le régime plus cohérent » (par. 101). Cette approche mènerait à la conclusion selon laquelle le Parlement voulait simplement concevoir un cadre incohérent en grande partie. Je suis en désaccord avec cette conclusion. Tel que l'a mentionné le juge Dickson (plus tard juge en chef) dans *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, p. 676 : « Nous devons avoir envers le Parlement la courtoisie de ne pas présumer aisément qu'il a édicté des incohérences ou des absurdités ». La conclusion que le Parlement a conçu l'art. 14.06 comme un tout incohérent est incompatible avec la tâche confiée aux tribunaux dans l'interprétation législative, laquelle consiste à lire les termes d'une loi dans leur contexte global en harmonie avec l'économie de la loi. Comme l'a fait remarquer Ruth Sullivan :

> [TRADUCTION] Les dispositions d'une loi sont présumées fonctionner ensemble, tant logiquement que téléologiquement, comme les diverses parties d'un tout. Les parties sont présumées s'assembler logiquement pour former un cadre rationnel, intrinsèquement cohérent; et parce que ce cadre a un objet, ses éléments sont aussi

each contributing something toward accomplishing the intended goal.

The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [Footnote omitted.]

(*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337; see also *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, at para. 47.)

[217] Where it is possible to read the provisions of a statute — especially the various subsections of a single section — in a consistent manner, that interpretation is to be preferred over one that results in internal inconsistency. In my view, as I have set out above, it is possible to read s. 14.06(4) coherently with the remainder of the section. This is the interpretation that Parliament is presumed to have intended. In this case, I see no compelling reason to depart from this presumption.

[218] My colleague's analysis is reminiscent of the strictly textual or literal approach to statutory interpretation — the "plain meaning rule" — that this Court squarely rejected in *Rizzo*. This is apparent from the fact that he relies strictly on what he alleges to be the "clear and unambiguous" wording of s. 14.06(4), while discounting the context of the provision. With respect, I am of the view that the Court should rely on the predominant and well-established modern approach to statutory interpretation: the words of an Act must 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"' (*Rizzo*, at para. 21; *Bell ExpressVu*, at para. 26, both quoting Driedger, at p. 87).

[219] In *Rizzo*, Iacobucci J. explained that "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). The Court of Appeal in *Rizzo*, which had adopted the plain

présumés s'appliquer ensemble de façon dynamique, chacun contribuant à la réalisation de l'objectif visé.

La présomption de cohérence se traduit également par une présomption d'absence d'incompatibilité intrinsèque. Il est présumé que l'ensemble des textes législatifs édictés par une législature ne comporte pas de contradictions ou d'incohérences et que chaque disposition peut être appliquée sans entrer en conflit avec une autre. [Note en bas de page omise.]

(*Sullivan on the Construction of Statutes* (6e éd. 2014), p. 337; voir aussi *R. c. L.T.H.*, 2008 CSC 49, [2008] 2 R.C.S. 739, par. 47.)

[217] Quand il est possible d'interpréter les dispositions d'une loi — surtout les divers paragraphes d'un même article — de façon cohérente, il faut privilégier cette interprétation à une interprétation qui donne lieu à une incohérence intrinsèque. À mon avis, et comme je l'ai déjà dit, il est possible de lire le par. 14.06(4) de façon cohérente avec le reste de l'article. Voilà l'interprétation que le Parlement est présumé avoir donnée à ce paragraphe. En l'espèce, je ne vois aucune raison impérieuse de s'écarter de cette présomption.

[218] L'analyse de mon collègue rappelle la méthode purement textuelle ou littérale d'interprétation des lois — la « règle du sens ordinaire » — que notre Cour a rejetée sans équivoque dans *Rizzo*. Cela ressort du fait qu'il se fonde strictement sur ce qu'il prétend être le texte « clai[r] et non ambig[u] » du par. 14.06(4), tout en ne tenant pas compte du contexte de la disposition. Avec égards, j'estime que la Cour devrait recourir à la méthode prédominante et bien établie d'interprétation des lois : il faut lire les termes d'une loi « dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'[économie] de la loi, l'objet de la loi et l'intention du législateur » (*Rizzo*, par. 21; *Bell ExpressVu*, par. 26, citant tous les deux Driedger, p. 87).

[219] Dans l'arrêt *Rizzo*, le juge Iacobucci a expliqué que « l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi » (par. 21). La Cour d'appel saisie de l'affaire *Rizzo*, qui avait retenu

meaning interpretation, "did not pay sufficient attention to the scheme of the [Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23).

[220] In interpreting s. 14.06(4) of the *BIA*, the majority similarly relies on the supposed plain meaning of the words of the provision but does not pay sufficient attention to the scheme of s. 14.06 as a whole; nor does it appropriately recognize the context of the words.

[221] Even if we were to leave aside the wording of the provision itself and its immediate statutory context, a purposive interpretation would lead to the same result. Consider the consequences of the analysis of the AER or the analysis of my colleague in other cases like this, where an oil company's environmental liabilities exceed the value of its realizable assets. Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability. Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that *none* of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase. This is a far cry from the objectives of the 1997 amendments to the *BIA* as discussed in Parliament, which were to "encourage [insolvency professionals] to accept mandates" and to "reduce the number of abandoned sites" (Standing Committee on Industry, June 11, 1996, at 15:49). It is difficult to imagine that Parliament would have intended a construction

l'interprétation fondée sur le sens ordinaire, « n'a pas accordé suffisamment d'attention à l'économie de la [Loi], à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement » (par. 23).

[220] En interprétant le par. 14.06(4) de la *LFI*, la majorité s'appuie elle aussi sur le supposé sens ordinaire des mots de la disposition mais n'accorde pas suffisamment d'attention à l'économie de l'art. 14.06 dans son ensemble; elle ne prend pas non plus adéquatement en compte le contexte de ces mots.

[221] Même si nous faisions abstraction du libellé de la disposition elle-même et de son contexte législatif immédiat, une interprétation téléologique mènerait au même résultat. Considérons les conséquences de l'analyse de l'AER ou de celle de mon collègue dans d'autres cas comme celui qui nous occupe, où les engagements environnementaux de la société pétrolière excèdent la valeur de son actif réalisable. Les professionnels de l'insolvabilité, sachant d'avance qu'ils peuvent être contraints de canaliser tous les autres éléments d'actif vers ces engagements environnementaux (soit parce qu'ils ne peuvent renoncer à des biens ayant une valeur négative en l'absence du risque d'engager leur responsabilité personnelle, soit parce que leur renonciation n'empêchera pas cette éventualité de se produire), n'accepteront jamais de mandats au départ. Il s'agit là d'une pratique commerciale sensée : si toute la valeur réalisable de l'actif doit être dirigée vers ces engagements environnementaux, et qu'il ne reste rien pour couvrir les frais administratifs, les professionnels de l'insolvabilité n'auront rien à gagner — et beaucoup à perdre — en acceptant d'exercer les fonctions de séquestre et de syndic, indépendamment de la question de savoir s'ils sont protégés contre toute responsabilité personnelle. Les débiteurs tout comme les créanciers, sachant qu'il en est ainsi, n'auront aucune raison de même présenter une requête de mise en faillite. Il s'ensuit qu'*aucun* des biens de l'actif du failli ne sera vendu — pas même les puits de valeur de la société pétrolière — et que le nombre de biens orphelins augmentera. Cela est bien loin des objectifs des modifications apportées à la *LFI* en 1997 qui ont été débattues au Parlement

of s. 14.06(4) that explicitly undermines its stated purposes.

[222] The majority appears to accept that the purposes of s. 14.06(4) of the *BIA* included encouraging insolvency professionals to accept mandates in cases where there may be environmental liabilities (paras. 80-81). However, merely protecting trustees from personal liability in such cases will fail to achieve Parliament's desired result. As I have explained, even where prospective trustees face no risk of personal liability, they will be reluctant to accept mandates if provincial entities can require the entire value of a bankrupt's realizable estate to be applied to satisfy environmental obligations.

[223] Since I have explained that s. 14.06(4) provides trustees with the power to disclaim assets even where there is no risk of personal liability, it is now necessary to briefly consider whether this power was available to GTL on the facts of this case. Here, the statutory conditions to the exercise of this power were met. The Abandonment Orders clearly relate to the remediation of an "environmental condition" (or "tout fait . . . lié à l'environnement" in the French version of the *BIA*, which can be translated literally as "any fact . . . related to the environment"). Indeed, even the AER and the OWA have never contested this point. In response to such orders, GTL was therefore entitled to exercise the disclaimer power provided for in s. 14.06(4).

(2) Section 14.06(4) Applies to Alberta's Oil and Gas Industry

[224] The AER raised an additional argument that the right of disclaimer is entirely inapplicable in the context of the statutory regime governing the oil and gas industry due to the role played by third-party surface landowners and the nature of the property

et qui devaient « encourager [les professionnels de l'insolvabilité] à accepter des mandats » et « réduire le nombre de sites abandonnés » (Comité permanent de l'industrie, 11 juin 1996 à 15 h 49). Il est difficile d'imaginer que le Parlement aurait privilégié une interprétation du par. 14.06(4) qui nuit explicitement aux objectifs qu'il a énoncés.

[222] La majorité semble reconnaître que le par. 14.06(4) de la *LFI* a eu notamment pour objectif d'encourager les professionnels de l'insolvabilité à accepter des mandats dans des cas où il existe peut-être des engagements environnementaux (par. 80-81). Or, le simple fait de mettre les syndics à l'abri de la responsabilité personnelle en pareil cas ne permettra pas d'atteindre le résultat escompté par le Parlement. Comme je l'ai expliqué, même lorsque les syndics potentiels ne courent aucun risque d'engager leur responsabilité personnelle, ils seront réticents à accepter des mandats si des entités provinciales peuvent exiger que toute la valeur de l'actif réalisable d'un failli serve à acquitter des obligations environnementales.

[223] Ayant expliqué que le par. 14.06(4) confère aux syndics le pouvoir de renoncer à des biens même en l'absence d'un risque de responsabilité personnelle, je dois maintenant me demander brièvement si GTL disposait de ce pouvoir à la lumière des faits de la présente affaire. En l'espèce, les conditions statutaires préalables à l'exercice de ce pouvoir étaient réunies. Les ordonnances d'abandon se rapportent clairement à la réparation de « tout fait [. . .] lié à l'environnement » (dans la version française de la *LFI*) ou d'une « condition environnementale » (une traduction littérale du terme « *environmental condition* » dans la version anglaise de la *LFI*). En effet, même l'AER et l'OWA n'ont jamais contesté ce point. En réaction à de telles ordonnances, GTL pouvait donc exercer le pouvoir de renonciation prévu au par. 14.06(4).

(2) Le paragraphe 14.06(4) s'applique à l'industrie pétrolière et gazière de l'Alberta

[224] L'AER a également soutenu que le droit de renonciation ne s'applique aucunement dans le contexte du régime législatif régissant l'industrie pétrolière et gazière en raison du rôle joué par les tiers propriétaires de droits de surface et de la nature

interests involved which rendered the Crown's super priority under s. 14.06(7) impractical. Martin J.A. (as she then was), writing in dissent at the Alberta Court of Appeal, reached the same conclusion. With respect, I cannot agree. Parliament did not make the disclaimer power in s. 14.06(4) conditional on the availability of the Crown's super priority.

[225] In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language. The trustee is permitted to disclaim "any interest" in "any real property". While Redwater's AER-issued licences may not be real property, all of the parties accept that *profits à prendre* and surface leases can be characterized as real property interests. In the context of this case, it is these interests that GTL truly sought to disclaim. The AER argued that s. 14.06(4) permits the disclaimer only of "true real property", meaning land currently or previously owned by the bankrupt, without any third-party landowners. This interpretation is not consistent with the actual language used by Parliament. Had Parliament intended to restrict the disclaimer power solely to fee simple interests, it could have stated this, rather than referring to "any interest in any real property".

[226] Further, the Alberta oil and gas industry is far from the only natural resource sector in which companies traditionally operate on the land of third parties, whether the Crown or private landowners. The potential liability of trustees would explode if the mere presence of these third-party landowners rendered the disclaimer power in s. 14.06(4) entirely inapplicable. The language of the section is clearly broad enough to capture the statutory regime governing Alberta's oil and gas sector.

(3) Conclusion on Operational Conflict

[227] In light of this interpretation of s. 14.06(4), I agree with both courts below that there is an operational conflict to the extent that Alberta's statutory

des droits de propriété en cause qui empêchaient la Couronne de se prévaloir de la superpriorité dont elle jouit en vertu du par. 14.06(7). La juge Martin (maintenant juge de notre Cour), dissidente en Cour d'appel de l'Alberta, est parvenue à la même conclusion. Avec égards, je ne peux partager son avis. Le Parlement n'a pas rendu le pouvoir de renonciation prévu au par. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité.

[225] En décidant des intérêts auxquels peut renoncer un syndic en vertu du par. 14.06(4), le Parlement a utilisé des mots exceptionnellement larges. Il est permis au syndic de renoncer à « tout intérêt » sur « le bien réel ». Bien que les permis réglementaires de Redwater ne soient peut-être pas des biens réels, toutes les parties reconnaissent que les profits à prendre et droits de surface peuvent être qualifiés d'intérêts sur des biens réels. Dans le contexte de la présente affaire, ce sont les droits auxquels GTL veut vraiment renoncer. L'AER a soutenu que le par. 14.06(4) autorise uniquement la renonciation à de « véritables biens réels », soit un terrain qui appartient ou appartenait au failli, sans tiers propriétaires fonciers. Cette interprétation ne s'accorde pas avec les mots employés par le Parlement. Si ce dernier avait voulu ne restreindre le pouvoir de renonciation qu'aux intérêts en fief simple, il aurait pu le dire plutôt que de parler de « tout intérêt sur le bien réel ».

[226] De plus, l'industrie pétrolière et gazière de l'Alberta est loin d'être le seul secteur de ressources naturelles où les sociétés exercent depuis longtemps leurs activités sur le terrain de tiers, qu'il s'agisse de la Couronne ou de propriétaires privés. La responsabilité potentielle des syndics exploserait si la simple présence de ces tiers propriétaires fonciers écartait complètement l'application du pouvoir de renonciation prévu au par. 14.06(4). Le texte du paragraphe est manifestement assez large pour embrasser le régime législatif régissant le secteur pétrolier et gazier de l'Alberta.

(3) Conclusion sur le conflit d'application

[227] Compte tenu de cette interprétation du par. 14.06(4), je suis d'accord avec les deux tribunaux d'instance inférieure pour dire qu'il y a un

regime holds receivers and trustees liable as "licensees" in relation to the disclaimed assets (see chambers judge reasons, at para. 181; C.A. reasons, at para. 57). This conflict is far from hypothetical. Under federal law, GTL is entitled to disclaim the bankrupt's assets affected by the Abandonment Orders. Under the *BIA*, GTL cannot be compelled to take action with respect to properties it has validly disclaimed, since the act of disclaimer relieves it of any rights, interests and liabilities in respect of the disclaimed properties. But under provincial law, the AER can order GTL to abandon the disclaimed assets, among other things (see para. 11). This is exactly what happened here. Not only did the AER order GTL to complete the work, but it also made the sale of Redwater's valuable assets conditional on GTL either abandoning the non-producing properties itself or packaging those properties with the estate's valuable assets for the purposes of any sale. In doing so, the AER impermissibly disregarded the effect of GTL's disclaimers. This remains the case, irrespective of whether GTL could (or would) ever be held personally liable for the costs of abandoning the properties above and beyond the entire value of the estate.

[228] My colleague claims that the AER "has never attempted to hold a trustee personally liable" (para. 107). What is clear is that, on the facts of this case, the AER directly sought to require GTL to perform or pay for the abandonment work itself, whether this is referred to as personal liability or not. It is critical to observe that this litigation began when the AER filed an application seeking to compel GTL to comply with its obligations as a licensee, including the obligation to abandon the non-producing properties. Practically speaking, this amounted to an effort to hold GTL personally liable. Where else would the money required to abandon the disclaimed properties have come from? The value of the estate as a whole was negative, and the AER refused to permit GTL to sell the valuable properties on their own. No purchaser would have agreed to buy all of the assets together. Therefore,

conflit d'application dans la mesure où le régime législatif albertain tient les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation (voir les motifs du juge en cabinet, par. 181; motifs de la Cour d'appel, par. 57). Ce conflit est loin d'être hypothétique. En vertu de la loi fédérale, GTL peut renoncer aux biens du failli touchés par les ordonnances d'abandon. Selon la *LFI*, GTL ne peut être contraint de prendre des mesures à l'égard des biens auxquels il a valablement renoncé puisque l'acte de renonciation le libère de tous les droits, intérêts et obligations à l'égard des biens visés par la renonciation. Mais selon la loi provinciale, l'AER peut notamment ordonner à GTL d'abandonner les biens ayant fait l'objet d'une renonciation (voir par. 11). C'est exactement ce qui s'est passé en l'espèce. Non seulement l'AER a-t-il ordonné à GTL de mener les travaux à terme, mais il a aussi rendu la vente des biens de valeur de Redwater conditionnelle à l'abandon des biens inexploités par GTL lui-même ou de la vente de ces biens avec les biens de valeur de l'actif comme un tout unique. En agissant ainsi, l'AER a indûment fait abstraction de l'effet des renonciations de GTL. Cela demeure vrai indépendamment de la question de savoir si GTL pouvait (ou allait) être tenue personnellement responsable des frais d'abandon des biens susmentionnés au-delà de la valeur totale de l'actif.

[228] Mon collègue prétend que l'AER « n'a jamais essayé d'engager la responsabilité personnelle d'un syndic » (par. 107). Ce qui est clair, c'est qu'à la lumière des faits de l'espèce, l'AER a directement tenté de contraindre GTL à exécuter ou à payer lui-même les travaux d'abandon, que l'on qualifie cela de responsabilité personnelle ou non. Il est primordial de faire remarquer que le présent litige a commencé lorsque l'AER a déposé une demande visant à contraindre GTL à respecter ses obligations en tant que titulaire de permis, notamment l'obligation d'abandonner des biens inexploités. Sur le plan pratique, cela constituait une tentative de tenir GTL personnellement responsable. Où d'autre aurait-on pris l'argent nécessaire à l'abandon des biens visés par les renonciations? La valeur de l'actif dans son ensemble était négative, et l'AER a refusé de permettre à GTL de vendre isolément les biens de

GTL had no way to recoup any value from the estate, as Redwater was bankrupt and no longer generating income. The *only* source of funds, in this scenario, was GTL itself. This is why the AER filed suit to compel GTL to carry out Redwater's abandonment obligations. As this makes clear, I cannot agree with the suggestion that the provincial regime has never been utilized to hold trustees personally liable in contravention of federal law. That is precisely what happened in this very case.

[229] This conclusion cannot be avoided by referring to the fact that, pursuant to orders of the Alberta courts, GTL has already sold the valuable Redwater assets and the proceeds are being held in trust pending the outcome of this appeal (see majority reasons, at para. 108). This is precisely the result the AER sought to prevent by precluding GTL from selling only the valuable properties, without the disclaimed ones. GTL was able to do so only as a direct result of this litigation.

[230] My colleague states that, if the AER "were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict" (para. 107). Thus, even on my colleague's interpretation of s. 14.06 — which I do not accept — an operational conflict does exist on the facts of this case, specifically as a result of the AER's application to the Alberta Court of Queen's Bench seeking to have GTL personally satisfy the environmental obligations associated with the disclaimed assets.

[231] All of that being said, creditors with provable claims can still seek payment in accordance with the *BIA*'s priority scheme (*Abitibi*, at para. 98). As I discuss below, the AER's environmental claims remain valid as against the Redwater estate, and it may pursue those claims through the normal bankruptcy

valeur. Personne n'aurait consenti à acheter les biens tous ensemble. GTL ne disposait par conséquent d'aucun moyen de recouvrer une quelconque valeur de l'actif, car Redwater était en faillite et ne générait plus aucun revenu. La *seule* source de fonds, dans ce scénario, était GTL lui-même. C'est pourquoi l'AER a intenté une poursuite visant à contraindre GTL à exécuter les obligations d'abandon de Redwater. Il est donc clair que je ne puis souscrire à l'idée que le régime provincial n'a jamais été utilisé pour tenir les syndics personnellement responsables en violation de la loi fédérale. C'est justement ce qui s'est passé dans la présente affaire.

[229] On ne peut éviter cette conclusion en invoquant le fait que, conformément aux ordonnances des tribunaux albertains, GTL a déjà vendu les biens de valeur de Redwater et que le produit de leur vente est détenu en fiducie en attendant l'issue du présent pourvoi (voir les motifs de la majorité, par. 108). C'est exactement le résultat que l'AER a cherché à prévenir en empêchant GTL de vendre uniquement les biens de valeur, sans les biens faisant l'objet de la renonciation. GTL n'est parvenu à le faire qu'à la suite du présent litige.

[230] Mon collègue dit que, si l'AER « devait tenter d'obliger personnellement GTL à se conformer aux ordonnances d'abandon, cela engenderait un conflit d'application entre, d'une part, l'*OGCA* et la *Pipeline Act* et, d'autre part, le par. 14.06(2) de la *LFI*, ce qui rendrait les deux premières lois inopérantes dans la mesure de ce conflit » (par. 107). Ainsi, même d'après l'interprétation donnée par mon collègue à l'art. 14.06 — que je ne retiens pas — il existe bel et bien un conflit d'application eu égard aux faits de l'espèce, surtout du fait de la demande présentée par l'AER à la Cour du Banc de la Reine de l'Alberta pour que GTL respecte personnellement les obligations environnementales associées aux biens faisant l'objet de la renonciation.

[231] Tout cela étant dit, les créanciers ayant des réclamations prouvables peuvent toujours demander un paiement conformément au régime de priorité établi par la *LFI* (*Abitibi*, par. 98). Comme je l'explique plus loin, les réclamations environnementales de l'AER demeurent valides à l'égard de l'actif de

process. Thus, even if s. 14.06(4) does not permit GTL to disclaim the non-producing wells and relieve itself of the environmental obligations associated with them, it is nevertheless the case that the AER cannot compel GTL to satisfy its claims ahead of those of Redwater's secured creditors.

B. *Frustration of Purpose*

[232] The second branch of the paramountcy test is frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will nevertheless be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose (*Moloney*, at para. 25; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at pp. 154-55; *Canadian Western Bank*, at para. 73). The focus of the analysis is on the effect of the provincial legislation or provisions, not its purpose (*Moloney*, at para. 28; *Husky Oil*, at para. 39).

[233] This Court has repeatedly recognized that one of the purposes of the *BIA* is "the equitable distribution of the bankrupt's assets among his or her creditors" (*Moloney*, at para. 32; *Husky Oil*, at para. 7). It achieves this goal through a collective proceeding model — one that maximizes creditors' total recovery and promotes order and efficiency by distributing the estate's assets in accordance with a designated priority scheme (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22). All claims that are "provable in bankruptcy" are subject to this priority scheme. Exercises of provincial power that have the effect of altering bankruptcy priorities are therefore inoperative because they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime (*Abitibi*, at para. 19; *Husky Oil*, at para. 32).

[234] The question here is whether the environmental claims asserted by the AER (i.e., the Abandonment Orders) are provable in bankruptcy. If they

Redwater, et il peut faire valoir ces réclamations dans le cadre du processus normal de faillite. Donc, même si le par. 14.06(4) n'autorise pas GTL à renoncer aux puits inexploités et à se libérer des obligations environnementales qui s'y rattachent, il n'en demeure pas moins que l'AER ne peut pas contraindre GTL à régler ses propres réclamations avant celles des créanciers garantis de Redwater.

B. *Entrave à la réalisation d'un objet fédéral*

[232] Le second volet du test de la prépondérance est l'entrave à la réalisation d'un objet fédéral. Même lorsqu'il est à proprement parler possible de se conformer à la fois à la loi fédérale et à la loi provinciale, la loi ou les dispositions provinciales seront néanmoins rendues inopérantes dans la mesure où elles ont pour effet d'entraver la réalisation d'un objet valide d'une loi fédérale (*Moloney*, par. 25; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121, p. 154-155; *Banque canadienne de l'Ouest*, par. 73). L'analyse est axée sur l'effet de la loi ou des dispositions provinciales, et non sur son objet (*Moloney*, par. 28; *Husky Oil*, par. 39).

[233] La Cour a maintes fois reconnu que l'un des objets de la *LFI* est « le partage équitable des biens du failli entre ses créanciers » (*Moloney*, par. 32; *Husky Oil*, par. 7). Elle réalise cet objectif au moyen d'un modèle de procédure collective — modèle qui maximise le recouvrement intégral au profit des créanciers et fait régner l'ordre et l'efficacité en partageant les biens de l'actif conformément à un régime de priorité désigné (*Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379, par. 22). Toutes les réclamations « prouvables en matière de faillite » sont assujetties à ce régime de priorité. Les exercices d'un pouvoir provincial ayant pour effet de modifier les priorités en matière de faillite sont donc inopérants parce qu'ils entravent la réalisation de l'objectif du Parlement d'assurer le partage équitable des biens de l'actif conformément au régime établi par la loi fédérale (*Abitibi*, par. 19; *Husky Oil*, par. 32).

[234] Il s'agit de savoir en l'espèce si les réclamations environnementales que fait valoir l'AER (c.-à-d. les ordonnances d'abandon) sont prouvables

are, then the AER is not permitted to assert those claims outside of the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme. Rather, it must abide by the *BIA* and seek recovery from the estate through the normal bankruptcy procedures (*Abitibi*, at para. 40).

[235] In *Abitibi,* this Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy: "First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation" (para. 26 (emphasis in original)). Since there is no dispute that Redwater's environmental obligations arose before it became bankrupt, I limit my analysis below to the first and third prongs of the *Abitibi* test: whether the liability is owed to a creditor, and whether it is possible to attach a monetary value to that liability.

[236] The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. Deschamps J., writing for a majority of the Court, suggested that this is not an exacting requirement: "The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied" (para. 27 (emphasis added)). Though I would not go so far as to suggest that the analysis under the first prong is merely perfunctory or pro forma, and circumstances may well exist where it is not satisfied, Deschamps J. made clear in *Abitibi* that "[m]ost environmental regulatory bodies can be creditors", again stressing that government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties (para. 27 (emphasis added)).

en matière de faillite. Si elles le sont, l'AER n'est pas autorisé à faire valoir ces réclamations en dehors du processus de faillite et avant les créanciers garantis de Redwater, car cela entraverait la réalisation de l'objet du régime de priorité fédéral. Il doit plutôt se conformer à la *LFI* et tenter de recouvrer de l'actif par le truchement de la procédure normale de faillite (*Abitibi*, par. 40).

[235] Dans *Abitibi*, la Cour a établi un test à trois volets, fondé sur le libellé de la *LFI*, pour déterminer si une réclamation est prouvable en matière de faillite : « Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation » (par. 26 (en italique dans l'original)). Comme personne ne conteste le fait que les obligations environnementales de Redwater ont pris naissance avant que cette dernière ne devienne faillie, je limiterai mon analyse ci-dessous aux premier et troisième volets du test établi dans *Abitibi* : la question de savoir si l'engagement est dû à un créancier, et celle de savoir s'il est possible d'attribuer une valeur pécuniaire à cet engagement.

[236] Le premier volet du test *Abitibi* pose la question de savoir si la dette, l'engagement ou l'obligation en cause sont dus par une entité faillie à un créancier. S'exprimant au nom des juges majoritaires, la juge Deschamps a laissé entendre qu'il ne s'agit pas d'une exigence rigoureuse : « [à] cette étape, la seule question à trancher est de savoir si l'organisme administratif a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. Lorsqu'il le fait, il s'identifie alors comme créancier et la condition de cette étape est respectée » (par. 27 (je souligne)). Je n'irais pas jusqu'à dire que l'analyse à effectuer au premier volet est une simple analyse superficielle ou *pro forma* et il peut fort bien exister des cas où il n'est pas satisfait à ce volet, mais la juge Deschamps indique clairement dans *Abitibi* que « [l]a plupart des organismes administratifs [environnementaux] peuvent agir à titre de créanciers » (par. 27 (je souligne)), soulignant encore une

Even Martin J.A., writing in dissent at the Court of Appeal in this case, acknowledged that "*Abitibi* cast[s] the creditor net widely" (para. 186). The language of *Abitibi* admits of no ambiguity, uncertainty or doubt in this regard.

[237] The majority suggests that applying *Abitibi* on its own terms will make it "impossible for a regulator *not* to be a creditor" (para. 136 (emphasis in original)). Without seeking to speculate on all possible scenarios, I would simply note that there will be many obvious circumstances in which regulators are not even exercising enforcement powers against particular debtors and the analysis from *Abitibi* can be concluded at a very early stage. Provincial regulators do many things that do not qualify as enforcement mechanisms against specific parties. For example, a regulatory agency may publish guidelines for the benefit of all actors in a certain industry or it may issue a license or permit to an individual. In such cases, any discussion of frustrating federal purposes will not go far. However, as Deschamps J. expressly acknowledged, the first prong of the test will have very broad application. This Court should not feel compelled to limit its scope when *Abitibi* employed clear language in full recognition of its wide-ranging effects.

[238] Here, there is no doubt that the AER exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. The reasoning is simple: Redwater owes a debt to the AER, and the AER has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or GTL, as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable

fois que les entités gouvernementales ne sauraient systématiquement se soustraire aux exigences en matière de priorité de la loi fédérale sur la faillite sous le couvert de l'obligation de faire respecter les devoirs publics. Même la juge d'appel Martin, dans les motifs dissidents qu'elle a rédigés, a reconnu que [TRADUCTION] « l'arrêt *Abitibi* ratisse large en ce qui a trait à la qualité de créancier » (par. 186). Le texte de cet arrêt ne laisse place à aucune ambiguïté, incertitude ou doute à cet égard.

[237] Les juges majoritaires soutiennent que, si l'on applique tel quel l'arrêt *Abitibi*, cela « exclut la possibilité qu'un organisme de réglementation *ne* soit *pas* un créancier » (par. 136 (en italique dans l'original)). Sans vouloir conjecturer tous les scénarios possibles, je ferai simplement remarquer qu'il existe de nombreuses situations évidentes où des organismes de réglementation n'exercent même pas de pouvoirs d'application à l'encontre de débiteurs en particulier, et l'analyse tirée d'*Abitibi* peut être menée à terme très tôt. Les organismes de réglementation font bien des choses qui ne participent pas de mécanismes d'application à l'encontre de certaines parties. Par exemple, un organisme de réglementation peut publier des lignes directrices pour le bien de tous les acteurs d'une industrie donnée, ou encore délivrer une licence ou un permis à un particulier. Dans ces cas, toute analyse de l'entrave à la réalisation d'objets fédéraux sera brève. Or, comme l'a explicitement reconnu la juge Deschamps, le premier volet du test sera d'application très large. Notre Cour ne devrait pas se sentir contrainte d'en restreindre la portée alors que des termes clairs sont employés dans cet arrêt pour reconnaître sans réserve ses vastes effets.

[238] En l'espèce, il ne fait aucun doute que l'AER a exercé son pouvoir d'appliquer la loi à l'encontre d'une débitrice lorsqu'il a rendu les ordonnances enjoignant à Redwater d'accomplir les travaux environnementaux sur les biens inexploités. Le raisonnement est simple : Redwater a une dette envers l'AER, et l'AER a tenté de recouvrer cette créance en rendant les ordonnances d'abandon, qui enjoignent à Redwater d'honorer son obligation. Si Redwater (ou GTL, en tant que séquestre et syndic) ne respecte pas ces ordonnances — au détriment des autres

under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, the AER itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).

[239] The conclusion that I reach with respect to the AER's status as a creditor follows from a straightforward application of *Abitibi*. My colleague, however, seeks to reformulate this prong of the test. He suggests that a regulator is acting as a creditor only where it is not acting in the public interest and where the regulator itself, or the general revenue fund, is the beneficiary of the environmental obligation. He endorses the holding allegedly made in *Northern Badger* that "a regulator enforcing a public duty by way of non-monetary order is not a creditor" (para. 130).

[240] In my view, it is neither appropriate nor necessary in this case to attempt to redefine this prong of *Abitibi* and narrow the broad definition of "creditor" provided by Deschamps J. This Court should leave her clear description of the provable claim standard to stand on its own terms. Respectfully, I disagree with the manner in which the majority is attempting to reformulate the "creditor" analysis, for a number of reasons.

[241] Firstly, I do not believe that this case represents an appropriate opportunity to revisit the "creditor" stage of the *Abitibi* test. The AER conceded in both of the courts below that it was in fact a creditor of GTL. As a direct result of these concessions, neither the Alberta Court of Queen's Bench nor the majority of the Court of Appeal directly addressed this issue; instead, they merely provided cursory comments. This issue appears to have been raised for the first time by Martin J.A. in her dissenting judgment. However, even her analysis is relatively brief, comprising only three paragraphs and consisting mainly of the statement that the costs of

créanciers de l'actif — elle peut être tenue responsable en application de la loi provinciale. Il s'agit, par définition, de l'exercice d'un pouvoir d'appliquer la loi, ce qui est précisément ce que décrit l'arrêt *Abitibi*. En fait, l'AER a lui-même concédé ce point *à deux reprises* — la première fois devant la Cour du Banc de la Reine, et la deuxième fois devant la Cour d'appel (motifs du juge en cabinet, par. 164; motifs de la Cour d'appel, par. 73).

[239] La conclusion que je tire quant au statut de créancier de l'AER découle d'une application pure et simple de l'arrêt *Abitibi*. Mon collègue, en revanche, cherche à reformuler ce volet du critère. Il soutient qu'un organisme de réglementation agit comme créancier seulement lorsqu'il ne le fait pas dans l'intérêt public et lorsque l'organisme lui-même, ou le Trésor, est le bénéficiaire de l'obligation environnementale. Il fait sienne la conclusion qui aurait été tirée dans *Northern Badger* selon laquelle « un organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier » (par. 130).

[240] À mon sens, il n'est ni approprié ni nécessaire en l'espèce d'essayer de redéfinir ce volet du critère *Abitibi* et de restreindre le large sens attribué par la juge Deschamps au mot « créancier ». La Cour devrait s'en tenir à la description claire que fait la juge Deschamps de la norme de la réclamation prouvable. Avec égards, je ne puis me rallier à la façon dont les juges majoritaires tentent de reformuler l'analyse relative au « créancier », et ce, pour plusieurs raisons.

[241] Premièrement, je ne crois pas que la présente affaire soit une bonne occasion de revoir l'étape « créancier » du critère *Abitibi*. L'AER a concédé devant les deux tribunaux d'instance inférieure qu'il était en effet un créancier de GTL. Ces concessions ont pour conséquence directe que la question n'a été abordée directement ni par la Cour du Banc de la Reine de l'Alberta ni par les juges majoritaires de la Cour d'appel, qui se sont plutôt contentés de formuler de brefs commentaires. Cette question semble avoir été soulevée pour la première par la juge d'appel Martin dans ses motifs dissidents. Toutefois, même son analyse est relativement brève, ne compte

abandonment are "not owed to the Regulator, or to the province" (para. 185). While it is true that the parties briefly addressed this issue in their written and oral submissions to this Court, it was clearly not a substantial focus of their arguments. Without the benefit of considered reasons from the lower courts or thorough submissions on the continued application of the first prong of the test formulated in *Abitibi*, this Court should not attempt to significantly alter it.

[242] Secondly, the majority states that no fairness concerns are raised by disregarding the AER's concessions below. It makes this point predominantly because the issue was raised and argued before this Court and because of the AER's unilateral assertion in its letter to GTL in May 2015. However, it is important to note that the effect of the AER's concessions was that GTL and ATB Financial were no longer required to adduce any evidence on this issue (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (5th ed. 2018), at p. 1387). This point is important given that the majority's reformulation of the "creditor" requirement under the first prong of the test is highly fact-specific and dependent on the circumstances of the particular case. As a direct result of the AER's concession in the Alberta Court of Queen's Bench, we cannot know what evidence GTL or ATB Financial could have adduced on this issue. Therefore, there may indeed be real prejudice occasioned to these parties by disregarding the AER's concession at this point in time.

[243] Thirdly, my colleague relies on the fact that the chambers judge in *Abitibi* found that the Province had already expropriated three of the five sites for which it issued remediation orders and was likely using the orders as a means to offset AbitibiBowater's NAFTA claims. While the chambers judge did in fact make these findings, they were inconsequential to Deschamps J.'s analysis on the "creditor" prong of the test. When applying the test to the facts of

que trois paragraphes et se limite principalement à l'affirmation portant que les coûts liés à l'abandon ne sont pas dûs à [TRADUCTION] « l'organisme de réglementation ou à la province » (par. 185). Bien que les parties aient abordé succinctement la question dans leurs observations écrites et leurs plaidoiries présentées à la Cour, ce n'était clairement pas au cœur de leur argumentaire. En l'absence de motifs réfléchis des tribunaux d'instance inférieure ou d'observations exhaustives sur l'application continue du premier volet du test formulé dans *Abitibi*, la Cour ne devrait pas tenter de le modifier substantiellement.

[242] Deuxièmement, selon les juges majoritaires, on ne soulève aucune préoccupation en matière d'équité en ne tenant pas compte de la concession faite par l'AER devant les tribunaux d'instance inférieure. La majorité apporte cette précision principalement parce que la question a été soulevée et débattue devant la Cour et en raison de l'affirmation unilatérale contenue dans la lettre de l'AER adressée à GTL en mai 2015. Il importe toutefois de noter que les concessions de l'AER ont eu pour effet que GTL et ATB Financial ne sont plus tenus de présenter de la preuve à cet égard (S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (5e éd. 2018), p. 1387). Il s'agit d'un point important étant donné que la reformulation, par les juges majoritaires, de l'exigence « créancier » au premier volet du test est largement tributaire des faits et dépend des circonstances de l'affaire en cause. La concession de l'AER devant la Cour du Banc de la Reine de l'Alberta a pour résultat direct qu'il nous est impossible de savoir quels éléments de preuve GTL ou ATB Financial aurait présentés à ce sujet. Par conséquent, ne pas tenir compte de la concession à ce moment-ci pourrait bien causer un véritable préjudice aux parties.

[243] Troisièmement, mon collègue s'appuie sur le fait que, dans *Abitibi*, le juge en cabinet a conclu que la Province avait déjà exproprié trois des cinq sites pour lesquels elle avait émis des ordonnances exigeant la décontamination et qu'elle utilisait vraisemblablement ces ordonnances pour compenser les réclamations d'AbitibiBowater fondées sur l'ALENA. Bien que le juge en cabinet soit effectivement arrivé à ces conclusions, celles-ci n'ont eu

Abitibi, she explained that the first prong was "easily satisfied" because "the Province had identified itself as a creditor by resorting to [*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] enforcement mechanisms" (*Abitibi*, at para. 49). She placed no reliance on the fact that the Province might itself derive a financial benefit from its actions and was not enforcing a purely public duty. Her analysis was in no way based on a finding that the Province's actions were a "colourable attempt" to recover a debt or that they demonstrated an "ulterior motive" (majority reasons, at para. 128).

[244] Fourthly, in my view, it is incorrect to rely on *Northern Badger* in this case. That decision does not support my colleague's position in the manner he alleges. The issue in *Northern Badger* was also whether environmental remediation orders could be considered claims provable in bankruptcy. However, the crux of the dispute was whether "enforcing the requirement for the proper abandonment of oil and gas wells" (p. 57) gave rise to a provable claim because it would require the receiver to expend funds. Laycraft C.J.A. never addressed the question of whether the regulator could be said to have a contingent claim because it would complete the abandonment work itself and assert a claim for reimbursement. It was in the context of the regulator requiring the receiver to fulfill the abandonment obligations *itself* that the Alberta Court of Appeal discussed the enforcement of a public duty. It is important to carefully examine what the Court of Appeal actually said in this regard:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of

aucune incidence sur l'analyse de la juge Deschamps relativement au volet « créancier » du test. Appliquant le test aux faits dans l'affaire *Abitibi*, elle a expliqué qu'il était « facile de répondre » au premier volet étant donné que « la province s'est elle-même présentée comme créancière en ayant recours aux mécanismes d'application de l'[*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] » (*Abitibi*, par. 49). Elle n'a pas tenu compte du fait que la Province pourrait elle-même tirer un avantage financier de ses actions et qu'elle n'appliquait pas un devoir purement public. Son analyse ne reposait aucunement sur la conclusion suivant laquelle les mesures de la Province étaient une « tentative déguisée » de recouvrer une créance ou témoignaient de « motifs obliques » (motifs des juges majoritaires, par. 128).

[244] Quatrièmement, il me paraît incorrect de s'appuyer sur l'arrêt *Northern Badger* en l'espèce. Cet arrêt n'étaye pas la position de mon collègue comme il l'affirme. L'arrêt *Northern Badger* portait également sur la question de savoir si des ordonnances de décontamination environnementale pouvaient être considérées comme des réclamations prouvables en matière de faillite. Le nœud du litige consistait toutefois à établir si [TRADUCTION] « l'application de l'exigence concernant l'abandon de puits de pétrole et de gaz » (p. 57) donnait naissance en soi à une réclamation prouvable parce qu'elle exigerait du séquestre qu'il débourse des fonds. Le juge en chef Laycraft de la Cour d'appel n'a jamais abordé la question de savoir s'il était possible d'affirmer que l'organisme de réglementation pouvait faire valoir une réclamation éventuelle du fait qu'il achèverait lui-même les travaux et présenterait une demande de remboursement. C'est dans le contexte où l'organisme de réglementation exige du séquestre qu'il s'acquitte *lui-même* des obligations liées à l'abandon que la Cour d'appel de l'Alberta s'est prononcée sur l'exécution d'un devoir public par l'organisme de réglementation. Il est important d'examiner avec soin les propos tenus par la Cour d'appel à cet égard :

> [TRADUCTION] Les dispositions statutaires exigeant l'abandon des puits de pétrole et de gaz font partie des lois d'application générale de l'Alberta et lient tous les citoyens de la province. Quiconque devient titulaire de permis relativement à de tels puits y est assujetti. Les

modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

citoyens sont liés par des obligations statutaires similaires dans de nombreux domaines de la vie moderne. Notons, par exemple, les règles relatives à la santé, à la prévention des incendies, à l'enlèvement de la glace et de la neige ou à la démolition des structures non sécuritaires. Mais l'obligation qui incombe au citoyen n'incombe pas au policier ou à l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application d'une loi générale. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta. [Emphasis added; paras. 33-34.]

Il est vrai que la loi autorise l'Office à créer une créance légale en sa faveur s'il le désire. En vertu des par. 91(1) et (2) de l'*Oil and Gas Conservation Act* (analysée précédemment), l'Office peut exécuter lui-même les travaux d'abandon et devenir créancier à l'égard des sommes dépensées. Mais il n'a pas procédé de cette façon en l'espèce. En réalité, il applique simplement une partie des lois d'application générale de l'Alberta. [Je souligne; par. 33-34.]

[245] As is evident from para. 34 of *Northern Badger*, quoted above, the Court of Appeal never stated in that case that a regulator is not — or cannot be — a creditor when it is acting to enforce a public duty. In *Abitibi*, when referring to *Northern Badger*, Deschamps J. explained that the Alberta Court of Appeal "found that the duty to undertake remediation work is owed to the public at large until the regulator exercises its power to assert a monetary claim" (*Abitibi*, at para. 44 (emphasis added)). Laycraft C.J.A. accepted that when the regulator fulfills an environmental obligation itself and asserts a claim for reimbursement, it does indeed "become a creditor for the sums expended". Even in this situation, the public is still the ultimate beneficiary of the remediation work. This is largely consistent with Deschamps J.'s formulation of the test for a provable claim. In fact, this Court simply extended this principle in *Abitibi*, concluding that a regulator may also be a creditor with a provable contingent claim

[245] Comme il ressort du par. 34 précité de l'arrêt *Northern Badger*, la Cour d'appel n'a jamais mentionné dans cette affaire qu'un organisme de réglementation n'a pas — ou ne peut avoir — le statut de créancier lorsqu'il fait respecter un devoir public. En parlant de *Northern Badger* dans l'arrêt *Abitibi*, la juge Deschamps a expliqué que la Cour d'appel de l'Alberta a « conclu que l'obligation d'entreprendre les travaux de décontamination est due au public en général jusqu'à ce que l'organisme administratif exerce son pouvoir de faire valoir une réclamation pécuniaire » (*Abitibi*, par. 44 (je souligne)). Le juge Laycraft a reconnu que l'organisme de règlementation qui s'acquitte lui-même d'une obligation environnementale et présente une demande de remboursement devient effectivement [TRADUCTION] « créancier à l'égard des sommes dépensées ». Même dans une telle situation, le public demeure l'ultime bénéficiaire des travaux de décontamination, ce qui cadre largement avec la norme de la réclamation

when it is sufficiently certain that the regulator will perform the remediation work and advance a claim for reimbursement. This is precisely the situation with the AER and the OWA here, as I will explain in more detail below. The Alberta Court of Appeal did not frame the issue in terms of the three-part test that would later be developed in *Abitibi*; it did not divide its analysis of whether a provable claim existed. However, viewed properly, Deschamps J. dealt with the concerns raised in *Northern Badger* under the third prong of the *Abitibi* test. It is not appropriate to duplicate these principles under the first prong as well, as the majority proposes. For this reason, it is misguided to rely on *Northern Badger* in this appeal to conclude that the AER is not a creditor.

[246] However, even if the majority were correct about the reasoning in *Northern Badger* with respect to whether regulators enforcing public duties can be creditors — which I do not concede — I do not accept its conclusion that *Abitibi* did not overturn that reasoning. The Court was well aware of the decision in *Northern Badger* and cited it directly. Despite this, Deschamps J., when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Instead, she stated that "the only determination that has to be made" (para. 27) is whether the regulator is exercising its enforcement powers against a debtor. In referring to *Northern Badger*, she expressly noted that "[t]he real question is not to whom the obligation is owed, as this question is answered by the statute, which determines who can require that it be discharged" (paras. 27 and 46 (emphasis added)).

[247] Finally, and perhaps most importantly, suggesting that a regulator is not acting as a creditor

prouvable énoncée par la juge Deschamps. En fait, notre Cour a simplement élargi ce principe dans *Abitibi*, concluant que l'organisme de réglementation peut également avoir le statut de créancier relativement à une revendication éventuelle prouvable s'il est suffisamment certain qu'il exécutera les travaux de décontamination et présentera une demande de remboursement. Comme je l'expliquerai plus en détail, il s'agit précisément de la situation dans laquelle se trouvent l'AER et OWA en l'espèce. La Cour d'appel de l'Alberta n'a pas formulé la question sous l'angle du test à trois volets qui a été élaboré par la suite dans *Abitibi*; elle n'a pas divisé son analyse de la question de savoir s'il existait une réclamation prouvable. Toutefois, il est juste de considérer que la juge Deschamps a traité des préoccupations exprimées dans *Northern Badger* en fonction du troisième volet du test *Abitibi*. Il ne convient pas de reprendre ces principes au premier volet également, comme le propose la majorité. C'est pourquoi il est malavisé de se fonder sur l'arrêt *Northern Badger* en l'espèce pour conclure que l'AER n'est pas un créancier.

[246] Cependant, même si les juges majoritaires avaient raison quant au raisonnement dans l'arrêt *Northern Badger* à savoir si un organisme de réglementation faisant respecter un devoir public peut avoir le statut de créancier — ce que je ne concède pas — je ne retiens pas leur conclusion portant que l'arrêt *Abitibi* n'a pas écarté ce raisonnement. La Cour était bien au fait de la décision rendue dans *Northern Badger* et l'a citée textuellement. Malgré cela, lorsqu'elle a formulé le premier volet du test, la juge Deschamps n'a établi aucune distinction entre les organismes de réglementation qui agissent dans un intérêt public et ceux qui agissent dans leur propre intérêt. Elle a plutôt affirmé que « la seule question à trancher » (par. 27) est de savoir si l'organisme exerce ses pouvoirs d'application de la loi à l'encontre d'un débiteur. En mentionnant l'arrêt *Northern Badger*, elle a souligné expressément que « [l]a véritable question n'est pas de savoir à qui est due l'obligation, puisque la loi y répond en indiquant qui peut en exiger l'exécution » (par. 27 et 46 (je souligne)).

[247] Enfin, et fait peut-être plus important encore, laisser entendre qu'un organisme de réglementation

where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of the *Abitibi* test. Under my colleague's approach, it is no longer the case that the *only* determination that has to be made at the creditor stage of the analysis is "whether the regulatory body has exercised its enforcement power against a debtor" (*Abitibi*, at para. 27). Instead, the court must consider whether the regulatory body is enforcing a public duty and whether it stands to benefit financially from the fulfillment of the obligation in question.

[248] Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. Under my colleague's reformulation of the first prong of the *Abitibi* test, it will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of *Abitibi* itself. As a result, provincial entities will be able to completely disregard the *BIA*'s priority scheme as long as they can plausibly point to some public interest that is furthered by their actions. Such a result strips *Abitibi* of its central holding and entitles provincial regulators to easily upend Parliament's purpose of providing an equitable recovery scheme in bankruptcy for all creditors.

[249] In my view, it is insufficient to simply note that the facts of *Abitibi* differ from those of the present appeal (majority reasons, at para. 136). Deschamps J.'s broad articulation of the first prong of the test was in no way made dependent upon the particular facts of *Abitibi*. She sought to provide a clear general framework for determining when a regulator will be classified as a creditor — a framework that the majority's reasons effectively rewrite.

[250] Further, it is worth noting that this Court in *Moloney* followed *Abitibi* in applying the broad

n'agit pas comme créancier quand ses activités de protection de l'environnement visent le bien public et profitent au public écarte dans les faits le premier volet du test *Abitibi*. Suivant l'approche de mon collègue, la question de savoir « si l'organisme [de réglementation] a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi » (*Abitibi*, par. 27) n'est plus la *seule* question à trancher à l'étape « créancier » de l'analyse. Le tribunal doit plutôt se demander si l'organisme de réglementation fait respecter un devoir public et s'il peut tirer un avantage financier de l'acquittement de l'obligation en question.

[248] Dans l'exercice des pouvoirs que la loi leur confie en matière d'environnement, les organismes de réglementation provinciaux agissent, en quelque sorte, toujours dans un intérêt public ou au bénéfice d'une partie de la population. Selon le premier volet du test *Abitibi* reformulé par mon collègue, il sera presque impossible de conclure que les organismes de réglementation protégeant les droits environnementaux sont des « créanciers » à l'extérieur du cadre de l'arrêt *Abitibi* lui-même. Par conséquent, les entités provinciales pourront totalement ignorer le régime de priorité de la *LFI* tant qu'elles sont en mesure de relever un quelconque intérêt public qui est servi par leurs actions. Pareil résultat vide l'arrêt *Abitibi* de sa conclusion centrale et permet aux organismes de réglementation provinciaux de faire obstacle aisément à l'objectif du Parlement d'instaurer un régime équitable de recouvrement des créances en matière de faillite au bénéfice de tous les créanciers.

[249] À mon avis, il ne suffit pas de noter simplement que les faits de l'affaire *Abitibi* diffèrent de ceux de l'espèce (motifs des juges majoritaires, par. 136). Les termes larges employés par la juge Deschamps pour formuler le premier volet du test n'étaient aucunement tributaires des faits propres à cette affaire. Elle a cherché à établir un cadre général clair indiquant dans quelles circonstances l'organisme de réglementation sera considéré comme un créancier, un cadre effectivement remanié dans les motifs de la majorité.

[250] En outre, il convient de souligner que, dans *Moloney*, la Cour a suivi l'arrêt *Abitibi* en

definition of "creditor". In *Moloney*, this Court concluded that the Province of Alberta was acting as a creditor even though the debt it was collecting was reimbursement for compensating a third party who had been injured by the debtor in a car accident (para. 55). I fail to see how any meaningful distinction can be drawn between that situation and a situation in which a regulator seeks reimbursement for the costs incurred to remedy environmental damage caused to the land of third parties by the debtor.

[251] "[G]reat care should be taken" before this Court overturns or overrules one of its prior decisions (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317, at para. 65). It is "a step not to be lightly undertaken" (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24). In order to do so, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig*, at para. 25; see also *Teva*, at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva*, at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

[252] Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in *Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve

appliquant la définition large de « créancier ». Dans cette affaire, la Cour a conclu que la province de l'Alberta agissait à titre de créancier même si la créance qu'elle cherchait à recouvrer était le remboursement d'une indemnité versée à une tierce partie blessée par le débiteur dans un accident de voiture (par. 55). Je ne vois pas en quoi il est possible d'établir quelque véritable distinction que ce soit entre cette situation et celle d'un organisme de réglementation qui chercherait à obtenir le remboursement des dépenses engagées pour réparer des dommages environnementaux causés au terrain d'un tiers par le débiteur.

[251] « [U]ne grande prudence s'impose » avant que notre Cour n'infirme ou n'écarte l'un de ses précédents (*Teva Canada Ltée c. TD Canada Trust*, 2017 CSC 51, [2017] 2 R.C.S. 317, par. 65). Cette étape ne peut être accomplie « à la légère » (*Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489, par. 24). Pour ce faire, la Cour doit « être convaincue, pour des raisons impérieuses, que la décision est erronée et qu'elle devrait être écartée » (*Craig*, par. 25; voir aussi *Teva*, par. 65). Il y de bonnes raisons qui, clairement, justifient de prendre une telle précaution, à savoir assurer « la certitude, la cohérence et la légitimité institutionnelle » et reconnaître que « le public s'attend à ce que nous respections scrupuleusement nos précédents » (*Teva*, par. 65). Lorsque la Cour juge nécessaire de s'écarter de l'un de ses précédents, sa décision et ce qui la motive devraient être clairs.

[252] Malgré ces mises en garde claires contre l'idée pour la Cour d'écarter trop aisément ses propres précédents, c'est précisément ce que les juges majoritaires proposent de faire en l'espèce. Leur approche revient, dans les faits, à infirmer la définition sans équivoque de « créancier » énoncée dans l'arrêt *Abitibi* — une décision réfléchie rendue par les juges majoritaires de la Cour il y a six ans à peine. En plus de ne fournir aucune raison impérieuse qui expliquerait en quoi la définition claire de la juge Deschamps est erronée, les juges majoritaires, dans leurs motifs, ne reconnaissent pas qu'ils écartent une décision récente de la Cour et rejettent la proposition que c'est là l'incidence de leur raisonnement (par. 136). Qui plus est, ils ont pris leur décision en l'absence d'observations complètes

the goals of certainty, consistency or institutional legitimacy.

[253] This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

[254] Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.
>
> . . .
>
> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the

et étoffées à ce sujet. Adopter une telle approche à l'égard de nos propres précédents ne permet pas d'atteindre les objectifs de certitude, de cohérence ou de légitimité institutionnelle.

[253] La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans l'arrêt *Abitibi*. La définition de la juge Deschamps empêche les organismes de réglementation provinciaux de s'approprier facilement un rang supérieur en matière de faillite et de saper le régime de priorité du Parlement. Cette définition favorise l'atteinte des objectifs d'ordre et d'équité dans les procédures d'insolvabilité. Suivant ce critère général, l'AER a clairement agi comme créancier relativement à l'actif de Redwater, et c'est probablement pour cette raison qu'il a concédé ce point devant les deux tribunaux d'instance inférieure.

[254] Puisque personne ne conteste qu'il est satisfait au second volet du test *Abitibi*, je passe maintenant au troisième volet, qui pose la question de savoir s'il est suffisamment certain que l'organisme de réglementation exécutera les travaux et présentera une demande de remboursement. Comme l'explique l'arrêt *Abitibi*, dans le contexte d'une ordonnance environnementale :

> En ce qui concerne la troisième condition, soit qu'il doit être possible d'attribuer à l'obligation une valeur pécuniaire, la question est de savoir si des ordonnances qui ne sont pas formulées en termes pécuniaires peuvent être formulées en de tels termes. Je souligne que lorsqu'un organisme administratif réclame une somme qui est due à la date pertinente, il formule ainsi son ordonnance en termes pécuniaires. Le tribunal n'a alors aucune détermination à faire à cette étape car ce qui est réclamé est une « dette » et est, par conséquent, clairement visé par la définition d'une « réclamation » prévue au par. 12(1) de la *LACC*.
>
> . . .
>
> Le critère retenu par les tribunaux pour décider si une réclamation éventuelle sera incluse dans le processus d'insolvabilité est celui qui consiste à déterminer si l'événement non encore survenu est trop éloigné ou conjectural (*Confederation Treasury Service Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). Dans le contexte d'une ordonnance environnementale, cela signifie qu'il doit y avoir

enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. [Emphasis added; paras. 30 and 36.]

[255] In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers judge made three critical findings of fact — each of which is entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10) — that easily support this conclusion.

[256] First, Wittmann C.J. found that GTL was not in possession of the disclaimed properties and, in any event, "has no ability to perform any kind of work on these assets" because the environmental liabilities exceeded the value of the estate itself (para. 170; see also *Abitibi*, at para. 53 where the Court stated that: "Abitibi had no means to perform the remediation work"). He discounted the possibility that any of Redwater's working interest participants would step in to perform the work, even for the small number of Redwater's licensed assets for which such partners existed (chambers judge reasons, at para. 171). In sum, he concluded that "there is no other party who could be compelled to carry out the abandonment work" (para. 172).

[257] Two decisions of the Ontario Court of Appeal highlight why this is important. In *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159, Juriansz J.A. found that the "sufficient certainty" standard was *not* satisfied in respect of certain sites because those sites had already been sold so the purchasers could be compelled to carry out the work on the basis that they were jointly and severally liable for the remediation obligations (paras. 39-40). But in *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, Juriansz J.A. found that the

des indications suffisantes permettant de conclure que l'organisme administratif qui a eu recours aux mécanismes d'application de la loi effectuera en fin de compte des travaux de décontamination et présentera une réclamation pécuniaire afin d'obtenir le remboursement de ses débours. Si cela est suffisamment certain, le tribunal conclura que l'ordonnance peut être assujettie au processus d'insolvabilité. [Je souligne; par. 30 et 36]

[255] À mon avis, il est suffisamment certain que l'AER ou l'OWA effectuera ultimement les travaux d'abandon et de remise en état et fera valoir une réclamation pécuniaire afin d'obtenir un remboursement. Il est donc satisfait au dernier volet du test *Abitibi*. Le juge en cabinet a tiré trois conclusions de fait cruciales — chacune d'elles commandant la déférence en appel (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 10) — qui appuient aisément cette conclusion.

[256] Premièrement, le juge en chef Wittmann a conclu que GTL n'était pas en possession des biens visés par les renonciations et, de toute façon, il [TRADUCTION] « ne peut pas exécuter de travaux sur les biens » parce que les engagements environnementaux dépassaient la valeur de l'actif même (par. 170; voir également *Abitibi*, par. 53, où la Cour a dit que : « Abitibi ne disposait d'aucune ressource pour exécuter les travaux »). Il a écarté la possibilité que les participants en participation directe de Redwater se chargent de le faire même à l'égard des quelques biens visés par des permis de Redwater pour lesquels de tels partenaires existaient (motifs du juge en cabinet, par. 171). Bref, il a conclu [TRADUCTION] « qu'il n'existe aucune autre partie susceptible d'être contrainte d'exécuter les travaux d'abandon » (par. 172).

[257] Deux décisions de la Cour d'appel de l'Ontario font ressortir pourquoi cela est important. Dans *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159, le juge Juriansz a conclu qu'il *n'était pas* satisfait au critère de la « certitude suffisante » relativement à certains sites parce que ceux-ci avaient déjà été achetés. Les acheteurs pouvaient par conséquent être contraints d'exécuter les travaux parce qu'ils étaient solidairement responsables des obligations de décontamination (par. 39-40). Mais dans *Northstar Aerospace Inc., Re*, 2013 ONCA 600,

"sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. While it is true that fresh evidence on appeal revealed that the Ministry of the Environment had commenced the remediation work, Juriansz J.A. found that the fact that there were no subsequent purchasers had grounded the application judge's implicit conclusion regarding sufficient certainty (paras. 16-17). The present case is like *Northstar*, which is perfectly applicable to the facts of this case: there is no purchaser to take on Redwater's assets, and the debtor itself is insolvent. The chambers judge in this case concluded that there was no other party who could be compelled to carry out the work.

[258] Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, Wittmann C.J. found as a fact that "the AER will ultimately be responsible for [the abandonment] costs" (para. 171). He concluded that "the AER has the power [to seek recovery of abandonment costs] and has actually performed the work on occasion" (para. 168). In fact, in this very case, "the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets" (para. 172). This conclusion finds ample support in the record. In a cover letter sent with the Abandonment Orders on July 15, 2015, the AER unambiguously stated that if Redwater failed to abandon the disclaimed properties in accordance with its instructions, "the AER will, without further notice, use its process to have the properties abandoned" (GTL's Record, vol. I, at p. 102 (emphasis added)). The letter further stated that "[t]he AER will exercise all remedies available to it to recover the costs from the liable parties" (p. 102 (emphasis added)). The chambers judge did not err in relying on these unequivocal statements from the AER itself — to the effect that it *will* have the abandonment work performed and seek reimbursement — to conclude that sufficient certainty existed in this case.

8 C.B.R. (6th) 154, le juge Juriansz a conclu qu'il *était* satisfait au critère de la « certitude suffisante » parce qu'il n'y avait pas d'acheteur qui pouvait être contraint d'exécuter les travaux par l'organisme de réglementation. Certes, les éléments de preuve nouveaux déposés en appel révèlent que le ministère de l'Environnement avait amorcé les travaux de décontamination, mais le juge Juriansz a conclu que l'absence d'acheteurs subséquents justifiait la conclusion implicite du juge de première instance quant à la certitude suffisante (par. 16-17). La présente affaire s'apparente à *Northstar*, qui s'applique parfaitement aux faits de l'espèce : il n'y a aucun acheteur pour prendre en charge les biens de Redwater, et la débitrice elle-même est insolvable. Le juge en cabinet en l'espèce a conclu qu'il n'existe aucune autre partie qui pourrait être contrainte d'exécuter les travaux.

[258] Deuxièmement, compte tenu du fait que ni GTL ni les participants en participation directe de Redwater ne voudraient (ou ne pourraient) entreprendre ces travaux, le juge en chef Wittmann a tiré la conclusion de fait selon laquelle [TRADUCTION] « l'AER sera en fin de compte responsable des frais [d'abandon] » (par. 171). Il a conclu que « l'AER a le pouvoir [de tenter de recouvrer les frais d'abandon] et a réellement exécuté les travaux à l'occasion » (par. 168). Dans les faits, en l'espèce, « l'AER a expressément manifesté l'intention de demander le remboursement des frais liés à l'abandon des biens faisant l'objet de la renonciation » (par. 172). Cette conclusion est amplement étayée par le dossier. Dans la lettre du 15 juillet 2015 accompagnant les ordonnances d'abandon, l'AER a déclaré sans équivoque que, si Redwater ne procède pas à l'abandon des biens visés par les renonciations conformément aux directives de l'AER, [TRADUCTION] « l'AER utilisera, sans autre avis, sa procédure pour faire abandonner les biens » (dossier de GTL, vol. I, p. 102 (je souligne)). La lettre indiquait également que « [l']AER exercera tous les recours dont il dispose pour recouvrer les frais des parties responsables » (p. 102 (je souligne)). Le juge siégeant en cabinet n'a pas commis d'erreur en se fondant sur ces déclarations sans équivoque de l'AER lui-même — selon lesquelles il *fera* exécuter les travaux d'abandon et demandera un remboursement — pour conclure qu'il y avait une certitude suffisante en l'espèce.

[259] Although there is some contrary evidence in the record — principally, the remarks of an AER affiant, who stated that the AER would not abandon the properties — Wittmann C.J. did not commit any palpable and overriding error by giving more weight to the letter that the AER sent contemporaneously with the Abandonment Orders. Likewise, to the extent that the AER sent other correspondence stating that it was not a creditor and that it was not asserting a provable claim, Wittmann C.J. did not err in discounting these self-serving statements as insufficiently probative on the ultimate legal questions. There is therefore no basis to disturb these factual findings or to reweigh this evidence on appeal.

[260] Even if the AER's admission that it would abandon the properties itself is not sufficient on its own, Wittmann C.J. made a third critical finding of fact: the AER's only "realistic alternativ[e] to performing the remediation work itself" was to deem the renounced assets to be orphan wells (para. 172). In this circumstance, he found that "the legislation and evidence shows that if the AER deems a well an orphan, then the OWA will perform the work" (para. 166 (emphasis added)).

[261] In light of these factual determinations, Wittmann C.J. rightly concluded that the "sufficient certainty" standard of *Abitibi* was satisfied. He elaborated on the legal basis for that conclusion as follows:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe. However, the situation does meet, in my opinion, what was intended by the majority of the Court in *AbitibiBowater*. . . . In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial. [para. 173]

[259] Bien qu'il y ait certains éléments de preuve contraires au dossier — notamment les propos d'un déclarant de l'AER selon lesquels l'AER ne procéderait pas à l'abandon des biens — le juge en chef Wittmann n'a pas commis d'erreur manifeste et dominante en accordant plus de poids à la lettre que l'AER a envoyée en même temps que les ordonnances d'abandon. De même, dans la mesure où l'AER a envoyé d'autres lettres dans lesquelles il déclarait ne pas être un créancier et ne pas faire valoir une réclamation prouvable, le juge en chef Wittmann n'a pas commis d'erreur en faisant abstraction de ces déclarations intéressées parce qu'elles n'étaient pas suffisamment probantes quant aux questions de droit ultimes. Il n'y a donc aucune raison de modifier ces conclusions de fait ou d'apprécier de nouveau ces éléments de preuve en appel.

[260] Même si la déclaration de l'AER selon laquelle il procéderait lui-même à l'abandon des biens n'est pas suffisante en soi, le juge en chef Wittmann a tiré une troisième conclusion de fait cruciale : la seule [TRADUCTION] « solution réaliste [qui s'offre à l'AER] autre que celle d'effectuer lui-même les travaux de décontamination » était de considérer les biens faisant l'objet de la renonciation comme des puits orphelins (par. 172). Il a conclu qu'en pareil cas, « les dispositions législatives et les éléments de preuve démontrent que, si l'AER considère un puits comme orphelin, l'OWA exécutera les travaux » (par. 166 (je souligne)).

[261] À la lumière de ces conclusions de fait, le juge en chef Wittmann a eu raison de conclure qu'il était satisfait à la norme de « certitude suffisante » énoncée dans *Abitibi*. Il a précisé ainsi le fondement juridique de cette conclusion :

> [TRADUCTION] La situation répond-elle au critère de la certitude suffisante décrit dans l'arrêt *AbitibiBowater*? Au sens strict et technique du terme, la réponse est non, car il n'est pas clair si l'AER effectuera lui-même les travaux ou s'il considérera les biens visés par les ordonnances comme orphelins. Dans l'affirmative, l'OWA exécutera probablement les travaux, mais pas nécessairement dans un délai précis. La situation correspond toutefois, à mon avis, à ce qu'ont voulu les juges majoritaires de la Cour dans *AbitibiBowater*. . . . Par conséquent, je conclus que, bien qu'elles ne soient pas formulées en termes pécuniaires, les ordonnances de l'AER sont, en l'espèce, intrinsèquement financières. [par. 173]

[262] My colleague does not specify the standard of review he applies in overturning Wittmann C.J.'s application of the third prong of the *Abitibi* test to this case. Nevertheless, he disagrees with the chambers judge and holds that the "sufficient certainty" standard is not satisfied. He offers two reasons for overruling Wittmann C.J.'s finding; but in doing so, he does not identify any palpable and overriding error (or, even under the non-deferential standard of correctness, *any* true error) in the chambers judge's ultimate conclusion.

[263] The first reason — the purported legal error of determining that the Abandonment Orders are "intrinsically financial" — is little more than a distraction. Even if this is an erroneous application of *Abitibi*, it is evident that Wittmann C.J. was of the view, *at a minimum*, that either the AER or the OWA would complete the abandonment work. And as I describe below, this alone is enough to satisfy the "sufficient certainty" standard. My colleague overemphasizes the import of this stray comment in the context of a thorough set of reasons that otherwise faithfully applies the correct standard. Any legal error on this basis, to the extent that one exists, does not displace the result that the chambers judge reached.

[264] The second reason is more substantial. According to Wagner C.J., whether the AER will perform the abandonment work itself or delegate that task to the OWA is dispositive, since it was the Province itself that undertook the reclamation work in *Abitibi*. Here, he suggests, "the OWA is not the regulator" (para. 147) and thus the involvement of the OWA "is insufficient to satisfy the 'sufficient certainty' test" (para. 146).

[265] Accepting, for a moment, the potential relevance of this distinction, I am of the view that any uncertainty as to whether the AER *would* delegate the reclamation work to the OWA is questionable. My colleague's emphasis on the self-serving remarks of an AER affiant and the fact that the AER took no immediate steps to perform the abandonment work

[262] Mon collègue ne précise pas la norme de contrôle qu'il applique en infirmant l'application par le juge en chef Wittmann du troisième volet du test *Abitibi* à la présente affaire. Néanmoins, il est en désaccord avec le juge en cabinet et conclut qu'il n'est pas satisfait au volet de la « certitude suffisante ». Il donne deux raisons pour infirmer la conclusion du juge en chef Wittmann; mais ce faisant, il ne relève aucune erreur manifeste et dominante (ni même une véritable erreur selon la norme de la décision correcte, qui ne commande aucune déférence) dans la conclusion ultime du juge en cabinet.

[263] La première raison, la prétendue erreur de droit consistant à décider que les ordonnances d'abandon sont [TRADUCTION] « intrinsèquement financières », n'est guère plus qu'une distraction. Même s'il s'agit d'une application erronée de l'arrêt *Abitibi*, il est manifeste que le juge en chef Wittmann a estimé, *au moins*, que l'AER ou l'OWA mènerait à terme les travaux d'abandon. Et comme je l'explique plus loin, cela suffit en soi pour satisfaire à la norme de « certitude suffisante ». Mon collègue surestime l'importance de ce commentaire isolé dans le contexte d'un ensemble de motifs étoffés où la norme appropriée est par ailleurs fidèlement appliquée. Toute erreur de droit de ce genre, dans la mesure où il en existe une, n'écarte en rien le résultat auquel est arrivé le juge en cabinet.

[264] La deuxième raison est plus sérieuse. Selon le juge en chef Wagner, la question de savoir si l'AER effectuera lui-même les travaux d'abandon ou s'il déléguera cette tâche à l'OWA est déterminante, car c'est la Province elle-même qui a procédé aux travaux de décontamination dans *Abitibi*. Dans l'affaire qui nous occupe, suggère-t-il, « l'OWA n'est pas l'organisme de réglementation » (par. 147) et, en conséquence, l'intervention de l'OWA « est insuffisante pour satisfaire au critère de la "certitude suffisante" » (par. 146).

[265] Acceptant pour un instant la pertinence éventuelle de cette distinction, j'estime que toute incertitude quant à la question de savoir si l'AER *déléguerait* l'exécution des travaux de décontamination à l'OWA est discutable. L'importance qu'accorde mon collègue aux propos intéressés d'un déclarant de l'AER et au fait que l'AER n'a rien fait sur-le-champ pour exécuter

itself amounts to little more than *post hoc* appellate fact finding, especially in light of the AER's own statement. Although Wittmann C.J. suggested that it was "unclear" whether the AER would complete this work itself, his other findings of fact and law — that the AER has the statutory power to perform the work, that it has actually done so in the past, and that it expressly stated its intention to seek reimbursement here — suggest otherwise. Regardless, Wittmann C.J.'s remark that the "sufficient certainty" standard was not satisfied "in a narrow and technical sense" must be read in this context: he was simply suggesting that there was some uncertainty as to "whether the AER will perform the work itself" as opposed to delegating the work to the OWA (para. 173). He was *not* implying — let alone concluding as a matter of law — that GTL had failed to prove the third prong of the *Abitibi* test. That reading would vastly overstate, and completely decontextualize, the meaning of a few isolated words in his reasons.

[266] The more important problem, though, is that any distinction between the performance of the abandonment work by the AER and its performance by the OWA is meaningless. Form is elevated over substance if it is concluded that the "sufficient certainty" standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. And despite my colleague's suggestion that a regulatory body cannot act strategically to evade *Abitibi*, that is precisely what his analysis permits.

[267] We are told that the "OWA's true nature" (majority reasons, at para. 147) — and therefore what purports to distinguish this case from impermissible examples of strategic delegation — rests on four factors: (1) the OWA is a non-profit organization; (2) it has an independent board of directors; (3) it has its own mandate and determines "when and how it will perform environmental work" (para. 148); and (4) it is "financially independent" (para. 148) as it is

lui-même les travaux d'abandon ne constitue rien de moins qu'une appréciation des faits après coup en appel, surtout compte tenu de la propre déclaration de l'AER. Bien que le juge en chef Wittmann ait affirmé qu'il n'était [TRADUCTION] « pas clair » si l'AER effectuerait lui-même les travaux, ses autres conclusions de fait et de droit — que la loi confère à l'AER le pouvoir d'exécuter les travaux, qu'il l'a réellement fait dans le passé et qu'il a expressément manifesté l'intention de demander un remboursement en l'espèce — indiquent le contraire. Quoi qu'il en soit, la remarque du juge en chef Wittmann selon laquelle il n'était pas satisfait à la norme de « certitude suffisante » « au sens strict et technique » doit être interprétée dans ce contexte : il voulait tout simplement dire qu'il y avait une certaine incertitude quant à savoir « si l'AER effectuera[it] lui-même les travaux » au lieu de déléguer les travaux à l'OWA (par. 173). Il *ne* sous-entendait *pas* — et concluait encore moins en droit — que GTL n'avait pas réussi à établir le troisième volet du test *Abitibi*. Cette interprétation exagère considérablement le sens de quelques mots isolés contenus dans ses motifs, et sort complètement ces mots de leur contexte.

[266] Le problème le plus important, cependant, c'est que toute distinction entre l'exécution des travaux d'abandon par l'AER et leur exécution par l'OWA est dénuée de sens. C'est faire passer la forme avant le fond que de conclure qu'il n'est pas satisfait à la norme de « certitude suffisante » lorsque le délégataire de l'organisme de réglementation, et non l'organisme de réglementation lui-même, effectue les travaux. Et malgré l'affirmation de mon collègue selon laquelle un organisme de réglementation ne saurait stratégiquement éviter l'arrêt *Abitibi*, c'est précisément ce que son analyse permet de faire.

[267] On nous dit que la « véritable nature de l'OWA » (motifs majoritaires, par. 147) — et, par conséquent, ce qui est censé distinguer la présente affaire des exemples inadmissibles de délégation stratégique — repose sur quatre facteurs : (1) l'OWA est un organisme sans but lucratif; (2) elle a un conseil d'administration indépendant; (3) elle dispose de son propre mandat et décide « quand et de quelle manière elle exécutera des travaux environnementaux »

funded "almost entirely" by a tax on the oil and gas industry (para. 23).

[268] The first point is true, but irrelevant. Why does an organization's non-profit status have any bearing on whether it is being used as a vehicle to avoid the "sufficient certainty" standard under *Abitibi*?

[269] The second point is not accurate. The AER appoints members of the OWA's board of directors, as does another provincial body, Alberta Environment and Parks — underscoring the extent to which the provincial government can influence the OWA's activities.

[270] The third point overstates the OWA's level of independence. The *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, gives the AER substantial power to influence the OWA's decision making. Section 3(2)(b) of the regulation expressly states that, in fulfilling its delegated powers, duties and functions, the OWA must act in accordance with "applicable requirements, guidelines, directions and orders of the [AER]". The regulation also mandates that the OWA provide information to the AER on request and regularly submit reports indicating or containing its budget, "goals, strategies and performance measures", activities for the previous year and financial statements (s. 6). The AER appears to be able to exercise substantial control and oversight over the OWA if it so chooses, including over the manner in which the OWA carries out its environmental work.

[271] The fourth point is also inaccurate and would probably be irrelevant even if it were accurate. The Province has provided funding to the OWA in the past, including a $30 million contribution in 2009 and an additional $50,000 in 2012, and it has announced that it will loan the OWA an additional $230 million (see A.F., at para. 99 (alluding to this loan); recall *Abitibi*, at para. 58 where the Court stated that: "Earmarking money may be a strong

(par. 148); (4) elle est « financièrement indépendante » (par. 148) et « presque entièrement » financée par une taxe imposée à l'industrie pétrolière et gazière (par. 23).

[268] Le premier point est exact, mais non pertinent. Pourquoi le statut d'organisme sans but lucratif aurait-il une incidence sur la question de savoir s'il est utilisé comme moyen d'éviter la norme de « certitude suffisante » fixée dans *Abitibi*?

[269] Le deuxième point est inexact. L'AER nomme les membres du conseil d'administration de l'OWA, comme le fait un autre organisme provincial, Alberta Environment and Parks — ce qui fait ressortir à quel point le gouvernement provincial peut influencer les activités de l'OWA.

[270] Le troisième point surestime l'indépendance de l'OWA. Le *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, accorde à l'AER le pouvoir important d'influencer la prise de décisions de l'OWA. L'alinéa 3(2)(b) du règlement dispose en termes exprès que, dans l'exercice des pouvoirs, obligations et attributions qui lui sont déléguées, l'OWA doit se conformer aux [TRADUCTION] « conditions, lignes directrices, directives et ordonnances applicables de [l'AER] ». Le règlement exige que l'OWA fournisse sur demande des renseignements à l'AER et dépose périodiquement des rapports décrivant son budget de même que ses « objectifs, stratégies, mesures du rendement », activités de l'année précédente et états financiers (art. 6). L'AER semble être à même d'exercer beaucoup d'emprise et de surveillance sur l'OWA, si tel est son désir, y compris sur la manière dont l'OWA effectue ses travaux environnementaux.

[271] Le quatrième point est lui aussi inexact et il n'aurait probablement aucune pertinence même s'il était exact. La Province a fourni des fonds à l'OWA dans le passé, notamment une contribution de 30 millions de dollars en 2009 et une somme supplémentaire de 50 000 $ en 2012, et elle a annoncé qu'elle prêtera une somme supplémentaire de 230 millions de dollars à l'OWA (voir le m.a., par. 99 (faisant allusion à ce prêt); rappelons ce que la Cour a affirmé

indicator that a province will perform remediation work").

[272] In any event, it is important to note the more salient features of the OWA and its relationship with the AER (and, more generally, with the provincial government). The OWA operates under legal authority delegated to it by the AER and in accordance with a Memorandum of Understanding it has signed with both the AER and Alberta Environment and Parks. The orphan fund itself is administered by the AER, which prescribes and collects industry contributions and remits the funds to the OWA. The OWA cannot increase the industry levy without first obtaining approval from the Alberta Treasury Board. In addition, the *OGCA* makes clear that abandonment costs incurred by any person authorized by the AER — which would include the OWA — constitute a debt payable to the AER (*OGCA*, s. 30(5)). The record shows that the AER has remitted abandonment costs to the OWA in the past, in the form of security deposits and amounts recovered through successful enforcement action against licensees.

[273] The AER and the OWA are therefore inextricably intertwined. We should see this arrangement for what it is: when the AER exercises its statutory powers to declare a property an "orphan" under s. 70(2) of the *OGCA*, it effectively delegates the abandonment work to the OWA. Treating the OWA's work as meaningfully different from abandonment activities carried out by the AER turns a blind eye to this reality and does nothing to further the underlying principles of paramountcy. To the contrary, it provides provincial regulators with an easy way to evade the test of *Abitibi* through strategic behaviour, thereby undermining the legitimate federal interest in enforcing the *BIA*'s priority scheme. It should not matter which body carries out the work (see C.A. reasons, at para. 78; *OGCA*, s. 70(1)(a)(ii)).

[274] The majority faults the chambers judge for "failing to consider whether the OWA can be treated as the regulator" (para. 153). However, the chambers

dans *Abitibi*, par. 58 : « [l]e fait de prévoir un budget peut constituer un indicateur clair qu'une province exécutera des travaux de décontamination »).

[272] Quoi qu'il en soit, il importe de souligner les caractéristiques plus saillantes de l'OWA et de sa relation avec l'AER (et, de façon plus générale, avec le gouvernement provincial). L'OWA agit en vertu du pouvoir légal qui lui est délégué par l'AER et conformément au protocole d'entente qu'elle a signé avec l'AER et Alberta Environment and Parks. Le fonds pour les puits orphelins est lui-même administré par l'AER, qui fixe et recueille les contributions de l'industrie et remet les fonds à l'OWA. L'OWA ne peut pas augmenter les prélèvements qu'elle effectue auprès de l'industrie sans d'abord obtenir l'approbation du Conseil du trésor de l'Alberta. De plus, l'*OGCA* indique clairement que les frais liés à l'abandon engagés par toute personne autorisée par l'AER — y compris l'OWA — constituent une dette payable à l'AER (*OGCA*, par. 30(5)). Le dossier révèle que l'AER a versé des frais d'abandon à l'OWA dans le passé, sous la forme de dépôts de garantie et de sommes recouvrées grâce à des mesures de recouvrement réussies à l'encontre des titulaires de permis.

[273] L'AER et l'OWA sont donc inextricablement liés. Il faut reconnaître cet arrangement pour ce qu'il est : lorsque l'AER exerce le pouvoir de déclarer un bien [TRADUCTION] « orphelin » que lui confère le par. 70(2) de l'*OGCA*, il délègue effectivement l'exécution des travaux d'abandon à l'OWA. Considérer les travaux de l'OWA comme significativement différents des activités d'abandon menées par l'AER ne tient pas compte de cette réalité et n'aide en rien à favoriser l'application des principes sous-jacents de la prépondérance. Au contraire, cela donne aux organismes de réglementation provinciaux un moyen facile d'échapper au test *Abitibi* par l'adoption d'un comportement stratégique, minant ainsi l'intérêt légitime du gouvernement fédéral à assurer le respect du régime de priorité établi par la *LFI*. Il importe peu de savoir qui effectue les travaux (voir les motifs de la Cour d'appel, par. 78; *OGCA*, sous-al. 70(1)(a)(ii)).

[274] La majorité reproche au juge en cabinet de « ne pas se demander si l'OWA [pouvait] être assimilé à l'organisme de réglementation » (par. 153).

judge cannot have erred by failing to appreciate a level of independence that simply does not exist.

[275] The majority also offers an alternative conclusion: it is not sufficiently certain that even the OWA will perform the abandonment work (para. 149). Whether the chambers judge's conclusion to the contrary amounts to a palpable and overriding error, or something else, we are not told.

[276] Again, such an approach would permit the AER to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets. This arbitrary line-drawing exercise, in which a period of 10 years before the wells are abandoned is too long (but presumably some shorter time line would not be), has no basis in law. As Slatter J.A. convincingly observed in his reasons, the AER

> cannot insist that security be posted to cover environmental costs, but at the same time argue that it may be a long time before the Orphan Well Association actually does the remediation. If the Regulator takes security for remediating Redwater's orphan wells, those funds cannot be used for any other purpose. If security is taken, it is no answer that the security might be held for an indefinite period of time; the consequences to the insolvency proceedings and distribution of funds to the creditors are immediate and certain. Further, if security is taken, the environmental obligation has clearly been reduced to monetary terms. [Emphasis added; para. 79.]

[277] Moreover, the OWA's estimate of 10 to 12 years was put forward at the start of this litigation more than 3 years ago. Whether that estimate remains accurate after the province's proposed infusion of nearly a quarter of a billion dollars into the orphan fund (A.F., at para. 99)[1] — money that will undoubt-

[1] I am assuming that the AER's factum is accurate in referring to the existence and amount of this loan (which no other party contested).

Le juge en cabinet ne peut toutefois avoir fait erreur en n'appréciant pas une indépendance qui n'existe tout simplement pas.

[275] La majorité tire aussi une conclusion subsidiaire : il n'est pas suffisamment certain que même l'OWA exécutera les travaux d'abandon (par. 149). Quant à savoir si la conclusion contraire du juge en cabinet équivaut à une erreur manifeste et dominante, ou à quelque chose d'autre, on ne nous le dit pas.

[276] Là encore, une telle approche permettrait à l'AER de tirer profit de manœuvres stratégiques en manipulant le moment de son intervention afin de se soustraire au régime d'insolvabilité et de dépouiller Redwater de ses biens. Cet exercice de délimitation arbitraire, dans lequel une période de 10 ans avant que les puits fassent l'objet d'un abandon est trop longue (mais selon lequel une période plus courte ne le serait présumément pas), n'a aucun fondement en droit. Comme le juge Slatter l'a fait observer de manière convaincante dans ses motifs, l'AER

> [TRADUCTION] ne peut exiger qu'un dépôt de garantie soit versé pour couvrir les frais environnementaux, et en même temps faire valoir qu'il pourrait s'écouler beaucoup de temps avant que l'Orphan Well Association procède réellement à la décontamination. Si l'organisme de réglementation prend un dépôt de garantie afin de décontaminer les puits orphelins de Redwater, ces fonds ne peuvent être utilisés à aucune autre fin. Si un dépôt de garantie est pris, il ne suffit pas de répondre que ce dépôt pourrait être conservé pendant une période indéterminée; les conséquences pour la procédure d'insolvabilité et la distribution des fonds aux créanciers sont immédiates et certaines. De plus, si un dépôt de garantie est pris, l'obligation environnementale est clairement réduite à une obligation formulée en termes pécuniaires. [Je souligne; par. 79.]

[277] De plus, l'estimation de 10 à 12 ans de l'OWA a été mise de l'avant au début du présent litige il y a plus de 3 ans. La question de savoir si cette estimation demeure exacte après l'injection proposée par la province de près d'un quart de milliard de dollars dans le fonds pour les puits orphelins (m.a., par. 99)[1] — des

[1] Je suppose que le mémoire de l'AER est exact quand il fait état de l'existence et du montant de ce prêt (des faits qui n'ont pas été contestés par une autre partie).

edly speed up the OWA's abandonment efforts — is an open question. In any case, the changing factual context highlights the essential problem with the majority's approach: pinning the constitutional analysis on the timing of the OWA's intervention is arbitrary and irrational, as it causes the result to shift based on decisions made by the very actor that stands to benefit from a finding that the "sufficient certainty" standard is not satisfied.

[278] All that aside, the chambers judge's recognition that the OWA will "probably" abandon the properties should be enough (chambers judge reasons, at para. 173). Concluding otherwise is not justified, since it would mean applying a stricter certainty requirement than is called for by *Abitibi* itself. Deschamps J. expressly rejected an alternative standard — a "likelihood approaching certainty" — adopted by McLachlin C.J. in dissent (*Abitibi*, at para. 60). But here, dismissing as insufficient the chambers judge's conclusion that the OWA would "probably" complete the work essentially means requiring a "likelihood approaching certainty". Since *Abitibi* does not require absolute certainty, or even a likelihood approaching certainty, Wittmann C.J. did not err in concluding that the third prong was satisfied (see the *Oxford English Dictionary* (online), which defines "probably" as "with likelihood (though not with certainty)"; "almost certainly; as far as one knows or can tell; in all probability; most likely").

[279] After concluding that it is not sufficiently certain that the AER will abandon the sites, the majority goes on to find that the AER's licence transfer restrictions similarly do not satisfy the *Abitibi* test. This is so, it says, because the AER's refusal to approve a licence transfer does not give it a monetary claim against Redwater and because compliance with the Licensee Management Ratio ("LMR") conditions "reflects the inherent value of the assets held by the bankrupt estate" (para. 157). At the outset, I wish to

sommes qui accéléreront sans doute les efforts d'abandon de l'OWA — demeure sans réponse. Quoi qu'il en soit, le contexte factuel changeant met en lumière le problème fondamental que pose l'approche de la majorité : arrimer l'analyse constitutionnelle au moment de l'intervention de l'OWA est arbitraire et irrationnel, car cette approche a pour effet d'inverser le résultat en fonction de décisions prises par l'acteur même qui peut bénéficier de la conclusion selon laquelle il n'est pas satisfait à la norme de « certitude suffisante ».

[278] Mis à part tout ce qui précède, la reconnaissance par le juge en cabinet que l'OWA abandonnera [TRADUCTION] « probablement » les biens devrait suffire (motifs du juge en cabinet, par. 173). Il n'est pas justifié de conclure le contraire, car cela reviendrait à appliquer une norme plus stricte en matière de certitude que celle que commande l'arrêt *Abitibi* lui-même. La juge Deschamps a expressément rejeté la norme subsidiaire — une « probabilité proche de la certitude » — qu'a adoptée la juge en chef McLachlin dans ses motifs dissidents (*Abitibi*, par. 60). Mais en l'espèce, rejeter comme insuffisante la conclusion du juge en cabinet selon laquelle l'OWA mènerait « probablement » à terme les travaux revient essentiellement à exiger une « probabilité proche de la certitude ». Étant donné que l'arrêt *Abitibi* n'exige pas une certitude absolue, ni même une probabilité proche de la certitude, le juge en chef Wittmann n'a pas commis d'erreur en concluant qu'il était satisfait au troisième volet du test (voir l'*Oxford English Dictionary* (en ligne), qui définit [TRADUCTION] « probablement » comme « selon la vraisemblance (mais sans certitude) »; « presque certainement; pour autant que l'on sache ou que l'on puisse le dire; selon toute vraisemblance; vraisemblablement »).

[279] Après avoir conclu qu'il n'est pas suffisamment certain que l'AER abandonnera les sites, la majorité juge que les restrictions imposées par l'AER au transfert de permis ne satisfont pas non plus au test *Abitibi*. Il en est ainsi, dit-elle, parce que le refus de l'AER d'approuver le transfert d'un permis ne lui confère pas une réclamation pécuniaire contre Redwater et que le respect des conditions liées au ratio de gestion du titulaire de permis (« RGTP ») « reflète la valeur inhérente des biens détenus par

make clear that I have already concluded that, since GTL lawfully disclaimed the non-producing properties under s. 14.06(4) of the *BIA*, an operational conflict arises to the extent that the AER included those disclaimed properties in calculating Redwater's LMR for the purpose of imposing conditions on the sale of Redwater's assets. In the analysis that follows, I reach that same conclusion under the frustration of purpose aspect of the paramountcy test as well.

[280] I take issue with the majority's conclusion regarding the LMR conditions for two reasons. First, this approach elevates form over substance, disregarding Gascon J.'s admonition in *Moloney* that "[t]he province cannot do indirectly what it is precluded from doing directly" (para. 28; see also *Husky Oil*, at para. 41). Refusing to approve a sale of Redwater's assets unless GTL satisfies Redwater's environmental liabilities is no different, in substance, from directly ordering Redwater or GTL to undertake that work. This is because the AER achieves the exact same thing — the fulfillment of Redwater's environmental obligations — by making any sale conditional on GTL completing the work itself, posting security or packaging the non-producing assets into the sale, which reduces the sale price by the exact amount of those liabilities and ensures that the purchaser can be compelled, as the subsequent "licensee" under provincial law, to comply with the Abandonment Orders.

[281] The only difference between these two exercises of provincial power is the means by which the AER has opted to enforce the underlying obligations. The Abandonment Orders carry a threat of liability for non-compliance; imposing conditions on the sale of Redwater's assets, on the other hand, does not create a liability in a formal sense, but it does preclude any sale from occurring unless and until those obligations are satisfied. Since the trustee must sell the assets in order to carry out its mandate, the *effect* of imposing conditions on the sale of Redwater's assets

l'actif du failli » (par. 157). Tout d'abord, je tiens à préciser une chose : j'ai déjà conclu qu'étant donné que GTL a légalement renoncé aux bien inexploités en vertu du par. 14.06(4) de la *LFI*, il y a un conflit d'application dans la mesure où l'AER a inclus ces biens visés par les renonciations dans le calcul du RGTP de Redwater afin d'imposer des conditions à la vente des actifs de Redwater. Dans l'analyse qui suit, j'arrive également à la même conclusion en m'appuyant sur le second volet concernant l'entrave à la réalisation d'un objet fédéral du test de la prépondérance.

[280] Je suis en désaccord avec la conclusion de la majorité quant aux conditions relatives au RGTP pour deux raisons. D'abord, cette approche fait passer la forme avant le fond, ignorant la mise en garde du juge Gascon dans l'arrêt *Moloney* selon laquelle « [l]a province ne peut faire indirectement ce qu'il lui est interdit de faire directement » (par. 28; voir aussi *Husky Oil*, par. 41). Refuser d'approuver la vente des biens de Redwater à moins que GTL ne satisfasse aux obligations environnementales de Redwater n'est pas différent, au fond, que d'ordonner directement à Redwater ou à GTL de procéder à ces travaux. Il en est ainsi parce que l'AER atteint exactement le même résultat — le respect des obligations environnementales de Redwater — en faisant dépendre la vente de l'exécution des travaux par GTL lui-même, du versement par celle-ci d'un dépôt de garantie ou de l'inclusion des biens inexploités dans la vente, ce qui réduit le prix de vente du montant exact de ces engagements et permet de contraindre l'acheteur, en tant que « titulaire de permis » subséquent sous le régime de la loi provinciale, à se conformer aux ordonnances d'abandon.

[281] La seule différence entre ces deux exercices d'un pouvoir provincial est le moyen par lequel l'AER a choisi de faire exécuter les obligations sous-jacentes. Les ordonnances d'abandon comportent un risque de responsabilité pour non-respect; l'imposition de conditions à la vente des actifs de Redwater, par contre, ne crée pas formellement de responsabilité, mais empêche effectivement toute vente de se réaliser tant et aussi longtemps qu'il n'est pas satisfait à ces obligations. Étant donné que le syndic doit vendre les biens afin de remplir

is the same as that of issuing abandonment orders — and, as my colleague acknowledges, it is the effect of provincial action, not its intent or its form, that is central to the paramountcy analysis (para. 116; see also *Husky Oil*, at para. 40). In either case, then, the effect of the AER's action is to create a debt enforcement scheme — one that requires the environmental obligations owed to the AER to be discharged ahead of the bankrupt's other debts.

[282] Second, it is irrelevant to this analysis that the licensing requirements predate Redwater's bankruptcy and apply to all licensees. This is no different from *Abitibi*, where the obligation to close down and remediate the properties predated AbitibiBowater's bankruptcy and could also have been said to constitute an "inherent" limitation on the value of the regulatory licence. Yet the obligations at issue there were provable claims. So too here. Alberta is, of course, free to affect the priority of claims in non-bankruptcy contexts. For example, it can leverage its licensing power to condition the sale of assets by *solvent* corporations on the payment of outstanding debts to the province. But "once bankruptcy has occurred [the *BIA*] determines the status and priority of the claims" (*Husky Oil*, at para. 32, quoting A. J. Roman and M. J. Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and The Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. Bar Rev.* 77, at p. 79).

[283] In this case, imposing conditions on the sale of Redwater's valuable assets *does* result in a monetary debt in the AER's favour, whether in the form of: (1) the posting of security; (2) actual completion of the environmental work; or (3) the sale of the non-producing properties to another entity that is then regulated as a "licensee" and, as such, can be compelled under provincial law to complete the work. In each case, the result is the same: the AER is conditioning any sale of Redwater's assets on its

son mandat, l'*effet* de l'imposition de conditions à la vente des biens de Redwater est le même que celui des ordonnances d'abandon — et, comme le reconnaît mon collègue, c'est l'effet de l'action provinciale, et non son intention ou sa forme, qui est au cœur de l'analyse relative à la prépondérance (par. 116; voir aussi *Husky Oil*, par. 40). L'effet de l'action de l'AER est donc, dans les deux cas, de créer un régime de recouvrement des créances — qui exige que les obligations environnementales envers l'AER soient acquittées avant les autres dettes du failli.

[282] Ensuite, le fait que les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis n'est pas pertinent pour les besoins de la présente analyse. La situation n'est pas différente de celle dans l'affaire *Abitibi*, où l'obligation de fermer et de décontaminer les biens précédait la faillite d'AbitibiBowater et aurait également pu être considérée comme constituant une limite « inhérente » à la valeur du permis réglementaire. Pourtant, les obligations en cause dans cette affaire étaient des réclamations prouvables. C'est également le cas en l'espèce. Il est certes loisible à l'Alberta de modifier l'ordre de priorité des réclamations dans un contexte autre que celui d'une faillite. Par exemple, elle peut se servir de son pouvoir de délivrer des permis pour faire dépendre la vente des biens des sociétés *solvables* du paiement des dettes impayées envers la province. Mais « dès qu'il y a faillite, c'est [la *LFI*] qui détermine le statut et l'ordre de priorité des réclamations » (*Husky Oil*, par. 32, citant A. J. Roman et M. J. Sweatman, « The Conflict Between Canadian Provincial Personal Property Security Acts and the Federal Bankrupcy Act : The War is Over » (1992), 71 *R. du B. can.* 77, p. 79).

[283] En l'espèce, l'imposition de conditions à la vente des actifs de valeur de Redwater entraîne *bel et bien* une créance pécuniaire en faveur de l'AER, que ce soit sous forme : (1) de versement d'un dépôt de garantie; (2) d'achèvement réel des travaux environnementaux; ou (3) de vente des biens inexploités à une autre entité qui est alors réglementée comme « titulaire de permis » et qui peut ainsi être contrainte en application de la loi provinciale à mener à bien les travaux. Dans un cas comme dans l'autre, le résultat

ability to recover a pre-existing debt owed to it by the bankrupt.

[284] An approach which artificially separates the Abandonment Orders and the transfer requirements in order to treat them as analytically distinct under the *Abitibi* test would cause the paramountcy analysis to turn on irrelevant subtleties in the manner or form in which the province has chosen to exercise its power. The two measures must be seen in tandem as the AER's means of enforcing a debt against the Redwater estate. As I have described, there is no meaningful difference in the bankruptcy context between a formal abandonment order directing a trustee to engage in remediation work and a rigid licensing system that imposes the exact same obligations as a condition of sale — a sale that, if the trustee is to carry out its mandate, *must* occur. The only effect of the majority's analysis is to encourage regulators to collect on their debts in more creative ways. None of this serves the purposes of paramountcy; and, more critically, nothing in that analysis offers insolvency professionals (or regulators, for that matter) clear guidance as to the types of obligations that will or will not satisfy the *Abitibi* test.

[285] Since it is sufficiently certain that the AER (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Abandonment Orders are provable claims, and therefore the AER may not compel Redwater or its trustee to fulfill the obligations in question outside of the *BIA*'s priority scheme. Likewise, the AER may not condition the sale of Redwater's valuable assets on the performance of those same obligations.

[286] Towards the end of its analysis, the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate,

est le même : l'AER fait dépendre la vente des biens de Redwater de sa capacité de recouvrer une dette préexistante que lui devait le failli.

[284] Une approche qui différencie artificiellement les ordonnances d'abandon et les exigences relatives au transfert afin de leur réserver un traitement distinct sur le plan analytique en application du critère *Abitibi* ferait reposer l'analyse relative à la prépondérance sur des subtilités non pertinentes concernant la manière dont la province a choisi d'exercer son pouvoir ou la forme que prend ce choix. Les deux mesures doivent être considérées ensemble comme le moyen employé par l'AER pour recouvrer une créance à l'encontre de l'actif de Redwater. Comme je l'ai expliqué, il n'existe aucune différence significative dans le contexte de la faillite entre une ordonnance officielle d'abandon enjoignant au syndic de procéder à des travaux de décontamination et un système de délivrance de permis rigide qui impose exactement les mêmes obligations comme condition de la vente — une vente qui, si le syndic veut remplir son mandat, *doit* avoir lieu. Le seul effet qu'a l'analyse de la majorité est d'encourager les organismes de réglementation à trouver des façons plus ingénieuses de recouvrer leurs créances. Rien de tout cela ne sert les fins de la prépondérance; et, fait plus important, rien dans cette analyse ne donne aux professionnels de l'insolvabilité (ni aux organismes de réglementation, d'ailleurs) des indications claires quant aux types d'obligations qui peuvent ou non satisfaire au test *Abitibi*.

[285] Comme il est suffisamment certain que l'AER (ou l'OWA, sa délégataire) achèvera les travaux d'abandon et de remise en état, il est satisfait aux trois volets du test *Abitibi*. Les ordonnances d'abandon sont des réclamations prouvables, et l'AER ne peut donc contraindre Redwater ou son syndic à acquitter les obligations en cause à l'extérieur du régime de priorité établi par la *LFI*. De la même façon, l'AER ne peut faire dépendre la vente des biens de valeur de Redwater de l'exécution de ces mêmes obligations.

[286] Vers la fin de son analyse, la majorité soutient que les mesures d'application prises par l'AER en l'espèce favorisent, au lieu de contrecarrer, la

Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7) (para. 159). Respectfully, I completely reject this contention. No party attempted to argue that the super priority in subs. (7) was applicable on the facts of this case. Indeed, it is clear that it is not, as the majority itself acknowledges. I cannot accept that where Parliament has set out a particular super priority for the Crown for environmental remediation costs, secured against specific real property assets of the bankrupt, and where certain conditions are met, it somehow "facilitates" Parliament's priority scheme to, in effect, impose that super priority over other assets, in the absence of those statutory conditions being satisfied. It is wrong to rely on s. 14.06(7) to recognize an effective super priority for the AER in circumstances where the terms of that subsection are inapplicable. Doing so clearly undermines the detailed and comprehensive priority scheme that Parliament set out in the *BIA* to achieve its purposes. Had Parliament wished to extend a Crown super priority for environmental remediation costs beyond the circumstances in s. 14.06(7), it could have done so.

[287] As a final note, GTL and ATB Financial advance alternative arguments that some aspects of Alberta's statutory regime, including the definition of "licensee", frustrate the purposes of the 1997 amendments to the *BIA* — purposes that, they say, include protecting insolvency professionals from liability and reducing the number of orphaned sites.

[288] It is not strictly necessary for me to address these arguments, since I have already found that there is an operational conflict (the Alberta regime's failure to recognize the lawfulness of GTL's disclaimers) as well as a frustration of purpose on other grounds (interference with the *BIA*'s priority scheme). I would note, however, that GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result

réalisation des intentions du Parlement qui sous-tendent le régime de priorité de la *LFI* en raison de la superpriorité prévue au par. 14.06(7) pour les frais de décontamination environnementale (par. 159). Avec égards, je rejette entièrement cette prétention. Aucune partie n'a tenté de faire valoir que la superpriorité visée au par. (7) s'appliquait aux faits de l'espèce. En effet, elle ne s'applique clairement pas, comme le reconnait elle-même la majorité. Je ne peux accepter que, dans les cas où le Parlement a conféré à la Couronne une superpriorité lorsque certaines conditions sont réunies pour les frais de décontamination environnementale et l'a garantie par une sûreté sur certains biens réels du failli, on « favorise » d'une façon ou d'une autre le régime de priorité du Parlement en imposant dans les faits cette superpriorité sur d'autres biens alors que ces conditions statutaires ne sont pas remplies. Il est erroné d'invoquer le par. 14.06(7) pour reconnaître à l'AER une superpriorité dans des situations où les conditions de ce paragraphe ne s'appliquent pas. Agir de la sorte sape clairement le régime de priorité détaillé et complet que le Parlement a établi dans la *LFI* pour réaliser ses objectifs. Si le Parlement avait souhaité étendre une superpriorité de la Couronne pour des frais de décontamination environnementale dans d'autres cas que ceux visés au par. 14.06(7), il aurait pu le faire.

[287] En terminant, GTL et ATB Financial font valoir des arguments subsidiaires selon lesquels certains aspects du régime de réglementation albertain, notamment la définition de « titulaire de permis », entravent la réalisation des objets des modifications apportées à la *LFI* en 1997 — objets qui, affirment-ils, comprennent la protection des professionnels de l'insolvabilité contre la responsabilité et la réduction du nombre de sites orphelins.

[288] Il n'est pas strictement nécessaire que j'examine ces arguments, car j'ai déjà conclu qu'il existe un conflit d'application (la non-reconnaissance par le régime albertain de la légalité des renonciations de GTL) ainsi qu'une entrave à la réalisation d'objet pour d'autres motifs (atteinte au régime de priorité établi par la *LFI*). Je tiens toutefois à souligner que GTL a déclaré qu'elle demanderait immédiatement une libération si elle était tenue d'exécuter les

in the remaining Redwater assets being surrendered to the OWA. The result in this circumstance, which does not appear to be acknowledged, or which appears to be ignored, in my colleague's reasons, would be *more* orphaned oil wells. To the extent, then, that the 1997 amendments were intended to reduce the number of orphaned properties, that purpose is also frustrated by preventing a receiver or trustee from disclaiming value-negative assets.

IV. Conclusion

[289] There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

[290] Whatever the merits of these competing positions, in matters of statutory interpretation this Court is one of law, not of policy. As the majority recognizes, at para. 30, "it is not the role of this Court to decide the best regulatory approach to the oil and gas industry"; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome. But this does not mean that the AER is without options to protect the public from bearing the costs of abandoning oil wells. It could adjust its LMR requirements to prevent other oil companies from reaching the point of bankruptcy with unfunded abandonment obligations (as it has already done since this litigation began). It could

travaux d'abandon, ce qui entraînerait la cession du reste des biens de Redwater à l'OWA. Il en résulterait, ce qui ne semble pas être reconnu ou paraît être passé sous silence dans les motifs de mon collègue, un nombre *plus élevé* de puits de pétrole orphelins. Dans la mesure où les modifications de 1997 étaient censées entraîner une réduction du nombre de biens orphelins, la réalisation de cet objet est également entravée en empêchant le séquestre ou le syndic de renoncer aux biens ayant une valeur négative.

IV. Conclusion

[289] Il y a beaucoup à dire, dans le contexte du présent pourvoi, sur l'issue qui établirait un équilibre optimal entre la protection de l'environnement et le développement économique. D'une part, faire exécuter les ordonnances de décontamination de l'AER aurait pour effet d'éliminer la valeur restante de l'actif et priverait tous ses créanciers (sauf l'AER) de tout recouvrement. En outre, cela découragerait vraisemblablement les professionnels de l'insolvabilité d'accepter des mandats dans des cas comme celui qui nous occupe, ce qui pourrait occasionner une augmentation du nombre de biens orphelins dans l'ensemble de la province. D'autre part, permettre à GTL de renoncer aux puits inexploités en empêchant l'AER de faire exécuter les obligations environnementales avant que l'actif soit épuisé laisserait sans réponse la question de savoir qui, exactement, devrait payer la facture de la décontamination des terrains concernés.

[290] Quel que soit le bien-fondé de ces positions opposées en matière d'interprétation statutaire, notre Cour est un tribunal de droit, et non de politique. Comme le reconnaît la majorité (par. 30), « il ne revient pas à notre Cour de décider de la meilleure approche réglementaire pour l'industrie pétrolière et gazière » : les décisions sur ces enjeux sont prises — et ont d'ailleurs *été prises* — par les législateurs, et non par les juges. Et le droit en l'espèce n'appuie qu'une seule issue. Mais cela ne veut pas dire qu'aucune solution ne s'offre à l'AER pour empêcher le public d'avoir à supporter les frais liés à l'abandon des puits de pétrole. Il pourrait ajuster ses exigences relatives à la RGTP afin d'éviter que d'autres sociétés pétrolières soient acculées à la faillite en raison

adopt strategies used in other jurisdictions, such as requiring the posting of security up-front so that abandonment costs are not borne entirely at the end of an oil well's life cycle. One of the interveners, the Canadian Bankers' Association, noted that such systems of up-front bonding are prevalent in American jurisdictions. The AER could work with industry to increase levies so that the orphan fund has sufficient resources to respond to the recent increase in the number of orphaned properties. It could seek judicial intervention in cases where it suspects that a company is strategically using insolvency as a voluntary step to avoid its environmental liabilities (*Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156, at para. 84). And, as I have noted, it can continue to apply the province's statutory regime to all assets of an insolvent or bankrupt debtor that are retained by a receiver or trustee, including wells and facilities that the receiver or trustee seeks to operate rather than sell.

d'obligations d'abandon non financées (comme il l'a déjà fait depuis que le présent litige a commencé). Il pourrait adopter les stratégies utilisées dans d'autres ressorts, comme exiger dès le début le versement d'un dépôt de garantie afin que les frais liés à l'abandon ne soient pas entièrement supportés à la fin du cycle de vie du puits de pétrole. L'une des intervenants, l'Association des banquiers canadiens, a fait remarquer que de tels systèmes de dépôts de garantie au départ abondent dans les États américains. L'AER pourrait collaborer avec l'industrie pour augmenter les prélèvements afin que le fonds pour les puits orphelins dispose de ressources suffisantes pour répondre à la récente augmentation du nombre de biens orphelins. Il pourrait solliciter l'intervention des tribunaux dans les cas où il soupçonne une société d'utiliser stratégiquement l'insolvabilité comme une mesure facultative lui permettant de se soustraire à ses engagements environnementaux (*Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156, par. 84). Et, comme je l'ai mentionné, il peut continuer d'appliquer le régime législatif provincial à tous les biens d'un débiteur insolvable ou en faillite qui sont conservés par un séquestre ou un syndic, y compris les puits et installations que le séquestre ou le syndic veut exploiter plutôt que de les vendre.

[291] The AER may not, however, disregard federal bankruptcy law in the pursuit of otherwise valid statutory objectives. Yet that is precisely what it has done here by effectively displacing the "polluter-pays" principle enacted by Parliament in favour of a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is transferred to the estate's creditors. Our paramountcy jurisprudence does not permit that result.

[291] L'AER ne peut pas, cependant, faire abstraction du droit fédéral de la faillite pour atteindre des objectifs statutaires par ailleurs valides. Or, c'est précisément ce qu'il a fait en l'espèce en écartant effectivement le principe du « pollueur-payeur » adopté par le Parlement en faveur d'un régime du « prêteur-payeur », dans le cadre duquel la responsabilité à l'égard des engagements environnementaux du failli passe aux créanciers de l'actif. Notre jurisprudence en matière de prépondérance n'admet pas ce résultat.

[292] For the foregoing reasons, I would dismiss the appeal and affirm the orders made by the chambers judge.

[292] Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi et de confirmer les ordonnances rendues par le juge en cabinet.

APPENDIX

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

. . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy

ANNEXE

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3

14.06 (1) Le syndic n'est pas tenu d'assumer les fonctions de syndic relativement à des cessions, à des ordonnances de faillite ou à des propositions concordataires; toutefois, dès qu'il accepte sa nomination à ce titre, il doit accomplir les fonctions que la présente loi lui impose, jusqu'à ce qu'il ait été libéré ou qu'un autre syndic ait été nommé à sa place.

(1.1) Les paragraphes (1.2) à (6) s'appliquent également aux syndics agissant dans le cadre d'une faillite ou d'une proposition ainsi qu'aux personnes suivantes :

a) les séquestres intérimaires;

b) les séquestres au sens du paragraphe 243(2);

c) les autres personnes qui sont nommément habilitées à prendre — ou ont pris légalement — la possession ou la responsabilité d'un bien acquis ou utilisé par une personne insolvable ou un failli dans le cadre de ses affaires.

. . .

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

(3) Le paragraphe (2) n'a pas pour effet de soustraire le syndic à une obligation de faire rapport ou de communiquer des renseignements prévue par le droit applicable en l'espèce.

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du

any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental

non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

(5) En vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

(6) Si le syndic a abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y a renoncé, les réclamations pour les frais de réparation du

damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Appeal allowed, MOLDAVER *and* CÔTÉ JJ. *dissenting.*

Solicitors for the appellants: Bennett Jones, Calgary; Alberta Energy Regulator, Calgary.

Solicitors for the respondents: Blake, Cassels & Graydon, Calgary; Cassels Brock & Blackwell, Calgary; Gowling WLG (Canada), Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

(7) En cas de faillite, de proposition ou de mise sous séquestre administrée par un séquestre, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre le débiteur pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses immeubles ou biens réels est garantie par une sûreté sur le bien en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge, sûreté ou réclamation visant le bien.

(8) Malgré le paragraphe 121(1), la réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant l'immeuble ou le bien réel du débiteur constitue une réclamation prouvable, que la date du fait ou dommage soit antérieure ou postérieure à celle de la faillite ou du dépôt de la proposition.

Pourvoi accueilli, les juges MOLDAVER *et* CÔTÉ *sont dissidents.*

Procureurs des appelants : Bennett Jones, Calgary; Alberta Energy Regulator, Calgary.

Procureurs des intimées : Blake, Cassels & Graydon, Calgary; Cassels Brock & Blackwell, Calgary; Gowling WLG (Canada), Calgary.

Procureur de l'intervenante la procureure générale de l'Ontario : Procureure générale de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Procureur de l'intervenant le procureur général de la Saskatchewan : Procureur général de la Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Clinic at the University of Ottawa, Ottawa.

Procureur de l'intervenante Ecojustice Canada Society : Clinique Ecojustice à l'Université d'Ottawa, Ottawa.

Solicitors for the intervener the Canadian Association of Petroleum Producers: Lawson Lundell, Calgary.

Procureurs de l'intervenante l'Association canadienne des producteurs pétroliers : Lawson Lundell, Calgary.

Solicitors for the intervener Greenpeace Canada: Stockwoods, Toronto.

Procureurs de l'intervenante Greenpeace Canada : Stockwoods, Toronto.

Solicitor for the intervener Action Surface Rights Association: University of Calgary Public Interest Law Clinic, Calgary.

Procureur de l'intervenante Action Surface Rights Association : University of Calgary Public Interest Law Clinic, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Calgary.

Procureurs de l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation : McMillan, Calgary.

Solicitors for the intervener the Canadian Bankers' Association: Norton Rose Fulbright Canada, Calgary.

Procureurs de l'intervenante l'Association des banquiers canadiens : Norton Rose Fulbright Canada, Calgary.

Most Negative Treatment: Reversed
Most Recent Reversed: Pries v. Economical Mutual Insurance Co. | 2013 CarswellOnt 9902, [2013] O.F.S.C.D. No. 93 | (F.S.C.O. App., Jul 8, 2013)

2012 CarswellOnt 12509
Financial Services Commission of Ontario (Arbitration Decision)

Pries v. Economical Mutual Insurance Co.

2012 CarswellOnt 12509

Leroy Pries, Applicant and Economical Mutual Insurance Company, Insurer

John Wilson Member

Heard: August 10, 2012
Judgment: September 21, 2012
Docket: FSCO A11-002004

Counsel: David Donnelly, for Mr. Pries
Helen D.K. Friedman, for Economical Mutual Insurance Company

Subject: Insurance
Related Abridgment Classifications
Insurance
XII Automobile insurance
XII.5 No-fault benefits
XII.5.e Disability benefits (loss of income payments)
XII.5.e.ii Entitlement
XII.5.e.ii.A General principles
Headnote
Insurance --- Automobile insurance — No-fault benefits — Disability benefits (loss of income payments) — Entitlement — General principles
Table of Authorities
Cases considered by *John Wilson Member*:
Beattie v. National Frontier Insurance Co. (2003), 5 C.C.L.I. (4th) 1, 68 O.R. (3d) 60, 2003 CarswellOnt 4465, 233 D.L.R. (4th) 329, 179 O.A.C. 52 (Ont. C.A.) — considered
Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — considered
Boarelli v. Flannigan (1973), 1973 CarswellOnt 872, [1973] 3 O.R. 69, 36 D.L.R. (3d) 4 (Ont. C.A.) — considered
Cugliari v. White (1998), 159 D.L.R. (4th) 254, 109 O.A.C. 109, 38 O.R. (3d) 641, 1998 CarswellOnt 1789, 21 C.P.C. (4th) 213 (Ont. C.A.) — referred to
Kirkham v. State Farm Mutual Automobile Insurance Co. (1996), 1996 CarswellOnt 3339 (Ont. Insurance Comm.) — considered
Kirkham v. State Farm Mutual Automobile Insurance Co. (1997), 1997 CarswellOnt 1277 (Ont. Insurance Comm.) — referred to
Kirkham v. State Farm Mutual Automobile Insurance Co. (1998), 1998 CarswellOnt 2811 (Ont. Div. Ct.) — referred to
Kirkham v. State Farm Mutual Automobile Insurance Co. (1998), 1998 CarswellOnt 2799 (Ont. C.A.) — referred to

R. v. McIntosh (1995), 21 O.R. (3d) 797 (note), 178 N.R. 161, 79 O.A.C. 81, [1995] 1 S.C.R. 686, 1995 CarswellOnt 4, 1995 CarswellOnt 518, 36 C.R. (4th) 171, 95 C.C.C. (3d) 481 (S.C.C.) — considered
Slater v. Personal Insurance Co. of Canada (2008), 2008 CarswellOnt 2019 (F.S.C.O. Arb.) — considered
State Farm Mutual Automobile Insurance Co. v. Kong (1996), 1996 CarswellOnt 2668, 5 O.T.C. 147 (Ont. Gen. Div.) — referred to
Trottier v. Royal & SunAlliance Insurance Co. of Canada (2003), 2003 CarswellOnt 5083 (F.S.C.O. App.) — considered
Vanderkop v. Personal Insurance Co. of Canada (2008), 2008 CarswellOnt 2761, 63 C.C.L.I. (4th) 64 (Ont. S.C.J.) — referred to
Vanderkop v. Personal Insurance Co. of Canada (2009), 2009 ONCA 511, 2009 CarswellOnt 3604, 74 C.C.L.I. (4th) 191, 251 O.A.C. 77, 2009 C.E.B. & P.G.R. 8348 (Ont. C.A.) — referred to

***John Wilson Member*:**

Issues:

1 The Applicant, Leroy Pries, was injured in a motor vehicle accident on September 3, 2007. He applied for and received statutory accident benefits from Economical Mutual Insurance Company ("Economical"), payable under the *Schedule*. [1]

2 Mr. Pries applied for a number of statutory accident benefits, including an income replacement benefit. For some time this benefit was stopped by Economical as it believed that he no longer met the criteria for its payment.

3 On the receipt of further information Economical reinstated payment of an income replacement benefit. In the meantime however, Mr. Pries had applied to the Canada Pension Plan for a disability benefit under that regime.

4 On March 3, 2010, Mr. Pries was informed that his application for CPP was accepted and received a lump sum payment from CPP retroactive to the date when CPP considered entitlement began. The payment reflected CPP benefits payable between November 23, 2008 to May 2, 2010.

5 Mr. Pries notified Economical of the benefit that he had received from CPP and on March 15, 2010 Economical formally provided notice to Mr. Pries of its intention to demand repayment of benefits by Mr. Pries as a result of what it qualified as an overpayment situation brought about by the receipt of the lump sum from CPP.

6 The parties were unable to resolve their disputes through mediation, and Mr. Pries applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

7 The preliminary issue is:

1. Is Economical entitled to the repayment of weekly income replacement benefits in the sum of $12,333.34 as set out in its letter of April 27, 2010 due to the retroactive payment Mr. Pries received for CPP benefits in the amount of $10,954.88 covering the period of November 1, 2008 to February 28, 2010?

Result:

8

1. Economical may not claim repayment income replacement benefits prior to the notice of repayment given on April 27, 2010 and may only deduct CPP benefits on a going- forward basis from the date of notice.

Evidence and Analysis:

9 As noted above, the background facts in this matter are not in dispute. Economical currently recognizes that Mr. Pries is entitled to an income replacement benefit on an ongoing basis. Both sides recognize that the ongoing payments Mr. Pries receives from CPP are properly deducted from his income replacement benefit payment. Where this dispute arises is Economical's

contention that the entire retroactive CPP payment is properly repayable in accordance with its notice under section 47 of the *Schedule* as it then read.

10 The right to deduct CPP payments from SABS IRB payments is a statutory provision that is incorporated into the insurance contract. Likewise, the right of an insurer to demand repayment under section 47(1)(c) (receipt of collateral deductible payments) does not arise outside of the statute. [2]

11 The nub of the dispute is section 47(3) which states that:

> The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made.

12 Economical chooses to interpret that section as meaning that notice must be given within 12 months after the collateral payment giving rise to the overpayment is received, while Mr. Pries has taken the position that a right to repayment is only generated when notice is given within 12 months of the date that payment of the benefit to be repaid has been paid.

13 Given that the *Schedule* in its various iterations wins no prizes for clarity and elegance in legislative drafting, it is not surprising that the parties have had some difficulty in agreeing on the meaning of "payment" in this section.

14 The word "payment" in the context of section 47 is not defined. Consequentially, both parties have looked to the grammatical sense of the phrase and the principles of legislative interpretation to assist them in divining some meaning.

15 Legislative interpretation in the words of Borins J.A. "resolves conflicts where the words of a provision are reasonably capable of more than one meaning." [3]

16 Iacobucci J. reminds us, in *Bell ExpressVu Ltd. Partnership*, that:

> The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like [page581] people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)* [4]

17 The first analysis must be to determine whether the word "payment" as used in section 47 is reasonably capable of more than one meaning.

18 To start, the *Concise Oxford Dictionary* accords three varying definitions to the word:

> **Payment 1** The act or an instance of paying. **2** an amount paid. **3** reward, recompense.

19 In this dispute, the definition "an amount paid" could *potentially* encompass the differing interpretations put on the word by both parties. Does this then make the word ambiguous enough to engage further the principles of statutory interpretation?

20 Iacobucci J., in *Bell ExpressVu*, posed the same question:

> What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, [1976] 1 S.C.R. 108, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. v.

> Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. [5]

21 Since examining the word by itself sheds little light on the section, it is necessary to divine the meaning of the word from its context. The immediate context reads as follows:

> The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the ***payment*** was made.

22 Counsel for Mr. Pries points to the use of the word "repay" in the same provision as payment as a key to interpretation. For Mr. Donnelly the *payment* can only be the payment of the benefit under the SABS which the Insurer wishes to have clawed back or reimbursed.

23 Counsel for Economical instead drew my attention to the wider context of section 47. Section 47(1)(c) for example provides that an insured shall repay to the insurer:

> Any income replacement, non-earner or caregiver benefit or any benefit under Part VI to the extent of any ***payments received by the person*** that are deductible from those benefits under this Regulation.
>
> [emphasis added]

24 It is clear in the latter referenced provision that the word *payments* refers to collateral payments received by an insured that would be deductible in the calculation of an income replacement benefit.

25 Adding to the confusion is the likely intention on the part of the drafters of the Regulation to have CPP and other income support benefits deducted from the amount payable by way of income replacement benefits.

26 Mr. Pries' reading of the clause would, in the mind of the insurer, inhibit the intention of the Act by creating circumstances where it would be impossible to provide notice of repayment in a timely manner and so disentitle an insurer from repayment.

27 The Insurer states that it would have to engage in time travel to provide adequate notice and to engage the repayment provisions in Mr. Pries' case

28 An alternative interpretation would be that the legislature did not intend that Mr. Pries' lump sum CPP payment be clawed back at all.

29 The revised version of the 2010 *Schedule* makes it clear that it is not the intention of the legislature to permit a clawback of benefits under all situations:

> (3) If the notice required under subsection (2) is not given within 12 months after the payment of the amount that is to be repaid, the person to whom the notice would have been given ceases to be liable to repay the amount unless it was originally paid to the person as a result of wilful misrepresentation or fraud. O. Reg. 34/10, s. 52 (3).

30 While still perhaps inelegant, the meaning of the section is clear. If, for example, Mr. Pries received a payment in January 2012 that the Insurer wants repaid, then notice must be given by January 2013 or "the person to whom the notice would have been given ceases to be liable to repay the amount." This is precisely what the predecessor section 47 is said to express.

31 Counsel for Economical, however, points to this change in wording as evidence of a change in meaning of the section as it read in the 1996 *Schedule*. I note, however, that the *Legislation Act, 2006* provides:

> 56. (1) The repeal, revocation or amendment of an Act or regulation does not imply anything about the previous state of the law or that the Act or regulation was previously in force.
>
> (2) The amendment of an Act or regulation does not imply that the previous state of the law was different.

32 In the end I find that nothing meaningful can be read into the changes between the 1996 and the 2010 *Schedules*. At best it would be a clarification and reassertion of what went before.

33 In such a case, it would make sense that "payment" takes its immediate context from the repayment of a benefit and that the appropriate time frame for the notice requirement relates to the original payment of the benefit being reclaimed.

34 In the context of the limited jurisprudence to date on this issue, this is not without precedent.

35 Mr. Pries relies principally on the *Slater* [6] case, an arbitration decision by Arbitrator Ashby, dating from 2008. In that matter, Personal Insurance claimed a repayment of benefits due to an error in calculation. Although the reason for repayment was different, the provisions relating to notice of repayment by the Insurer are identical to those faced by Mr. Pries. Arbitrator Ashby held that "payment" in section 47(3) refers to the initial payment of the benefit to the insured by the insured. Accordingly, Mr. Pries' interpretation is not without precedent.

36 In *Trottier*, [7] Director's Delegate Draper also dealt with the repayment provisions in section 47. In that matter, the Director's Delegate found that "in my opinion that 'the payment' in s. 47(3) refers to the payment of the accident benefit, not the payment of collateral benefits."

37 Economical's principal argument against this interpretation is that it runs counter to the purpose of the repayment provisions and the collateral reduction. If the legislature has decided that certain collateral payments are deductible, then it makes no sense for an insured to be in a position to keep an overpayment just because of the manner in which the payment was made: a retrospective bulk payment in the case of Mr. Pries. Economical sees this as an interpretive absurdity conferring what can only be a windfall of double payment on Mr. Pries.

38 As Professor Ruth Sullivan has observed [8] :

> In a perfect world the legislature would create flawless legislation. Each statute would be drafted so that the effects of interpreting and applying it to an unfolding reality would match the goals sought by the legislature.

39 The *Schedule* exists in a very imperfect universe. It has been subject to continual revision, tinkering and titivation in an attempt to balance its political sensitivity with the realities of the insurance marketplace.

40 Professor Sullivan concluded her observation as follows:

> In an imperfect world there is often a divergence between the purpose of legislation on the one hand and the effects of applying it on the other. The language of particular provisions may turn out to be over or under inclusive: there may be a lacuna in the legislative scheme. [9]

41 If the sole purpose of the repayment provision is to prevent double payment, then there indeed is a logical dissonance if the provision of the payment by retroactive lump sum somehow succeeds in avoiding at least part of the effective deductibility of the collateral payment. Economical would have me change the meaning of "payment" in section 47(3) to facilitate the operation of the policy against double recovery. I am not convinced that it is either proper or appropriate to do so.

42 Lamer C.J., in *McIntosh* [10] , dealing with what he characterized as Criminal Code "provisions (that) overlap, and are internally inconsistent in certain respects", stated:

> In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise

43 Elsewhere in the decision he commented:

> The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis would match the goals sought by the legislature.

44 Professor Sullivan sums up the reasoning behind Lamer C.J.'s approach as follows:

> While courts are willing to correct drafting errors, they are reluctant to fill gaps in legislation. This reluctance is grounded in two factors. First, unlike mistakes, which are always inadvertent, a gap in legislation may be deliberate. Gaps may result from faulty drafting but equally they may result from factual misconceptions, poor planning or even a considered policy choice. For this reason, gaps are taken to embody the actual intentions of the legislature, which courts are bound to respect. It is up to the legislature rather than the courts to effect any desired change. Second, whether inadvertent or not, gaps result from provisions or schemes that are under-inclusive, and correcting under-inclusiveness would require courts to legislate.

45 In this matter, it is plausible that the legislature was not as concerned about limited double recovery as it was about encouraging insureds to apply for potential collateral benefits, even in the face of initial refusals by the collateral carrier. In Mr. Pries' case, he followed through with an application for CPP benefits, which in the long term greatly benefitted the Insurer in spite of initial roadblocks and refusals. Some incentive for insureds to persevere [11] would not be contrary to the scheme of the *Schedul*e since it would serve the purpose of encouraging parties to access collateral benefits notwithstanding refusals.

46 Even if such an intention cannot be read into the creation of the *Schedule*, the fact remains that changing the meaning of "payment" as urged by the Insurer would constitute judicial legislation.

47 While I believe that the use of "payment" in section 47(3), when analyzed in its immediate context, inescapably has the meaning attributed to it by Mr. Pries and Arbitrator Ashby, I would also accept that if it was found to be at all ambiguous, the principles of statutory interpretation outlined by Arbitrator Ashby in *Slater* would lead to the same conclusion.

48 Consequently, I find that, although Economical is entitled to deduct Mr. Pries' CPP payments from his ongoing IRB payments, it must have acted within 12 months of the "payment (which) was made" in making its demand of repayment. As noted, the notice date was given on April 27, 2010.

49 Assuming that the first payment of an income replacement benefit was made to Mr. Pries on October 13, 2007, it is obvious that a notice of repayment given on April 27, 2010 is at the very least partially out of time, if Economical wishes to recover the equivalent in benefits of the entire CPP payment. At best, if one interpreted the repayment provisions widely, as targeting each individual payment, Economical could hope to be eligible to reclaim benefits paid after April 27, 2009.

50 Mr. Pries, however, would challenge even this interpretation of what is repayable, relying again on *Slater*, in which Arbitrator Ashby held that the date of first payment of the benefit was the watershed to be used to determine whether *any* benefits would be repayable.

51 Arbitrator Ashby noted the jurisprudence of the Commission specifically rejecting the notion of a rolling limitation in respect of time limits for contesting benefits and found that the corollary of no rolling time limits arising to the benefit of an insured was the principle that the same would apply to insurer's time limits in reclaiming benefits.

52 Arbitrator Ashby's reasoning makes sense. Her concerns regarding the burden of repayment falling on vulnerable people would seem congruent with an insurance scheme that incorporates elements of social policy.

53 The words in section 47(3) have at least one clear meaning. They provide for no repayment of a benefit "unless the notice under subsection (2) is given within 12 months after the payment was made." We have already seen that the payment in question is the payment of the income replacement benefit and not the payment of the collateral benefit.

54 What the provision does not clearly address is the *timing* of the payment that was made. Economical would suggest that the section addresses each and every subsequent payment of a benefit, and that although payment of a benefit may have commenced beyond the 12 month period, later payments of the same benefit, if within a 12-month period, may be caught retrospectively by the provision.

55 Statutory accident benefits can be payable over a lifetime. Situations change. Collateral payment sources may change. Given that understanding, it might seem odd, indeed unworkable if, 12 months after the commencement of benefit payments, all benefits became immune from recapture except in cases of fraud, even those "within 12 months" of the repayment notice.

56 Arbitrator Ashby's conclusions in *Slater* are difficult to reconcile with the popular interpretation of *Trottier* — that is, that the repayment claim may automatically go back 12 months from the date of notice.

57 The unique aspect of *Slater* is that Arbitrator Ashby treats section 47(3) as a limitation period rather than a period of retroactivity. As such, in the absence of a rolling limitation, the limitation period would be calculated from the initial IRB payment.

58 Section 51(1) of the *Schedule*, which contains the general limitation, reads as follows:

> A mediation proceeding or evaluation under section 280 or 280.1 of the *Insurance Act* or a court proceeding or arbitration under clause 281 (1) (a) or (b) of the Act in respect of a benefit under this Regulation shall be commenced within two years after the insurer's refusal to pay the amount claimed.

59 In the case of the generalized limitation, the meaning of the "refusal" is clearly the first refusal, and not the ongoing refusal to pay each further benefit as it would have accrued to the insured (rolling time limit).

60 In Mr. Pries' case, a rolling time limit would be necessary in any interpretation where it would be individual ongoing payments that trigger the repayment claim and not the commencement of payment of the benefit being reclaimed.

61 Earlier iterations of the *Schedule* dealt with repayment due to "error, wilful misrepresentation or fraud" as well as certain collateral benefits. CPP benefits [12] however were not caught in this scheme until the *Schedule* was amended to specifically address that issue.

62 It would make sense that errors and misfeasance ought to be discoverable at an early point in the process and that insurers would be expected to raise such simple issues early in the process. [13] That and the need to provide early warning to an insured if he or she is to bear the burden of repayment would justify the current wording.

63 In this context, I note Economical's submission that the CPP claims process has built-in delays that make retroactive payments almost a routine of the process once a claimant is accepted.

64 The expansion of the reasons for repayment to include CPP payments did not see a commensurate revision of what became section 47(3) to recognize the institutional delays referred to by Economical. This may well have been an oversight that failed to reflect the changed conditions resulting from the potentially wider grounds for repayment.

65 There might have been good policy grounds for the legislature to have specifically included a rolling time limit to deal with the changed situation, but it did not. Consequently, it is hard to unilaterally import a rolling time limit into this section.

66 Jurisprudence at the Commission has long treated rolling limitations as a pariah. In *Kirkham*, [14] the Director's Delegate, Divisional Court and the Court of Appeal all agreed that certainty required that the limitation period commence with the refusal to pay a benefit and not with each individual payment as it became due. Essentially, Arbitrator Ashby contends that if the insured is held to an inflexible date for the initiation of proceedings against an insurer, then fairness dictates that, in actions against an insured for repayment, the insurer not have benefit of the same sort of rolling limitation denied to its insured.

67 Whatever the policy reasons for finding in favour of rolling limitations or not, it comes down to the question of whether the wording of the section can support Arbitrator Ashby's interpretation.

68 Once again the section reads:

> (3) The obligation to repay a benefit does not apply unless the notice under subsection (2) is given within 12 months after the payment was made.

69 The French version [15] of the same enactment is perhaps equally enlightening:

> (3) L'obligation de rembourser une indemnité ne s'applique que si l'avis prévu au paragraphe (2) est donné dans les 12 mois du versement

70 Any questions arising from the phrase « after the payment was made » are clarified by the use of « versement » without the verb « made ». There is no question of whether the phrase refers to the payment most recently made, or first made, or each payment. It refers instead simply to the payment of the benefit itself. As such, it is consistent with Arbitrator Ashby's understanding.

71 This is not merely an academic discussion about meaning and grammatical sense.

72 In Mr. Pries' case, as a result of the deduction of CPP, and the Insurer's claim for repayment, an income replacement benefit of $264.48 per week was reduced to $87.56 per week. Mr. Pries fulfilled his obligation of promptly reporting his CPP benefit. One can infer that, even with the CPP payments available to Mr. Pries, he is not getting rich on the back of the Insurer. Indeed, persons living on the economic margins of society such as Mr. Pries must be seen as a highly vulnerable group.

73 Both *Trottier* and *Kong* [16] stand for the proposition that an insured should "not be expected to receive his no-fault benefits with a mere hope that the quantum is correct and a fear that he will be asked to repay them at a later date."

74 This is not a calculation error by Economical. It is however linked to the unjustified cessation and later reinstatement of benefits that prompted Mr. Pries to attempt to claim from CPP notwithstanding the long waiting period and initial discouragement.

75 It should be noted that Economical could at any time have put Mr. Pries on notice that he had to apply for CPP benefits to continue to receive IRB benefits. Economical was not shy about ceasing to pay IRB benefits for reasons that later turned out to be spurious, and could well have acted promptly to bring the CPP issue forward. It did not and Mr. Pries did not apply until much later, all of which could have been a factor in potentially delaying both the CPP payment and the notice of deductibility.

76 In the end, Economical benefitted from Mr. Pries' action and continues to do so. If Mr. Pries gets to keep a little more of his past CPP benefit than Economical intended, then it is the result of an anomaly in the legislation, not the fault of Mr. Pries.

77 While Arbitrator Ashby's reasoning in *Slater* is not binding on me, her discussion of the application of sections 47(2) and (3) of the *Schedule* is one of the few attempts to make sense of an often-contradictory provision and to account for the dilemma of insureds in Mr. Pries' uncomfortable position.

78 Consequently, while I accept that the drafters of the *Schedule* may well have had the overall goal of making all collateral payments deductible, and consequently recoverable by way of repayment, that goal did not translate well into the legislation itself.

79 The answer to calls to reinterpret this legislation is to suggest that they direct their attention to the Legislature and ask that institution to clarify the law.

80 If I am wrong in my interpretation of the applicability of *Slater* to this matter, then I would find that the jurisprudence, including *Trottier*, would not support a recovery of benefits beyond the 12-month notice period.

81 Mr. Pries also alleged that Economical's Notice of Repayment was insufficient and did not comply with section 47(2). Although the notice argument was not directly raised at the time the issue was set for hearing, it goes without saying that the statutory scheme requires a valid notice prior to any repayment taking place.

82 Having examined the notice, I am satisfied that it adequately communicated the extent of Economical's claim for repayment, and importantly, that it was overreaching itself in its attempt to recapture the IRB payments which were at that time clearly out of its reach. It certainly put Mr. Pries on notice of both the repayment and the need to challenge its rationale. As such, it served its purpose.

Expenses:

83 If the parties are unable to agree on the issue of expenses I may be spoken to on that issue providing that the request is made in a timely manner.

***John Wilson Member*:**

84 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Economical may not claim repayment income replacement benefits prior to the notice of repayment given on April 27, 2010 and may only deduct CPP benefits on a going-forward basis from the date of notice.

2. If the parties are unable to agree on the issue of expenses, I may be spoken to on that issue providing that the request is made in a timely manner.

Footnotes

1 *The Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.*

2 "Moneys received by an injured party as a result of a private or public benevolence have never been taken into consideration in assessing damages for loss of income or earning capacity." *Boarelli v. Flannigan*, [1973] 3 O.R. 69 (Ont. C.A.) at p. 73, (1973), 36 D.L.R. (3d) 4 (Ont. C.A.)

3 *Beattie v. National Frontier Insurance Co.* (2003), 68 O.R. (3d) 60 (Ont. C.A.)

4 *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.)

5 *Bell ExpressVu Ltd. Partnership v. Rex*, *(supra)*

6 *Slater v. Personal Insurance Co. of Canada* [2008 CarswellOnt 2019 (F.S.C.O. Arb.)], (FSCO A07-000592, March 27, 2008)

7 *Trottier v. Royal & SunAlliance Insurance Co. of Canada* [2003 CarswellOnt 5083 (F.S.C.O. App.)] (FSCO Appeal P03-00019, December 15, 2003)

8 *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 134,

9 *Sullivan and Driedger op cit.*

10 *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.):

11 Collateral payments that have been refused after application by an insured are not "available" benefits subject to deduction by the AB insurer. See *Vanderkop v. Personal Insurance Co. of Canada*, [2008] O.J. No. 1937 (Ont. S.C.J.), [2009] O.J. No. 2616 (Ont. C.A.)

12 See *Cugliari v. White* (1998), 38 O.R. (3d) 641 (Ont. C.A.)

13 It is noteworthy that an exception in the time limit is specifically carved out when the repayment is triggered by fraud.

14 *Kirkham v. State Farm Mutual Automobile Insurance Co.* [1996 CarswellOnt 3339 (Ont. Insurance Comm.)] (OIC A96-000141, August 15, 1996), appeal (OIC P96-00069, January 27, 1997 [1997 CarswellOnt 1277 (Ont. Insurance Comm.)]) and [1998] O.J. No. 6459 (Ont. Div. Ct.), [1998] O.J. No. 2872 (Ont. C.A.)

15 *Legislation Act* 2006, S.O. 2006, c. 21 Sched. F — *65.* The English and French versions of Acts and regulations that are enacted or made in both languages are equally authoritative.

16 *State Farm Mutual Automobile Insurance Co. v. Kong*, [1996] O.J. No. 2321 (Ont. Gen. Div.), Kennedy J.

End of Document

Ontario Supreme Court
Purolator Courier Ltd. v. United Parcel Service Canada Ltd.
Date: 1995-04-03

Purolator Courier Ltd./Courrier Purolator Ltee

and

United Parcel Service Canada Ltd.

Court File No. 94-CU-81492

Ontario Court (General Division), Lederman J. April 3, 1995.

Marilyn Field-Marsham, Jennifer Dolman and Ahab Abdel-Aziz, for plaintiff.

Robert Kwinter, for defendant.

[1] LEDERMAN J.:—In this action the plaintiff, Purolator Courier Ltd.—Courrier Purolator Ltee ("PCL"), seeks damages and a permanent injunction restraining the defendant, United Parcel Service Canada Ltd. ("UPS"), from airing and using a radio and television commercial concerning UPS's guaranteed overnight delivery before 10:30 a.m. service ("Guaranteed 10:30 Service"). The radio broadcast consists of the following:

(Character Norm Yustin talking to himself)

Norm: "How much will it cost?"

Norm: "How much?"

Norm: "What do you mean, how much have I got?"

Norm: "How much do you want?"

Announcer: When Norm Yustin sends an urgent overnight package, he has only one overriding concern …

Norm: "Just tell me how much? I can take it."

Announcer: Which is why UPS guarantees overnight delivery before 10:30 a.m., *usually at rates up to 40% less than other couriers charge.*

Norm: (sighing with relief) Yes. Thank you.

Announcer: UPS. Removing the need to go all the way down to Accounting to get approval to spend way too much for your overnight deliveries. Next time call 1-800-PICKUPS. See Service Guide for Guaranteed details; (Emphasis added.)

[2] The television broadcast displays the following caption:

> UPS
>
> 10:30 a.m.
>
> Guaranteed
>
> For less

[3] and vocalizes the following statement:

> Which is why UPS guarantees overnight delivery before 10:30 a.m., *usually at rates up to 40% less than other couriers charge.* (Emphasis added.)

[4] PCL has asserted both statutory and common law causes of action in this proceeding. The former is based upon s. 36(1) of the *Competition Act,* R.S.C. 1985, c. C-34 (the "Act"), which creates a civil cause of action for loss or damage suffered as a result of contravention of the provisions of the Act. In this regard, PCL alleged the following violations: s. 52(1)(*a*) of the Act which prohibits false and misleading advertising; s. 52(1)(*d*) of the Act which prohibits materially misleading representations concerning the price at which a product has been or will be ordinarily sold; and s. 57(2) of the Act which prohibits the practice of "bait and switch" selling. The common law cause of action asserted by PCL is the tort claim that the advertising in question has unlawfully interfered with its economic relations.

[5] At issue is whether the words in the commercial, which are highlighted above, contravene the Act or are otherwise tortious and actionable by PCL.

Nature of courier services in Canada

[6] The Canadian courier industry is highly competitive. There are some 2,000 businesses engaged in this industry, the four largest of which (PCL, Priority Post, Federal Express, and UPS) control 50% of the total market. These four primary competitors compete on a national basis. Each tracks and traces packages, has pick-up and call-taking capability, and a pricing system based on the time of arrival, distance and weight. The four courier firms all offer guaranteed overnight delivery. PCL, Priority Post and Federal Express hold roughly equal shares of the guaranteed overnight delivery segment of the market. PCL's revenue share is about 28%, that of Priority Post is about 26% and that of Federal Express is approximately 24%. UPS's revenue share of the guaranteed overnight segment is approximately 5%.

[7] At issue in this case is the Guaranteed 10:30 Service.

[8] Since the primary competitors offer essentially the same service, price is a major point of competition among them. A company can gain market share by offering a similar service at a lower price, or it can take a sub-segment of the market and tailor the service to that sub-segment. Since the courier business is a mature market, the only way to gain market share is to capture market share away from competitors.

[9] *Nature of customers of Guaranteed 10:30 Service*

[10] PCL breaks down its customers for this service into two groups: high frequency and low frequency. It defines a high frequency customer as one who sends more than 20 shipments per day whereas a low frequency customer sends less than 20 shipments per day. PCL estimates that it has 7,500 high frequency customers and 450,000 low frequency customers. High frequency customers, because of the volume of their business, are able to negotiate a separate contract and generally are afforded a price discount. Low frequency customers have no contract with PCL and pay published rates because their volume is not high enough to be afforded a discount.

[11] A substantial part of PCL's Guaranteed 10:30 Service business comes from low frequency customers. Fifty-nine percent of PCL's Guaranteed 10:30 a.m. Service business is comprised of packages in the weight range of 1 to 4 lbs. and 73% of that business comes from low frequency customers.

[12] Decisions by low frequency customers as to which courier to use are generally made by an individual in the firm who has other functions. Since volume and cost are not significant, the person responsible for sending overnight shipments is usually a receptionist, secretary or small firm partner, who is free to choose whatever courier he or she desires. Purchasing decisions by high frequency customers, on the other hand, are usually made by a distribution manager or committee.

[13] Courier companies have sales staff who are utilized exclusively to solicit business from high frequency shippers. These customers are approached directly by the sales personnel in the hope of landing a negotiated contract. In order to reach low frequency customers, courier companies resort to mass advertising, by way of television, radio, mailings, posters, etc. The UPS ads in question are an example of one such means.

The UPS ads

[14] On November 10, 1994, UPS commenced running a series of three radio advertisements which promoted its Guaranteed 10:30 Service. Three television advertisements, similar in content to the radio advertisements, began running on November 23, 1994. The three advertisements have been identified in these proceedings as the "Norm Yustin" ad, the "Maria Bayley" ad, and the "Melissa Minor" ad. Only the radio and television versions of the "Norm Yustin" ad are in issue in this case. The other two advertisements were put into evidence by PCL to demonstrate the general target audience of the series of commercials.

[15] UPS has admitted that the ads were developed to capture market share from its other three competitors in the 10:30 a.m. market. The ads were trying to appeal to shippers, such as the ones depicted in the ads, *i.e.,* a tax accountant (Norm Yustin who sends 21 overnight deliveries per month), a law firm receptionist (Maria Bayley who sends six overnight letters per day) and a sales manager (Melissa Minor who sends 37 documents per week).

[16] It is important to note that the ads make no reference to either PCL or its products. Rather, they refer generally to other courier companies and do not single out a particular competitor, including PCL.

[17] Before these proceedings were begun, the Norm Yustin ad ran 394 times on radio in four cities: Toronto, Montreal, Vancouver and Calgary. The television commercial ran from November 23 to December 28, 1994, 58 times in Toronto, Montreal and Vancouver. The intention was to run these ads 500 more times on the radio and 200 more times on television. In addition, the intention was to run the Maria Bayley and Melissa Minor ads the same number of times. UPS has spent approximately $1 million on this ad campaign.

[18] PCL alleges that the Norm Yustin ad is false and misleading because of the price claim "usually at rates up to 40% less than other couriers charge". PCL has argued that it is misleading as it gives the false impression that UPS's rates are 40% less than those of other couriers, including PCL.

The connection between the advertisements and PCL

[19] UPS argues that in order to establish a cause of action under the misleading provisions of the Act, or under common law, the plaintiff must be specifically or implicitly named or targeted in the offending advertisement.

[20] In *Unitel Communications Inc. v. Bell Canada* (1994), 56 C.P.R. (3d) 232, 17 B.L.R. (2d) 63, [1994] O.J. No. 1320 (Gen. Div.), Winkler J., on a motion for an interlocutory injunction, in considering ss. 36(1) and 52(1) of the Act, stated at p. 250: “It is critical to the success of this action that Unitel be identifiable directly or by implication in the advertisement.”

[21] Jarvis J., in *Church & Dwight Ltd. v. Sifto Canada Inc.* (1994), 58 C.P.R. (3d) 316, 17 B.L.R. (2d) 92, 20 O.R. (3d) 483 (Gen. Div.), referred to this passage. He also had before him a motion for an interlocutory injunction in an action based upon ss. 36 and 52 of the Act and the tort of injurious falsehood. He stated that to make out that tort, the party complaining of injury must have been identified by name or by implication. At p. 321 he said:

> The case before me is unusual in that virtual domination of the marketplace has been established by the plaintiff’s product. Where a party virtually controls the market-place it cannot be said that the absence of the name of the target competitor is determinative of the question. Viscount Simon L.C. in *Knupffer v. London Express Newspaper Ltd.,* [1944] A.C. 116 (H.L.) said at p. 119:
>
> > “Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.”
>
> …
>
> The facts of the case before me satisfy me that the plaintiff’s product is identifiable by implication in that its product dominates the market, and for that reason the disparaging comments would fall upon them with virtually full force.

[22] (A similar finding was made by Jarvis J. in *Maple Leaf Foods Inc. v. Robin Hood Multifoods Inc.* (1994), 58 C.P.R. (3d) 54, 17 B.L.R. (2d) 86, [1994] O.J. No. 2165 (Gen. Div.), where the plaintiffs products represented 75% of the market).

[23] Based on these authorities, UPS submits that an unnamed competitor can be identified by implication in an advertisement only where its share of the market is so dominant that the

offending representations can point only to the unnamed competitor and to no one else. UPS argues that this is not the case here, as PCL is one of three competitors with roughly equal shares of the relevant market segment and PCL is no more likely to be singled out as the target of the representation than UPS's other major competitors.

[24] As distinguished from *Church & Dwight Ltd.,* the tort of injurious falsehood is not being advanced in the instant case. Furthermore, even in respect of that cause of action, Viscount Simon L.C. in the passage in *Knupffer v. London Express Newspaper Ltd.,* [1944] A.C. 116 (H.L.), quoted by Jarvis J., went on to say at p. 119:

> There are cases in which the language used in a reference to a limited class may be reasonably understood to refer to every member of the class, in which case every member may have a cause of action.

[25] That would appear to be the situation here. There are only three major couriers, including PCL, in the Guaranteed 10:30 Service to which the advertisements make comparative reference. PCL does not dominate the market as did the complaining parties in *Church & Dwight* and *Maple Leaf Foods Inc.* None the less, the fact that it is a member of such a small class means that reference to PCL in the advertisements is reasonably understood.

[26] There is no express requirement in respect of claims made under the Act that a competitor must be identified in the impugned advertising. In fact, competitors and consumers alike have a cause of action if harmed by the false and misleading representations: *General Motors of Canada Ltd. v. City National Leasing* (1989), 24 C.P.R. (3d) 417 at p. 448, 58 D.L.R. (4th) 255, [1989] 1 S.C.R. 641. Consumers and competitors are not required to be identified.

[27] Accordingly, notwithstanding that PCL has not been specifically named in the commercials in question, it is free to assert claims under the Act and may also assert a claim for unlawful interference with economic relations.

Meaning of the representation according to UPS

[28] UPS's position is that the representation as to its rates in comparison with the other couriers is true. UPS argues that, having regard to the plain and ordinary meaning of the

words in the advertisements, the representation is that UPS's rates for Guaranteed 10:30 Service are more often than not (although not always) less than the rates charged by other courier companies by as much as 40%. UPS's argument is that the advertisements do not claim that its rates are *always less* than the rates charged by PCL or its other competitors, nor does UPS claim that its rates are *always* "40%" less than the rates charged by PCL or the others. Rather, UPS asserts that it advertises that its Guaranteed 10:30 Service is *usually* at rates *up to* 40% less than other couriers charge. Support for this interpretation, according to UPS, is found in a comparison of the rates charged by PCL and UPS.

Comparative rates

[29] A considerable part of the trial was spent closely examining the rates charged by UPS and PCL with respect to various weight and destination combinations. The comparison is difficult because UPS's "rate zones" do not necessarily correspond with those of PCL, However, to the extent that such examination can be done, the evidence does indicate that there are significant occasions when UPS's rates are in fact cheaper than those of PCL. For example:

(a) UPS's rates are always less than PCL's regular 10:30 rates.

(b) With the exception of limited anomalies in UPS's zones 9 and 10, UPS's letter rates are 39% less than PCL's letter rates in UPS's zones 4, 5, 6, 7 and 8 and 34% less than PCL's letter rates in UPS's zones 1, 2 and 3.

(c) UPS's rates are less than PCL's in the higher weight categories (*i.e.,* over 5 lbs. in UPS's zones 1-8 and over 10 lbs. in zones 9 and 10).

[30] A comparison of rates for every possible shipping instance was adduced in evidence by PCL. In 80% of those possibilities, UPS's rates are in fact lower than PCL'S. Moreover, in approximately 16% of the total permutations and combinations, UPS's rates are at least 30% lower.

FlitePak

[31] PCL has argued that such comparison is irrelevant since its FlitePak product is that which has been targeted by implication in the advertisements and that the representation in respect of it is false.

[32] FlitePak is a plasticized envelope used by PCL which generally contains documents in the weight range of under 4 lbs. The charge for the Flitepak is a favourable flat rate of $13.25 for regional ground delivery and $14.95 for national air delivery. This FlitePak product is one of a number of products utilized by PCL in its Guaranteed 10:30 Service. It was launched in October, 1994. The UPS commercials were aired for the first time in November, 1994, and PCL has argued that the timing was such that UPS intended its commercials to draw away customers of PCL's FlitePak. PCL had high hopes for its FlitePak product, forecasting that it would result in 1,200 shipments *per diem* after two months, then 1,800 shipments *per diem* after four months, increasing to 2,500 *per diem* after six months. PCL alleges that they were on target for the first month; however, the UPS advertisements caused sales to decline and then level off at 1,088 shipments per day.

[33] There is no question that the FlitePak, in a head-to-head comparison with any of UPS's products, would prove, for the most part, to be less expensive. PCL has argued that because the bulk of its volume in the Guaranteed 10:30 Service is in the 1 to 4 lbs. category, the representation in UPS's advertisement that its rates are usually less expensive is a blatant falsehood.

[34] In the comparative rate evidence developed by PCL in respect of every possible shipping instance (a total of 17.8 million possible situations) PCL utilized the most favourable rates of both it and UPS. It indicated that in the weight category of 1 to 4 lbs., PCL was cheaper than UPS 94.7% of the time and in the 5 lbs. and over category, PCL was cheaper than UPS 15.4% of the time. It submitted that 1 to 4 lbs. shipments for October and November, 1994, represented 59% of PCL's Guaranteed 10:30 Service and, when this volume distribution was applied to the 94.7% of instances where PCL is cheaper, the result was that 55.9% of all PCL activity in the 1 to 4 lbs. category was cheaper than UPS.

[35] UPS countered by submitting that the 59% figure in relation to PCL's Guaranteed 10:30 a.m. Service included non-FlitePak shipments and no allowance was made in this percentage for the fact that UPS's rates would be lower than PCL's for the shipments that would not fit into the FlitePak. Furthermore, no allowance had been made for the frequency of FlitePak shipments in UPS's zone 1 where UPS's Express Pak rates are lower than PCL's FlitePak rates up to 3 lbs., and no allowance had been made for FlitePaks which are part of a multiple shipment in respect of which UPS's rates are lower than PCL's rates. No allowance

had been made for any FlitePak containing items that would fit in a UPS Express Envelope in which case UPS's rates are lower than PCL's rates. Accordingly, the 59% figure is somewhat suspect.

[36] In addition, there are numerous instances where FlitePak pricing does not compare favourably with UPS's rates. For example:

(a) The UPS Express Pak rate (for Express Paks up to 3 lbs.) is less than the FlitePak rate within UPS's zone 1.

(b) UPS's rates are frequently less than PCL's rates (either using FlitePak or PCL's regular 10:30 rates) for shipments *over* 5 lbs.

(c) UPS's rates are frequently less than PCL's rates for items *under* 5 lbs. that are too large to fit in a FlitePak.

(d) UPS's rates are less than PCL's FlitePak rates if the shipment requires *more than one* FlitePak;

(e) UPS's Express Envelope rates are almost always less than PCL's FlitePak rates. Thus, in respect of any item that will fit in UPS's Express Envelope, the UPS rate is almost always less than the FlitePak rate.

[37] Nevertheless, there is no question that PCL can point to many examples where its rates are significantly cheaper than UPS's rates in the utilization of its FlitePak product or, indeed, with its Metroservice pricing (for shipments within four designated cities in Canada where the point of origin and destination are within that same Metropolitan area).

[38] What emerges from any analysis of all the hypothetical permutations and combinations is that in many situations UPS is cheaper than PCL and conversely, in many situations PCL is cheaper than UPS.

Target of the commercials

[39] PCL argued that it is a distortion to examine the entire spectrum of shipment categories since the advertisements in question are directed to the one area where it consistently offers cheaper rates, namely, the 1 to 4 lbs. FlitePak. PCL has submitted that the individual, Norm Yustin, who is the subject-matter of the advertisements in both the radio and television broadcasts, is the very sort of individual and business person who would utilize

PCL's FlitePak. He is described as a tax accountant and PCL says that it appears from the backdrop that he is in a small business and sends small packages in the weight range of 1 to 4 lbs. Reference, however, is made to going "all the way down to Accounting to get approval", suggesting a larger business enterprise. The commercial indicates that he sends 21 overnight deliveries per month which PCL characterizes as a low frequency or low-volume shipper.

[40] In addition to the two commercials in question, two other UPS commercials were put into evidence. These commercials were launched at the same time as the impugned ones. No mention is made of comparative rates in these advertisements and, accordingly, no allegation is made by PCL that they are false and misleading. They were put into evidence by PCL, however, to demonstrate that the target of these advertisements go hand in hand with the Norm Yustin example and would also be typical low frequency customers of its FlitePak product. "Melissa Minor" is a sales manager and "Maria Bayley" is a law firm receptionist. PCL argues that the profile of its low frequency customer is the same as is typified in these commercials:—that decisions about choosing a courier service are only one aspect of their employment responsibilities and do not constitute a high-budget item for them. They are therefore particularly susceptible to the message in these advertisements which offer an instant and cost-effective solution to their problems.

What do Norm Yustin, Melissa Minor and Maria Bayley ship?

[41] PCL's analysis, however, can only be meaningful if it can be said that these advertisements are truly aimed at its FlitePak product. There is, however, no mention in these ads of what is specifically intended to be shipped—whether it is a single letter, or documents which weigh up to 4 lbs., or documents which weigh in excess of 4 lbs. UPS's rates may or may not be cheaper than PCL's depending on what is being shipped and the weight of the item. Tax accountants and law firms often ship single letters or documents which weigh over 4 lbs. or are of a size that may not fit into a FlitePak. One cannot conclude, by watching and listening to the advertisements, that they make any direct comparison with PCL's FlitePak. Rather, they could just as readily be interpreted as referring to a comparison of the overall range of weights. If so, there is a reasonable basis for UPS to say that its products are usually less expensive.

[42] Furthermore, there are numerous situations where UPS offers a discount between 35% and 40%. So long as there is a significant opportunity to obtain discounts in the range of 40%, then the advertisement cannot be said to be misleading on its face.

The general impression conveyed by the UPS ads

[43] In order for the court to determine whether or not a representation is false or misleading in a material respect, it must consider the general impression conveyed by the advertisement in question in addition to its literal meaning. Section 52(4) of the Act codifies this requisite step. The general impression created by the advertisement depends on a combination of factors: the understanding of those who have listened to the commercial, as presented through survey evidence; the use of the qualifiers, “usually” and “up to”; the nature of the consumers; and the nature of the medium.

(a) *PCL’s survey*

[44] Peter Atkinson, who has been engaged in market survey research for the last 30 years, was given the task by PCL to determine what message was being communicated by the UPS radio ad and to determine what might be the reaction of the audience. The customer that he focused upon was someone who ships less than 4 lbs. for overnight delivery to a non-local destination in Canada and who chooses the appropriate courier as part of his or her day-to-day decisions, as PCL considered the ad to be a threat to that particular kind of customer. A sampling was taken of 100 such PCL customers in the Metropolitan Toronto area who had used PCL in the months of October and November of 1994. The radio ad was played to them twice over the telephone and they were asked a series of questions. The conclusions drawn by Mr. Atkinson from the survey are as follows:

> (a) Seventy-two percent of the respondents understood the commercial to be telling them that UPS’s pricing is lower than that of other couriers.
>
> (b) Thirty-three percent thought that UPS is 40% cheaper than other couriers.
>
> (c) Sixty-two percent said they would expect other companies to be more expensive than UPS for Guaranteed 10:30 Service.
>
> (d) Thirty-four percent expected PCL to be more expensive than UPS.

[45] UPS has challenged the reliability of the survey for the following reasons: the uncertainty of the universe from which the sample frame was drawn; the unsupported resultant projectability of Mr. Atkinson's results to the total population of PCL customers who use its Guaranteed 10:30 Service; the apparent absence of adequate controls; and the failure to eliminate a variety of biases. More serious concerns with the survey, however, arise from the fact that a number of the respondents who were played the radio ad over the telephone had difficulty hearing the tape recording. Furthermore, for unknown reasons, a number of respondents completely misunderstood the intent of what was being communicated in the ad. In this regard, on the basis of the UPS commercial, 29% of the respondents expected that companies other than UPS would be cheaper or charge the same price as UPS for Guaranteed 10:30 a.m. Service. However, there is nothing in the commercial to that effect. Obviously, those respondents walked away with a message that was completely the opposite of what was intended to be conveyed. If 29% suffered from such perceptual distortion, it is quite possible that similar hearing and perceptual distortions affected some of those who concluded that UPS was 40% cheaper. This makes the entire survey suspect.

(b) *The qualifiers "usually" and "up* to"

[46] Gerald Gorn, a professor of consumer behaviour at the University of British Columbia, testified on behalf of PCL to explain the general message or impression of the ad that would be received by consumers. He testified that people do not process or encode everything that they see and will of necessity select particular information and form certain impressions. This is especially true in situations where they are not paying close attention to the specific content of a message, for example, when they are watching television or listening to the radio. Viewers or listeners have tuned in because of the program content and pay less attention to the commercials. They generally do not know in advance which commercials will be aired at any given point in time. In contrast to the print medium, there is no opportunity to go back and look more closely at the details of a message that may not have been fully appreciated when the commercial was first aired.

[47] He pointed out that the UPS commercial is quite complex and quickly paced. For example, the time of delivery and rates are mentioned in a very brief time period.

[48] In his report, Professor Gorn indicated that a consumer is more likely to pay attention to and recall the 40% figure rather than any “up to” qualifier that precedes it. He stated the following in his report at pp. 2-3:

> Numbers should be easier to retain than words given that they are specific. One would expect that the number “40%” would stand out and be easier to recall than the large series of words the ad would contain. A consumer is more likely to pay attention to and recall the 40% figure percentage off rather than any “up to” qualifier that precedes it. The fact that it is a percentage further increases its likelihood of recall. Consumers are accustomed to seeing sales promotions containing percentage deductions. For example, ads promoting a sale usually indicate the percentage off, as opposed to putting down the original price and the sale price of every item.
>
> Referring in an ad to concrete numbers such as actual percentages may also be convincing for the following reason. If the ad contains a price claim with a supportive number like 40% then it would likely be seen as having a factual basis. Otherwise, why would the advertiser be picking that particular value and not an even higher value like 50% or 60%? Hence the mention of “40%” less would likely increase the credibility of the ad in the eyes of the consumer.
>
> One would usually equate the word “usually” (the word “usually” connotes “generally”, “regularly”, “customarily”, and “habitually”) with something in the 2/3 (roughly 66%) to 3/4 (75%) range, or higher. Percentages closer to 50% would not be consistent with the word “usually” or any of the other synonyms noted above. The word “usually” also has to be interpreted in the context of the ad. The actor in the commercial is playing the part of a tax accountant in an office setting, who needs to deliver items overnight. It is natural to assume that these items would be small documents and not large boxes. In fact, there are no large boxes or even large stacks of paper in the office setting, just a few sheets of paper on the accountant’s desk. One would assume that the relatively low weight documents that this accountant (and by extension, other business people) would send are substantially cheaper using UPS. In this context, it would be reasonable for a consumer to interpret “usually up to 40% less for next day 10:30 a.m. delivery” as UPS is generally cheaper (40% would be the likely amount to come to mind) than other couriers for guaranteed next day 10:30 a.m. delivery of small items.

[49] It is not clear why Professor Gorn would conclude that the audience would attribute considerable significance to the impression conveyed by the qualifying word “usually” but that the qualifier “up to” would be ignored. In fact, another expert called by PCL, Professor Thomas Speh, a professor of marketing at Miami University in Ohio, had no hesitation in concluding that business consumers of courier services would clearly understand the UPS advertisement as representing savings that “could be up to rates 40%” less than the rates charged by other companies.

[50] The qualifiers “usually” and “up to” are akin to disclaimers which often appear somewhere in an ad to provide additional limiting information with respect to the main representation.

[51] In *R. v. International Vacations Ltd.* (1980), 56 C.P.R. (2d) 251, 124 D.L.R. (3d) 319, 59 C.C.C. (2d) 557 (Ont. C.A.), the accused, a marketer of air travel, published advertisements relating to its flights to Europe. The advertisement stated “Seats Still Available” and had a complete flight schedule printed below. At the bottom of the list of flights, the following disclaimer appeared: “This is Wardair’s operating schedule. Please check individual flight availabilities with a travel agent or Intervac, as some flights may be sold out.” The accused was charged with several counts of misleading advertising contrary to the then *Combines Investigation Act* The issue was whether the advertisements held out that seats were available on all flights listed at the time of publication. The court applied the general impression test and held that the average traveller interested in taking an overseas flight would presumably read the advertisement carefully. The average traveller would be a discerning consumer and read the advertisement in its entirety, including the disclaimer, and would understand that the disclaimer was an important part of the advertisement itself and should not be treated as separate from the primary representation.

[52] *National Hockey League v. Pepsi-Cola Canada* (1992), 42 C.P.R. (3d) 390, 92 D.L.R. (4th) 349, 5 B.L.R. (2d) 121 (B.C.S.C.); affirmed 59 C.P.R. (3d) 216, 122 D.L.R. (4th) 412, [1995] B.C.J. No. 310 (C.A.), was a case involving actions for passing-off, trade mark infringement, interference with economic relations, and interference with future business. The court held that the manner in which the disclaimer was displayed during the television commercials, stating that the defendant was not associated with nor sponsored by the plaintiff, left something to be desired. It was displayed for about seven seconds against a

background that made it difficult to read. In contrast, however, on all the printed material that related to the contest in question, the disclaimer was displayed prominently in quite bold print. The court held [at p. 408]:

> The prominence to be given to a disclaimer must, to some extent, depend on the likelihood of a false impression being conveyed to the public if there is no disclaimer. The greater the likelihood the more prominent must be the disclaimer.

[53] The court held that the likelihood was minimal that the television advertisements relating to the contest would create a false impression in the minds of the public that the plaintiff in some way endorsed the defendant's products. The court therefore held, at p. 409, that "had the disclaimer been necessary, it would have been sufficient to dispel any possible misapprehension".

[54] In the case at bar, it appears, at least on the face of the advertisement, that UPS gave as much prominence to the qualifications as any other part of the text.

[55] A disclaimer does not automatically nullify a misleading impression created by an ad. Its effect will depend on several factors, including the degree to which a representation misleads the public without the disclaimer, the prominence which it is given in the context of the entire advertisement, the degree of sophistication that the public to whom the advertisement is directed exhibits, and the likelihood that the audience would recognize the disclaimer. It is a question of fact whether, in the circumstances, a disclaimer is sufficient to ensure that the representation is not otherwise misleading.

[56] The qualifiers in the instant case must be considered in the context which the general impression of the advertisement conveys. These qualifiers, like the disclaimers in the above-noted cases, attempt to explain or further restrict the generality of the given representation. Most importantly, the qualifiers form part of the primary representation in that they do not appear elsewhere in the ad in small print marked with an asterisk.

[57] The court, in *International Vacations, supra,* at p. 257, held that the disclaimer in that case had to be considered an "integral part of the advertisement". UPS has attempted to give the qualifiers as much prominence as the rest of the text in issue.

(c) *Nature of the consumers and nature of the medium*

[58] The consumers in question are not totally naive. They are business individuals who make these kinds of decisions everyday based on service and price. The qualifier “up to” is commonly used in advertising parlance and it is difficult to accept that they would interpret that reference to mean that in all cases UPS is 40% cheaper than PCL. Common sense would dictate that the “up to” qualifier is of great significance in the context of courier rates where the only variables affecting price are the weight, destination and time of arrival of the shipment.

[59] Business purchasers, even those in what have been described as “modified” or “straight re-buy” situations, would not be sold on the service merely by being exposed to the UPS commercial. Most likely, they would make inquiries to determine if the opportunity for savings applied to their particular situation.

[60] If some listeners misinterpret the ad, it does not mean that the ad itself is necessarily misleading. Much turns on the degree of attention paid by the listener and the environment in which he or she hears or sees the ad.

[61] At the risk of sounding McLuhanesque, the medium may affect how some perceive the message. In this regard, I agree with Professor Gorn that the public views television commercials and listens to radio ads much differently than it reads an advertisement in print. By their nature, television and radio commercials are short, fast paced and often utilize, as the UPS commercials do, background music, voice-overs and superimposed words to attract attention and interest. Some people do not listen as keenly as others and may perceive the message incorrectly. That does not mean the commercial is misleading.

[62] The qualifiers here are an important part of UPS’s message and I believe that the import of those words would be absolutely clear to the discerning business consumer.

Geographical coverage

[63] PCL provides service to a greater number of destinations within Canada than does UPS. PCL has argued that the advertisements are misleading when one takes that factor into account. The advertisements, however, do not make reference to any destination points. UPS, like PCL, covers the major metropolitan areas, although not to the same extent, and there are certainly some important centres in Canada that PCL services but UPS does not. This is irrelevant in any event as the advertisements make no mention of the extent of

geographical coverage. Rather, the implication is that where UPS provides service, there is a possibility of savings if its services, as opposed to its competitors' services, are utilized.

Bait and switch selling

[64] With respect to s. 57(2) of the Act, it cannot be said that the ad represents that a certain bargain price is available. Rather, UPS is merely promoting its regular prices for its Guaranteed 10:30 Service. Moreover, these services are not restricted in quantity in any way, in that there is no practical limit on the quantity of such services supplied by UPS and available to the public.

Conclusion

[65] There is nothing wrong with the aggressive promotion of one's own goods or services so long as there is no untruthful disparagement of a competitor's goods or services. In the circumstances, it cannot be said that these advertisements have that effect. What they do is raise awareness that could lead business purchasers to make inquiries to determine whether their shipment requirements would attract the discount set out in the ads. By means of a simple telephone call, a common business consumer can readily obtain the information as to whether there is any price advantage and, if so, the extent of such advantage in using UPS for a particular shipment need. The advertisements do not claim that UPS's rates are always less than the rates charged by PCL or its other competitors; nor do they claim that UPS's rates are always 40% less than the rates of the others. Advertising is unfair where claims are made which lack a reasonable basis. I cannot, however, say that is the case here.

[66] The "Norm Yustin" ad is well crafted and effective. The ad in question in the *Unitel* case, *supra*, prompted Winkler J. to say at p. 250:

> The … ad is an effective advertisement. The Unitel response to it is ample proof of this. That is insufficient justification, however, for the court's intervention in the dynamic of the market-place.

[67] The same statement can be made just as appropriately here. Advertising can be an effective tool in persuading the public to utilize a particular product or service. By its nature, it is one-sided and usually does not convey a full and balanced analysis. To do so, of course, might diminish its persuasive power. There must, however, be a reasonable basis for the

representation that is made. So long as that is so, competitors may complain that the ad does not depict the whole picture; but they are just as equipped to tell their side of the story in the commercial market-place of ideas, with emphasis on those matters which they believe to be important. Courts should be reluctant to intervene in the competitive market-place unless the advertisements are clearly unfair.

[68] In the circumstances, PCL has not established that UPS has contravened the *Competition Act* or wrongfully interfered with PCL's economic relations. The action is dismissed with costs.

Action dismissed.

2009 ONCA 624
Ontario Court of Appeal

R. v. Abbey

2009 CarswellOnt 5008, 2009 ONCA 624, [2009] O.J. No. 3534, 246 C.C.C. (3d) 301, 254 O.A.C. 9, 68 C.R. (6th) 201, 84 W.C.B. (2d) 790, 97 O.R. (3d) 330

Her Majesty the Queen (Appellant) and Warren Abbey (Respondent)

Doherty, J.C. MacPherson, S.E. Lang JJ.A.

Heard: January 13-14, 2009
Judgment: August 27, 2009
Docket: CA C47020

Counsel: Randy Schwartz for Appellant
Christopher Hicks, Catriona Verner for Respondent

***Doherty J.A.*:**

I. Overview

1 A jury acquitted the respondent of first degree murder. The Crown appeals, alleging that the trial judge erred in law in excluding evidence relating to the meaning of a teardrop tattoo the respondent had inscribed on his face a few months after the murder. At trial, the Crown contended that the excluded evidence, considered as a whole, provided evidence from which the jury could infer that the respondent had killed a rival gang member. The Crown contended that this evidence, placed in the context of the rest of the evidence, provided a strong case identifying the respondent as the killer of Simeon Peter, the victim named in the indictment. Identity was the only live factual issue at trial.

2 The Crown attempted to elicit evidence as to the meaning of the teardrop tattoo from three gang members, A.B., C.S. and G.D.;[1] Detective Sergeant Quan, a police officer with extensive involvement with Toronto street gangs; and Dr. Mark Totten, an acknowledged expert in the culture of Canadian street gangs. For various and different reasons, the trial judge refused to allow any of these witnesses to testify as to their understanding of the meaning of the teardrop tattoo.

3 On appeal, the Crown argues that the exclusion of the evidence of the gang members, standing alone, constitutes a reversible error in law. Crown counsel makes the same submission with respect to the exclusion of Dr. Totten's evidence. Counsel submits that the exclusion of Detective Sergeant Quan's evidence, while not sufficient on its own to merit a new trial, exacerbates the improper exclusion of the other evidence.

4 I would allow the appeal. For the reasons that follow, I would hold that the trial judge erred in excluding Dr. Totten's evidence insofar as that evidence identified the potential meanings of the teardrop tattoo within the urban street gang culture. I would also hold that the three gang members should have been allowed to testify as to the meaning of that tattoo within the culture that they shared with the respondent. Finally, I would hold that the witness, G.D., should have been allowed to provide evidence of his comments concerning the respondent's tattoo, made during his conversation with the respondent immediately before the respondent's description of his involvement in the murder. Had G.D. been allowed to testify to the entirety of this interaction, a jury may well have inferred from the respondent's conduct that the inscription of the tattoo on his face was related to the murder. The improperly excluded evidence, taken as a package, could well have affected the verdict. The acquittal must be quashed and a new trial ordered.

5 I will not address the merits of the Crown's argument that the trial judge should have admitted the evidence of Detective Sergeant Quan. The trial record on this issue is unclear in many respects and the appeal can be resolved without deciding the admissibility of this evidence.

II. The Evidence

6 In January 2004, two Toronto street gangs, the Malvern Crew and the Galloway Boys, both of whom claimed parts of Scarborough as their territory, were engaged in a bloody turf war. Several members of the Malvern Crew had been the targets of drive-by shootings attributed to the Galloway Boys. Any sighting of a member of the Galloway Boys in the part of Scarborough regarded as Malvern territory could instigate a violent reaction by members of the Malvern Crew. The respondent lived in Empringham, part of the Malvern district of Scarborough. He was an associate of the Malvern Crew with ties to a gang called the "Emps", a subset of the Malvern Crew operating in the Empringham area.

7 On the afternoon of January 8, 2004, Mr. Simeon Peter and his girlfriend, Clorie-Ann Anderson, were walking towards Ms. Anderson's home in the Malvern district of Scarborough. Ms. Anderson noticed that they were being followed. Mr. Peter slowed down and fell behind Ms. Anderson. The person following Mr. Peter opened fire, striking Mr. Peter with at least one bullet. The shooter approached the wounded Mr. Peter and shot him from close range. He then fled the scene, running through backyards in the direction of Empringham Park. The police later found seven cartridge casings along the route where the shots were fired. The post-mortem examination revealed that Mr. Peter had been shot three times.

8 It was agreed at trial that the murder was gang related and that one or more of the Malvern Crew had killed Mr. Peter believing that he was a member of the Galloway Boys.[2] The Crown contended that the respondent was the shooter and that he had the help of A.B. and C.S., two other Malvern Crew members. The defence did not call any evidence but argued that the respondent had nothing to do with the shooting and that A.B. and/or C.S. had killed Mr. Peter.

9 The respondent was not arrested until March 2005, some 14 months after the homicide. Apart from the excluded teardrop tattoo evidence, the Crown's case was based on evidence of motive; the testimony of A.B. and C.S.; the testimony of G.D., a third member of the Malvern Crew; and some circumstantial evidence.

10 The Crown advanced two motives for the murder. First, the Crown contended that the respondent and his accomplices decided to kill Mr. Peter because, as members of the Malvern Crew, they believed that Mr. Peter, who they thought was a member of the rival Galloway Boys, had no right to be in their territory. The Crown contended that in the street gang world inhabited by the respondent and his accomplices, a rival gang member's presence in the territory of the Malvern Crew was enough to justify killing that individual. The Crown led evidence to establish the existence of these street gangs, their respective territories, their bloody rivalry, and the manner in which they operated.

11 The second motive relied on by the Crown was more personal to the respondent. When Mr. Peter was seen by A.B. and C.S. on January 8, 2004, they mistakenly believed that he was a person named "Tevin", a Galloway Boys gang member who had recently robbed the respondent. They reported this information to the respondent who, on the Crown's theory, went after Mr. Peter and shot him.

12 The Crown alleged that A.B. and C.S. assisted the respondent in the commission of the murder. Both were members of the Malvern Crew. They had criminal records and were admitted drug dealers. Both testified as part of a plea agreement, which saw them receive lenient treatment in return for acknowledging their involvement in the Malvern Crew, admitting responsibility in certain criminal activities and testifying against the respondent. The trial judge cautioned the jury against relying on the unconfirmed evidence of either A.B. or C.S.

13 A.B. testified that on January 8, 2004, he and C.S. were driving through Scarborough on their way to Ajax, Ontario to see another member of the Malvern Crew. As they approached the highway, they noticed Ms. Anderson and Mr. Peter. C.S. recognized Ms. Anderson as a person who went out with members of the Galloway Boys. A.B. and C.S. decided that Mr. Peter could well be a member of the Galloway Boys and that he should not be in the Malvern Crew territory.

14 A.B. testified that he and C.S. decided to go to the respondent's home as it was nearby. They needed a gun to go after Mr. Peter and they knew that the respondent had access to the guns communally used by members of the Malvern Crew. A.B. also thought that the respondent would be interested in going after Mr. Peter because he believed Mr. Peter was the man named "Tevin" who had robbed the respondent about a week earlier.

15 A.B. and C.S. arrived at the respondent's home and told him that they had seen a suspected Galloway Boys member in their territory. They told the respondent that it could be "Tevin" — the person who had robbed him. According to A.B., the respondent agreed to go after this person. He was armed. The three men drove to where Mr. Peter and Ms. Anderson had been seen earlier by A.B. and C.S. They saw Mr. Peter and Ms. Anderson get on a bus. They followed the bus until Ms. Anderson and Mr. Peter disembarked. The respondent got out of the car and followed Ms. Anderson and Mr. Peter on foot.

16 A.B. and C.S. drove to Ajax. About twenty minutes after letting the respondent out of the car, A.B. called him on his home number and spoke with him. He did not ask the respondent what had happened because he thought the phone could be tapped by the police. He asked the respondent if everything was okay, and the respondent replied that it was. A.B. told him he should take a shower.

17 A.B. spoke to the respondent the next day. The respondent told A.B. that he believed that Mr. Peter had a gun so he had shot him in the leg from behind. He then ran up to Mr. Peter and shot him again. The respondent went on to tell A.B. that he turned the gun on Ms. Anderson intending to shoot her but that he was out of bullets. The respondent recounted how he ran home and subsequently disposed of the gun. A.B. also testified about other similar conversations with the respondent. The respondent complained that rumours were circulating that he was the shooter and that he was being teased for having run out of bullets before he could shoot Ms. Anderson.

18 C.S. denied any involvement in the murder. He testified that he was in his vehicle with A.B. and the respondent when they saw Mr. Peter and Ms. Anderson standing at a bus shelter. There was some discussion about Mr. Peter being a member of the Galloway Boys, but there was no discussion about doing him any harm. According to C.S., shortly after they passed the bus shelter, the respondent left the vehicle indicating he wanted to visit a friend who lived nearby.

19 C.S. testified that in the days after the murder, the respondent told him that he had shot Mr. Peter. The respondent told C.S. that Mr. Peter was the person who had robbed him earlier. The respondent described how he followed Mr. Peter and his girlfriend, shot Mr. Peter in the leg, caught up to him and shot him a couple more times. The respondent also told C.S. that he had turned the gun on Ms. Anderson and tried to shoot her but that it was out of bullets.

20 C.S.'s credibility was even more suspect than A.B.'s credibility. The Crown ultimately told the jury that it should reject C.S.'s evidence except where it was supported by other evidence. In the end, the Crown relied only on C.S.'s evidence regarding the admissions made to him by the respondent.

21 G.D., the third member of the Malvern Crew to testify for the Crown, had nothing to do with this murder. G.D. was, however, a long-time senior member of the Malvern Crew street gang. G.D. had a lengthy criminal record and had been arrested on a variety of offences. He ultimately decided to cooperate with the police and give evidence concerning the operation of the Malvern Crew and his conversations with the respondent. G.D. was serving a 12-year sentence when he testified against the respondent. He had not entered into any plea agreement with the Crown in exchange for his testimony, however, his cooperation was considered by the trial judge as a mitigating factor when G.D. received the 12-year sentence.

22 G.D. testified that the respondent told him that he and three other members of the Malvern Crew had killed Mr. Peter, who they believed to be a member of the rival gang. According to the respondent, he was chosen as the shooter because the other three gang members knew Ms. Anderson. G.D. testified that the respondent told him that he followed the victim and Ms. Anderson, shot the victim first in the leg and then chased him down and shot him again. The respondent also told G.D. that he tried to shoot Ms. Anderson but that the gun was out of bullets. [3]

23 In addition to the evidence from the gang members, there was some circumstantial evidence, which played a minor supporting role in the Crown's case. Cell phone records confirmed that the respondent was in the vicinity of the shooting shortly before it occurred and that he was at his residence, also within the vicinity of the shooting, shortly after the shooting occurred. Shoeprint impressions taken at the scene indicated that the shooter probably wore size 13 Nike Air Force 1 shoes. The respondent wore size 13 Nike Air Force 1 shoes. The police could not, however, connect any shoes owned by the respondent to the murder scene. The shoes he was wearing when arrested, some 14 months after the homicide, were not manufactured until sometime after the homicide.

24 Expert evidence also established that the seven cartridge casings found at the scene of the murder matched a .45 calibre semi-automatic handgun manufactured by Springfield Armory. That gun is a near exact replica of the Colt model handgun commonly referred to as a "Colt .45". A.B. testified that Malvern Crew gang members, including the respondent, had access to a communal "Colt .45" handgun.

III. The Admissibility of Dr. Totten's Evidence

(i) Background

25 The Crown offered Dr. Totten, a sociologist, as an expert in the culture of urban street gangs in Canada. The Crown proposed to have Dr. Totten give his opinion as to the meaning of a teardrop tattoo within the urban street gang culture and to give his opinion as to the meaning of the respondent's teardrop tattoo. The admissibility of this evidence was one of several issues addressed in a series of pre-trial motions that proceeded intermittently for several weeks prior to trial. Dr. Totten prepared a report dated December 8, 2006. He testified on a *voir dire* and his report was filed on consent. Following Dr. Totten's evidence, the trial judge expressed concerns about its admissibility and invited the Crown to address those concerns by way of further evidence from Dr. Totten. Dr. Totten prepared a second report, dated January 3, 2007, which was also filed as an exhibit. He testified for a second time. The defence did not call any evidence on the *voir dire* and the trial judge's ruling was based on Dr. Totten's evidence and the contents of the two reports. [4]

26 Several facts were agreed upon for the purpose of determining the admissibility of Dr. Totten's evidence. It was agreed that the respondent was an associate of the Malvern Crew street gang with proven ties to the Emps, a subset of the Malvern Crew. It was also agreed that the Malvern Crew and the Galloway Boys were involved in a bloody turf war in January 2004 when Mr. Peter was killed and that his murder was gang related. Counsel further agreed for the purpose of the *voir dire* that the respondent had a teardrop tattoo inscribed on his face some time in May or June 2004, about four or five months after the homicide. Counsel also agreed that no other member of the Galloway Boys was murdered in the first half of 2004 and that the person or persons who killed Mr. Peter believed that he was a member of the Galloway Boys.

27 The defence also conceded the following facts:

- no member of the Malvern Crew was murdered in 2003 or 2004;
- no close family member of the respondent died in 2003 or in the first six months of 2004; and
- the respondent had not spent any significant time in a penitentiary or a correctional institution.

28 This latter group of admissions was relevant to the three possible meanings of the teardrop tattoo put forward by Dr. Totten in his reports and testimony.

(ii) The Crown's Position

29 The Crown contended that Dr. Totten's expertise extended to the manner in which gang members communicated with each other and with members of other gangs. Various symbols, including tattoos, had certain meanings within the gang culture and were used to communicate with fellow gang members and sometimes with rival gang members. The Crown submitted that Dr. Totten's numerous research studies, his long clinical experience and his review of the relevant academic literature, enabled

him to offer the opinion that a teardrop tattoo inscribed on the face of a young gang member had one of three possible meanings. One of those meanings was that the person with the tattoo had recently murdered a rival gang member.

30 The Crown proposed to have Dr. Totten testify not only as to the three possible meanings of the teardrop tattoo, but also to answer a hypothetical question that would include factual assumptions eliminating the two other possible meanings. In effect, the Crown wanted Dr. Totten to testify that, based on his knowledge of gang culture and the Crown's assumptions (to be supported, presumably, by the evidence), the respondent's inscription of a teardrop tattoo meant that he had killed a rival gang member. In the context of the rest of the evidence, this could only mean that he had killed Mr. Peter.

31 The Crown took a less ambitious alternative position, submitting that Dr. Totten should be permitted to at least identify the three possible meanings of the teardrop tattoo within the urban street gang culture. It would then be left to the Crown to lead evidence that would permit the jury, if so inclined, to exclude the other two possibilities, leaving only the explanation that the respondent had killed a rival gang member. Crown counsel at trial expressed her alternative position in these terms:

> [T]he other position is that we would be asking Your Honour to also consider whether this gentleman can provide merely the definitions [explanations], because the definitions have been consistent throughout that there are, as he put it, three, though I see four. There is three; one of them is doublebarrelled: loss of family member or a gang member has died; killed someone; or has spent time in prison.
>
> Whether that definition — *we will be asking Your Honour to consider whether just merely the definition can be left to the jury, and then it is for the jury, not usurping the jury's role, because then it is for the jury to decide whether they want to make the inferences that the Crown may ask them to make.*
>
> [Emphasis added.]

(iii) The Defence Position

32 The defence did not argue that the meaning of the teardrop tattoo was not properly the subject of expert evidence. Nor did the defence argue that Dr. Totten was not qualified to offer an opinion with respect to the meaning of a teardrop tattoo based on his study and knowledge of street gang culture. The defence submitted, however, that Dr. Totten's opinion concerning the meaning to be attributed to the respondent's teardrop tattoo was not sufficiently reliable to justify risking the potential prejudice to the trial process that could flow should his opinion be heard by the jury. In arguing that the potential probative value of the evidence was insufficient to risk the prejudice occasioned to the trial process, counsel stressed that Dr. Totten could not speak specifically to the meaning of the teardrop tattoo among members of the Malvern Crew. Counsel also emphasized that Dr. Totten's opinion could potentially be taken by the jury as determinative on the issue of identity, the only factual issue at trial.

(iv) Dr. Totten's Evidence

33 It is unnecessary to detail Dr. Totten's extensive and impressive academic, research and clinical credentials. The trial judge accepted that Dr. Totten was a "preeminent leader" in his field — the study of the culture of street gangs in Canada. The trial judge readily accepted that Dr. Totten's expertise could assist the trier of fact in understanding how gang members communicate. That expertise extended to the interpretation of tattoos; one of the symbols used by gang members to communicate with fellow gang members and with rival gangs.

34 In his reports and testimony, Dr. Totten stated that it was his opinion that a teardrop tattoo on the face of a young male member of an urban street gang signified one of three things:

- the death of a fellow gang member or family member of the wearer of the tattoo;
- that the wearer of the tattoo had served a period of incarceration in a correctional facility; or
- that the wearer of the tattoo had murdered a rival gang member.

35 Dr. Totten testified, however, that the meaning of a tattoo worn by any particular individual was ultimately a personal matter. He said:

> *In my opinion, and based on existing studies in the area, it is not possible to determine the meaning of a teardrop tattoo unless one spends a significant period of time with the person wearing the tattoo.*
>
> What's important is to understand how he — the meanings that he attaches to the tattoo. We can't impute motives. We can't assume that we know why the tattoo has been inscribed under the eye.
>
> So, if, for example, a researcher was merely to photograph people or just to use mug shots of offenders who had the tattoo, you can't — you can't imply that the reason that these individuals got the tattoo was for "X". *We know that there are at least three distinct possibilities*.
>
> [Emphasis added.]

36 This testimony echoes the comments in his January 3, 2007 report:

> This means that one cannot ascribe one meaning only to the tear drop tattoo worn by an individual without having access to other supporting data. *It is not possible to just look at someone with this tattoo and verify the meaning without having specific information on the individual and his gang.*
>
> [Emphasis added.]

37 Dr. Totten based his opinion as to the possible meanings of a teardrop tattoo on data gathered through several research projects conducted over ten years, information gained through a 25-year clinical practice involving long-term relationships with gang members both in and out of custody, and his review of the relevant academic literature. Dr. Totten's research consisted of six different studies conducted between 1995 and 2005. These studies explored the day-to-day lives of gang members through detailed interviews with those who lived in that culture. The manner in which gang members communicated, including various symbols used, was one of the many aspects of gang culture explored in these studies. Questions about tattoos were a small part of a much wider range of questions. The broad purpose of the studies was to understand the urban street gang world from the perspective of those who lived in that world.

38 Each of the research studies involved long interview sessions with gang members who agreed to be interviewed by Dr. Totten and his fellow researchers. These interviews were recorded and the questioners took detailed notes. The accumulated data were examined and assessed by the researchers. Often, more than one researcher would examine the same data and their assessments would be compared. Dr. Totten used the information garnered from these interviews and assessments when asked by the Crown to offer an opinion as to the meaning of the teardrop tattoo on the respondent's face. None of this information was gathered for the purpose of offering an opinion for the Crown in a criminal proceeding.

39 Dr. Totten described his research as qualitative and not quantitative. He explained that quantitative studies employ large sample sizes, attempt to explore the strength of association between variables and establish generalizations applicable to populations beyond the study sample. Qualitative research depends on information gleaned from individuals through a carefully constructed interview process. In research involving cultural habits, knowledge gained through many individual interviews with persons who live within a given culture permits the researcher to come to conclusions about the meaning that members of that group or culture attribute to certain conduct or symbols.

40 Dr. Totten indicated that in the fields of criminology, sociology and anthropology, there is a long-established tradition of excellent qualitative research into the culture and lifestyle of various groups, including street gangs. Dr. Totten referred to various well-recognized and accepted qualitative studies and reports on gang culture reaching back 80 years. Dr. Totten gave uncontradicted evidence to the effect that qualitative research techniques had been proven to yield excellent and reliable data "on the fine details of gang life". In his assessment, quantitative studies based on statistical inferences could not provide the same insight into those "fine details".

41 Dr. Totten described at length the steps taken by him, and others in his field, to enhance the reliability of answers received from those interviewed during his studies. Several techniques were used to increase the reliability of the questioning process itself. Interviews followed a fixed and carefully formulated format. The language used in each question was selected using insight gained from the experience of prior studies and input from peer review of the proposed questions. Dr. Totten sought to remove anything from the questions that was suggestive of the answer, ambiguous or would not have a common meaning across a broad spectrum of interviewees.

42 Dr. Totten also explained that answers given by interviewees were not simply accepted at face value. Answers were checked against reliable independent sources such as criminal records and police reports, a process called triangulation. If information from these outside sources was inconsistent with the answers given, those answers were not accepted as accurate.

43 Dr. Totten described at length a technique known as investigative discourse analysis. Applying that technique, an examination of the actual language used by an interviewee in his answers afforded insight into the veracity of those answers. Dr. Totten testified that this technique was well understood by him and other qualitative sociological researchers and that it had a long and well-established pedigree as a useful tool in his kind of research.

44 Dr. Totten also explained that several prospective subjects were excluded from his studies because there were reasons to doubt the reliability of any answers they might give. Gang members suffering from mental disorders or severe drug abuse were not asked to participate in the studies. Gang members who had been charged with a homicide related offence and who were awaiting trial were excluded from the study on the basis that their legal status gave them a motive to be less than honest about any criminal activity in which they had engaged. About 45 gang members were excluded from the studies.

45 Dr. Totten's six studies involved interviews with 300 gang members between the ages of 15 and 26. Roughly one half were in custody. Ninety-seven of the gang members interviewed had been convicted of some form of homicide. Of that group, 71 had teardrop tattoos under one eye. Of the 203 not convicted of homicide, ten had teardrop tattoos under one eye. In total, 81 of the 300 gang members whose interviews were considered had a teardrop tattoo. All 71 gang members interviewed who had a teardrop tattoo and had also been convicted of a homicide related offence indicated that the teardrop tattoo signified that they had killed a rival gang member. The ten gang members who had a teardrop tattoo but had not been convicted of a homicide related offence explained that the tattoo meant they had served time in a correctional institution.

46 Dr. Totten was questioned about the concept of peer review as it applied to his field of study. He acknowledged the importance of peer review in sociological research. Dr. Totten testified that in addition to the efforts made to carefully select those interviewed and to produce questions that yielded reliable answers, his studies underwent extensive peer reviews at several levels. In any given study, the questions he intended to use to collect data and his proposed methodology were peer reviewed before conducting the study. A post-study peer review occurred if any of the collected data were proposed for publication. Co-authors, where studies involved Dr. Totten and another author, served as a means of peer review after the studies were completed. Finally, those studies commissioned by a government ministry were subject to careful review by officials within the commissioning ministry.

47 While Dr. Totten insisted that concepts such as error rates and random sampling applied to quantitative scientific research and not to qualitative behavioural analysis, he agreed that concerns about the reliability of one's methodology and the validity of one's results were as germane to his work as the work of those engaged in quantitative research. However, in his view, given the very different nature of the research that he conducted as compared to quantitative research, different analytical tools than those used to assess quantitative research had to be used to assess the reliability of his methods and the validity of his results.

48 Dr. Totten found confirmation for the data collected in his studies from his own clinical experience. In the course of a 25-year clinical practice, Dr. Totten had been involved in many long-term relationships with gang members. During those relationships, he had had many conversations with gang members who had teardrop tattoos and had discussed with them what those tattoos meant to them. The answers provided were consistent with the answers received in the studies conducted by Dr. Totten.

49 The six studies conducted by Dr. Totten involved interviews with young male gang members in most of the major cities across Canada. His research was centered in Ottawa. He interviewed ten persons who were members of street gangs in Toronto. Dr. Totten did not interview any members of the Malvern Crew.

50 In cross-examination, Dr. Totten testified that his own experience and the academic literature suggested that the potential meanings of teardrop tattoos were not localized to any particular street gang, but cut across gang lines throughout North America. He pointed to his clinical experience, some of which occurred in Chicago, as support for this observation. Dr. Totten also indicated that his results were consistent with the results reported in American academic literature. He opined that there was "no evidence at all to suggest that it [the teardrop tattoo] is the property of one or a couple of street gangs".

51 Dr. Totten was also questioned about the sample size of his studies. He explained that as his data came from six separate studies, including some 300 gang members, his sample size was much larger than the size commonly used for behavioural research involving street gangs.

52 Dr. Totten was asked how long after a homicide the perpetrator would typically inscribe a tattoo on his cheek. Dr. Totten suggested that it could be between four months and a year after the homicide. He acknowledged that he could not be very specific and that there was "quite a range". He thought it would be unusual for a gang member to inscribe the teardrop soon after the homicide because by doing so he would identify himself to knowledgeable people, including the police, as the perpetrator. Dr. Totten did not refer to any specific parts of his studies or anything in the academic literature that directly addressed the amount of time that would pass after the homicide before the gang member who committed that homicide would have the teardrop tattoo inscribed on his face.

53 Dr. Totten agreed in cross-examination that gang symbols, including teardrop tattoos, could be used by "wannabees" or "poseurs" who wished to appear to be part of a gang culture but in reality had nothing to do with gangs, much less with the murder of rival gang members. Dr. Totten thought this an unlikely explanation for the respondent's teardrop tattoo in that he was an acknowledged member of the Malvern Crew and, as a result of this membership, he would be exposed to attack by other gang members if he inscribed a teardrop tattoo on his face and had not "earned" that tattoo.

54 Dr. Totten also agreed that the meanings of gang symbols, including tattoos, were subject to change: as those outside of the gang world became aware of and adopted gang symbols into parts of the mainstream culture, the meaning of those same symbols was lost or changed within the gang culture.

(v) The Trial Judge's Reasons [5]

55 The trial judge began his reasons by reference to the criteria governing the admissibility of expert opinion evidence. He quickly disposed of the criteria that were not in dispute before him. He accepted, as did defence counsel, that Dr. Totten's opinion was logically relevant to the identification of the respondent as the killer (para. 45). Likewise, the trial judge accepted that Dr. Totten was properly qualified to give an opinion on aspects of gang culture, including the meaning of tattoos, and that this was a subject matter that was appropriate for expert evidence by a properly qualified expert (paras. 13-15, 34). Finally, although the trial judge did not expressly address this issue, there was no exclusionary rule apart from the rule governing the admissibility of expert opinion evidence barring the admissibility of Dr. Totten's opinion. Having disposed of the non-contentious issues, the trial judge turned his attention to the reliability of Dr. Totten's opinion. The trial judge appreciated that his role as "gatekeeper" required that he determine whether that evidence was sufficiently reliable to warrant its consideration by the jury. He found that it was not.

56 The trial judge gave many reasons for rejecting Dr. Totten's evidence as insufficiently reliable. Several are summarized near the beginning of his reasons at para. 4:

> Based on the evidence, I am not satisfied that Dr. Totten's opinion is reliable. First, Dr. Totten's qualitative research is used to make specific quantitative conclusions. Second, he cannot provide an error rate for his analysis. Third, I have concerns about the small size of his study sample and its composition. Fourth, his opinions clash with authoritative texts in the

> field. Fifth, his attempts at verifying the "truth-status" of his interview subjects are suspect. Sixth, his own conclusions are internally inconsistent — he often vacillated on the issues of whether the teardrop tattoo meaning was regional or universal, and whether the meaning could be generalized to individuals outside his study. Seventh, he did not interview any members of the Malvern Crew — the very gang of which the accused is a member. Eighth, Dr. Totten's theories with respect to the meaning of the teardrop are rare, and have never been peer-reviewed or published.

57 The trial judge found that the evidence was unreliable because, in addition to the reasons set out in the above passage, it was not based on proven facts (para. 46) and did not take into account the possibility that the meaning of the teardrop tattoo could change in time (para. 70) or the possibility that a "poseur" or "wannabee" may inscribe the tattoo "as some kind of fad" (para. 66).

58 The trial judge also characterized Dr. Totten's opinion concerning the meaning of the tattoo as "a novel scientific theory". Having so characterized his opinion, the trial judge, applying binding authority, subjected Dr. Totten's evidence to a more rigorous threshold reliability inquiry than would be the case if his opinion was not regarded as involving a novel scientific theory. However, it would seem from the trial judge's reasons that he would have excluded Dr. Totten's evidence even on the lower threshold reliability requirement applicable to expert opinion evidence that does not involve a novel scientific theory (para. 92).

59 Despite the many reasons advanced by the trial judge for rejecting Dr. Totten's evidence, it would appear that had Dr. Totten's studies and clinical work included members of the Malvern Crew, the trial judge would have admitted his evidence (para. 12). In the course of explaining four possible ways in which the Crown could have adduced admissible expert evidence, the trial judge said at para. 9:

> The third possible way would be through a sociologist, criminologist, or psychologist with specific experience of the Malvern Crew.

(vi) Analysis

60 The admissibility of Dr. Totten's opinion as to the meaning of the respondent's teardrop tattoo raised a difficult evidentiary problem for the trial judge. On the one hand, gang culture and the murderous violence it promotes were unavoidably central features of the factual matrix of this trial. On the other hand, the respondent could only be properly convicted if the Crown could prove his personal criminal responsibility in Mr. Peter's death. The respondent could not be convicted on the basis of his involvement in a violent gang culture. In ruling on the admissibility of Dr. Totten's evidence, the trial judge had to steer a course that would at once equip the jury with all relevant, reliable information available and needed to arrive at a correct verdict, while avoiding exposure to information that could invite a verdict based on the jury's understandably negative reaction to those who were part of the gang culture: see *R. c. J. (J.-L.)*, [2000] 2 S.C.R. 600 (S.C.C.), at para. 61.

61 With respect, I think the trial judge, whose reasons reveal a detailed consideration of the issues raised by Dr. Totten's proposed evidence, erred in excluding Dr. Totten's evidence in its entirety. Before turning to the errors in his analysis, I will address the general principles governing the admissibility of this kind of evidence. I propose to outline an approach that I suggest may be helpful when assessing admissibility. In doing so, I do not depart from the controlling jurisprudence of the Supreme Court of Canada. Nor do I intend to suggest that the admissibility of expert opinion evidence should always be approached in the same way.

(a) Delineating the Scope of the Expert's Opinion

62 The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process. A cautious delineation of the scope of the proposed expert evidence and strict adherence to those boundaries, if the evidence is admitted, are essential. The case law demonstrates that overreaching by expert witnesses is probably the most common fault leading to reversals on appeal: see, for example, *R. v. Ranger* (2003), 67 O.R. (3d) 1 (Ont. C.A.); *R. v. Klymchuk* (2005), 203 C.C.C. (3d) 341 (Ont. C.A.); *R. v. K. (A.)* (1999), 45 O.R. (3d) 641 (Ont. C.A.), at paras. 123-35; *R. v. Llorenz* (2000), 145 C.C.C. (3d) 535 (Ont. C.A.), at paras. 33-40.

63 A determination of the scope of the proposed expert opinion evidence and the manner in which it may be presented to the jury if admissible will be made after a *voir dire*. The procedures to be followed on that *voir dire* are for the trial judge to decide. Sometimes the expert must be examined and cross-examined on the *voir dire* to ensure that the proposed evidence is properly understood. At the conclusion of the *voir dire*, the trial judge must identify with exactitude the scope of the proposed opinion that may be admissible. He or she will also decide whether certain terminology used by the expert is unnecessary to the opinion and potentially misleading: see *R. v. G. (P.)* (2009), 242 C.C.C. (3d) 558 (Ont. C.A.), at para. 16. Admissibility is not an all or nothing proposition.[6] Nor is the trial judge limited to either accepting or rejecting the opinion evidence as tendered by one party or the other. The trial judge may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion: see, for example, *R. v. Wilson* (2002), 166 C.C.C. (3d) 294 (Ont. S.C.J.).

64 The importance of properly defining the limits and nature of proposed expert opinion evidence and the language to be used by the expert is one of the valuable lessons learned from the Inquiry into Pediatric Forensic Pathology in Ontario.[7] That inquiry examined the forensic work of Dr. Charles Smith, who at the time was considered to be a leading pediatric pathologist in Ontario. The inquiry determined that, among other failings, Dr. Smith often went beyond the limits of his expertise when offering opinions in his testimony. His excesses were sometimes not caught by the court or counsel and, along with other shortcomings, led to several miscarriages of justice. Goudge J.A., the Commissioner, stressed the trial judge's obligation to take an active role in framing the scope and the language of the proposed expert opinion evidence. He observed at pp. 499-500:

> A final outcome from the admissibility process is a clear definition of the scope of the expertise that a particular witness is qualified to give. As discussed in the earlier part of this chapter, *it will be beneficial to define the range of expertise with as much precision as possible so that all the parties and the witness are alerted to areas where the witness has not been qualified to give evidence. ... As I earlier recommended, the trial judge should take steps at the outset to define clearly the proposed subject area of the witness's expertise. At the conclusion of the* voir dire, *the trial judge will be well situated to rule with precision on what the witness can and cannot say.* These steps will help to ensure that the witness's testimony, when given, can be confined to permissible areas and that it meets the requirement of threshold reliability.
>
> [Emphasis added.]

65 The present case affords an example of the problem that can ensue when the proffered expert opinion evidence is not properly circumscribed. In its primary position, the Crown contended that Dr. Totten's opinion could be put before the jury in the form of a hypothetical, which, as the trial judge accurately observed, was "tantamount to a confession" (para. 92). The Crown's proposed formulation of Dr. Totten's evidence drew a straight and powerful line between the jury's acceptance of his opinion and the conviction of the respondent on a charge of first degree murder. As advanced by the Crown in its primary position, Dr. Totten's evidence reads less like the opinion of a sociologist on the meaning of a symbol used in a certain culture and more like evidence from a factual witness offering identification testimony: see *United States of America v. Mejia*, 545 F.3d 179 (U.S. C.A. 2nd Cir. 2008), at pp. 195 -96.

66 In his reasons, the trial judge acknowledged both the primary and alternative positions advanced by the Crown, but in his analysis focussed almost entirely on the Crown's primary position. For example, very early in his analysis (para. 25), he summarized Dr. Totten's proposed evidence in these terms:

> Dr. Totten concluded that Mr. Abbey's tattoo was related to the murder of a rival gang member in 2004.

67 References to Dr. Totten's evidence going directly to the meaning of the respondent's tattoo are found throughout the reasons. In the concluding paragraph (para. 96), the trial judge said:

> It would be an error to allow Dr. Totten to testify to the potential meanings of the teardrop tattoo on Mr. Abbey's face and to present a ready-made inference concerning it to the jury.

The close and strong connection urged by the Crown between Dr. Totten's opinion and the ultimate issue of identification quite properly caused the trial judge to be concerned that if admitted, Dr. Totten's evidence could usurp the jury's fact-finding role on the ultimate issue in the trial: *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), at p. 24.

68 The Crown's attempt to link directly Dr. Totten's opinion to the identity of the respondent as the killer misconceived the true nature of Dr. Totten's opinion and the role he could legitimately play in assisting the jury. His report and his evidence made it clear that he could not speak to the reason the respondent placed a teardrop tattoo on his face. Dr. Totten could speak to the culture within urban street gangs in Canada and specifically the potential meanings to be taken from the inscription of a teardrop tattoo on the face of a young male member of that culture. Dr. Totten's evidence was directed to the potential meanings attributed to that symbol within a given culture and not to the reason any particular individual placed a tattoo on his face. Properly understood, Dr. Totten's opinion provided context within which to assess other evidence that the jury would hear, thereby assisting the jury in making its own assessment as to the meaning, if any, to be given to the respondent's teardrop tattoo: see David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5th ed. (Toronto: Irwin Law, 2008), at p. 209; Melvin M. Mark, "Social Science Evidence in the Courtroom: Daubert and Beyond?" (1999) 5 Psychol. Pub. Pol'y & L. 175, at p. 187, n. 7.

69 The Crown's secondary position on the *voir dire* was described by the trial judge in these terms, at para. 28:

> ... Dr. Totten's evidence could be limited to the introduction alone of the possible meanings for the tattoo without providing his analysis of the specific meaning attributable to Mr. Abbey's tattoo.

70 This secondary position reflects the proper limits of the opinion that Dr. Totten could properly advance. Phrased in this manner, his opinion did not go directly to the ultimate issue of identity and did not invite the jury to move directly from acceptance of the opinion to a finding of guilt. Dr. Totten's opinion, as properly delineated, would form part of a larger evidentiary picture to be evaluated as a whole by the jury.

(b) The Applicable Principles and a Suggested Approach to Admissibility

71 It is fundamental to the adversary process that witnesses testify to what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts. Expert opinion evidence is different. Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases. Consequently, expert opinion evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on the balance of probabilities: Paciocco & Stuesser at pp. 184, 193; S. Casey Hill *et al.*, *McWilliams' Canadian Criminal Evidence*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2009), at para. 12:30.10.

72 The increased reliance on expert opinion evidence by both the Crown and defence in criminal matters is evident upon even a cursory review of the reported cases. Sometimes it seems that a deluge of experts has descended on the criminal courts ready to offer definitive opinions to explain almost anything. Expert evidence is particularly prevalent where inferences must be drawn from a wide variety of human behaviour: see, for example, *R. v. McIntosh* (1997), 35 O.R. (3d) 97 (Ont. C.A.), at pp. 101 -103, leave to appeal to S.C.C. refused *R. v. McIntosh*, [1998] 1 S.C.R. xii (S.C.C.) [leave sought by second appellant in *McIntosh*, Mr. McCarthy]; David M. Paciocco, "Coping With Expert Evidence About Human Behaviour" (1999) 25 Queen's L.J. 305, at pp. 307-308; S. Casey Hill *et al.* at para. 12:30.10; *R. v. Olscamp* (1994), 95 C.C.C. (3d) 466 (Ont. Gen. Div.)), approved in *R. v. Lance* (1998), 130 C.C.C. (3d) 438 (Ont. C.A.), at para. 24; Ontario, *The Commission on Proceedings Involving Guy Paul Morin: Report*, vol. 1 (Toronto: Queen's Printer, 1998), at pp. 311-24. As Moldaver J.A. put it in *R. v. Clark* (2004), 69 O.R. (3d) 321 (Ont. C.A.), at para. 107, a case involving the proposed expert evidence of a criminal profiler:

> Combined, these two concerns [giving expert evidence more weight than it deserves and accepting expert evidence without subjecting it to the scrutiny it requires] raise the spectre of trial by expert as opposed to trial by jury. That is something that must be avoided at all costs. The problem is not a new one but in today's day and age, with proliferation of expert

evidence, it poses a constant threat. *Vigilance is required to ensure that expert witnesses like Detective Inspector Lines are not allowed to hijack the trial and usurp the function of the jury.*

[Emphasis added.]

73 Despite justifiable misgivings, expert opinion evidence is, of necessity, a mainstay in the litigation process. Put bluntly, many cases, including very serious criminal cases, could not be tried without expert opinion evidence. The judicial challenge is to properly control the admissibility of expert opinion evidence, the manner in which it is presented to the jury and the use that the jury makes of that evidence.

74 The current approach to the admissibility of expert opinion evidence was articulated by Sopinka J. in *Mohan*. Broadly speaking, *Mohan* replaced what had been a somewhat *laissez faire* attitude toward the admissibility of expert opinion evidence with a principled approach that required closer judicial scrutiny of the proffered evidence. After *Mohan*, trial judges were required to assess the potential value of the evidence to the trial process against the potential harm to that process flowing from admission.

75 The four criteria controlling the admissibility of expert opinion evidence identified in *Mohan* have achieved an almost canonical status in the law of evidence. No judgment on the topic seems complete without reference to them. The four criteria are:

- relevance;
- necessity in assisting the trier of fact;
- the absence of any exclusionary rule; and
- a properly qualified expert.

76 Using these criteria, I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, 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. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence: see *Mohan*; *R. v. D. (D.)*, [2000] 2 S.C.R. 275 (S.C.C.); *J. (J.-L.)*; *R. v. Trochym*, [2007] 1 S.C.R. 239 (S.C.C.); *K. (A.)*; *Ranger*; *R. v. Osmar* (2007), 84 O.R. (3d) 321 (Ont. C.A.), leave to appeal to S.C.C. refused (2007), 85 O.R. (3d) xviii (S.C.C.).

77 I appreciate that *Mohan* does not describe the admissibility inquiry as a two-step process. It does not distinguish between what I refer to as the preconditions to admissibility and the trial judge's exercise of the "gatekeeper" function. My description of the process as involving two distinct phases does not alter the substance of the analysis required by *Mohan*. In suggesting a two-step approach, I mean only to facilitate the admissibility analysis and the application of the *Mohan* criteria.

78 It is helpful to distinguish between what I describe as the preconditions to admissibility of expert opinion evidence and the performance of the "gatekeeper" function because the two are very different. The inquiry into compliance with the preconditions to admissibility is a rules-based analysis that will yield "yes" or "no" answers. Evidence that does not meet all of the preconditions to admissibility must be excluded and the trial judge need not address the more difficult and subtle considerations that arise in the "gatekeeper" phase of the admissibility inquiry.

79 The "gatekeeper" inquiry does not involve the application of bright line rules, but instead requires an exercise of judicial discretion. The trial judge must identify and weigh competing considerations to decide whether on balance those considerations favour the admissibility of the evidence. This cost-benefit analysis is case-specific and, unlike the first phase of the admissibility inquiry, often does not admit of a straightforward "yes" or "no" answer. Different trial judges, properly applying the relevant principles in the exercise of their discretion, could in some situations come to different conclusions on admissibility.

80 In what I refer to as the first phase, four preconditions to admissibility must be established, none of which were in dispute at trial:

- the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- the witness must be qualified to give the opinion;
- the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
- the proposed opinion must be logically relevant to a material issue.

81 For the purpose of explaining the analytic distinction I draw between the preconditions to admissibility and the "gatekeeper" function, I need not address the first three preconditions. The relevance criterion, however, does require some explanation. Relevance is one of the four *Mohan* criteria. However, I use the word differently than Sopinka J. used it in *Mohan*.

82 Relevance can have two very different meanings in the evidentiary context. Relevance can refer to logical relevance, a requirement that the evidence have a tendency as a matter of human experience and logic to make the existence or non-existence of a fact in issue more or less likely than it would be without that evidence: *J. (J.-L.)* at para. 47. Given this meaning, relevance sets a low threshold for admissibility and reflects the inclusionary bias of our evidentiary rules: see *R. v. Clarke* (1998), 129 C.C.C. (3d) 1 (Ont. C.A.), at p. 12. Relevance can also refer to a requirement that evidence be not only logically relevant to a fact in issue, but also sufficiently probative to justify its admission despite the prejudice that may flow from its admission. This meaning of relevance is described as legal relevance and involves a limited weighing of the costs and benefits associated with admitting evidence that is undoubtedly logically relevant: see Paciocco & Stuesser at pp. 30-35.

83 The relevance criterion for admissibility identified in *Mohan* refers to legal relevance. To be relevant, the evidence must not only be logically relevant but must be sufficiently probative to justify admission: see *Mohan* at pp. 20-21; *K. (A.)* at paras. 77-89; Paciocco & Stuesser at pp. 198-99.

84 When I speak of relevance as one of the preconditions to admissibility, I refer to logical relevance. I think the evaluation of the probative value of the evidence mandated by the broader concept of legal relevance is best reserved for the "gatekeeper" phase of the admissibility analysis. Evidence that is relevant in the sense that it is logically relevant to a fact in issue survives to the "gatekeeper" phase where the probative value can be assessed as part of a holistic consideration of the costs and benefits associated with admitting the evidence. Evidence that does not meet the logical relevance criterion is excluded at the first stage of the inquiry: see e.g. *R. v. Dimitrov* (2003), 68 O.R. (3d) 641 (Ont. C.A.), at para. 48, leave to appeal to S.C.C. refused (2004), 70 O.R. (3d) xvii (S.C.C.).

85 My separation of logical relevance from the cost-benefit analysis associated with legal relevance does not alter the criteria for admissibility set down in *Mohan* or the underlying principles governing the admissibility inquiry. I separate logical from legal relevance simply to provide an approach which focuses first on the essential prerequisites to admissibility and second, on all of the factors relevant to the exercise of the trial judge's discretion in determining whether evidence that meets those preconditions should be received.

86 As indicated above, it was not argued that Dr. Totten's evidence did not meet the preconditions to admissibility. Nor is it suggested that it was not logically relevant to identity, a fact in issue. The battle over the admissibility of his evidence was fought at the "gatekeeper" stage of the analysis. At that stage, the trial judge engages in a case-specific cost-benefit analysis.

87 The "benefit" side of the cost-benefit evaluation requires a consideration of the probative potential of the evidence and the significance of the issue to which the evidence is directed. When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise and the extent to which the expert is shown to be impartial and objective. [8]

88 Assessment of the reliability of proffered expert evidence has become the focus of much judicial attention, particularly where the expert advances what is purported to be scientific opinion: see, for example, *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (U.S. Cal. 1993); *J. (J.-L.)* at paras. 33-37; S. Casey Hill *et al.* at para. 12:30.20.30; Bruce D. Sales & Daniel W. Shuman, *Experts in Court Reconciling Law, Science, and Professional Knowledge* (Washington, D.C.: American Psychological Association, 2005).

89 In assessing the potential benefit to the trial process flowing from the admission of the evidence, the trial judge must intrude into territory customarily the exclusive domain of the jury in a criminal jury trial. The trial judge's evaluation is not, however, the same as the jury's ultimate assessment. The trial judge is deciding only whether the evidence is worthy of being heard by the jury and not the ultimate question of whether the evidence should be accepted and acted upon.

90 The "cost" side of the ledger addresses the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in *J. (J.-L.)* at para. 47 as "consumption of time, prejudice and confusion". Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence. The complexity of the material underlying the opinion, the expert's impressive credentials, the impenetrable jargon in which the opinion is wrapped and the cross-examiner's inability to expose the opinion's shortcomings may prevent an effective evaluation of the evidence by the jury. There is a risk that a jury faced with a well presented firm opinion may abdicate its fact-finding role on the understandable assumption that a person labelled as an expert by the trial judge knows more about his or her area of expertise than do the individual members of the jury: *J. (J.-L.)* at para. 25.

91 In addition to the risk that the jury will yield its fact finding function, expert opinion evidence can also compromise the trial process by unduly protracting and complicating proceedings. Unnecessary and excessive resort to expert evidence can also give a distinct advantage to the party with the resources to hire the most and best experts — often the Crown in a criminal proceeding.

92 All of the risks described above will not inevitably arise in every case where expert evidence is offered. Nor will the risks have the same force in every case. For example, in this case, I doubt that the jury would have difficulty critically evaluating Dr. Totten's opinion. There was nothing complex or obscure about his methodology, the material he relied on in forming his opinion or the language in which he framed and explained his opinion. As when measuring the benefits flowing from the admission of expert evidence, the trial judge as "gatekeeper" must go beyond truisms about the risks inherent in expert evidence and come to grips with those risks as they apply to the particular circumstances of the individual case.

93 The cost-benefit analysis demands a consideration of the extent to which the proffered opinion evidence is necessary to a proper adjudication of the fact(s) to which that evidence is directed. In *Mohan*, Sopinka J. describes necessity as a separate criterion governing admissibility. I see the necessity analysis as a part of the larger cost-benefit analysis performed by the trial judge. In relocating the necessity analysis, I do not, however, depart from the role assigned to necessity by the *Mohan* criteria.

94 It seems self-evident that an expert opinion on an issue that the jury is fully equipped to decide without that opinion is unnecessary and should register a "zero" on the "benefit" side of the cost-benefit scale. Inevitably, expert opinion evidence that brings no added benefit to the process will be excluded: see, for example, *R. v. Batista* (2008), 238 C.C.C. (3d) 97 (Ont. C.A.), at paras. 45-47; *R. v. Nahar* (2004), 181 C.C.C. (3d) 449 (B.C. C.A.), at paras. 20-21. Opinion evidence that is essential to a jury's ability to understand and evaluate material evidence will register high on the "benefit" side of the scale. However, the ultimate admissibility of the opinion, even where it is essential, will depend on not only its potential benefit, but on the potential prejudice to the trial process associated with its admission.

95 In many cases, the proffered opinion evidence will fall somewhere between the essential and the unhelpful. In those cases, the trial judge's assessment of the extent to which the evidence could assist the jury will be one of the factors to be weighed in deciding whether the benefits flowing from admission are sufficiently strong to overcome the costs associated with admission. In addressing the extent to which the opinion evidence is necessary, the trial judge will have regard to other facets of the trial process — such as the jury instruction — that may provide the jury with the tools necessary to adjudicate properly

on the fact in issue without the assistance of expert evidence: *D. (D.)* at para. 33; *R. v. Bonisteel* (2008), 236 C.C.C. (3d) 170 (B.C. C.A.), at para. 69.

96 It is unnecessary to explore the necessity requirement in any greater detail. The trial judge appears to have accepted defence counsel's concession that Dr. Totten's evidence was necessary in the sense that the meaning of a teardrop tattoo was outside of the ordinary knowledge of a Toronto juror (para. 34).

(c) Application of the Principles to this Case

97 The trial judge's decision to exclude Dr. Totten's evidence was the product of his cost-benefit analysis. That assessment is entitled to deference on appeal: *D. (D.)* at para. 13; *Bonisteel* at para. 70. In my view, however, the trial judge made five legal errors in his analysis. First, he did not properly delineate the nature and scope of Dr. Totten's evidence before addressing its admissibility. Second, in testing the reliability of Dr. Totten's proposed opinion evidence, the trial judge relied almost exclusively on concepts and criteria that were inappropriate to the assessment of the reliability of Dr. Totten's opinion while failing to consider the criteria that were relevant. Third, in examining the methods used by Dr. Totten to enhance the reliability of his opinion, the trial judge imposed too high a standard of reliability, misapprehended parts of Dr. Totten's evidence and considered evidence that was irrelevant to the reliability of the opinion. Fourth, in assessing the reliability of Dr. Totten's opinion, the trial judge went beyond questions of threshold reliability and considered features of Dr. Totten's evidence that should have been left to the jury in their ultimate assessment of that evidence. Fifth, the trial judge erred in holding that because Dr. Totten's opinion had not been peer reviewed, it followed that his opinion was not based on proven facts and could not be admitted into evidence.

(d) The Nature and Scope of Dr. Totten's Evidence

98 I outlined Dr. Totten's evidence above (see Part III (iv)). The trial judge directed virtually the entirety of his admissibility analysis to the Crown's primary position, which would have had Dr. Totten testifying as to the meaning of the respondent's teardrop tattoo. I have already indicated that position was not consistent with the substance of Dr. Totten's evidence or his reports. Dr. Totten could not speak directly to the reasons the respondent had put a teardrop tattoo on his face. But, he could offer an opinion based on his research, clinical experience and review of the relevant literature as to the meaning ascribed to a teardrop tattoo within the urban street gang culture, a community to which the respondent admittedly belonged. The Crown's alternative position was consistent with the scope of Dr. Totten's evidence and expertise.

99 The difference between an opinion on why the respondent put the teardrop tattoo on his face and an opinion on the meanings of that symbol in the street gang culture in which the respondent lived is much more than semantical. The former speaks directly to the issue of the murderer's identity. That opinion, if heard, invites the jury to move directly from accepting Dr. Totten's evidence to a finding of guilt. The latter opinion speaks on a much more general level and provides context in which the evidence of other witnesses, who can speak more directly to the facts of the case, can be placed and assessed.

100 The distinction between the proper scope of Dr. Totten's evidence and the scope as primarily advanced by the Crown and considered by the trial judge is not unlike the distinction drawn in *K. (A.)*. In that case, Charron J.A. dealt with expert evidence relating to the behaviour of children who had allegedly been abused. As she explained, the experts in that case could not testify that certain features of a child's behaviour demonstrated that the child had been abused. In other words, the experts could not forge a direct link between their observations and prior abuse of the complainant. However, those experts could testify for the limited purpose of explaining that certain kinds of behaviour have been commonly observed in victims of child abuse. That kind of expert evidence was admissible because it provided the jury with a more complete picture when assessing the entirety of the evidence and, in particular, when deciding what inferences or conclusions should be drawn from the post-event behaviour of the complainants: see also *R. v. Bernardo* (1995), 42 C.R. (4th) 96 (Ont. Gen. Div.)); *R. v. F. (D.S.)* (1999), 132 C.C.C. (3d) 97 (Ont. C.A.), at paras. 50-52.

101 The trial judge, no doubt influenced by the Crown's primary position, failed to properly limit the scope of Dr. Totten's opinion. He addressed the question of admissibility on the assumption that Dr. Totten would speak directly to the reason the respondent had put a teardrop tattoo on his face. The trial judge's only reference to the merits of the Crown's alternative position

in the course of his 96-paragraph decision appears in the last sentence of the last paragraph where he states "the same reliability concerns are present in either form of the proposed expert evidence".

102 I disagree with this assessment. Had the trial judge limited Dr. Totten's opinion to the potential meanings of the tattoo within the street gang culture, Dr. Totten would not have testified about the meaning of the respondent's tattoo. His evidence could not be described as "tantamount to a confession" (para. 1). Nor would Dr. Totten's evidence "present a ready-made inference concerning it [the meaning of the tattoo]" (para. 96).

103 Properly limited, Dr. Totten's evidence took a first, albeit important, step toward establishing the Crown's position that the respondent's teardrop tattoo signified that he had killed Mr. Peter. Standing alone, however, the evidence could not make the Crown's case with respect to the meaning of the tattoo. I see no significant risk that the jury, having heard Dr. Totten's opinion in its properly limited form, would have moved directly from accepting that opinion to a conviction of the respondent. One must bear in mind that if Dr. Totten's evidence was admitted, he would have been cross-examined. No doubt, his ready acknowledgement that he could not speak directly to the respondent's reasons for putting a tattoo on his face would be front and centre in that cross-examination. Had the trial judge limited the scope of Dr. Totten's evidence along the lines proposed by the Crown in its alternative position, the cost-benefit analysis required by the case law may well have yielded a different result.

(e) Assessing the Reliability of Dr. Totten's Opinion

(1) The *Daubert*, the leading American author Factors Are Not Applicable

104 During Dr. Totten's evidence and the argument following his evidence, the trial judge continually referred to the reliability factors identified in *Daubert*, the leading American authority, which is approvingly referred to in the Supreme Court of Canada's decision in *J. (J.-L.)* In numerous lengthy dialogues with Crown counsel, the trial judge repeatedly challenged the Crown to establish the reliability of Dr. Totten's opinion using the *Daubert* factors. Those factors include the existence of measurable error rates, peer review of results, the use of random sampling and the ability of the tester to replicate his or her results.

105 In his reasons for excluding Dr. Totten's evidence, the trial judge treated the evidence as advancing a "novel scientific theory" (para. 38) put forward to "scientifically prove that Mr. Abbey's tattoo means he killed Simeon Peter" (para. 92). Having set Dr. Totten's opinion up as a scientific theory, the trial judge then tested the reliability of that theory as if it had been put forward as the product of an inquiry based on the scientific method. The trial judge's reasons are replete with references to the absence of error rates (paras. 56-59, 62-64), the failure to use random sampling (paras. 56-59), the absence of peer review of Dr. Totten's conclusions (para. 78) and the absence of any attempt to replicate Dr. Totten's findings (para. 78). It is clear that the trial judge viewed the absence of the factors identified in *Daubert* as fatal to the reliability of Dr. Totten's evidence. He said at para. 78:

> ... without evidence on the rate of error, a peer review of his conclusions, or the replication of his findings, I am not satisfied that Dr. Totten's conclusion is not flawed.

106 The extent to which the *Daubert* factors dominated the trial judge's reliability analysis can be seen in the following passage from his reasons (para. 56):

> One of the problems with accepting his methodology is that the common *indicia* of reliable, replicable, scientific studies are not present (nor could they be according to Dr. Totten) in his qualitative research. In order to generalize and extrapolate Dr. Totten's findings, or use his theory as a diagnostic tool, *I should have some knowledge about the statistical probability of the accuracy of his conclusions. To that end, his conclusions should be tested by applying them to a random sample of the population of street gangs who wear teardrop tattoos to see if his conclusion can be falsified.*
>
> [Emphasis added.]

107 This passage mischaracterizes Dr. Totten's evidence as presenting a "theory" to be used as a "diagnostic tool". This language, taken from the leading authority of *J. (J.-L.)*, does not fit Dr. Totten's evidence. I also do not understand the meaning

of the reference to "random samples of the population of street gangs who wear teardrop tattoos". The persons interviewed by Dr. Totten were randomly selected in the sense that he did not seek out particular gang members. They were not randomly selected in the sense that Dr. Totten specifically excluded persons who had a strong motive to mislead him. It may be that the trial judge was simply saying that Dr. Totten's conclusions could have been tested through additional interviews with more street gang members from different gangs all of whom had teardrop tattoos. One cannot disagree that interviews with more gang members who had teardrop tattoos would have assisted in weighing Dr. Totten's opinion. However, that process is not the same as the process of random sampling as that term is used in the application of the scientific method.

108 It is not surprising that Dr. Totten's opinion could not pass scientific muster. While his research, and hence his opinion, could be regarded as scientific in the very broad sense of that word, as used in *McIntosh*, Dr. Totten did not pretend to employ the scientific method and did not depend on adherence to that methodology for the validity of his conclusions. As his opinion was not the product of scientific inquiry, its reliability did not rest on its scientific validity. Dr. Totten's opinion flowed from his specialized knowledge gained through extensive research, years of clinical work and his familiarity with the relevant academic literature. It was unhelpful to assess Dr. Totten's evidence against factors that were entirely foreign to his methodology. As Professors Sales and Shuman put it in their text, *Experts in Court: Reconciling Law, Science, and Professional Knowledge*, at pp. 74-75: "[f]or non-scientific expert testimony, scientific validity is an oxymoron."

109 Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death, accident reconstructionists testify to the location or cause of an accident, economists or rehabilitation specialists testify to future employment prospects and future care costs, fire marshals testify about the cause of a fire, professionals from a wide variety of fields testify as to the operative standard of care in their profession or the cause of a particular event. Like Dr. Totten, these experts do not support their opinions by reference to error rates, random samplings or the replication of test results. Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts and Dr. Totten using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole. [9]

110 Tested exclusively against the *Daubert* factors, much of the expert evidence routinely accepted and acted upon in courts would be excluded despite its obvious reliability and value to the trial process. However, *Daubert* does not suggest that the factors it proposes are essential to the reliability inquiry. Instead, *Daubert*, at p. 484, describes that inquiry as "a flexible one". This flexibility was subsequently emphasized in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. Ala. 1999). Unlike *Daubert*, *Kumho Tire Co.* did not involve an opinion, the validity of which relied upon the scientific method. The expert's opinion in *Kumho Tire Co.* depended in part on scientific principles but also upon the knowledge of the witness gained through his experience and training.

111 In *Kumho Tire Co.*, the court made it clear that, while all expert opinion evidence must demonstrate a sufficient level of reliability to warrant its admissibility, a flexible approach to the determination of reliability was essential. Some *Daubert* factors, e.g. error rates, are not germane to some kinds of expert testimony. The court observed at p. 150:

> ... In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise. ... *Daubert* makes clear that the factors it mentions do *not* constitute a "definitive checklist or test." ... We agree with the Solicitor General that "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.
>
> [Emphasis in original; footnote omitted.]

112 An example of the flexible approach to the assessment of reliability favoured in *Daubert* and *Kumho Tire Co.* is found in *United States of America v. Hankey*, 203 F.3d 1160 (U.S. C.A. 9th Cir. 2000), a case involving expert evidence regarding gangs. There, the prosecution offered expert opinion evidence through a long-time undercover police officer of the "code of

silence" that operated within the culture of certain urban street gangs. After referring to *Kumho Tire Co.* and the need to assess reliability by *indicia* that are relevant to the particular expertise advanced, the court said at p. 1169:

> Given the type of expert testimony proffered by the government, it is difficult to imagine that the court could have been more diligent in assessing relevance and reliability. *The* Daubert *factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it.*
>
> [Emphasis added.]

113 Several Canadian trial courts have reached a similar conclusion and admitted expert evidence about various features of gang culture relevant to the particular prosecution, see e.g. *R. v. Wilson*; *R. v. Hiscock*, [2002] B.C.J. No. 3103 (B.C. S.C.); *R. v. Grant*, [2005] O.J. No. 5891 (Ont. S.C.J.); *R. v. Lindsay*, [2004] O.J. No. 4097 (Ont. S.C.J.).

114 The same caution against the inappropriate use of the *Daubert* factors to assess the reliability of expert opinion evidence can be found in Canadian commentary. Professor Paciocco has observed:

> Clearly it is inappropriate to consider all expertise as science, or to require all expertise to attain the scientific method. Some expert witnesses rely on science only in a loose sense. Actuaries apply probability theory and mathematics to produce decidedly unscientific results. Appraisers make subjective assessments of objective data, as do family assessment experts. Professionals testifying to standards of care within their profession are doing nothing scientific. Yet Daubert *spawned a jurisprudence that was fixated for a time with science. This led lower courts to commit two kinds of error.* First, it caused some lower courts to hold that the *Daubert* test and the gatekeeping role is confined to scientific expertise. Experts who were not scientists would not be subjected to the reliability inquiry prescribed by *Daubert*. *Second, it caused other courts to apply the criteria listed in* Daubert *in a wooden fashion, even to non-scientific forms of expertise.* Each of these two kinds of errors was caused by the failure to take context into account. [10]
>
> [Emphasis added.]

115 Commissioner Goudge made the same point in his report at p. 493:

> Forensic pathology provides a good example of a discipline that has not traditionally engaged in random testing or determining rates of error. The reasons are obvious: testing and reproducibility cannot be used to verify a cause of death. *The forensic pathologist's opinion must instead rely on specialized training, accepted standards and protocols within the forensic pathology community, accurate gathering of empirical evidence, attention to the limits of the discipline and the possibility of alternative explanations or error, knowledge derived from established peer-reviewed medical literature, and sound professional judgment.*
>
> [Emphasis added.]

116 The trial judge mischaracterized Dr. Totten's opinion as involving a novel scientific theory. It was not scientific. It was not novel. And it was not a theory. Dr. Totten's opinion was based on knowledge he had acquired about a particular culture through years of academic study, interaction in various ways with members of that culture and review of the relevant literature. He spoke to the meaning, as he understood it from his knowledge, of certain symbols within that culture. Dr. Totten's evidence could no more be regarded as a "scientific theory" than would evidence from a properly qualified expert to the effect that wearing certain clothing in a particular culture indicates that the wearer belonged to a particular religious sect.

117 The proper question to be answered when addressing the reliability of Dr. Totten's opinion was not whether it was scientifically valid, but whether his research and experiences had permitted him to develop a specialized knowledge about gang culture, and specifically gang symbology, that was sufficiently reliable to justify placing his opinion as to the potential meanings of the teardrop tattoo within that culture before the jury: see David H. Kaye, David E. Bernstein & Jennifer L. Mnookin, *The New Wigmore, A Treatise on Evidence: Expert Evidence* (New York: Aspen, 2004), at para. 9.3.4.

(2) The Relevant Reliability Factors

118 In holding that the trial judge improperly attempted to use the specific *Daubert* factors in assessing the reliability of Dr. Totten's evidence, I do not suggest that the Crown was not required to demonstrate threshold reliability. That reliability had to be determined, however, using tools appropriate to the nature of the opinion advanced by Dr. Totten.

119 As with scientifically based opinion evidence, there is no closed list of the factors relevant to the reliability of an opinion like that offered by Dr. Totten. I would suggest, however, that the following are some questions that may be relevant to the reliability inquiry where an opinion like that offered by Dr. Totten is put forward:

- To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?

- To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?

- What are the particular expert's qualifications within that discipline, profession or area of specialized training?

- To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?

- To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?

- To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?

- To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?

- To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?

- To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?

120 The significance of testing the expert's methodologies against those accepted in the field was highlighted in *Kumho Tire Co.* at p. 152:

> The objective of that requirement [the gatekeeper function] is to ensure the reliability and relevancy of expert testimony. *It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigour that characterizes the practice of an expert in the relevant field.*
>
> [Emphasis added.]

121 The study of cultural mores within particular communities or groups in a community is a well-recognized field of study within the broader academic and professional disciplines of sociology, criminology and anthropology. Dr. Totten's expertise in this particular field was acknowledged by all involved in this case. There was no challenge to the manner in which Dr. Totten gathered the relevant data. By that I mean it was not suggested that the information he looked to had not been accurately recorded and memorialized by those involved in the various studies. These three features of his evidence should have factored into the trial judge's assessment of the threshold reliability of Dr. Totten's evidence. They were not.

122 Dr. Totten testified at length about the techniques and methods he used in his research to assemble and verify the information he ultimately drew on to advance his opinion. While acknowledging that he could not ensure that all the information he received from gang members was accurate, he explained the various methods used in an attempt to maximize the veracity of the information received. Dr. Totten testified that the methodology he followed was well established within his field of study and was entirely consistent with the methods used by others conducting the same kind of research. For example, Dr. Totten explained several ways in which the concept of peer review was used in his field. His studies were all peer reviewed using those techniques.

123 The trial judge, as he was entitled to do, made his own assessment of the effectiveness of some of the specific techniques used by Dr. Totten to enhance the reliability of the information he received in his studies. However, the trial judge should have taken into account in his threshold reliability assessment the unchallenged evidence that Dr. Totten's work was done in accordance with the established and accepted methodology used in his field. Dr. Totten, by employing "the same level of intellectual rigour" (*Kumho Tire Co.* at p. 152) when advancing his opinion in the courtroom that he and his colleagues used in the course of their practice, enhanced the threshold reliability of the opinion based on that work.

124 Two other factors not mentioned by the trial judge were potentially important to the reliability assessment. First, Dr. Totten drew his conclusions from data gathered in research studies that had no connection to this case. There was no chance that in gathering the relevant information, Dr. Totten sought, consciously or subconsciously, to lend his expertise to one side of the legal controversy. "Confirmation bias" was not an issue. It cannot be suggested that Dr. Totten set out to confirm an existing belief about the meaning of teardrop tattoos when he conducted his research. Dr. Totten's neutrality when he gathered the information he ultimately looked to to form the relevant opinion distinguishes his evidence from that of experts who are sought out to generate information for the purposes of litigation, or those who come to a case with firmly held preconceived notions that place the expert firmly on one side of the controversy.

125 Second, neither the methodology used by Dr. Totten nor his opinion concerning the teardrop tattoos were complex or difficult for the layperson to understand and evaluate. I have no doubt that the methods Dr. Totten employed, the data those methods produced and his opinion based on those data could be critically evaluated and independently assessed by a jury. This was not rocket science.

126 I am satisfied that the factors outlined above, taken in combination, offer a firm basis upon which a trial judge could conclude that Dr. Totten's opinion, that the inscription of a teardrop tattoo on the face of a young male gang member carried one of three possible meanings within the urban gang culture, was sufficiently reliable to justify its admission. Unfortunately, the trial judge did not address these factors but focused almost exclusively on the *Daubert* factors, which, for the reasons I have explained, had no relevance to the reliability of Dr. Totten's evidence.

(3) Further Errors in the Reliability Assessment

127 In addition to using inapplicable reliability factors and failing to consider applicable ones, the trial judge made errors in his assessment of the methods used by Dr. Totten to enhance the reliability of his data. Most significantly, the trial judge applied too high a standard in determining whether those methods provided sufficient reliability to clear the threshold reliability requirement.

128 The trial judge accepted that some of Dr. Totten's methods, for example triangulation, could enhance the reliability of the information given to him by the interviewed gang members (para. 81). The trial judge ultimately concluded, however, that the methods used by Dr. Totten were "not unassailable" (para. 85) and were "far from foolproof" (para. 84). In so holding, the trial judge appears to have required the Crown to demonstrate that the methods used by Dr. Totten produced information that was proven to be entirely accurate. For example, after referring to investigative discourse analysis, one of the tools used by Dr. Totten and others in his field, the trial judge said, at para. 84:

> ... There still exists *the probability* that some of Dr. Totten's research subjects *may have been deceitful on many subjects unknown to him.* That deceit would dramatically skew his results and sample size.

[Emphasis added.]

129 I would think that in any field of study where the expert depends on information received from other individuals, there will inevitably be "a probability" that some of those individuals "may have been deceitful" about something in the course of the information gathering process. If this is the standard demanded before opinion evidence based on information received from individuals can be admitted, one must wonder how evidence from psychiatrists and psychologists based on information gathered from an accused, his friends and family is ever deemed sufficiently reliable to warrant its admission. That evidence is, of course, routinely received and used in criminal trials.

130 The Crown was not required to demonstrate on the *voir dire* that the information relied on by Dr. Totten was accurate. The Crown was required to demonstrate that there were sufficient *indicia* of reliability to warrant placing an opinion based on that information before the jury so that it could make the ultimate determination on the reliability of that information and the validity of the opinion based on it. The probability that some part of the wealth of material relied on by Dr. Totten may have been inaccurate was not enough to keep his opinion from the jury.

131 Not only did the trial judge test the informational basis for Dr. Totten's opinion against too exacting a standard, he also misapprehended parts of Dr. Totten's evidence. When explaining why he regarded the absence of error rates to be a very significant factor in assessing the reliability of Dr. Totten's opinion, the trial judge expressed concern about the risk of "false positives" in Dr. Totten's research. The trial judge explained (at para. 64):

> The possibility of occasions occurring when an individual wearing a teardrop tattoo fits the profile of a murderer but has in reality killed no one should be expressed.

132 This observation demonstrates a misapprehension of Dr. Totten's evidence. Dr. Totten interviewed 300 gang members. Ninety-seven had been convicted of homicide related offences. Of that group of 97, 71 had teardrop tattoos. All 71 explained that their teardrop tattoo represented the murder of a rival gang member. Dr. Totten's opinion as to the potential meaning of a teardrop tattoo was based in part on the explanation offered by persons who had a teardrop tattoo and who had been convicted of a homicide related offence. The convictions for homicide related offences of 71 people with teardrop tattoos lent some credibility to their explanation for the reason behind the teardrop tattoo. Dr. Totten made no attempt to fit individuals with teardrop tattoos into "the profile of a murderer". Language referring to profiling by experts is used in some of the expert opinion case law, but has no application to Dr. Totten's evidence.

133 The trial judge also misapprehended Dr. Totten's evidence as it related to the potential motive of the gang members interviewed to deny any involvement in criminal activity. The trial judge determined that the reliability of Dr. Totten's opinion suffered because of the very real possibility that gang members he interviewed would have a motive to conceal involvement in criminal activity (paras. 82, 83). The trial judge explained that because Dr. Totten told interviewees that he may be obliged to disclose criminal conduct revealed by them, the interviewees would be reluctant to disclose criminal activity.

134 There is no denying the logic of the trial judge's analysis. In respect of some of the information gathered by Dr. Totten, there was a very real motive to conceal the truth from Dr. Totten. I do not see, however, how any motive to lie could have a negative effect on the information pertinent to Dr. Totten's opinion in this case. First of all, any lies told to Dr. Totten by persons who did not have teardrop tattoos were irrelevant for the purposes of his opinion. That opinion rested in part on the explanation given for the teardrop tattoo by all 71 of the interviewed gang members who both had tattoos and had been convicted of a homicide related offence. Their responses, linking their teardrop tattoos with the murders of rival gang members, could not have been motivated by a desire to avoid criminal liability. The only persons interviewed who had teardrop tattoos and who might have had a motive to lie to avoid incriminating themselves in a homicide were the 10 gang members who had teardrop tattoos, but did not have homicide related convictions. None of those gang members suggested that the teardrop tattoo represented involvement in a homicide.

135 On the trial judge's hypothesis, some or all of these 10 gang members may have lied about the meaning of their teardrop tattoo to avoid implicating themselves in the murder of a rival gang member. If any of the 10 lied for that reason, however,

their lie does not undermine the validity of Dr. Totten's opinion that the murder of a rival gang member is one explanation for a teardrop tattoo, but would instead confirm that opinion.

136 The trial judge also misapprehended Dr. Totten's evidence concerning the possibility that individuals who were not gang members would place a teardrop tattoo on their face as a fashion statement or to pose as persons living the gangster lifestyle. The trial judge said (at para. 66) that Dr. Totten:

> was quite adamant in eliminating the possibility that 'wannabees' or 'poseurs' may have a teardrop inscribed on their face in order to portray a sense of dangerousness or false identity with a gang.

137 I do not read Dr. Totten's evidence that way. He readily acknowledged the "wannabee" and "poseur" phenomena. Dr. Totten agreed that gang symbols had found their way into the more mainstream culture and that non-gang members used them without regard to their meanings within the gang culture. However, Dr. Totten went on to testify, correctly, that the respondent was not a "poseur" or "wannabee", but was a gang member. He opined that a gang member would not likely misuse the symbols of the gang to which he belonged lest he face the gang's retribution. Dr. Totten's evidence offers an explanation that could be accepted by a jury for discounting the possibility that an admitted gang member would misuse the symbols. That reasoning is mischaracterized as a refusal to acknowledge that "wannabees" and "poseurs" use gang symbols.

138 Another misapprehension of Dr. Totten's evidence occurred when the trial judge referred to that evidence as "fairly equivocal" on the issue of whether Dr. Totten could speak directly to the meaning of the respondent's teardrop tattoo without interviewing the respondent. On a fair reading of the entirety of Dr. Totten's evidence and the contents of his reports, it cannot be said that he equivocated. Dr. Totten acknowledged throughout that the meaning of an individual's tattoo could only be definitively determined by speaking with that individual.

139 A further misapprehension of Dr. Totten's evidence occurred when the trial judge addressed his evidence concerning the applicability of American studies to Canadian urban street gangs. According to the trial judge, Dr. Totten was content to conclude that Canadian research was applicable in the United States "because he has often been asked to present at American sociology conferences" (para. 88). Speaking at academic conferences in the United States would offer scant support for Dr. Totten's opinion that research in the two countries had cross-border application. In fact, Dr. Totten testified that his belief with respect to the applicability of American research was based on his own extensive experience with American street gangs in Chicago and his detailed review of the American literature. This is a much firmer basis for the opinion than was acknowledged by the trial judge.

140 In addition to misapprehending parts of Dr. Totten's evidence, the trial judge took into account what I consider to be an irrelevant part of that evidence. The trial judge held (at para. 68) that Dr. Totten's "theoretical model" did not allow for instances where there were multiple shooters of a rival gang member and not all of those shooters were entitled to wear a teardrop tattoo.

141 Dr. Totten was not advancing a "theoretical model" of anything in his evidence. More to the specific point, the question of who among multiple shooters should, according to gang rules, get credit for a killing and have the right to inscribe a teardrop tattoo on his face had nothing to do with Dr. Totten's opinion concerning the meaning of a teardrop tattoo in the urban street gang culture. The manner in which a particular individual involved in a killing was selected as the person entitled to wear the teardrop tattoo would not alter the fact that the individual who had the teardrop tattoo earned it by killing a rival gang member.

(4) The Distinction Between Threshold Reliability and Ultimate Reliability

142 In performing the "gatekeeper" function, a trial judge of necessity engages in an evaluation that shares some of the features with the evaluation ultimately performed by the jury if the evidence is admitted. The trial judge is, however, charged only with the responsibility to decide whether the evidence is sufficiently reliable to merit its consideration by the jury. The integrity of the trial process requires that the trial judge not overstep this function and encroach onto the jury's territory. In assessing threshold reliability, I think trial judges should be concerned with factors that are fundamental to the reliability of the opinion offered and responsive to the specific dangers posed by expert opinion evidence. Trial judges, in assessing threshold reliability, should not be concerned with those factors which, while relevant to the ultimate reliability of the evidence, are common with those relevant

to the evaluation of evidence provided by witnesses other than experts. For example, I would not think that inconsistencies in an expert's testimony, save perhaps in extreme cases, would ever justify keeping the expert's opinion from the jury. Juries are perfectly able to consider the impact of inconsistencies on the reliability of a witness's testimony.

143 In this case, the trial judge focused on what he considered to be several inconsistencies in Dr. Totten's evidence in deciding whether that evidence met the threshold reliability inquiry. In doing so, I think he went beyond the bounds of that inquiry. Those inconsistencies may or may not have been significant to the jury's ultimate evaluation, but I do not think they had any role to play in the trial judge's analysis. I will refer to four of the inconsistencies emphasized by the trial judge.

144 The trial judge decided that Dr. Totten gave inconsistent evidence concerning the timing of the inscription of a teardrop tattoo by a person who had killed a rival gang member. Initially, during examination-in-chief, Dr. Totten indicated that the tattoo could be inscribed "a couple of months after the murder". Later, but still in his examination-in-chief, Dr. Totten talked about "three or four months to a year". Still, later, he described the timing as depending on a variety of factors. These answers are different and perhaps inconsistent with each other. However, the differences could well be regarded as inconsequential. Certainly, they have nothing to do with the core opinion advanced by Dr. Totten concerning the meanings of a teardrop tattoo.

145 The trial judge characterized Dr. Totten's evidence about the population of street gangs as "inconsistent" (para. 63). He testified that the population of street gangs in Canada was unknown and difficult to isolate with any accuracy. Dr. Totten later offered an estimate of the total gang population in Canada. I have difficulty seeing any inconsistency in these two answers. In any event, if there is an inconsistency, it is not such as would affect the threshold reliability of his evidence.

146 The trial judge compared portions of Dr. Totten's evidence to various comments in the authoritative academic literature and found several conflicts, which the trial judge used in assessing threshold reliability (paras. 75, 76). I count nine examples of inconsistencies referred to by the trial judge. Some were picayune. For example, Dr. Totten said the tattoo could refer to the death of a family member or a gang member whereas one of the authors reported that it could also refer to the death of a good friend. Some of the other inconsistencies identified by the trial judge were not inconsistencies. For example, the trial judge referred to comments by several authors to the effect that only the wearer of a tattoo knew the reason for the tattoo. This is entirely consistent with Dr. Totten's evidence and his reports. Some of the other differences between Dr. Totten's evidence and excerpts from the academic literature were overstated by the trial judge. For example, one author had written that the teardrop tattoo may have lost its traditional meaning among young members of Hispanic gangs in California. The trial judge read this single qualification on the symbolic meaning of the tattoo as completely undermining Dr. Totten's opinion that the teardrop tattoo had common meanings among urban street gangs in North America. The reporting by another expert of a single anomaly does not, in my view, necessarily undermine Dr. Totten's evidence. At its highest, it suggests some potential controversy among authorities, certainly fodder for cross-examination but no reason to exclude Dr. Totten's evidence.

(f) Peer Review and Proof of the Facts Underlying an Opinion

147 The trial judge concluded that Dr. Totten's opinion was unreliable in part because it was not based on proven facts. He said at para. 46:

> Dr. Totten conceded that his conclusions concerning the results have not been peer reviewed by other criminologists or sociologists. As a consequence, it cannot be held that his opinion is based on proved facts.

148 Dr. Totten's research was peer reviewed, as that phrase is used and understood in the field of sociological research. In any event, I cannot see a connection between peer review and proof of the facts upon which Dr. Totten's opinion was based. Some of the facts relevant to his opinion were agreed upon. For example, it was agreed that the respondent was a gang member, that the murder of Mr. Peter was gang related and that the respondent had inscribed a teardrop tattoo on his face a few months after the murder. However, the information relied on by Dr. Totten, which was received from the various gang members during his interview process, was clearly not proved within the confines of this case.

149 Experts, in forming their opinions, often rely on information gathered using techniques and methods common to their field of expertise, even though that information is not proved within the four corners of the case in which the opinion is offered.

The reliability of the information received by Dr. Totten in the interview process was obviously crucial to the ultimate weight to be assigned to his opinion. It was, however, a matter for the jury and not a reason to exclude the opinion: see *Saint John (City) v. Irving Oil Co.*, [1966] S.C.R. 581 (S.C.C.), at p. 592; *R. v. B. (S.A.)* (2003), 178 C.C.C. (3d) 193 (S.C.C.), at p. 217-18.

IV The Admissibility of the Gang Members' Evidence

150 As outlined above, the Crown proposed to elicit evidence from A.B., C.S. and G.D. All three could testify to the meaning of a teardrop tattoo within their group of friends and associates, some of whom were Malvern Crew gang members. In addition, the Crown proposed to elicit evidence from G.D. of the circumstances surrounding a conversation he had with the respondent in which the respondent admitted he had killed Mr. Peter. The Crown contended that the circumstances surrounding that admission were capable of demonstrating that the respondent shared the same understanding of the meaning of a teardrop tattoo as the other gang members, and had acted on that understanding by inscribing a teardrop tattoo on his face after he murdered Mr. Peter.

151 The trial judge excluded this evidence. I will consider first the admissibility of the evidence concerning the meaning of a teardrop tattoo within the Malvern Crew gang culture. I will then consider the admissibility of the evidence given by G.D. concerning the events surrounding the respondent's alleged admission to G.D. that he had killed Mr. Peter.

(i) The Meaning of a Teardrop Tattoo in the Malvern Crew Culture

152 A.B. testified on a *voir dire* that he first saw the respondent with a teardrop tattoo in May 2004. He could not recall any discussion with the respondent about the tattoo. He was then asked what a teardrop tattoo meant to him. A.B. responded that it could mean either that the wearer of the tattoo had killed someone or that someone close to that person had died. A.B. confirmed that a teardrop tattoo had one of those two meanings within the group of people, including the Malvern Crew, that he associated with on a regular basis. A.B. believed that the respondent's teardrop tattoo was meant to indicate that he had killed someone.

153 At the trial judge's request, A.B. was asked how he came to believe that a teardrop tattoo had one of the two meanings he had described in his evidence. He indicated that he heard people "on the street" talking about it and had also seen reference to it on television and in the movies. A.B. had not discussed the meaning of a teardrop tattoo with other Malvern Crew gang members and he was unaware of any gang "policy" relating to tattoos. When pressed, A.B. could not identify a specific person with whom he had discussed the meaning of a teardrop tattoo. When further pressed as to why he believed that a teardrop tattoo had one of two possible meanings in his group culture, A.B. answered:

> I couldn't answer. I'm not sure how I like to say on behalf of them how they know, but I just, me, personally, I believe they know, because I think it is a fact.

154 C.S.'s *voir dire* evidence as to the meaning of a teardrop tattoo was much the same as A.B.'s evidence. C.S. indicated that he gained his understanding of the meaning of a teardrop tattoo from watching rap videos, documentaries and other gang-related films. He also testified that he and his associates would from time to time discuss the meaning of teardrop tattoos. It was from these discussions that he came to believe there was a common understanding of the possible meanings to be attributed to a teardrop tattoo. C.S. testified that at one time he asked the respondent why he had inscribed a teardrop tattoo on his face. The respondent replied, "just stupidity".

155 G.B., a long time and senior member of the Malvern Crew, testified that "getting a teardrop on your face, it means you took a life, that's what it means to me". G.B. indicated that the meaning of a teardrop tattoo was not the subject of conversation among gang members, but that he understood the meaning because in "the culture I'm from that's what it means".

156 The trial judge treated the evidence of the three gang members as to the meaning of a teardrop tattoo in their culture as akin to expert evidence. He called upon the Crown to establish the basis for the witnesses' belief as to the meaning of a teardrop tattoo. The trial judge then found that the basis put forward in the evidence was "hearsay and unreliable". In excluding the evidence, he noted that the witnesses did not have "direct knowledge of the meaning of a teardrop tattoo", but instead relied on a variety of unreliable sources such as movies and television. The trial judge held that evidence as to the meaning of a teardrop

tattoo within the gang culture in which the respondent lived was admissible only from a gang member who had a teardrop tattoo, or from a gang member who had spoken to the respondent about the reason he placed the teardrop tattoo on his face. [11]

157 I agree with Crown counsel that neither requirement imposed by the trial judge was necessary to the admissibility of the evidence. The three gang members who testified were deeply immersed in the gang culture to which the respondent also belonged. They offered evidence as to the meaning of a certain symbol within that culture based on their day-to-day involvement in it. The mere fact that none had a teardrop tattoo could not disqualify them from speaking to the meaning of that symbol within their culture. As Crown counsel cogently argued, individuals within a given community or culture may well know the meaning of slang words, hand gestures or the symbolic meaning of certain kinds of clothing even though those individuals have never personally used the slang words, gestures or worn the clothing. To take an obvious example, I would think that anyone living in Toronto could give evidence based on their knowledge of customs within the community that persons wearing certain uniforms were police officers. It would be irrelevant that the person giving this evidence had never worn a police uniform and that his knowledge about the uniforms worn by police officers came in part from movies and television.

158 The absence of any direct explanation from the respondent concerning the meaning of his teardrop tattoo was also irrelevant to the admissibility of the evidence offered by the three gang members. Had the respondent said anything about the meaning of his tattoo, that statement could have been admissible against the respondent as an admission. That would, however, constitute an entirely different basis for receiving the evidence. Whether or not the respondent spoke to the three gang members about his tattoo had nothing to do with the gang members' ability to testify as to their understanding of the symbolic meaning of that tattoo within the world in which they lived.

159 A.B., C.S. and G.B. were not put forward as experts on the symbolic meanings of tattoos. Their evidence was based on their knowledge gained from living within and being part of a particular group culture. It is hardly surprising that they could not identify with any specificity the source of their knowledge. Virtually any group, be it a gang or a profession, develops a jargon and symbology which is understood by those who live within that milieu. The witness's ability to speak to the common understanding of a symbol comes not from the reliability of any particular source of knowledge but from that witness's day-to-day living within the culture. [12]

160 A.B., C.S. and G.B. should have been allowed to testify as to their understanding of the meaning of a teardrop tattoo within the culture in which they and the respondent lived. All could have been cross-examined. No doubt weaknesses in their evidence, including the basis upon which the witnesses formed their belief as to the meaning of the teardrop tattoos, would have been fully explored on cross-examination. It would have been for the jury to decide whether to accept that evidence. If, however, the jury accepted the evidence of these witnesses as to the meaning of a teardrop tattoo, that evidence could connect Dr. Totten's opinion about the meaning of teardrop tattoos within urban street gangs with the specific street gang culture in which the respondent lived and operated. This evidence was, potentially, an important link in the Crown's case.

(ii) The Context of G.B.'s Conversation with the Respondent

161 G.B. had a conversation with the respondent in the summer of 2004. According to G.B., the respondent admitted that he and three other members of the Malvern Crew had killed Mr. Peter. The respondent's description of the murder to G.B. was consistent with the description he allegedly gave to A.B. and C.S. shortly after the murder. The admissibility of the respondent's admission to G.B. was not in dispute. The jury heard G.B.'s testimony about the alleged admission made by the respondent. The Crown also sought to lead evidence of the exchange between G.B. and the respondent immediately before the respondent's alleged confession. The Crown contended that this exchange precipitated the confession.

162 On a *voir dire*, G.B. testified that he saw the respondent in the summer of 2004. He noticed the teardrop tattoo on the respondent's face. The respondent had not had the tattoo when G.B. had seen him on previous occasions. To G.B., a long time member of the Malvern Crew, the teardrop tattoo meant "you took a life".

163 G.B. did not think it was wise for the respondent to have put the tattoo on his face. He said to the respondent:

> What are you doing, like, kinda of, like, you're putting yourself on heat; putting yourself on that — on your face is just bringing heat to yourself.

164 The respondent made no reply. G.B. then immediately asked the respondent, "what happened". In posing his question, G.B. made no reference to Mr. Peter's death or to any other specific event. To this point in the conversation, no one had mentioned anyone's murder. In response to G.B.'s question, the respondent immediately launched into a detailed description of his murder of Mr. Peter.

165 The trial judge addressed the admissibility of G.B.'s evidence at several different times. On more than one occasion, he said that although he had been initially inclined to admit the evidence, he had reconsidered the matter and decided that the evidence should be excluded. The trial judge found that, as the respondent did not make any explicit response to G.B.'s comment about his teardrop tattoo, the proposed evidence was not sufficiently probative to warrant its admission. He said:

> Clearly, if Mr. Abbey had responded in any fashion about the teardrop tattoo, that evidence would have been admissible and consistent with my prior arguments — prior reasons. He said nothing and you came back to it several times, and it just wasn't there — implicit, perhaps, but not explicit. And the problem with implicit versus explicit, given the nature of the evidence, there is a weighing of probative value and prejudicial effect that I have to do here.

166 The trial judge erred in excluding G.B.'s evidence of the events leading up to the respondent's alleged confession. The trial judge's observation that an explicit acknowledgement by the respondent concerning the purpose of the tattoo would have been admissible, while no doubt accurate, had no bearing on the admissibility of the evidence as tendered. The probative value of evidence is determined by the nature of that evidence and the context in which it is offered, not by some comparative analysis with the probative value of different hypothetical evidence that is not available.

167 A jury could reasonably infer from G.B.'s evidence that upon seeing the teardrop tattoo, he believed that the respondent had killed someone. After commenting on the inadvisability of advertising such conduct, G.B. asked the respondent what had happened, meaning what happened to cause the respondent to put the tattoo on his face. A reasonable jury could further infer that the respondent understood exactly what G.B. was asking him and proceeded to explain why he put the teardrop tattoo on his face. That explanation came in the form of a description of his murder of Mr. Peter.

168 G.B.'s evidence about the context in which the respondent's admission was made could potentially bring home to the respondent the evidence concerning the meaning of a teardrop tattoo within the culture in which the respondent lived. G.B.'s evidence was capable of supporting the contention that the respondent also understood that a teardrop tattoo indicated the murder of a rival gang member and that he had acted upon that understanding by placing the teardrop tattoo on his face after killing Mr. Peter.

V. The Admissibility of Detective Sergeant Quan's Opinion Evidence

169 The Crown sought to have Detective Sergeant Quan, a long time member of the Toronto Police Service, offer an opinion as to the meaning of a teardrop tattoo. Detective Sergeant Quan was the lead investigator on the Guns and Gangs Task Force. It was accepted that he had expertise concerning many facets of gang activity. The defence did not, however, concede that he was qualified to offer an opinion as to the meaning of a teardrop tattoo.

170 Detective Sergeant Quan gave extensive evidence on a *voir dire*. The trial judge did not rule on the admissibility of his opinion evidence at the end of that *voir dire* but proceeded with other evidentiary matters. In the ensuing weeks, the admissibility of Detective Sergeant Quan's testimony arose in the course of argument on many occasions. During these exchanges, the trial judge expressed a variety of concerns about the admissibility of that evidence. As I read the record, the trial judge never made a formal ruling as to the admissibility of Detective Sergeant Quan's evidence. It seems clear, however, that by the end of the various *voir dires*, the Crown and defence understood that Detective Sergeant Quan's evidence as tendered on the *voir dire* would not be admissible.

171 The Crown argues that Detective Sergeant Quan's opinion evidence should have been admitted. The Crown does not argue, however, that the improper exclusion of that evidence, standing alone, would justify a new trial. As I would require a new trial based on the other errors identified above, it is not essential to the disposition of this appeal that I pass upon the admissibility of Detective Sergeant Quan's evidence.

172 I have concluded that I should not address the admissibility of Detective Sergeant Quan's opinion. Quite frankly, the record as it stands relating to Detective Sergeant Quan's evidence is quite confusing. On one reading, it could be said that the Crown eventually abandoned its attempt to introduce his evidence.

173 If the Crown proposes to lead the opinion evidence of Detective Sergeant Quan at a new trial, it will be for the trial judge to determine its admissibility according to the operative principles and approach set out in these reasons. That trial judge will not be bound by anything said by this trial judge concerning Detective Sergeant Quan's evidence.

VI. The Appropriate Order

174 The Crown has established that the trial judge erred in law in excluding Dr. Totten's opinion concerning the possible meanings of the teardrop tattoo within urban street gang cultures. The Crown has further established that the trial judge erred in excluding the evidence of the three gang members concerning the meaning of a teardrop tattoo in their group of friends and Malvern Crew gang members, and in excluding the evidence of G.B. concerning the exchange relating to the respondent's teardrop tattoo immediately preceding his alleged confession to G.B. The respondent's acquittal, however, can be set aside only if the Crown demonstrates that but for the cumulative effect of these errors, the verdict would not necessarily have been the same. Double jeopardy principles, while modified in Canada to permit Crown appeals from acquittals, demand that acquittals be quashed only where the appellate court can say with a reasonable degree of certainty that the outcome may well have been affected by the legal errors: *R. v. Graveline* (2006), 207 C.C.C. (3d) 481 (S.C.C.), at paras. 14-16; *R. v. Morin*, [1988] 2 S.C.R. 345 (S.C.C.), at p. 374.

175 The Crown has met its burden. The excluded evidence must be looked at as whole. Viewed cumulatively, the excluded evidence could reasonably present a compelling picture for the Crown. The excluded evidence moves from Dr. Totten's general opinion about the meaning of a teardrop tattoo within urban street gang culture, to the more specific evidence of the gang members from the Malvern Crew concerning the tattoo's meaning within their cultural milieu, to the arguably implicit acknowledgement by the respondent in his conversation with G.B. that his teardrop tattoo symbolized his murder of Mr. Peter. I do not suggest that a jury would necessarily take that view of the excluded evidence. I say only that a reasonable jury could take that view. If it did, the verdict could very well be different.

176 The acquittal should be quashed and a new trial ordered.

***J.C. MacPherson J.A.*:**

I agree.

***S.E. Lang J.A.*:**

I agree.

Appeal allowed; new trial ordered.

Footnotes

1 The trial judge made an order under s. 486.5 of the *Criminal Code* directing the non-publication of any information that could identify certain civilian witnesses. In the course of his rulings on the admissibility of parts of the evidence given by two of the gang members, the trial judge referred to one gang member as A.B. and the other as C.S. (not their real initials). I will use those same initials to refer to those witnesses in these reasons. I will refer to the third gang member, part of whose evidence was also excluded, as G.D.

2 There was no proof that Mr. Peter was in fact associated with any street gang.

3 G.D. explained that the respondent's description of the murder summarized in this paragraph was precipitated by G.D.'s inquiry about the respondent's teardrop tattoo. The trial judge excluded this part of the evidence and the jury did not hear what led to the respondent's admissions. That ruling is challenged on appeal and is addressed below in Part IV (ii).

4 It is hard to tell exactly what evidence was led on each *voir dire*. Although it would appear that Dr. Totten was the only witness on the *voir dire* into the admissibility of his opinion, the trial judge did refer briefly to evidence heard on the *voir dire* into the admissibility of Detective Sergeant Quan's evidence in his reasons for excluding Dr. Totten's evidence.

5 The reasons are reported at [*R. v. Abbey*] [2007] O.J. No. 277 (Ont. S.C.J.). The paragraph numbering is slightly different than in the version taken from the transcript. My references are to the transcript version.

6 Dr. Totten's *voir dire* evidence affords an example of the need to consider different parts of the proposed opinion evidence individually. Whatever may be said about the admissibility of Dr. Totten's opinion concerning the meaning of a teardrop tattoo, his evidence as to the timing of the inscription of the tattoo (para. 51) does not seem founded either in his research or his clinical experience, but rather seems a product of what Dr. Totten thought was common sense. It may be that this aspect of Dr. Totten's evidence would not be admissible even if his main opinion was admitted.

7 Ontario, Inquiry into Pediatric Forensic Pathology in Ontario, *Report: Policy and Recommendations*, vol. 3 (Toronto: Queen's Printer, 2008) [The Goudge Report].

8 There are many civil cases in which an expert's evidence has been excluded or given no weight because of that expert's bias: see Guy Pratte, Nadia Effendi & Jennifer Brusse, "Experts in Civil Litigation: A Retrospective on Their Role and Independence with a View to Possible Reforms" in The Hon. Todd L. Archibald & The Hon. Randall Scott Echlin, *Annual Review of Civil Litigation, 2008* (Toronto: Thomson Carswell, 2008) 169, at pp. 182-88. See also David Paciocco, "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony", (2009) 13 Can. Crim. L.R. 135 at 150-153.

9 Indeed, the evidence of professional experts as to the appropriate standard of care in negligence actions is not unlike Dr. Totten's evidence in that professional experts speak essentially to the culture of the profession by reference to the conduct expected of a reasonably competent member of the profession in a given fact situation.

10 David M. Paciocco, "Context, Culture and the Law of Expert Evidence" (2001) 24 Adv. Q. 42, at p. 57. Professor Paciocco has recently repeated his caution against the misuse of the *Daubert* factors: see Paciocco, "Taking a 'Goudge' out of Bluster and Blarney" at pp. 148-49.

11 The trial judge gave separate but very similar reasons for excluding the evidence of A.B. and C.S. The above quotes are from the reasons relating to A.B. released February 7, 2007. The reasons relating to C.S. were released February 20, 2007. The trial judge did not give separate reasons with respect to this aspect of G.B.'s evidence.

12 Examples of how jargon is understood within particular groups or cultures abound. For example, how does the golfer know that when a ball flies off in one direction it is a "hook" and when it flies off in the other it is a "slice"? Because, those are the words commonly used by other golfers and golf commentators on television and print to refer to balls that fly off in either of those manners. The terms convey a common meaning to those who operate within the "golfer" culture.

2008 ONCA 804
Ontario Court of Appeal

R. v. Batista

2008 CarswellOnt 7154, 2008 ONCA 804, [2008] O.J. No. 4788, 181 C.R.R. (2d) 300, 238 C.C.C. (3d) 97, 270 O.A.C. 73, 62 C.R. (6th) 376, 80 W.C.B. (2d) 303

Her Majesty the Queen (Respondent) and Antonio Batista (Appellant)

R.J. Sharpe, S.E. Lang, G. Epstein JJ.A.

Heard: November 4, 2008
Judgment: November 28, 2008
Docket: CA C47563

Proceedings: reversing *R. v. Batista* (2007), 2007 CarswellOnt 9632 (Ont. C.J.)

Counsel: Clayton Ruby for Appellant
Megan Stephens for Respondent

***S.E. Lang J.A.*:**

Overview

1 The appellant wrote and posted a "poem" on five mail and newspaper boxes in his neighbourhood. The poem was about the appellant's city councillor, Pat Saito. The poem came to the attention of Pat Saito, who brought it to the attention of the police. The appellant was charged with uttering a threat to cause death and intimidation. He was convicted of uttering a death threat after a two-day trial. The charge of intimidation was stayed pursuant to the *Kienapple* principle. By way of sentence, the appellant received a conditional discharge, subject to a 12-month term of probation. The appellant appeals his conviction.

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

Background

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

4 These circumstances left the appellant dissatisfied with the councillor's performance of her duties. The appellant had earlier read a newspaper article that reported that the councillor had jokingly suggested that potholes could serve the purpose of slowing

traffic. It was this reference to potholes that provided the appellant with the idea for his poems. On January 2, 2006, he sent other members of city council, but not Ms. Saito, an anonymous poem that was not the subject of any charges. That poem read:

> What is good or bad with—Mrs. Pat Saito—Pat Saito wonders around the City of Mississauga
> — She Goes pat pot—pat pot Ai ai ai—she satambles but—does not fall down.——She comes arround CHURCHILL—MEADOWS—That is her Ward and gets disapointed—Because She sees no pot holes—But She sees a cheating hole—She sees a House that was sold—for more than One hundre dollars—(100,ooo)—than the owner paid for when—He bought it in the year 2001——She did not knock on the—to say helow but she saw—a loop hole and said—They are going to pay the TOW ——So in the Year 2006 she decided—to Make the Owners for Churchil —Meadows pay the taxes again—for the Year of 2001 ——But when the owners wrote letters—and the phoned in for answers—She was not in.She was Home Sick.—One month later Mrs. Saito was not—at work yet but on Holidays.
> — Why, Why? Why?—Does Mrs. Saito thinks —That the money fals—From the sky?— — Why why why is She—Is She looking for Pot—holes when she showd be—in the office doing —her work?— —Why Why Why have we—to pay so much for her—to be looking for pot—holes or lookimg at the—Sky?——This is from the——Bed Wolf

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

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

> Parked cars and pot holes in the City of Mississauga
>
> Pat pot, patch pot—look here look there —pat pot patch pot —there is a car parked here—. there is a car parked in there. ——This kept a Good looking—old Lady away from her—working place and—by looking at pot holes She—thought about about doing—nothing and winning the Race——There She marched back and—forth—one two, one two—one two three four—one two, three four——But on the way back—to Her working place—She got lost on the fog—and could not keep up—with the running traffic—and She lost the race. ——When She got to Curchill—Meadows—She was out off the Race—but She was too far behind in—her work,and witout thinking—She backed up and without—making—sure that it was safe to do so—She provoked a big accident
> Now this bad driver that—WE only know as Pat Saito—who run away from that—accident—site is going to think twice —before backing up and looking—at—pot holes instead of doing—Her job——We are going to dig a pot hole—about six feet long and 3 feet—wide—and five feet deep to hide —her body and God will take—care—of Her Soul, but We can not—forgive her for doing nothing ——She can keep running—at a good pace but—We will make sure—that She is in HEAVEN—and out of the Race.——So please GOD take care—of this SOUL for ever and—EVER.

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

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

The Trial Judge's Reasons

8 In his reasons, the trial judge noted the appellant's denial of any intention to threaten Ms. Saito with the posting of the poem. He acknowledged the defence position that the poem was "satire, intended to be in jest". He considered the defence request to

tender an expert opinion to assist the court in understanding "satire" as a means of expression in which words are not meant to be taken literally, but are written to ridicule the subject's vices or failings. The trial judge concluded that the expert opinion was not necessary to assist the court with determining whether an objective reasonable person could consider the poem a threat or with whether the appellant intended the threat to be taken seriously. Thus, he excluded the opinion.

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

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

Issues

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

Analysis

1. The Elements of the Offence

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

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

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

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

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

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

> To determine if a reasonable person would consider that the words were uttered as a threat the court must regard them objectively, and review them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed.

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

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

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

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

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

2. Is the poem a "threat"?

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

(a) The Reasonable Person

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

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

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

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

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

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

(b) The Context of the Relationship

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

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

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

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

(c) The Structure of the Poem

31 The trial judge's reasons do not reflect a consideration of the impugned stanzas of the poem in the context of the poem as a whole, or in the context of the appellant's earlier poem. Instead, the reasons appear to consider the impugned stanzas in isolation, separate from the context of the mocking tone and cadence — albeit inelegant and rudimentary — that are evident in the earlier stanzas. Like the first poem, the first stanzas are replete with attempts to rhyme or mimic nursery rhymes. The first stanzas highlight the author's perception of the councillor's interest or preoccupation with potholes, rather than with fulfilling the obligations of her job. This approach is further confirmed by the title "Parked Cars and pot holes in the City of Mississauga".

As poorly written as the appellant's poem is, the earlier stanzas cannot but diminish what might otherwise be seen as an implicit threat if the later stanzas were read in isolation. It was incumbent on the trial judge to situate the later stanzas in this broader context of the poem as a whole and the earlier poem and to consider whether the author's purpose may have been to mock the councillor for concentrating her efforts on potholes at the expense of other issues important to her constituents.

(d) The Context of Posting the Poem

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

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

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

(e) The Context of Freedom of Expression

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

36 The appellant's argument, distilled on appeal, is not that s. 2(b) applies to protect threats to public representatives. Rather, the appellant argues that whether the appellant's poem constitutes a threat has to be decided in the light of the s. 2(b) right to freedom of expression, particularly freedom of expression in a political context. In other words, the fundamental right of freedom of expression is a factor relevant to the determination of whether the statement constituted a threat just as is the fundamental right to freedom of choice and action protected by the criminalization of threats. Both freedoms must be considered and balanced.

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

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

These concepts are central to the tenets of a democracy.

38 Even in circumstances where s. 2(b) has no direct application, such as in this case, nonetheless its fundamental values can operate as a relevant consideration. In *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, [2002] 1 S.C.R. 156 (S.C.C.), the Supreme Court of Canada, at para. 20, confirmed freedom of expression as a "fundamental Canadian value" that is expressed in the *Charter*, but that also informs the common law. *Pepsi-Cola*, also at para. 20, quotes McIntyre J.'s observation in *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573 (S.C.C.), at p. 583, that "[f]reedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society." See also pp. 584-86 of *Dolphin Delivery*; *R. v. Boucher* (1950), [1951] S.C.R. 265 (S.C.C.), at p. 288; *Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.), at p. 306 and pp. 326-328; *Reference re Alberta Legislation*, [1938] S.C.R. 100 (S.C.C.), at pp. 132-33.

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

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

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

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

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

3. Was the Verdict Unreasonable?

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

offensive, and badly written the poem, the words at issue cannot meet the legal definition of a threat. The appellant is therefore entitled to a verdict of not guilty.

4. Expert Evidence

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

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

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

Conclusion

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

***R.J. Sharpe J.A.*:**

I agree.

***G. Epstein J.A.*:**

I agree.

Appeal allowed.

R. v. Blackham's Construction Ltd.

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

McFarlane, Taggart and Hutcheon JJ.A.

Oral judgment: December 16, 1980.

Vancouver Registry No. CA 800055 [CA800055]

[1980] B.C.J. No. 1265 | 10 C.E.L.R. 115

Between Regina, appellant, and Blackham's Construction Ltd., respondent

(41 paras.)

On appeal from the decision of Grimmett Co. Ct. J. from a summary conviction appeal

Counsel

D.R. Kier, Q.C., appearing for the (Crown) appellant. J. Cram, appearing for the respondent.

The judgment of the Court was delivered by

McFARLANE J.A. (orally)

1 This is an application by the Crown for leave to appeal the acquittal of the respondent upon four counts contained in an Information to which I will refer more specifically in a moment. The proceedings were by way of summary conviction proceeding tried before a provincial Court Judge in Chilliwack, who acquitted the respondent.

2 On the Crown's appeal to the County Court of Westminster the Crown's appeal was dismissed by His Honour Judge Grimmett.

3 The application for leave to appeal is brought here from that decision.

4 The respondent was charged, so far as this appeal is concerned, under an Information containing four counts. The first and third (the second of which was called count number seven) related to offences alleged to have occurred, one on the 21st of November, 1978 and the second on the 23rd of that month and were laid under the provisions of a Regulation made by the Governor General in Council, under the authority of the Fisheries Act, being Chapter F14 of the Revised Statutes of Canada 1970. The particular regulation is known as the British Columbia Gravel Removal Order SOR/76-698, which, I think I said, was passed under the authority of that Act.

5 The other two counts which are involved were presented under Section 31, subsection (1) of the Fisheries Act.

6 The provisions are as follows:

"FISHERIES ACT

> Section 31(1). 'No person shall carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat.'

> Section 31(5) 'For the purposes of this section and sections 33, 31.1 and 33.2, "fish habitat" means spawning grounds and nursery, rearing, food supply and migration areas on which fish depend directly or indirectly in order to carry out their life processes.'
>
> BRITISH COLUMBIA GRAVEL REMOVAL ORDER '2. No person shall remove gravel from, or displace gravel within, the normal high water wetted perimeter of any portion of a stream, river or other body of water that is a spawning ground frequented by fish otherwise than under the authority of and in accordance with a permit in writing issued by the Regional Director or a fishery officer.'
>
> '4. A permit issued under Section 2 or 3 shall not be construed as permitting a person
>
> (a) to alter the configuration of a river, stream or body of water without permission from the provincial authority having jurisdiction in the matter; or
>
> (b) to remove gravel from or displace gravel within a place unless he is owner of that place or acts on behalf of such owner.'"

7 Upon the presentation of the appeal to this court, which was heard yesterday, counsel for the Crown conceded that there should not be convictions on the counts laid under the regulation and convictions under the counts laid under Section 31 subsection (1). I agree that that is a proper concession based upon the principle known as that of the Kineapple case.

8 In those circumstances, I have little more to say regarding the counts which relate to Section 31 subsection (1) of the Fisheries Act and I will devote most of my attention from here on to the counts alleging a breach of the regulation.

9 I think I should turn to the essential facts of the matter, with this preface: That counsel for the respondent, on his presentation of the answer to the Crown's application yesterday, told the court that all of the facts necessary to establish proof of the alleged offences are admitted on behalf of the respondent.

10 The nature of the defence I will mention in a moment.

11 With that preliminary observation, I take the essential facts of the matter from the findings made by the County Court Judge in his reasons for judgment:

> "The facts relating to the case are not in dispute, and the material facts are:
>
> 1. The area involved is either owned by, or that portion not owned is leased, by the Respondent.
> 2. Both parts, either owned or under lease, were alienated from the Crown by Crown grants late in the last century, and are held in fee simply by the Respondent or its lessor as ultimate successor in title from the original Crown grantees."

12 I interpolate at that point that the titles so described as being held in fee simple are proved by certificates of indefeasible title issued either to the respondent or to its lessor under the relevant provincial legislation.

13 I continue with the County Court Judge's findings of fact:

> "3. All of the area involved was originally dry land but subsequent to the Crown grants, according to the surveyor witness, Turnbridge, in the 1930's or 1940's, the Fraser River changed and a channel of the river became established, still exists, and it is from part of this area of the river that the Respondent is in the business of gravel removal.
>
> 4. The area from which the Respondent is removing gravel is a 'fishing habitat' as described in the Fisheries Act."

14 The Provincial Court Judge, as the basis for his decision of acquittal, found that Section 31 subsection (1) of the Fisheries Act and the British Columbia Gravel Removal Order were both ultra vires, that they had been in the one

case enacted by Parliament and, on the other, passed by the Governor in Council without constitutional jurisdiction to enact them.

15 The County Court Judge, on appeal, appears to me to have given effect to the argument presented on behalf of the Respondent, that although the section of the Fisheries Act and the regulation be intra vires, they, nevertheless, are not expressed in such sufficiently clear language to apply to the respondent so as to prevent its carrying on what it considered its lawful business on property owned or leased by it.

16 The County Court Judge concluded his reasons for judgment with these words:

> "It of course must be presumed that the prohibition was enacted for 'the regulation and protection of Fisheries'. So too, and applying this principle, surely the Fisheries Act cannot, in the absence of express words, in effect prohibit the Appellant herein from carrying on its business of gravel removal from property over which it has exclusive rights of ownership."

17 I think the County Court Judge made a slip there. When he said "appellant" he meant "respondent".

18 In this court, when Counsel for the Crown opened his argument with the intention expressed of supporting his submission that the legislation and the regulation are intra vires, Mr. Cram, counsel for the respondent, helpfully, rose and informed the court that he did not contend that the legislation and the regulation were ultra vires. He conceded and, in my opinion, entirely correctly, that the section to which I have referred and the regulation, are intra vires. He told us also that he had never contended otherwise during the whole of this proceeding. He did proceed, however, consistently, to contend that the language used in the subsection and in the Gravel Removal Order were not sufficiently clear to apply to the respondent. He said that because, he contended, the effect of those provisions is, as he put it, to expropriate, or otherwise to prevent the lawful carrying on of a business of extracting gravel without any compensation being given to the person whose business and property rights were so affected.

19 His contention was based upon the principle, which I do not think anyone denied, that if the effect of legislation be to so interfere with the private rights of property it must be clear or that result must follow by necessary implication.

20 The question, therefore, is one of interpretation of the statutory provision and of the order.

21 The opening words of the relevant clause in the Gravel Removal Order are simply these:

> "No person shall remove gravel ..."

22 In my view, in their context, that language is perfectly clear and it allows of no suggestion of ambiguity or uncertainty. To suggest that the words "no person" must be read as excluding persons in the position of the respondent is, in my view, quite untenable, and that is particularly so when reference is made to clause number 4 of the same order which contains specific provisions regarding the effect of a permit which may be issued to an owner to remove gravel from an area to which otherwise the gravel removal order would apply.

23 I think this view of the language used in the order and, incidentally, also in the section, to which I will not refer more specifically, is in accord with the comment of Chief Justice Laskin, Chief Justice of Canada, in the comparatively recent decision, Interprovincial Co-operatives Ltd. v. The Queen *(1975) 5 W.W.R. 382*. At page 413 of that report, the Chief Justice, after referring to a decision in the case of The Queen and Robertson, which I will mention again in a moment, said this:

> "Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner's right of utilization."

24 I think the opinion I have expressed on the interpretation of the relevant provisions here is also in accord with

the recent decision of the Supreme Court of Canada in The Queen and Fowler in June of 1980 (the reference I have is 32 National Reporter, page 230) and the judgment of the Supreme Court in the case of Northwest Falling Contractors Ltd. which, so far as I know, is not yet reported, but was pronounced on July 18th, 1980.

25 I should mention that respondent's counsel and the County Court Judge relied particularly on a decision of the Supreme Court of Canada in a case of Venning v. Steadman, which is reported in (1883) 9 S.C.R. page 206. I think that decision is distinguishable, and it ought to be distinguished so as to have no application to the problem involved in this appeal. I will not take time to discuss it at any length, but will merely point out first that it involved the interpretation of another statute. Such interpretations are helpful, but by no means reliable guides for interpreting other statutes.

26 Secondly, it was an action for damages for trespass and assault based upon an alleged interference with the right of a riparian owner to fish on a river crossing his property.

27 The specific issue of interpretation involved in that case is, in my opinion, an entirely different one than that involved here as appears from a reading of the judgments of Chief Justice Ritchie and Mr. Justice Henry in that case.

28 Another authority upon which counsel for the respondent relied in particular was The Queen and Robertson to which Chief Justice Laskin referred in the Manitoba case.

29 Again, I think that case is one clearly distinguishable here and I will not take the time at this moment to discuss it further. I do not think that it has any determinative force in arriving at the disposition of the present appeal.

30 Counsel for the respondent did present to us in argument that the question placed before the court in this appeal is not a question of law alone.

31 If he were right in that, of course, we would lack jurisdiction to interfere with the judgment of the County Court Judge because of the provisions of Section 771 of the Criminal Code.

32 I do not accept that argument. I think that the question involved here is a question of law alone, within the meaning of that section of the Code. It is purely a question of the interpretation of the provision of the statute and of the regulation. There is no issue regarding essential facts. Therefore, I reject that objection on the part of counsel for the respondent.

33 Counsel for the Crown has asked that the court, in the circumstances, upon allowing the appeal, should exercise the power conferred by Section 613 of the Criminal Code and order that a conviction be entered.

34 In the circumstances, counsel for the respondent agreeing that nothing is to be gained by returning the case to the County Court, or to the Provincial Court, I think that is the course that should be followed.

35 I would, therefore, grant leave and allow this appeal and order conviction of the respondent to be entered on counts 1 and 7.

McFARLANE J.A.

TAGGART J.A.

36 I agree.

HUTCHEON J.A.

37 I agree.

McFARLANE J.A.

38 The appeal is allowed and convictions entered accordingly.

(FOLLOWING SUBMISSIONS AS TO SENTENCE)

McFARLANE J.A.

39 It is the judgment of the court that the sentence to be imposed here is that of a fine of $100.00 in respect of each of the two counts. I presume there is no problem about time, or anything of that kind, Mr. Cram?

40 MR. CRAM: No. I do not believe there is. Perhaps we could say two weeks, just for convenience.

McFARLANE J.A.

41 We will leave that to you and Mr. Kier to work that out. Judgment accordingly.

Regina ex rel. Vezina v. Canadian Broadcasting Corp. et al.

[Indexed as: R. v. Canadian Broadcasting Corp.]

Ontario Court (General Division), Borins J. May 12, 1992.

I.G. Scott, Q.C., *I.F. McGilp*, and *M.N. Ruby*, for informant/appellant in all appeals.

Marc Rosenberg, for respondent, Canadian Broadcasting Corporation.

E.A. Ayers, Q.C., and *R. Foerster*, for respondent, CTV Television Network Ltd.

I.V.B. Nordheimer, for respondent, Global Communications Ltd.

W. Howard, for intervenor, Canadian Radio-television and Telecommunications Commission.

BORINS J.:—These are three summary conviction appeals brought by the informant, Gregory Vezina, from a decision of a Provincial Court judge quashing three informations each of which charged the Canadian Broadcasting Corporation (the C.B.C.), the CTV Television Network Ltd. (CTV), and Global Communications Ltd. (Global), respectively, with four offences contrary to s. 8 of the *Television Broadcasting Regulations*, SOR/87-49, and s. 20 of the *Broadcasting Act*, R.S.C. 1985, c. B-9. (The *Broadcasting Act* has been repealed since the commencement of the prosecution and replaced by the *Broadcasting Act*, S.C. 1991, c. 11.)

In separate informations each of the respondents was charged with four identical offences. However, three of the charges were withdrawn and the trial of each respondent proceeded on the basis of a single count. The following count against CTV is typical of the counts against each respondent:

> (2) AND that the CTV Television Network Ltd., a network operator licensed to carry on a broadcasting undertaking, did, during the period of the 1988 Federal election campaign held between 1 October and 21 November 1988, fail to include the leader of the Green Party of Canada in a nationally televised leaders' debate held on 24 and 25 October 1988, or to accommodate the leader of the Green Party of Canada in a similar subsequent debate, and did thereby contravene section 8 of the Television Broadcasting Regulations, 1987, SOR/87-49, and Section 20 of the Broadcasting Act, R.S. c. B-11, s. 1;

It is common ground that the factual foundation for this charge was the refusal or failure of the respondents to permit Dr. Seymour Trieger, the leader of the Green Party of Canada (the Green Party), to participate in nationally televised debates held in French and English, respectively, on October 24 and 25, 1988, among the leaders of the three main Canadian political parties at that time — the Progressive Conservative Party of Canada, the Liberal Party of Canada and the New Democratic Party.

The C.B.C. and CTV are each licensed as a network under the *Broadcasting Act* by the Canadian Radio-television and Telecommunications Commission (the C.R.T.C.), the agency created by s. 5 of the Act for the purpose of regulating and supervising "all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3" of the Act. The C.B.C. is established by s. 24 of the Act "for the purpose of providing the national broadcasting service contemplated by section 3 . . . subject to any applicable regulations of the [C.R.T.C.]": s. 30(1). Global is not a network as defined in the Act, but is licensed as a broadcaster by the C.R.T.C.

The informant, Gregory Vezina, is a member of the Green Party. The proceedings at trial and on appeal have been conducted as a private prosecution. Each of the respondents moved before the trial judge to quash count 2 of the information under which it was charged on the ground that s. 8 of the *Television Broadcasting Regulations, 1987*, does not apply to "a nationally televised leaders' debate" and, that, therefore count 2 failed to disclose an offence contrary to s. 20 of the *Broadcasting Act*. As well, each respondent challenged the constitutional validity of s. 8 of the regulations on the ground that in so far as s. 8 purports to regulate the content of news and public affairs programming of a broadcaster it violates the guarantee to freedom of thought, belief, opinion

and expression, including freedom of the press and other media of communication contained in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and does not constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. Although the Attorney-General of Canada and the Attorney-General of Ontario were served with notice of constitutional question as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, neither Attorney-General elected to intervene in the trial or the appeal. However, with the consent of all parties the C.R.T.C. was given leave by the trial judge to intervene with respect to the constitutional question and was also permitted to intervene in respect to the same issue on the appeal.

Although each of the respondents was charged under a separate information the parties agreed, with the approval of the trial judge, that one evidentiary hearing take place in respect to the interpretation of s. 8 of the regulations and its constitutional validity. After a lengthy evidentiary hearing the trial judge concluded that s. 8 of the regulations had no application to a nationally televised leaders' debate and accordingly quashed count 2 of the information under which each of the respondents was charged. Although unnecessary for him to do so, the trial judge also found that s. 8 of the regulations infringed the respondents' rights guaranteed by s. 2(*b*) of the Charter and was not justified under s. 1.

The issues

The appellant submits that the trial judge erred in his interpretation of s. 8 of the regulations and in his conclusion that s. 8 infringed s. 2(*b*) of the Charter and that the appellant was unable to demonstrate that the infringement was justified under s. 1 of the Charter. The appellant asks that the order of the trial judge quashing the informations be set aside and that the informations be remitted to the trial judge for trial.

The issues raised by the appeal, therefore, are as follows:

1. Does s. 8 of the *Television Broadcasting Regulations, 1987*, apply to "a nationally televised leaders' debate"?
2. If the answer to the first issue is "yes", does s. 8 infringe the fundamental freedoms guaranteed to the respondents by s. 2(*b*) of the Charter?
3. If the answer to the second issue is "yes", does s. 8 constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Charter?

The legislative and regulatory background

The issues raised by the appeal require an understanding of the legislative and regulatory scheme created by the *Canada Elections Act*, R.S.C. 1985, c. E-2, the *Broadcasting Act* and the *Television Broadcasting Regulations, 1987*, in respect to the provision and allocation of broadcasting time to political parties and their candidates during the election campaign period preceding election day in regard to a federal election, and the responsibilities of networks and broadcasters in respect thereto in force at the relevant time. As will be seen, the *Broadcasting Act* and the *Television Broadcasting Regulations, 1987*, have broad application to all elections — federal, provincial and municipal. However, as this appeal concerns a federal election it is necessary to consider the relationship of the provisions of the *Canada Elections Act* to those of the *Broadcasting Act* and the regulations made under it. In this regard, as I will explain, it is the *Canada Elections Act* which governs political broadcasting during the period of a federal election.

Canada Elections Act

"Political Broadcasts", to use the subheading contained in the Act, are governed by ss. 303 to 322, which provide a rather cumbersome code for the provision of free and paid time for political broadcasts to registered parties and their candidates during a federal election campaign. The definition of "registered party" is contained in ss. 2(1) and 24. Although the conditions in respect to the registration of a political party are somewhat complex, it can be said that a registered party is one which has officially nominated 50 candidates in 50 electoral districts to contest a pending general election. It is common ground in respect to the charges against the respondents that the Green Party at the relevant time was a "registered party" as defined by the *Canada Elections Act*.

It would appear that little attention had been paid by Parliament to specific legislation concerning political broadcasts until 1974 when the provisions which preceded ss. 303 to 322 [formerly ss. 99.1 to 99.4], were enacted by way of amendments made to the *Canada Elections Act*: 1973-74, c. 51, s. 14. Previously the only provision with respect to political broadcasts in the *Canada Elections Act*, R.S.C. 1970, c. 14 (1st. Supp.), was s. 99 which prohibited political broadcasting on polling day and one day before it and prohibited the use of broadcasting facilities outside of Canada for political broadcasts. The provisions which were introduced in 1974 in respect to the allocation of paid and free time

political broadcasting were no doubt a response to the significant role which television had come to play in enabling political parties and their candidates to communicate their policies to the Canadian electorate and the need to provide a formula for the provision and allocation of broadcasting time among the various political parties. There is no substantial difference between the legislation introduced in 1974 and that contained in ss. 303 to 322. While the legal framework concerning political broadcasting is to be found in the *Canada Elections Act*, the policy in respect to political broadcasting, as I will explain, is found in the *Broadcasting Act* and the regulations made thereunder by the C.R.T.C.

The allotment of paid time political broadcasting is overseen by the broadcasting arbitrator selected pursuant to s. 304. Section 307(1) requires every broadcaster to provide paid time to every registered political party and reads as follows:

> 307(1) In the period beginning on Sunday, the twenty-ninth day before polling day at a general election and ending on the second day before polling day, every broadcaster shall, *subject to the regulations made pursuant to the Broadcasting Act* and the conditions of its licence, *make available for purchase* by all registered parties for the transmission *of political announcements and other programming produced by or on behalf of the registered parties* an aggregate of six and one-half hours of broadcasting time during prime time on its facilities.

(Emphasis added.) In the 1988 federal election the Progressive Conservative Party, the Liberal Party and the New Democratic Party were allocated 195 minutes, 89 minutes and 67 minutes of paid time respectively and the Green Party was allocated four minutes of paid time. The remaining 35 minutes of paid time were allocated among all other registered parties. In addition, s. 311(3) requires that every broadcaster must make available for purchase by unregistered political parties a total of up to 39 minutes.

Although s. 309(2) of the Act provides that the political parties may agree among themselves in respect to the allocation of paid time, it also contains four rules to be applied by the broadcasting arbitrator in his or her allocation of paid time if the parties are unable to reach an agreement on a division of paid time: s. 310. As can be seen from the allocation of paid time in 1988, the formula contained in the Act results in a significant imbalance in the allocation of paid time among major and minor parties. Although ss. 309 and 310 of the *Canada Elections Act* are lengthy, because they are central to the view which I have in regard to s. 8 of the regulations made under the *Broadcasting Act*, it is necessary to reproduce them in their entirety. It is significant to observe that ss. 309 and 310 are concerned with the *allocation* of paid broad-

casting time. Sections 309 and 310, as well as s. 313(1) which is also significant, read as follows:

309(1) A registered party that, subsequent to being contacted pursuant to subsection 308(2),

(*a*) indicates in writing to the Broadcasting Arbitrator that it does not wish to be *allocated any of the broadcasting time* to be made available under section 307, or

(*b*) fails to communicate to the Broadcasting Arbitrator its intentions regarding the *allocation of the broadcasting time* to be made available under section 307 and fails to have its representative attend the meeting referred to in subsection 308(2),

shall not be allocated, under this section, any of the broadcasting time to be made available under section 307.

(2) Where, pursuant to consultations between the representatives of the registered parties, other than registered parties referred to in subsection (1), a unanimous agreement *on the allocation of the broadcasting time* to be made available under section 307 is reached, that *allocation shall be binding on all registered parties.*

(3) Where no unanimous agreement *on the allocation of the broadcasting time* to be made available under section 307 is reached within four weeks after the meeting referred to in subsection 308(2), the broadcasting time to be made available under section 307 *shall be allocated* by the Broadcasting Arbitrator, which *allocation shall be final and binding on all registered parties.*

310(1) Subject to subsections (2) to (4), in *allocating, under section 309, the broadcasting time* to be made available under section 307, the Broadcasting Arbitrator shall give equal weight to

(*a*) the percentage of seats in the House of Commons held by each of the registered parties at the previous general election, and

(*b*) the percentage of the popular vote at the previous general election of each registered party,

and he shall give half the weight given to each of the factors referred to in each of paragraphs (*a*) and (*b*) to the number of candidates endorsed by each of the registered parties at the previous general election expressed as a percentage of all candidates endorsed by all registered parties at that election.

(2) In no case shall the Broadcasting Arbitrator *allocate* to any registered party more than fifty per cent of the aggregate of the broadcasting time to be made available under section 307.

(3) Where an *allocation* determined in accordance with subsection (1) would, but for subsection (2), result in the receipt by a registered party of more than fifty per cent of the aggregate of the broadcasting time to be made available under section 307, the Broadcasting Arbitrator shall *allocate* that excess broadcasting time to the other registered parties entitled to broadcasting time under that section on a proportionate basis.

(4) Where the Broadcasting Arbitrator considers that an *allocation* determined in accordance with subsection (1) would be *unfair to any of the registered parties or contrary to public interest*, he may, subject to subsections (2) and (3), modify the *allocation* in any manner he deems fit and the *modified allocation shall constitute his allocation under section 309.*

(5) The Broadcasting Arbitrator shall, as soon as possible, by notice in writing notify

(*a*) every registered party, and

(*b*) every political party whose application for registration has been accepted, either before or after the allocation, by the Chief Electoral Officer

of *every allocation made by him or by the registered parties* under this section and section 309 and in that notice he shall, in the case of a political party referred to in paragraph (*b*), advise the political party that it has thirty days from the receipt thereof to request that broadcasting time be made available to it, for purchase, under section 311.

. . . . .

313(1) The Broadcasting Arbitrator *shall notify the Canadian Radio-television and Telecommunications Commission of every allocation* under sections 309 and 310 and every *entitlement* under section 311 as soon as possible after the making or the requesting thereof and the Canadian Radio-television and Telecommunications commission *shall notify every broadcaster and every network operator of every such allocation and entitlement* forthwith thereafter and again immediately after the issue of the writs for the next general election.

(Emphasis added.)

Each party is required to notify each broadcaster and network operator from whom it intends to purchase broadcasting time of its preference as to the days and hours when it wishes the time be made available and the proportion of commercial time and of program time which it requires. If the party and the broadcaster or network operator cannot agree on a party's requests, their differences are to be resolved by the broadcasting arbitrator. The provisions of the Act which apply are s. 315(1) and (4):

315(1) Each registered party and each political party entitled to purchase broadcasting time under this Act shall, not later than ten days after the issue of the writs for a general election, send a notice in writing to each broadcaster and each network operator from whom it intends to purchase broadcasting time setting out its preference as to the *proportion of commercial time and of program time* to be made available to it, and the days on which and the hours in which that time as so proportioned is to be made available.

. . . . .

(4) In making any decision under subsection (3), the Broadcasting Arbitrator shall take into account the following principles:

(*a*) that each registered party and each political party should have the freedom and flexibility to determine the proportion of commercial time and program time to be made available to it and the days on which and the hours in which that time as so proportioned should be made available; and

(*b*) that any broadcasting time to be made available to any registered party or political party *should be made available fairly throughout prime time.*

(Emphasis added.) In s. 2(1) the following terms are defined:

> "commercial time" means any period of two minutes or less during which a broadcaster normally presents commercial messages, public service announcements or station or network identification;
>
> . . . . .
>
> "program time" means any period longer than two minutes during which a broadcaster does not normally present commercial messages, public service announcements or station or network identification;
>
> . . . . .
>
> "prime time" in relation to a broadcasting undertaking, means, in the case of a radio station, the time between the hours of 6 a.m. and 9 a.m., 12 p.m. and 2 p.m., and 4 p.m. and 7 p.m., and, in the case of a television station, the hours between 6 p.m. and midnight;

The 1974 amendments to the *Canada Elections Act* introduced provisions requiring every network, but not broadcasters, to provide free time for political broadcasting to both registered and unregistered political parties. Section 316 governs free broadcasting time and reads, in part, as follows:

> 316(1) In the period beginning on Sunday the twenty-ninth day before polling day at a general election and ending on the second day before polling day, every network operator
>
> (*a*) that reaches a majority of those Canadians whose mother tongue is the same as that in which the network broadcasts,
>
> (*b*) that is licensed with respect to more than a particular series of programs or type of programming, and
>
> (*c*) that does not involve any broadcasting receiving undertaking
>
> shall, *subject to the regulations made pursuant to the Broadcasting Act* and to the conditions of its licence, make available, at no cost, to the registered parties and political parties referred to in subsection (2), *for the transmission of political announcements and other programming produced by or on behalf of those parties* broadcasting time as determined under that subsection.
>
> (2) For the purposes of subsection (1), the minimum amount of broadcasting time a network operator is to make available shall be no less than the free broadcasting time made available by it in the twenty-nine days prior to polling day at the last general election, which broadcasting time shall be made available as follows, namely,
>
> (*a*) two minutes to every registered party referred to in paragraph 309(1)(*a*) and every political party referred to in paragraph 311(2)(*a*); and
>
> (*b*) the remainder to all registered parties that have been *allocated* any of the broadcasting time to be made available under section 307 and all political parties that have requested broadcasting time under section 311 in the proportion that their *allocated* or requested purchasable broadcasting time bears to the total broadcasting time *allocated* or requested under or pursuant to those sections.

(Emphasis added.) The broadcasting arbitrator plays no role in the allocation of free time, which is allocated pursuant to the formula

in s. 316(2). It should also be noted, that unlike paid time, free time need not be broadcast during prime time. In the 1988 election 101, 46, 35 and two minutes of free time were allocated the Progressive Conservative, Liberal, New Democratic and Green parties, respectively.

The following additional provisions of the Act are also significant:

> 317. The Broadcasting Arbitrator shall, not later than five days after the issue of writs for a general election, issue to all broadcasters and network operators
>
> (*a*) a set of guidelines covering
>
> (i) the *allocation* of or entitlement to broadcasting time *under this Act*,
>
> (ii) the procedures for booking broadcasting time by registered parties and political parties, and
>
> (iii) such other matters as may be pertinent to the conduct of broadcasters and network operators *under this Act*; and
>
> (*b*) the guidelines provided to him by the Canadian Radio-television and Telecommunications Commission pursuant to section 318.
>
> 318. The Canadian Radio-television and Telecommunications Commission shall, not later than three days after the issue of writs for a general election, prepare and send to the Broadcasting Arbitrator a set of guidelines respecting the applicability of the *Broadcasting Act* and the regulations made thereunder to the conduct of broadcasters and network operators in relation to a general election.

(Emphasis added.)

In summary, the *Canada Elections Act* requires that broadcasters and networks provide political parties with paid time to promote themselves and that networks provide them with free time to do so. It encourages the parties to agree upon the allocation of paid time among themselves, failing which it will be allocated by the broadcasting arbitrator. It also encourages the individual parties to agree with the broadcasters and networks as to proportion of commercial time and program time required and when it is to broadcast, failing which the decision is to be made by the broadcasting arbitrator. The Act provides a formula in respect to the allocation of free time, but is silent as to the time when it is to be provided. The Act makes no reference to leadership debates.

Broadcasting Act and Regulations

The authority of the C.R.T.C. to regulate broadcasting derives from s. 5 of the Act which states:

> 5. Subject to this Act and the *Radio Act* and any directions to the Commission issued from time to time by the Governor in Council under the authority of this Act, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3.

The broadcasting policies contained in s. 3 relevant to this appeal are as follows:

> 3. It is hereby declared that
>
> (*a*) broadcasting undertakings in Canada make use of radio frequencies that are public property and those undertakings constitute a single system, in this Act referred to as the Canadian broadcasting system, comprising public and private elements;
>
> (*b*) the Canadian broadcasting system should be effectively owned and controlled by Canadians so as to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
>
> (*c*) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;
>
> (*d*) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by each broadcaster should be of high standard, using predominantly Canadian creative and other resources;

Counsel for the C.R.T.C. stated that the C.R.T.C., unlike other federal regulatory agencies whose regulations must be made by the Governor in Council, is empowered to make its own regulations. In this regard, s. 6(1)(*b*)(iii) of the Act provides:

> 6(1) In furtherance of its objects, the Commission, on the recommendation of the Executive Committee, may
>
> . . . . .
>
> (*b*) make regulations applicable to all persons holding broadcasting licences, or to all persons holding broadcasting licences, to all persons holding broadcasting licences of one or more classes,
>
> . . . . .
>
> (iii) respecting the proportion of time that may be devoted to broadcasting programs, advertisements or announcements of a partisan political character and the assignment of the time on an equitable basis to political parties and candidates . . .

It was pursuant to the powers conferred by s. 6(1)(*b*)(iii) that the C.R.T.C. made s. 8 of the *Television Broadcasting Regulations*, SOR/87-49, under which the respondents were charged. It appears in the regulations under the subheading "Political Broadcasts" and is the only provision contained in the regulations which deals with this subject. It reads:

> 8. During an election period, a licensee shall allocate time for the broadcasting *of programs, advertisements or announcements of a partisan political character on an equitable basis* to all accredited political parties and rival candidates represented in the election or referendum.

(Emphasis added.) Section 20(1) of the Act makes it a summary conviction offence for a licensee to contravene a regulation made under the Act.

The terms "partisan political character" and "accredited political parties" are not defined in the regulations nor in the Act. However, the following definition of "program" is found in s. 2 of the regulations:

> "program" means a broadcast presentation of sound and visual matter that is designed to inform or entertain and that belongs to one of the categories set out in item 6 of Schedule I.

The relevant part of Sch. I states:

> 6. Categories
> Information Programs:
> (1) News
> (2) Analysis and Interpretation
> (3) Reporting and Actualities
> (4) Religion
> (5) Education
> (A) Formal
> (B) Informal

"Election period" is defined as follows in s. 2 of the regulations:

> "election period" means
> (*a*) in the case of a federal or provincial election or of a federal, provincial or municipal referendum, the period beginning on the date of the announcement of the election or referendum and ending on the date the election or referendum is held, or
> (*b*) in the case of a municipal election, the period beginning two months before the date of the election and ending on the date the election is held;

Does s. 8 of Television Broadcasting Regulations apply to leadership debates?

After an evidentiary hearing in which the appellant and the respondents presented evidence with respect to both the Charter issue and the interpretation of s. 8, the trial judge interpreted s. 8 and concluded that it does not apply to leadership debates. He, therefore, held that count 2 failed to disclose an offence contrary to s. 20 of the *Broadcasting Act*. Although it may be unusual to conduct an evidentiary hearing in respect to the interpretation of legislation, the evidence was considered by the trial judge in his interpretation of s. 8 and, of course, forms part of the record on this appeal. Evidence presented by the appellant disclosed that the

C.R.T.C. is of the opinion that leadership debates come within the ambit of s. 8. Evidence presented by the respondents indicated that a leadership debate is a program originated and produced by the respondents and does not come within the allocation of paid time and free time for political broadcasts which a broadcaster must provide in accordance with the *Canada Elections Act*. The position of the respondents, therefore, was that s. 8 applied only to the provision of paid time and free time for political broadcasts to the political parties for programs produced by the parties and has no application to programs containing political content originated and produced by a network or a broadcaster. The respondents also took the position, based on the evidence of their witnesses one of whom was Peter Desbarats, Dean of the Graduate School of Journalism at the University of Western Ontario, that in any event a leadership debate is not a program of "a partisan political character" within the meaning of s. 8.

The trial judge's reasons and conclusion with respect to the interpretation of s. 8 were as follows:

> The court, however, concurs with the opinion that Mr. Desbarats expressed during his examination-in-chief. That is to say that debates do not fall within the definition of programs, advertisements, or announcements of a partisan political character. As indicated earlier, it would have been open to the C.R.T.C. well before the election was called in 1988, to pass a further regulation, or amend the existing one to provide for all leadership candidates to be invited to participate in the debates. For reasons best known to themselves, they chose not to pass such a regulation.
>
> In the opinion of this court, the construction which the defendants have urged that I place on s. 8 is more reasonable, with respect, than that urged upon me by the prosecution and the C.R.T.C. Even if I were to feel that upon one of two equally reasonable readings of the regulation, a penalty has been incurred, I would be bound to follow the reasoning of Chief Justice Rose in the case of *Kelly v. O'Brien* (1935), 79 C.C.C. 198 at p. 202, [1943] 1 D.L.R. 725, [1942] O.R. 691 (C.A.), where the Chief Justice stated:
>
> > "The defendant is entitled to judgment if the Act is ambiguous and if one reasonable reading will let him out."
>
> Here, the court finds that the most reasonable interpretation of s. 8 is that it applies to free or paid time allocated to each political party on an individual basis, but not to a three-way debate participated in by the only leaders who had any hope of forming a government after the election. On this ground alone, the case for the prosecution must fail and the charge against the three defendants quashed.

In interpreting a provision contained in a statute or a regulation, it is helpful to examine its legislative history. Accordingly, I will examine the history of s. 8 of the regulations. As mentioned earlier, before the 1974 amendments to the *Canada Elections Act* it contained no legislation directed to the provision and allocation

of paid time and free time for political broadcasts by broadcasters. However, s. 22(1)(*e*) of the *Canadian Broadcasting Act, 1936*, S.C. 1936, c. 24, empowered the C.B.C. to make regulations:

> (*e*) to prescribe the proportion of time which may be devoted to political broadcasts by stations of the [C.B.C.] and by private stations, and to assign such time on an equitable basis to all parties and rival candidates.

There was, at that time, no agency which regulated broadcasting in Canada. No independent regulatory agency existed until the establishment of the Board of Broadcast Governors in 1958, which was the predecessor of the C.R.T.C. Pursuant to s. 22(1)(*e*) of the 1936 Act, in 1937 the C.B.C. made the original *C.B.C. Regulations for Sound Broadcasting Stations*, s. 8(2) of which was the first provision regulating the allocation of time for political broadcasting. It read as follows:

> 8(2) Each station shall allocate time for political broadcasts as fairly as possible between the different parties or candidates desiring to purchase or obtain time for such broadcasts.

This regulation remained in effect until 1953 when changed by s. 6(1) of the *C.B.C. Regulations for Sound Broadcasting Stations*, SOR/53-235, to read:

> 6(1) Each station shall allocate time for political broadcasts as fairly as possible among all parties or candidates desiring to purchase or obtain time for such broadcasts.

The *Broadcasting Act*, S.C. 1958, c. 22, created the Board of Broadcast Governors and by s. 11(1)(*d*) gave it powers to make regulations virtually identical to those given to the C.R.T.C. by s. 6(1)(*b*)(iii) of the *Broadcasting Act*, R.S.C. 1985, c. B-9. For the first time the expression "partisan political character" was used and a new regulation applicable to television was made. Contained in s. 7 of the *Radio (TV) Broadcasting Regulations*, SOR/59-456, it read as follows:

> 7(1) Each station shall allocate time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all parties and rival candidates.
>
> (2) Political programs, advertisements or announcements shall be broadcast by stations in accordance with the directions of the Board [of Broadcast Governors] issued from time to time respecting:
>
> (*a*) the proportion of time which may be devoted to the broadcasting of programs, advertisements or announcements of a partisan political character, and
>
> (*b*) the assignment of time to all political parties and rival candidates.

This section was amended in 1960 by s. 4 of the *Radio (TV) Broadcasting Regulations*, SOR/60-470, to add after the word "station" in s. 7(1) the words "or network operator", and to add

after the word "stations" in 7(2) the words "or network operators". When new regulations were made in 1964, the amended section was not changed: SOR/64-50, s. 7.

With its creation in 1968 by the *Broadcasting Act*, S.C. 1967-68, c. 25, the C.R.T.C. was given by s. 16(1)(*b*)(iii) the same powers to make regulations concerning political broadcasting as are contained in s. 6(1)(*b*)(iii) of R.S.C. 1985, c. B-9. In 1968, s. 7 of the 1964 *Radio (TV) Broadcasting Regulations*, was in force and, by s. 62 of the 1968 *Broadcasting Act* was continued in force until repealed or altered by the C.R.T.C. It is, in my view, extremely relevant to the issue presented by this appeal to appreciate that when the C.R.T.C. was established in 1968, like its predecessor, the Board of Broadcast Governors, the C.R.T.C. was delegated the power in respect to all election campaigns, including, of course, federal election campaigns, to determine the proportion of time which broadcasters were required to provide for "the broadcasting of programs, advertisements or announcements of a partisan political character" and to assign such time "to all political parties and rival candidates". In other words, it was the agency which regulated broadcasters, and not Parliament, which determined these important matters. Therefore, in respect to providing and allocating time to political parties for their partisan programming the broadcasters were responsible to the C.R.T.C., and not to Parliament, as the C.R.T.C. had the authority to make and enforce regulations to force broadcasters to provide time to the political parties for partisan political purposes.

In 1974, the power to require broadcasters to provide political parties with time for political programming and to allocate that time among the political parties was, in respect to federal elections, assumed by Parliament and removed from the C.R.T.C. This was accomplished by the amendment to the *Canada Elections Act*, S.C. 1973-74, c. 51, s. 14, to which I have referred, and resulted in a complete code in respect to the provision and allocation of broadcasting time during federal election campaigns contained in ss. 303 to 322 of the present *Canada Elections Act*, which I have discussed in considerable detail. Although Parliament assumed the authority to determine all issues in respect to the provision and allocation of paid and free time political broadcasting during federal election campaigns by virtue of the amendments made to the *Canada Elections Act* in 1974, it would seem that no change was made to s. 7 of the 1964 *Radio (TV) Broadcasting Regulations* until 1987, when s. 8 of the *Television Broadcasting Regulations*, under which the respondents were charged, came into effect. Section 8 is similar in purpose and language to s. 7(1) of

the 1964 regulations. In making the 1987 regulations the C.R.T.C. did not re-enact s. 7(2) of the 1964 regulations, perhaps recognizing that since the 1974 amendments to the *Canada Elections Act* it no longer had the authority to regulate the provision and allocation of paid and free time for political broadcasting during a federal election.

To complete the history of s. 8 of the 1987 *Television Broadcasting Regulations* it is necessary to examine the 1978 *Television Broadcasting Regulations*, C.R.C., c. 381, which until 1987 would seem to have existed together with s. 7 of the 1964 *Radio (TV) Broadcasting Regulations*, s. 9 of which provided as follows:

POLITICAL BROADCASTS

9(1) Each station or network operator shall allocate time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all parties and rival candidates.

(2) Political programs, advertisements or announcements shall be broadcast by stations or network operators in accordance with the directions of the Commission issued from time to time respecting

(*a*) the proportion of time which may be devoted to the broadcasting of programs, advertisements or announcements of a partisan political character; and

(*b*) the assignment of time to all political parties and rival candidates.

It is significant to note that s. 9 is in identical language to s. 7 of the 1964 *Radio (TV) Broadcasting Regulations* except that in s-s. (2) it is the C.R.T.C. and not the Board of Broadcast Governors which has the power to regulate the proportion and assignment of time for the broadcasting of programs of a partisan political character. I also note that the C.R.T.C. enacted s. 9 in 1978 notwithstanding the amendments to the *Canada Elections Act* in 1974 which gave Parliament the authority to regulate the provision and allocation of broadcast time in regard to federal elections. Section 9 remained unchanged until it was revoked by the C.R.T.C. and replaced by s. 8 of the 1987 *Television Broadcasting Regulations* which became effective on January 9, 1987. In my view, it is reasonable to conclude that s. 9(2) was not re-enacted because it had been superseded by, and could not exist with, the 1974 amendments to the *Canada Elections Act*.

As I will explain, the legislative history of s. 8 of the regulations and 1974 amendments to the *Canada Elections Act* removing from the C.R.T.C. the power to regulate the provision and allocation of broadcast time in relation to federal election campaign broadcasting establishes that the trial judge was correct in the conclusion which he reached that count 2 failed to disclose an offence contrary to s. 20 of the *Broadcasting Act* because s. 8 does

not apply to leadership debates. However, I have reached the conclusion that count 2 fails to disclose an offence for a reason different than that of the trial judge which was that leadership debates do not come within the meaning of s. 8 as they do not constitute "programs ... of a partisan political character". Although I agree with this conclusion as a matter of interpretation of s. 8, the reason why I believe the trial judge reached the correct result is that s. 8 has no application to the allocation of broadcasting time to political parties during a federal election campaign because ss. 303 to 322 of the *Canada Elections Act* contain specific legislation governing both the provision and allocation of such time. In other words, it is the *Canada Elections Act* and not the *Broadcasting Act* which is the governing statute in respect to political broadcasting related to federal elections.

Section 6(1)(*b*)(iii) of the *Broadcasting Act* empowers the C.R.T.C., as an aspect of its authority to regulate and supervise all aspects of broadcasting in Canada, to make regulations respecting the "proportion of time" for the broadcasting of partisan political programs and "the assignment of the time on an equitable basis to political parties". The regulation made under s. 6(1)(*b*)(iii) does not address the proportion of time which broadcasters must provide to political parties but, on the assumption that it has been provided, requires that it be allocated "on an equitable basis to all accredited political parties". Although s. 6(1)(*b*)(iii) of the Act does not stipulate any particular time or times to which the regulation of the proportion and assignment of political broadcasting time is to take place, s. 8 of the regulations restricts the time to an "election period" and defines this period in respect to federal, provincial and municipal elections. However, in so far as s. 8 of regulations purports to affect political broadcasting in relation to federal elections it must give way to the provisions of the *Canada Elections Act*.

I have set out and analyzed the relevant sections of the *Canada Elections Act* which pertain to political broadcasting commencing at p. 7 of my reasons [*ante*, p. 551]. As the analysis shows, s. 307(1) requires every broadcaster to provide a prescribed amount of paid time to all registered parties in the 29-day period preceding election day and s. 316(1) requires every network operator to provide a prescribed amount of free time to registered and unregistered political parties for their use in broadcasting "political announcements and other programming produced by on behalf of" the parties. The provisions of ss. 309 and 310 contain a complete code for the allocation of the paid and free time among the parties. Subsections (2) and (3) of s. 309 are particularly important

because each provides, respectively, that where the parties have been able to agree on the allocation or where the allocation is determined by the broadcasting arbitrator such "allocation shall be final and binding on all registered parties". I would also note that s. 313(1) requires the broadcasting arbitrator to advise the C.R.T.C. of every allocation under ss. 309 and 310 and requires the C.R.T.C. to inform the broadcasters. If nothing else, the binding nature of the allocation of time provided by s. 309(2) and (3), together with the factors to be considered in the allocation of the time, demonstrate that s. 8 of the regulations cannot stand alongside the provisions of the *Canada Elections Act*.

It is necessary to acknowledge that s. 307(1), which requires every broadcaster to provide paid time, and s. 316(1), which requires every network operator to provide free time, each state that the broadcaster or network operator is to make the time available "subject to the regulations made pursuant to the *Broadcasting Act*". Section 8 is the only regulation made under the *Broadcasting Act* which relates to political broadcasting and, as I have discussed, it does not purport to regulate the provision of time to the political parties but only its allocation among the parties after it has been provided. Thus, the purpose of ss. 307(1) and 316(1) of the *Canada Elections Act* is the legal duty of broadcasters and network operators to *provide* paid and free time to the political parties to promote themselves and their candidates during a *federal* election campaign. The purpose of s. 8 of the regulations is the duty of broadcasters to *allocate* time among political parties for partisan political programming during federal, provincial and municipal election campaigns. The provisions of the *Canada Elections Act* dealing with the allocation of paid and free time are ss. 309 and 310 and they make no reference to the *Broadcasting Act*. Therefore, it follows that there is no regulation made under the *Broadcasting Act* in respect to the subject-matter of ss. 307(1) and 316(1) of the *Canada Elections Act* to which these subsections can be subject.

In my view, ss. 303 to 322 of the *Canada Elections Act* dealing with political broadcasting are, in substance, legislation in respect to federal elections even though they require broadcasters and networks to make broadcast time available to political parties and to allocate it among them to enable them to inform the electorate of their policies and to attempt to procure their votes. The regulation enacted under the *Broadcasting Act* requires fairness and equitability on the part of the broadcasters in respect to the time which they provide to political parties for programs or announcements or advertisements of "a partisan political charac-

ter". Although this phrase is not found in the *Canada Elections Act*, it is obvious that the paid or free time which the Act requires broadcasters and network operators to provide to each political party is to enable the party to produce programs, and announcements and advertisements intended to promote itself which, as I will explain, constitutes programming of a partisan political character. In my view this is clear from the language of s. 307(1) which requires broadcasters to make paid time available to the registered parties for "the transmission of political announcements and other programming produced by or on behalf of the registered parties". Similar language is contained in s. 316(1) dealing with the provision of free time. It goes without saying that the Tories are not going to purchase time to produce a program promoting the Grits! As the *Canada Elections Act* specifically covers both the provision and allocation of broadcast time in federal elections, s. 8 of the regulations can have no application to the allocation of broadcast time during federal elections.

In a word, the purpose of ss. 303 to 322 of the *Canada Elections Act* is to give political parties and their candidates contesting a federal election access to the limited resources of the electronic media so that they may explain their stand on the issues and thereby more fully and completely inform the voters and to assure fairness in the allocation to them of their right to access to these resources. Broadcasters and network operators are told that they must allow the parties and their candidates to use their facilities. There is no legal requirement that broadcasters and network operators must give media access to parties and their candidates other than what is found in the *Canada Elections Act*. It creates an affirmative right of access to parties and their candidates to the use of the electronic media during an election campaign and a corresponding duty on the part of broadcasters to provide access, subject to the formula which determines the allocation of media time among the parties. Allocation of media time, whether allocated pursuant to an agreement reached among the parties or determined by the broadcasting arbitrator, is final and binding on all the parties.

In my view, it follows that the allocation of media time among the parties pursuant to the formula provided for that purpose must necessarily be final and binding upon the broadcasters and network operators whose duty under the *Canada Elections Act* is to provide access to their facilities to the parties in accordance with the allocation. This allocation must also necessarily be final and binding in respect to the C.R.T.C. because, as I will explain, the specific requirements of the *Canada Elections Act* in respect to

political broadcasting during federal elections take precedence over the policy contained in s. 8 of the regulations made under the *Broadcasting Act* which requires that there be an equitable allocation of time among the parties for the broadcasting of partisan political programs. Although the phrase "of a partisan political character" does not appear in the *Canadian Elections Act*, the only reasonable interpretation of the provisions of that Act dealing with access by the parties to the electronic media is that it is access for the purpose of partisan programming. It follows, therefore, that s. 8 of the regulations has no application to political broadcasting during federal election campaigns. If there is any complaint that the political parties have not received an equitable allocation of broadcasting time, the fault cannot lie with the broadcasters and the network operators. It lies with Parliament which has responsibility for what is contained in the *Canada Elections Act* which imposes the allocation of time on the broadcasters and network operators based upon either the agreement of the parties or the decision of the broadcast arbitrator in respect to the allocation of the time.

This is not to say that s. 8 of the regulations is without meaning or application. Although it does not apply to federal elections, it has application to provincial and municipal elections. This is because it is Parliament, and not the provincial legislatures, which has the exclusive authority to regulate broadcasting, including access to the electronic media and content of programming, in respect to political broadcasting: *Re Regulation and Control of Radio Communication in Canada*, [1932] 2 D.L.R. 81, [1932] A.C. 304, [1932] 1 W.W.R. 563 (P.C.); *Re C.F.R.B. Ltd. and A.-G. Can. (No. 2)* (1973), 14 C.C.C. (2d) 345, 38 D.L.R. (3d) 335, [1973] 3 O.R. 819 (C.A.). Although Parliament could have continued to regulate political broadcasting in respect to federal elections under the *Broadcasting Act*, R.S.C. 1970, c. B-11, in 1974 it chose to do so under the *Canada Elections Act*. However, as the *C.F.R.B.* case held, restrictions in respect to political broadcasting in provincial election campaigns cannot be achieved by provincial legislation and must be left to Parliament even though Parliament has no jurisdiction to legislate over matters of procedure or substance in respect to provincial or municipal elections. That is why, for example, legislation in respect to elections in the Province of Ontario is silent in respect to political broadcasting: see *Election Finances Act*, R.S.O. 1990, c. E.7, s. 37, and *Municipal Elections Act*, R.S.O. 1990, c. M.53, s. 177.

In summary, s. 5 of the *Broadcasting Act* requires the C.R.T.C. to "regulate and supervise all aspects of the Canadian broadcast-

ing system with a view to implementing the broadcasting policy enunciated in section 3". As a matter of broadcasting policy, s. 3(*d*) declares that "the programming provided by the Canadian broadcasting system . . . should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern . . .". Section 6(1)(*b*)(iii) empowers the C.R.T.C. to make regulations "respecting the proportion of time that may be devoted to broadcasting programs, advertisements or announcements of a partisan political character and the assignment of the time on an equitable basis to political parties and candidates". Section 8 of the *Television Broadcasting Regulations* made pursuant to s. 6(1)(*b*)(iii) of the Act states that a "licensee shall allocate time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all accredited political parties and rival candidates represented in the election". Section 8 does not require that broadcasters provide time for partisan political broadcasting to the parties and their candidates; on the assumption that the broadcasters have provided such time, it requires that the time be allocated on an equitable basis among the parties.

However, with respect to federal elections the *Canada Elections Act* contains a complete code governing the duty of broadcasters to provide paid time and free time to each political party "for the transmission of political announcements and other programming produced by or on behalf of those parties" and contains a formula for the allocation of such time among the parties which is final and binding on the parties. Although the *Canada Elections Act* does not use the term "partisan political character", it is reasonable to conclude that a program "produced by on behalf of" a party will be a program the purpose of which is to advocate the platform and policies of that party and, therefore, constitute a program which can be characterized as a program of a "partisan political character". It follows that to the extent that s. 8 of the regulations is legislation requiring broadcasters to allocate on an equitable basis among political parties contesting a federal election time provided by them for partisan political programming it is in conflict with the provisions of the *Canada Elections Act* governing the allocation of paid time and free time for political broadcasting during the period of a federal election.

It is a well-established principle that where enactments in two statutes pertain to the same subject and are in conflict, a specific enactment takes precedence over a general enactment: see, *e.g.*, *Gatz v. Kiziw* (1958), 16 D.L.R. (2d) 215, [1959] S.C.R. 10; *Upper Canada College v. City of Toronto* (1916), 32 D.L.R. 246, 37

O.L.R. 665 (C.A.); *Ontario and Sault Ste. Marie R.W. Co. v. Canadian Pacific R.W. Co.* (1887), 14 O.R. 432 (Ch. Div.); *Re Regional Municipality of Ottawa-Carleton and Voyageur Colonial Ltd.* (1974), 51 D.L.R. (3d) 161, 5 O.R. (2d) 601 (Div. Ct.); *R. v. Greenwood* (1992), 70 C.C.C. (3d) 260, 10 C.R. (4th) 392, 7 O.R. (3d) 1 (C.A.).

This principle was discussed in *R. v. Greenwood*, *supra*, by Griffiths J.A. at pp. 265-6:

> It is a fundamental principle of statutory construction that in approaching the interpretation of two statutes in apparent conflict, the court should attempt, if possible, to resolve the contradiction and try to harmonize them. Parliament should be presumed consistent in its intention and any apparent repugnancy should be avoided by reconciling the two enactments where possible: see Côté, *The Interpretation of Legislation in Canada* (1984), at pp. 279 and 284-5.
>
> In *Greenshields v. The Queen* (1958), 17 D.L.R. (2d) 33, [1958] S.C.R. 216, [1959] C.T.C. 77, the Supreme Court of Canada was called upon to reconcile a statutory conflict. Locke J., although dissenting in the result, expressed the applicable principle of statutory construction at pp. 42-3 as follows:
>
> > "In the case of conflict between an earlier and a later statute, a repeal by implication is never to be favoured and is only effected where the provisions of the later enactment are so inconsistent with, or repugnant to, those of the earlier that the two cannot stand together. Unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal cannot be implied. Special Acts are not repealed by general Acts unless there be some express reference to the previous legislation or a necessary inconsistency in the two Acts standing together which prevents the maxim *generalia specialibus non derogant* being applied (Brooms's Legal Maxims, 10th ed., p. 349: Maxwell . . . *op. cit.*, p. 176)."
>
> The maxim *generalia specialibus non derogant* referred to by Locke J. means that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one. In *Re Township of York and Township of North York* (1925), 57 O.L.R. 644 (S.C.), Riddell J.A. states the principle at pp. 648-9:
>
> > "It is, of course, elementary that special legislation overrides general legislation in case of a conflict — the general maxim is *Generalia specialibus non derogant — see Lancashire Asylums Board v. Manchester Corporation*, [1900] 1 Q.B. 458, at p. 470, *per* Smith, L.J. — even where the general legislation is subsequent: *Barker v. Edgar*, [1898] A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the particular subject and made provision for it, and the presumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: Craies on Statute Law, 3rd ed., p. 317."
>
> Applying this maxim of construction, the provisions of the special statute are not construed as repealing the general statute but as providing an exception to the general. In the Supreme Court of Canada decision of *Ottawa*

v. Eastview, [1941] 4 D.L.R. 65 at p. 77, [1941] S.C.R. 448, 53 C.R.T.C. 193, Rinfret J. said:

> "The principle is, therefore, that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject matter of the rule from the general Act . . ."

By treating the special legislation as creating an exception to the general, the two statutes are then brought into harmony.

The question of what constitutes special legislation as opposed to general legislation must, in itself, be a matter of construction involving a careful examination of the over-all schemes of the two pieces of legislation to determine Parliament's intention.

As I have illustrated, it is the *Canada Elections Act* which is the special legislation as it governs federal elections and it is ss. 303 to 322 which govern all aspects of political broadcasting during and in respect to federal elections. The *Broadcasting Act* and Regulations made under it by the C.R.T.C., although in one sense special legislation in respect to the Canadian broadcasting system and broadcasting policy, is general legislation in respect to political broadcasting affecting federal elections.

Even though I have reached the conclusion that s. 8 of the regulations has no application to political broadcasts during a federal election campaign, I would agree with the opinion of the trial judge that properly interpreted s. 8 has no application to leadership debates. He based his conclusion on two grounds — s. 8 "applies to free or paid time allocated to each political party on an individual basis" and not to leadership debates and, in any event, a leadership debate is not a program of a partisan political character". It will be helpful to repeat s. 8:

> 8. During an election period, a licensee *shall allocate time* for the broadcasting of programs, advertisements or announcements *of a partisan political character* on an equitable basis to *all accredited political parties* and rival candidates represented in the election or referendum.

(Emphasis added.)

It is common ground that a leadership debate is a program within the definition of "program" in the regulations which I have reproduced on p. 20 [*ante*, p. 558]. The dispute between the appellant and the respondents is whether or not a leadership debate is a program "of a partisan political character". In my view, there is nothing ambiguous about this phrase. The key word in it is "partisan". In Black's Law Dictionary, 5th ed. (1979), St. Paul; West Publishing Co., at p. 1008, "partisan" is defined as follows: "An adherent to a particular party or cause as opposed to the

public interest at large". In the Shorter Oxford English Dictionary, 3rd ed. (1979), London: Oxford University Press, at p. 1519, "partisan" as a noun is defined as "one who takes part or sides with another; *esp.* a zealous supporter of a party, person or cause . . .", and as an adjective is defined as "of, pertaining to, or characteristic of a partisan; biased, prejudiced, one-sided".

In *R. v. C.F.R.B. Ltd.* (1976), 30 C.C.C. (2d) 386, 31 C.P.R. (2d) 13, the Court of Appeal was required to interpret the phrase "broadcast . . . of a partisan character" as contained in s. 28(1) of the *Broadcasting Act* R.S.C. 1970, c. B-11. Section 28(1) prohibited the broadcasting of programs of a partisan character within 24 hours of a provincial election. Within that period, a news reader on radio station C.F.R.B. urged his listeners to re-elect the incumbent Premier of Ontario and was convicted of an offence under s. 28(1). In upholding the conviction, Arnup J.A. at pp. 390-1, held: "A partisan broadcast is one intended to favour one candidate over the other or others, in an election, or to favour one point of view over another, in a referendum."

Because the evidentiary hearing before the trial judge was held, it would seem, in respect to both the interpretation issue and the Charter issue it is difficult, if not impossible, from this vantage point to separate the evidence relevant to each issue. Although counsel did not address this problem, it is not without significance on this appeal. There is no need to cite authority for the proposition that absent agreement with respect to relevant facts, relevant extrinsic evidence is both admissible and required when it comes to establishing whether legislation rests on a valid constitutional base. However, when it comes to statutory interpretation the admissibility of extrinsic evidence as an aid to interpretation often presents a difficult problem. For example, the comments of a Minister in introducing legislation in the legislature and the report of a select committee of the legislature may be considered to determine if they will settle the matter of interpretation: *Babineau v. Babineau* (1981), 122 D.L.R. (3d) 508, 32 O.R. (2d) 545, 9 A.C.W.S. (2d) 46 (High Ct. J.); affirmed 133 D.L.R. (3d) 767*n*, 37 O.R. (2d) 527*n*, 14 A.C.W.S. (2d) 305 (C.A.). However, it is stated in *Craies on Statute Law*, 7th ed. (1971), London: Sweet & Maxwell, at p. 132: "Usually the views of a government department as to the meaning of a statute which is administered by them are not admissible as an aid to construction . . .". But the authors do point to an exception to this rule referred to by Lord Macnaghten in *Commissioners of Income Tax v. Pemsel*, [1891] A.C. 531 at p. 590, where from re-enactment of legislation it may be inferred that the legislature intended the words of the statute to

have the meaning applied to them by the department administering the statute. However, I would observe that in the United States where the court is asked to review the decision of a regulatory agency based on its interpretation of the statute which it administers, if the statute is ambiguous and open to interpretation a degree of deference is granted to the agency, though a reviewing court need not accept an interpretation which is unreasonable: *Nat. R.R. Passenger Corp. v. Boston & Me. Corp.*, 112 S. Ct. 1394 (1992), at pp. 1401-2.

There was considerable evidence given with respect to how the broadcasters and network operators organize and present a leadership debate and how they characterize such a program. I believe that this evidence is helpful in determining the nature of a leadership debate in contrast to other forms of political broadcasting. As well, evidence was given with respect to the interpretation placed on s. 8 by the C.R.T.C. in support of the interpretation of s. 8 advocated by the appellant. Although this evidence may not have been admissible, certain aspects of it, however, indicate a recognition on the part of the C.R.T.C. that s. 8 does not apply to federal election broadcasting.

When televised leadership debates have been held in the past, they have been debates among the leaders of the three largest parties although, in 1968, a fourth leader, Real Caouette, participated. The debates have been initiated and organized by the networks and are the product of negotiation between the networks and the political parties, who also determine the format of the debate. Generally speaking, a panel of journalists asks questions of the leaders and each leader is given the opportunity to provide his or her views in respect to each question. Depending on the format, each leader may have a short period of time to make a general statement in respect to the policies of his or her party. Participation in a debate by the party leaders is by invitation of the networks and is voluntary. Indeed, as the evidence before the trial judge indicated, when leadership debates have not been held it is because the parties and the networks have been unable to agree on some aspect of the ground rules applicable to the debate, or because one of the parties has not agreed to participate.

In my view, this evidence conforms with the clear and obvious distinction between what the *Canada Elections Act* requires of broadcasters and network operators in the provision and allocation of paid and free time to political parties to be used by them as they may see fit to promote themselves, and the traditional role of broadcast journalists to report on election campaigns by way of newscasts, news interviews, news documentaries, public affairs

programs and on-the-spot coverage of news events such as political conventions and leaders debates. The latter type of broadcasting is very different in nature from paid or free-time political programs produced exclusively by a political party which are conceived and produced by, or on behalf of, a political party for the express purpose of conveying the policies of the party to persuade the voters to support it and its candidates. Newscasts and the other news-type programs are conceived, edited and produced by the broadcasters and networks. They are not broadcast during paid or free time *provided and allocated* to the parties under the *Canada Elections Act.* They are the intellectual property of the broadcasters or networks. They are conceived, written, organized and produced by the broadcaster exercising its own editorial judgment, are non-partisan in nature, and are broadcast pursuant to the broadcaster's responsibility mandated by s. 3(*d*) of the *Broadcasting Act*, to inform Canadians about events occurring across Canada. Control over the content of paid and free-time political broadcasting rests in the political parties. Control over the content of newscasts and similar programs rests in the broadcaster and network operators.

As evidence of the interpretation placed on s. 8 by the C.R.T.C., two documents were produced at the trial. Public Notice C.R.T.C. 1988-142, dated September 2, 1988, is entitled "A Policy with Respect to Election Campaign Broadcasting". Circular No. 351, dated October 4, 1988, intended for all licensees of broadcasting undertakings was issued pursuant to s. 318 of the *Canada Elections Act* and is entitled "Federal General Election — Guidelines for Broadcast Licensees". I believe that it is accurate to say that the focus of each document is s. 3(*d*) of the *Broadcasting Act* and s. 8 of the regulations.

I do not intend to analyze in any depth the contents of the circular. However, I would observe that in it the C.R.T.C. takes the position that there is an "obligation on the part of the broadcaster to provide equitable — fair and just — treatment of issues, candidates and parties". It is the position of the C.R.T.C. that "equity" applies to what it identifies as four categories of "political campaign broadcasts" — paid time, free time, news and public affairs. The C.R.T.C. includes in public affairs "in-depth examination of candidates and issues, profiles of candidates, debates, and under the editorial control of the licensee". It is interesting to note that even though the C.R.T.C. requires equitable treatment of issues by the broadcaster, it makes the following acknowledgement:

> Matters respecting the allocation of broadcast time for political parties are dealt with in the Canada Elections Act and are administered by the Broadcasting Arbitrator.

In view of the provisions of the *Canada Elections Act* to which I have referred, I suggest that the C.R.T.C. could hardly avoid making this acknowledgement. However, my point in referring to the circular is to illustrate what in my view is faulty reasoning on the part of the C.R.T.C. It has rewritten s. 8, which is addressed to the *allocation of time on an equitable basis* among the political parties for broadcasting, *inter alia*, programs of a partisan political character — a task performed by the broadcasting arbitrator or determined by agreement among the parties — to require broadcasters to provide *equitable treatment of issues, candidates and parties.* Hence, the circular addresses equity in news coverage and public affairs programming and, as for the debates, has this to say:

> In the case of so-called "debates" it may be impractical to include all rival parties or candidates in one program. However, if this type of broadcast takes place, all parties and candidates should be accommodated, even if doing so requires that more than one program be broadcast.

While in the circular the C.R.T.C. would appear to confuse the equitable allocation of time requirement of s. 8 with a requirement on the part of broadcasters to provide an equitable treatment of issues, candidates and parties, in the public notice the C.R.T.C. appears, in the following statement, to have recognized the true situation:

> The Commission has concluded that, in light of the differences between the various types of elections and the differences in the communities served by Canadian broadcasters, it should not establish specific minimum time allocations either by regulation or policy. Rather, it will continue to require each licensee to make its own equitable allocation of time devoted to election campaign broadcasting, *except in the case of federal elections* where specific requirements for the allocation of time to registered parties are contained in the Canada Elections Act.

(Emphasis added.) If nothing else, this passage provides support for the conclusion which I have reached that s. 8 does not apply to federal election political broadcasting and demonstrates a recognition of this by the C.R.T.C.

Taking into consideration the evidence that a leadership debate consists of statements made by the various leaders of the policies of their respective parties and considering the definitions of "partisan" to which I have referred, it is my view that a leadership debate is not a program of a "partisan political character" within the meaning of s. 8. A program of a "partisan political character"

is one which is biased, prejudiced and one sided, intended to favour one party over the other or others in its presentation of a political viewpoint. By definition at least two leaders are required for a debate and it cannot, therefore, be said that a debate is a program which is biased, prejudiced or one-sided and is intended to favour one debater over another. While a debate no doubt includes the expression of partisan political points of view, s. 8 is not directed to a program which *includes* partisan political views but is directed to a program of a partisan political character, in other words, a program devoted exclusively to the views of a single party or candidate. Therefore, assuming the application of s. 8 to federal election broadcasting, if, for example, a broadcaster allocated 15 minutes to the Liberal party to present a program urging voters to support its candidates this would constitute a program "of a partisan political character" and s. 8 would require the broadcaster to allocate its time equitably to "all accredited political parties" contesting the election to present a similar program.

In any event, it is my view that s. 8 has no application to programs produced by broadcasters or network operators such as newscasts or debates. As I have stated many times, the purpose of s. 8 (assuming its applicability to federal elections) is the *allocation* of broadcast time to political parties to enable them to produce programs of their own choosing. Section 8 does not require broadcasters to provide *coverage* of political parties on an equitable basis in its newscasts and similar programs. It must not be forgotten that it is under s. 8 that the respondents were charged. Section 8, therefore, has no application to broadcast time which has not been allocated to a political party and which has been retained by a broadcaster for its own use to broadcast programs of its own choosing, including leadership debates.

Counsel for the appellants filed the Report of the Royal Commission on Electoral Reform and Party Financing (1991) (Ottawa; Minister of Supply and Services Canada), which in vol. 1, pp. 274-420 considered access to broadcasting in the context of federal elections. Although it was agreed that I would not have recourse to the report for the purpose of supplementing the evidence presented at trial, I do not feel that it would be inappropriate to indicate that the commissioners were of the view that leadership debates do not come within the scope of the legislation which I have discussed. As I have mentioned, there is no express reference in the *Canada Elections Act*, in the *Broadcasting Act* or in the *Television Broadcasting Regulations* to leadership debates. Only the provision by broadcasters and network operators of paid and free time to the political parties, and its

allocation, are governed by legislation. Neither statute provides a legal framework covering debates. Neither statute delegates to the C.R.T.C. the authority to require that broadcasters and network operators organize and present debates and to require that they invite the leader of each political party to participate in a debate. Had Parliament intended to include leadership debates within the scope of political broadcasts governed by the *Canada Elections Act* one would expect to find an express provision requiring broadcasters and network operators to produce debates, as well as rules for selecting participants in a debate and, perhaps, guidelines in respect to the format of the debate.

Because I am of the view that the trial judge did not err in his finding that s. 8 of the *Television Broadcasting Regulations* does not apply "to a nationally televised leaders' debate", there is no need to consider whether s. 8 infringes the fundamental freedoms guaranteed to the respondents by s. 2(*b*) of the Charter.

In the result, the appeal is dismissed.

Appeal dismissed.

Regina v. Church of Scientology of Toronto

(1975), 4 O.R. (2d) 707

ONTARIO
COUNTY COURT
JUDICIAL DISTRICT OF YORK
STORTINI, CO.CT.J.
17TH MAY 1974

Municipal law -- Building by-law -- Prosecution for violation of repair order by Commissioner of Buildings -- Accused unable to comply because building permit refused -- Permit refused because of improper zoning use -- Accused acquitted -- Commissioner required to issue permit to permit accused's compliance where repairs ordered -- Land use irrelevant to issuance of permit -- Interpretation Act, R.S.O. 1970, c. 225, s. 10.

Statutes -- Interpretation -- Strict construction of penal statutes -- Words of criminal or quasi-criminal statute creating ambiguity -- Ambiguity must be resolved in favour of liberty of subject -- Existence of ambiguity to be determined after regular rules of construction applied -- Interpretation Act, R.S.O. 1970, c. 225, s. 10.

[Dyke v. Elliott; The "Gauntlet" (1872), L.R. 4 P.C. 184; R. v. Eaves (1913), 21 C.C.C. 23, 9 D.L.R. 419, apld; R. v. Haggins, [1953] O.W.N. 833, 107 C.C.C. 225; R. v. Barabash (1951), 99 C.C.C. 399, 11 C.R. 319, 1 W.W.R. (N.S.) 539; R. v. Robinson (or Robertson) et al., [1951] S.C.R. 522, 100 C.C.C. 1, 12 C.R. 101, refd to]

APPEAL by the accused by way of trial de novo from its conviction contrary to art. 14(2) of By-law 300-68 of the Corporation of the City of Toronto.

Paul M. Champagne, for appellant.

R. Mori, for respondent.

STORTINI, CO.CT.J.: This is an appeal by way of a trial de novo against a conviction by a Provincial Judge, that the appellant:

> Unlawfully did, being the occupant of a building known municipally as 122 and 124 Avenue Road, which is in an unsafe condition in respect of a risk of fire, accident or other danger, fail forthwith to take all necessary action to put such building in a safe condition so as to guard against fire, or other dangerous risk or accident, after receiving notice in writing dated the 27th day of April 1972, stating wherein such unsafe condition exists from the Commissioner of Buildings, contrary to the provisions of Chapter 1, Article 14(2) of By-law 300-68 as amended of The Corporation of the City of Toronto.

Article 14(2) of the said by-law (ex. 1) reads as follows:

> Where any building or yard or part thereof is in an unsafe condition in respect of a risk of fire, accident or other danger and the Commissioner gives to the owner or his agent, or any occupant of the property, or any person shown by the records of the Registry Office or the Land Titles Office to have an interest in the property notice in writing stating wherein such unsafe condition exists, the person to whom such notice was given shall forthwith take all necessary action to put the building or yard in a safe condition so as to guard against fire or other dangerous risk or accident.

Exhibit 2 is a letter dated April 27, 1972, addressed to the appellant and signed by the Commissioner of Buildings,

Department of Buildings, City Hall, Toronto. Because of the nature of the problem in this case, I deem it advisable to set out the body of the letter, viz.:

Dear Sirs: Re: 122-124 Avenue Road

A recent inspection of the premises at the above location by the Toronto Fire Department and this Department discloses that the occupancy has changed from funeral parlour use to that of church and study purposes prior to permit being obtained in breach of Chapter 1, Article 5 of By-law 300-68.

My Inspector also reports that the building is in an unsafe condition in respect of a risk of fire in breach of Chapter 1, Article 14 of said By-law inasmuch as:

1. Stairs from the basement to the 1st floor and from the 2nd floor to the 3rd floor have not been enclosed as required by Chapter 4, Article 20.

2. Two means of exit have not been provided from the 3rd floor, as required by Chapter 3, Article 25.

Since the building is in an area Zoned C.I.S. and in such district the above occupancy is not permitted, this is to serve you notice to vacate the building to the satisfaction of this Department forthwith.

If I am advised that the instructions contained herein have not been complied with, I intend to take legal action for maintaining an unsafe condition and for change of occupancy prior to permit being obtained.

Yours truly,

R.H. Milne
Commissioner of Buildings

A city building inspector, John Jones, testified that on June 12, 1972, he inspected the three-storey building in question and found that the stairs from the basement to the first floor,

and from the second floor to the third floor were not enclosed with proper fire-rated enclosures. In addition, he found that two means of exit from the third floor were not provided, i.e., a fire escape was lacking.

Evidence on behalf of the appellant was tendered in the person of Mr. Bryan G. Levman who is a minister of the appellant and at the material time was its president. He acknowledges that the letter (ex. 2) was delivered to him on May 3, 1972. At that time the appellant was due to appear in Court on May 18, 1972, concerning the matter of occupancy and a letter was written on behalf of the appellant to the Department of Buildings requesting a deferment until the outcome of those proceedings: see ex. 5.

Mr. Levman states that he made an application to the city Department of Buildings in September or October of 1972, for the necessary building permit in order to proceed with the required repairs.

Under date of November 6, 1972, the Department of Buildings sent an examiner's notice (ex. 6) to the appellant concerning the application for a building permit to construct a fire escape. The notice rejects the application on the grounds:

> Application, plans and specifications for the work referred to above do not conform with the By-laws of the City of Toronto, as follows:
>
> Subject premises is located within a district zoned C.I.S. under Zoning By-law No. 20623, and in this classification of district a church is not a permitted use.
>
> This Department is therefore unable to approve the fire escape application.
>
> R.H. Milne
>
> Commissioner of Buildings

Mr. Levman also states that he had previously been told by Inspector Jones that it would be impossible to get a building

permit until the zoning matter was cleared up.

The appellant had made an unsuccessful zoning application to be considered an educational institution, and recently has made an application for a zoning amendment to allow the church use. This application has not yet been determined by the tribunals with jurisdiction.

Article 5 of By-law 300-68 (ex. 1) provides that no person shall, inter alia, repair any building without first obtaining a permit therefor from the Commissioner.

Article 7 of said by-law provides that where the applicant has paid the prescribed fee for the permit, and the application, plans, specifications, drawings, block plan and survey comply with the requirements of this by-law, and the proposed work complies with the provisions of all by-laws of the corporation and all by-laws of the Municipality of Metropolitan Toronto and the laws of Ontario, the Commissioner shall issue the permit and shall approve the application, plans, etc.

The Commissioner of Buildings maintains that art. 7 has not been complied with in that the appellant's use of the premises as a church contravenes the zoning by-law.

The appellant maintains that he is on the horns of a dilemma. The Commissioner has served him with a work order but he has refused the necessary building permit. The appellant maintains that it has complied with the by-law requirement to "forthwith take all necessary action" to put the building in a safe condition, and it is now up to the city Department of Buildings to "take action" by issuing the necessary building permit.

The appellant might have attempted to resolve the dilemma by applying for the prerogative remedy of mandamus to compel the issuance of the building permit. The value of this remedy became academic once the charge was laid.

By art. 14(3) of By-law 300-68 the municipal corporation was empowered to act through the Commissioner of Buildings to put

the building in a safe condition at the expense of the owner. No building permit problem would then exist.

An issue arises as to the interpretation of the words contained in art. 7 of By-law 300-68 "and the proposed work complies with the provisions of all By-laws ..."

Section 10 of the Interpretation Act, R.S.O. 1970, c. 225, provides that every Act (and presumably every by-law) shall be deemed to be remedial and shall receive "such fair, large and liberal construction and interpretation" as will ensure the object of the Act.

On the other hand, the principle governing the construction of penal statutes was laid down by the Privy Council in Dyke v. Elliott; "The Gauntlet" (1872), L.R. 4 P.C. 184 at p. 191, as follows:

> ... all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

The above principle was followed by Gale, J. (as he then was), in R. v. Haggins, [1953] O.W.N. 833, 107 C.C.C. 225, and by Graham, J., of the Saskatchewan King's Bench in R. v. Barabash (1951), 99 C.C.C. 399, 11 C.R. 319, 1 W.W.R. (N.S.) 539.

In the case of R. v. Eaves (1913), 21 C.C.C. 23, 9 D.L.R. 419 (Court of King's Bench, Quebec), the matter of interpretation of a penal statute was considered. This was an appeal by the Crown upon a question of law, brought up upon a stated case pursuant to leave to appeal after an acquittal of the defendant at his trial for an offence under the Money Lenders Act, R.S.C. 1906, c. 122, relating to criminal usury.

At pp. 31-2, Gervais, J., refers to Maxwell on Interpretation of Statutes, 4th ed., p. 395 et seq., part of which reads as follows:

"But the rule of strict construction requires that the language shall be so construed that no cases shall be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment."

Also on p. 32 we find this extract from Maxwell:

"The effect of the rule of strict construction might almost be summed up in the remark, that 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. But it yields to the paramount rule that every statute is to be expounded according to the intent of them that made it; and that all cases within the mischiefs aimed at are to be held to fall within its remedial influences."

At pp. 32-3 His Lordship also refers to Beal on Cardinal Rules of Legal Interpretation, p. 443, as follows:

"A penal statute is to be interpreted, like any other instrument, according to the fair common sense meaning of the language used.

"Penal statutes should be construed strictly so that no cases shall be held to be reached by them but such as are

within both the spirit and letter of such laws.

"If there are two possible interpretations of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum.

"If there is a reasonable interpretation which will avoid the penalty in any particular case, it must be adopted.

"If the words are merely equally capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail."

Therefore, if the words of an enactment relied on as creating a new offence are ambiguous, the ambiguity must be resolved in favour of the liberty of the subject, but the Court must first determine whether ambiguity exists after calling in aid the regular rules of construction: see R. v. Robinson (or Robertson) et al., [1951] S.C.R. 522, 100 C.C.C. 1, 12 C.R. 101.

The by-law in question creates a quasi-criminal offence. Chapter 21 of the by-law provides for penalties for non-compliance, as follows:

Any person convicted of a breach of any of the provisions of this By-law shall forfeit and pay, at the discretion of the convicting magistrate, a penalty not exceeding (exclusive of costs) the sum of three hundred dollars for each offence.

The principles governing the construction of penal statutes apply as well to quasi-criminal offences.

I hold that where, as in this case, the Commissioner of Buildings has issued a work order to put premises in a safe condition, he must issue a building permit if the proposed work complies with all legal requirements, e.g., fire escapes to be of steel, stair enclosures to be of fire-rated materials, location of exits, etc. As art. 14 is concerned with safety and not land-use zone control, the repairs should not be

thwarted if they comply with the required standards.

It may very well be that the appellant may lose the benefits of any repairs in the event that it is ultimately unsuccessful in its application for rezoning; however, that is a risk that the appellant may choose to take. The other alternative is to cease its unzoned-for operations.

In the result, therefore, this appeal is allowed and the charge is dismissed.

Appeal allowed; conviction quashed.

R. v. J. CLARK & SON LIMITED
(F/CR/5/85)

INDEXED AS: R. v. CLARK (J.) & SON LIMITED

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Fredericton
Stevenson, J.
May 9, 1986.

Counsel:
Douglas L. Smith, for the appellant;
Richard J. Scott and Sean McNulty, for the respondent.

This appeal was heard on February 21,

1986, before Stevenson, J., of the New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Fredericton, who delivered the following judgment on May 9, 1986.

.....

[1] Stevenson, J.: The Crown appeals from the acquittal of the respondent on an information charging that it:

> "did, at the City of Fredericton, in the Province of New Brunswick, on the 25th, 26th and 28th days of January 1985, for the purpose of promoting the supply of a product, to wit: automobiles, make representation to the public by way of newspaper advertisement, which read in part '...4.9% interest rate, for a limited time only John Clark is offering an unbelievably low 4.9% interest rate ...', which advertisement was misleading in a material respect contrary to and in violation of s. 36(1)(a) of the **Combines Investigation Act**..."

[2] The relevant provisions of the **Combines Investigation Act**, R.S.C. 1970, c. C-23, are:

> "36.1(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> (a) make a representation to the public that is false or misleading in a material respect;
>
> "(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect."

[3] The charge was one of making a misleading representation, not a false representation. The information did not

[1] M. le juge Stevenson [Traduction]: La Couronne porte en appel l'acquittement de l'intimée relativement à une dénonciation l'accusant d'

> "avoir, dans la cité de Fredericton, province du Nouveau-Brunswick, les 25, 26 et 28 janvier 1985, aux fins de promouvoir la fourniture d'un produit, à savoir des automobiles, donné des indications au public au moyen d'une annonce dans le journal, qui disait en partie '... taux d'intérêt de 4,9%, pendant une période de temps limitée seulement, John Clark offre un taux d'intérêt incroyablement bas de 4,9%...'; cette annonce était trompeuse sur un point important contrairement à l'al. 36(1)a) de la **Loi relative aux enquêtes sur les coalitions**..."

[2] Les dispositions pertinentes de la **Loi relative aux enquêtes sur les coalitions**, S.R.C. 1970, c. C-23, sont les suivantes:

> "36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques
>
> a) donner au public des indications fausses ou trompeuses sur un point important;
>
> "4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral."

[3] L'accusation portait que l'on avait donné des indications trompeuses, et non des indications fausses. La dénon-

set out the material respect in which the representation was alleged to be misleading, but no particulars were sought and no objection was made to the form of the information.

[4] The advertisement that is the subject matter of the charge appeared in the Fredericton Daily Gleaner on Friday, January 25, Saturday, January 26 and Monday, January 28, 1985. It was four columns wide and eighteen inches deep. A photocopy of the advertisement is attached to this decision. The content of the advertisement relevant to the charge are the following words and figures:

"LIMITED OFFER

4.9% INTEREST RATE

For a limited time only John Clarke is offering an unbelievably low 4.9% interest rate... Visit CLARK CHEV OLDS CADILLAC for complete details regarding terms and conditions.

NOW IS THE TIME TO BUY and SAVE

ACT NOW and SAVE

Low Interest Rate"

[5] The advertisement was ambiguous. In the words of Terry Amos, a defence witness:

"It could mean one of two things I suppose - whether that 4.9% is limited or whether the time that this 4.9% is being offered is limited. It is not clear."

[6] When interested parties responded to the invitation to visit the dealership for complete details they learned that the terms and conditions were as follows. The respondent would approach several banks and General Motors Acceptance Corporation to arrange an installment loan for a purchaser at interest rates in the 14% to 17% range.

ciation ne précisait pas sur quel point important les indications auraient été trompeuses, mais aucun détail n'a été démandé et aucune objection n'a été soulevée relativement au contenu de la dénonciation.

[4] L'annonce publicitaire sur laquelle porte l'accusation a paru dans le Fredericton Daily Gleaner le vendredi 25 janvier, le samedi 26 janvier et le lundi 28 janvier 1985. L'annonce s'étendait sur quatre colonnes de large et sur 18 pouces de long. Une photocopie de l'annonce est jointe à la présente décision. Les mots et les chiffres de l'annonce, sur lesquels porte l'accusation, sont les suivants:

"OFFRE LIMITEE

TAUX D'INTERET DE 4,9%

Pendant une période de temps limitée seulement, John Clark offre un taux d'intérêt incroyablement bas de 4,9%- ... Rendez-vous chez CLARK CHEV OLDS CADILLAC pour tous les détails ayant trait aux modalités.

C'EST MAINTENANT LE TEMPS D'ACHETER et D'ECONOMISER

AGISSEZ MAINTENANT et ECONOMISEZ

Taux d'intérêt bas"

[5] L'annonce était ambiguë. Selon Terry Amos, un témoin de la défense:

"Cela peut vouloir dire deux choses je suppose - soit que le taux d'intérêt de 4,9% est limité ou que la période de temps pendant laquelle on offre ce taux d'intérêt de 4,9% est limitée. Ce n'est pas clair."

[6] Lorsque des personnes intéressées ont répondu à l'invitation de se rendre chez le concessionnaire pour obtenir tous les détails, elles ont appris que les modalités étaient les suivantes. L'intimée ferait des démarches auprès de quelques banques et auprès de la General Motors Acceptance Corporation pour obtenir pour l'acheteur un prêt

A conditional sales agreement would be prepared requiring the purchaser of the vehicle to make monthly payments based on that interest rate. The respondent would then calculate what the monthly payment would be if the conditional sales contract was based on an interest rate of 4.9%. The respondent would then give the purchaser a cash rebate equal to the difference between the monthly payment called for by the conditional sale contract and the monthly payment calculated at 4.9%, for six months. The purchaser could take the cash or could apply it to his down-payment. In other words, although the contract made no reference to a 4.9% interest rate the respondent would, by the device of a cash rebate, reduce the interest on the buyer's loan to 4.9% for the first six months of the term of the loan.

remboursable par versements à un taux d'intérêt se situant entre 14% et 17%. Un contrat de vente conditionnelle serait préparé engageant l'acheteur du véhicule à faire des versements mensuels basés sur ce taux d'intérêt. L'intimée calculerait alors quel serait le versement mensuel si le contrat de vente conditionnelle stipulait un taux d'intérêt de 4,9%. L'intimée donnerait alors à l'acheteur une remise au comptant équivalant à la différence entre le versement prévu dans le contrat de vente conditionnelle et le versement mensuel calculé au taux de 4,9%, sur une période de six mois. L'acheteur pourrait prendre cette somme en espèces ou la faire porter au crédit de son versement initial. En d'autres mots, bien qu'il ne soit pas question d'un taux d'intérêt de 4,9% dans le contrat, l'intimée, au moyen d'une remise au comptant, réduirait le taux d'intérêt sur le prêt de l'acheteur à 4,9% pendant les six premiers mois de la durée du prêt.

[7] The Crown contends that the advertisement was misleading in that it represented an interest rate of 4.9% for any financing the prospective buyer needed to purchase a vehicle.

[7] La Couronne prétend que l'annonce était trompeuse en ceci qu'elle indiquait un taux d'intérêt de 4,9% sur toute somme que l'acheteur éventuel devrait emprunter pour acheter un véhicule.

[8] While, at first glance, the advertisement might give the impression of holding out a 4.9% interest rate it was qualified by the invitation to the public to visit the respondent for complete details. Indeed the advertisement suggested it should not be taken seriously: It said the 4.9% rate was "unbelievably low".

[8] Bien qu'à première vue l'annonce puisse donner l'impression d'offrir un taux d'intérêt de 4,9%, elle était accompagnée d'une invitation au public de se rendre chez l'intimée pour prendre connaissance de tous les détails. Effectivement, l'annonce laissait entendre qu'elle ne devait pas être prise au sérieux: il était écrit que la taux d'intérêt de 4,9% était "incroyablement bas".

[9] Four persons who had been attracted to the respondent's place of business by the advertisement testified at the trial. Dana Stairs purchased a car and entered into a conditional sales contract with interest at 17.25%. While on direct-examination he said he did not realize that he had not received a 4.9% rate until reading the contract after returning home, on cross-examination he was led to admit that he knew before

[9] Quatre personnes qui ont été attirées à l'établissement de l'intimée par l'annonce ont témoigné au procès. Dana Stairs a acheté une voiture et a signé un contrat de vente conditionnelle à un taux d'intérêt de 17,25%. Lors de l'interrogatoire principal, il a dit que c'était seulement à son retour chez lui, et après avoir lu le contrat, qu'il s'était rendu compte qu'il n'avait pas obtenu un taux

signing the contract that he was not getting a 4.9% interest rate. His evidence was confusing and the trial judge did not make a clear finding of fact. Gary Charles Tomlison testified that he found it hard to believe that one could get a loan for 4.9%. He approached one of the respondent's sales representatives and asked what the catch was. Mr. Amos, whose evidence I have already referred to, inquired of a salesman as to what was meant by 4.9%. James Arthur Pentland telephoned the respondent's place of business to ask "just exactly how the deal worked".

d'intérêt de 4,9%; lors du contre-interrogatoire, il a été amené à admettre qu'il savait, avant de signer le contrat, qu'il n'avait pas obtenu un taux d'intérêt de 4,9%. Son témoignage n'était pas clair et le juge du procès n'a pas tiré de conclusion limpide sur les faits. Gary Charles Tomlison a témoigné qu'il avait eu de la peine à croire que quelqu'un pouvait obtenir un prêt à un taux d'intérêt de 4,9%. Il a parlé à l'un des vendeurs de l'intimée et lui a demandé où était l'attrape. M. Amos, dont j'ai déjà cité le témoignage, s'est informé auprès d'un vendeur de ce que l'on entendait par 4,9%. James Arthur Pentland a téléphoné à l'établissement de l'intimée pour demander "en quoi exactement consistait l'affaire".

[10] It is, of course, not necessary for a conviction to prove that anyone was in fact misled. The question is whether the representation was misleading.

[10] Evidemment, il n'est pas nécessaire, pour inscrire une déclaration de culpabilité, de prouver que quelqu'un a effectivement été trompé. La question est de savoir si les indications étaient trompeuses.

[11] In acquitting the respondent the trial judge said:

> "The thrust of the Prosecution I take it is that, as elicited from the witnesses was that there was, by this ad, implanted in the minds of readers the suggestion either - certainly not expressed but by implication I guess, the suggestion that this 4.9% interest rate was going to be applicable to the life of the financing, but I think when you read the ad and read it in its entirety - it can't be approached by simply reading part of it or by simply skimming it, I think one has to look at it and say 'what would a reasonably intelligent person who is interested in this type of offer take from the ad in question'. Now I expected more might be made of the term 'for a limited time only' and that an argument would be that the limited time was referring to the - the limited time was some portion of the life of the financing. That doesn't appear to have been advanced although I think it could have been.

[11] En acquittant l'intimée, le juge du procès a dit:

> "L'argument principal soulevé par la Couronne d'après moi est que, comme on a pu l'apprendre des témoins, était qu'il y a eu, au moyen de cette annonce, une suggestion qui a pris racine dans la tête des lecteurs soit que - certainement pas expresse mais qui était sous-entendue je crois, la suggestion que ce taux d'intérêt de 4,9% serait applicable à toute la durée du prêt, mais je crois que lorsqu'on lit l'annonce et qu'on la lit dans sa totalité - on ne peut pas en lire une partie seulement ni la lire en diagonale, je crois qu'on doit la regarder et dire 'qu'est-ce qu'une personne raisonnablement intelligente qui s'intéresse à ce genre d'offre comprendrait de l'annonce en question'. Je m'attendais à ce que l'on fasse plus de cas de l'expression 'pendant une période de temps limitée seulement' et que l'argument serait que la période de temps limitée avait trait à la - la période

But I think what is of particular importance in the ad is that there does exist, in clear print, and it is stated pretty concisely, succinctly, that one should contact Clark's for complete details regarding terms and conditions. Now while the ad does not set out what those terms and conditions are, in my view it clearly states that terms and conditions are going to apply. I would think that the average person of reasonable intelligence and reasonably well informed would appreciate that there are all sorts of different terms and conditions that do apply to financing with respect to eligibility and other matters as well. I guess the acid test of the situation is that two out of the three people who saw that ad contacted Clark's for the purpose of finding out what the terms and conditions were.

. . . . .

"Likewise, if this ad contained no mention of conditions or details and simply indicated 4.9% interest rate without anything more, then I would think, in my view at least, the Crown would likely have succeeded in the prosecution of the matter. But when reads that as an intelligent person I think it comes out crystal clear, or it should come out as being crystal clear that this 4.9% interest rate has conditions, or terms and conditions which are applicable to it, and invites people to get in touch with Clark's to find out basically what the complete story on the matter is. Now as I have said, the legislation does not limit advertisements to those which are absolutely complete in each and every relevant detail. If that were the case then I suppose again the Crown would succeed because it does not set out the terms and conditions, and if that is the intent of the legislation that where terms

de temps limitée était une partie de la durée du prêt. Ca ne semble pas avoir été soulevé bien que je crois qu'on aurait pu le faire. Mais, à mon avis, ce qui a une importance particulière dans l'annonce c'est qu'il est écrit, en toutes lettres, et c'est dit de façon assez concise, succincte, que l'on doit entrer en contact avec le concessionnaire Clark pour obtenir tous les détails au sujet des modalités. Bien que l'annonce ne précise pas quelles sont ces modalités, à mon avis, elle établit clairement qu'il y aura des modalités. Je serais porté à croire que la personne ordinaire d'intelligence moyenne et raisonnablement bien informée serait en mesure de comprendre qu'il existe toutes sortes de modalités qui s'appliquent aux prêts relativement à l'admissibilité et à d'autres questions également. Je crois que l'épreuve décisive à ce sujet est que deux personnes sur trois qui ont vu l'annonce sont entrées en contact avec le concessionnaire Clark dans le but de s'informer des modalités.

. . . . .

"De même, si l'annonce n'avait pas fait mention de conditions ou de détails et avait simplement indiqué un taux d'intérêt de 4,9% sans mentionner autre chose, alors je serais porté à croire, à mon avis au moins, que la Couronne aurait probablement eu gain de cause dans la poursuite. Mais lorsqu'on lit l'annonce comme le ferait une personne intelligente, je crois que c'est clair comme le jour, ou que ça devrait être clair comme le jour, que cette offre d'un taux d'intérêt de 4,9% est assortie de conditions, ou de modalités, et que l'on invite les gens à entrer en contact avec le concessionnaire Clark pour prendre connaissance de ce dont il s'agit exactement. Comme je l'ai déjà dit, la loi ne limite pas la publicité aux annonces qui sont tout à fait complètes dans chacun des détails pertinents. Si c'était le cas, alors je suppose encore que la Couronne aurait

and conditions are applicable they must be set out then the legislation will have to be amended to say that. But here, as I have already indicated, in my view there is a clear and concise statement that terms and conditions do apply and I don't think it is straining the interpretation of that particular ad to suggest, and I believe the defence did, that what it amounted to was an invitation to come in and explore what terms and conditions had to be met to gain the benefit of this 4.9% interest rate. There's nothing; there's no express or implied - or nothing in there either expressly or by implication which suggests that it is going to go on for any given period of time."

gain de cause étant donné que les modalités ne sont pas énoncées, et si le législateur voulait exiger la mention expresse de toute modalité, il faudrait que la loi soit modifiée en conséquence. Mais en l'espèce, comme je l'ai déjà mentionné, j'estime qu'il y a un énoncé clair et concis qu'il y a des modalités et je ne crois pas que c'est pousser trop loin le sens de l'annonce en question de dire, comme je crois que la défense l'a fait, que l'annonce équivalait à une invitation à rendre visite et à prendre connaissance des modalités qu'on devrait respecter pour bénéficier de ce taux d'intérêt de 4,9%. Il n'y a rien; il n'y a rien qui soit écrit ou sous-entendu - ou rien là-dedans qui dise expressément ou implicitement que c'est pour une période de temps donnée."

[12] The grounds of appeal are:

"(a) The learned trial judge erred in law in applying the 'average person of reasonable intelligence and reasonably well informed' test in the construction of the particular advertisement.

"(b) The learned trial judge erred in law in failing to apply the average reader and common sense approach to the construction of the advertisement.

"(c) The learned trial judge erred in law in failing to apply the provisions of section 36(4) of the **Combines Investigation Act** in the construction of the advertisement."

[12] Les moyens d'appel sont les suivants:

"(a) Le savant juge du procès a commis une erreur de droit en appliquant le critère de la 'personne moyenne d'intelligence raisonnable et raisonnablement bien informée' dans l'interprétation de l'annonce en question.

"(b) Le savant juge du procès a commis une erreur de droit en n'utilisant pas l'approche du lecteur moyen et du bon sens dans l'interprétation de l'annonce.

"(c) Le savant juge du procès a commis une erreur de droit en ne mettant pas en application, dans l'interprétation de l'annonce, les dispositions du paragr. 36(4) de la **Loi relative aux enquêtes sur les coalitions**."

[13] In giving his decision the trial judge referred to the decision of the Ontario Court of Appeal in **R. v. International Vacations Ltd.** (1980), 59 C.C.C.(2d) 557. That case involved advertisements for overseas airline travel. Blair, J.A., dealt with the question of construction of the adver-

[13] En rendant sa décision, le juge de procès s'est référé à la décision de la Cour d'appel de l'Ontario dans **R. v. International Vacations Ltd.** (1980), 59 C.C.C.(2d) 557. Dans cette affaire, il était question d'annonces de voyages par avion à l'étranger. M. le juge Blair de la Cour d'appel, a tranché la

tisements as follows at pp. 561-563:

"It remains to consider what is the proper construction to be placed upon the advertisements in this case. In **R. v. R.M. Lowe Real Estate Ltd. and Pastoria Holdings Ltd.** (1978), 40 C.C.C.(2d) 529; 39 C.P.R.(2d) 266, which dealt with a real estate advertisement, Arnup, J.A., stated the common sense principle which should guide the interpretation of any advertisement when he said at pp. 530-1:

> '... the meaning to be placed upon the advertisement is that meaning which would be discerned by the average reader who was interested in making a purchase of a house in that locality...'

"This approach is consistent with s. 36(4) of the **Combines Investigation Act** which directs:

> '36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.'

"The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import of the advertisement would be absolutely clear to such a discerning reader. At the head of the advertisement it is stated that Intervac's flights are 'via Wardair'. The reader is invited to 'Check the schedule below and pick the flight that's the right date, and the right price, for you'. The flights are then listed in schedules in small print and, as noted above, at the bottom in plain, ordinary and clear type the following appears: 'This is Wardair's operating sched-

question de l'interprétation des annonces comme suit, aux p. 561 à 563:

"Il reste à examiner quelle est la bonne interprétation à donner aux annonces dans la présente affaire. Dans **R. v. R.M. Lowe Real Estate Ltd. and Pastoria Holdings Ltd.** (1978), 40 C.C.C.(2d) 529; 39 C.P.R.(2d) 266, qui avait trait à une annonce immobilière, M. le juge Arnup, de la Cour d'appel, a exposé la règle de bon sens qui devrait guider l'interprétation de toute annonce lorsqu'il a dit, aux p. 530 et 531:

> '... le sens que l'on doit donner à l'annonce est celui qui lui serait accordé par le lecteur moyen qui est intéressé à acheter une maison dans cette localité...'

"Cette approche est compatible avec le paragr. 36(4) de la **Loi relative aux enquêtes sur les coalitions** qui dit:

> '36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.'

"On peut supposer que le lecteur moyen qui est intéressé à faire un voyage à l'étranger est instruit et intelligent, et qu'il y a peu de chances qu'il débourse une somme assez importante sans avoir lu soigneusement l'annonce. Il me semble que le sens de l'annonce serait tout à fait clair pour un lecteur ayant un tel esprit de discernement. En tête de l'annonce, il est dit que les vols Intervac se font 'via Wardair'. On lance au lecteur l'invitation suivante: 'Prenez connaissance de l'horaire ci-dessous et choisissez le vol à la date et au prix qui vous conviennent'. Les horaires des vols figurent en petits caractères et, comme il a été signalé ci-dessus, au bas de l'annonce, en caractères ordinaires, simples et clairs, il est

ule. Please check individual flight availabilities with a travel agent or Intervac, as some flights may be sold out.'

"The learned County Court judge treated this statement as what he called a 'disclaimer' which was separate and apart from the main body of the advertisement. He held, as I understand his language, that the publication of the schedule represented that space was available on the flights and that the disclaimer was ineffective to correct this impression. In reaching this conclusion he relied on **R. v. Saro's Ltd.** (1978), 43 C.C.C.(2d) 310; 40 C.P.R. (2d) 208. In that case television sets had been advertised for sale at less than the 'regular' price listed in the advertisement. In small print near a bottom corner of the advertisement, in what the learned trial judge called a 'disclaimer', the regular price listed in the advertisement was defined as being the manufacturer's suggested list price. In fact the regular price in the area for television sets sold by all retail dealers was proven to be considerably below the suggested list prices of manufacturers. It was, therefore, held that, despite the so-called disclaimer, the advertisement was misleading as to the regular price for which the goods were ordinarily sold. I have some difficulty in understanding the use of the term 'disclaimer' in **Saro's** because it appears to me that the so-called disclaimer formed an essential part of the representation that the television sets were usually sold for the higher suggested price named in the disclaimer rather than the lower regular price prevailing in the market.

"Whatever may be the correct interpretation of the **Saro's** decision, I am of the respectful opinion that the learned County Court judge erred in

écrit: 'La présente est l'horaire des vols de Wardair. Veuillez vérifier auprès d'un agent de voyages ou d'Intervac la disponibilité des places sur les vols en particulier étant donné que certains vols peuvent être complets'.

"Le savant juge de la cour de comté a qualifié cet énoncé de ce qu'il a appelé une 'dénégation' qui était distincte et séparée du corps de l'annonce. Il a jugé, si je comprends bien son discours, que la publication de l'horaire laissait entendre qu'il y avait des places libres sur ces vols et que la dénégation n'avait pas pour effet de corriger cette impression. En tirant cette conclusion, il s'est appuyé sur **R. v. Saro's Ltd.** (1978), 43 C.C.C.(2d) 310, 40 C.P.R. (2d) 208. Dans cette affaire, des téléviseurs avaient été annoncés à un prix plus bas que le prix 'courant' figurant dans l'annonce. En petits caractères près d'un coin au bas de l'annonce, dans ce que le savant juge du procès a qualifié de 'dénégation', le prix courant figurant dans l'annonce était défini comme étant le prix suggéré sur la liste des prix du fabricant. En fait, il a été prouvé que le prix courant des téléviseurs chez tous les détaillants de la région était considérablement plus bas que la prix suggéré sur la liste des prix du fabricant. Par conséquent, il a été conclu que, malgré la soi-disant dénégation, l'annonce était trompeuse relativement au prix courant auquel se vendait habituellement la marchandise. J'ai quelque difficulté à comprendre l'emploi du terme 'dénégation' dans **Saro's** parce qu'il me semble que la soi-disant dénégation constitue l'essence des indications que les téléviseurs se vendaient habituellement au prix plus élevé suggéré dans la dénégation plutôt qu'au prix courant plus bas du marché.

"Quelle que soit la bonne interprétation de la décision **Saro's**, je suis d'avis, en toute déférence, que le savant juge de la cour de comté a

compartmentalizing Intervac's advertising and treating the important statement which appears under the schedules as if it were separate from the main text. It is, on the contrary, an integral part of the advertisement. It makes it clear beyond any possibility of doubt that Intervac does not hold out that seats are available on all flights listed in the schedules. The advertisement states that 'individual flight availabilities' should be checked 'as some flights may be sold out'. I am unable to conceive how the matter could be put more plainly. I, therefore, conclude that the advertisements were not 'false or misleading' within the meaning of the **Combines Investigation Act**."

commis une erreur en compartimentant l'annonce d'Intervac et en traitant l'énoncé important qui apparaît au-dessous des horaires comme s'il était séparé du texte principal. Il s'agit, au contraire, d'une partie intégrante de l'annonce. Cet énoncé indique clairement, sans l'ombre d'un doute, qu'Intervac ne prétend pas qu'il y a des places libres sur tous les vols énumérés dans les horaires. L'annonce dit qu'il faudrait 'vérifier... la disponibilité des places sur les vols en particulier étant donné que certains vols peuvent être complets'. Je suis incapable de concevoir comment on aurait pu présenter l'affaire de façon plus claire. Par conséquent, je conclus que les annonces n'étaient pas 'fausses ou trompeuses' au sens de la **Loi relative aux enquêtes sur les coalitions**."

[14] Counsel for the Crown here relies primarily on the judgment of Clement, J.A., of the Alberta Court of Appeal in **R. v. Imperial Tobacco Products Ltd.** (1971), 4 C.C.C.(2d) 423. That case involved an earlier version of the false advertising provisions of the **Combines Investigation Act** that prohibited publishing an advertisement containing a statement that purported to be a true statement of fact but that was untrue, deceptive or misleading. At pages 440-441 Mr. Justice Clement said:

[14] En l'espèce, l'avocat de la Couronne invoque principalement le jugement de M. le juge Clement de la Cour d'appel de l'Alberta dans **R. v. Imperial Tobacco Products Ltd.** (1971), 4 C.C.C.(2d) 423. Cette affaire mettait en cause une version antérieure des dispositions relatives à la fausse publicité prévues dans la **Loi relative aux enquêtes sur les coalitions** visant à interdire la publication d'une annonce contenant une déclaration présentée comme déclaration de fait, mais qui était fausse, fallacieuse ou trompeuse. Aux pages 440 et 441, M. le juge Clement a dit:

"Nevertheless, the determination should not be coerced one way or the other, either by narrow or by vague parameters. The issue is whether in the context of the whole advertisement, the statement purports to be true, and the question is the standard to be used in the determination. The learned trial judge adopted as his, a phrase appearing in **Aronberg et al. v. F.T.C.** (1943), 132 F. 2d 165 at p. 167. The paragraph in which that phrase occurs is in these terms:

"Néanmoins, la décision ne devrait pas être forcée d'une façon ou d'une autre par des paramètres étroits ou vagues. Le point en litige est de savoir si, dans le contexte de l'annonce dans sa totalité, la déclaration est présentée comme vraie, et la question est de savoir quelle est la norme à utiliser pour prendre la décision. Le savant juge du procès fait sienne une locution que l'on trouve dans **Aronberg et al. v. F.T.C.** (1943), 132 F. 2d 165, à la p. 167. Le paragraphe dans lequel se trouve cette locution est rédigé comme suit:

'The law is not made for experts

'La loi n'est pas faite pour les

but to protect the public, -- that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions. Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal.'

"On this point, the following passage appears in **F.T.C. v. Sterling Drug Inc.**, supra, [at p. 674]:

'It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied".'

"And, in **Charles of the Ritz Distributors Corp. v. F.T.C.** (1944), 143 F. 2d 676, specifically referred to by the learned trial judge, it was said [at p. 679]:

'... and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced".'

"As I have noted above, an offence in respect of advertising under the **Federal Trade Commission Act**, has somewhat different characteristics from the offence with which we are here concerned, but nevertheless it appears to me that the foregoing

experts mais pour protéger le public, -- cette vaste multitude qui comprend les ignorants, les irréfléchis et les crédules qui, lorsqu'ils achètent, ne s'arrêtent pas pour analyser mais se laissent trop souvent guider par les impressions générales et les apparences. Les annonces doivent être examinées dans leur totalité, en tenant compte de la façon dont elles seraient lues par ceux à qui elles s'adressent.'

"A ce sujet, le passage suivant se trouve dans **F.T.C. v. Sterling Drug Inc.**, précité, [à la p. 674]:

'Par conséquent, il est nécessaire dans ces cas d'examiner l'annonce dans sa totalité et de ne pas faire de dissection discutable. On devrait examiner toute la mosaïque plutôt que chaque pièce séparément. "Habituellement, le public acheteur n'étudie pas ou ne pèse pas soigneusement chaque mot d'une annonce. La dernière impression qui reste dans l'esprit du lecteur découle de l'ensemble non seulement de ce qui est dit mais également de ce qui est raisonnablement sous-entendu".'

"Et, dans l'arrêt **Charles of the Ritz Distributors Corp. v. F.T.C.** (1944), 143 F. 2d 676, auquel le savant juge du procès s'est référé spécifiquement, il a été dit [à la p. 679]:

'... et le "fait qu'une fausse déclaration soit manifestement fausse pour ceux qui sont avertis et qui ont de l'expérience ne change pas le caractère de la déclaration, pas plus qu'il ne lui enlève le pouvoir de tromper ceux qui ont moins d'expérience".'

"Comme je l'ai mentionné précédemment, une infraction relative à la publicité visée par la **Federal Trade Commission Act** a des caractéristiques quelque peu différentes de l'infraction qui nous est présentée dans la cause en l'espèce, mais il me semble

observations afford some sensible guidance. The law does not recognize a particular class of the public as ignorant, unthinking and credulous; nor should it measure these matters by the standards of the skeptical who have learned by bitter experience to beware of commercial advertisements. What is the immediate impression that the advertisement makes? Does the impugned statement stand out so that in fact it does not appear to be modified by the context in which it appears unless the whole is examined with care? Having these considerations in mind, I am not prepared to disagree with the conclusion reached by the learned trial judge."

néanmoins que les observations précédentes contiennent des conseils judicieux. La loi ne distingue pas une classe particulière du public comme étant ignorante, irréfléchie et crédule, pas plus qu'elle ne devrait peser ces questions d'après le normes des sceptiques qui ont appris à la suite d'expériences malheureuses à se méfier des annonces commerciales. Quelle est l'impression immédiate que produit l'annonce? La déclaration en cause ressort-elle à un point tel que le contexte dans lequel elle apparaît ne semble pas la modifier à moins qu'il soit procédé à un examen minutieux de tout le contexte? Avec ces considérations à l'esprit, je ne suis pas prêt à me prononcer contre la conclusion du savant juge du procès."

[15] Counsel for the Crown submits that the members of the public who buy cars are less likely to be as literate, intelligent or unlikely to make a purchase without carefully reading the advertisement than the overseas travellers to whom the advertisement in the **International Vacations** case was directed. That may or may not be so. One still has to look at both the general impression conveyed by and the literal meaning of the advertisement to determine whether it is misleading.

[15] L'avocat de la Couronne a fait valoir qu'il est peu probable que les membres du public qui achètent des voitures soient aussi instruits ou intelligents que les voyageurs à l'étranger auxquels était destinée l'annonce dans l'affaire **International Vacations**, et aussi peu portés à faire un achat sans lire soigneusement l'annonce. Cela peut ou non être vrai. On doit cependant tenir compte à la fois de l'impression générale qui se dégage de l'annonce et de son sens littéral pour déterminer si elle est trompeuse.

[16] Considering the language of the entire advertisement, its literal meaning, and the impression it conveyed, I am unable to conclude that the trial judge erred as alleged in the grounds of appeal. Nor am I convinced that he erred in his conclusion that the advertisement was not misleading.

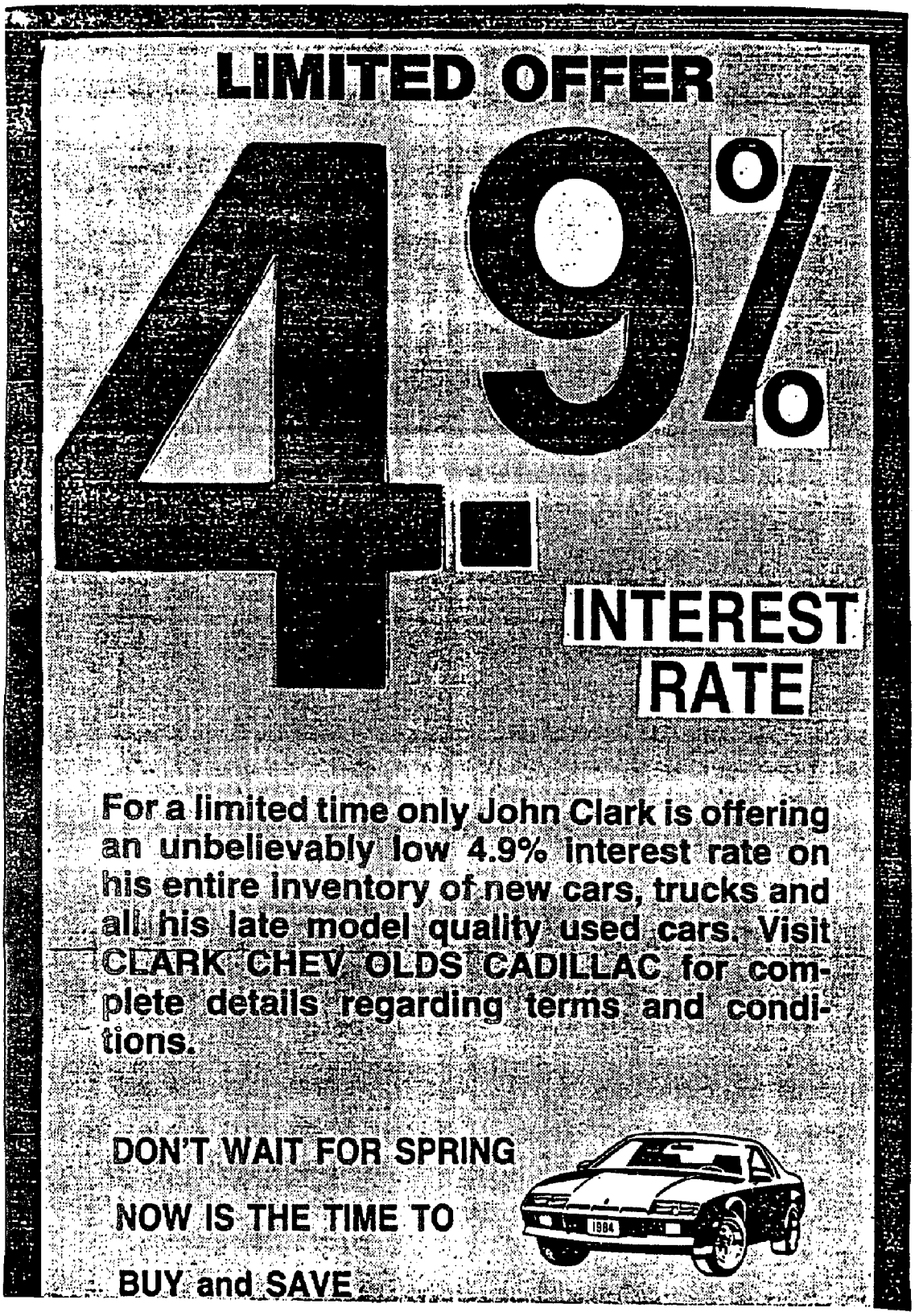
[16] Compte tenu du contenu de toute l'annonce, de son sens littéral et de l'impression qui s'en dégage, je suis incapable de conclure que le juge du procès a commis une erreur comme on l'allègue dans les moyens d'appel. Je ne suis pas non plus convaincu qu'il a commis une erreur dans sa conclusion que la publicité n'était pas trompeuse.

[17] The appeal is dismissed.

[17] L'appel est rejeté.

Appeal dismissed.

Appel rejeté.



Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon

Citation: R. v. Coates
Date: 1981-12-04
Docket: D.C.C.A. No. 30

Between:
R.
and
Coates

Sirois, J.

Counsel:
D. Pelletier, for the appellant;
P. MacKinnon, for the respondent.

[1] Sirois, J.: Prior to arguments being presented on this appeal, the following admission of facts was filed by the respondent:

> 1. That the University of Saskatchewan Traffic Regulations were published in the Saskatchewan Gazette on September 29, 1978.
>
> 2. That the Unviersity (sic) of Saskatchewan Traffic Regulations have been approved by the Highway Traffic Board pursuant to Section 220 of the *Vehicles Act.*
>
> 3. That on the 18th day of December, A.D. 1980, a vehicle with License Plate No. KDZ 463 was parked, within the meaning of the University Traffic Regulations, on Gymnasium Road on the campus of the University of Saskatchewan in an area not designated for parking and which was not a bus stop, a loading zone or a metered zone contrary to Section 6.6.1 of the University of Saskatchewan Traffic Regulations.

At issue in this appeal is the ownership of the vehicle in question and more particularly whether a certified copy of the certificate of registration of said private passenger vehicle is admissible in evidence in proof of the said ownership.

[2] Counsel for the respondent took the position that we are faced with a clear legislative oversight that can only be corrected by the legislature. In specific instances the legislature has seen fit to provide for admission of certificates as prima facie evidence such as in the *Vehicles Act,* R.S.S. 1978, c. V-3, sec. 251; the *Liquor Licensing Act,* R.S.S. 1978, c. L-21, sec. 163; the *Vital Statistics Act,* R.S.S. 1978, c. V-7, sec. 42(1), he said. Sec. 220(1) of the *Vehicles Act* supra states in part: "No bylaw of a city, town, village or rural municipality heretofore or hereafter passed, regulating vehicles, the parking of vehicles or the use of public highways, shall have

any effect unless it is approved by the board but where any such bylaw has heretofore been approved in accordance with any former *Vehicles Act* or any former Act of like intent, it shall, insofar as it is not inconsistent with this Act, be deemed to have been approved by the board under this subsection". This section does not refer to a bylaw of the *'University'* and it should have according to counsel for the respondent. Neither is there any provision in the *University Act* allowing the tendering of a certificate of registration as proof of ownership of vehicles that have been ticketed.

[3] The respondent did not ignore s. 12 of the *Saskatchewan Evidence Act,* R.S.S. 1978, c. S-16, which reads as follows: "In every case in which the original record could be received in evidence, a copy of a grant, map, plan, report letter or of any official or public document belonging to or deposited in a department of the Government of Canada, of this province or of any province or territory of Canada, purporting to be certified under the hand of any office a person in whose custody the grant, map, plan, report letter or official or public document is placed, or a copy of a document, bylaw, rule, regulation or proceeding or of an entry in a register or other book of a municipal or other corporation created by charter or statute of Canada, or by charter or ordinance of the North West Territories or by charter or statute of Saskatchewan or of any province of territory of Canada, purporting to be certified under the seal of the corporation and the hand of the presiding officer, clerk or secretary thereof, shall be received in evidence without proof of the seal of the corporation or of the signature or of the official character of the person or persons appearing to have signed the same and without further proof thereof".

[4] The respondent said of this section that it had not been interpreted on many occasions. In any event, he went on to say that if s. 12 of the *Saskatchewan Evidence Act* was interpreted to allow the admission of certificates of registration of vehicles and copies of these certificates, then there would be no reason to s. 251 of the *Vehicles Act* or for s. 42 of the *Vital Statistics Act* to have been included in those statutes. It was not clear that s. 12 applied here he said.

[5] The appellant took the position that a certified copy of the certificate of registration was admissible in evidence either pursuant to s. 251 of the *Vehicles Act* or in the alternative pursuant to s. 12 of the *Saskatchewan Evidence Act* supra.

[6] The statutory authority for the making of parking regulations is found in s. 74 of the *University of Saskatchewan Act,* R.S.S. 1978, c. U-6, which reads as follows:

> 74.(1) in this section:
>
> (a) 'regulation' means a regulation made under this section, which regulation shall not have effect until published in the Gazette;
>
> (b) 'university campus' includes any lands under the administration and control of the University of Saskatchewan situated in or in the vicinity of the city of Saskatoon, in the province of Saskatchewan, and any future additions made

thereto;

(c) 'vehicle' means a vehicle as defined in the *Vehicles Act.*

(2) Notwithstanding the *Urban Municipality Act,* and subject to the provisions of section 220 of the *Vehicles Act,* which section shall apply *mutatis mutandis,* the board shall have power to make regulations controlling pedestrians and the operation, including traffic control, parking and standing of vehicles on the university campus and may impose fines and penalties for the violation thereof, determine the consequences of non-payment of any fine or penalty so imposed and delegate to any person or persons the right to enforce the said regulations and levy, collect and administer the fines or penalties imposed upon any person guilty of an infraction of the said regulations; and the exercise of such power shall be deemed to include the right:

(a) to remove or cause the removal of any vehicle in violation of the said regulations, to impound the said vehicle and to secure from the owner or operator the cost of removal, impounding and storage whether by way of lien or by action in a court of competent jurisdiction, or by sale of the vehicle at a public auction or otherwise;

(b) to determine the circumstances under which fines, penalties and costs created under this section may be recovered by summary conviction before a provincial magistrate or Justice of the peace and to determine that upon default of payment of said fines, penalties and costs that the person be subject to imprisonment for a term not exceeding thirty days.

Clearly the above section provides the University of Saskatchewan with the power to make parking regulations subject to s. 220 of the *Vehicles Act.* Certainly an area that has 12,000 to 20,000 people within its confines for many hours of each day with a very large number of vehicles circulating in a relatively restricted area must have parking regulations otherwise it would be utter chaos. The situation there is very similar to that encountered in a city except perhaps the average age of persons at the university is somewhat lower than that found in the average urban area. Without enforcement the regulations are meaningless. It is worthwhile noting as well that s. 74(2) says that "Notwithstanding the *Urban Municipality Act* and subject to the provisions of s. 220 of the *Vehicles Act* which sections shall apply *mutatis mutandis* . . ." The words mutatis mutandis are defined as meaning 'with the necessary changes in points of detail' meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices and the like. Or briefly the words mean 'having changed those things which ought to be changed'. A good example of that is to be found in *Re Pinetree Development Co. Ltd. and Ministry of Housing for the Province of Ontario* (1976), 14 O.R.(2d) 687. When subsec. 24(2) of the *Condominium Act* provides that the provisions of s. 33 of the *Planning Act,* R.S.O. 1970, c. 349, that apply to plans of subdivision apply mutatis mutandis to descriptions under the *Condominium Act,* the clear effect of the legislature was to incorporate into the *Condominium Act* all of the appropriate provisions of the *Planning Act* on a continuing basis having changed those

things which ought to be changed from time to time. The enactment of the *Regional Municipality of Durham Act* 1973, providing that the region was a municipality for the purpose of s. 33 of the *Planning Act,* was one of those changes to the *Planning Act* which was contemplated when the *Condominium Act* was enacted and the region is a municipality within the meaning of s. 24 of the *Condominium Act.*

[7] I am satisfied that the regulations passed by the university once published and approved by the Highway Traffic Board are in effect a bylaw, (vide: *Foster v. Reno* (1910), 22 O.L.R. 413; re: *Maloney and Victoria* (1907), 6 W.L.R. 627) as mentioned in s. 220.

[8] S. 229(1) of the *Vehicles Act* which begins "No bylaw of a city, town, village or rural municipality . . ." has had the same opening words for the past 46 years. The University of Saskatchewan campus back in 1935 was still in its embronic stage. One could stand in the heart of the campus all day without seeing a single vehicle. The great transformation at the university occurred in the post-war years when the veterans came home and the student body grew to the 3000 figure in the mid-forties. It has never ceased to grow. A graduate of the dirty thirties needs a map and a guide to pilot him successfully around the university city today. And in spite of numerous and spacious parking lots to accommodate the thousands of vehicles roaming in the campus on working days, one is put to a considerable exercise in finding a parking place. I am satisfied that in giving the university the right to make its own parking regulations subject to the approval of the Highway Traffic Board, the legislature can be seen to have intended to place the university in the same position as a municipality with respect to the question of vehicle control within its limits. If the university is left without the means to enforce the regulations which the legislature has given it the power to make, the intent of the legislature is nullified. This power of enforcement can be said to be lacking if the evidentiary requirements of prosecuting for a violation of the regulations are so cumbersome as to make prosecution impractical. Does one suppose that the legislature intended one set of evidentiary rules to apply in cities, towns, villages and rural municipalities and another set of evidentiary rules to apply on the campus of the University of Saskatchewan? I do not for one moment believe this to have been the intention of the legislators. The *Vehicles Act* purports to, intends to, and indeed does control the operation of vehicles throughout the province of Saskatchewan. There is no exception to this in the *Act* hence the intent of the legislators is clear. To hold otherwise in my opinion leads to an absurdity.

[9] In the construction of statutes there are instances in which the courts will depart from the literal rule. Admittedly such instances are exceptional and it is impossible to lay down any categories of cases in which ordinary grammatical interpretation will inevitably be abandoned: the courts are very reluctant to substitute words in a statute or to add words to it, and it has been said that they will only do so where there is a repugnancy or something which is opposed to good sense. Vide: *Frederichs v. Payne* (1862), 1 H & C 584 per Bramwell B.

[10] On the general principle of avoiding injustice and absurdity, and construction

will, if possible, be rejected ("unless the policy of the act requires it) if it would enable a person by his own act to impair an obligation which he has undertaken, or otherwise to profit by his own wrong. A man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity: Vide: *Kish v. Taylor,* [1911] 1 K.S. 625, per Fletcher Moulton, L.J., at p. 634; *Maxwell on Interpretation of Statutes* (12th Ed.), p. 212. A person who is given the right to drive his vehicle on the property of the University of Saskatchewan, out of consideration for the thousands of other motorists on the premises who have exactly the same rights as he has, must be prepared to accept and submit to the regulations in full force and effect on the said premises. It is ridiculous to suggest otherwise.

[11] The language of a statute is generally extended to new things which were not known and could not have been contemplated when the act was passed, when the act deals with agencies and the thing which afterwards comes into existence was a species of it. For instance the provision of Magna Carta which exempted lords from the liability of having their carts taken for carriage was held to extend to degrees of nobility, not known when it was made, such as dukes, marquises and viscounts. Similarly, bicycles were held to be carriages within the provision of the *Highway Act* 1835 against furious driving and tricycles capable of being propelled by steam to be "locomotives" within the *Locomotives Act* 1861 and 1865 though not invented when these acts were passed. Similarly when in 1935 the *Vehicles Act* which came into existence had the relevant section commencing with the words . . . "No bylaw of a city, town, village or rural municipality", the University of Saskatchewan was not mentioned for vehicular problems in the confines of the latter area were unknown and nonexistent. The legislators have merely copied these words in every consolidation of the said statute down to the present, without giving attention to the changes taking place and their ensuing problems. However, should the language of the statute be extended to cover the situation of today? In spite of what I have just said, I do not believe that the language should be so extended. The words of an act will generally be understood in the sense which they bore when it was passed. Vide: *Gaslight and Coke Co. v. Hardy* (1886), 17 Q.B.D. 619 per Lord Eskan, M.R., at p. 621. Furthermore it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. In *Thompson v. Goold & Co.,* [1910] A.C. 409, at 420 Lord Mersey said: "It is a strong thing to read into an act of parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do." Lord Loreburn L.C. said: "We are not entitled to read words into an act of parliament unless clear reason for it is to be found within the four corners of the act itself." Vide: *Vickers, Sons & Maxim Ltd. v. Evans,* [1910] A.C. 444, at 445. A case not provided for in a statute is not to be dealt with merely because there seems to good reason why it should have been omitted, and the omission appears in consequence to have been unintentional.

[12] I do not feel it is the court's function or duty in this case to read words in the *Vehicles Act* that are not there. It is up to the legislators to do this if they deem it desirable to do so.

[13] However, the matter does not end there. It is true that specific provisions exist in the *Vehicles Act,* the *Liquor Licensing Act* and the *Vital Statistics Act,* supra, whereby either, copies of records certified by the director to be true, or certificates of the clerk or secretary treasurer of a municipality specifying that a bylaw has been approved by the board, or a certificate signed by the chairman, vice-chairman or secretary of the commission that a license has been issued, or certified copies or photographic prints of certificates purporting to be issued under s. 40 of the latter statute, are all admissible as prima facie evidence of the facts recorded therein. Special provision has been made by the legislators in each of these statutes to have certain facts proved in that manner. But I fail to see how these special provisions in any way are in opposition to or in any way derogate from the sweeping provisions of s. 12 of the *Saskatchewan Evidence Act* supra. S. 12 is very clear. It *states that in every case* in which the original record could be received in evidence . . . shall be received in evidence without proof the seal of the corporation or of the signature or of the official character of the person or persons appearing to have signed the same and without further proof thereof. The act is clear that it can apply in *"every case". It* makes no distinction between statutes where special provisions exist and those where they do not.

[14] The certified copy of the certificate of registration of a private passenger vehicle is clearly a public or official document of this province. The original of that document would be admissible in an exception to the hearsay rule as a public official document. Vide: *Finestone v. The Queen,* [1953] 2 S.C.R. 107, *R. v. Hatpin,* [1975] 2 All E.R. 1124; *Sterla v. Freccia* (1880), 5 A.C. 623.

[15] There are 4 requirements necessary for the admissibility of such a document in evidence all of which have been satisfied here:

1. The document must be brought into existence and preserved for public use on a public matter.

2. It must be open to public inspection, i.e. to people having a sufficient interest in the matter such as the peace officers and the provincial insurer, etc.

3. The entry must be made promptly after the events it purports to record, and

4. The entry must be made by a person having a duty to inquire and satisfy himself as to the truth of the recorded facts. Vide also the following sections of the *Vehicles Act:* secs. 25, 30(1), 32, 33(1) and 45.

[16] On the basis of the above provisions, the original of the document, which is now before the court by way of a certified copy, would be admissible in evidence. It follows that the certified copy is also admissible. No one could argue that the director, or his representative, or the chairman of the board of his representative who have care and control of such records could not be summonsed to give viva voce evidence as to the contents of the said records. The *Saskatchewan Evidence Act* as well as the other statutes when special provisions exist to admit such documents in

evidence without calling viva voce evidence, merely avoid what would otherwise be cumbersome evidentiary requirements. It simplifies the processes. The *Saskatchewan Evidence Act* provides supplements, supports and completes the requirements of the law of evidence in this province whenever necessary.

[17] The appeal is allowed. The respondent shall appear before the court below and pay his fine at the earliest opportunity.

Appeal allowed.

1934
* Nov. 20, 21.
1935
* May 13.

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

ALBERT DUBOIS AND ANTOINETTE DUBOIS (SUPPLIANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability of, for negligence of its servant "while acting within the scope of his duties or employment upon any public work" (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—"Public work"—Alleged negligence of occupants of motor car used in detection and elimination of radio inductive interference.

A motor car owned by the Government of Canada, used by the Radio Branch of the Department of Marine in the detection and elimination of radio inductive interference, and specially equipped for that purpose, was, in such use, while returning to headquarters, stopped by its occupants (the driver and a radio electrician) on the highway, and was struck by another car, with fatal result to a passenger in the latter. Damages were claimed from the Crown on the ground that the collision and fatality were due to the negligence of the occupants of the Government car. The case was heard on certain questions of law.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1933] S.C.R. 509 at 514.

1935

THE KING v. DUBOIS.

Held: The Government car was not a "public work," nor were its occupants acting within the scope of their duties or employment "upon any public work," at the time in question, within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34). (Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 195, reversed).

Having regard to the history of the legislation and the judicial decisions upon it (reviewed at length in the judgment), the phrase "public work" in s. 19 (*c*) means a physical thing having a defined area and an ascertained locality, and does not comprehend public service or employment, as such; nor does it include vehicles or vessels. This construction is further supported by the language of the French version of the section.

Semble, where there is a "public work" in the sense above indicated, and an injury is caused through the negligence of a servant of the Crown in the execution of his duties or employment in the construction, repair, care, maintenance, or working of such public work, such an injury may come within the scope of s. 19 (*c*), though the servant's negligent act was not committed on the public work in the physical sense.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), deciding certain questions of law in favour of the suppliants.

The suppliants, by petition of right, claimed against the Crown the sum of $5,000 by reason of the death of their son, Albert Dubois Jr., due, it was alleged, to the negligence of certain servants of the Crown. The following facts of the case are taken from the reasons for judgment of the President of the Exchequer Court:

"There is in the Department of Marine at Ottawa, what is known as the Radio Branch, and one important work carried on by this Branch, from coast to coast in Canada, is the detection and elimination of radio inductive interference. The extent of this particular work may be gathered from the Introduction to a Bulletin issued by that Branch in 1932, entitled "Radio Inductive Interference," and from which it appears that over thirty thousand sources of radio interference have been investigated. The varied and important activities of the Radio Branch may be gathered from its Annual Reports, and the Radiotelegraph Act, Chap. 195, R.S.C., 1927.

"In the investigation of radio inductive interference specially equipped motor cars owned by the Government of Canada are employed by the Radio Branch. In October, 1931, such a car, allocated for such work in the district

(1) [1934] Ex. C.R. 195.

1935
THE KING
v.
DUBOIS.

surrounding Ottawa, was being used on a regular inspection tour for the detection of radio inductive interference, one Pollard being the radio electrician and investigator, and one Langlois the driver, both being regularly employed by the Radio Branch of the Department of Marine; Pollard and Langlois were on this occasion returning to their headquarters at Ottawa, from Fitzroy Harbour, when, towards the close of the afternoon, darkness, rain and fog rendered driving conditions so bad that they were obliged, while nearing the village of Britannia, to stop the car on one side of the travelled road in order to wipe the windshield. An oncoming car, in which Dubois the deceased was a passenger, collided with the Government car with fatal results to Dubois. The suppliants allege that the collision and fatality were due to the negligence of Pollard and Langlois."

The case was set down for hearing on the following questions of law raised by the pleadings, namely: (1) whether the said Government owned motor car, equipped and used as aforesaid and in occupation and control of the persons mentioned on the occasion in question, was at the time of the collision in question a "public work" within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C. 1927, c. 34; and (2) whether Pollard and Langlois were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of said s. 19 (*c*).

It was adjudged in the Exchequer Court that the motor car was at the time in question a public work within the meaning of s. 19 (*c*) of the *Exchequer Court Act;* and that the said Pollard and Langlois were at the time in question officers or servants of the Crown acting within the scope of their duties or employment upon a public work within the meaning of said s. 19 (*c*); and that the Exchequer Court had jurisdiction to entertain the petition of right.

The Crown appealed.

F. P. Varcoe K.C. for the appellant.

C. Morse K.C. and *E. G. Gowling* for the respondent.

The judgment of Duff C.J. and Cannon, Crocket and Hughes JJ. was delivered by

DUFF C.J.—This appeal involves the construction of section 19 of the *Exchequer Court Act* (R.S.C. 1927, ch. 34). The enactment now before us, and the parent enactment which it reproduces in amended form, have been the sub-

ject of a considerable number of decisions in the Exchequer Court and in this Court.

It will appear as we proceed that the most effectual way of ascertaining the import of the language we have to construe is to note the course of legislation upon the subject matter of the enactment from 1870 onward, and to examine with some care the course of judicial decision upon that legislation.

One general observation will not, I think, be superfluous. The judicial function in considering and applying statutes is one of interpretation and interpretation alone. The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.

In this process of interpretation the individual views of the judge as to the subject matter of the legislation are, of course, quite irrelevant. To start with presumptions as to policy is, as Lord Haldane said in *Vacher & Sons Ltd.* v. *London Society of Compositors* (1), to enter upon a labyrinth for the exploration of which the judge is provided with no clue.

We have before us an enactment which presents certain peculiarities. There is a remedy given against the Crown in a limited class of torts; and the reasons which actuated the legislature in prescribing the limitations cannot be stated with any kind of certainty. That is no ground for ignoring the limitations, or for ascribing a non-natural meaning to the words in which they are stated in order to minimize the effect of those words. A particular enactment of the legislature is sometimes, as everybody knows, the result of compromise—a result which it would often be difficult to explain by reference to any broadly conceived principle of legislative action.

It is the duty of the courts to give effect to the language employed, having due regard to the judicial construction which it has received. The parent enactment of section 19 (*c*) of the *Exchequer Court Act,* R.S.C. (1927), cap. 34 (the section we have to construe and apply), was section 16 (*c*) of the statute of 1887 (50-51 Vict., ch. 16)

(1) [1913] A.C. 107, at 113.

1935
THE KING
v.
DUBOIS.
Duff C.J.

(by which statute the Exchequer Court, in its present constitution, came into being); and section 19 (*c*), in the English version, received its present form by an amendment brought into force by section 2 of ch. 23 of the Statutes of 1917. The French version of section 19 (*c*) (in the R.S.C. 1927, cap. 34) was not mentioned in argument. That version, as will very clearly appear at a later stage, is most illuminating upon the question of construction. In the meantime, I shall, in my references to the statute of 1887, and the amendment of 1917, confine myself to the English version. Section 16 of the statute of 1887, which became section 20 in the Revised Statutes of 1906, was as follows:

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

The amendment of 1917 was in these words:

2. Paragraph (*c*) of section twenty of the said *Exchequer Court Act* is repealed and the following is substituted therefor:

"(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work."

An important change was effected in the law in the amendment of 1917; by the simple process of taking the phrase "on any public work" from its place following "property," and with the substitution of the preposition "upon" for the preposition "on," attaching it to the end of the paragraph, immediately after the word "employment." The phrase "public work" remained unchanged, a phrase which also appears, as will be noticed, in paragraph (*b*). It was early held (*The City of Quebec* v. *The Queen* (1)) that while in form section 16 (*c*) (of the Statutes of 1887) only conferred jurisdiction, it gave,

(1) (1892) 3 Ex.C.R. 164 and (1894) 24 Can. S.C.R. 420.

nevertheless, by necessary implication, a substantive right of action to the subject.

It will be convenient, first of all, to consider section 16 (*c*) in its original form, and the decisions upon it prior to the amendment of 1917. The actual decisions of this court upon the enactment establish three propositions: first, that the phrase "on a public work" served the office of fixing the locality within which the death or injury must occur in order to bring the enactment into operation; second, that the phrase "public work" denoted, not a service or services, but a physical thing; third, that such physical thing must have a fixed situs and a defined area.

The determination of the present appeal largely turns upon the meaning to be ascribed to the phrase "public work" in the existing statute, that is to say, in the form the statute, in its English version, assumed in consequence of the amendment of 1917.

The jurisdiction created by section 16 (*c*) of the legislation of 1887 was a jurisdiction transferred from the Official Arbitrators to the Exchequer Court (*Graham* v. *The King* (1); *Armstrong* v. *The King* (2)). The jurisdiction of the Official Arbitrators in relation to this particular subject had originally been constituted by section 1 of chapter 23 of the Statutes of 1870; which provided that where there was a supposed claim upon the Government of Canada

> arising out of any death, or any injury to person or property on any railway, canal, or public work under the control and management of the Government of Canada

the claim might, by the head of the department concerned therewith, be referred to Official Arbitrators who should have power to hear and make an award upon such claim.

In the Revised Statute of 1886, the Act relating to Official Arbitrators reproduced this provision in slightly altered form (ch. 40, sec. 6), the words there being:

> claim * * * arising out of any death, or any injury to person or property on any public work;

"public work" being thus defined by section 1, "unless the context otherwise requires,"

> (*c*) The expression "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharves, piers and works for improving the navigation of any water—

(1) (1902) 8 Ex.C.R. 331, at 335. (2) (1907) 11 Ex.C.R. 119, at 122, 123.

1935

THE KING v. DUBOIS.

Duff C.J.

lighthouses and beacons—the slides, dams, piers, booms and other works for facilitating the transmission of timber—the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, fortifications and other works of defence, and all other property which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public money is voted and appropriated by Parliament, and every work required for any such purpose; but not any work for which money is appropriated as a subsidy only.

Section 6 also gave jurisdiction to the Official Arbitrators, on reference by a Minister in respect of other matters:

* * * any claim for property taken, or for alleged direct or consequential damage to property, arising from or connected with the construction, repair, maintenance or working of any public work, or arising out of anything done by the Government of Canada.

Section 16 of the Exchequer Court Act of 1887, which, by section 58, repealed the *Official Arbitrators Act* (R.S.C. 1886, c. 40), gave to the newly created Exchequer Court jurisdiction in a modified form in respect of these matters. It is not without relevancy to note that claims for

alleged direct or consequential damage to property, arising from or connected with the construction, repair, maintenance or working of any public work.

(in the *Official Arbitrators Act*) become claims

for damage to property, injuriously affected by the construction of any public work

in section 16 (*b*) of the Statute of 1887.

The decisions in this Court and in the Exchequer Court upon claims under section 16 (*b*) have proceeded upon the view that the words of that paragraph must be construed by reference to the decisions of the English courts in respect of the subject of "injurious affection" (*MacArthur* v. *The King* (1); *The King* v. *MacArthur* (2)). There can, I think, be no doubt that "public work" in that paragraph is to be construed by reference to the interpretation clause in the *Official Arbitrators Act* (R.S.C. 1886, c. 40) and to the interpretation clause in the *Expropriation Act* (R.S.C. 1886, c. 39) which correspond *ipsissimis verbis*. In that definition, it will be observed that the phrase "all other property which now belong to Canada" is, if read alone, very comprehensive; but, as Burbridge J. held in *Larose* v. *The Queen* (3), that expression in the *Expropriation Act*, where, as I have already said, the definition precisely con-

(1) (1903) 8 Ex.C.R. 245, at 257. (2) (1904) 34 Can. S.C.R. 570.
(3) (1900) 6 Ex.C.R. 425.

forms to that in the *Official Arbitrators Act,* must be read in connection with the words preceding it, and not in the broadest possible sense.

I entertain no doubt that "public work," as employed in section 6 of the *Official Arbitrators Act,* and in the contemporaneous *Expropriation Act,* did not embrace any subject not falling within the definition quoted. Moreover, I have no doubt that when the jurisdiction conferred by that section was transferred, with the modifications noticed above, to the Exchequer Court by the Statute of 1887, the phrase "public work," as employed in paragraphs (*b*) and (*c*) of section 16 of that statute, must be read and construed by reference to that definition. So read and construed, the term "public work" cannot be given the sense the respondent seeks to ascribe to it: of public service, employment or duty; nor can it fairly be read as comprehending such things as vehicles and vessels. This, we shall see, is the effect of the decisions of this court respecting the construction of these paragraphs.

I now proceed to consider the decisions. In *The City of Quebec* v. *The Queen* (1), Mr. Justice Gwynne thus states his views as to the effect of section 16 (*c*) of the Statute of 1887:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

In *the Queen* v. *Filion* (2) Mr. Justice Sedgewick expressly adopted the view thus expressed. These words of Mr. Justice Gwynne, adopted by Mr. Justice Sedgewick, give no countenance to the suggestion that the phrase "public work" in the enactments under consideration should be construed in the sense of public employment or service.

Since I came to this court in 1906 there have been a good many appeals involving the construction of this en-

(1) (1894) 24 Can. S.C.R. 420 at 449-450.

(2) (1895) 24 Can. S.C.R. 482.

1935

THE KING v. DUBOIS.

Duff C.J.

actment. The first of these was in *Paul* v. *The King* (1), which was decided in the year 1906. The construction there laid down by Davies J., as the basis of his judgment (at p. 132), was expressed in these words:

> I think a careful and reasonable construction of the clause 16 (*c*) must lead to the conclusion that the public works mentioned in it and "on" which the injuries complained of must happen are public works of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analagous purposes; not confined to any definite area or physical work or structure.

This, be it observed, was no mere dictum. It was concurred in by Mr. Justice Maclennan and myself and was deliberately adopted as the ratio of the decision by the majority of the court.

This decision in *Paul* v. *The King* in 1906 (1), is conclusive upon the point that "public work" in the statute of 1887 did not bear the sense of public employment, public service, public labour, public business. The suppliant's steamship *Préfontaine* had been damaged in a collision with a loaded scow fastened to the side of the steam tug *Champlain,* which the latter was towing from the dredge *Lady Minto,* working in one of the channels of the St. Lawrence river. The dredge, the steam tug and the scow were all the property of the Government, and the claim was based upon section 16 (*c*). It was held that, assuming the collision was due to the negligence of those in charge of the tug *Champlain,* there was no remedy because the injury was not "on a public work." Now, the officers in charge of the tug were, admittedly, engaged on a public service, in a public employment. Construing "public work" in the sense contended for on behalf of the present respondent (as comprehending public service or employment), and assuming negligence, the statutory conditions were plainly satisfied. As I have already pointed out, the judgment of the court expressly rejected that construction; and I am now pointing out that the decision necessarily involved the rejection of it.

Moreover, it was held by Mr. Justice Burbridge in the Exchequer Court (2) that neither the tug nor the scow was a "public work" within the meaning of the statute. His view, to which I shall have to advert later, was that the phrase "on a public work" in the statute was sufficiently

(1) (1906) 38 Can. S.C.R. 126. (2) (1904) 9 Ex.C.R. 245, at 270.

comprehensive to include the case of an injury occasioned by something done on the public work; although the injury itself did not occur there. The negligence of the officers navigating the tug was not, in his view, within that description, that is to say, was not something done on a "public work," because the tug was not, at all events when separated from the dredge, a "public work."

In the Supreme Court of Canada, the majority maintained the view that neither the dredge, nor the tug, nor the scow, was a "public work." It may be observed at this point that in *Montgomery* v. *The King* (1) this was applied by Cassels J., who held that a dredge belonging to the Dominion Government was not a "public work" within the contemplation of section 16 (*c*).

Before passing from this decision, it is, perhaps, well to emphasize the principle of the decision, stated in the quotation from the reasons of Mr. Justice Davies, which were expressly adopted as the reasons of the majority of the court. "Public work" is there defined in such a way as to exclude from its ambit public employment or public service, as such, and this, as I have said, was necessary to the decision; and, further, the decision is explicitly rested upon the proposition that "public work," within the meaning of the statute, means a physical thing having a definite area.

Paul v. *The King* (2) has been consistently followed; there is no decision of this court which is, in the slightest degree, at variance with it.

The next appeal in which the point arose was in *The King* v. *Lefrançois* (3), and I there endeavoured to sum up the tenour of the previous decisions in their application to the case under consideration in these words:

> Having regard to the previous decisions of this court, the phrase "on a public work" in section 20, subsection (*c*), of "The Exchequer Court Act" must, I think, be read as descriptive of the locality in which the death or injury giving rise to the claim in question occurs. The effect of these decisions seems to be that no such claim is within the enactment unless "the death or injury" of which it is the subject happened at a place which is within the area of something which falls within the description "public work." (*Paul* v. *The King* (4) and the cases there cited).

(1) (1915) 15 Ex. C.R. 374.
(2) (1906) 38 Can. S.C.R. 126.
(3) (1908) 40 Can. S.C.R. 431.
(4) 38 Can. S.C.R. 126.

1935
THE KING
v.
DUBOIS.
Duff C.J.

I pause here to observe that the phrase "happened at a place which is within the area of something which falls within the description 'public work'," could hardly be read as contemplating a vehicle or a public service.

The section came before this court again in *Chamberlin* v. *The King* (1). The Chief Justice, Mr. Justice Girouard and Mr. Justice Idington adopted the phraseology of *Lefrançois'* case (2) in the passage cited. The Chief Justice used these words (p. 351):

> In a long series of decisions this court has held that the phrase "on a public work" in sec. 20, subsec. (*c*), of the "Exchequer Court Act," must be read, to borrow the language of Mr. Justice Duff in *The King* v. *Lefrançois* (3), at p. 436, "as descriptive of the locality in which the death or injury giving rise to the claim in question occurs," and that to succeed the suppliant must come within the strict words of the statute. (Taschereau J. in *Larose* v. *The King* (4). See also *Paul* v. *The King* (5), and cases there cited).

Mr. Justice Davies says (p. 353):

> We are all of the opinion that the point has already been expressly determined by this court, particularly in the case of *Paul* v. *The King* (5). In that case the majority of the court held after the fullest consideration that clause (*c*) of the 16th section of the "Exchequer Court Act," which alone could be invoked as conferring jurisdiction, only did so in the case of claims
>
> "arising out of any death or injury to the person or property *on any public work* resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties."
>
> Claims for injuries not within these words of the section and occurring, not on, but away from, a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

Mr. Justice Davies added,

> With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

Mr. Justice Anglin and myself agreed with the views expressed by the Chief Justice, as well as with those expressed by Mr. Justice Davies.

The next case to which I shall refer is *Olmstead* v. *The King* (6), in which a claim was made for the flooding of lands in consequence of the negligent operation of a dam on the Rideau Canal. At pp. 456-7 of the report Mr. Justice Anglin said:

(1) (1909) 42 Can. S.C.R. 350.
(2) (1908) 40 Can. S.C.R. 431.
(3) 40 Can. S.C.R. 431.
(4) (1901) 31 Can. S.C.R. 206.
(5) (1906) 38 Can. S.C.R. 126.
(6) (1916) 53 Can. S.C.R. 450.

The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in carrying on a public work. The injury of which he complains did not happen on the public work. Section 20 (c) of the "Exchequer Court Act," therefore, does not confer jurisdiction on the Exchequer Court. *Chamberlin* v. *The King* (1); *Paul* v. *The King* (2). Since these cases were decided *Letourneux* v. *The King* (3) cannot be followed in such a case as this. In that case the full limitative effect of the words "on any public work" in sub-sec. (c) of sec. 20 would appear not to have been sufficiently considered. The suppliant points to no other provision giving him a right of action against the Crown.

Before passing on to the next case, it is well to observe, perhaps, that *Letourneux* v. *The King* (3)) (decided in 1903 before *Paul* v. *The King* (4)), mentioned in the judgment of Mr. Justice Anglin, is very imperfectly reported. Only two judgments are in evidence. There was there no question as to the meaning of the phrase "public work." The injury complained of was, in part, the result of the negligence of employees of the Crown in failing to keep a siphon culvert clear and in proper order to carry off the waters of a stream which had been diverted and carried under the Lachine Canal. In part it appears to be a claim under paragraph (*b*) of section 16, for injurious affection. It is impossible now to ascertain what were the grounds on which the majority of the court proceeded.

In *Piggot* v. *The King* (5), Mr. Justice Cassels, President of the Exchequer Court, (at pp. 489-492) cited verbatim and applied the judgments of the Chief Justice and of Davies J. in *Chamberlin* v. *The King* (6), including the passages I have already cited from the latter. I quote what he said, verbatim, because his reasons were explicitly approved by one of the members of this Court:

Section 20, subsection (*c*) of the *Exchequer Court Act* (R.S.C. 1906, c. 140) reads as follows:

"The Exchequer Court shall have exclusive original jurisdiction to hear and determine: (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work."

In the case of *Chamberlin* v. *The King* (6), the Chief Justice of the Supreme Court says at p. 353:

"In a long series of decisions this Court has held that the phrase 'on a public work' in section 20, subsection (*c*) of the *Exchequer Court Act* must be read, to borrow the language of Mr. Justice Duff, in *The King* v. *Lefrançois* (7), 'as descriptive of the locality in which the death or injury (that is injury to property) giving rise to the claim in ques-

(1) (1909) 42 Can. S.C.R. 350.
(2) (1906) 38 Can. S.C.R. 126.
(3) (1903) 33 Can. S.C.R. 335.
(4) (1906) 38 Can. S.C.R. 126.
(5) (1915) 19 Ex. C.R. 485.
(6) (1909) 42 Can. S.C.R. 350.
(7) (1908) 40 Can. S.C.R. 431.

1935

THE KING
v.
DUBOIS.

Duff C.J.

tion occurs,' and that to succeed the suppliant must come within the strict words of the statute. In this case the property destroyed by fire, previous to and at the time of its destruction, was upon the land of the suppliant, some distance from the right of way of the Intercolonial Railway and was not property on a public work. As to the objection that this question was not raised in the Court below, I refer to *McKelvey* v. *LeRoi Mining Company* (1). If questions of law raised here for the first time appear upon the record we cannot refuse to decide them where no evidence could have been brought to affect them had they been taken at the trial. The point was taken by the pleadings if not urged at the argument below."

Sir Louis Davies says:

"This was an action brought in the Exchequer Court on a claim for damages arising out of the destruction of the property of the suppliants claimed to have been caused by sparks from the smoke stack of an Intercolonial Railway engine.

"The property destroyed was previous to and at the time of its destruction upon the land of the suppliant some distance from the right of way of the railway and was not property on a public work.

"The learned Judge, Mr. Justice Cassels, who delivered the judgment of the Court of Exchequer, had not heard the witnesses, who had given their testimony before the late Judge Burbidge.

"The suppliants were desirous to avoid the expense of a rehearing and with the assent of the respondent the case was fully argued before Mr. Justice Cassels on the evidence taken before Mr. Justice Burbidge.

"The learned Judge found as a fair conclusion to be drawn from the evidence that the fire originated from a spark or sparks emitted from the engine, but he was unable to find that it was caused through any defect in the engine for the existence of which and the failure to remedy which the Crown could be held liable for the losses claimed. On this appeal the jurisdiction of the Court of Exchequer over the claim in question was challenged and denied by Mr. Chrysler, his contention being that such jurisdiction was limited to claims against the Crown arising out of injuries to the person or property on a public work, and did not extend to injuries happening away from a public work, although caused by the operations of the Crown's officers or servants. The cases in which the question has already come before this Court for consideration were all referred to.

"We are all of the opinion that the point has already been expressly determined by this Court, particularly in the case of *Paul* v. *The King* (2). In that case the majority of the Court held after the fullest consideration that clause (*c*) of the 16th section—(that is the same as this is)—of the *Exchequer Court Act*, which alone could be invoked as conferring jurisdiction, only did so in the case of claims arising out of any death or injury to the person or property *on any public work* resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties, claims for injuries not within these words of the section and occurring not on, but away from, a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

"With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does

(1) (1902) 32 Can. S.C.R. 664. (2) (1906) 38 Can. S.C.R. 126.

not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

"Under these circumstances we must, without expressing any opinion upon the conclusions of fact reached by the learned judge, dismiss this appeal with costs.

At this point, it is convenient to observe that, in the Supreme Court of Canada (1), in giving judgment in the appeal from Cassels J., this language is expressly adopted by Anglin J. in these words:

I respectfully concur in the reasons assigned by the learned judge of the Exchequer Court for dismissing this action.

Again, in this court (1), Mr. Justice Idington, at p. 630, used these words:

The words therein, "on any public work," rendered it impossible, in the case of *Chamberlin* v. *The King* (2), for us to interfere, solely because the injury, if any, was done to property a long distance from the place where the public work existed from which it was said the cause of the destruction of suppliant's property originated.

Here, once more, the phrase "place where the public work existed" is not a phrase that would be used in relation to a public service, or employment, or to a vehicle.

In *La Compagnie Generale D' Entreprises Publiques* v. *The King* (3), a derrick scow which was used for the purpose of making repairs to a wharf, that was, admittedly, a public work, was made fast to the face of the wharf. The scow was crushed and sunk owing to the negligence of the officers working a Government ferry. The view of Idington J., and apparently of the Chief Justice, was that the locality of the scow was "on a public work." Anglin J. expressed the opinion that "public work" in section 16 (*c*) might be read as meaning "any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property." Such a view could not be reconciled with the decisions, already mentioned, which were binding on the court, and was not accepted by any other judge. The decision is of no assistance, and I mention it only because the observation of Anglin J. was relied upon. To that observation I shall revert later.

Before coming to the amendment of 1917, it is important, I think, to refer to some dicta by Mr. Justice Burbridge and some decisions of this court upon a question which arose at an early stage, that is to say, whether, if the in-

(1) (1916) 53 Can. S.C.R. 626. (2) (1909) 42 Can. S.C.R. 350.
(3) (1917) 57 Can. S.C.R. 527.

1935
THE KING
v.
DUBOIS.
Duff C.J.

jury in respect of which the claim was made was caused by something done on a public work, the claimant was entitled to the benefit of the statute, although the injury did not actually occur on the public work. Mr. Justice Burbidge expressed the view that in such a case the statute would apply (*The City of Quebec* v. *The Queen* (1); in *Price* v. *The King* (2); in *Paul* v. *The King* (3)). This view was negatived in this court in a number of decisions.

Two of these decisions, *Chamberlin* v. *The King* in 1909 (4), and *Piggott* v. *The King* in 1916 (5), were rather striking. In the first case, the statute was held not to apply where the injury was caused by the escape of sparks from a locomotive engine, negligently constructed or maintained, on the Intercolonial Railway. The second case concerned injury to the property of the suppliant resulting from blasting operations carried on by the Crown in clearing the site of a public work. It must have been a little difficult to understand why the Crown should be responsible for the negligence of its train hands in failing to ring a bell, on approaching a highway, and not responsible for damages caused by the escape of sparks due to the employment of inadequate appliances for the prevention of such escape; and, perhaps, more difficult to understand why, where the safety of people was endangered by the negligent manner in which blasting operations were conducted, one person, who happened to be on a public work, should be entitled to recover damages for injuries due to such negligence, while another person, who was in the vicinity, but not on the public work, should have no remedy. I have no doubt that these decisions explain the introduction of the amendment of 1917,

It should, perhaps, be observed that in many cases in the Exchequer Court the ratio of *Paul* v. *The King* (6), as expresed in the passage from the judgment of Davies J., above quoted, has been applied. Among them may be mentioned *Piggot* v. *The King* (7), *supra,* decided in 1915; *Theberge* v. *The King* (8), decided in 1916; *Coleman* v.

(1) (1891) 2 Ex.C.R. 252 at 260 and 270; (1892) 3 Ex.C.R. 164, at 178.
(2) (1906) 10 Ex.C.R. 105, at 137.
(3) (1904) 9 Ex. C.R. 245, at 270.
(4) 42 Can. S.C.R. 350.
(5) 53 Can. S.C.R. 626.
(6) (1906) 38 Can. S.C.R. 126.
(7) 19 Ex.C.R. 485.
(8) 17 Ex.C.R. 381.

The King (1), decided in 1918; and *Desmarais* v. *The King* (2), decided in 1918.

We now come to the effect of the statute of 1917. In substance, it is contended on behalf of the respondents, first, that the automobile by which the deceased Albert Dubois, Jr., was killed was a "public work" within the meaning of section 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, ch. 34); and, second, if the automobile itself was not a "public work," then the driver of the automobile, whose negligence unfortunately resulted in the death of the suppliants' son, was engaged in a public service, the nature of which it is not necessary to enter upon; and, consequently, was within the meaning of the statute "acting within the scope of his duties or employment" upon a "public work" when guilty of that negligence.

The amendment with which we have to deal was an amendment introduced into the *Exchequer Court Act,* an amendment effected, as already observed, by a change in the order of the words in one paragraph of section 16 of that Act. The term "public work" was already there in paragraph (*b*). It was already there and remained there in the amended paragraph (*c*). The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and the definitions in that legislation, and as determined by the decisions of this court, was plainly settled. No expansion of the meaning of the term "public work," so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled. The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it. "Public work" still, in paragraph (*c*), as well as in paragraph (*b*), designates a physical thing, and not a public service. Indeed, I find it impossible to suppose that anybody drafting an amendment to paragraph (*c*), by which he proposed to make the Crown liable for the death or injury resulting from the negligence of any officer or servant of the Crown acting within the scope of his duty or employment in the public service, would have retained the phrase "public work." Either the term public service,

(1) 18 Ex.C.R. 263. (2) 18 Ex.C.R. 289.

1935
THE KING
v.
DUBOIS.
Duff C.J.

or public employment, or public labour, or public business, or public duty, would have been made use of, or the phrase "upon any public work" would have been dispensed with altogether; because it is quite clear that the contention that "public work", in the amended statute, is equivalent to public service leads to the conclusion that the phrase "upon any public work" is merely redundant, if not tautological.

Moreover, if you substitute "public service" for "public work," or "public employment" or "public labour" for "public work," you establish a liability on the part of the Crown generally for the negligence of its servants. It is not a liability for every tort, but it is a liability embracing the vast majority of torts committed by public employees. Maritime torts committed by His Majesty's vessels, for example, would, speaking generally, fall within it. Such a construction, in a word, adopts the doctrine of *respondeat superior* generally throughout the whole field of negligence.

I have nothing to say upon the point whether such an amendment of the law would be desirable. I am not concerned with that. That is for the legislature, not for me. But it would effect a great enlargement of the field of responsibility of the Crown for tort, and the courts can only accept a proposed construction of a statutory enactment accomplishing such a result, where the language is reasonably clear. To me it is not at all doubtful that the language of the statute of 1917 would have been very different if such had been the object of it.

There have been some decisions of this court since the enactment of the amendment of 1917. The first to which I must refer is *Wolfe* v. *The King* (1). The precise question before the court in that case was whether or not the Crown was responsible, under the amendment of 1917, for damages caused by a fire which originated in the basement and first floor of a building leased by the Government of Canada under a lease terminable on fourteen days' notice, as a recruiting station, in 1916-17. In the Exchequer Court it was held that the portion of the building occupied by the Government was not a public work within the meaning of paragraph (*c*). The Chief Justice adopted that view (2). Mr. Justice Anglin held that the term "public

(1) (1921) 63 Can. S.C.R. 141. (2) (1921) 63 Can. S.C.R. 141, at 144.

work" in subsection (*c*) must be largely governed by the construction given to it in subsection (*b*), and that "public work" in subsection (*b*) comprehends only "physical works which are the subject of construction." Nevertheless, he adhered to the opinion, already referred to, which he had expressed in *La Compagnie Generale D'Entreprises Publiques* v. *The King* (1), as to the effect of paragraph (*c*), prior to the amendment of 1917.

It may be noted here that Anglin J. did not suggest and, as I think, plainly enough, did not hold the view, that "public work" under the amended statute had any broader signification than it had prior to this amendment.

It ought, perhaps, to be noticed here that Mr. Justice Anglin, apparently, in his judgment in *La Compagnie Generale D'Entreprises Publiques* v. *The King* (1), where he was dealing with the construction of the phrase "public work" as found in the parent enactment, that is to say, prior to the amendment of 1917, seems to have overlooked the circumstance that the rule of construction deducible from the reasons of Davies J. in *Paul* v. *The King* (2), as applied to the facts of that case, was more than an expression of that learned judge's individual opinion. It was, as we have seen, the basis of the decision of the majority of the court. The ratio of that decision, which was that "public work" ought not to be construed in such a way as to include within its scope public services, as such, but only physical things having a defined area and an ascertained locality, was, of course, binding upon him as well as upon all the members of the court.

Mr. Justice Mignault thought (p. 154) that "public work" in paragraph (*c*) should receive, if possible, the same construction as in paragraph (*b*); that the public work contemplated by paragraph (*b*) is a public work coming within the definition of "public work" and "public works" in the *Expropriation Act*; and that "it would, at all events, be impossible to give a wider meaning to these words" (any public work) "in subsection (*c*) than in subsection (*b*)." He held that the property in question occupied by the Crown was not a public work within the meaning of paragraph (*c*).

(1) (1917) 57 Can. S.C.R. 527. (2) (1906) 38 Can. S.C.R. 126.

1935
THE KING
v.
DUBOIS.
Duff C.J.

It must be observed that here Mr. Justice Mignault gives no countenance to a construction of the phrase "public work" under the amended Act which would ascribe to it a broader scope than that which had been attributed to it by the decisions of this court prior to the amendment. Indeed, he expressly holds that its scope is limited by the definition in the *Expropriation Act*; that such scope cannot be broader than that of the same words in paragraph (*b*), where they admittedly include only physical things, not services, and could, of course, not be applied to such a thing as a vessel or vehicle.

I should, perhaps, call attention to an error in the headnote in *Wolfe* v. *The King* (1). That note ascribes to Mr. Justice Mignault, as well as to Mr. Justice Anglin, the view that "public work," in section 20 (*c*) of the Act of 1917, "includes any operation undertaken by or on behalf of the Crown in constructing, repairing or maintaining public property." It is implied in what I have just said, and a perusal of the judgment of Mr. Justice Mignault establishes it, that Mr. Justice Mignault did not give his adherence to that view, but, on the contrary, was of the opinion that by reason of the context, "public work" in paragraph (*c*) must be read as limited by the definition of "public work" in the *Expropriation Act* and, consequently, as excluding public services, as such.

The next case is *The King* v. *Schrobounst* (2). Before proceeding with the discussion of that case, it is convenient to give what I believe to be the proper construction of the statute as amended. My own view, as already intimated, is that the principal object of the amendment of 1917 was to bring within the scope of the statute those cases such as *Piggott* v. *The King* (3) and *Chamberlin* v. *The King* (4), in which an injury not occurring on a public work was caused by the negligence of some servant of the Crown upon a public work; injuries, for example, caused by the escape of sparks from a carelessly constructed locomotive engine, by blasting operations carelessly conducted, and cases in which, through the negligent working of a canal, lands at some distance from the canal are flooded.

(1) (1921) 63 Can. S.C.R. 141.
(2) [1925] Can. S.C.R. 458.
(3) (1916) 53 Can. S.C.R. 626.
(4) (1909) 42 Can. S.C.R. 350.

My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and an injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute; that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work." I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily or reasonably incidental to the construction, repair, maintenance, care, working of public works.

My reason for this view I can state in a sentence or two. The purpose of the legislation having been, as I have said, to correct the "stupid" inequalities, to use the phrase of Mr. Justice Idington, arising in the application of the statute as it stood before 1917, it seemed to me that that purpose would be largely frustrated if you read the word "upon," which had been substituted for the word "on," strictly as a preposition of place. In a very large number of cases the officer of the Crown responsible for the injury would be a person whose duties were not carried out on the public work in the physical sense. These considerations have seemd to me to be sufficient to justify the construction I have indicated.

Coming now to *Schrobounst's* case (1). In that case we had to consider a claim arising from the injury to a suppliant who had been run down by a motor vehicle driven by a servant of the Crown who was engaged in transporting to Thorold workmen employed on the Welland Canal there. The question at issue arose on demurrer, and I thought it involved no undue distortion of the language of the statute, as amended, to hold that an allegation that the driver was employed upon the Welland Canal was not, in the circumstances, a demurrable allegation. Further investigation of the circumstances might have disclosed that the employees who were being carried entered upon their duties

(1) [1925] Can. S.C.R. 458.

1935
THE KING
v.
DUBOIS.
Duff C.J.

in entering the motor vehicle. It is possible that *Schrobounst's* case (1) has carried the construction of section 19 (*c*) to the furthest permissible limit, but the principle on which it is based is clearly capable, in my opinion, of justification upon the grounds I have indicated.

The next decision was that in *The King* v. *Mason* (2). There, Government employees were engaged in dredging a part of a harbour adjoining a public pier for the purpose of effecting an excavation by which the harbour would be deepened and the navigation of it facilitated. They were engaged, in other words, in effecting a navigation improvement. The plans in evidence show that the excavation was to be of defined area and dimensions. It was, therefore, a public work within the meaning of the definition of "public work" contained in the *Expropriation Act* and in the *Official Arbitrators Act*. The injury was caused, it was held, by the negligent navigation of a tug which was towing away a scow laden with material taken up by the dredge. The operation in which the officer in charge of the tug was engaged was an operation necessarily incidental to the deepening of the harbour, to the creation, that is to say, of the harbour improvement. He was, therefore, on the principle indicated, employed upon the harbour improvement.

It is important, in applying legislation of this character, to be on one's guard against a very natural tendency. For the reasons I have given, the conclusion is inescapable that the purpose of the statute is not to establish the doctrine *respondeat superior* as affecting the Crown throughout the whole field of negligence. The area of responsibility, even in respect of negligence, is restricted. In *Schrobounst's* case (1) this court thought it was not infringing upon this restriction in holding that the facts of that case brought it within the statute. There is a natural tendency to take the latest case as a new starting point and to apply the statute to all cases which seem to fall within any of its apparent logical implications. But one thing is indisputable. If the supposed logical implication carries you beyond the area delimitated by the language of the statute, then you cannot give effect to it without transcending your function as a judge. You are

(1) [1925] Can. S.C.R. 458. (2) [1933] Can. S.C.R. 332.

constituting yourself a legislator; and you cannot, for the purpose of this case, having regard to the history of the legislation and the decisions upon it, which are binding on this court, hold that "public work," in this enactment, includes matters which are not physical things, but public service or public employment as such.

What I have said in relation to public service and public employment applies, in large degree, *mutatis mutandis*, to such things as vessels and vehicles.

The decisions of this court upon the statute as it stood prior to the amendment of 1917 (section 16 (*c*) of the statute of 1887) exclude, as appears above, the possibility of reading the words "public work," in the last mentioned statute, as including within their scope vehicles or vessels. Mr. Justice Burbidge, it is true, while rejecting the suggestion that vehicles or vessels generally fall within the scope of the phrase, did suggest, in *Paul* v. *The King* (1), that a dredge engaged in deepening one of the channels of the St. Lawrence river might be a public work or "on a public work"; but this suggestion was, as we have seen, definitely rejected by the Supreme Court of Canada on appeal from Mr. Justice Burbidge in that case (2); and, as already pointed out, vehicles and vessels are not within the definition in the *Official Arbitrators Act* or the *Expropriation Act*. Of course, if a construction had been adopted by which "public work," in the phrase "on a public work" in the statute of 1887, was held to signify public service or public employment, then the statute might have been applied to injuries caused by the negligence of a servant of the Crown driving a vehicle within the scope of his duties as such. But this view of the statute was rejected and the phrase "on a public work" was read as indicative of the locality in which the injury must occur in order to bring the case within the statute; and necessarily, as already explained, in view of the fact that the jurisdiction under the Act of 1887 was a jurisdiction transferred from the *Official Arbitrators Act* where the language, so far as pertinent to the present point, was identical with that employed in the statute of 1887; and in view of the definition of "public work" in the *Official Arbitrators Act*, and the scope and signification which, by force of that

(1) (1904) 9 Ex. C.R. 245. (2) (1906) 38 Can. S.C.R. 126

1935
THE KING
v.
DUBOIS.
Duff C.J.

definition, had become attached to the words "public work."

Having regard to all this, I find it very difficult to convince myself that anybody intending to subject the Crown to liability for negligence of its servants engaged in driving vehicles belonging to the Crown, or in navigating a vessel belonging to the Crown, could employ the procedure followed in effecting the amendment of 1917. If such had been the purpose of that amendment a different procedure would most assuredly have been resorted to.

I should add that if "public work" embraces employment and service as well as physical things, then the reference in *Schrobounst's* case (1) to the "public work" at Thorold was entirely superfluous; because the driver of the motor vehicle was admittedly, "acting within the scope of his duties or employment" upon a public service—that of driving the vehicle. On the construction now contended for, that, in itself, was sufficient to establish liability.

I have not thought it necessary to discuss the wealth of material put before us by Mr. Morse in his most able and interesting argument: because decisions in other jurisdictions upon other statutes, not in *pari materia,* interesting as they may be, cannot safely be relied upon as a guide, especially when, in the decisions of this Court, and in the history of the legislation under review, we have a very sufficient lexicon for the purpose in hand.

I now turn to the consideration of a point not mentioned on the argument which has been brought before us as the result of the research of our brother Cannon.

The respondents' claim rests upon section 19 of the *Exchequer Court Act* (R.S.C. 1927, ch. 34). In the French version the enactment upon which the respondents rely reads as follows:

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

* * *

(c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public;

* * *

(1) [1925] Can. S.C.R. 458.

Before calling attention to the effect of this language, it is right to mention, first of all, that the statutes of the Parliament of Canada in their French version pass through the two Houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version. The enactment quoted is an enactment of the Parliament of Canada just as the enactments of the same section, expressed in English, are.

The first section of the Act respecting the Revised Statutes of Canada, assented to on the 19th of July, 1924, is in these words:

1. So soon as the said Commissioners or a majority of them shall report in writing the completion of the said consolidation, including therein such Acts or parts of Acts passed during the present session and subsequent thereto as the Governor General upon the said report may deem advisable so to be included, the Governor General may cause a printed Roll thereof, attested under his signature and that of the Clerk of the Parliaments to be deposited in the office of such Clerk; and such Roll shall be held to be the original of the said statutes so revised, classified and consolidated.

Sections 4, 5 and 8 are as follows: ,

4. The Governor in Council, after such deposit of the said last mentioned Roll, may, by proclamation, declare the day on, from and after which the same shall come into force and have effect as law, by the designation of "The Revised Statutes of Canada, 192..."

5. On, from and after such day, the said Roll shall accordingly come into force and effect as and by the designation of "The Revised Statutes of Canada, 192...," to all intents, as if the same were expressly embodied in and enacted by this Act, to come into force and have effect, on from and after such day.

2. On, from and after such day, all the enactments in the several Acts and parts of Acts in Schedule A above mentioned shall stand and be repealed to the extent mentioned in the third column of the said Schedule A.

* * *

8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

2. If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail; but, as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

The proclamation contemplated by this Act was made on the 22nd of December, 1927.

1935

THE KING v. DUBOIS.

DUFF, C.J.

It is quite clear that, as regards the alleged negligence, in respect of which the respondents' claim arises, which occurred after the Revised Statutes received the force of law, the respondents' remedy, if any, must be derived from the Revised Statutes. It seems equally clear that, in construing section 19 of the *Exchequer Court Act*, the statute in its French version cannot be ignored.

The phrase "pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public" is plainly inconsistent with any construction of the phrase "public work" which has the effect of extending its meaning in such a way as to include public services. The rule for the construction of the parent enactment (50-51 Vict., c. 16, s. 16 (*c*)), laid down in *Paul* v. *The King* (1), that the phrase "public work" includes physical things of defined area and ascertained locality and does not include public services, is plainly sanctioned and adopted by these words as the rule applicable to the construction of section 19 in the Revised Statutes of 1927.

"Chantier," in this connection, implies defined area and locality and is incapable of application in such a way as to include public services, as such. We are indebted to our brother Cannon for the following note upon the subject which puts this point beyond dispute:

Littré, "Dictionnaire de la langue française," *verbo* "chantier" nous dit que d'après le sens donné soit par le bas latin, soit par le français, le chantier est une place, un espace vide où l'on entasse du bois, où l'on radoube un vaisseau, où l'on travaille quoi que ce soit.

Larousse du XXème siècle le définit: Atelier à l'air libre, clôturé ou non, où l'on travaille des matériaux de construction (bois, pierre, fer, etc.).

Harzfeld, Darmesteter & Thomas, "Dictionnaire de la langue française"; Lieu où l'on dépose des matériaux pour les travailler.

Lafaye, "Dictionnaire des synonymes de la langue française," sous la rubrique: "boutique, magasin, atelier, chantier, le définit: Tout lieu consacré à une industrie. Ces auteurs nous disent: Dans le chantier, comme dans la boutique, on fait deux choses, on tient des objets et on travaille. Mais le chantier, du latin *canterius*, chevron, étançon, se distingue par la matière des objets. Ce qu'on y tient en dépôt ou en vente, c'est exclusivement du bois, bois de chauffage, de charpente, de charronnage, de construction, et quelquefois des pierres à bâtir; d'autre part, le bois et la pierre sont les seules matières employées dans les travaux du chantier tous ou la plupart relatifs à l'industrie du bâtiment, et qui comprennent principalement ceux des charpentiers, des scieurs de long, des constructeurs de navires et des tailleurs de pierre.

Lebrun & Toisoul, "Dictionnaire Etymologique de la langue française:

Chantier: Atelier à l'air libre, clôturé ou couvert, où l'on travaille le bois, la pierre.

(1) (1906) 38 Can. S.C.R. 126.

Sachet, "Accidents du travail, 1er vol. p. 85, n° 82, nous dit:

"Le chantier est, en principe, à l'industrie du bâtiment et de la construction ce que l'usine, la manufacture ou la fabrique sont à l'industrie de la production: pris dans son acception première il signifie l'emplacement où des ouvriers sont occupés à travailler le bois, la pierre, la terre et les différents matériaux destinés à l'édification de bâtiments ou à la construction de routes, chemins, chaussées, travaux d'art, etc. Mais peu à peu le sens de cette expression s'est élargie et a fini par englober, du moins dans le langage courant, tous les lieux de travail un peu vastes, ainsi que les dépôts de marchandises des négociants en gros, quelle que soit la nature des travaux qui y sont exécutés."

La Revue Trimestrielle de Droit Civil, 1902, 1er vol., étudiant la loi sur la responsabilité des accidents du travail, donne, à la page 456, les indications suivantes:

"37. Chantiers—Dans quel sens le législateur de 1898 a-t-il entendu employer le mot "chantier"?

Pour M. Cabouat c'est un terme vague sans acception précise. Pour M. Loubat c'est un 'lieu en plein air où on dispose les objets pour les travailler' (Loubat, op. cit., p. 91, n° 100). Avec M. Sachet au contraire nous nous trouvons en présence d'une définition précise et restrictive: 'C'est un emplacement où des ouvriers sont occupés à travailler le bois, la pierre, la terre et les différents matériaux destinés à l'édification de bâtiments ou à la construction de routes' (Sachet, op. cit., p. 84, n° 10).

Cette définition est rejetée par la Cour de Caen, qui décide que 'l'expression chantier de l'article 1er de la loi de 1898 implique le groupement, dans un emplacement déterminé, d'un certain nombre d'ouvriers employés à la préparation des matériaux destinés à des constructions *ou à des travaux quelconques*' (C. Caen, 30 janv. 1901, *Rec. Arr. Caen,* 1901, p. 5).

The statute, in the French version, plainly does not envisage a vessel, as such, although it does envisage a shipyard. Nor does it contemplate an automobile as such, although it may very well be held to contemplate an automobile factory.

The statute, in the French version, must, of course, be read with the statute in the English version. I am not suggesting that, read in that way, the proper construction and application of the statute is inconsistent with the construction and application of it in the actual decision in *Schrobounst's* case (1) or in *Mason's* case (2), *supra;* but, the phraseology of the French version markedly emphasizes what I have already indicated, that is to say, the impropriety of making these two decisions a new point of departure for the development of a principle of liability which the statute plainly does not sanction.

The appeal should be allowed and the petition dismissed. We assume the Crown will not ask for costs.

(1) [1925] Can. S.C.R. 458. (2) [1933] Can. S.C.R. 332.

1935

THE KING v. DUBOIS.

RINFRET J.—The appeal should be allowed and the petition dismissed. In my opinion this is not a case for costs.

Appeal allowed.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondents: *Paul Labelle.*

Regina v. International Vacations Ltd.

33 O.R. (2d) 327
124 D.L.R. (3d) 319

ONTARIO
COURT OF APPEAL
MARTIN, BLAIR AND GOODMAN JJ.A.
9TH DECEMBER 1980.

Criminal Law -- Appeal -- Summary conviction appeals -- Procedure -- Appeal to Court of Appeal from decision of summary conviction appeal Court limited to question of law alone -- Accused charged with misleading advertising based on newspaper advertisement -- No dispute as to facts and case turning on construction of advertisement -- Appeal involving question of law alone -- Cr. Code, s. 771 -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 36(1)(a).

[Woodhouse AC Israel Cocoa Ltd. SA et al. v. Nigerian Produce Marketing Co. Ltd., [1971] 1 All E.R. 665; Alberta Giftwares Ltd. v. The Queen, [1974] S.C.R. 584, 11 C.C.C. (2d) 513, 36 D.L.R. (3d) 321, 11 C.P.R. (2d) 233, [1973] 5 W.W.R. 458, apld]

Criminal Law -- Trade offences -- Misleading advertising -- Proof of offence -- Accused marketer of air travel -- Advertisement setting out airline schedule and inviting persons to book overseas charter flights -- Statement in advertisement that some flights may be sold out -- Whether advertisement false or misleading where some flights unavailable -- Whether Court required to construe advertisement from point of view of discerning reader interested in such flights -- Combines Investigation Act, R.S.C. 1970, c. C-23, s. 36.

The accused, a marketer of air travel, was charged with several counts of misleading advertising contrary to s. 36(1)(a) (rep. & sub. 1974-75-76, c. 76, s. 18(1)) of the Combines Investigation Act, R.S.C. 1970, c. C-23, based on newspaper advertisements promoting Advanced Booking Charter (ABC) overseas flights operated by it in conjunction with a licensed airline. In these advertisements were set out the airline's schedule and consumers were invited to check the schedule and pick the right date. At the bottom of the schedule was a note to "Please check individual flight availabilities with a travel agent or [the accused], as some flights may be sold out". Government regulations required ABC flights to be "closed" at a certain time prior to the flight although if there were cancellations some last minute substitutions could be made with Government approval. The accused was charged that it made a representation that was "false or misleading in a material respect, to wit: the availability of airline transportation ...". The charges were based on refusal of the accused to accept reservations on certain flights due to information that all the available options for the flight had been taken up. The accused was acquitted at trial but convicted on an appeal by the Crown to the County Court. On appeal by the accused to the Court of Appeal, held, the appeal should be allowed and the acquittals restored.

The average reader interested in making an overseas flight can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement, and the import of the advertisement would be absolutely clear to such a discerning reader. The statement below the schedule as to the availability of flights could not be severed from the advertisement. Rather it was an integral part of the advertisement and made it clear beyond any possibility of doubt that the accused did not hold out that seats were available on all flights listed in the schedules.

[R. v. R.M. Lowe Real Estate Ltd. and Pastoria Holdings Ltd. (1978), 40 C.C.C. (2d) 529, 39 C.P.R. (2d) 266; R. v. Saro's Ltd. (1978), 43 C.C.C. (2d) 310, 40 C.P.R. (2d) 208, refd to]

APPEAL by the accused from its conviction on six charges of misleading advertising contrary to s. 36 of the Combines Investigation Act (Can.).

V. R. Morrison, for accused, appellant.

R. W. Hubbard, for the Crown, respondent.

The judgment of the Court was delivered by

BLAIR J.A.:-- The appellant (Intervac) was acquitted by a Provincial Court Judge on six charges of false and misleading advertising tried on summary conviction under s. 36(1)(a) [ss. 36 to 39 rep. & sub. 1974-75-76, c. 76, s. 18(1)] of the Combines Investigation Act, R.S.C. 1970, c. C-23. On appeal, these acquittals were set aside by a County Court Judge and Intervac was fined $1,000 on each charge. Intervac now applies for leave to appeal these convictions to this Court under s. 771 of the Criminal Code which limits an appeal in summary conviction offences to a question of law alone.

Intervac is a marketer of air travel and the present charges arise from Advanced Booking Charter (ABC) flights operated by it. It chartered aircraft from a related company, Wardair Canada (1975) Ltd. (Wardair), a licensed air carrier, for specific trans-Atlantic flights listed in a contract approved by the Air Transport Committee of the Canadian Transport Commission. Intervac, in turn, sold seats to the public at attractive prices which were considerably less than ordinary scheduled airline fares because of the economies of charter operations. Under its contract with Wardair, Intervac was obliged to conduct ABC flights in accordance with the detailed rules prescribed by the Air Carrier Regulations, C.R.C. 1978, c. 3, as amended, made pursuant to the Aeronautics Act, R.S.C. 1970, c. A-3, and enforced by the Air Transport Committee. The Regulations originally required passengers to pay the full price of their tickets 60 days before the date of departure. This period was reduced to 45 days in mid-1977. When making

reservations, customers had to reserve a return flight which could not take place less than 14 days from the date of departure. Of importance in this case was the requirement that all advertisements of Advanced Booking Charters list the points and dates of departure and return for every flight.

To promote its 1977 ABC flight programme Intervac commencing in March placed large three-quarter page advertisements each week in the Saturday and Sunday Toronto newspapers. Although the form of the advertisements varied, they all were similar in substance. [Because it was impossible to reproduce a legible copy of a typical advertisement which appeared at this point in the judgment, the Court provided the following description of the advertisement in substitution therefor.]

They contained schedules of flights to named points in Great Britain and Europe. At the bottom of the schedules the following appears:

> This is Wardair's operating schedule. Please check individual flight availabilities with a travel agent or Intervac, as some flights may be sold out.

There were 12 similarly worded charges laid in connection with Intervac's ABC flight advertisements published in April, June and July, 1977. One typical charge, relating to an advertisement published in the Toronto Star on Saturday, June 25, 1977, alleged that Intervac:

> on or about the 25th day of June, 1977 ... for the purpose of promoting, directly or indirectly, the supply of a product or for the purpose of promoting, directly or indirectly, a business interest, namely airplane transportation, unlawfully did make a representation to the public by means of an advertisement published in The Toronto Star ... that was false or misleading in a material respect, to wit: the availability of airplane transportation departing from Canada on August 27th, 1977, destined for Great Britain and returning to Canada on September 10th, 1977, contrary to Section 36(1)(a) of the Combines Investigation Act, R.S.C. 1970, Chapter C-23 as amended.

The other five charges are similarly worded and relate to advertisements published in April, June and July, 1977.

The operation of ABC flights by Intervac provides an interesting insight into the problems of serving the Canadian travelling public. Intervac chartered one aircraft with a capacity of 455 seats from Wardair. It employed 25 people who dealt with approximately 800 telephone calls each day in response to its newspaper advertisements. It utilized a computer for the purpose of dealing with what it termed its "inventory" of reservations in a three-step procedure. On the initial telephone call, if space was available, the prospective passenger was given an option of one week to take up his booking and the seat was taken out of the computerized inventory. Within the week the passenger was required to pay a $50 deposit. This confirmed his booking until the balance of the fare was payable not less than 60 days (later reduced to 45 days) before the date of departure. When the balance was paid, an airline ticket was issued to the passenger. After the 45-day period had passed, the flight was "closed", as the above schedules indicate, and Intervac was prevented by the regulations from generally soliciting passengers. Nevertheless, even after payment, some passengers cancelled their flights and Intervac was able with the approval of the Air Transport Committee to make last minute substitutions. The result was that the precise number of passengers on any given flight was never established until it departed.

Each advertised flight was attended by an immense flow of options, bookings and cancellations. For example, for the flight of August 27, 1977, the subject of the charge quoted above, there were 32 options granted by the appellant between June 25, 1977 (the date of the advertisement), and the date of departure, and 12 options granted between July 10, 1977, and the date of departure. A total of 663 options were granted. There were 212 cancellations, and the flight departed on August 27, 1977, with 439 passengers and 16 empty seats. The refusals of the telephone operators to accept reservations on specific flights, which are the subject of the charges, were based on the information provided by the computer at the time of request

that all available options had been taken up.

The charges were laid under s. 36(1)(a) of the Combines Investigation Act which provides:

> 36(1) No person shall for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> (a) make a representation to the public that is false or misleading in a material respect;

Because there is no dispute about the facts, the issue can be simply stated. Does the advertisement hold out to the public that seats are available on all flights listed in it at the time of publication? If this is so, then the conviction must be upheld. On the other hand, does the advertisement merely offer air transport to named European points on a series of flights on which each traveller had to ascertain the availability of space? If this is so, the convictions cannot stand.

The threshold question is whether construing this advertisement involves a question of law alone giving jurisdiction to this Court to entertain this appeal. This question must be answered in the affirmative. It is well established that the construction of a written document is a matter of law and not a question of mixed law and fact as was contended by counsel for the respondent; Wigmore on Evidence, 3rd ed., vol. IX (1940), Section2556, p. 522, and 17 Hals., 4th ed., p. 20, para. 25. Lord Denning M.R. restated this principle in Woodhouse AC Israel Cocoa Ltd. SA et al. v. Nigerian Produce Marketing Co. Ltd., [1971] 1 All E.R. 665, where he said at p. 671:

> It has long been settled that the interpretation of a document is a matter of law for the court, save in those cases where there is some ground for thinking that the words were used by the writer--and understood by the reader--in a special sense different from their ordinary meaning. Unless there is evidence of some such special sense, the document

must be given its ordinary meaning as found by the judges, no matter whether it be a contract contained in correspondence or a representation on which another acts. The reason is so that the parties can know where they stand. When a question arises on a written contract or a written representation--it often arises long after it was made--the parties themselves will look it through to see what it means. They will study it closely. They will take the advice of their lawyers on it. They will go by the written word. It is the thing that determines their course of action. It is no good one party saying he meant this, and the other saying he meant that. He must accept it as its true meaning--and that is its meaning as ultimately found by the courts.

This decision was affirmed by the House of Lords: [1972] A.C. 741, [1972] 2 All E.R. 271.

This principle was applied by the Supreme Court of Canada to the specific issue of construing a written advertisement in a charge of misleading advertising under the Combines Investigation Act. In Alberta Giftwares Ltd. v. The Queen, [1974] S.C.R. 584 at p. 588, 11 C.C.C. (2d) 513 at p. 516, 36 D.L.R. (3d) 321 at p. 324, Ritchie J. held that the construction of the advertisement was a matter of law and stated:

> ... in my opinion in construing a will, deed, contract, prospectus or other commercial document, the legal effect to be given to the language employed, is a question of law ...

It remains to consider what is the proper construction to be placed upon the advertisements in this case. In R. v. R.M. Lowe Real Estate Ltd. and Pastoria Holdings Ltd. (1978), 40 C.C.C. (2d) 529, 39 C.P.R. (2d) 266, which dealt with a real estate advertisement, Arnup J.A. stated the common sense principle which should guide the interpretation of any advertisement when he said at pp. 530-1:

> ... the meaning to be placed upon the advertisement is that meaning which would be discerned by the average reader who was interested in making a purchase of a house in that

locality ...

This approach is consistent with s. 36(4) of the Combines Investigation Act which directs:

> 36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import of the advertisement would be absolutely clear to such a discerning reader. At the head of the advertisement it is stated that Intervac's flights are "via Wardair". The reader is invited to "Check the schedule below and pick the flight that's the right date, and the right price, for you". The flights are then listed in schedules in small print and, as noted above, at the bottom in plain, ordinary and clear type the following appears: "This is Wardair's operating schedule. Please check individual flight availabilities with a travel agent or Intervac, as some flights may be sold out."

The learned County Court Judge treated this statement as what he called a "disclaimer" which was separate and apart from the main body of the advertisement. He held, as I understand his language, that the publication of the schedule represented that space was available on the flights and that the disclaimer was ineffective to correct this impression. In reaching this conclusion he relied on R. v. Saro's Ltd. (1978), 43 C.C.C. (2d) 310, 40 C.P.R. (2d) 208. In that case television sets had been advertised for sale at less than the "regular" price listed in the advertisement. In small print near a bottom corner of the advertisement, in what the learned trial Judge called a "disclaimer", the regular price listed in the advertisement was defined as being the manufacturer's suggested list price. In fact the regular price in the area for television sets sold by all retail dealers was proven to be

considerably below the suggested list prices of manufacturers. It was, therefore, held that, despite the so-called disclaimer, the advertisement was misleading as to the regular price for which the goods were ordinarily sold. I have some difficulty in understanding the use of the term "disclaimer" in Saro's because it appears to me that the so-called disclaimer formed an essential part of the representation that the television sets were usually sold for the higher suggested price named in the disclaimer rather than the lower regular price prevailing in the market.

Whatever may be the correct interpretation of the Saro's decision, I am of the respectful opinion that the learned County Court Judge erred in compartmentalizing Intervac's advertising and treating the important statement which appears under the schedules as if it were separate from the main text. It is, on the contrary, an integral part of the advertisement. It makes it clear beyond any possibility of doubt that Intervac does not hold out that seats are available on all flights listed in the schedules. The advertisement states that "individual flight availabilities" should be checked "as some flights may be sold out". I am unable to conceive how the matter could be put more plainly. I, therefore, conclude that the advertisements were not "false or misleading" within the meaning of the Combines Investigation Act.

Accordingly, I would grant leave to appeal, allow the appeal and direct that the convictions be set aside and acquittals entered on all six charges.

Appeal allowed; acquittals restored.

Her Majesty The Queen *Appellant*

v.

Bevin Bervmary McIntosh *Respondent*

INDEXED AS: R. *v.* McINTOSH

File No.: 23843.

1994: November 28; 1995: February 23.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Defences — Self-defence — Accused charged with second degree murder after stabbing deceased in what he claimed was an act of self-defence — Trial judge instructing jury that words "without having provoked the assault" should be read into s. 34(2) of Criminal Code — Whether self-defence as defined in s. 34(2) is available to initial aggressors — Whether s. 37 outlining basic principles of self-defence should have been put to jury — Criminal Code, R.S.C., 1985, c. C-46, ss. 34(1), (2), 35, 37.

The accused, a disc jockey, had given the deceased, who lived in the same neighbourhood, some sound equipment to repair. Over the next eight months the accused made several attempts to retrieve his equipment, but the deceased actively avoided him. On the day of the killing, the accused's girlfriend saw the deceased working outside and informed the accused. The accused obtained a kitchen knife and approached the deceased. Words were exchanged. According to the accused, the deceased pushed him, and a struggle ensued. Then the deceased picked up a dolly, raised it to head level, and came at the accused. The accused reacted by stabbing the deceased with the kitchen knife. At his trial on a charge of second degree murder the accused took the position that the stabbing of the deceased was an act of self-defence. The trial judge instructed the jury, however, that the words "without having provoked the assault", which appear in the self-defence provision in s. 34(1) of the *Criminal Code*, should be read into s. 34(2), which provides for a self-defence justification for an aggressor who causes death or grievous bodily harm.

Sa Majesté la Reine *Appelante*

c.

Bevin Bervmary McIntosh *Intimé*

RÉPERTORIÉ: R. *c.* McINTOSH

Nº du greffe: 23843.

1994: 28 novembre; 1995: 23 février.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit criminel — Moyens de défense — Légitime défense — Accusé inculpé de meurtre au deuxième degré après qu'il eût poignardé la victime au cours d'un incident relativement auquel il invoque la légitime défense — Directives du juge du procès au jury selon lesquelles l'expression «sans provocation de sa part» devait être considérée comme incluse dans l'art. 34(2) du Code criminel — La légitime défense visée à l'art. 34(2) peut-elle être invoquée par l'agresseur initial? — Le jury aurait-il dû recevoir des directives sur les principes fondamentaux de la légitime défense énoncés à l'art. 37? — Code criminel, L.R.C. (1985), ch. C-46, art. 34(1), (2), 35, 37.

L'accusé, un disc-jockey, avait demandé à la victime, qui vivait dans le quartier, de réparer de l'équipement audio. Au cours des huit mois qui ont suivi, l'accusé a maintes fois tenté de récupérer son équipement, mais la victime faisait tout pour l'éviter. Le jour du meurtre, l'amie de l'accusé a vu la victime travailler à l'extérieur et en a informé l'accusé. Celui-ci s'est procuré un couteau de cuisine et s'est rendu chez la victime. Une altercation a suivi. Selon l'accusé, la victime l'a alors poussé et ils se sont battus. La victime aurait pris un chariot et l'aurait soulevé à la hauteur de la tête en direction de l'accusé. Ce dernier a réagi en poignardant la victime avec le couteau de cuisine. À son procès relativement à une accusation de meurtre au deuxième degré, l'accusé a invoqué la légitime défense. Dans les directives qu'il a données au jury, le juge du procès a cependant dit que l'expression «sans provocation de sa part», qui figure au par. 34(1) du *Code criminel*, devrait être incluse dans le par. 34(2), qui prévoit une justification de légitime défense pour un agresseur qui cause la mort ou des lésions corporelles graves. L'accusé a été déclaré coupa-

The accused was convicted of manslaughter. The Court of Appeal set aside the conviction and ordered a new trial. This appeal is to determine (1) whether the trial judge erred in holding that the self-defence justification in s. 34(2) is not available where an accused is an initial aggressor, and (2) whether he should have left s. 37, which contains a general statement of the principle of self-defence, with the jury.

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: Section 34(2) is clear on its face and is available to an initial aggressor. While s. 34(1) includes the statement "without having provoked the assault", s. 34(2) does not. A contextual approach to statutory interpretation lends no support to the position that these words should be read into s. 34(2). If Parliament's intention is to be implied from its legislative actions, then there is a compelling argument that Parliament intended s. 34(2) to be available to initial aggressors, since it could have included a non-provocation requirement in the provision. As well, the contextual approach does not generally mandate the courts to read words into a statutory provision. To do so would be tantamount to amending the provision, which is a legislative and not a judicial function. Finally, it is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation. Section 34(2), on its face, is available to the accused. It was an error for the trial judge to narrow the provision in order to preclude the accused from relying on it.

Where a provision is enacted by the legislature by the use of clear and unequivocal language capable of only one meaning, it must be enforced however harsh or absurd or contrary to common sense the result may be. The fact that a provision gives rise to absurd results is not sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis. Only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, will the absurd results flowing from one of the available interpretations justify rejecting it in favour of the other. Further, even assuming that absurdity by itself is sufficient to create

ble d'homicide involontaire coupable. La Cour d'appel a annulé la déclaration de culpabilité et ordonné la tenue d'un nouveau procès. Le présent pourvoi vise à déterminer (1) si le juge du procès a commis une erreur en concluant que la justification de la légitime défense prévue au par. 34(2) ne peut être invoquée si l'accusé est l'agresseur initial, et (2) s'il aurait dû permettre au jury de se fonder sur l'art. 37, qui renferme un énoncé général du principe de la légitime défense.

Arrêt (Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin sont dissidents): Le pourvoi est rejeté.

Le juge en chef Lamer et les juges Sopinka, Cory, Iacobucci et Major: À première vue, le par. 34(2) est clair et un agresseur initial peut s'en prévaloir. Le paragraphe 34(1) inclut l'expression «sans provocation de sa part», mais non le par. 34(2). Une analyse contextuelle des dispositions d'une loi ne renforce pas la position que cette expression devrait être incluse dans le par. 34(2). S'il faut déduire l'intention du législateur des mesures législatives qu'il a prises, il existe alors un solide argument pour affirmer qu'il avait l'intention de permettre à un agresseur initial de se prévaloir du par. 34(2), puisqu'il aurait pu inclure une exigence de non-provocation dans cette disposition. En outre, l'analyse contextuelle n'exige généralement pas des tribunaux qu'ils introduisent des termes dans une disposition législative. Cela équivaudrait à modifier la disposition, ce qui constitue une fonction législative et non judiciaire. Enfin, en matière d'interprétation des lois, dans le cas où il est possible de donner deux interprétations à une disposition qui porte atteinte à la liberté d'une personne, dont l'une serait plus favorable à un accusé, il existe un principe voulant que la cour devrait adopter l'interprétation qui favorise l'accusé. À première vue, l'accusé peut invoquer l'application du par. 34(2). Le juge du procès a commis une erreur lorsqu'il a restreint la portée de la disposition de façon à empêcher l'accusé de s'en prévaloir.

Lorsqu'une législature adopte un texte législatif qui emploie des termes clairs, non équivoques et susceptibles d'avoir un seul sens, ce texte doit être appliqué même s'il donne lieu à des résultats rigides ou absurdes ou même contraires à la logique. Le fait qu'une disposition aboutit à des résultats absurdes n'est pas suffisant pour affirmer qu'elle est ambiguë et pour procéder ensuite à une analyse d'interprétation générale. Ce n'est que lorsqu'un texte législatif est ambigu, et peut donc raisonnablement donner lieu à deux interprétations, que les résultats absurdes susceptibles de découler de l'une de ces interprétations justifieront de la rejeter et de pré-

ambiguity, a literal interpretation of s. 34(2) is still to be preferred. The *Criminal Code* has a direct and potentially profound impact on the personal liberty of citizens, and thus requires an interpretive approach which is sensitive to liberty interests. An ambiguous penal provision must therefore be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law. Here s. 34(2) applies on its face to initial aggressors, and is therefore open to such an interpretation. This interpretation is more favourable to accused persons than the alternative advanced by the Crown, and is consistent with the clear wording of s. 34(2), thus providing certainty for citizens.

While Parliament's intention in enacting s. 37 is unclear, at the very least the provision must serve a gap-filling role, providing the basis for self-defence where ss. 34 and 35 are not applicable. Since the accused has been unable to advance a scenario under which s. 34 as interpreted here and s. 35 would not afford him a defence, there appears to be no room left for s. 37 in this case.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting): The trial judge did not err in limiting s. 34(2) to unprovoked assaults in his instructions to the jury. The point of departure for statutory interpretation is not the "plain meaning" of the words, but the intention of the legislature. Since the words of s. 34(2), taken alone, do not provide a clear and conclusive indication of Parliament's intention, it is necessary to look further to the history of the section and the practical problems and absurdities which may result from interpreting the section one way or the other. Self-defence at common law rested on a fundamental distinction: where the killer had not provoked the aggression the homicide was called "justifiable homicide", and where he had provoked the aggression it was called "excusable homicide". In the case of justifiable homicide the killer could stand his ground and was not obliged to retreat in order to rely on the defence of self-defence. In the case of excusable homicide, on the other hand, the killer must have retreated as far as possible in attempting to escape the threat which necessitated homicide, before he could claim self-defence. These two situations were codified in the first *Criminal Code* in 1892. Under s. 45, the predecessor of s. 34, an accused who had not provoked the assault was a person "unlawfully assaulted"; he was entitled to stand his ground and need

férer l'autre. Toutefois, même en supposant que l'absurdité en soi suffit à créer l'ambiguïté, il faut quand même préférer une interprétation littérale du par. 34(2). Le *Code criminel* a des répercussions directes et vraisemblablement profondes sur la liberté personnelle des citoyens, et il doit être interprété de façon à tenir compte des intérêts en matière de liberté. Par conséquent, il faut interpréter une disposition pénale ambiguë de la façon qui favorisera le plus l'accusé et de la façon qui est le plus susceptible de jeter de la clarté et de la certitude sur le droit criminel. En l'espèce, le par. 34(2) s'applique à première vue aux agresseurs initiaux et peut donc donner lieu à une telle interprétation. Cette interprétation favorise davantage les accusés que celle préconisée par le ministère public et est compatible avec le libellé clair du par. 34(2), offrant ainsi une certitude aux citoyens.

On ne peut déterminer clairement quelle était l'intention du législateur lors de l'adoption de l'art. 37; cependant, cette disposition peut tout au moins servir à combler une lacune de façon à établir le fondement de la légitime défense dans les cas où les art. 34 et 35 ne sont pas applicables. Puisque l'accusé n'a pas été en mesure de présenter un scénario dans lequel ni l'art. 34 (selon l'interprétation donnée ici) ni l'art. 35 ne lui offriraient un moyen de défense, il ne paraît pas y avoir possibilité de rendre l'art. 37 applicable en l'espèce.

Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin (dissidents): Le juge du procès n'a pas commis d'erreur en restreignant l'application du par. 34(2) aux agressions sans provocation lorsqu'il a donné ses directives au jury. Le point de départ de l'exercice d'interprétation n'est pas le «sens ordinaire» des mots, mais l'intention du législateur. Puisque le libellé du par. 34(2), en soi, n'en donne pas une indication claire et concluante, il est nécessaire d'examiner l'historique de cette disposition ainsi que les problèmes pratiques et les absurdités qui peuvent résulter d'une interprétation ou d'une autre. En common law, la légitime défense reposait sur une distinction fondamentale: dans le cas où le meurtrier n'avait pas provoqué l'agression, on parlait d'«homicide justifiable», et, dans le cas où le meurtrier avait provoqué l'agression, il s'agissait d'un «homicide excusable». Dans le cas de l'homicide justifiable, le meurtrier pouvait faire front et n'était pas obligé de se retirer du combat pour invoquer la légitime défense. Par contre, dans le cas de l'homicide excusable, avant de pouvoir invoquer la légitime défense, le meurtrier devait s'être retiré autant qu'il lui était possible de le faire en tentant d'échapper à la menace qui avait entraîné l'homicide. Ces deux situations ont été codifiées dans le premier *Code criminel* en 1892. En vertu de l'art. 45, qui a précédé l'art. 34, un accusé qui n'avait pas provoqué

not retreat. This provision was later divided into two subsections and the phrase "so assaulted" in the second subsection, which had referred back to the phrase "unlawfully assaulted, not having provoked such assault", was subsequently replaced by "unlawfully assaulted". The need to insert the modifying phrase "not having provoked such assault" in the newly worded subsection was most likely overlooked. The marginal notes accompanying ss. 34 and 35, Parliament's retention of the phrase "unlawfully assaulted" in both s. 34(1) and s. 34(2) and the fact that neither s. 34(1) nor s. 34(2) imposes a duty to retreat support the view that the omission was inadvertent and that Parliament continued to intend that s. 34 would apply to unprovoked assaults and s. 35 to provoked assaults. If the word "unlawful" is given its proper meaning, it is unnecessary to read anything into s. 34(2) to conclude that it does not apply to provoked assaults. Alternatively, if it were necessary to read in the phrase "without having provoked the assault", this would be justified. Policy considerations support this interpretation. People who provoke attacks must know that a response, even if it is life-threatening, will not entitle them to stand their ground and kill. Rather, they must retreat.

Since ss. 34 and 35 exclusively dictate the application of the principles laid out in s. 37 where death or grievous bodily harm has occurred, the trial judge was correct in declining to leave s. 37 to the jury.

Cases Cited

By Lamer C.J.

Approved: *R. v. Stubbs* (1988), 28 O.A.C. 14; *R. v. Nelson* (1992), 71 C.C.C. (3d) 449; **referred to:** *R. v. Baxter* (1975), 27 C.C.C. (2d) 96; *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174; *R. v. Merson* (1983), 4 C.C.C. (3d) 251; *R. v. Chamberland* (1988), 96 A.R. 1; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201; *Altrincham Electric Supply Ltd. v. Sale Urban District Council* (1936), 154 L.T. 379.

une attaque était une personne «illégalement attaqué[e]»; il avait le droit de faire front et n'était pas obligé de se retirer. Cette disposition a plus tard été subdivisée en deux paragraphes, et l'expression «ainsi attaqué» dans le second paragraphe, qui renvoyait à l'expression «illégalement attaqué, sans provocation de sa part», a par la suite été remplacée par «[q]uiconque est illégalement attaqué». On a vraisemblablement oublié qu'il était nécessaire d'insérer dans le paragraphe nouvellement formulé l'incise: «sans provocation de sa part». Les notes marginales en regard des art. 34 et 35, le fait que le législateur a conservé l'expression «illégalement attaqué» tant au par. 34(1) qu'au par. 34(2) et le fait que ni le par. 34(1) ni le par. 34(2) ne comportent une obligation de se retirer du combat appuient la position que l'omission était un oubli et que le législateur avait toujours l'intention que l'art. 34 vise les attaques sans provocation et l'art. 35, les attaques avec provocation. Si l'on interprète comme il se doit le terme «illégalement», il est inutile d'introduire quoi que ce soit par interprétation dans le par. 34(2) pour conclure qu'il ne s'applique pas aux attaques avec provocation. Par contre, s'il faut considérer que le paragraphe contient l'expression «sans provocation de sa part», cet exercice serait justifié. Des considérations de principe appuient cette interprétation. Une personne qui provoque une attaque doit savoir qu'une réplique, même dans le cas de risque pour sa vie, ne lui permettra pas de faire front et de causer la mort. Cette personne a plutôt l'obligation de se retirer.

Puisque les art. 34 et 35 imposent exclusivement l'application des principes formulés à l'art. 37 lorsqu'il y a eu mort ou lésions corporelles graves, le juge du procès a eu raison de refuser de donner au jury des directives sur cette disposition.

Jurisprudence

Citée par le juge en chef Lamer

Arrêts approuvés: *R. c. Stubbs* (1988), 28 O.A.C. 14; *R. c. Nelson* (1992), 71 C.C.C. (3d) 449; **arrêts mentionnés:** *R. c. Baxter* (1975), 27 C.C.C. (2d) 96; *R. c. Bolyantu* (1975), 29 C.C.C. (2d) 174; *R. c. Merson* (1983), 4 C.C.C. (3d) 251; *R. c. Chamberland* (1988), 96 A.R. 1; *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108; *New Brunswick c. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201; *Altrincham Electric Supply Ltd. c. Sale Urban District Council* (1936), 154 L.T. 379.

By McLachlin J. (dissenting)

Sussex Peerage Case (1844), 11 C. & F. 85, 8 E.R. 1034; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025; *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108; *R. v. Deruelle*, [1992] 2 S.C.R. 663; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174; *R. v. Squire* (1975), 26 C.C.C. (2d) 219; *R. v. Merson* (1983), 4 C.C.C. (3d) 251; *R. v. Alkadri* (1986), 29 C.C.C. (3d) 467; *R. v. Stubbs* (1988), 28 O.A.C. 14; *R. v. Nelson* (1992), 71 C.C.C. (3d) 449; *Stock v. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231.

Statutes and Regulations Cited

Crimes Act 1961, S.N.Z. 1961, No. 43, s. 48(2) [rep. & sub. 1980, No. 63, s. 2].
Criminal Code, R.S.C. 1906, c. 146, s. 53(1), (2).
Criminal Code, R.S.C. 1927, c. 36, s. 53(1), (2).
Criminal Code, R.S.C., 1985, c. C-46, ss. 19, 34(1), (2), 35, 36, 37.
Criminal Code, S.C. 1892, c. 29, ss. 45, 46.
Criminal Code, S.C. 1953-54, c. 51, ss. 34, 35.

Authors Cited

Blackstone, William. *Commentaries on the Laws of England*, Book IV. Oxford: Clarendon Press, 1769.
Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville: Yvon Blais, 1991.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Driedger, Elmer A. *Driedger on the Construction of Statutes*, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
East, Sir Edward Hyde. *A Treatise of the Pleas of the Crown*, vol. 1. London: J. Butterworth, 1803.
Maxwell, Sir Peter Benson. *Maxwell on the Interpretation of Statutes*, 12th ed. By P. St. J. Langan. London: Sweet & Maxwell, 1969.

APPEAL from a judgment of the Ontario Court of Appeal (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199, allowing the accused's appeal from his conviction of manslaughter and ordering a new trial. Appeal dismissed, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting.

Michael Bernstein and *Alexander Alvaro*, for the appellant.

Citée par le juge McLachlin (dissidente)

Sussex Peerage Case (1844), 11 C. & F. 85, 8 E.R. 1034; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025; *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108; *R. c. Deruelle*, [1992] 2 R.C.S. 663; *R. c. Wigglesworth*, [1987] 2 R.C.S. 541; *R. c. Bolyantu* (1975), 29 C.C.C. (2d) 174; *R. c. Squire* (1975), 26 C.C.C. (2d) 219; *R. c. Merson* (1983), 4 C.C.C. (3d) 251; *R. c. Alkadri* (1986), 29 C.C.C. (3d) 467; *R. c. Stubbs* (1988), 28 O.A.C. 14; *R. c. Nelson* (1992), 71 C.C.C. (3d) 449; *Stock c. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231.

Lois et règlements cités

Code criminel, L.R.C. (1985), ch. C-46, art. 19, 34(1), (2), 35, 36, 37.
Code criminel, S.C. 1892, ch. 29, art. 45, 46.
Code criminel, S.C. 1953-54, ch. 51, art. 34, 35.
Code criminel, S.R.C. 1906, ch. 146, art. 53(1), (2).
Code criminel, S.R.C. 1927, ch. 36, art. 53(1), (2).
Crimes Act 1961, S.N.Z. 1961, No. 43, art. 48(2) [abr. et rempl. 1980, No. 63, art. 2].

Doctrine citée

Blackstone, William. *Commentaries on the Laws of England*, Book IV. Oxford: Clarendon Press, 1769.
Côté, Pierre-André. *Interprétation des lois*, 2e éd. Cowansville: Yvon Blais, 1990.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Driedger, Elmer A. *Driedger on the Construction of Statutes*, 3rd ed. By Ruth Sullivan. Toronto: Butterworths, 1994.
East, Sir Edward Hyde. *A Treatise of the Pleas of the Crown*, vol. 1. London: J. Butterworth, 1803.
Maxwell, Sir Peter Benson. *Maxwell on the Interpretation of Statutes*, 12th ed. By P. St. J. Langan. London: Sweet & Maxwell, 1969.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199, qui a accueilli l'appel de l'accusé contre sa déclaration de culpabilité d'homicide involontaire coupable et ordonné la tenue d'un nouveau procès. Pourvoi rejeté, les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin sont dissidents.

Michael Bernstein et *Alexander Alvaro*, pour l'appelante.

Russell S. Silverstein and *Michelle Levy*, for the respondent.

The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

LAMER C.J. —

I. Factual Background

On February 7, 1991, Basile Hudson, who made his living repairing appliances and electronic equipment, was stabbed to death by the respondent. The circumstances surrounding Hudson's death arose during the summer of 1990 when the respondent, a 26-year-old man, was working as a disc jockey. He gave the deceased, who lived in the same neighbourhood, an amplifier and other equipment to repair. Over the next eight months, the respondent made several attempts to retrieve his equipment, but the deceased actively avoided him. On one occasion, the respondent, armed with a knife, confronted the deceased and told him he would "get him" if the equipment was not returned. On another occasion, the deceased fled through the back exit of his home when the respondent appeared at the front door.

On the day of the killing, the respondent's girlfriend saw the deceased working outside and informed the respondent. The respondent obtained a kitchen knife and approached the deceased. Words were exchanged. The respondent testified that he told the deceased, "Get my fucking amp because I need it. Go suck your mother and bring my fucking amp." According to the respondent, the deceased pushed him, and a struggle ensued. Then the deceased picked up a dolly, raised it to head level, and came at the respondent. The respondent reacted by stabbing the deceased with the kitchen knife. He then threw the knife down and fled the scene. Later that day, after consulting with a lawyer, the respondent turned himself in.

On November 25, 1991, the respondent appeared in the Ontario Court (General Division) before Moldaver J. and a jury on a charge of second degree murder. He entered a plea of not guilty,

Russell S. Silverstein et *Michelle Levy*, pour l'intimé.

Version française du jugement du juge en chef Lamer et des juges Sopinka, Cory, Iacobucci et Major rendu par

LE JUGE EN CHEF LAMER —

I. Le contexte factuel

Le 7 février 1991, l'intimé a mortellement poignardé Basile Hudson, dont le gagne-pain était la réparation d'appareils ménagers et d'équipement électronique. Les circonstances entourant le décès de Hudson remontent à l'été 1990; à cette époque, l'intimé, un homme de 26 ans, travaillait comme disc-jockey. Il avait demandé à la victime, qui vivait dans le quartier, de réparer un amplificateur et d'autres pièces d'équipement. Au cours des huit mois qui ont suivi, l'intimé a maintes fois tenté de récupérer son équipement, mais la victime faisait tout pour l'éviter. À une occasion, l'intimé, armé d'un couteau, s'est présenté chez la victime et lui a dit qu'il [TRADUCTION] «l'attraperait au détour» s'il ne lui remettait pas l'équipement. À une autre occasion, la victime s'est sauvée par la porte arrière en voyant l'intimé à l'entrée. 1

Le jour du meurtre, l'amie de l'intimé a vu la victime travailler à l'extérieur et en a informé l'intimé. Celui-ci s'est procuré un couteau de cuisine et s'est rendu chez la victime. Une altercation a suivi. Selon son témoignage, l'intimé aurait dit à la victime: [TRADUCTION]«Va chercher mon «crisse» d'ampli parce que j'en ai besoin. Va téter ta mère et ramène mon «crisse» d'ampli.» Selon l'intimé, la victime l'a alors poussé et ils se sont battus. La victime aurait pris un chariot et l'aurait soulevé à la hauteur de la tête en direction de l'intimé. Ce dernier a réagi en poignardant la victime avec le couteau de cuisine. Il a ensuite lancé le couteau et s'est enfui. Plus tard le même jour, l'intimé s'est livré à la police après avoir consulté un avocat. 2

Le 25 novembre 1991, l'intimé a comparu en Cour de l'Ontario (Division générale), devant le juge Moldaver et un jury, relativement à une accusation de meurtre au deuxième degré. Il a plaidé 3

and took the position at trial that the stabbing of the deceased was an act of self-defence. The jury found the respondent guilty of the lesser and included offence of manslaughter. He was sentenced to two and one-half years' imprisonment.

4 The respondent appealed his conviction to the Ontario Court of Appeal on the ground that the trial judge erred in instructing the jury that s. 34(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, was not applicable in the event they found that the respondent had been the initial aggressor, having provoked the deceased. The Court of Appeal allowed the respondent's appeal, set aside the conviction and ordered a new trial: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199.

5 The Crown now appeals to this Court, arguing that the Ontario Court of Appeal erred when it reached the conclusion that self-defence as defined in s. 34(2) of the *Criminal Code* is available to accused persons who are initial aggressors.

II. Relevant Statutory Provisions

Criminal Code, R.S.C., 1985, c. C-46

Defence of Person

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

non coupable et, au procès, a invoqué la légitime défense. Le jury a déclaré l'intimé coupable de l'infraction moindre et incluse d'homicide involontaire coupable. Il a été condamné à deux ans et demi d'emprisonnement.

L'intimé a interjeté appel contre la déclaration de culpabilité devant la Cour d'appel de l'Ontario en faisant valoir que le juge du procès aurait commis une erreur lorsqu'il a indiqué au jury que le par. 34(2) du *Code criminel*, L.R.C. (1985), ch. C-46, n'était pas applicable s'il jugeait que l'intimé avait été l'agresseur initial, ayant provoqué la victime. La Cour d'appel a accueilli l'appel de l'intimé, annulé la déclaration de culpabilité et ordonné la tenue d'un nouveau procès: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199.

Le ministère public se pourvoit maintenant devant notre Cour en faisant valoir que la Cour d'appel de l'Ontario aurait commis une erreur lorsqu'elle a conclu qu'un accusé, qui est l'agresseur initial peut invoquer la légitime défense, au sens du par. 34(2) du *Code criminel*.

II. Les dispositions législatives pertinentes

Code criminel, L.R.C. (1985), ch. C-46

Défense de la personne

34. (1) Toute personne illégalement attaquée sans provocation de sa part est fondée à repousser la violence par la violence si, en faisant usage de violence, elle n'a pas l'intention de causer la mort ni des lésions corporelles graves et si la violence n'est pas poussée au-delà de ce qui est nécessaire pour lui permettre de se défendre.

(2) Quiconque est illégalement attaqué et cause la mort ou une lésion corporelle grave en repoussant l'attaque est justifié si:

a) d'une part, il la cause parce qu'il a des motifs raisonnables pour appréhender que la mort ou quelque lésion corporelle grave ne résulte de la violence avec laquelle l'attaque a en premier lieu été faite, ou avec laquelle l'assaillant poursuit son dessein;

b) d'autre part, il croit, pour des motifs raisonnables, qu'il ne peut pas autrement se soustraire à la mort ou à des lésions corporelles graves.

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(*a*) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures.

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

35. Quiconque a, sans justification, attaqué un autre, mais n'a pas commencé l'attaque dans l'intention de causer la mort ou des lésions corporelles graves, ou a, sans justification, provoqué sur lui-même une attaque de la part d'un autre, peut justifier l'emploi de la force subséquemment à l'attaque si, à la fois:

a) il en fait usage:

(i) d'une part, parce qu'il a des motifs raisonnables d'appréhender que la mort ou des lésions corporelles graves ne résultent de la violence de la personne qu'il a attaquée ou provoquée,

(ii) d'autre part, parce qu'il croit, pour des motifs raisonnables, que la force est nécessaire en vue de se soustraire lui-même à la mort ou à des lésions corporelles graves;

b) il n'a, à aucun moment avant qu'ait surgi la nécessité de se soustraire à la mort ou à des lésions corporelles graves, tenté de causer la mort ou des lésions corporelles graves;

c) il a refusé de continuer le combat, l'a abandonné ou s'en est retiré autant qu'il lui était possible de le faire avant qu'ait surgi la nécessité de se soustraire à la mort ou à des lésions corporelles graves.

36. La provocation comprend, pour l'application des articles 34 et 35, celle faite par des coups, des paroles ou des gestes.

37. (1) Toute personne est fondée à employer la force pour se défendre d'une attaque, ou pour en défendre toute personne placée sous sa protection, si elle n'a recours qu'à la force nécessaire pour prévenir l'attaque ou sa répétition.

(2) Le présent article n'a pas pour effet de justifier le fait d'infliger volontairement un mal ou dommage qui est excessif, eu égard à la nature de l'attaque que la force employée avait pour but de prévenir.

III. Decisions Below

A. *Ontario Court, General Division*

Moldaver J. first charged the jury with respect to self-defence under s. 34(1), and then turned to the application of s. 34(2). The portion of the charge with respect to s. 34(2) which the Court of Appeal found to be in error is the following:

III. Les décisions des juridictions inférieures

A. *La Cour de l'Ontario, Division générale*

Le juge Moldaver a tout d'abord donné au jury des directives sur la légitime défense en vertu du par. 34(1) et ensuite sur l'application du par. 34(2). Voici la partie des directives concernant le par. 34(2) qui, selon la Cour d'appel, était erronée:

Moving on from there, you will notice, ladies and gentlemen, that the words "without having provoked the assault", which we saw in s. 34(1), do not appear in s. 34(2). If you take a look on your paper and you look at 34(1), you will see the words "without having provoked the assault". You will not see those words in s. 34(2).

However, as a matter of law, I direct you that those words are to be read into s. 34(2). You will see the reason for this when we deal with s. 35, but for the present time you must accept that the words "without having provoked the assault" are to be read into s. 34(2).

7 Moldaver J. then charged the jury with respect to s. 35. After reading s. 35 to the jury, Moldaver J. stated:

Now, for the purposes of this case, ladies and gentlemen, this section relates to a situation where the accused has, without justification, provoked an assault upon himself. It defines the nature and scope of the force which a person may use to defend himself after he has provoked an assault upon himself and the steps he must take before the force used in response can be justified.

B. *Ontario Court of Appeal*

8 Austin J.A. (Goodman and McKinlay JJ.A. concurring) considered two issues: (1) was the trial judge in error in reading the words "without having provoked the assault" into s. 34(2) of the *Criminal Code*?; and (2) was the trial judge in error in not leaving s. 37 to the jury as a basis on which they could have found that the respondent was acting in self-defence?

9 In resolving the first issue, Austin J.A. felt that it was unnecessary to consider the history of s. 34, principles of statutory interpretation, the law in other jurisdictions, and the views of academics. Instead, the focus should be on the structure of s. 34, and Canadian jurisprudence. In Austin J.A.'s view, the problem with s. 34(2) (i.e., that it does not include the words "without having provoked the assault", whereas s. 34(1) does) has been apparent from the very first *Criminal Code* provi-

[TRADUCTION] Ensuite, vous constaterez, Mesdames et Messieurs, que l'expression «sans provocation de sa part», qui figure au par. 34(1), ne se trouve pas au par. 34(2). En examinant la feuille que vous avez entre les mains, vous remarquerez que le par. 34(1) comprend l'expression «sans provocation de sa part». Ces mots ne figurent pas dans le par. 34(2).

Cependant, je vous ordonne, en droit, de considérer que le par. 34(2) inclut ces termes. Vous verrez pourquoi lorsque je vous parlerai de l'art. 35, mais pour l'instant vous devez accepter que l'expression «sans provocation de sa part» est incluse dans le par. 34(2).

Le juge Moldaver a ensuite donné au jury des directives sur l'art. 35. Après avoir lu cette disposition, le juge Moldaver a affirmé:

[TRADUCTION] Mesdames et Messieurs, pour les fins qui nous intéressent, cette disposition vise le cas où la personne accusée a, sans justification, provoqué une attaque sur elle. On y définit d'une part, la nature et l'étendue de la force que cette personne peut employer pour se défendre lorsqu'elle a provoqué un attaque sur elle-même et d'autre part, les mesures qu'elle doit prendre avant que l'emploi de la force puisse être justifié.

B. *La Cour d'appel de l'Ontario*

Le juge Austin (avec l'appui des juges Goodman et McKinlay) a examiné les deux questions suivantes: (1) le juge du procès a-t-il commis une erreur en affirmant que le par. 34(2) du *Code criminel* devait être considéré comme incluant l'expression «sans provocation de sa part»? et (2) le juge du procès a-t-il commis une erreur en ne permettant pas au jury de se fonder sur l'art. 37 pour conclure que l'intimé avait agi en légitime défense?

Pour résoudre la première question, le juge Austin n'a pas jugé utile d'examiner l'historique de l'art. 34, les principes d'interprétation législative, les textes législatifs dans d'autres ressorts, ni la doctrine. Il s'est plutôt attardé à l'économie de l'art. 34 et à la jurisprudence canadienne. De l'avis du juge Austin, c'est depuis l'adoption du tout premier *Code criminel* en 1892 que le par. 34(2) comporte un problème (le fait que cette disposition, contrairement au par. 34(1), n'inclut pas l'expres-

sions dating from 1892. For this reason, legislative history did not resolve the problem.

Austin J.A. then considered the relevant case law. The Crown relied on the following cases for the proposition that "without having provoked the assault" should be read into the provision: *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 (Ont. C.A.); *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174 (Ont. C.A.); *R. v. Merson* (1983), 4 C.C.C. (3d) 251 (B.C.C.A.); *R. v. Chamberland* (1988), 96 A.R. 1 (C.A.). The respondent relied on the following cases to support his position that provocation is irrelevant to s. 34(2): *R. v. Stubbs* (1988), 28 O.A.C. 14 (C.A.); *R. v. Nelson* (1992), 71 C.C.C. (3d) 449 (Ont. C.A.).

Austin J.A. determined that the cases relied on by the Crown did not directly confront the issue he had to consider, and were "broad brush" statements concerning the interrelationship between ss. 34 and 35 of the *Criminal Code*. In contrast, the issue was addressed in the two cases on which the respondent relied. In both of those cases, the Ontario Court of Appeal had concluded that provocation is not relevant to s. 34(2). These cases, in his opinion, were conclusive.

Austin J.A. then turned to the second issue. He disagreed with the respondent that s. 37 of the *Criminal Code* should be put to the jury in every case where self-defence might arise. He noted that counsel for the respondent had been invited to suggest a scenario which would not be covered by ss. 34 and 35, and which might therefore be covered by s. 37. No scenario was put forward. There was therefore no basis on which s. 37 could have been put to the jury.

As a result, the court set aside the respondent's conviction and ordered a new trial.

sion «sans provocation de sa part»). C'est pourquoi l'historique législatif ne permettait pas de résoudre le problème.

10 Le juge Austin a ensuite examiné la jurisprudence pertinente. Pour soutenir que la disposition en cause devrait être considérée comme incluant l'expression «sans aucune provocation de sa part», le ministère public s'est fondé sur les arrêts suivants: *R. c. Baxter* (1975), 27 C.C.C. (2d) 96 (C.A. Ont.); *R. c. Bolyantu* (1975), 29 C.C.C. (2d) 174 (C.A. Ont.); *R. c. Merson* (1983), 4 C.C.C. (3d) 251 (C.A.C.-B.); *R. c. Chamberland* (1988), 96 A.R. 1 (C.A.). À l'appui de sa position que la question de la provocation n'est pas pertinente pour les fins de l'application du par. 34(2), l'intimé a cité les décisions suivantes: *R. c. Stubbs* (1988), 28 O.A.C. 14 (C.A.); *R. c. Nelson* (1992), 71 C.C.C. (3d) 449 (C.A. Ont.).

11 Le juge Austin a indiqué que les arrêts cités par le ministère public ne portaient pas directement sur la question en litige et constituaient des affirmations [TRADUCTION]«générales sommaires» sur la corrélation entre les art. 34 et 35 du *Code criminel*. Par contre, la question en litige était examinée dans les deux arrêts cités par l'intimé. Dans ces deux cas, la Cour d'appel de l'Ontario avait conclu que la provocation n'est pas un élément pertinent aux fins du par. 34(2). De l'avis du juge Austin, ces arrêts étaient concluants.

12 Le juge Austin a ensuite examiné la seconde question soulevée. Contrairement à l'intimé, il n'était pas d'avis que le jury devait recevoir des directives sur l'art. 37 du *Code criminel* chaque fois que la légitime défense pouvait être invoquée. Il a fait remarquer que l'avocat de l'intimé avait été invité à présenter un scénario qui ne serait pas visé par les art. 34 et 35, et qui pourrait par conséquent l'être par l'art. 37. Il n'a pas répondu à l'invitation. Il n'existait donc aucun fondement justifiant le juge de donner au jury des directives relativement à l'art. 37.

13 En définitive, la cour a annulé la déclaration de culpabilité de l'intimé et ordonné la tenue d'un nouveau procès.

IV. Analysis

A. *Introduction*

14 This case raises a question of pure statutory interpretation: Is the self-defence justification in s. 34(2) of the *Criminal Code* available where an accused is an initial aggressor, having provoked the assault against which he claims to have defended himself? The trial judge, Moldaver J., construed s. 34(2) as not applying in such a circumstance. The Ontario Court of Appeal disagreed.

15 The conflict between ss. 34 and 35 is obvious on the face of the provisions. Section 34(1) begins with the statement, "Every one who is unlawfully assaulted without having provoked the assault . . .". In contrast, s. 34(2) begins, "Every one who is unlawfully assaulted . . .". Missing from s. 34(2) is any reference to the condition, "without having provoked the assault". The fact that there is no non-provocation requirement in s. 34(2) becomes important when one refers to s. 35, which explicitly applies where an accused has "without justification provoked an assault . . .". Therefore, both ss. 34(2) and 35 appear to be available to initial aggressors. Hence, the issue arises in this case of whether the respondent, as an initial aggressor raising self-defence, may avail himself of s. 34(2), or should be required instead to meet the more onerous conditions of s. 35.

16 As a preliminary comment, I would observe that ss. 34 and 35 of the *Criminal Code* are highly technical, excessively detailed provisions deserving of much criticism. These provisions overlap, and are internally inconsistent in certain respects. Moreover, their relationship to s. 37 (as discussed below) is unclear. It is to be expected that trial judges may encounter difficulties in explaining the provisions to a jury, and that jurors may find them confusing. The case at bar demonstrates this. During counsel's objections to his charge on ss. 34 and 35, the trial judge commented, "Well, it seems to

IV. Analyse

A. *Introduction*

Le présent pourvoi soulève une question d'interprétation législative pure: La justification de la légitime défense prévue au par. 34(2) du *Code criminel* peut-elle être invoquée si l'accusé est l'agresseur initial, qui a provoqué l'attaque relativement à laquelle il invoque la légitime défense? Selon l'interprétation du juge du procès, le juge Moldaver, le par. 34(2) ne s'appliquerait pas dans une telle situation. La Cour d'appel de l'Ontario a exprimé un avis contraire.

Le conflit entre les art. 34 et 35 est évident à la lecture de ces dispositions. Le paragraphe 34(1) commence en ces termes: «Toute personne illégalement attaquée sans provocation de sa part . . .», et le par. 34(2), ainsi: «Quiconque est illégalement attaqué . . .». La condition «sans provocation de sa part» n'est pas mentionnée au par. 34(2). Le fait que le par. 34(2) n'exige pas qu'il y ait absence de provocation devient important lorsque l'on examine l'art. 35, qui s'applique explicitement dans le cas où un accusé a «sans justification, provoqué [. . .] une attaque . . .». Par conséquent, le par. 34(2) et l'art. 35 paraissent s'appliquer à un agresseur initial. Il faut donc se demander en l'espèce si l'intimé, en tant qu'agresseur initial qui invoque la légitime défense, peut se prévaloir du par. 34(2) ou s'il devrait plutôt satisfaire aux conditions plus exigeantes de l'art. 35.

À titre de commentaire préliminaire, je tiens à préciser que les art. 34 et 35 du *Code criminel* sont fort techniques, et sont des dispositions excessivement détaillées qui méritent d'être fortement critiquées. Ces dispositions se chevauchent et sont en soi incompatibles à certains égards. En outre, le lien entre ces dispositions et l'art. 37 (que, j'analyse ci-dessous) n'est pas clair. Il faut s'attendre à ce qu'un juge du procès ait des difficultés à expliquer ces dispositions au jury et à ce que les jurés puissent les trouver déroutantes. Le présent pourvoi le démontre bien. À la suite des objections que les avocats ont formulées relativement aux directives qu'il a données sur les art. 34 et 35, le juge du

me these sections of the Criminal Code are unbelievably confusing." I agree with this observation.

Despite the best efforts of counsel in the case at bar to reconcile ss. 34 and 35 in a coherent manner, I am of the view that any interpretation which attempts to make sense of the provisions will have some undesirable or illogical results. It is clear that legislative action is required to clarify the *Criminal Code*'s self-defence regime.

B. *Did the trial judge err in charging the jury that s. 34(2) of the Criminal Code is not available to an initial aggressor?*

(i) Section 34(2) is not ambiguous

In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise (*Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 29).

While s. 34(1) includes the statement "without having provoked the assault", s. 34(2) does not. Section 34(2) is clear, and I fail to see how anyone could conclude that it is, on its face, ambiguous in any way. Therefore, taking s. 34(2) in isolation, it is clearly available to an initial aggressor.

The Crown has asked this Court to read into s. 34(2) the words "without having provoked the assault". The Crown submits that by taking into consideration the common law of self-defence, legislative history, related *Criminal Code* provi-

procès a affirmé: [TRADUCTION]«Bien, il me semble que ces dispositions du Code criminel sont incroyablement déroutantes.» Je suis d'accord avec cette observation.

17 Bien que les avocats se soient, en l'espèce, tout particulièrement efforcés de faire un rapprochement compatible entre les art. 34 et 35, je suis d'avis qu'une interprétation qui tente de donner un sens logique à ces dispositions aboutira à certains résultats peu souhaitables ou illogiques. De toute évidence, le législateur devrait intervenir pour clarifier le régime de la légitime défense prévu dans le *Code criminel*.

B. *Le juge du procès a-t-il commis une erreur en disant au jury, dans ses directives, que le par. 34(2) du Code criminel n'était pas applicable à un agresseur initial?*

(i) Le paragraphe 34(2) n'est pas ambigu

18 Pour résoudre la question d'interprétation soulevée par le ministère public, je pars de la proposition qu'il faut donner plein effet à une disposition législative qui, à sa lecture, ne présente pas d'ambiguïté. C'est une autre façon de faire valoir ce que l'on a parfois appelé la «règle d'or» de l'interprétation littérale; une loi doit être interprétée d'une façon compatible avec le sens ordinaire des termes qui la compose. Si le libellé de la loi est clair et n'appelle qu'un seul sens, il n'y a pas lieu de procéder à un exercice d'interprétation (*Maxwell on the Interpretation of Statutes* (12e éd. 1969), à la p. 29).

19 Le paragraphe 34(1) inclut l'expression «sans provocation de sa part», mais non le par. 34(2). Celui-ci est clair et je ne vois pas comment on pourrait conclure qu'il est, à première vue, ambigu à quelque point de vue. Par conséquent, si l'on examine séparément le par. 34(2), un agresseur initial peut de toute évidence s'en prévaloir.

20 Le ministère public a demandé à notre Cour de considérer que le par. 34(2) incluait l'expression «sans provocation de sa part». À son avis, en examinant la légitime défense en common law, l'historique législatif, les dispositions connexes du

sions, margin notes, and public policy, it becomes clear that Parliament could not have intended s. 34(2) to be available to initial aggressors. Parliament's failure to include the words "without having provoked the assault" in s. 34(2) was an oversight, which the Crown is asking this Court to correct.

21 The Crown labels its approach "contextual". There is certainly support for a "contextual approach" to statutory interpretation. Driedger, in *Construction of Statutes* (2nd ed. 1983), has stated the modern principle of contextual construction as follows (at p. 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. . . . Lord Atkinson in *Victory (City) v. Bishop of Vancouver Island*, [1921] A.C. 384, at p. 387, put it this way:
>
> > In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.

Driedger then reduces the principle to five steps of construction (at p. 105):

> 1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or impliedly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
>
> 2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.

Code criminel, les notes marginales et l'ordre public, on se rend bien compte que le législateur ne peut avoir eu l'intention de permettre à un agresseur initial de se prévaloir du par. 34(2). Le fait que le législateur a omis d'inclure dans le par. 34(2) l'expression «sans provocation de sa part» serait un oubli, et le ministère public demande à notre Cour d'y remédier.

Le ministère public qualifie son analyse de «contextuelle». On peut certainement procéder à une «analyse contextuelle» en matière d'interprétation des lois. Voici comment Driedger, dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983), a formulé le principe moderne de l'interprétation contextuelle (à la p. 87):

> [TRADUCTION] De nos jours, il n'y a qu'un seul principe ou méthode; il faut interpréter les termes d'une loi dans leur contexte global selon le sens grammatical et ordinaire qui s'harmonise avec l'économie et l'objet de la loi et l'intention du législateur. [. . .] Dans *Victoria (City) c. Bishop of Vancouver Island*, [1921] A.C. 384, à la p. 387, lord Atkinson l'a exposé en ces termes:
>
> > Dans l'interprétation des lois, on doit donner aux termes leur sens grammatical ordinaire, à moins que quelque chose dans le contexte, ou dans l'objet visé par la loi où ils figurent, ou encore dans les circonstances où ils sont employés, n'indique qu'ils ont été employés dans un sens spécial et différent de leur acception grammaticale ordinaire.

Driedger ramène ensuite le principe à cinq étapes d'interprétation (à la p. 105):

> [TRADUCTION]
>
> 1. Il faut interpréter l'ensemble de la loi en fonction de son contexte global pour déterminer l'intention du législateur (la loi selon sa teneur expresse ou implicite), l'objet de la loi (les fins qu'elle poursuit) et l'économie de la loi (les liens entre ses différentes dispositions).
>
> 2. Il faut ensuite interpréter les termes des dispositions particulières applicables à l'affaire en cause selon leur sens grammatical et ordinaire, en fonction de l'intention du législateur manifestée dans l'ensemble de la loi, de l'objet de la loi et de son économie. S'ils sont clairs et précis, et conformes à l'intention, à l'objet, à l'économie et à l'ensemble de la loi, l'analyse s'arrête là.

3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to be given them.

4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in *pari materia*, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

5. If obscurity, ambiguity or disharmony cannot be resolved objectively by reference to the intention of Parliament, the object of the Act or the scheme of the Act, then a meaning that appears to be the most reasonable may be selected. [Emphasis added.]

3. Si les termes sont apparemment obscurs ou ambigus, il faut leur donner le sens qui est le plus compatible avec l'intention du législateur, l'objet de la loi et son économie, mais un sens qu'ils peuvent raisonnablement avoir.

4. Si, malgré que les termes soient clairs et sans ambiguïté lorsqu'ils sont interprétés selon leur sens grammatical et ordinaire, il y a discordance dans la loi, avec les lois qualifiées de *pari materia*, ou avec le droit en général, alors il faut donner aux termes un sens inhabituel pouvant entraîner l'harmonie, s'ils peuvent raisonnablement avoir ce sens.

5. Si les termes obscurs, ambigus ou discordants ne peuvent être interprétés objectivement en fonction de l'intention du législateur, de l'objet de la loi ou de son économie, alors il faut leur donner l'interprétation qui paraît la plus raisonnable. [Je souligne.]

Certainly, interpreting statutory provisions in context is a reasonable approach. However, a "contextual approach" lends no support to the Crown's position. First, the contextual approach takes as its starting point the intention of the legislature. However, given the confused nature of the *Criminal Code* provisions related to self-defence, I cannot imagine how one could determine what Parliament's intention was in enacting the provisions. Therefore, it seems to me that in this case one is prevented from embarking on a contextual analysis *ab initio*.

22 Certes, il est raisonnable d'interpréter les dispositions d'une loi dans leur contexte. Cependant, une «analyse contextuelle» ne renforce pas la position du ministère public. Premièrement, l'analyse contextuelle se fonde au départ sur l'intention du législateur. Toutefois, compte tenu du caractère déroutant des dispositions du *Code criminel* en matière de légitime défense, je ne peux voir comment il serait possible de déterminer quelle était l'intention du législateur lorsqu'il a adopté ces dispositions. Par conséquent, il me semble que, en l'espèce, l'on soit *ab initio* empêché de procéder à une analyse contextuelle.

The Crown argues that it was Parliament's intention that neither s. 34(1) nor s. 34(2) be available to initial aggressors, and that it was a mere oversight that the words chosen in s. 34(2) do not give effect to this intention. I would have thought it would be equally persuasive to argue that Parliament intended both ss. 34(1) and (2) to be available to initial aggressors, and that Parliament's mistake was in including the words "without having provoked the assault" in s. 34(1).

23 Le ministère public soutient que le législateur voulait empêcher que l'agresseur initial ne se prévale des par. 34(1) et 34(2) et que c'est par simple oubli que les termes employés au par. 34(2) ne concrétisent pas cette intention. À mon avis, on aurait tout aussi bien pu soutenir de façon tout aussi convaincante que le législateur avait l'intention de permettre à un agresseur initial de se prévaloir de ces deux paragraphes, et que l'erreur du législateur est d'avoir inclus l'expression «sans provocation de sa part» au par. 34(1).

Parliament's intention becomes even more cloudy when one refers to s. 45 of the 1892 *Criminal Code*, S.C. 1892, c. 29, which was the forerunner of ss. 34(1) and 34(2):

24 L'intention du législateur s'obscurcit davantage lorsque l'on examine l'art. 45 du *Code criminel*, S.C. 1892, ch. 29, à l'origine des par. 34(1) et 34(2):

45. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. [Emphasis added.]

There is a clear ambiguity in this provision. Does the expression "every one so assaulted" refer to "[e]very one unlawfully assaulted", or to "[e]very one unlawfully assaulted, not having provoked such assault"? This question is academic, since Parliament appears to have resolved the ambiguity in its 1955 revision of the *Criminal Code*, S.C. 1953-54, c. 51. The first part of the former s. 45 was renumbered s. 34(1), and the second part became s. 34(2). The new s. 34(2) omitted any reference to a non-provocation requirement.

25 If Parliament's intention is to be implied from its legislative actions, then there is a compelling argument that Parliament intended s. 34(2) to be available to initial aggressors. When Parliament revised the *Criminal Code* in 1955, it could have included a provocation requirement in s. 34(2). The result would then be similar to s. 48(2) of the New Zealand *Crimes Act 1961*, S.N.Z. 1961, No. 43 (repealed and substituted 1980, No. 63, s. 2) which was virtually identical to s. 34(2) save that it included an express non-provocation requirement:

48. . . .

(2) Every one unlawfully assaulted, not having provoked the assault, is justified in repelling force by force although in so doing he causes death or grievous bodily harm, if . . . [Emphasis added.]

45. Tout individu illégalement attaqué, sans provocation de sa part, est justifiable de repousser la violence par la violence, si, en en faisant usage, il n'a pas l'intention de causer la mort ni des blessures corporelles graves, et si elle n'est pas poussée au delà de ce qui est nécessaire pour se défendre; et quiconque est ainsi attaqué est justifiable, même s'il cause la mort ou quelque blessure corporelle grave, et s'il la cause dans l'appréhension raisonnable de mort ou de blessures corporelles graves par suite de la violence avec laquelle l'attaque a été d'abord faite contre lui ou avec laquelle son assaillant poursuit son dessein, et s'il croit pour des motifs plausibles qu'il ne peut autrement se soustraire lui-même à la mort ou à des blessures corporelles graves. [Je souligne.]

Cette disposition renferme une ambiguïté évidente. L'expression «quiconque est ainsi attaqué» renvoie-t-elle à l'expression «[t]out individu illégalement attaqué» ou à «[t]out individu illégalement attaqué, sans provocation de sa part»? Il s'agit d'une question théorique, puisque le législateur paraît avoir résolu cette ambiguïté dans sa révision de 1955 du *Code criminel*, S.C. 1953-54, ch. 51. La première partie de l'ancien art. 45 est devenu le par. 34(1), et la seconde, le par. 34(2). Le nouveau par. 34(2) ne renferme aucun renvoi à l'exigence de non-provocation.

S'il faut déduire l'intention du législateur des mesures législatives qu'il a prises, il existe alors un solide argument pour affirmer qu'il avait l'intention de permettre à un agresseur initial de se prévaloir du par. 34(2). Lorsque le législateur a révisé le *Code criminel* en 1955, il aurait pu inclure une exigence de provocation au par. 34(2). La disposition aurait alors été semblable au par. 48(2) de la *Crimes Act 1961*, de la Nouvelle-Zélande, S.N.Z. 1961, No. 43 (abrogée et remplacée en 1980 par No. 63, art. 2), lequel est pratiquement identique au par. 34(2), sauf qu'il prévoyait explicitement une exigence de non-provocation:

[TRADUCTION]

48. . . .

(2) Quiconque est illégalement attaqué sans provocation de sa part est fondé à employer la force nécessaire, même s'il cause de ce fait la mort ou des lésions corporelles graves, si . . . [Je souligne.]

The fact that Parliament did not choose this route is the best and only evidence we have of legislative intention, and this evidence certainly does not support the Crown's position.

Second, the contextual approach allows the courts to depart from the common grammatical meaning of words where this is required by a particular context, but it does not generally mandate the courts to read words into a statutory provision. It is only when words are "reasonably capable of bearing" a particular meaning that they may be interpreted contextually. I would agree with Pierre-André Côté's observation in his book *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 231, that:

> Since the judge's task is to interpret the statute, not to create it, as a general rule, interpretation should not add to the terms of the law. Legislation is deemed to be well drafted, and to express completely what the legislator wanted to say. . . .

The Crown is asking this Court to read words into s. 34(2) which are simply not there. In my view, to do so would be tantamount to amending s. 34(2), which is a legislative and not a judicial function. The contextual approach provides no basis for the courts to engage in legislative amendment.

Third, in this case we cannot lose sight of the overriding principle governing the interpretation of penal provisions. In *Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108, Dickson J. (as he then was) stated the principle as follows, at p. 115:

> Even if I were to conclude that the relevant statutory provisions were ambiguous and equivocal . . . I would have to find for the appellant in this case. It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.

Le fait que le législateur n'a pas choisi cette voie constitue la seule et meilleure preuve que nous ayons de l'intention du législateur, et cette preuve n'appuie certainement pas la position du ministère public.

Deuxièmement, l'analyse contextuelle permet aux tribunaux de s'écarter du sens grammatical ordinaire des termes lorsqu'un contexte particulier l'exige, mais elle n'exige généralement pas des tribunaux qu'ils introduisent des termes dans une disposition législative. C'est seulement lorsqu'«ils peuvent raisonnablement avoir» un sens particulier que ces termes peuvent être interprétés d'après leur contexte. Je suis d'accord avec l'observation de Pierre-André Côté dans son livre, *Interprétation des lois* (2e éd. 1990), aux pp. 257 et 258: 26

> La fonction du juge étant d'interpréter la loi et non de la faire, le principe général veut que le juge doive écarter une interprétation qui l'amènerait à ajouter des termes à la loi: celle-ci est censée être bien rédigée et exprimer complètement ce que le législateur entendait dire . . .

Le ministère public demande à notre Cour d'inclure dans le par. 34(2) des termes qui ne s'y trouvent pas. À mon avis, cela équivaudrait à modifier le par. 34(2), ce qui constitue une fonction législative et non judiciaire. L'analyse contextuelle ne justifie aucunement les tribunaux de procéder à des modifications législatives.

Troisièmement, on ne peut en l'espèce faire abstraction du principe suprême qui régit l'interprétation des dispositions pénales. Dans l'arrêt *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, le juge Dickson (plus tard Juge en chef) a formulé le principe suivant, à la p. 115: 27

> Même si je devais conclure que les dispositions pertinentes sont ambiguës et équivoques [. . .] je devrais conclure en faveur de l'appelant en l'espèce. Il n'est pas nécessaire d'insister sur l'importance de la clarté et de la certitude lorsque la liberté est en jeu. Il n'est pas besoin de précédent pour soutenir la proposition qu'en présence de réelles ambiguïtés ou de doutes sérieux dans l'interprétation et l'application d'une loi visant la liberté d'un individu, l'application de la loi devrait alors être favorable à la personne contre laquelle on veut exécuter ses dispositions.

Section 34(2), as a defence, acts as a "subtraction" from the liability which would otherwise flow from the criminal offences contained in the *Criminal Code*. *Criminal Code* provisions concerning offences and defences both serve to define criminal culpability, and for this reason they must receive similar interpretive treatment.

28 This principle was eloquently stated by La Forest J.A. (as he then was) in *New Brunswick v. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201, at p. 210:

> There is no doubt that the duty of the courts is to give effect to the intention of the Legislature as expressed in the words of the statute. And however reprehensible the result may appear, it is our duty if the words are clear to give them effect. This follows from the constitutional doctrine of the supremacy of the Legislature when acting within its legislative powers. The fact that the words as interpreted would give an unreasonable result, however, is certainly ground for the courts to scrutinize a statute carefully to make abundantly certain that those words are not susceptible of another interpretation. For it should not be readily assumed that the Legislature intends an unreasonable result or to perpetrate an injustice or absurdity.
>
> This scarcely means that the courts should attempt to reframe statutes to suit their own individual notions of what is just or reasonable.

29 It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation. By this same reasoning, where such a provision is, on its face, favourable to an accused, then I do not think that a court should engage in the interpretive process advocated by the Crown for the sole purpose of narrowing the provision and making it less favourable to the accused. Section 34(2), on its face, is available to the respondent. It was, with respect, an error for the trial judge to narrow the

Le paragraphe 34(2), à titre de moyen de défense, permet de «réduire» l'étendue de la responsabilité qui se rattacherait par ailleurs aux infractions criminelles prévues au *Code criminel*. Tant les dispositions du *Code criminel* relatives aux infractions que celles relatives aux moyens de défense visent à définir la responsabilité criminelle, et elles doivent de ce fait être interprétées de façon similaire.

Ce principe a été formulé de façon éloquente par le juge La Forest (maintenant juge de notre Cour) dans *New Brunswick c. Estabrooks Pontiac Buick Ltd.* (1982), 44 N.B.R. (2d) 201, aux pp. 230 et 231:

> [TRADUCTION] Il ne fait aucun doute que le devoir des tribunaux est de donner effet à l'intention du législateur, telle qu'elle est formulée dans le libellé de la Loi. Tout répréhensible que le résultat puisse apparaître, il est de notre devoir, si les termes sont clairs, de leur donner effet. Cette règle découle de la doctrine constitutionnelle de la suprématie de la Législature lorsqu'elle agit dans le cadre de ses pouvoirs législatifs. Cependant, le fait que les termes, selon l'interprétation qu'on leur donne, conduiraient à un résultat déraisonnable constitue certainement une raison pour motiver les tribunaux à examiner minutieusement une loi pour bien s'assurer que ces termes ne sont pas susceptibles de recevoir une autre interprétation, car il ne faudrait pas trop facilement prendre pour acquis que le législateur recherche un résultat déraisonnable ou entend créer une injustice ou une absurdité.
>
> Ce qui précède ne signifie pas que les tribunaux devraient tenter de reformuler les lois pour satisfaire leurs notions individuelles de ce qui est juste ou raisonnable.

En matière d'interprétation des lois, dans le cas où il est possible de donner deux interprétations à une disposition qui porte atteinte à la liberté d'une personne, dont l'une serait plus favorable à un accusé, il existe un principe voulant que la cour devrait adopter l'interprétation qui favorise l'accusé. Dans la même ligne de pensée, dans le cas où une disposition est, à première vue, favorable à un accusé, je ne crois pas qu'un tribunal devrait appliquer la méthode d'interprétation préconisée par le ministère public à la seule fin de restreindre la portée de la disposition et de la rendre ainsi moins favorable à l'accusé. À première vue, l'intimé peut

provision in order to preclude the respondent from relying on it.

I therefore conclude that s. 34(2) is not an ambiguous provision, and is available to an initial aggressor. I find myself in agreement with the Ontario Court of Appeal, which has reached a similar conclusion in its rulings in *Stubbs, supra*, and *Nelson, supra*, and in the case at bar.

(ii) Even though s. 34(2) may give rise to absurd results, the Crown's interpretation cannot be adopted

It is important to reiterate that there is no ambiguity on the face of s. 34(2). The Crown's argument that the provision is ambiguous relies on legislative history, the common law, public policy, margin notes, and the relationship between ss. 34 and 35. The Crown alleges that it would be absurd to make s. 34(2) available to initial aggressors when s. 35 so clearly applies. Parliament, the Crown submits, could not have intended such an absurd result, and therefore the provision cannot mean what it says. Essentially, the Crown equates absurdity with ambiguity.

The Crown asks this Court to resolve the absurdity/ambiguity by narrowing s. 34(2) so that it does not apply in the case of an initial aggressor. If the Crown is correct, then an initial aggressor could only rely on s. 35 of the *Criminal Code*, which imposes more onerous requirements. In particular, s. 35(*c*) only allows an initial aggressor to raise self-defence where

> (*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

The respondent takes the position that if there is ambiguity, it must be resolved in the manner most

invoquer l'application du par. 34(2). En toute déférence, je suis d'avis que le juge du procès a commis une erreur lorsqu'il a restreint la portée de la disposition de façon à empêcher l'intimé de s'en prévaloir.

En conséquence, je conclus que le par. 34(2) n'est pas une disposition ambiguë et qu'un agresseur initial peut s'en prévaloir. Je suis d'accord avec la Cour d'appel de l'Ontario, qui est arrivée à une conclusion similaire tant dans les arrêts *Stubbs* et *Nelson*, précités, que dans la présente affaire.

(ii) Même si le par. 34(2) risque de donner lieu à des résultats absurdes, on ne saurait adopter l'interprétation du ministère public

Il importe de répéter que le par. 34(2) n'est pas à première vue ambigu. Lorsque le ministère public soutient que cette disposition est ambiguë, il se fonde sur l'historique législatif, la common law, l'intérêt public, les notes marginales et la relation entre les art. 34 et 35. À son avis, il serait absurde de permettre à un agresseur initial de se prévaloir du par. 34(2), alors que l'art. 35 est de toute évidence applicable. Selon le ministère public, le législateur ne saurait avoir eu l'intention de créer un résultat aussi absurde et la disposition ne peut donc avoir ce sens. Essentiellement, le ministère public assimile l'absurdité à l'ambiguïté.

Le ministère public demande à notre Cour de résoudre cette absurdité ou ambiguïté en donnant une interprétation restrictive au par. 34(2) de façon à le rendre inapplicable à un agresseur initial. Si le ministère public a raison, alors un agresseur initial ne pourrait se prévaloir que de l'art. 35 du *Code criminel*, lequel impose des exigences plus lourdes. Plus particulièrement, l'al. 35*c*) ne permet à un agresseur initial de soulever la légitime défense qu'à la condition suivante:

> *c*) il a refusé de continuer le combat, l'a abandonné ou s'en est retiré autant qu'il lui était possible de le faire avant qu'ait surgi la nécessité de se soustraire à la mort ou à des lésions corporelles graves.

Selon l'intimé, s'il existe une ambiguïté, elle doit être tranchée de la façon qui favorise le plus

favourable to accused persons. As a result, s. 34(2) must be made available to initial aggressors.

34 I am of the view that the Crown's argument linking absurdity to ambiguity cannot succeed. I would adopt the following proposition: where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be (*Maxwell on the Interpretation of Statutes*, *supra*, at p. 29). The fact that a provision gives rise to absurd results is not, in my opinion, sufficient to declare it ambiguous and then embark upon a broad-ranging interpretive analysis.

35 In *Altrincham Electric Supply Ltd. v. Sale Urban District Council* (1936), 154 L.T. 379 (H.L.), Lord Macmillan criticized the view that absurdity alone would justify the rejection of a literal interpretation of a statutory provision. He emphasized that an "absurdity approach" is generally unworkable because of the difficulty of developing criteria by which "to judge whether a particular enactment, if literally read, is so absurd that Parliament cannot have intended it to be so read . . ." (p. 388). He then proceeded, at p. 388, to outline what I believe to be the correct approach to statutory interpretation where absurdity is alleged:

> . . . if the language of an enactment is ambiguous and susceptible of two meanings, one of which is consonant with justice and good sense while the other would lead to extravagant results, a court of law will incline to adopt the former and to reject the latter, even although the latter may correspond more closely with the literal reading of the words employed.

36 Thus, only where a statutory provision is ambiguous, and therefore reasonably open to two interpretations, will the absurd results flowing from one of the available interpretations justify rejecting it in favour of the other. Absurdity is a factor to consider in the interpretation of ambiguous statutory

l'accusé. En conséquence, un agresseur initial devrait être en mesure de se prévaloir du par. 34(2).

À mon avis, on ne saurait accepter l'argument du ministère public qui assimile l'absurdité à l'ambiguïté. Voici la proposition que j'adopterais: lorsqu'une législature adopte un texte législatif qui emploie des termes clairs, non équivoques et susceptibles d'avoir un seul sens, ce texte doit être appliqué même s'il donne lieu à des résultats rigides ou absurdes ou même contraires à la logique (*Maxwell on the Interpretation of Statutes*, *op. cit.*, à la p. 29). Le fait qu'une disposition aboutit à des résultats absurdes n'est pas, à mon avis, suffisant pour affirmer qu'elle est ambiguë et procéder ensuite à une analyse d'interprétation globale.

Dans l'arrêt *Altrincham Electric Supply Ltd. c. Sale Urban District Council* (1936), 154 L.T. 379 (H.L.), lord Macmillan a critiqué l'idée que l'absurdité justifierait à elle seule le rejet de l'interprétation littérale d'une disposition législative. Il a fait ressortir qu'une «analyse fondée sur l'absurdité» n'est généralement pas applicable parce qu'il est difficile de formuler des critères qui serviront à [TRADUCTION] «déterminer si un texte législatif particulier, interprété dans son sens littéral, est si absurde que le législateur ne peut avoir voulu qu'il soit ainsi interprété . . .» (p. 388). Il a ensuite formulé, à la p. 388, l'analyse qu'il estimait correcte en matière d'interprétation des lois dans le cas où l'on soulève l'absurdité:

> [TRADUCTION] . . . si le libellé d'un texte législatif est ambigu et susceptible de donner lieu à deux interprétations, dont l'une est compatible avec la justice et la logique, et l'autre donnerait lieu à des résultats extravagants, une cour de justice aura tendance à adopter la première et à rejeter la seconde, bien que cette dernière puisse correspondre davantage au sens littéral des termes employés.

En conséquence, ce n'est que lorsqu'un texte législatif est ambigu, et peut donc raisonnablement donner lieu à deux interprétations, que les résultats absurdes susceptibles de découler de l'une de ces interprétations justifieront de la rejeter et de préférer l'autre. L'absurdité est un facteur dont il faut

provisions, but there is no distinct "absurdity approach".

However, assuming for the moment that absurdity by itself is sufficient to create ambiguity, thus justifying the application of the contextual analysis proposed by the Crown, I would still prefer a literal interpretation of s. 34(2).

As stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in *Marcotte, supra*, when freedom is at stake, clarity and certainty are of fundamental importance. He continued, at p. 115:

> If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the *Criminal Code*, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the *Criminal Code* requires an interpretive approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable

tenir compte dans l'interprétation de dispositions législatives ambiguës; cependant, il n'existe pas de méthode distincte d'«analyse fondée sur l'absurdité».

Toutefois, même en supposant pour l'instant que l'absurdité en soi suffit à créer l'ambiguïté, nous justifiant ainsi d'appliquer l'analyse contextuelle proposée par le ministère public, je préférerais quand même une interprétation littérale du par. 34(2). 37

Comme je l'ai mentionné, le principe suprême qui régit l'interprétation des dispositions pénales est que l'ambiguïté devrait être tranchée de la façon qui favorise le plus l'accusé. En outre, lorsqu'il faut choisir entre deux interprétations possibles, il est important de donner effet à l'interprétation la plus compatible avec le libellé de la disposition. Comme le juge Dickson l'a fait remarquer dans l'arrêt *Marcotte*, précité, lorsque la liberté est en jeu, la clarté et la certitude ont une importance fondamentale. Il a poursuivi, à la p. 115: 38

> Si quelqu'un doit être incarcéré, il devrait au moins savoir qu'une loi du Parlement le requiert en des termes explicites, et non pas, tout au plus, par voie de conséquence.

En vertu de l'art. 19 du *Code criminel*, l'ignorance de la loi n'est pas une excuse en matière de responsabilité criminelle. Notre système de justice criminelle repose sur le principe que nul n'est censé ignorer la loi. Cependant, nous ne pouvons guère faire valoir cette présomption si les tribunaux, dans leur interprétation des dispositions pénales, décident qu'elles incluent des termes qui, à leur lecture, ne s'y trouvent pas. Comment un citoyen est-il censé connaître la loi dans un tel cas?

Le *Code criminel* n'est pas un contrat ni une convention collective. Il est même qualitativement différent de la plupart des autres textes législatifs en ce qu'il peut entraîner des répercussions directes et vraisemblablement profondes sur la liberté personnelle des citoyens. Compte tenu de son caractère spécial, le *Code criminel* doit être interprété de façon à tenir compte des intérêts en matière de liberté. Par conséquent, il faut interpré- 39

to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.

40 I would agree that some absurdity flows from giving effect to the terms of s. 34(2). One is struck, for example, by the fact that if s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious. This is because the less serious aggressor could not take advantage of the broader defence in s. 34(2), as that provision is only available to an accused who "causes death or grievous bodily harm". Section 34(1) would not be available since it is explicitly limited to those who have not provoked an assault. Therefore, the less serious aggressor could only have recourse to s. 35, which imposes a retreat requirement. It is, in my opinion, anomalous that an accused who commits the most serious act has the broadest defence.

41 Even though I agree with the Crown that the interpretation of s. 34(2) which makes it available to initial aggressors may be somewhat illogical in light of s. 35, and may lead to some absurdity, I do not believe that such considerations should lead this Court to narrow a statutory defence. Parliament, after all, has the right to legislate illogically (assuming that this does not raise constitutional concerns). And if Parliament is not satisfied with the judicial application of its illogical enactments, then Parliament may amend them accordingly.

42 What is most important in this case is that s. 34(2) applies on its face to initial aggressors, and is therefore open to such an interpretation. This interpretation is more favourable to accused persons than the alternative advanced by the Crown. Moreover, this interpretation is consistent with the clear wording of s. 34(2), thus providing certainty

ter une disposition pénale ambiguë de la façon qui favorisera le plus l'accusé et de la façon qui est le plus susceptible de jeter de la clarté et de la certitude sur le droit criminel.

Je reconnais que l'application du par. 34(2) donne lieu à une certaine absurdité. Par exemple, on est frappé par le fait que, si un agresseur initial qui a causé la mort ou des lésions corporelles graves peut se prévaloir du par. 34(2), alors cette personne une fois accusée pourrait être en meilleure position pour soulever la légitime défense qu'un agresseur initial qui a commis une attaque moins grave, ceci précisément parce que l'agresseur qui a causé une lésion moins grave ne pourrait se prévaloir du moyen de défense général visé au par. 34(2), dont seul l'accusé qui «cause la mort ou une lésion corporelle grave» peut se prévaloir. Le paragraphe 34(1) ne s'appliquerait pas puisqu'il prévoit expressément qu'une personne ne pourra s'en prévaloir que si elle n'a pas provoqué une attaque. Par conséquent, l'agresseur qui a commis une attaque moins grave ne pourrait se prévaloir que de l'art. 35, qui lui impose de se retirer du combat. À mon avis, il n'est pas normal qu'un accusé qui a commis l'infraction la plus grave puisse invoquer le moyen de défense le plus large.

Même si, à l'instar du ministère public, je suis d'avis qu'il est quelque peu illogique, compte tenu de l'art. 35, de considérer qu'un agresseur initial puisse se prévaloir de l'application du par. 34(2) et que cela donne lieu à une certaine absurdité, je ne crois pas que notre Cour devrait limiter l'étendue d'un moyen de défense prévu dans la loi. Après tout, le législateur a le droit de légiférer de façon illogique (pourvu qu'il ne soulève pas de préoccupations d'ordre constitutionnel). Si le législateur n'est pas satisfait de l'application que les tribunaux accordent aux textes législatifs illogiques, il peut les modifier en conséquence.

Le plus important en l'espèce est que le par. 34(2) s'applique à première vue aux agresseurs initiaux et peut donc donner lieu à une telle interprétation. Cette interprétation favorise davantage les accusés que celle préconisée par le ministère public. En outre, elle est compatible avec le libellé clair du par. 34(2) et offre une certitude aux

for citizens. Although I appreciate the efforts of the Crown to underscore the problems with the *Criminal Code*'s self-defence regime through a broad historical, academic and policy-based analysis, I suspect that very few citizens are equipped to engage in this kind of interpretive approach. Rare will be the citizen who will read ss. 34 and 35, and recognize the logical inconsistencies as between the two provisions. Rarer still will be the citizen who will read the provisions and conclude that they are inconsistent with the common law, or with Parliament's intention in 1892, or with margin notes. Given that citizens have to live with the *Criminal Code*, and with judicial interpretations of the provisions of the *Code*, I am of the view that s. 34(2) must be interpreted according to its plain terms. It is therefore available where an accused is an initial aggressor, having provoked the assault against which he claims to have defended himself.

C. *Section 37 of the Criminal Code*

Before concluding, I will briefly address the respondent's argument related to s. 37 of the *Criminal Code*. Section 37, itself a distinct justification, contains a general statement of the principle of self-defence:

37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

Section 37 adds to the confusion surrounding ss. 34 and 35, since it appears to make the self-defence justification available to an accused in any circumstance where the force used by that accused was (i) necessary, and (ii) proportionate. If s. 37 is available to an initial aggressor (and there is no indication that it is not), then it would appear to be in conflict with s. 35. Moreover, it is difficult to understand why Parliament would enact the spe-

citoyens. Bien que je reconnaisse que le ministère public se soit efforcé de faire ressortir les problèmes du régime de la légitime défense contenu dans le *Code criminel*, à partir d'une analyse approfondie fondée sur l'histoire, la doctrine et les principes, je crains que très peu de citoyens ne soient en mesure de procéder à un tel exercice d'interprétation. Rares seront les citoyens qui, en lisant les art. 34 et 35, se rendront compte des incompatibilités logiques entre eux. Il sera encore plus rare qu'un citoyen conclura que ces dispositions sont incompatibles avec la common law, avec l'intention du législateur en 1892, ou encore avec les notes marginales. Puisque les citoyens sont régis par le *Code criminel* et par l'interprétation que les tribunaux donnent à ses dispositions, je suis d'avis que le par. 34(2) doit être interprété selon le sens ordinaire de ses termes. Un accusé peut donc invoquer l'application de cette disposition s'il est l'agresseur initial qui a provoqué l'attaque contre laquelle il dit s'être défendu.

C. *L'article 37 du Code criminel*

Avant de conclure, j'examinerai brièvement l'argument de l'intimé relativement à l'art. 37 du *Code criminel*. Cette disposition, en soi une justification distincte, renferme un énoncé général du principe de la légitime défense: 43

37. (1) Toute personne est fondée à employer la force pour se défendre d'une attaque, ou pour en défendre toute personne placée sous sa protection, si elle n'a recours qu'à la force nécessaire pour prévenir l'attaque ou sa répétition.

(2) Le présent article n'a pas pour effet de justifier le fait d'infliger volontairement un mal ou dommage qui est excessif, eu égard à la nature de l'attaque que la force employée avait pour but de prévenir.

L'article 37 vient ajouter à la confusion qui entoure les art. 34 et 35 puisqu'il paraît permettre à un accusé d'invoquer la légitime défense dans tous les cas où la force employée par l'accusé était (i) nécessaire et (ii) proportionnée. Si l'art. 37 peut être invoqué par un agresseur initial (et rien n'indique que c'est impossible), alors il semblerait être en conflit avec l'art. 35. De plus, il est difficile de comprendre pourquoi le législateur aurait adopté 44

cific and detailed justifications in ss. 34 and 35, yet then make available a broad justification in s. 37 which appears to render ss. 34 and 35 redundant.

45 Although Parliament's intention in enacting s. 37 is unclear, at the very least the provision must serve a gap-filling role, providing the basis for self-defence where ss. 34 and 35 are not applicable. The respondent, though taking the position that Moldaver J. erred in not putting s. 37 to the jury at his trial, has been unable to advance a scenario under which ss. 34 (as interpreted above) and 35 would not afford him a defence. Therefore, there appears to be no room left for s. 37 in this case.

46 The respondent has suggested that s. 37 should be put to the jury in all cases because it outlines the basic principles of self-defence, and this will be helpful to the jury. However, a trial judge can explain these principles without resort to s. 37, since these principles form the foundation of ss. 34 and 35.

D. *Conclusion*

47 With respect, Moldaver J. erred in instructing the jury at the respondent's trial that s. 34(2) was not available to an initial aggressor. I therefore am in agreement with the Ontario Court of Appeal. The appeal is dismissed, the respondent's conviction set aside and a new trial.

The reasons of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

McLACHLIN J. (dissenting) —

Introduction

48 This case raises the issue of whether a person who provokes another person to assault him can

les justifications spécifiques et détaillées visées aux art. 34 et 35, pour ensuite formuler à l'art. 37 une justification générale qui paraît rendre redondants les art. 34 et 35.

On ne peut déterminer clairement quelle était l'intention du législateur lors de l'adoption de l'art. 37; cependant, cette disposition peut tout au moins servir à combler une lacune de façon à établir le fondement de la légitime défense dans les cas où les art. 34 et 35 ne sont pas applicables. Même s'il a soutenu que le juge Moldaver a commis une erreur en ne donnant pas de directives au jury sur l'art. 37, l'intimé n'a pas été en mesure de présenter un scénario dans lequel ni l'art. 34 (selon l'interprétation qui précède) ni l'art. 35 ne lui offriraient un moyen de défense. En conséquence, il ne paraît pas y avoir possibilité de rendre l'art. 37 applicable en l'espèce.

L'intimé a indiqué que le jury devrait toujours recevoir des directives sur l'art. 37 parce que cette disposition énonce les principes fondamentaux de la légitime défense, lesquels seront utiles au jury. Cependant, le juge du procès pourra expliquer ces principes sans parler de l'art. 37, puisqu'ils sont le fondement même des art. 34 et 35.

D. *Conclusion*

En toute déférence, le juge Moldaver a commis une erreur lorsqu'il a, dans ses directives, indiqué au jury que le par. 34(2) ne s'appliquait pas à un agresseur initial. En conséquence, je suis d'accord avec la Cour d'appel de l'Ontario. Le pourvoi est rejeté, la déclaration de culpabilité de l'intimé est annulée et tenue d'un nouveau procès est ordonnée.

Version française des motifs des juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendus par

LE JUGE McLACHLIN (dissidente) —

Introduction

Le présent pourvoi soulève la question de savoir si une personne qui en provoque une autre peut

rely on the defence of self-defence, notwithstanding the fact that he failed to retreat from the assault he provoked. The Chief Justice would answer this question in the affirmative. I, with respect, take a different view.

The accused McIntosh was a disc jockey. He had given some sound equipment to the deceased to repair. Over the next eight months, McIntosh tried to get the equipment, without success. On one occasion, McIntosh told the deceased he would "get him" if the equipment were not returned. On another occasion, the deceased fled though the back door when McIntosh appeared at his front door. On the day of the killing, McIntosh, armed with a kitchen knife, ordered the deceased to return the equipment. According to McIntosh, the deceased responded by pushing him. They struggled. The deceased picked up a dolly, raised it to head level, and came at the respondent. McIntosh stabbed him, threw the knife down, and fled.

It was open to the jury to find, in this scenario, that McIntosh had provoked the assault by threatening the deceased while armed with a knife. This raised the question of which of the self-defence provisions of the *Criminal Code* apply to a person who provokes the aggression that led to the killing. The answer depends on the interpretation accorded to ss. 34 and 35 of the *Criminal Code*, R.S.C., 1985, c. C-46, which codify self-defence in Canada. Section 35 clearly applies where the accused initiated the aggression; however, it contains a requirement that the accused have attempted to retreat, and might not have assisted McIntosh. Sections 34(1) and 34(2), on the other hand, contain no requirement to retreat. Section 34(1) clearly does not apply to the initial aggressor. The debate, in these circumstances, focused on s. 34(2). If McIntosh could avail himself of s. 34(2), he would be entitled to rely on self-defence, notwithstanding findings that he provoked the fight and did not retreat.

The trial judge instructed the jury that s. 34(2) would not apply if they found that McIntosh had

invoquer la légitime défense, même si elle ne s'est pas retirée de l'attaque qu'elle a provoquée. Le Juge en chef répond par l'affirmative à cette question. En toute déférence, je suis d'avis différent.

L'accusé McIntosh était un disc-jockey. Il avait apporté à la victime de l'équipement audio pour qu'il le répare. Au cours des huit mois qui ont suivi, l'intimé a vainement tenté de récupérer son équipement. À une occasion, l'intimé a dit à la victime qu'il [TRADUCTION] «l'attraperait au détour» s'il ne lui remettait pas l'équipement. À une autre occasion, la victime s'est sauvée par la porte arrière en voyant McIntosh à l'entrée. Le jour du meurtre, McIntosh, armé d'un couteau de cuisine, a ordonné à la victime de lui rendre l'équipement. Selon McIntosh, la victime l'aurait alors poussé. Ils se sont battus. La victime aurait pris un chariot et l'aurait soulevé à la hauteur de la tête en direction de l'intimé. McIntosh a alors poignardé la victime, a lancé le couteau et s'est enfui. 49

Il était loisible au jury de conclure, à partir de ce scénario, que McIntosh avait provoqué l'attaque en menaçant la victime au moyen d'un couteau. La question était ensuite de déterminer laquelle des dispositions en matière de légitime défense du *Code criminel* s'applique à une personne qui provoque l'attaque qui cause la mort. La réponse à cette question dépend de l'interprétation donnée aux art. 34 et 35 du *Code criminel*, L.R.C. (1985), ch. C-46, qui codifient la légitime défense au Canada. De toute évidence, c'est l'art. 35 qui s'applique si l'accusé est l'auteur de l'agression; cependant, il exige aussi que l'accusé tente de se retirer du combat, et il pourrait ne pas avoir été utile à McIntosh. Par contre, les par. 34(1) et 34(2) ne renferment pas cette obligation. Le paragraphe 34(1) ne s'applique manifestement pas à l'agresseur initial. Dans ces circonstances, le débat a porté essentiellement sur le par. 34(2). Si McIntosh pouvait se prévaloir de l'application du par. 34(2), il aurait le droit d'invoquer la légitime défense, même si l'on arrive à la conclusion qu'il a provoqué l'attaque et ne s'en est pas retiré. 50

Dans ses directives, le juge du procès a dit au jury que le par. 34(2) ne s'appliquait pas s'il arri- 51

provoked the fight in which he killed the deceased. In his view, only s. 35 was available to an initial aggressor. The jury returned a verdict of guilty of manslaughter. McIntosh appealed on the ground that the trial judge erred in telling the jury that s. 34(2) did not apply to the initial aggressor. The Court of Appeal agreed and ordered a new trial: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199. The Crown now appeals to this Court, arguing that the trial judge correctly instructed the jury that s. 34(2) is not available to persons who provoke the attack which led to the killing.

52 A second issue arose with respect to s. 37 of the *Criminal Code*. The trial judge declined to put it to the jury, on the ground that counsel had not indicated how it could be applied to the evidence in the case. The Court of Appeal agreed.

Analysis

1. *Does Section 34(2) of the Criminal Code Apply to a Person Who Provokes an Attack?*

53 McIntosh raises one main argument. It is this. Section 34(1) states expressly that it does not apply to people who have provoked the assault from which they defended themselves. Section 34(2), by contrast, does not expressly exclude provokers. Therefore, s. 34(2) must be read as applying to people who have provoked the assault from which they defended themselves. In order to prevent s. 34(2) from applying to initial aggressors, it would be necessary to "read in" to s. 34(2) the phrase found in s. 34(1): "without having provoked the assault". On this basis, it is argued that the provisions contain no ambiguity. It is further argued that even if they did contain an ambiguity, it must be resolved in favour of the accused, following the principle that an ambiguity in penal provisions

vait à la conclusion que McIntosh avait provoqué l'attaque au cours de laquelle il a causé la mort de la victime. À son avis, seul l'art. 35 pouvait être invoqué par un agresseur initial. Le jury a rendu un verdict de culpabilité d'homicide involontaire coupable. McIntosh a interjeté appel pour le motif que le juge du procès aurait commis une erreur lorsqu'il a indiqué au jury que le par. 34(2) du *Code criminel* ne s'appliquait pas à un agresseur initial. La Cour d'appel était d'accord et elle a ordonné la tenue d'un nouveau procès: (1993), 15 O.R. (3d) 450, 84 C.C.C. (3d) 473, 24 C.R. (4th) 265, 65 O.A.C. 199. Le ministère public se pourvoit maintenant devant notre Cour et soutient que le juge du procès a eu raison d'indiquer au jury que le par. 34(2) ne s'appliquait pas à une personne qui provoque une attaque qui cause la mort d'une personne.

Une seconde question a été soulevée relativement à l'art. 37 du *Code criminel*. Le juge du procès a refusé de la soumettre au jury parce que l'avocat n'avait pas indiqué comment cette disposition pouvait s'appliquer à la preuve en l'espèce. La Cour d'appel était aussi de cet avis.

Analyse

1. *Le paragraphe 34(2) du Code criminel s'applique-t-il à une personne qui provoque une attaque?*

McIntosh soulève l'argument principal suivant: Le paragraphe 34(1) prévoit explicitement qu'il ne s'applique pas à une personne qui a provoqué l'attaque contre laquelle elle se défend. Par contre, le par. 34(2) n'exclut pas explicitement l'auteur d'une attaque. Par conséquent, le par. 34(2) s'appliquerait à la personne qui a provoqué l'attaque contre laquelle elle se défend. Pour que le par. 34(2) ne s'applique pas à un agresseur initial, il faudrait le considérer comme «incluant» l'expression «sans provocation de sa part» qui figure au par. 34(1). C'est pourquoi on soutient que ces dispositions ne renferment aucune ambiguïté, mais que, même si elles en renfermaient une, elle devrait être résolue en faveur de l'accusé, conformément au principe selon lequel il faut résoudre

should be resolved in the manner most favourable to accused persons.

Section 34(1), as mentioned, contains the phrase "without having provoked the assault". It reads:

Self-defence against unprovoked assault

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Section 34(2), on the other hand, contains no such phrase. It reads:

Extent of justification

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(*a*) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(*b*) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Section 35 specifically refers to initial aggressors or provocateurs. It reads:

Self-defence in case of aggression

35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if

(*a*) he uses the force

(i) under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and

toute ambiguïté dans une disposition pénale de la façon la plus favorable à la personne accusée.

Comme je l'ai mentionné, le par. 34(1) renferme l'expression «sans provocation de sa part»: 54

Légitime défense contre une attaque sans provocation

34. (1) Toute personne illégalement attaquée sans provocation de sa part est fondée à repousser la violence par la violence si, en faisant usage de violence, elle n'a pas l'intention de causer la mort ni des lésions corporelles graves et si la violence n'est pas poussée au-delà de ce qui est nécessaire pour lui permettre de se défendre.

Le paragraphe 34(2), par contre, ne contient pas cette expression: 55

Mesure de la justification

(2) Quiconque est illégalement attaqué et cause la mort ou une lésion corporelle grave en repoussant l'attaque est justifié si:

a) d'une part, il la cause parce qu'il a des motifs raisonnables pour appréhender que la mort ou quelque lésion corporelle grave ne résulte de la violence avec laquelle l'attaque a en premier lieu été faite, ou avec laquelle l'assaillant poursuit son dessein;

b) d'autre part, il croit, pour des motifs raisonnables, qu'il ne peut pas autrement se soustraire à la mort ou à des lésions corporelles graves.

L'article 35 fait un renvoi explicite aux agresseurs initiaux ou provocateurs: 56

Légitime défense en cas d'agression

35. Quiconque a, sans justification, attaqué un autre, mais n'a pas commencé l'attaque dans l'intention de causer la mort ou des lésions corporelles graves, ou a, sans justification, provoqué sur lui-même une attaque de la part d'un autre, peut justifier l'emploi de la force subséquemment à l'attaque si, à la fois:

a) il en fait usage:

(i) d'une part, parce qu'il a des motifs raisonnables d'appréhender que la mort ou des lésions corporelles graves ne résultent de la violence de la personne qu'il a attaquée ou provoquée,

(ii) in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;

(*b*) he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and

(*c*) he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose.

(ii) d'autre part, parce qu'il croit, pour des motifs raisonnables, que la force est nécessaire en vue de se soustraire lui-même à la mort ou à des lésions corporelles graves;

b) il n'a, à aucun moment avant qu'ait surgi la nécessité de se soustraire à la mort ou à des lésions corporelles graves, tenté de causer la mort ou des lésions corporelles graves;

c) il a refusé de continuer le combat, l'a abandonné ou s'en est retiré autant qu'il lui était possible de le faire avant qu'ait surgi la nécessité de se soustraire à la mort ou à des lésions corporelles graves.

57 At first blush the argument seems attractive that the absence of the phrase "without having provoked the assault" in s. 34(2) makes it applicable to all cases of self-defence, even those where the accused provoked the attack. Yet, a closer look at the language, history and policy of ss. 34 and 35 of the *Criminal Code* suggests that this argument should not prevail.

À première vue, l'argument qui veut que l'absence de l'expression «sans provocation de sa part» au par. 34(2) le rende applicable à tous les cas de légitime défense, même ceux où l'accusé a provoqué l'attaque, semble intéressant. Cependant, si l'on examine de plus près le libellé et l'historique des art. 34 et 35 du *Code criminel* ainsi que les principes qui les sous-tendent, cet argument ne devrait pas être accueilli.

58 The Chief Justice starts from the premise that "the language of the statute is plain and admits of only one meaning" (p. 697). From this he concludes that "the task of interpretation does not arise" (p. 697). I cannot agree. First, the language is not, with respect, plain. The facial ambiguity of s. 34(2) is amply attested by the different interpretations which it has been given by different courts. But even if the words were plain, the task of interpretation cannot be avoided. As *Driedger on the Construction of Statutes* (3rd ed. 1994) puts it at p. 4, "no modern court would consider it appropriate to adopt that meaning, however "plain", without first going through the work of interpretation".

Le Juge en chef part de la prémisse que «le libellé de la loi est clair et n'appelle qu'un seul sens» (p. 697) et il conclut qu'«il n'y a pas lieu de procéder à un exercice d'interprétation» (p. 697). Je ne saurais être d'accord. Premièrement, le libellé n'est pas, en toute déférence, clair. L'ambiguïté apparente du par. 34(2) est amplement démontrée par les différentes interprétations que les tribunaux lui ont données. Cependant, même si les termes étaient clairs, l'exercice d'interprétation ne peut être évité. Comme on l'affirme dans *Driedger on the Construction of Statutes* (3e éd. 1994) à la p. 4, [TRADUCTION] «aucun tribunal moderne ne considérerait comme approprié d'adopter ce sens, aussi «clair» soit-il, sans tout d'abord faire un exercice d'interprétation».

59 The point of departure for interpretation is not the "plain meaning" of the words, but the intention of the legislature. The classic statement of the "plain meaning" rule, in the *Sussex Peerage Case* (1844), 11 C. & F. 85, 8 E.R. 1034 (H.L.), at p. 1057, makes this clear: "the only rule for the con-

Le point de départ de l'exercice d'interprétation n'est pas le «sens ordinaire» des mots, mais l'intention du législateur. La formulation classique de la règle du «sens ordinaire», dans l'affaire *Sussex Peerage Case* (1844), 11 C. & F. 85, 8 E.R. 1034 (H.L.), à la p. 1057, établit clairement ce fait: [TRA-

struction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act". To quote *Driedger, supra*, at p. 3: "The purpose of the legislation must be taken into account, even where the meaning appears to be clear, and so must the consequences." As Lamer C.J. put it in *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025, at p. 1042: "the express words used by Parliament must be interpreted not only in their ordinary sense but also in the context of the scheme and purpose of the legislation". The plain meaning of the words, if such exists, is a secondary interpretative principle aimed at discerning the intention of the legislator. If the words admit of only one meaning, they may indeed "best declare the intention of the lawgiver" as suggested in the *Sussex Peerage Case* at p. 1057, but even here it is the intention, and not the "plain meaning", which is conclusive. But if, as in the case of s. 34(2), the words permit of doubt as to the intention of Parliament, other matters must be looked to to determine that intention.

DUCTION] «la seule règle d'interprétation des lois est qu'elles doivent être interprétées en fonction de l'intention du législateur qui les a adoptées». Comme on le dit dans *Driedger, op. cit.*, à la p. 3: [TRADUCTION] «Il faut tenir compte, de l'objet de la loi, même dans le cas où son sens paraît clair, ainsi que de ses conséquences.» Comme le juge en chef Lamer l'indique dans l'arrêt *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025, à la p. 1042, «[l]es termes exprès utilisés par le législateur dans les dispositions pertinentes d'une loi, doivent être interprétés non seulement selon leur sens ordinaire mais également dans le contexte de l'esprit et de l'objet de la loi». La détermination du sens ordinaire des termes, en admettant qu'on puisse le dégager, est un principe secondaire d'interprétation qui vise à déterminer quelle était l'intention du législateur. Si les termes n'ont qu'un seul sens, ils peuvent en fait [TRADUCTION]«constituer la meilleure indication de l'intention du législateur», comme on le dit dans l'arrêt *Sussex Peerage*, à la p. 1057; toutefois, même dans ce cas, c'est l'intention du législateur et non le «sens ordinaire» des termes qui est concluante. Par contre, si, comme dans le cas du par. 34(2), les termes utilisés laissent planer le doute quant à l'intention du législateur, il faut examiner d'autres questions pour dégager cette intention.

I also depart from the Chief Justice on his application of the proposition that "where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation" (p. 702). This Court in *Marcotte v. Deputy Attorney General for Canada*, [1976]1 S.C.R. 108, at p. 115, made it clear that this rule of construction applies only where "real ambiguities are found, or doubts of substance arise" (*per* Dickson J. (as he then was)). If the intention of Parliament can be ascertained with reasonable precision, the rule has no place. As La Forest J. put it in *R. v. Deruelle*, [1992] 2 S.C.R. 663, at pp. 676-77:

Je m'écarte également de la façon dont le Juge en chef applique la proposition selon laquelle «dans le cas où il est possible de donner deux interprétations à une disposition qui porte atteinte à la liberté d'une personne, dont l'une serait plus favorable à un accusé, [. . .] la cour devrait adopter l'interprétation qui favorise l'accusé» (p. 702). Dans l'arrêt *Marcotte c. Sous-procureur général du Canada*, [1976] 1 R.C.S. 108, à la p. 115, notre Cour a clairement établi que cette règle d'interprétation ne s'applique «qu'en présence de réelles ambiguïtés ou de doutes sérieux» (le juge Dickson (plus tard Juge en chef)). Si l'on peut déterminer de façon suffisamment précise l'intention du législateur, cette règle n'est pas applicable. Comme le juge La Forest l'affirme dans l'arrêt *R. c. Deruelle*, [1992] 2 R.C.S. 663, aux pp. 676 et 677:

60

In the court below, the majority suggested that any ambiguity in a penal provision should be resolved in favour of the accused. . . . While it is true that s. 254(3)

Suivant la Cour d'appel à la majorité, toute ambiguïté dans une disposition pénale doit profiter à l'accusé. [. . .] Le paragraphe 254(3) n'est peut-être pas un modèle de

is not a model of clarity, in this instance the intent of Parliament is sufficiently clear that there is no need for the aid of that canon of statutory construction.

61 In summary, then, I take the view that this Court cannot evade the task of interpreting s. 34(2). The Court's task is to determine the intention of Parliament. The words of the section, taken alone, do not provide a clear and conclusive indication of Parliament's intention. It is therefore necessary to look further to determine Parliament's intention to the history of the section and the practical problems and absurdities which may result from interpreting the section one way or the other. These considerations lead, in my respectful view, to the inescapable conclusion that Parliament intended s. 34(2) to apply only to unprovoked assaults. This in turn leads to the conclusion that the trial judge was correct in declining to leave s. 34(2) with the jury.

The History of Section 34(2)

62 Self-defence at common law rested on a fundamental distinction between cases where no fault was attributable to the killer, and cases where the killing was partly induced by some fault of the killer. Where the killer was not at fault — that is where he had not provoked the aggression — the homicide was called "justifiable homicide". Where blame could be laid on the killer, as where he had provoked the aggression, on the other hand, the homicide was called "excusable homicide". (See E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. 1; William Blackstone, *Commentaries on the Laws of England* (1769), Book IV.)

63 Justifiable homicide and excusable homicide attracted different duties. In the case of justifiable homicide, or homicide in defending an unprovoked attack, the killer could stand his ground and was not obliged to retreat in order to rely on the defence of self-defence. In the case of excusable homicide, on the other hand, the killer must have retreated as far as possible in attempting to escape the threat which necessitated homicide, before he could claim self-defence. In other words, unpro-

clarté, mais dans le cas qui nous occupe l'intention du législateur est suffisamment claire pour qu'il ne soit pas nécessaire de recourir à ce précepte de l'interprétation législative.

En résumé, alors, je suis d'avis que notre Cour ne peut se dérober à la tâche d'interpréter le par. 34(2). Notre Cour doit déterminer quelle était l'intention du législateur. Le libellé de la disposition, en soi, n'en donne pas une indication claire et concluante. Il est en conséquence nécessaire, pour déterminer cette intention, d'examiner l'historique de cette disposition ainsi que les problèmes pratiques et les absurdités qui peuvent résulter d'une interprétation ou d'une autre. À mon humble avis, ces considérations aboutissent à l'inévitable conclusion que le législateur visait à ce que le par. 34(2) ne s'applique qu'aux attaques sans provocation. Ce qui m'amène à conclure que le juge du procès a eu raison de ne pas permettre au jury de se prononcer sur le par. 34(2).

L'historique du par. 34(2)

En common law, la légitime défense reposait sur une distinction fondamentale entre les cas où le meurtre ne résultait d'aucune faute du meurtrier et ceux où il résultait en partie d'une faute du meurtrier. En l'absence de faute de la part du meurtrier — c'est-à-dire s'il n'avait pas provoqué l'agression — on parlait d'«homicide justifiable». Par contre, dans le cas où l'on pouvait rejeter la responsabilité sur le meurtrier, par exemple s'il avait provoqué l'agression, il s'agissait d'un «homicide excusable». (Voir E. H. East, *A Treatise of the Pleas of the Crown* (1803), vol. 1; William Blackstone, *Commentaries on the Laws of England* (1769), livre IV.)

Ces deux types d'homicide donnaient lieu à des obligations différentes. Dans le cas de l'homicide justifiable, ou de l'homicide commis pour repousser une attaque non provoquée, le meurtrier pouvait faire front et n'était pas obligé de se retirer du combat pour invoquer la légitime défense. Par contre, dans le cas de l'homicide excusable, avant de pouvoir invoquer la légitime défense, le meurtrier devait s'être retiré autant qu'il lui était possible de le faire en tentant d'échapper à la menace qui avait

voked attacks imposed no duty to retreat. Provoked attacks did impose a duty to retreat.

The two situations recognized at common law — justifiable homicide and excusable homicide — were codified in the first Canadian *Criminal Code* in 1892, S.C. 1892, c. 29, in ss. 45 and 46. Section 45 when enacted in 1892 differed from its modern equivalent, s. 34, in that it was not divided into two subsections. Rather, it consisted of two parts divided by a semicolon. The wording too was slightly different. Its wording indicated that the phrase at the heart of this appeal — "not having provoked the assault" — was applicable to both halves of the section. Section 45 read:

Self-defence against unprovoked assault

45. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is justified, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

The 1892 *Code* was clear and conformed to the common law on which it was based. An accused who had not provoked the assault was a person "unlawfully assaulted". He was entitled to stand his ground and need not retreat. An accused who had provoked the assault, on the other hand, was covered by s. 46 and could not claim to have acted in self-defence unless he retreated.

In 1906 the *Criminal Code* underwent a general revision. One of the policies of the revision was to

entraîné l'homicide. En d'autres termes, une attaque sans provocation ne donnait lieu à aucune obligation de se retirer, alors que l'attaque provoquée comportait cette obligation.

Les deux situations reconnues en common law — l'homicide justifiable et l'homicide excusable — ont été codifiées dans le premier *Code criminel* canadien en 1892, S.C. 1892, ch. 29, dans les art. 45 et 46. L'article 45 adopté en 1892 divergeait de son équivalent moderne, l'art. 34, en ce qu'il ne comportait pas deux paragraphes. Il était plutôt divisé en deux parties séparées par un point-virgule. Le libellé était aussi quelque peu différent en ce que l'expression au cœur du présent pourvoi, «sans provocation de sa part», s'appliquait aux deux parties de l'art. 45:

Repousser une attaque non provoquée

45. Tout individu illégalement attaqué, sans provocation de sa part, est justifiable de repousser la violence par la violence, si, en en faisant usage, il n'a pas l'intention de causer la mort ni des blessures corporelles graves, et si elle n'est pas poussée au delà de ce qui est nécessaire pour se défendre; et quiconque est ainsi attaqué est justifiable, même s'il cause la mort ou quelque blessure corporelle grave, et s'il la cause dans l'appréhension raisonnable de mort ou de blessures corporelles graves par suite de la violence avec laquelle l'attaque a été d'abord faite contre lui ou avec laquelle son assaillant poursuit son dessein, et s'il croit pour des motifs plausibles qu'il ne peut autrement se soustraire lui-même à la mort ou à des blessures corporelles graves.

Le *Code* de 1892 était clair et conforme à la common law sur lequel il se fondait. Un accusé qui n'avait pas provoqué une attaque était une personne «illégalement attaqué[e]». Il avait le droit de faire front et n'était pas obligé de se retirer. Par contre, un accusé qui avait provoqué l'attaque était visé par l'art. 46 et ne pouvait soutenir qu'il avait agi par légitime défense, sauf s'il s'était retiré du combat.

En 1906, le *Code criminel* a subi une révision générale. L'un des principes de la révision était de

divide longer provisions into subsections. In accordance with this policy, s. 45 became s. 53(1) and (2). The wording, however, remained identical. The marginal note to s. 53(1) read "Self defence. Assault.", and the marginal note to s. 53(2) read "Extent justified.". In 1927, while the section remained identical in wording and numbering, the marginal note to s. 53(1) reverted to "Self-defence against unprovoked assault.".

67 In 1955, in the course of another general revision, S.C. 1953-54, c. 51, s. 53 became s. 34. The words "Every one so assaulted is justified, though he causes" in the second subsection were removed, and the words "Every one who is unlawfully assaulted and who causes" were substituted. The second subsection was further divided into two paragraphs, but all else remained the same. Section 35, like the former s. 46, dealt with provoked assault. As might be expected, s. 34 imposed no requirement of retreat; s. 35 did. Thus the common law distinction between justifiable homicide and excusable homicide was carried forward.

68 One incongruity, however, emerged with the 1955 revision. The phrase "so assaulted" in the second part of the old s. 45 had clearly referred back to the phrase in the first part "unlawfully assaulted, not having provoked such assault". In 1955, however, when "Every one so assaulted" was replaced in the severed subsection by "Every one who is unlawfully assaulted", the clear reference back that had been present in the older versions became less clear. The phrase "not having provoked such assault", which in the old s. 45 had modified or explained the term "unlawfully assaulted" in both the first and second part of the section, was thus effectively deleted from s. 34(2).

69 History provides no explanation for why the explanatory phrase was omitted from s. 34(2). Certainly there is no suggestion that Parliament was attempting to change the law of self-defence. The more likely explanation, given the history of the

diviser les longues dispositions en paragraphes. L'article 45 a alors été subdivisé en deux paragraphes, les par. 53(1) et (2). Le libellé est cependant demeuré essentiellement identique. La note marginale du par. 53(1) est intitulée: «Défense personnelle.» et celle du par. 53(2): «Voies de fait.». En 1927, le libellé de la disposition est demeuré essentiellement le même, mais la note marginale est devenue: «Défense personnelle contre attaque sans provocation.».

En 1955, dans le cadre d'une autre révision générale, S.C. 1953-54, ch. 51, l'art. 53 est devenu l'art. 34. L'expression «Quiconque est ainsi attaqué est justifiable même de causer» a été supprimée dans le second paragraphe et remplacée par «Quiconque est illégalement attaqué et cause». Le second paragraphe a de plus été subdivisé en deux alinéas, mais le libellé est demeuré essentiellement le même. L'article 35, comme l'ancien art. 46, portait sur une attaque avec provocation. Comme on pouvait s'y attendre, l'art. 34 n'imposait aucune obligation de se retirer du combat, mais l'art. 35 le faisait. En conséquence, on s'est trouvé à reprendre la distinction en common law entre l'homicide justifiable et l'homicide excusable.

Cependant, la révision de 1955 a donné naissance à une incongruité. L'expression «ainsi attaqué» dans la seconde partie de l'ancien art. 45 renvoyait clairement à l'expression «illégalement attaqué, sans provocation de sa part» dans la première partie de la disposition. Cependant, en 1955, lorsque l'on a, dans le nouveau paragraphe, remplacé l'expression «[q]uiconque est ainsi attaqué» par «[q]uiconque est illégalement attaqué», le renvoi clair à un passage déjà cité, qui figurait dans les anciennes versions, ne l'était plus autant. L'expression «sans provocation de sa part» qui, dans l'ancien art. 45, avait modifié ou expliqué l'expression «illégalement attaqué», tant dans la première que dans la seconde partie de la disposition, a effectivement été retranchée du par. 34(2).

L'historique de la disposition ne précise pas pourquoi l'incise explicative a été supprimée du par. 34(2). Rien n'indique que le législateur aurait tenté de modifier le droit en matière de légitime défense. L'explication la plus probable, compte

changes, is inadvertence. In the process of breaking the old s. 45 into two subsections and later substituting new words for the old connector "so assaulted", and in the context of the significant task of a general revision of the entire *Code*, the need to insert the modifying phrase "not having provoked such assault" in the newly worded subsection was overlooked.

tenu de l'historique des modifications, est qu'il y a eu inadvertance. Dans le cadre de la subdivision de l'ancien art. 45 en deux paragraphes et plus tard du remplacement de l'expression «ainsi attaqué» par une nouvelle expression, et dans le contexte de l'importante tâche de révision générale de tout le *Code*, on a oublié qu'il était nécessaire d'insérer l'incise: «sans provocation de sa part».

The marginal notes accompanying ss. 34 and 35 support the view that the omission of the phrase "without having provoked the assault" in the 1955 *Code* was inadvertent and that Parliament continued to intend that s. 34 would apply to unprovoked assaults and s. 35 to provoked assaults. The note for s. 34 is "Self-defence against unprovoked assault/Extent of justification", for s. 35 "Self-defence in case of aggression", namely assault or provocation. While marginal notes are not part of the legislative act of Parliament, and hence are not conclusive support in interpretation, I agree with the view of Wilson J. in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, at pp. 556-58, that they may be of some limited use in gleaning the intention of the enactment. Inasmuch as they do indicate an intention, they clearly support the interpretation suggested by the above discussion.

70 Les notes marginales en regard des art. 34 et 35 appuient l'idée que l'omission de l'expression «sans provocation de sa part» dans le *Code* de 1955 était un oubli et que le législateur avait toujours l'intention que l'art. 34 vise les attaques sans provocation et l'art. 35, les attaques avec provocation. La note de l'art. 34 est «Légitime défense contre une attaque sans provocation/Mesure de la justification» et celle de l'art. 35, «Légitime défense en cas d'agression», soit une attaque ou une provocation. Bien que les notes marginales ne fassent pas partie de la loi adoptée par le législateur, et ne sont donc pas déterminantes en matière d'interprétation, je suis d'accord avec le point de vue du juge Wilson dans l'arrêt *R. c. Wigglesworth*, [1987] 2 R.C.S. 541, aux pp. 556 à 558, qui a affirmé que ces notes peuvent avoir une certaine utilité dans la détermination de l'intention du texte législatif. Dans la mesure où elles indiquent une intention, ces notes appuient clairement l'interprétation proposée dans l'analyse qui précède.

Parliament's retention of the phrase "unlawfully assaulted" in both s. 34(1) and s. 34(2) provides yet further confirmation of the view that Parliament did not intend to remove the long-standing distinction between provoked and unprovoked assault. The meaning of that phrase, in the context of the two sections, is indicated by its conjunction with the phrase "not having provoked such assault" which modified "unlawfully assaulted" in the 1892 codification. This phrase in the 1892 codification suggests that "unlawfully assaulted" in the context of that section meant "not having provoked such assault". There is no reason to suppose that the meaning of the phrase "unlawfully assaulted" changed in the intervening years. If so, then on its plain wording s. 34(2) applies only to

71 Le fait que le législateur a conservé l'expression «illégalement attaqué» tant au par. 34(1) qu'au par. 34(2) vient aussi confirmer l'idée que le législateur n'avait pas l'intention d'éliminer la distinction de longue date entre une attaque avec provocation et une autre sans provocation. Le sens de cette expression, dans le contexte des deux dispositions en question, ressort de l'incise explicative «sans provocation de sa part» qui modifiait l'expression «illégalement attaqué» que l'on trouvait dans la codification de 1892. Cette expression dans la codification de 1892 laisse entendre que l'expression «illégalement attaqué» employée dans le contexte de cet article signifiait «sans provocation de sa part». Il n'y a aucun motif de supposer que le sens de l'expression «illégalement attaqué» a

an unprovoked assault, even in the absence of the phrase "without having provoked the assault".

72 Parliament's intention to retain the long-standing distinction between provoked and unprovoked assault in the context of self-defence is also confirmed by the fact that neither s. 34(1) nor s. 34(2) imposes a duty to retreat, indicating that these provisions deal with the common law category of justifiable homicide, contrasted with the excusable homicide of s. 35.

73 Taking all this into account, can it be said that Parliament intended to change the meaning of s. 34(2) in the 1955 codification, thus abrogating sixty years of statutory criminal law, based on hundreds of years of the common law? I suggest not. To effect such a significant change, Parliament would have made its intention clear. This it did not do. If the word "unlawful" is given its proper meaning, it is unnecessary to read anything into the section to conclude that it does not apply to provoked assaults. Alternatively, if it were necessary to read in the phrase "without having provoked the assault", this would be justified. *Driedger*, at p. 106, states that a court will be justified in making minor amendments or substituting one phrase for another where a drafting error is evidenced by the fact that the provision leads to a result that cannot have been intended. Redrafting a provision, it suggests at p. 108, is acceptable where the following three factors are present: (1) a manifest absurdity; (2) a traceable error; and (3) an obvious correction. All three conditions are filled in the case at bar. In a similar vein, Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), suggests that words may be read in to "express what is already implied by the statute" (p. 232). This condition too is met in the case of s. 34(2).

74 The argument that Parliament intended to effect a change to the law of self-defence in 1955 rests

changé au cours des ans. Alors, dans son sens ordinaire, le par. 34(2) s'applique seulement à une attaque sans provocation, même en l'absence de l'expression «sans provocation de sa part».

L'intention du législateur de préserver la distinction de longue date entre l'attaque avec provocation et celle sans provocation dans le contexte de la légitime défense est également confirmée par le fait que ni le par. 34(1) ni le par. 34(2) ne comportent une obligation de se retirer du combat, indiquant qu'ils traitent de la catégorie de l'homicide justifiable, reconnue en common law, par opposition à l'homicide excusable que vise l'art. 35.

Compte tenu de toutes ces considérations, peut-on dire que le législateur a voulu modifier le sens du par. 34(2) dans la codification de 1955, abrogeant ainsi soixante années d'interprétation du droit criminel, fondée sur des centaines d'années de common law? Je ne le crois pas. Pour procéder à un changement aussi important, le législateur aurait clairement exprimé son intention. Ce qu'il n'a pas fait. Si l'on interprète comme il se doit le terme «illégalement», il est inutile d'introduire quoi que ce soit par interprétation pour conclure que la disposition ne s'applique pas aux attaques avec provocation. Par contre, s'il faut considérer que le paragraphe contient l'expression «sans provocation de sa part», cet exercice serait justifié. On affirme dans *Driedger*, à la p. 106, qu'un tribunal sera justifié d'apporter des modifications mineures ou de remplacer une expression par une autre dans le cas où une erreur de rédaction aboutit à un résultat qui ne peut pas avoir été envisagé. On y précise à la p. 108 que l'on peut reformuler une disposition lorsque les trois facteurs suivants sont réunis: (1) une absurdité manifeste, (2) une erreur dont on peut retracer l'origine et (3) une correction évidente. En l'espèce, ces trois conditions sont respectées. Dans la même veine, selon Pierre-André Côté dans *Interprétation des lois* (2e éd. 1990), les mots peuvent être introduits pour «expliciter l'élément implicite de la communication légale» (p. 259). Cette condition est également respectée dans le cas du par. 34(2).

La thèse selon laquelle le législateur a eu l'intention de modifier le droit en matière de légitime

finally on the presumption that a change in wording is intended to effect substantive change. But this presumption is weak and easily rebutted in Canada, where making formal improvements to the statute book is a minor industry. This is particularly the case where, as in this case, there is evidence of a drafting error: *Driedger*, at pp. 450-51.

I conclude that the intention of Parliament is clear and that s. 34(2), read in its historical context, applies only to unprovoked assaults.

The Jurisprudence

For many years after the 1955 amendments to the *Criminal Code*, ss. 34 and 35 were interpreted in the way that the history of the sections and the marginal notes suggest. In two 1975 cases, the Ontario Court of Appeal made broad statements to the effect that s. 34 was available only to the victims of unprovoked assaults. In *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174, at p. 176, the Ontario Court of Appeal (*per* Kelly, Lacourciere and Zuber JJ.A.) stated:

> The trial Judge did not instruct the jury as to the effect of s. 35 of the *Criminal Code* and in our view, he should have so done. Section 34 entitles one to defend himself from an unlawful assault that he has not provoked. Section 35 deals with the right of a person to defend himself from an assault which he has provoked. Section 35 should have been left with the jury in the event that they were of the view that Bolyantu had provoked an assault (either actual or believed) by Stimac.

In *R. v. Squire* (1975), 26 C.C.C. (2d) 219, at p. 233, Martin J.A. for the court distinguished between the situation where the deceased had been provoked and hence had a "legal right" to strike back, and a situation where he had not been provoked, in which case the deceased's strike would be "unlawful". In the former case, s. 35 governed, in the latter s. 34.

> It is clear that a blow struck justifiably in self-defence by the deceased cannot afford provocation, since it is

défense en 1955 repose en fin de compte sur la présomption qu'une modification de libellé vise à procéder à une modification de fond. Cependant, cette présomption est faible et peut être facilement réfutée au Canada où les améliorations de forme des lois sont légion. Ce qui est particulièrement le cas où, comme en l'espèce, il existe une preuve d'une erreur de rédaction: *Driedger*, aux pp. 450 et 451.

Je conclus que l'intention du législateur est claire et que le par. 34(2), interprété dans son contexte historique, ne s'applique qu'aux attaques sans provocation. 75

La jurisprudence

Pendant de nombreuses années après les modifications apportées au *Code criminel* en 1955, les art. 34 et 35 ont été interprétés de la façon dont leur historique et leur note marginale le laissent entendre. Dans deux affaires en 1975, la Cour d'appel de l'Ontario a fait des déclarations générales et affirmé que seules les victimes d'attaques non provoquées pouvaient invoquer l'art. 34. Dans l'arrêt *R. c. Bolyantu* (1975), 29 C.C.C. (2d) 174, à la p. 176, la Cour d'appel de l'Ontario (les juges Kelly, Lacourciere et Zuber) affirme: 76

> [TRADUCTION] Le juge du procès n'a pas donné au jury de directives sur l'effet de l'art. 35 du *Code criminel* et, à notre avis, il aurait dû le faire. L'article 34 permet à une personne de repousser une attaque illégale qu'elle n'a pas provoquée. L'article 35 porte sur le droit d'une personne de repousser une attaque qu'elle a provoquée. Le jury aurait dû recevoir des directives sur l'art. 35 au cas où il aurait été d'avis que c'est Bolyantu qui avait provoqué l'attaque (réelle ou appréhendée) de Stimac.

Dans l'arrêt *R. c. Squire* (1975), 26 C.C.C. (2d) 219, à la p. 233, le juge Martin, au nom de la Cour d'appel, a établi une distinction entre un cas où la victime a été provoquée et avait en conséquence «un droit légal» de répliquer, et un cas où elle n'aurait pas été provoquée, auquel cas il lui était «illégal» de frapper. Dans le premier cas, c'est l'art. 35 qui s'applique, et dans le second, l'art. 34.

> [TRADUCTION] Il est clair qu'un coup que la victime aurait été fondée à assener pour se défendre ne peut

something that the deceased "had a legal right to do", within the proviso to s. 215(3) of the *Code*. In such circumstances the blow is not a wrongful act.

The case of a person who has willingly engaged in a fight without any necessity for defending himself falls within the provisions of s. 35 of the *Code* which establishes the conditions necessary to justify the subsequent use of force in self-defence by one who has without justification assaulted another or who has without justification provoked an assault upon himself. It is difficult to see how in such circumstances *one who has actually and willingly begun to fight* could be said to be the victim of an *unprovoked assault* under s. 34. [Underlining added; italics in original.]

77 The British Columbia Court of Appeal has followed the same approach. In *R. v. Merson* (1983), 4 C.C.C. (3d) 251, at p. 255, it stated, *per* Nemetz C.J.B.C. (in dissent, but not on this point):

Generally speaking, s. 34 provides a defence of self-defence to a victim. Section 35 provides such a defence to the aggressor.

And *per* Taggart J.A., at p. 266:

Unlike s. 34, s. 35 is available to an accused notwithstanding the fact that he initiates the conflict by assaulting, or by provoking an assault by, the other combatant.

The Alberta Court of Appeal has taken the same view in *R. v. Alkadri* (1986), 29 C.C.C. (3d) 467, at p. 470, *per* Kerans J.A.:

If he did not provoke that assault, the killing is justified under s. 34(2) if the jury has a doubt whether the accused caused the death under reasonable apprehension of death and in the belief he had no choice. If, on the other hand, the jury views the accused as the original aggressor, he can only invoke s. 35 and the jury must additionally ask itself both whether he did not, before the threat to his life arose, himself try to kill and whether he had, after he started the fight, retreated from it as far as was feasible.

78 More recently, the Ontario Court of Appeal in two cases, *R. v. Stubbs* (1988), 28 O.A.C. 14, and

constituer une provocation puisqu'il s'agit de quelque chose que la victime «avait un droit légal de faire» au sens du par. 215(3) du *Code*. Dans ces circonstances, le coup n'est pas un acte illégal.

Le cas d'une personne qui a volontairement participé à un combat, sans qu'existe une nécessité de se défendre, est visé par l'art. 35 du *Code*, qui prévoit les conditions qui justifient l'emploi subséquent de la force en légitime défense par une personne qui a, sans justification, attaqué une autre personne ou a, sans justification, provoqué une attaque contre elle. Il est difficile de voir comment l'on pourrait dire dans ces circonstances *qu'une personne qui a réellement et volontairement commencé un combat* est la victime d'une *attaque non provoquée* au sens de l'art. 34. [Je souligne; en italique dans l'original.]

La Cour d'appel de la Colombie-Britannique a suivi la même démarche. Dans l'arrêt *R. c. Merson* (1983), 4 C.C.C. (3d) 251, à la p. 255, le juge en chef Nemetz (dissident, sur un autre point) affirme:

[TRADUCTION] D'une manière générale, l'art. 34 permet à la victime d'invoquer la légitime défense. L'article 35 offre le même moyen de défense à l'agresseur.

Le juge Taggart précise à la p. 266:

[TRADUCTION] Contrairement à l'art. 34, un accusé peut faire valoir l'application de l'art. 35 même s'il a commencé le combat en attaquant ou en provoquant une attaque de la part de l'autre combattant.

La Cour d'appel de l'Alberta a adopté le même point de vue dans l'arrêt *R. c. Alkadri* (1986), 29 C.C.C. (3d) 467, à la p. 470, sous la plume du juge Kerans:

[TRADUCTION] Si l'accusé n'a pas provoqué l'attaque, il est justifié d'avoir causé la mort, selon le par. 34(2), dans le cas où le jury entretient un doute quant à savoir s'il a causé la mort parce qu'il avait des motifs raisonnables d'appréhender la mort et qu'il croyait ne pas avoir d'autre choix. Par contre, dans le cas où l'accusé est, aux yeux du jury, l'agresseur initial, celui-ci ne peut invoquer que l'art. 35 et le jury devra également se demander d'une part, si l'accusé n'a pas, avant qu'ait surgi la menace à sa vie, lui-même tenté de causer la mort et d'autre part, s'il s'est retiré du combat autant qu'il lui était possible de le faire.

Plus récemment, dans les arrêts *R. c. Stubbs* (1988), 28 O.A.C. 14, et *R. c. Nelson* (1992), 71

R. v. Nelson (1992), 71 C.C.C. (3d) 449, took the view that the court took in this case, that s. 34(2) is available to an aggressor. Viewed in the historical continuum, these decisions represent a departure from the settled view at common law and throughout most of the first century of the Canadian *Criminal Code* that both branches of s. 34 apply only in the situation of justifiable assault, that is where the accused did not provoke the fight that led to the killing.

C.C.C. (3d) 449, la Cour d'appel de l'Ontario a adopté le même point de vue que dans la présente affaire, c'est-à-dire que l'agresseur initial peut faire valoir l'application du par. 34(2). Examinés dans le contexte historique, ces arrêts s'écartent de la position reconnue en common law et tout au long de la majeure partie du premier siècle d'existence du *Code criminel* canadien, selon laquelle les deux parties de l'art. 34 ne s'appliquent que dans le cas d'une attaque justifiable, c'est-à-dire lorsque l'accusé n'a pas provoqué l'attaque qui a causé la mort.

Policy Considerations

The interpretation of ss. 34 and 35 which I have suggested is supported by policy considerations. The Crown argues that it would be absurd to make s. 34(2) available to aggressors when s. 35 so clearly applies. Parliament, it argues, could not have intended such a result. More practically, as the Chief Justice notes, the sections read as McIntosh urges may lead to absurd results. If s. 34(2) is available to an initial aggressor who has killed or committed grievous bodily harm, then that accused may be in a better position to raise self-defence than an initial aggressor whose assault was less serious; since s. 34(2) is only available to an aggressor who "causes death or grievous bodily harm", the less serious aggressor would not fall under its ambit. The less serious aggressor, forced to rely on s. 35, would have no defence in the absence of retreat. It is anomalous, to use the Chief Justice's word, that an accused whose conduct is the more serious has the broader defence.

Les considérations de principe

Des considérations de principe appuient l'interprétation que je donne aux art. 34 et 35. Le ministère public soutient qu'il serait absurde de permettre l'application du par. 34(2) à un agresseur dans les cas où l'art. 35 s'applique manifestement. Il soutient que le législateur ne saurait avoir voulu un tel résultat. D'un côté plus pratique, comme le fait remarquer le Juge en chef, les dispositions interprétées de la façon que préconise McIntosh, peuvent aboutir à des résultats absurdes. Si le par. 34(2) peut s'appliquer à un agresseur initial qui a causé la mort ou des lésions corporelles graves, l'accusé pourrait être en meilleure position pour invoquer la légitime défense qu'un agresseur initial dont l'attaque a été moins grave; puisque le par. 34(2) ne s'applique qu'à un agresseur qui «cause la mort ou une lésion corporelle grave», l'agresseur qui a commis une attaque moins sérieuse ne serait pas visé par ce paragraphe. Ce dernier, forcé de faire valoir l'art. 35, n'aurait aucun moyen de défense s'il ne s'est pas retiré du combat. Il n'est pas normal, pour employer une expression du Juge en chef, qu'une personne accusée, dont la conduite a été plus grave, puisse invoquer le moyen de défense plus large.

79

Common sense suggests that ss. 34 and 35 set out two situations, each with its corresponding defence. The broader defence of s. 34, not requiring retreat, goes naturally with the less serious category of conduct by the accused, namely, the situation where the accused is unlawfully attacked, not having provoked the assault. The narrower defence of s. 35 similarly goes naturally with the more seri-

Logiquement, les art. 34 et 35 établissent deux situations, chacune assortie d'un moyen de défense correspondant. Le moyen de défense plus large prévu à l'art. 34, ne comportant pas l'obligation de se retirer, va naturellement de pair avec une conduite moins grave, soit le cas où l'accusé est illégalement attaqué, sans provocation de sa part. De la même façon, le moyen de défense plus restreint

80

ous conduct by the accused, the situation where the accused as aggressor provoked the assault.

81 While I agree with the Chief Justice that Parliament can legislate illogically if it so desires, I believe that the courts should not quickly make the assumption that it intends to do so. Absent a clear indication to the contrary, the courts must impute a rational intent to Parliament. As Lord Scarman put it in *Stock v. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231 (H.L.), at p. 239: "If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake." That, in my view, describes this case. Indeed, as noted earlier, the law goes so far as to permit a missing provision to be read in where absurdity, traceable error and obvious correction combine.

82 Not only is the result McIntosh argues for anomalous; to my mind it is unwise and unjust. The common law has for centuries insisted that the person who provokes an assault and subsequently kills the person he attacks when that person responds to the assault must retreat if he wishes to plead self-defence. Otherwise, a person who wished to kill another and escape punishment might deliberately provoke an attack so that he might respond with a death blow. People who provoke attacks must know that a response, even if it is life-threatening, will not entitle them to stand their ground and kill. Rather, they must retreat. The obligation to retreat from provoked assault has stood the test of time. It should not lightly be discarded. Life is precious; the justification for taking it must be defined with care and circumspection.

offert par l'art. 35 est naturellement offert à une personne accusée dont la conduite a été plus grave, c'est-à-dire, le cas où l'accusé, en tant qu'agresseur, a provoqué l'attaque.

Bien que je reconnaisse, à l'instar du Juge en chef, que le législateur peut légiférer de façon illogique s'il le désire, je suis d'avis que les tribunaux ne devraient pas s'empresser de supposer qu'il a eu cette intention. En l'absence d'une indication claire du contraire, les tribunaux doivent imputer une intention rationnelle au législateur. Comme lord Scarman l'affirme dans l'arrêt *Stock c. Frank Jones (Tipton) Ltd.*, [1978] 1 W.L.R. 231 (H.L.), à la p. 239: [TRADUCTION] «Si les termes utilisés par le législateur sont clairs, il n'y a pas lieu d'appliquer le critère des «anomalies», sauf si les conséquences sont si absurdes que l'on peut se rendre compte, sans s'écarter de la loi, que le législateur doit avoir commis une erreur de rédaction.» Cela décrit, à mon avis, la situation en l'espèce. En fait, comme je l'ai déjà mentionné, le droit va jusqu'à permettre d'introduire par interprétation un élément manquant dans une disposition dans les cas où il existe une absurdité, une erreur dont on peut retracer l'origine et une correction évidente.

La solution préconisée par McIntosh n'est pas seulement irrégulière, mais elle est aussi, à mon avis, peu sage et injuste. En effet, on a, pendant des siècles, insisté en common law pour que la personne qui provoque une attaque et qui, au cours du combat qui s'ensuit, cause ensuite la mort de la personne qu'il a attaquée, se retire du combat si elle désire faire valoir la légitime défense. Sinon, une personne qui désire causer la mort d'une autre, sans être punie, pourrait délibérément provoquer une attaque qui lui permettrait de réagir en frappant un coup mortel. Une personne qui provoque une attaque doit savoir qu'une réplique, même dans le cas de risque pour sa vie, ne lui permettra pas de faire front et de causer la mort. Cette personne a plutôt l'obligation de se retirer. Cette obligation de se retirer en cas de provocation a résisté au temps. Elle ne devrait pas être écartée à la légère. La vie est précieuse; la justification pour causer la mort doit être définie avec soin et circonspection.

Conclusion on Section 34(2)

In summary, the history, the wording and the policy underlying s. 34(2) all point to one conclusion: Parliament did not intend it to apply to provoked assault. It follows that the trial judge did not err in limiting s. 34(2) in this way in his instructions to the jury.

2. *Should Section 37 of the Criminal Code Have Been Left with the Jury?*

Section 37 refers to two aspects of defence of the person: self-defence and defence of others. With respect to defence of others, the section is unique, and its meaning is therefore clear. I agree with the Chief Justice that the purpose of s. 37 in the self-defence context is not readily apparent and appears to conflict with s. 35, in so far as it applies to an initial aggressor. However, again the section must be viewed in keeping with the overall scheme of self-defence established by Parliament. Section 37 gives a broad overview of the principles of self-defence. Sections 34 and 35 deal with the common law of justifiable and excusable homicide. They thus deal with death and grievous bodily harm. It must therefore be assumed that ss. 34 and 35 exclusively dictate the application of the principles laid out in s. 37 where death or grievous bodily harm has occurred. Where death or grievous bodily harm has not occurred, the principles of s. 37 apply without the focus and direction provided by ss. 34 or 35. It follows that the trial judge was correct in declining to leave it to the jury.

Conclusion

I would allow the appeal and restore the conviction.

Appeal dismissed, LA FOREST, L'HEUREUX-DUBÉ, GONTHIER *and* MCLACHLIN JJ. *dissenting.*

Conclusion relative au par. 34(2)

En résumé, l'historique et le libellé du par. 34(2) ainsi que les principes qui le sous-tendent pointent tous vers une conclusion: le législateur n'avait pas l'intention de rendre cette disposition applicable à une attaque avec provocation. Il s'ensuit que le juge du procès n'a pas commis d'erreur en restreignant ainsi le par. 34(2) lorsqu'il a donné ses directives au jury. 83

2. *Des directives sur l'art. 37 du Code criminel auraient-elles dû être données au jury?*

L'article 37 porte sur deux aspects de la défense de la personne: la légitime défense et la défense des autres. En ce qui concerne la défense des autres, cette disposition est unique et son sens est en conséquence clair. À l'instar du Juge en chef, je reconnais que, dans le contexte de la légitime défense, l'objet de l'art. 37 n'est pas si évident et paraît aller à l'encontre de l'art. 35, dans la mesure où il s'applique à un agresseur initial. Cependant, on doit examiner cette disposition en tenant compte de l'ensemble du régime de la légitime défense établi par le législateur. L'article 37 donne un vaste aperçu des principes de la légitime défense. Les articles 34 et 35 ont trait à l'homicide justifiable ou à l'homicide excusable, reconnus en common law, et traitent donc de la mort et des lésions corporelles graves. On doit en conséquence supposer que les art. 34 et 35 imposent exclusivement l'application des principes formulés à l'art. 37, lorsqu'il y a eu mort ou lésions corporelles graves. Dans les cas où il n'y a eu ni mort ni lésions corporelles graves, les principes de l'art. 37 s'appliquent sans que l'on ait à se fonder sur les art. 34 ou 35. Il s'ensuit que le juge du procès a eu raison de refuser de donner au jury des directives sur cette disposition. 84

Conclusion

Je suis d'avis d'accueillir le pourvoi et de rétablir la déclaration de culpabilité. 85

Pourvoi rejeté, les juges LA FOREST, L'HEUREUX-DUBÉ, GONTHIER *et* MCLACHLIN *sont dissidents.*

Solicitor for the appellant: The Ministry of the Attorney General, Toronto.

Solicitors for the respondent: Pinkofsky, Lockyer, Kwinter, Toronto.

Procureur de l'appelante: Le ministère du Procureur général, Toronto.

Procureurs de l'intimé: Pinkofsky, Lockyer, Kwinter, Toronto.

1994 SCC 80
Supreme Court of Canada

R. v. Mohan

1994 CarswellOnt 1155, 1994 CarswellOnt 66, 1994 SCC 80, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36, 114 D.L.R. (4th) 419, 166 N.R. 245, 18 O.R. (3d) 160 (note), 23 W.C.B. (2d) 385, 29 C.R. (4th) 243, 71 O.A.C. 241, 89 C.C.C. (3d) 402, J.E. 94-778, EYB 1994-67655

R. v. CHIKMAGLUR MOHAN

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 9, 1993
Judgment: May 5, 1994
Docket: Doc. 23063

Counsel: *Jamie C. Klukach*, for the Crown.
Brian H. Greenspan and *Sharon E. Lavine*, for respondent.

The judgment of the court was delivered by *Sopinka J.*:

1 In this appeal we are required to determine under what circumstances expert evidence is admissible to show that character traits of an accused person do not fit the psychological profile of the putative perpetrator of the offences charged. Resolution of this issue involves an examination of the rules relating to expert and character evidence.

I. Facts

A. The Events

2 The respondent, a practising paediatrician in North Bay, was charged with four counts of sexual assault on four of his female patients, aged thirteen to sixteen at the relevant time. The alleged sexual assaults were perpetrated during the course of medical examinations of the patients conducted in the respondent's office. The complainants had been referred to the respondent for conditions which were, in part, psychosomatic in nature.

3 Evidence relating to each complaint was admitted as similar fact evidence with respect to the others. The complainants did not know one another. Three of them came forth independently. Following a mistrial, which was publicized, the fourth victim came forward, having heard about the other charges. Three of the four complainants had been victims of prior sexual abuse. With respect to two of them, the respondent knew about their sexual abuse at the hands of others. The alleged assaults consisted of fondling of the girls' breasts and digital penetration and stimulation of their vaginal areas, accompanied by intrusive questioning of them as to their sexual activities. All of the complainants testified that the respondent did not wear gloves while examining them internally. The respondent, who testified in his own defence, denied the complainants' evidence.

4 At the conclusion of the respondent's examination in chief, counsel for the respondent indicated that he intended to call a psychiatrist who would testify that the perpetrator of the offences alleged to have been committed would be part of a limited and unusual group of individuals and that the respondent did not fall within that narrow class because he did not possess the characteristics belonging to that group. The Crown sought a ruling on the admissibility of that evidence. The trial judge held a voir dire and ruled that the evidence tendered on the voir dire would not be admitted.

5 The jury found the respondent guilty as charged on November 16, 1990. He was sentenced to nine months' imprisonment on each of the four counts, to be served concurrently, and to two years' probation. The respondent appealed his convictions and

the Crown appealed the sentence. The Court of Appeal allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal found it was not necessary to deal with the Crown's sentence appeal and refused the Crown leave to appeal.

6 The appellant sought leave to appeal to this court against the decision of the Ontario Court of Appeal pursuant to s. 693 of the *Criminal Code*, R.S.C. 1985, c. C-46. On December 10, 1992 leave to appeal was granted by this court.

B. The Excluded Evidence

7 In the voir dire, Dr. Hill, the expert, began his testimony by explaining that there are three general personality groups that have unusual personality traits in terms of their psychosexual profile perspective. The first group encompasses the psychosexual who suffers from major mental illnesses (e.g. schizophrenia) and engages in inappropriate sexual behaviour occasionally. The second and largest group contains the sexual deviation types. This group of individuals shows distinct abnormalities in terms of the choice of individuals with whom they report sexual excitement and with whom they would like to engage in some type of sexual activity. The third group is that of the sexual psychopaths. These individuals have a callous disregard for people around them, including a disregard for the consequences of their sexual behaviour towards other individuals. Another group would include paedophiles who gain sexual excitement from young adolescents, probably pubertal or post-pubertal.

8 Dr. Hill identified paedophiles and sexual psychopaths as examples of members of unusual and limited classes of persons. In response to questions hypothetically encompassing the allegations of the four complainants, the expert stated that the psychological profile of the perpetrator of the first three complaints would likely be that of a paedophile, while the profile of the perpetrator of the fourth complaint would likely be that of a sexual psychopath. Dr. Hill also testified that, if but one perpetrator was involved in all four complaints described in the hypothetical questions, he would uniquely categorize that perpetrator as a sexual psychopath. He added that such a person would belong to a very small, behaviourally distinct category of persons. Dr. Hill was asked whether a physician who acted in the manner described in the hypothetical questions would be a member of a distinct group of aberrant persons. His answer was that such behaviours could only flow from a significant abnormality of character and would be part of an unusual and limited class. In cross-examination, Dr. Hill said: "You bring an extra abnormal, extra component for the abnormality when you talk about a physician in his or her office." According to Dr. Hill, physicians who were also sexual offenders would be a small group because not only would they be breaking the usual norms of society, but they would also be breaking out against the norms of the medical profession which are very strict given the intimate contact necessary to treat patients. It was contemplated that Dr. Hill would go on to testify "to the effect that Doctor Mohan does not have the characteristics attributable to any of the three groups in which most sex offenders fall."

II. Judgments Below

A. Ontario Court of Justice (Ruling on Voir Dire) (Bernstein J.)

9 In ruling on the admissibility of Dr. Hill's evidence, the trial judge stated the issues as follows:

> One: Did the offences alleged to have been committed by the accused have unusual features which would indicate that anyone who committed them was a member of a limited and distinguishable group?
>
> Two: Did the psychiatrist have the necessary qualifications and ex pertise to venture an opinion on the first issue so as to be helpful to the jury?

10 The trial judge noted that Dr. Hill had personally interviewed and treated three doctors who engaged in criminal sexual misconduct with their patients. He also noted that Dr. Hill admitted that he was not aware of any scientific study or literature related to the psychiatric make-up of doctors who sexually abuse their patients and that his experience with three admitted offenders who were doctors was not a sufficient basis to allow him to make any generalizations on the subject. Dr. Hill acknowledged that he, as a psychiatrist, is unable to diagnose individuals as having the distinct characteristics of a paedophile or of a homosexual until the patient has performed an overt act which suggests the existence of the characteristic.

11 The trial judge reviewed the case law in which the use of such psychiatric evidence had been discussed (i.e., *R. v. Lupien*, [1970] S.C.R. 263; *R. v. Robertson* (1975), 21 C.C.C. (2d) 385 [29 C.R.N.S. 141] (Ont. C.A.); *R. v. McMillan* (1975), 23 C.C.C. (2d) 160 [29 C.R.N.S. 191] (Ont. C.A.); *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.); *R. v. T. (S.)* (1986), 31 C.C.C. (3d) 1 [55 C.R. (3d) 321] (Ont. C.A.)). From these cases, the trial judge concluded that the use of psychiatric evidence has been greatly expanded since *Lupien*. He cited the following words of Martin J.A. in *Robertson* (at p. 423 [C.C.C., p. 183 C.R.N.S.]):

> Evidence that the offence had distinctive features which identified the perpetrator as a person possessing unusual personality traits constituting him a member of an unusual and limited class of persons would render admissible evidence that the accused did not possess the personality characteristics of the class of persons to which the perpetrator of the crime belonged.

The trial judge also relied on the following passage of *McMillan* (at p. 175 [C.C.C., p. 207 C.R.N.S.]):

> I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible.

After relying on *McMillan*, the trial judge held:

> Doctor Hill is of the opinion that sexual assault is a crime committed by a distinguishable group. As I read the cases, I came to the conclusion that it is the size and the degree of distinctiveness of the "unusual and limited class of persons" which determines whether expert opinion will be helpful in defining the class and categorizing accused persons within or without the group. These days it is trite to say that a large number of men from all walks of life commit sexual offences on young women. While all may have some type of character disorder, I doubt that expert evidence regarding the normality of any given accused would be of assistance to a trier of fact absent some more distinguishing within the wide spectrum of sexual assault.
>
> The evidence of Doctor Hill is not sufficient, I believe, to establish that doctors who commit sexual assaults on patients are in a significantly more limited group in psychiatric terms than are other members of society. There is no scientific data available to warrant that conclusion. A sample of three offenders is not a sufficient basis for such a conclusion. Even the allegations of the fourth complainant ... are not so unusual, as sex offenders go, to warrant a conclusion that the perpetrator must have belonged to a sufficiently narrow class.
>
> I conclude that if the evidence was received as proposed, it would merely be character evidence of a type that is inadmissible as going beyond evidence of general reputation, and does not fall within the proper sphere of expert evidence.

B. Ontario Court of Appeal (1992), 8 O.R. (3d) 173

12 It was apparent for Finlayson J.A., who wrote the court's judgment, that the trial judge's conclusions were based on a misapprehension of the evidence of Dr. Hill. Finlayson J.A. stated that Dr. Hill did not base his opinion on case studies of the three physicians he had as patients who were accused of sexual crimes. Rather, Finlayson J.A. was of the view at p. 177 that, in concluding that the perpetrators in the hypothetical examples would fall into an unusual and limited class of persons, and that, if the perpetrator were a physician, the class into which he would fall would be even narrower, Dr. Hill based his opinion on all of his experience:

> With respect, I think the learned trial judge was in error, in that he ruled on the sufficiency of the evidence of Dr. Hill, not its admissibility. It was up to the jury to consider what weight should be given to the expert opinion. Crown counsel suggested on appeal that the trial judge was ruling on the qualifications of the expert witness to give the opinion that he did. I do not think that is a correct interpretation of the trial judge's reasons. Dr. Hill's qualifications are outstanding and no

attempt was made at trial to challenge them. I think the trial judge was saying that Dr. Hill's personal experience in dealing with sex-offending physicians and the lack of scientific literature specific to such physicians did not justify Dr. Hill giving the opinion that he did. In my opinion, in restricting his interpretation of Dr. Hill's testimony to "doctors who commit sexual assaults on patients", the trial judge misapprehended the opinion of Dr. Hill and the broad psychiatric experience upon which it was based.

13 Finlayson J.A. went on to say that the evidence of Dr. Hill was admissible on two bases. On the first basis, given that similar fact evidence was admitted showing that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, Dr. Hill's testimony was admissible to show that the offences alleged were unlikely to have been committed by the same person (*R. v. C. (M.H.)*, [1991] 1 S.C.R. 763).

14 On the second basis, it was admissible to show that the respondent was not a member of either of the unusual groups of aberrant personalities which could have committed the offences alleged. Referring to *R. v. Lupien*, supra, at pp. 275-78, *R. v. Robertson*, supra, at p. 425 [C.C.C., pp. 184-85 C.R.N.S.], and *R. v. McMillan*, supra, Finlayson J.A. held that it is settled law that opinion evidence showing that the accused did or did not possess the distinguishing characteristics of an abnormal group is admissible in a criminal case, where it would appear that the perpetrator of the crime alleged is a person with an abnormal propensity or disposition which stamps him or her as being a member of that special and extraordinary class (or group). In this case, the psychiatrist showed that paedophiles and sexual psychopaths are members of special and extraordinary classes. Considering also the issues put to the jury in the case at bar (complex psychological issues, testimonial trustworthiness), Finlayson J.A. held that evidence of persons with professional psychiatric experience in dealing with sexual offences would be of assistance (based on: *R. v. Lyons*, (sub nom. *R. v. L. (T.P.)*) [1987] 2 S.C.R. 309; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. Lavallee*, supra; *R. v. B.(G.)*, [1990] 2 S.C.R. 30).

15 The court allowed the respondent's appeal, quashed the convictions and ordered a new trial. Accordingly, the Court of Appeal refused leave to the Crown's sentence appeal.

III. Analysis

16 The admissibility of the rejected evidence was analyzed in argument under two exclusionary rules of evidence: (1) expert opinion evidence, and (2) character evidence. I have concluded that, on the basis of the principles relating to exceptions to the character evidence rule and under the principles governing the admissibility of expert evidence, the limitations on the use of this type of evidence require that the evidence in this case be excluded.

(1) Expert Opinion Evidence

17 Admission of expert evidence depends on the application of the following criteria:

18 (a) relevance;

19 (b) necessity in assisting the trier of fact;

20 (c) the absence of any exclusionary rule;

21 (d) a properly qualified expert.

(a) Relevance

22 Relevance is a threshold requirement for the admission of expert evidence as with all other evidence. Relevance is a matter to be decided by a judge as question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost-benefit analysis, that is "whether its value is worth what it costs." See *McCormick on Evidence* (3rd ed. 1984), at p. 544. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant

may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule (see *R. v. Morris*, [1983] 2 S.C.R. 190). Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

23 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. As La Forest J. stated in *R. c. Béland*, [1987] 2 S.C.R. 398, at p. 434, with respect to the evidence of the results of a polygraph tendered by the accused, such evidence should not be admitted by reason of "human fallibility in assessing the proper weight to be given to evidence cloaked under the mystique of science". The application of this principle can be seen in cases such as *R. v. Melaragni* (1992), 73 C.C.C. (3d) 348 (Ont. Gen. Div.), in which Moldaver J. applied a threshold test of reliability to what he described, at p. 353, as "a new scientific technique or body of scientific knowledge". Moldaver J. also mentioned two other factors, inter alia, which should be considered in such circumstances (at p. 353):

> (1) Is the evidence likely to assist the jury in its fact-finding mission, or is it likely to confuse and confound the jury?
>
> (2) Is the jury likely to be overwhelmed by the "mystic infallibility" of the evidence, or will the jury be able to keep an open mind and objectively assess the worth of the evidence?

24 A similar approach was adopted in *R. v. Bourguignon*, [1991] O.J. No. 2670 (Q.L.), where, in ruling upon a voir dire concerning the admissibility of DNA evidence, Flanigan J. admitted most of the evidence but excluded statistical evidence about the probability of a match between the DNA contained in samples taken from the accused and those taken from the scene of a crime. The learned judge explained:

> This Court does not think that the criminal jurisdiction of Canada is yet ready to put such an additional pressure on a jury, by making them overcome such fantastic odds and asking them to weigh it as just one piece of evidence to be considered in the overall picture of all the evidence presented. There is a real danger that the jury will use the evidence as a measure of the probability of the accused's guilt or innocence and thereby undermine the presumption of innocence and erode the value served by the reasonable doubt standard. As said in the Schwartz case: "dehumanize our justice system".
>
> I would therefore, rule admissible the DNA testing evidence but not the statistic probabilities. This restriction can be easily overcome by evidence that "such matches are rare" or "extremely rare" or words to the same effect, which will put the jury in a better position to assess such evidence and protect the right of the accused to a fair trial.

It should be noted that, subsequently, other courts have rejected the distinction drawn by Flanigan J. and have admitted both DNA evidence and the evidence regarding statistical probabilities of a match. (See, e.g., *R. v. Lafferty*, [1993] N.W.T.J. No. 17 (Q.L.) [reported at [1993] 4 W.W.R. 74]). I rely on *R. v. Bourguignon*, supra, simply to illustrate the mode of approach adopted there and leave the specific issue decided by Flanigan J. to be considered when it arises.

(b) Necessity in Assisting the Trier of Fact

25 In *R. v. Abbey*, supra, Dickson J., as he then was, stated, at p. 42:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (*Turner* (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.).

26 This precondition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, supra. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village) v. Smith*, [1931] S.C.R. 672, at p. 684, this court, quoting from *Beven on Negligence* (4th ed. 1928), p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge." More recently, in *Lavallee*, supra, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.

27 As in the case of relevance, discussed above, the need for the evidence is assessed in light of its potential to distort the fact-finding process. As stated by Lawton L.J. in *R. v. Turner*, [1975] Q.B. 834, at p. 841, and approved by Lord Wilberforce in *Director of Public Prosecutions v. Jordan*, [1977] A.C. 699 at 708, at p. 718:

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

The possibility that evidence will overwhelm the jury and distract them from their task can often be offset by proper instructions.

28 There is also a concern inherent in the application of this criterion that experts not be permitted to usurp the functions of the trier of fact. Too liberal an approach could result in a trial's becoming nothing more than a contest of experts with the trier of fact acting as referee in deciding which expert to accept.

29 These concerns were the basis of the rule which excluded expert evidence in respect of the ultimate issue. Although the rule is no longer of general application, the concerns underlying it remain. In light of these concerns, the criteria of relevance and necessity are applied strictly, on occasion, to exclude expert evidence as to an ultimate issue. Expert evidence as to credibility or oath-helping has been excluded on this basis. See *R. v. Marquard*, [1993] 4 S.C.R. 223, per McLachlin J.

(c) The Absence of any Exclusionary Rule

30 Compliance with criteria (a), (b) and (d) will not ensure the admissibility of expert evidence if it falls afoul of an exclusionary rule of evidence separate and apart from the opinion rule itself. For example, in *R. v. Morin*, [1988] 2 S.C.R. 345, evidence elicited by the Crown in cross-examination of the psychiatrist called by the accused was inadmissible because it was not shown to be relevant other than as to the disposition to commit the crime charged. Notwithstanding, therefore, that the evidence otherwise complied with the criteria for the admission of expert evidence it was excluded by reason of the rule that prevents the Crown from adducing evidence of the accused's disposition unless the latter has placed his or her character in issue. The extent of the restriction when such evidence is tendered by the accused lies at the heart of this case and will be discussed hereunder.

(d) A Properly Qualified Expert

31 Finally the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

32 In summary, therefore, it appears from the foregoing that expert evidence which advances a novel scientific theory or technique is subjected to special scrutiny to determine whether it meets a basic threshold of reliability and whether it is essential

in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of the expert. The closer the evidence approaches an opinion on an ultimate issue, the stricter the application of this principle.

(2) Expert Evidence as to Disposition

33 In order to decide what principles should govern the admissibility of this kind of evidence, it is necessary to consider the limitations imposed by the rules relating to character evidence, having regard to the restrictions imposed by the criteria in respect of expert evidence.

34 I have already referred to *R. v. Morin*, supra, wherein a unanimous court decided that the Crown cannot lead such evidence in the first instance unless it is relevant to an issue and is not being used merely as evidence of disposition. As I stated, at p. 371:

> In my opinion, in order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual behavioural trait with the perpetrator of the crime. The trait must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. The judgment of Lord Hailsham in *Boardman*, quoted above, provides one illustration of the kind of evidence that would be relevant.
>
> . . . . .
>
> Conversely, the fact that the accused is a member of an abnormal group some of the members of which have the unusual behavioural characteristics shown to have been possessed by the perpetrator is not sufficient. In some cases it may, however, be shown that all members of the group have the distinctive unusual characteristics. If a reasonable inference can be drawn that the accused has those traits then the evidence is relevant subject to the trial judge's obligation to exclude it if its prejudicial effect outweighs its probative value. The greater the number of persons in society having these tendencies, the less relevant the evidence on the issue of identity and the more likely that its prejudicial effect predominates over its probative value.

35 When, however, the evidence is tendered by the accused, other considerations apply. The accused is permitted to adduce evidence as to disposition both in his or her own evidence or by calling witnesses. The general rule is that evidence as to character is limited to evidence of the accused's reputation in the community with respect to the relevant trait or traits. The accused in his or her own testimony, however, may rely on specific acts of good conduct. See *R. v. McNamara (No.1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at p. 348; leave to appeal refused, [1981] 1 S.C.R. xi. Evidence of an expert witness that the accused, by reason of his or her mental make-up or condition of the mind, would be incapable of committing or disposed to commit the crime does not fit either of these categories. A further exception, however, has developed that is limited in scope. I propose to examine the extent of this exception.

36 In England, with the exception of non-insane automatism, expert psychiatric and psychological evidence is not admissible to show the accused's state of mind unless it is contended that the accused is abnormal in the sense of suffering from insanity or diminished responsibility. In *R. v. Chard* (1971), 56 Cr. App. R. 268 (C.A.), the trial judge refused to allow medical evidence that the accused who was not alleged to be suffering from a disease of the mind lacked the necessary mens rea. In the Court of Appeal, Roskill L.J. stated at p. 271 that it was "not permissible to call a witness, whatever his personal experience, merely to tell the jury how he thinks an accused man's mind — assuming a normal mind — operated at the time of the alleged crime ..."

37 In *Lowery v. R.*, [1974] A.C. 85 (P.C.), such evidence was admitted when tendered by one co-accused against another. It was a case involving the sadistic murder of a young girl. Lowery and King were both charged, and it was obvious that one, the other, or both of them were guilty. In this context, King sought to prove that he feared Lowery and that Lowery dominated him. The Privy Council held that the trial judge acted properly in allowing King to call a psychiatrist to swear that he was less likely to have committed the crime than Lowery. That is, character evidence tendered by a psychiatrist was held to be admissible. Lord Morris of Borth-y-Gest of the Privy Council stated, at p. 103:

> Lowery and King were each asserting that the other was the completely dominating person at the time Rosalyn Nolte was killed: each claimed to have been in fear of the other. In these circumstances it was most relevant for King to be able to show, if he could, that Lowery had a personality marked by aggressiveness whereas he, King, had a personality which

> suggested that he would be led and dominated by someone who was dominant and aggressive ... Not only however was the evidence which King called relevant to this case: its admissibility was placed beyond doubt by the whole substance of Lowery's case.

Moreover, in *R. v. Turner*, supra, the accused unsuccessfully pleaded provocation in answer to a charge of murder of his girlfriend whom he alleged that he had killed in a fit of rage caused by her sudden confession of infidelity. He appealed on the grounds that the trial judge had wrongly refused to admit the evidence of a psychiatrist. That psychiatrist was to testify to the effect that the accused was not mentally ill, that he had a great affection toward the victim and that he deeply regretted his act of murder. The evidence was rejected on the basis that it was not the proper subject of expert evidence. As for *Lowery*, it was confined to its own facts.

38 C. Tapper in *Cross on Evidence* (7th ed. 1990), at p. 492, reconciled *Lowery* and *Turner* using a principled approach:

> Juries do not need to be told that normal men are liable to lose control of themselves when their women admit to infidelity, but they require all the expert assistance they can get to help them determine which of two accused has the more aggressive personality.

Tapper then proceeded to reconcile the two cases using a more technical approach:

> Another way of reconciling the cases would be to treat the fact that Lowery had put his character in issue as crucial to the decision of the Privy Council, the psychiatric evidence then being admissible to impugn the credibility of his testimony. Unfortunately we are left without any guidance on the subject from the Court of Appeal who contented themselves with saying that *Lowery*'s case was decided on its special facts.

39 With respect to the development of the exception in Canada, *R. v. Lupien*, supra, is a good starting point. It involved a respondent who was convicted of attempting to commit an act of gross indecency, and whose defence was that he lacked the requisite intent to commit the act because he thought his companion was a woman. He sought to prove his "lack of intent" by tendering psychiatric evidence which showed that he reacted violently against any type of homosexual activity and, therefore, could not have knowingly engaged in an act of gross indecency. Ritchie J. concluded, at pp. 277-78, that the evidence was admissible for the following reasons:

> I am far from saying that as a general rule psychiatric evidence of a man's disinclination to commit the kind of crime with which he is charged should be admitted, but the present case is concerned with gross indecency between two men and I think that crimes involving homosexuality stand in a class by themselves in the sense that the participants frequently have characteristics which make them more readily identifiable as a class than ordinary criminals. See *Reg. v. Thompson* [(1917), 13 Cr. App. R. 61 at 81]. In any event, it appears to me that the question of whether or not a man is homosexually inclined or otherwise sexually perverted is one upon which an experienced psychiatrist is qualified to express an opinion and that if such opinion is relevant it should be admitted at a trial such as this even if it involves the psychiatrist in expressing his conclusion that the accused does not have the capacity to commit the crime with which he is charged.

It is this passage that created the abnormal group exception which is often sought to be applied to various contexts other than the homosexual context.

40 The Ontario Court of Appeal, and specifically Martin J.A., further looked into this exception of proving the disposition of the accused through psychiatric evidence in the following two cases: *R. v. McMillan*, supra, affirmed [1977] 2 S.C.R. 824, and *R. v. Robertson*, supra.

41 *R. v. McMillan* involved an accused who was charged with the murder of his infant child and whose defence was that it was in fact his wife and not he who killed the child. The trial judge allowed the accused to call a psychiatrist who testified that the accused's wife had a psychopathic personality disturbance with brain damage. This psychiatric evidence showed that a third party, the accused's wife, was more likely to have committed the crime because of her abnormal personality/disposition. Martin J.A., speaking for the court, found that disposition to commit a crime is generally relevant since it goes to the probability/

propensity of the person doing or not doing the act charged. He then referred to *R. v. Lupien*, at p. 169 [C.C.C., p. 201 C.R.N.S.], as creating the following exception:

> One of the exceptions to the general rule that the character of the accused, in the sense of disposition, when admissible, can only be evidenced by general reputation, relates to the admissibility of psychiatric evidence where the particular disposition or tendency in issue is characteristic of an abnormal group, the characteristics of which fall within the expertise of the psychiatrist.

After having noted the applicability of *R. v. Lupien*, Martin J.A. engaged in a lengthy discussion of the exception and in fact extended *R. v. Lupien*. This extension, at pp. 173-75 [C.C.C., pp. 205-207 C.R.N.S.], was affirmed by the Supreme Court of Canada:

> I do not consider that, because the crime under consideration was not one that could only be committed by a person with a special or abnormal propensity, psychiatric evidence with respect to Mrs. McMillan's disposition, was, therefore, inadmissible, in the circumstances of this case.
>
> All evidence to be admissible must, of course, be relevant to some issue in the case. Psychiatric evidence with respect to the personality traits or disposition of a person, whether of the accused or another, may be admissible for different purposes. While those purposes are not mutually exclusive, evidence which is relevant for one purpose may not be for another.
>
> Psychiatric evidence with respect to the personality traits or disposition of an accused, or another, is admissible provided:
>
> (a) the evidence is relevant to some issue in the case;
>
> (b) the evidence is not excluded by a policy rule;
>
> (c) the evidence falls within the proper sphere of expert evidence.
>
> One of the purposes for which psychiatric evidence may be admitted is to prove identity when that is an issue in the case, since psychical as well as physical characteristics may be relevant to identify the perpetrator of the crime.
>
> Where the offence is of a kind that is committed only by members of an abnormal group, for example, offences involving homosexuality, psychiatric evidence that the accused did or did not possess the distinguishing characteristics of that abnormal group is relevant either to bring him within, or to exclude him from, the special class of which the perpetrator of the crime is a member. In order for psychiatric evidence to be relevant for that purpose, the offence must be one which indicates that it was committed by a person with an abnormal propensity or disposition which stamps him as a member of a special and extraordinary class.
>
> Psychiatric evidence with respect to the personality traits or disposition of the accused, or another, if it meets the three conditions of admissibility above set out, is also admissible, however, as bearing on the *probability* of the accused, or another, having committed the offence.
>
> It would appear that it was upon this latter ground that the psychologist's evidence was held to be admissible in *Lowery v. The Queen, supra*, although the features of the offence in that case were sufficiently indicative of the possession of an abnormal propensity by the perpetrator, that the expert evidence might have been relevant to the issue of identity as well. Since in that case the evidence was offered by the accused King, it was not excluded by the policy rule which prevents the prosecution from introducing evidence to prove that the accused by reason of his criminal propensities is likely to have committed the crime charged. Both accused in *Lowery v. The Queen* had psychopathic personalities (although the features of King's psychopathic personality were less severe than Lowery's) and hence their personality traits fell within the proper sphere of expert evidence.
>
> . . . . .
>
> Where the crime under consideration does not have features which indicate that the perpetrator was a member of an abnormal group, psychiatric evidence that the accused has a normal mental make-up but does not have a disposition for

> violence or dishonesty or other relevant character traits frequently found in ordinary people is inadmissible. The psychiatric evidence in the circumstances postulated is not relevant on the issue of identity to exclude the accused as the perpetrator any more than the possession of violent or dishonest tendencies by the accused or a third person would be admissible to identify the accused or the third person as the perpetrator of the crime.
>
> "So common a characteristic is not a recognisable mark of the individual." (*Per* Lord Sumner in *Thompson v. Director of Public Prosecutions* (1918), 26 Cox C.C. 189 at p. 199.)
>
> While such evidence is relevant as bearing on the probability of the accused having committed the crime, the psychiatric evidence proffered in such circumstances really amounts to an attempt to intro duce evidence of the accused's good character, as a normal person, through a psychiatrist. Such evidence does not fall within the proper sphere of expert evidence and is subject to the ordinary rule applicable to character evidence which, in general, requires the character of the accused to be evidenced by proof of general reputation.
>
> I leave open, until the question is required to be decided, whether when the crime is one assumed to be committed by normal persons, *e.g.*, rape, psychiatric evidence is admissible to show that the accused is a member of an abnormal group, possessing characteristics which make it improbable that he committed the offence, *e.g.*, that he is a homosexual with an aversion to heterosexual relations. I am disposed, however, to think that such evidence is admissible. [Emphasis in original.]

The evidence of the psychiatrist was held to be admissible.

42 Martin J.A. elaborated on the reasoning set out above in *R. v. Robertson*, supra. That case involved a 16-year-old accused charged with brutally murdering a nine-year-old girl by kicking her. The defence sought to introduce expert psychiatric evidence to show that a propensity for violence or aggression was not a part of the accused's psychological make-up. This tended to rebut evidence led by the Crown as to the accused's violent character. Martin J.A. summed up, at p. 426 [C.C.C., p. 186 C.R.N.S.]:

> While the judgment of Ritchie J. deals only with the admissibility of psychiatric evidence with respect to disposition in offences involving homosexuality, there would appear to be no logical reason why such evidence should not be admitted on the same principle in other cases where there is evidence tending to show that, by reason of the nature of the offence, or its distinctive features, its perpetrator was a person who, in the language of Lord Sumner, was member of "a specialized and extraordinary class", and whose psychological characteristics fall within the expertise of the psychiatrist, for the purpose of showing that the accused did not possess the psychological characteristics of persons of that class. Obviously, where such evidence is adduced by the accused, the prosecution is entitled to call psychiatric evidence in order to rebut the evidence introduced by the defence.
>
> In my view, however, the judgment of Ritchie J. in *Regina v. Lupien* provides no support for a conclusion that, in the case of ordinary crimes of violence, psychiatric evidence is admissible to prove that the accused's psychological makeup does not include a tendency or disposition for violence.

Martin J.A. further stated, at pp. 429-30 [C.C.C., pp. 189-90 C.R.N.S.]:

> In my view psychiatric evidence with respect to disposition or its absence is admissible on behalf of the defence, if relevant to an issue in the case, where the disposition in question constitutes a characteristic feature of an abnormal group falling within the range of study of the psychiatrist, and from whom the jury can, therefore, receive appreciable assistance with respect to a matter outside the knowledge of persons who have not made a special study of the subject. A *mere* disposition for violence, however, is not so uncommon as to constitute a feature characteristic of an abnormal group falling within the special field of study of the psychiatrist and permitting psychiatric evidence to be given of the absence of such disposition in the accused. [Emphasis in original.]

Given this reasoning, Martin J.A. concluded that the crime was not specially marked and so the conditions for the admissibility of psychiatric evidence were not met.

43 A useful summary of the principles that emerge from the cases is made by Alan W. Mewett, "Character as a Fact in Issue in Criminal Cases" (1984-85) 27 Crim. L.Q. 29, at pp. 35-36 of his article, where he points out the various contexts in which an accused can tender character evidence by way of an expert:

> There are thus three basic requirements that must be met before such psychiatric evidence can even be considered as potentially admissible. First, it must be relevant to an issue. Second, it must be of appreciable assistance to the trier of fact and third, it must be evidence that would otherwise be unavailable to the ordinary layman without specialized training, but these requirements only set forth the general requirements for the admissibility of expert testimony.
>
> Once these hurdles have been passed, a number of different scenarios may be postulated. The crime may be an "ordinary" one (which I take to mean a crime for which no special mental characteristics on the part of the perpetrator would be required) and the accused is an "ordinary" person; the crime may be an "ordinary" one, but the accused an "extraordinary" person (*i.e.*, having some peculiar mental make-up that would tend to show that he would not commit that "ordinary" crime); the crime may be "extraordinary", but the accused "ordinary"; or the crime may be "extraordinary" and the accused "extraordinary", in a different direction.
>
> In the first scenario, the evidence is irrelevant because it is simply not probative of anything. In the second it is probative and admissible but only if the extraordinary characteristic of the accused tends to show that he would not commit an ordinary crime of that nature (such as a homosexual being charged with a heterosexual offence). In the third, if it is shown that the crime is such that it could only, or in all probability would only, be committed by a person having identifiable peculiarities that the accused does not possess, it would be admissible. In the last scenario, the situation is the same provided that the difference in the abnormalities tends to exclude the accused from the probable group of perpetrators.

44 I question whether use of the terms "abnormal" and "normal" is the best way to describe the concept that underlies their use. The term "abnormal" is derived from the English cases in which it usually connotes the mental state of insanity or diminished responsibility. See *R. v. Chard*, supra, at p. 270. The basic rationale of these cases is that "normal" human behaviour is a matter which a judge or jury can assess without the assistance of expert evidence. Canadian cases have extended the exception to include what has been described as sexually deviant behaviour. See Rosemary Pattenden, "Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia" [1986] Crim. L.R. 92, at p. 100. The rationale underlying this extension is the relevance of the evidence based on the distinctiveness of the behavioural traits of either the putative perpetrator of the crime or the accused. This distinctiveness tends to exclude the accused from the category of persons that could or would likely commit the crime.

45 There are other reasons why the use of the term "abnormal" is no longer satisfactory. Even in medical circles there are differing views as to what constitutes abnormality. See Pattenden, supra, at p. 100, and David C. Rimm and John W. Sommerville, *Abnormal Psychology* (1977), at pp. 31 and 32. Moreover, it imports a value judgment on the lifestyle of some groups in society. This is aptly illustratedby considering the statement of Lord Sumner in *Thompson v. R.*, [1918] A.C. 221, at p. 235:

> The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.

46 The difficulty in defining what is abnormal was recently referred to by McCarthy J.A. in *R. v. Garfinkle* (1992), 15 C.R. (4th) 254 (Que. C.A.). At pp. 256-57, speaking for the court, he stated:

> What dispositions are to be classified as abnormal, as outside ordinary human experience, for the purpose of admitting psychiatric evidence may be a difficult question. A disposition for sadism is clearly abnormal. Dispositions for violence (short of sadism or something akin thereto), or for dishonesty, are clearly too common to be classified as abnormal. In sexual offences, classification is less easy. However, it seems to me that, whether it be called pedophilia or something else, a disposition in an adult to use boys of 10 and 11 for sexual gratification must be classified as abnormal. Accordingly, in the present case, psychiatric evidence is admissible to show that Garfinkle does not have such a disposition.

47 In my opinion, the term "distinctive" more aptly defines the behavioural characteristics which are a precondition to the admission of this kind of evidence.

48 How should the criteria for the admission of this type of evidence be applied? I find the following statement of Professor Mewett, supra, at p. 36, to be an apt characterization of the nature of the decision which the trial judge must make:

> The categorization of crimes into the "ordinary" and the "extraordinary" is therefore a legal question to be determined by the judge, as is the "normality" or "abnormality" of the accused — to the despair, no doubt, of psychiatrists. But admissibility of evidence is a legal question and depends primarily upon relevance, that is, upon its assistance to the trier of fact in his inference-drawing process, and this is governed, not by expertise, but by common sense and experience; words like "ordinary", "extraordinary" or "abnormal" are not meant to be scientific expressions but assessments of relevance and are thus clearly within the domain of the judge.

49 Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioural characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. Although this decision is made on the basis of common sense and experience, as Professor Mewett suggests, it is not made in a vacuum. The trial judge should consider the opinion of the expert and whether the expert is merely expressing a personal opinion or whether the behavioural profile which the expert is putting forward is in common use as a reliable indicator of membership in a distinctive group. Put another way: Has the scientific community developed a standard profile for the offender who commits this type of crime? An affirmative finding on this basis will satisfy the criteria of relevance and necessity. Not only will the expert evidence tend to prove a fact in issue but it will also provide the trier of fact with assistance that is needed. Such evidence will have passed the threshold test of reliability which will generally ensure that the trier of fact does not give it more weight than it deserves. The evidence will qualify as an exception to the exclusionary rule relating to character evidence provided, of course, that the trial judge is satisfied that the proposed opinion is within the field of expertise of the expert witness.

(3) Application to This Case

50 I take the findings of the trial judge to be that a person who committed sexual assaults on young women could not be said to belong to a group possessing behavioural characteristics that are sufficiently distinctive to be of assistance in identifying the perpetrator of the offences charged. Moreover, the fact that the alleged perpetrator was a physician did not advance the matter because there is no acceptable body of evidence that doctors who commit sexual assaults fall into a distinctive class with identifiable characteristics. Notwithstanding the opinion of Dr. Hill, the trial judge was also not satisfied that the characteristics associated with the fourth complaint identified the perpetrator as a member of a distinctive group. He was not prepared to accept that the characteristics of that complaint were such that only a psychopath could have committed the act. There was nothing to indicate any general acceptance of this theory. Moreover, there was no material in the record to support a finding that the profile of a paedophile or psychopath has been standardized to the extent that it could be said that it matched the supposed profile of the offender depicted in the charges. The expert's group profiles were not seen as sufficiently reliable to be considered helpful. In the absence of these indicia of reliability, it cannot be said that the evidence would be necessary in the sense of usefully clarifying a matter otherwise unaccessible, or that any value it may have had would not be outweighed by its potential

for misleading or diverting the jury. Given these findings and applying the principles referred to above, I must conclude that the trial judge was right in deciding as a matter of law that the evidence was inadmissible.

51 The Court of Appeal also supported the admissibility of the evidence on the basis that Dr. Hill's evidence tended to rebut alleged similarities between the evidence on the respective counts. On this point, Finlayson J.A. stated at p. 178:

> Where, as here, the Crown alleges that the probative value of the similar fact evidence arises from the circumstance that the acts compared are so unusual and strikingly similar that their similarities cannot be attributed to coincidence, the defence is equally entitled to lead evidence as to features of the alleged acts which demonstrate dissimilarities ...

The judgment of the Court of Appeal was not supported on this ground either in the respondent's factum or in the oral argument.

52 The use to which the jury could put the evidence was explained by the trial judge in his charge to the jury. The key passage in the charge in this respect was the following:

> If you conclude when considering any of the specific counts that evidence relating to any or all of the other counts is *so similar that common sense dictates the relevancy of such evidence* to one or more of the issues I mentioned earlier, then you may, not must, draw the inferences to which I have referred. [Emphasis added.]

The similarities, which were detailed by the judge, were with respect to the modus operandi of the perpetrator of the acts which were the subject of the individual counts. No objection was taken to this aspect of the charge. This use of the similar fact evidence relates to a different issue from the subject matter of the proposed evidence of Dr. Hill. As discussed above, the dissimilarities addressed in Dr. Hill's proposed evidence are not as to modus operandi but rather with respect to the comparative psychological make-up of the respondent on the one hand and the alleged perpetrator of the acts charged, on the other. Furthermore, whether a crime is committed in a manner that identifies the perpetrator by reason of striking similarities in the method employed in the commission of other acts is something that a jury can, generally, assess without the aid of expert evidence. As stated by the trial judge, it is a matter of common sense.

53 I would allow the appeal, set aside the judgment of the Court of Appeal, restore the convictions and remit the matter to the Court of Appeal for disposition of the sentence appeal.

Appeal allowed.

Most Negative Treatment: Reversed
Most Recent Reversed: R. v. Morgentaler | 1988 CarswellOnt 45, 1988 CarswellOnt 954, 31 C.R.R. 1, 26 O.A.C. 1, 82 N.R. 1, 62 C.R. (3d) 1, [1988] S.C.J. No. 1, EYB 1988-67444, 63 O.R. (2d) 281 (note), [1988] 1 S.C.R. 30, 3 W.C.B. (2d) 332, 44 D.L.R. (4th) 385, 37 C.C.C. (3d) 449, [1988] W.D.F.L. 727, J.E. 88-220 | (S.C.C., Jan 28, 1988)

1985 CarswellOnt 114
Ontario Supreme Court, Court of Appeal

R. v. Morgentaler

1985 CarswellOnt 114, 11 O.A.C. 81, 15 W.C.B. 67, 17 C.R.R. 223, 22 D.L.R. (4th) 641, 22 C.C.C. (3d) 353, 48 C.R. (3d) 1, 52 O.R. (2d) 353

R. v. MORGENTALER, SMOLING and SCOTT

Howland C.J.O., MacKinnon A.C.J.O., Brooke, Dubin and Martin JJ.A.

Heard: April 29 and 30 and May 1 to 3, 6 and 7, 1985
Judgment: October 1, 1985

Counsel: *W.J. Blacklock* and *B.J. Wein*, for the Crown.
M. Manning, Q.C., for respondents.
A. Pennington, Q.C., and *M.D. Steffen*, for Attorney General of Canada.

Subject: Criminal; Constitutional; Civil Practice and Procedure
Related Abridgment Classifications
Constitutional law
VIII Indirect legislation
VIII.1 Delegation of legislative power
VIII.1.c Delegation between federal government and provinces
VIII.1.c.i General principles
Criminal law
I General principles
I.3 Statutory interpretation
I.3.a Ambiguity
Criminal law
III Canadian Bill of Rights
III.4 Equality before law
Criminal law
IV Charter of Rights and Freedoms
IV.7 Freedom of religion [s. 2(a)]
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.f Miscellaneous
Criminal law
IV Charter of Rights and Freedoms
IV.25 Cruel and unusual punishment [s. 12]
Criminal law

IV Charter of Rights and Freedoms
IV.29 Right to equal protection and benefit of law [s. 15]
Criminal law
XIII Offences against the person and reputation
XIII.3 Abortion
Criminal law
XXI Defences
XXI.14 Necessity
Criminal law
XXXI Trial
XXXI.4 Conduct of trial
XXXI.4.c Defence
XXXI.4.c.ii Closing address
Criminal law
XXXIII Appeals
XXXIII.1 Appeal from conviction or acquittal
XXXIII.1.d Right of appeal of provincial Attorney General
XXXIII.1.d.iii Question of law
Judges and courts
XVI Jurisdiction
XVI.1 Jurisdiction of courts under Constitution Act, 1867, s. 96

Headnote

Constitutional Law --- Indirect legislation — Delegation of legislative power — Delegation between Federal government and provinces
Criminal Law --- General principles involving criminal law — Criminal statutes — Interpretation — Ambiguity
Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Freedom of religion
Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Life, liberty and security of person — Security of person
Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Right to equal protection and benefit of law
Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Cruel and unusual punishment
Criminal Law --- Offences against person and reputation — Abortion (procuring miscarriage) — Constitutional validity of provision
Criminal Law --- Offences against the person and reputation — Abortion (procuring miscarriage) — Constitutional validity of provision
Criminal Law --- Defences — Bill of Rights — Equality before law
Criminal Law --- Defences — Necessity — Requirements — Involuntariness
Criminal Law --- Trial by indictment — Conduct of trial — Defence — Closing address — By counsel
Criminal Law --- Appeals — Appeal of indictable offence — Appeal of conviction or acquittal — Right of appeal of provincial Attorney General — Question of law
Judges and Courts --- Constitutional issues — Jurisdiction of courts in 1867 (s. 96) — Administrative tribunals
Civil liberties — Life, liberty and security — Principles of fundamental justice — Section 7 of Charter of Rights and Freedoms including substantive review in exceptional cases — Abortion provisions in Criminal Code not violating s. 7.
Abortion and offences relating to childbirth — Abortion — Validity of offence — Criminal Code provisions not being void for vagueness.
Civil liberties — Freedom of conscience and religion — Abortion provisions in Criminal Code not violating s. 2(a) of Charter of Rights and Freedoms, as no religion having absolute right to abortion.

Civil liberties — Cruel and unusual treatment or punishment — Abortion procedures in Criminal Code based on consent not violating s. 12 of Charter of Rights and Freedoms.

Civil liberties — Equality rights — Equal protection and benefit of law — Abortion provisions in Criminal Code not violating s. 15 of Charter of Rights and Freedoms — Legislation not being discriminatory, and unequal application not being concern of courts. .

Constitutional law — Constitution Act, 1867 — Distribution of legislative powers — Criminal law — Abortion provisions in Criminal Code falling within federal power under s. 92, head 27, of Constitution Act, 1867, as not solely concerned with health of mother — Not effecting unconstitutional delegation to provinces.

Abortion and offences relating to childbirth — Abortion — Therapeutic abortion committees under Criminal Code not exercising judicial function.

Abuse of process — Selective prosecution — Abortion prosecution in Ontario not being abuse of process because Quebec authorities choosing not to prosecute for similar offences.

Appeals — Right of appeal — Question of law — Crown's right of appeal on question of law from jury acquittal not violating Charter of Rights and Freedoms.

Defences — Necessity — Defence not available where accused agreed to violate abortion laws because laws did not allow freedom of choice — Trial judge erring in leaving defence of necessity with jury and in leaving all defence evidence with jury.

Juries — Address to jury — Defence counsel erring in urging that jury having right to refuse to apply bad law — Correction of error by trial judge not being possible.

The accused, doctors, were charged with conspiracy to use an induced suction method for the purposes of carrying out an intent to procure the miscarriage of female persons contrary to ss. 251(1) and 423(1)(*d*) of the Criminal Code. Prior to entering a plea, the accused brought a motion to quash or stay the indictment on the grounds that s. 251 of the Criminal Code was contrary to the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms and the proceedings were an abuse of process. This motion was denied by the trial judge, and an appeal by the accused was quashed by the Ontario Court of Appeal on the basis of a lack of jurisdiction to appeal at this point in the proceedings. The trial before a judge and jury then proceeded, and the accused was acquitted by the jury. The Crown appealed and the accused cross-appealed on the constitutional issues.

Held:

Crown's appeal allowed; acquittal set aside; new trial ordered.

Section 251 of the Criminal Code does not violate the right to liberty and security of the person guaranteed by s. 7 of the Charter. Section 7 is not limited to protection against arbitrary arrest and detention. However, bearing in mind the statutory prohibition against abortion in Canada which had existed for over 100 years, it could not be said that there is a right to procure an abortion so deeply rooted in Canadian traditions and way of life as to be fundamental. A woman's only right to an abortion at the time the Charter came into force was that given to her by s. 251(4).

In applying the principles of fundamental justice under s. 7, the court is not limited to procedural review but may also review the substance of legislation. However, substantive review should take place only in exceptional cases where there has been a marked departure from the norm of civil and criminal liability, resulting in the infringement of liberty or in some other injustice. The policy and wisdom of legislation should remain first and foremost a matter for Parliament and the legislature. Section 251 did not contain any exceptional provision which would require the court to subject it to substantive review. Any modification to give a pregnant woman greater rights to terminate her pregnancy was a matter for Parliament. It was not necessary to decide whether the decision of a therapeutic abortion committee could be challenged on the grounds of fairness if it failed or refused to give the reasons for its decision, because no specific decision of such a committee was here being impugned.

Section 251 is not void for vagueness. There was no difficulty in determining what was proscribed and what was permitted. There was no known authority for holding a statute void for uncertainty. The accused could have had no doubt that their procuring of a miscarriage could be carried out within the section only in an accredited or approved hospital after the securing of the required certificate in writing from the therapeutic abortion committee of that hospital.

Section 251 does not violate freedom of religion and conscience guaranteed by s. 2(*a*) of the Charter. No religion had as part of its tenets or creed the absolute right to an abortion. Some religions might permit it under certain circumstances, but that did not make it part of its essential religious practice. Nor was it established that there was a set of beliefs that bound one's conscience in a way that required complete freedom at the instance of one individual to choose abortions.

Section 251 does not subject the medical profession or females to cruel and unusual punishment contrary to s. 12 of the Charter. It did not inflict punishment, nor did it fall within cruel and unusual treatment. Section 251(4) was predicted on the consent of the woman. Section 251 is not inconsistent with ss. 15, 27 and 38 of the Charter, guaranteeing equality under the law and equal benefit of and equal protection of the law. There was nothing on the face of s. 251 that discriminated between individuals on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Any inequality between the sexes was not created by legislation, but by nature. Section 251 had been administered unevenly, in that some hospitals in some areas did not have therapeutic abortion committees and the Attorney General for Quebec had decided not to enforce strict compliance with s. 251(4). But the fact that s. 15 was now part of the supreme law of Canada did not give the court the obligation or the power to carry out the administration of the section. This was the concern of Parliament. On the facts of an individual case, discriminatory treatment might render the section inoperable. Here, the submissions were global.

Section 251 is not colourable legislation in pith and substance relating to matters of health within the province and therefore ultra vires Parliament as not falling within s. 92, head 27, of the Constitution Act, 1867. Section 251 served wider ends than safeguarding the health of the mother, and was an attempt to balance the interest of the foetus with those of the mother by more narrowly defining the criminal activity proscribed. It properly fell within the criminal law power.

Section 251 does not effect an unconstitutional delegation of legislative power to the provincial Minister of Health or an abdication of the criminal law power by Parliament. The granting of power to regulate a matter within the exclusive legislative authority of Parliament to a provincial board or minister of the Crown is not a violation of the constitutional principle against interdelegation. There had been no delegation of any legislative power to a provincial legislature, nor had there been any exercise of federal legislative power by the province.

Section 251 does not confer judicial powers on therapeutic abortion commit tees akin to those exercised by judges under s. 96 of the Constitution Act, 1867. Whatever power was being conferred on the committee was being conferred by Parliament and did not involve the exercise of a judicial function.

The prosecution of the accused in Ontario was not an abuse of process and a breach of the principles of fundamental justice because they would not be prosecuted in Quebec. It was irrelevant that proceedings on different facts in another province had resulted in acquittals, nor could prosecutorial forbearance in one province foreclose prosecutions in another province.

Section 605(1)(*a*) of the Criminal Code, conferring on the Crown a right of appeal from a verdict of acquittal on a question of law alone in proceedings by indictment, does not contravene ss. 7, 11(*d*) and 11(*h*) of the Charter. Although there is no such right of appeal in England and in several Australian states, and it is precluded by the Fifth Amendment guarantee against double jeopardy in the United States, such a Crown right of appeal from an acquittal on a point of law is not unique to Canada amongst Commonwealth jurisdictions. In Canada such a Crown appeal had been an established part of the criminal process for almost 100 years prior to the advent of the Charter, and when the Charter was enacted this right was not regarded as a violation of the double jeopardy principle. The language of s. 11(*h*) led to the conclusion that the framers of the Charter had not intended to abrogate such a well-established part of the Canadian criminal justice system.

The trial judge had erred in law in leaving the defence of necessity to the jury. Although it was for the jury to weigh the evidence, it is the function of an appellate court to examine the record with a view to ascertaining whether there is any evidence to support a defence. Here, the defence of necessity was not open. Before a defence of necessity is available, the conduct of the accused must be truly involuntary. There was nothing involuntary in the agreement entered into in this case by the accused. There had to be evidence that compliance with the law was demonstrably impossible and that there was no legal way out. Not only did the accused fail to make every reasonable effort to comply with the law, but they consciously agreed to violate it. Their dissatisfaction with the state of the law, although perhaps relevant to the issue of motive, afforded no basis for the defence of necessity. The constitutional validity of s. 251 having being upheld by the trial judge, it was not for the jury to weigh the merits of the law enacted by Parliament and to resolve the public debate on abortion. The defence of necessity is not premised on dissatisfaction with the law. The defence of necessity recognized that the law must be followed but that there are certain factual situations which may excuse a person for failure to comply with the law. It is not the law which can create an emergency giving rise to a defence of necessity, but it is the facts of a given situation which may do so. This was not a case where two or more doctors agree to procure the miscarriage of a female person who was in immediate need of medical services in order to avoid danger to her life or health. The defence of necessity could not be resorted to as an excuse for doctors agreeing to procure abortions on their own opinion of the danger to life or health and at the place of their own choosing in complete disregard of the provisions of s. 251 of the Criminal Code.

In the alternative, even if there was some evidence upon which the defence of necessity could have been placed before the jury, the trial judge had erred in leaving to the jury evidence which he held to be relevant to a defence and upon which they could find a verdict of not guilty by reason of necessity. Although the trial judge had not erred in instructing the jury as to the legal test of the defence of necessity, he had erred in instructing the jury that all the evidence tendered by the defence was relevant. They were in effect invited to acquit if they accepted the evidence tendered on behalf of the defence as to the unsatisfactory state of the law. It was a serious error for the defence counsel to urge the jury that they had the right to decide whether to apply the law which the trial judge instructed them was applicable. The jury has no right to do what they like according to their view of the law or what they think the law should be. The defence counsel had urged the jury to find that the abortion law was bad law, harmful and unfair, and that they were the proper tribunal to change the law by refusing to follow and apply it. The Crown had not objected, although he had emphasized to the jury that it was for Parliament and not the jury to pass the laws and to change them. The trial judge had also attempted to correct the error and had specifically told the jury that they could not ignore the law and do what they wanted. However, it was unrealistic to suggest that correction of the error was possible.

Annotation

A detailed assessment of each ruling in this ongoing, complex and controversial saga will not be attempted here. The focus will be on several major pronouncements which could have an impact beyond the law of abortion. There are at least six.

Section 7 of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, includes substantive review, but only in exceptional cases where there has been a marked departure from the norm of civil or criminal liability, resulting in injustice, and with the policy of legislation first and foremost a matter for legislatures (pp. 25-40).

This ruling by a five-member panel of the court marks the end of a progression in the Ontario Court of Appeal from a beginning interpretation that s. 7 was confined to procedural review: *Re Potma and R.* (1983), 41 O.R. (2d) 43, 31 C.R. (3d) 231, 18 M.V.R. 133, 2 C.C.C. (3d) 383, 144 D.L.R. (3d) 620, 3 C.R.R. 252, leave to appeal to S.C.C. refused 41 O.R. (2d) 43n, 33 C.R. (3d) xxv, 2 C.C.C. (3d) 383n, 144 D.L.R. (3d) 620n, 4 C.R.R. 17, 50 N.R. 400. The court distances itself from the contrary view expressed by the Manitoba Court of Appeal in *R. v. Hayden*, 36 C.R. (3d) 187, [1983] 6 W.W.R. 655, 5 C.H.R.R. D/2121, [1984] 1 C.N.L.R. 148, 8 C.C.C. (3d) 33, 3 D.L.R. (4th) 361, 7 C.R.R. 325, 23 Man. R. (2d) 315, leave to appeal to S.C.C. refused 36 C.R. (3d) xxiv, [1984] 2 C.N.L.R. 190, 8 C.C.C. (3d) 33n, 3 D.L.R. (4th) 361n, 26 Man. R. (2d) 318, 52 N.R. 386.

In opting for substantive review, the Ontario Court of Appeal clearly seeks to restrict it to major departures from accepted common law principles and to eschew policy questions. It was held that there was no justification for substantive review of our abortion laws, any reform of which was a matter of policy for politicians. While one can sympathize with the concern of the court to restrict the scope of substantive review, one wonders whether its general approach is tenable. Surely any review of the substance of legislation must involve a question of policy. In the criminal context the court here accepts a constitutional requirement of fault in the form of mens rea. Presumably it would also accept now that there is a constitutional requirement of a meaningful act: see *R. v. Burt*, 47 C.R. (3d) 49, [1985] 5 W.W.R. 545, 21 C.C.C. (2d) 138, 40 Sask. R. 214 (Q.B.). When they assert such principles the courts are rejecting policy determinations by the legislature. In their new role as guardians of the Constitution (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 41 C.R. (3d) 97 at 110-11 (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), the courts must measure governmental action against a yardstick of certain rights and freedoms. There can as well be no doubt that the courts are directly involved in policy considerations when judging whether a violation of a Charter right is a reasonable limit demonstrably justified under s. 1, since the courts have to agree that the aim of the restriction is legitimate and only as restrictive as necessary: *R. v. Bryant* (1984), 48 O.R. (2d) 732, 42 C.R. (3d) 312, 16 C.C.C. (3d) 408, 15 D.L.R. (4th) 66, 11 C.R.R. 219, 6 O.A.C. 118 (C.A.).

There can be no void-for-vagueness finding where a sensible meaning can be given to the words of a statute, it being for the courts to say what the meaning is (pp. 41-43).

This seems to be a most restrictive approach to the void-for-vagueness doctrine. It is easy to agree with the court that the accused here had no case, since there is no doubt that a legal abortion under s. 251 [am. 1974-75-76, c. 93, s. 22.1] of the Criminal

Code, R.S.C. 1970, c. C-34, has to proceed through a therapeutic abortion committee. However, in an appropriate case it would seem possible to argue that the notoriously undefined criteria for a legal abortion of "likely to endanger the life or health" of the pregnant woman (s. 251(3)(*c*)) are susceptible to a void-for-vagueness argument. The approach of the court would appear to preclude this as well, since these words themselves bear a sensible meaning.

The court adverted to the fact that it had been provided with no authority for holding a statute void for uncertainty in Canada. There has, however, long been precedent in the case of by-law offences: see, for example, *Harrison v. Toronto* (1982), 39 O.R. (2d) 721, 31 C.R. (3d) 244, 19 M.P.L.R. 310, 140 D.L.R. (3d) 309 (H.C.). There is also now direct authority in the case of statutes: see *R. v. Robson* (1985), 45 C.R. (3d) 68, 31 M.V.R. 220, 19 C.C.C. (3d) 137, 19 D.L.R. (4th) 112 (B.C.C.A.) (involving a provincial statute), and *Luscher v. Dep. Min., Revenue Can., Customs & Excise*, 45 C.R. (3d) 81, [1985] 1 C.T.C. 246, 17 D.L.R. (4th) 503, 57 N.R. 386 (Fed. C.A.) (concerning a federal regulation prohibiting the importation of immoral or indecent matter).

The fact that s. 15 of the Charter is now part of the supreme law of Canada does not give courts the obligation or the power to carry out its administration (pp. 46-51).

This bald proposition cannot be right. It may be contrasted with the attitude of the courts to other sections of the Charter where the administration of law has clearly been the court's consideration: cf. the right to be tried within a reasonable time under s. 11(*b*) (where the courts are involved in an ad hoc balancing process of the conduct of the accused, the police and the lawyers involved: see, for example, *R. v. Beason* (1983), 43 O.R. (2d) 65, 36 C.R. (3d) 73, 7 C.C.C. (3d) 20, 1 D.L.R. (4th) 218, 7 C.R.R. 65 (C.A.)); the right to be protected against unreasonable search or seizure under s. 8 (which includes protection against the reasonable manner of the search: see *Hunter*, supra); and the freedom of religion under s. 2(*a*) (where the courts are concerned with the indirect effect of legislation: *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395, 34 R.P.R. 97, 15 C.C.C. (3d) 353, 14 D.L.R. (4th) 10, 9 C.R.R. 193, 5 O.A.C. 1 (C.A.)).

The court in *Morgentaler* did qualify their broad statement by suggesting that established discrimination on the facts of an individual case could render legislation inoperative in those cases. In *Morgentaler* itself the court accepted that there was uneven administration of the law but refused to consider the matter further, since there was no evidence of individual rather than global discrimination against women. It is debatable whether this is logical given that the Crown chose to widen the charge to one of conspiracy to procure an illegal abortion.

The Crown's right to appeal a jury verdict of acquittal on a point of law is constitutional (pp. 55-65).

The court notes that there is such an appeal in New Zealand and in some Australian states, although it acknowledges that there is no such general right of appeal in England or in the United States. Although the accused's arguments were based on ss. 7, 11(*d*) and 11(*h*), the court largely contents itself with the view that the language in s. 11(*h*) could not have been intended to abrogate a well-established part of the Canadian criminal justice system.

The court's rejection of this argument is not surprising given the wide range of appeals we allow the Crown, including those as to sentence quantum. The court asserts at p. 65 that there are "valid policy reasons for permitting the Crown to appeal from an acquittal on questions of law alone to ensure the correct and uniform interpretation of the criminal law". Few would dispute this, but one can perhaps question whether the court was sufficiently attentive to the fact that in issue was an appeal from an acquittal *by a jury*. The court agreed that there was no error in the way that the law as to the defence of necessity was explained to the jury. Rather the error was in the judge either not withdrawing the issue from the jury or not properly relating the evidence to the defence. The traditional classification of the question of whether there is any evidence for the jury to consider as one of law has always been an uneasy one. Did the Court of Appeal really confine itself to a question of law? On the occasion of the Morgentaler acquittals in Quebec, Parliament intervened to take away the courts' power to substitute a conviction for jury acquittal. Is there a case now for suggesting that Parliament should guarantee that, like several other jurisdictions, there are no appeals from jury acquittals?

Dissatisfaction with the law cannot create an emergency giving rise to a defence of necessity (pp. 84-85).

This proposition might well flow from the narrow defence of necessity recognized by the Supreme Court of Canada in *Perka v. R.*, [1984] 2 S.C.R. 233, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 14 C.C.C. (3d) 385, 13 D.L.R. (4th) 1, 55 N.R. 1 [B.C.]. Whether the defence of necessity should be so limited will have to be further debated if and when there is a statutory version of the defence of necessity inserted in the Criminal Code.

The jury has no right to refuse to apply law it considers bad (pp. 87-91).

The court excoriates defence counsel for advising the jury that they had such a right, and emphasizes that it was not just a chance remark of the defence counsel but rather a repeated basis of the whole defence. The court furthermore holds that the judge's careful admonition could not undo the serious damage.

The attitude of the court may be contrasted to the well-accepted proposition that there is no unyielding rule that an unduly inflammatory address by the Crown must result in a new trial following a conviction: see, for example, *Pisani v. R.*, [1971] S.C.R. 738, 1 C.C.C. (2d) 477, 15 D.L.R. (3d) 1 [Ont.], and *R. v. Roberts* (1973), 14 C.C.C. (2d) 368 (Ont. C.A.). In that context courts have often accepted that judges can achieve a correction.

It is also interesting to note that Blair J.A. of the Ontario Court of Appeal in *Bryant*, supra, at p. 328 quoted with apparent approval the following description by Lord Devlin in "Trial by Jury", Hamlyn lecture (1966), at p. 164:

Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.

Of course the history of the four *Morgentaler* acquittals confirms that juries have the *power* to disregard instruction from judges. Are we truly prepared to embrace directed verdicts of conviction? Wouldn't this threaten the integrity of the jury system?

Don Stuart

Table of Authorities

Cases considered:

Akron v. Akron Center for Reproductive Health Inc., 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983) — *not followed*

Benton v. Maryland, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) — *not followed*

Bliss v. A.G. Can., [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 78 C.L.L.C. 14,175, 92 D.L.R. (3d) 417, 23 N.R. 527 [Fed.] — *considered*

Boucher v. R., [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263 [Que.] — *referred to*

Carruthers v. Therapeutic Abortion Ctees. of Lions Gate Hosp. (1983), 4 Admin. L.R. 51, 6 D.L.R. (4th) 57, 50 N.R. 373, leave to appeal to S.C.C. refused 4 Admin. L.R. 51n, 6 D.L.R. (4th) 57n, 52 N.R. 398 [Fed.] — *considered*

Crain (R.L.) Inc. v. Couture (1983), 10 C.C.C. (3d) 119, 6 D.L.R. (4th) 478, 9 C.R.R. 287, 30 Sask. R. 191 (Q.B.) — *followed*

Crane v. D.P.P., [1921] 2 A.C. 299 (H.L.) — *referred to*

Doe v. Bolton, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739 (1973) [rehearing denied 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1410] — *not followed*

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.] — *considered*

Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972) — *referred to*

Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) — *referred to*

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 71 L. Ed. 2d 372, 102 S. Ct. 1186 (1982) [rehearing denied 456 U.S. 950, 72 L. Ed. 2d 476, 102 S. Ct. 2023] — *applied*

Jamieson and R., Re (1982), 70 C.C.C. (2d) 430, 142 D.L.R. (2d) 54, 3 C.R.R. 193 (C.S. Que.) — *not followed*

Joshua v. R., [1955] A.C. 121, [1955] 2 W.L.R. 8, [1955] 1 All E.R. 22 (P.C.) — *followed*

Kepner v. U.S., 195 U.S. 100, 49 L. Ed. 114, 24 S. Ct. 797 (1904)*not followed*
L.S.U.C. v. Skapinker, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169 — *applied*
Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965) — *considered*
Loving v. Virginia, 388 U.S. 1, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967) — *referred to*
Maher v. Roe, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977) — *considered*
Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) [rehearing denied 368 U.S. 871, 7 L. Ed. 2d 72, 82 S. Ct. 23] — *referred to*
Martineau v. Matsqui Inst. Disciplinary Bd., [1980] 1 S.C.R. 602, 13 C.R. (3d) 1, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 [Fed.] — *referred to*
Martineau v. Matsqui Inst. Inmate Disciplinary Bd., [1978] 1 S.C.R. 118, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410 [Fed.] — *referred to*
Mason and R., Re (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, 1 D.L.R. (4th) 712 (H.C.) — *referred to*
Medhurst and Medhurst, Re (1984), 45 O.R. (2d) 575, 4 Admin. L.R. 126, 7 D.L.R. (4th) 335 (H.C.) — *considered*
Morgentaler v. R., [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 4 N.R. 277 [Que.] — *followed*
Nicholson v. Haldimand-Norfolk Reg. Bd. of Police Commrs., [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410 [Ont.] — *referred to*
Palko v. Connecticut, 302 U.S. 319, 82 L. Ed. 288, 58 S. Ct. 149 (1937) — *considered*
Peralta and R. in Right of Ont., Re; Peralta v. Warner (1985), 49 O.R. (2d) 705, 16 D.L.R. (4th) 259, 7 O.A.C. 283 (C.A.) [leave to appeal to S.C.C. granted 51 O.R. (2d) 191] — *applied*
Perka v. R., [1984] 2 S.C.R. 233, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 14 C.C.C. (3d) 385, 13 D.L.R. (4th) 1, 55 N.R. 1 — *followed*
Pierce v. Soc. of Sisters of Holy Names of Jesus & Mary, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468 (1925) — *referred to*
Potma and R., Re (1983), 41 O.R. (2d) 43, 31 C.R. (3d) 321, 18 M.V.R. 133, 2 C.C.C. (3d) 383, 144 D.L.R. (3d) 620, 3 C.R.R. 252, leave to appeal to S.C.C. refused 41 O.R. (2d) 43n, 33 C.R. (3d) xxv, 144 D.L.R. (3d) 620n, 4 C.R.R. 17, 50 N.R. 400 — *considered*
Ref. re Residential Tenancies Act, [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 [Ont.] — *applied*
Ref. re S. 94(2) of Motor Vehicle Act, 33 C.R. (3d) 22, [1983] 4 W.W.R. 756, 42 B.C.L.R. 364, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, 5 C.R.R. 148 (C.A.) — *followed*
Ref. re Validity of S. 5(a) of Dairy Indust. Act, [1949] S.C.R. 1, [1949] 1 D.L.R. 433, affirmed *(*sub nom. *Can. Fed. of Agriculture v. A.G. Que.)* [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.) — *distinguished*
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*applied*
R. v. Bourne, [1939] 1 K.B. 687, [1938] 3 All E.R. 615 (C.A.).
R. v. Burns (1901), 4 C.C.C. 323 (Ont. C.A.) — *considered*
R. v. Gushue (1976), 14 O.R. (2d) 620, 35 C.R.N.S. 304, 32 C.C.C. (2d) 189, 74 D.L.R. (3d) 473, affirmed [1980] 1 S.C.R. 798, 16 C.R. (3d) 39, 50 C.C.C. (2d) 417, 106 D.L.R. (3d) 152, 30 N.R. 204 — *referred to*
R. v. Hayden, 36 C.R. (3d) 187, [1983] 6 W.W.R. 655, 5 C.H.R.R. D/2121, [1984] 1 C.N.L.R. 148, 8 C.C.C. (3d) 33, 3 D.L.R. (4th) 381, 7 C.R.R. 325, 23 Man. R. (2d) 315, leave to appeal to S.C.C. refused 36 C.R. (3d) xxiv, [1984] 2 C.N.L.R. 190, 8 C.C.C. (3d) 33n, 3 D.L.R. (4th) 361n, 26 Man. R. (2d) 318, 52 N.R. 386 — *not followed*
R. v. Jordan (1971), 14 C.R.N.S. 225, 1 C.C.C. (2d) 385, 2 N.S.R. (3d) 594 (C.A.) [leave to appeal to S.C.C. refused 2 C.C.C. (2d) 349, 2 N.S.R. (2d) 602 (C.A.)] — *considered*
R. v. Karn (1903), 2 O.W.R. 335, 1903 CarswellOnt 247, 5 O.L.R. 704, 6 C.C.C. 479 (Ont. C.A.) — *referred to*
R. v. Langevin (1984), 45 O.R. (2d) 705, 39 C.R. (3d) 333, 11 C.C.C. (3d) 336, 8 D.L.R. (4th) 485, 9 C.R.R. 16, 3 O.A.C. 110 (C.A.) — *considered*

R. v. Operation Dismantle, [1983] 1 F.C. 745, 39 C.P.C. 120, 3 D.L.R. (4th) 193, 49 N.R. 363, affirmed [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 18 D.L.R. (4th) 481, 13 C.R.R. 287, 59 N.R. 1 — *considered*

R. v. Robson (1985), 45 C.R. (3d) 68, 31 M.V.R. 220, 19 C.C.C. (3d) 137, 19 D.L.R. (4th) 112 (B.C.C.A.) — *considered*

R. v. Roche (1985), 46 C.R. (3d) 170, 20 C.C.C. (3d) 524, 9 O.A.C. 391 (C.A.) — *considered*

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.] — *referred to*

R. v. Shipley (1784), 4 Doug. K.B. 73, 99 E.R. 774 — *followed*

R. v. Stevens (1983), 3 C.C.C. (3d) 198, 145 D.L.R. (3d) 563, 5 C.R.R. 139, leave to appeal to S.C.C. granted 6th June 1983 [Ont.] — *considered*

R. v. Therens, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 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 — *considered*

R. v. Videoflicks Ltd. (1984), 48 O.R. (2d) 395, 34 R.P.R. 97, 15 C.C.C. (3d) 353, 14 D.L.R. (4th) 10, 9 C.R.R. 193, 5 O.A.C. 1 (C.A.) — *considered*

R. v. Young (1984), 46 O.R. (2d) 520, 40 C.R. (3d) 289, 13 C.C.C. (3d) 1, 10 C.R.R. 307, 3 O.A.C. 254 (C.A.) — *followed*

Roe v. Wade, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973) [rehearing denied 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1409] — *not followed*

Schloendorff v. Soc. of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 52 L.R.A. (N.S.) 505, Ann. Cas. 1915 C. 581 (C.A., 1914) — *considered*

Schneider v. R. in Right of B.C., [1982] 2 S.C.R. 112, [1982] 6 W.W.R. 673, 39 B.C.L.R. 273, 68 C.C.C. (2d) 449, 139 D.L.R. (3d) 417, *(*sub nom. *Schneider v. B.C.)* 43 N.R. 91 — *referred to*

Singh v. Min. of Employment & Immigration; Thandi v. Min. of Employment & Immigration; Mann v. Min. of Employment & Immigration, [1985] 1 S.C.R. 176, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422, 14 C.R.R. 13, 58 N.R. 1 [Fed.] — *considered*

Skinner v. Oklahoma, 316 U.S. 479, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942)*referred to*

U.S. v. Moylan; U.S. v. Berrigan; U.S. v. Lewis, 147 F. 2d 1002 (1970) [certiorari denied 397 U.S. 910, 25 L. Ed. 2d 91, 90 S. Ct. 908] — *considered*

Welch v. R., [1950] S.C.R. 412, 10 C.R. 97, 97 C.C.C. 177, [1950] 3 D.L.R. 641 [Ont.] — *considered*

Winsor v. R. (1865), L.R. 1 Q.B. 390, 10 Cox C.C. 276 — *referred to*

Statutes considered:

Abortion Act, 1967 (Eng.), c. 87, s. 5(1).

Act to Amend the Criminal Code, 1923 (Can.), c. 41.

Act to Amend the Criminal Code, 1930 (Can.), c. 11, s. 28.

Canadian Bill of Rights, R.S.C. 1970, App. III, ss. 1(*a*), (*b*), 2(*e*).

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I, ss. 1, 2, 7 to 12, 15, 24(1), 27, 28, 32(1)(*a*).

Constitution Act, 1867, ss. 91, head 27, 96.

Constitution Act, 1982, s. 52.

Crimes Act, 1961 (New Zealand) (No. 43 of 1961), ss. 187A, 380, 383.

Criminal Appeal Act, 1907 (7 Edw. 7, c. 23).

Criminal Appeal Act, 1912-69 (New South Wales), s. 5A(2).

Criminal Code, 1892 (Can.), c. 29, ss. 272 to 274, 743, 744, 746.

Criminal Code, R.S.C. 1906, c. 146, ss. 303 to 306.

Criminal Code, R.S.C. 1927, c. 36, ss. 303 to 306.

Criminal Code, 1953-54 (Can.), c. 51 [now R.S.C. 1970, c. C-34], ss. 237 [am. 1968-69, c. 38, s. 18; now s. 251], 238 [now s. 252].

Criminal Code, R.S.C. 1970, c. C-34, ss. 7(3), 45, 146(1) [am. 1972, c. 13, s. 70], 246.1 [en. 1980-81-82-83, c. 125, s. 19], 251 [am. 1974-75-76, c. 93, s. 22.1], 603 [am. 1974-75-76, c. 105, s. 13], 605 [am. 1974-75-76, c. 105, s. 15], 610(3).

Criminal Code (Georgia).

Criminal Code (Germany), paras. 218a, 218b, STGB.

Criminal Code (Western Aus.) (No. 28 of 1913; R.S. vol. 8), s. 688(2).

Criminal Code Act (Tasmania) (No. 69 of 1924), ss. 401(2), 402(5).

Criminal Justice Act, 1972 (Eng.), c. 71, s. 36.

Criminal Law Consolidation Act, 1935-1975 (South Aus.) (No. 2252 of 1935 — No. 14 of 1978), s. 82a.

Criminal Law Consolidation Act and Ordinance, 1876-1960 (Nor. Terr.), s. 79A.

Crown Cases Act, 1848 (11 & 12 Vict., c. 78).

Federal Criminal Code (Switzerland), art. 120 C.P.

Infant Life (Preservation) Act, 1929 (19 & 20 Geo. 5, c. 34).

Lord Ellenborough's Act, 1803 (43 Geo. 3, c. 58).

Offences Against the Person Act, 1869 (Can.), c. 20 (32 & 33 Vict., c. 20), ss. 59, 60.

Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 58.

Penal Law (Israel), 5737-1977, ss. 312, 321.

United States Constitution, Fourth, Fifth and Fourteenth Amendments.

Authorities considered:

Archbold, Pleading, Evidence and Practice in Criminal Cases, 41st ed. (1982), pp. 725, 761, 815-16.

Blackstone, Commentaries on the Laws of England (1765), vol. 1, pp. 129-30.

Brett and Waller, Criminal Law, 4th ed. (1978), pp. 55-56.

Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History" (1978), 16 Alta. L. Rev. 446, pp. 448-54.

Fletcher, Rethinking Criminal Law (1978), pp. 811-12.

Friedland, A Century of Criminal Justice: Perspectives on the Development of Canadian Law (1984), pp. 227-28.

Friedland, Double Jeopardy (1969), pp. 283-84, 285-86, 287, 296.

Friedland, "New Trial after an Appeal from a Conviction" (1965), 84 L.Q. Rev. 48.

Garrow and Willis, Criminal Law, 5th ed. (1968), pp. 357-61.

Hansard, Minutes of Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada (1980-81), vol. 7, p. 21; vol. 46, pp. 36, 43.

Hogg, Constitutional Law of Canada, 2nd ed. (1985), p. 777.

Mayers and Yarbrough, "*Bis Vexari*: New Trials and Successive Prosecutions" (1960), 74 Harvard L. Rev. 1, pp. 8-13.

Miller, "Appeals by the State in Criminal Cases" (1927), 36 Yale L.J. 486.

Morel, "Certain Guarantees of Criminal Procedure (Ss. 11(*b*), (*f*), (*h*), 12 and 14)", in Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (1982), pp. 383-86.

Nedjati, Human Rights under the European Convention (1978), p. 86.

Stephen, History of the Criminal Law of England (1883), vol. 1, pp. 308-10.

Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms: Commentary (1982), pp. 383-86.

Words and phrases considered:

CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT

We cannot construe the terms of s. 251 [of the *Criminal Code*, R.S.C. 1970, c. C-34] as they now stand as inflicting punishment either on the medical profession, including the respondents, or on females. Nor do we see it as falling within "cruel and unusual treatment".

. . . . .

In [*R. v. Morgentaler (No. 5)*, [1976] 1 S.C.R. 616], at p. 631, Laskin C.J.C., in dealing with this argument, stated what is, in essence, our position:

I am unable to agree that the mere prohibition of abortions save as permitted by s. 251(4), (5) involves any imposition of treatment; nor can it be said that a physician or other person who runs foul of the abortion law is subjected to cruel or unusual punishment if he is sentenced to a term of imprisonment for his criminal conduct.

DISCRIMINATION BASED ON SEX

It is true that abortion, as a matter of biological fact, relates only to women. However, that fact does not make the section discriminatory on the basis of sex. It could not apply to men and the argument would be without any substance to say that the legislation is discriminatory or causes inequality before the law because it does not require men seeking an abortion to comply with s. 251.

FINALLY

Two influential commentators on the *Charter* have expressed the view that the word "finally" was inserted in s. 11(h) to ensure that the provision did not prevent a new trial ordered by the Court of Appeal.

In A Century of Criminal Justice, Professor Friedland states at p. 228:

The word "finally" in the *Charter* provision makes it clear that new trials can be ordered following an appeal from a conviction and reasonably clear that, unlike in England or the United States, appeals from an acquittal are permitted in certain cases.

Professor Hogg in Constitutional Law of Canada, 2nd ed. (1985), states at p. 777:

The word "finally" in s. 11(h) makes clear that a second trial is barred only if there was a final disposition of the charge against the accused in the earlier proceedings. If the earlier proceedings ended in a stay of proceedings, the accused can be charged again and tried for the same offence. If a trial ended in a mistrial, or if a new trial was ordered on appeal, a second trial for the same offence would not be barred.

FREEDOM OF RELIGION

In [*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295], Dickson J., in delivering the reasons of the majority, said at p. [336]:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom, in a broad sense, embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

Giving the words "freedom of conscience and religion" the most generous interpretation, we do not see any aspect of the legislation under review [s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34] as infringing that right or falling within the Supreme Court's approach to s. 2(a) [of the *Charter*]. There is no religion that has, as part of its tenets or creed, the absolute right to an abortion. Some religions may, indeed, permit it under certain circumstances, but that does not make it part of its essential religious practice. Nor was it established that there was a set of beliefs that bound one's conscience in a way that required there be complete freedom at the instance of one individual, without more, to choose an abortion.

LIFE, LIBERTY AND SECURITY OF THE PERSON

Some rights have their basis in common law or statute law. Some are so deeply rooted in our traditions and way of life as to be fundamental and could be classified as part of life, liberty and security of the person. The right to choose one's partner in marriage, and the decision whether or not to have children would fall in this category, as would the right to physical control of one's person, such as the right to clothe oneself, take medical advice and decide whether or not to act on this advice. As Tarnopolsky J.A. said in *R. v. Videoflicks Ltd. et al.* (1984), 48 O.R. (2d) 395 . . . at p. 433:

The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes.

Or as Cardozo J. put it in *Schloendorff v. Society of New York Hospital*, 105 N.E. 92at 93 (1914):

Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . .

. . . it would place too narrow an interpretation on s. 7 to limit it to protection against arbitrary arrest and detention. However it is not necessary for the purpose of this appeal to consider how broad a meaning should be given to life, liberty and security of the person.

PRINCIPLES OF FUNDAMENTAL JUSTICE

. . . in *Re Potma and The Queen* (1983) . . . 2 C.C.C. (3d) 383 [(Ont. C.A.)] . . . (leave to appeal to the Supreme Court of Canada refused . . .) . . . Robins J.A., in delivering the judgment of this Court, stated at pp. 391-92:

The concepts of "fundamental justice" and "fair hearing" relevant here are the same whether considered under ss. 7 and 11(d) of the *Charter*, under s. 2(e) and (f) of the *Bill of Rights* [R.S.C. 1970, App. III], or under the common law. In so far as this case is concerned, while the *Charter* accords recognition to the well-established rights asserted by the appellant, it effects no change in the law respecting those rights.

This is not to suggest that "the principles of fundamental justice" now recognized by the *Charter of Rights and Freedoms* are immutable. "Fundamental justice", like "natural justice" or "fair play", is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure. The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust.

. . . . .

In *R. v. Young* (1984), 46 O.R. (2d) 520 . . . this Court held that principles of fundamental justice in s. 7 were not limited to a matter of procedural fairness. In delivering the judgment of the Court, Dubin J.A. stated at p. 542:

Having regard to the language of s. 7 of the *Charter*, read in light of its other provisions and when contrasted with the language of the *Bill of Rights*, I would conclude that the principles of fundamental justice are not limited to the right to a fair hearing in accordance with the principles of natural justice.

. . . . .

After considering the above decisions 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. While the limits of such review will evolve as the interpretation of the *Charter* unfolds, it is sufficient to say at this juncture that 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. We reiterate that the policy and wisdom of legislation should remain first and foremost a matter for Parliament and the Legislatures.

Appeal by Crown from accused's acquittal of conspiracy to procure miscarriages.

International conventions considered:

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5.

International Covenant on Civil and Political Rights, 1966, arts. 9, 18(3).

***Per curiam*:**

1 This appeal revolves around an issue which engages the deepest of human emotions, an issue which, understandably, brings into conflict sincerely and strongly held opposing views. However, we wish to emphasize at the outset that our task is not to express an opinion on the merits or demerits of abortion, but rather to determine whether Parliament has the jurisdiction to enact s. 251 of the Criminal Code now under attack and, if so, whether this case was properly put to the jury. We would adopt the statement of Dickson J. in *Morgentaler v. R.*, [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 20 C.C.C. (2d) 449 at 491, 53 D.L.R. (3d) 161, 4 N.R. 277 [Que.], where he said:

> It seems to me to be of importance, at the outset, to indicate what the Court is called upon to decide in this appeal and, equally important, what it has not been called upon to decide. It has not been called upon to decide, or even to enter, the loud and continuous public debate on abortion which has been going on in this country between, at the two extremes, (i) those who would have abortion regarded in law as an act purely personal and private of concern only to the woman and her physician in which the state has no legitimate right to interfere, and (ii) those who speak in terms of moral absolutes and, for religious or other reasons, regard an induced abortion and destruction of a foetus, viable or not, as destruction of

a human life and tantamount to murder. The values we must accept for the purposes of this appeal are those expressed by Parliament which holds the view that the desire of a woman to be relieved of her pregnancy is not, of itself, justification for performing an abortion.

The Appeal

2 The respondents were charged on an indictment which reads as follows:

Henry Morgentaler and Leslie Frank Smoling and Robert Scott stand charged that they during the period commencing in the month of November, 1982 and ending on the 5th day of July, 1983 at the Municipality of Metropolitan Toronto in the Judicial District of York, did conspire with each other, with intent to procure the miscarriage of female persons, to use an induced suction method for the purpose of carrying out that intent, thereby committing an indictable offence contrary to sections 251(1) and 423(1)(d) of the Criminal Code of Canada.

3 Upon their arraignment and before plea, their counsel moved to quash the indictment on the basis that s. 251 of the Criminal Code was unconstitutional. After very lengthy proceedings the learned trial judge rejected the defence plea and held the section to be constitutionally valid.

4 Following the ruling of the trial judge, the trial then proceeded on the premise that the charge laid against the accused was valid in law. At the conclusion of the trial, the jury acquitted the respondents, and it is from that acquittal that this appeal is taken by the Crown.

Respondents' Cross-Appeal

5 The respondents purported to "cross-appeal" on the constitutional issues, although it is acknowledged that such issues are part of the respondents' position on the appeal. However, for the convenience of counsel and the court, it was agreed that the submissions on the Crown appeal would be heard first, and then there would be completely separate submissions by Mr. Manning, on behalf of the respondents, on the constitutional and Canadian Charter of Rights and Freedoms issues, to which the Crown would respond and Mr. Manning would reply. This was the manner in which the appeal was heard.

6 If the respondents were to succeed on any part of their constitutional or Charter arguments, the Crown appeal would be moot. Accordingly, it is logical that we should deal first with those arguments. Counsel for the respondents separated his argument in this area under several headings and we shall deal with them under those headings. Many of the arguments necessarily overlapped and sometimes it will be necessary to repeat our opinions and the relevant quotations from authorities.

7 Without doing a disservice to Mr. Manning's forceful submissions, the headings can be combined in question form as follows:

8 (1) Does s. 251 of the Criminal Code violate the right to liberty and the security of the person guaranteed by s. 7 of the Charter?

9 (2) Is s. 251 void for vagueness?

10 (3) Does s. 251(4) violate the procedural protections in s. 7 of the Charter?

11 (4) Does s. 251 violate freedom of religion and conscience guaranteed by s. 2(*a*) of the Charter?

12 (5) Do the provisions of s. 251, particularly s. 251(4), subject persons to cruel and unusual punishment?

13 (6) Is s. 251 "inconsistent" with ss. 15, 27 and 28 of the Charter? Are the guarantees of equality under the law and equal benefit of and equal protection of the law violated by the section?

14 (7) Is s. 251 colourable legislation, in pith and substance relating to matters of health within the province and therefore ultra vires Parliament as not falling within s. 91, head 27, of the Constitution Act, 1867?

15 (8) Is s. 251 in effect an unconstitutional delegation of legislative power to the provincial Minister of Health, and an abdication of the criminal law power by Parliament?

16 (9) Does s. 251 confer judicial powers on therapeutic abortion committees akin to those exercised by s. 96 (of the Constitution Act, 1867) judges, that is, county, district and superior court judges? Although not a constitutional argument, counsel for the respondents completed his argument in this area by submitting that the prosecution of the respondents in Ontario was an abuse of process and a breach of the principles of fundamental justice because they would not be prosecuted in the province of Quebec.

17 Counsel for the respondents submitted that all of the above nine questions should be answered in the affirmative. We turn now to the individual questions.

(1) Does S. 251 of the Criminal Code Violate the Right to Liberty and Security of the Person Guaranteed by S. 7 of the Charter?

18 Section 251 provides:

> 251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
>
> (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (3) In this section, "means" includes
>
> (*a*) the administration of a drug or other noxious thing,
>
> (*b*) the use of an instrument, and
>
> (*c*) manipulation of any kind.
>
> (4) Subsections (1) and (2) do not apply to
>
> (*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
>
> (*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (*a*) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
>
> (*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
>
> (*d*) has caused a copy of such certificate to be given to the qualified medical practitioner.
>
> (5) The Minister of Health of a province may by order

(*a*) require a therapeutic abortion committee for any hospital in that province, or any member thereof, to furnish to him a copy of any certificate described in paragraph (4)(*c*) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

(*b*) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(*c*), to furnish to him a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection

"accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

"approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

"board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

"Minister of Health" means

(*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health

(*a*.1) in the Province of Alberta, the Minister of Hospitals and Medical Care,

(*b*) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,

(*c*) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and

(*d*) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

"qualified medical practitioner" means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

"therapeutic abortion committee" for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person.

History of the Law of Abortion

19 The history of the law of abortion is of some importance. At common law procuring an abortion before quickening was not a criminal offence. Quickening occurred when the pregnant woman could feel the foetus move in her womb. It was a misdemeanour to procure an abortion after quickening: Blackstone's Commentaries on the Laws of England (1765), vol. 1, at pp. 129-30. The law of criminal abortion was first codified in England in Lord Ellenborough's Act, 1803 (43 Geo. 3, c. 58). That Act made procuring an abortion of a quick foetus a capital offence and provided lesser penalties for abortion before quickening. After the Offences Against the Person Act, 1861 (24 & 25 Vict., c. 100), s. 58, no differentiation in penalty was made in England on the basis of the stage of foetal development. The offence was a felony and the maximum penalty life imprisonment. The Infant Life (Preservation) Act, 1929 (19 & 20 Geo. 5, c. 34), gave greater protection to a viable foetus by creating the offence

of child destruction where a child capable of being born alive was caused to die except in good faith to preserve the life of the mother. In *R. v. Bourne*, [1939] 1 K.B. 687, [1938] 3 All E.R. 615 (C.A.), the prohibition against abortion both at common law and by statute was held to be subject to the common law defence based upon the necessity of saving the mother's life.

20 The earliest statutory prohibition in Canada against attempting to procure an abortion is to be found in the Offences Against the Person Act, 1869 (Can.), c. 20 (32 & 33 Vict., c. 20), ss. 59, 60. The Act was based on Lord Ellenborough's Act, 1803, and the Offences Against the Person Act, 1861. The provisions relating to abortion were included in the Canadian Criminal Code in 1892 (1892 (Can.), c. 29, ss. 272 to 274), and with slight changes were included in the Codes of 1906 (R.S.C. 1906, c. 146, ss. 303 to 306); 1927 (R.S.C. 1927, c. 36, ss. 303 to 306) and 1954 (1953-54 (Can.), c. 51, ss. 237 and 238).

21 Section 251(1) made it clear that Parliament regarded procuring an abortion as a very serious crime for which there was a maximum sentence of imprisonment for life.

22 In 1969, Parliament alleviated the situation by the addition to s. 251 [then s. 237] of subss. (4), (5), (6) and (7) as exculpatory provisions, by 1968-69 (Can.), c. 38, s. 18. These subsections provided that it was not a criminal act to procure an abortion where the continuation of the pregnancy would or would be likely to endanger the life or health of a female person. As can be seen, in order to come within the exceptions to ss. 251(1) and (2):

> (a) the majority of the members of a therapeutic abortion committee comprising not less than three qualified medical practitioners of an accredited or approved hospital had to certify in writing after reviewing the case at a meeting that in the opinion of the majority the continuation of the pregnancy would or would be likely to endanger the life or health of a female person; and
>
> (b) the abortion had to be performed in an accredited or approved hospital by a medical practitioner to whom the certificate was given who was not a member of the committee.

By defining criminal conduct more narrowly, these amendments reflected the contemporary view that abortion is not always socially undesirable behaviour.

23 The provisions in s. 251 are more stringent than those of the Abortion Act, 1967 (Eng.), c. 87, of the United Kingdom. Under that Act, it is sufficient for the legal procurement of an abortion if two registered medical practitioners form an opinion in good faith that: (a) the continuance of the pregnancy would involve greater risk to the life, or of injury to the physical or mental health, of the pregnant woman or existing children of her family; or (b) there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, two opinions are not required where the registered medical practitioner terminating the pregnancy is of the opinion, formed in good faith, that the termination is immediately necessary to save her life or prevent grave permanent injury to her physical or mental health. By s. 5(1) of the Abortion Act, 1967, nothing in that Act affects the provisions of the Infant Life (Preservation) Act, 1929.

24 Counsel for the respondents has strongly contended that the legal position under the Charter, and particularly under s. 7, is very different from what it was prior to the enactment of the Charter. It is accordingly necessary to examine the legal position both before and after the Charter came into force and to compare the legal situation in the United States.

Pre-Charter Legal Position

25 The constitutional validity of s. 251 and its operative effect in light of the Canadian Bill of Rights were carefully considered by Laskin C.J.C. in his dissenting judgment in *Morgentaler v. R.*, supra (hereinafter referred to as "*Morgentaler* (1975)"). In that case, Dr. Morgentaler had been charged with unlawfully procuring the miscarriage of a female person contrary to s. 251 of the Code. Following a trial with a jury, he was acquitted. On an appeal by the Crown, the Quebec Court of Appeal set aside the acquittal and entered a verdict of guilty. A further appeal by the accused to the Supreme Court of Canada was dismissed. The appellant in the Supreme Court of Canada raised the constitutional validity of s. 251 and its operative effect in light of the Canadian Bill of Rights. He also relied on the defence of necessity, and on s. 45 of the Code as protecting him from criminal responsibility for performing a surgical operation which was reasonable.

26 After hearing counsel for the appellant and for the two intervenants supporting the attack against s. 251, the Supreme Court of Canada unanimously decided that no case had been established that would require hearing counsel for the Crown or the intervenants on the constitutional validity of s. 251, or the effect of the Canadian Bill of Rights. Laskin C.J.C., with whom Judson and Spence JJ. concurred, was the only member of the court to give reasons with respect to the constitutional validity of s. 251 and the effect of the Canadian Bill of Rights. After explaining why the court did not hear the Crown and the other intervenants on these points, he stated at p.455:

> It is none the less important, in my opinion, to state why the attack on the validity and operation of s. 251 was rejected.

27 The views of Laskin C.J.C. on these points do not form the basis of his dissent. There is nothing in the reasons of Pigeon J. or Dickson J. to indicate that they disagreed in any way with the reasons of Laskin C.J.C. on these points. The six members of the court comprising the majority concluded that the defence of necessity should not have been put to the jury as there was no evidence of an urgent necessity. So far as s. 45 was concerned, the majority concluded that it could not apply so as to remove criminal liability under s. 251. The other three members of the court considered that the defence of necessity and the defence under s. 45 were properly left to the jury.

28 Laskin C.J.C. had no difficulty in concluding that s. 251 was a valid exercise of the federal criminal law power, and did not encroach on provincial legislative power in relation to hospitals and to the regulation of the profession of medicine and the practice of medicine. At p. 457 he stated:

> What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.

29 In *Morgentaler* (1975), seven points were raised with respect to the Canadian Bill of Rights. The first point was with respect to s. 1(*a*), which provides:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law ...

30 The contention as to point (1) as set out by Laskin C.J.C. at p. 459 was that under s. 1(*a*) of the Canadian Bill of Rights "women had a right to privacy, involving at least a qualified right to have pregnancy terminated, especially in the first trimester of pregnancy".

31 Point (1) raised the very important issue of whether the court under s. 1(*a*) of the Canadian Bill of Rights can "pass on the substantive quality of legislation as well as on the procedural safeguards for the right of the individual to life, liberty, security of the person and enjoyment of property" [p. 461]. This contention had its basis in American cases, particularly *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705, rehearing denied 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1409 (1973), and *Doe v. Bolton*, 410 U.S. 179, 35 L. Ed. 2d 201, 93 S. Ct. 739, rehearing denied 410 U.S. 959, 35 L. Ed. 2d 694, 93 S. Ct. 1410 (1973). Laskin C.J.C. was quick to point out that the Canadian Bill of Rights was a statutory instrument and, as with the question of ultra vires, the court should resist the temptation to consider the wisdom of legislation. He was not prepared to go so far as to say that due process of law should be rigidly confined to procedural matters. Nor was he prepared to say that during a part of the period of gestation a pregnant woman could claim freedom of choice as to abortion as a right of privacy embodied in liberty of the person, and that the federal Parliament could legislate as to the remainder of the gestation period.

United States Law as to Abortions

32 Although there is no express right of privacy in the American Constitution, the Supreme Court of the United States has recognized that such a right is one aspect of the "liberty" protected by the due process clause of the Fourteenth Amendment. The relevant part of the Fourteenth Amendment is as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

33 Amongst the personal decisions that the United States Supreme Court has held are included in the individual's right of privacy are decisions as to whom he or she will marry (*Loving v. Virginia*, 388 U.S. 1 at 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967)); whether or not they will have children (*Skinner v. Oklahoma*, 316 U.S. 535 at 541, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942)); whether or not they will use contraceptives (*Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 at 453, 31 L. Ed. 2d 349, 92 S. Ct. 1029 (1972)); and how their children shall be reared and educated (*Pierce v. Soc. of Sisters of Holy Names of Jesus & Mary*, 268 U.S. 510 at 535, 69 L. Ed. 1070, 45 S. Ct. 571, 39 A.L.R. 468 (1925)).

34 The present law as to criminal abortions in the United States had its foundation in two decisions of the Supreme Court of the United States heard in 1973, *Roe v. Wade*, supra, and *Doe v. Bolton*, supra. In *Roe v. Wade* the majority of the United States Supreme Court (White and Rehnquist JJ. dissenting), in considering the right of privacy, concluded that the decision whether or not to bear or beget children necessarily included the right of a woman to decide whether or not to terminate her pregnancy. This right of termination was held not to be an absolute one, but was subject to control by state legislation in protecting important interests such as safeguarding health, maintaining medical standards and protecting potential life. It was recognized that a state can impose increasing restrictions on abortions as the period of pregnancy lengthens, so long as those restrictions are tailored to recognized state interests.

35 The majority of the court held [at pp. 103-84] that:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

36 In a dissenting opinion, Rehnquist J. pointed out at p. 197 that liberty in the Fourteenth Amendment "is not guaranteed absolutely against deprivation, only against deprivation without due process of law". On the proper role of the court he continued [pp. 197-98]:

> The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective ... But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one ...
>
> As in *Lochner* [*Lochner v. New York*, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905)] and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in

> the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment ...
>
> Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellant would have us believe.

37 The majority of the Supreme Court held that the sections of the Texas Penal Code in question which prohibited abortions at any stage of the pregnancy, except to save the life of the mother, were unconstitutional as violating the due process clause of the Fourteenth Amendment. The provisions of the Texas Penal Code were representative of provisions which had for a long time been in effect in a majority of the states of the United States.

38 In the companion decision of *Doe v. Bolton*, supra, the provisions of the Georgia Criminal Code in question were similar in several respects to s. 251 of our Criminal Code. For an abortion to be non-criminal it had to be performed by a licensed physician based upon his best clinical judgment that it was necessary because: (1) a continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) the foetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or (3) the pregnancy resulted from forcible or statutory rape. In addition, the following conditions, inter alia, had to be satisfied:

> (a) at least two other Georgia-licensed physicians, after independent examinations of the patient, had to concur in the performing physician's medical judgment;
>
> (b) the abortion had to be performed in a licensed and accredited hospital; and
>
> (c) there had to be advance approval by an abortion committee of not less than three members of the hospital's staff.

The Supreme Court of the United States (White and Rehnquist JJ. dissenting) held that the three conditions as to concurrence by two other physicians, performance in a licensed and accredited hospital, and approval by an abortion committee all violated the Fourteenth Amendment.

39 In *Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416, 76 L. Ed. 2d 687, 103 S. Ct. 2481 (1983), the majority of the Supreme Court of the United States reaffirmed *Roe v. Wade*, supra, and its decision as to the powers of the state during each of the three trimesters. It concluded, however, based on current medical knowledge, that the safety of second-trimester abortions had increased dramatically since 1973, and that a requirement of an abortion ordinance of the city of Akron that all second-trimester abortions be performed in a hospital was not justified and was therefore unconstitutional. This decision clearly emphasized that the power of a state to regulate abortion procedures may be reduced as medical knowledge develops. Other provisions of the ordinance were also declared unconstitutional.

40 O'Connor J., in a dissenting opinion (in which Rehnquist and White JJ. joined), did not dispute that the right of privacy grounded in the concept of personal liberty included the right of a woman to determine whether or not her pregnancy should be terminated within the limits set out in *Roe v. Wade*. However, she was of the opinion that the state possessed a compelling interest in the protection of potential human life and in maternal health throughout the pregnancy. At p. 2505 O'Connor J. attacked the trimester approach as a completely unworkable method of accommodating conflicting personal rights and compelling state interests that are involved in the abortion context. In her opinion the proper test to be applied was whether the regulation imposed on a lawful abortion was unduly burdensome. At pp. 717-18 she stated:

> Our recent cases indicate that a regulation imposed on "a lawful abortion" is not unconstitutional unless it unduly burdens the right to seek an abortion. Maher v Roe, 432 US 464, 473, 97 S Ct 2376, 2382, 53 L Ed 2d 484 (1977) (quoting Bellotti v Baird, 428 US 132, 147, 96 S Ct 2857, 2866, 49 L Ed 2d 844 (1977) (Bellotti I)). See also Harris v McRae, 448 US 297, 314, 100 S Ct 2671, 2686-2687, 65 L Ed 2d 784 (1980). In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of pregnancy

> involved. If the particular regulation does not "unduly burden[ ]" the fundamental right, Maher, supra, at 473, 53 L Ed 2d 484, 97 S Ct, at 2376, then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose. Irrespective of what we may believe is wise or prudent policy in this difficult area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom' or 'common sense'." Plyler v Doe, 457 US 202, 242, 102 S Ct 2382, 2408, 72 L Ed 2d 786 (1982) (Burger, C.J., dissenting).

In deciding whether a regulation is unduly burdensome, she urged that very careful consideration be given to what the legislature has enacted. At p. 726 she stated:

> In determining whether the State imposes an "undue burden", we must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, "the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' " Missouri, K. & T. R. Co. v. May, 194 US 267, 270, 24 S Ct 638, 639, 48 L Ed 971 (1904) (Holmes J.). Maher, 432 US, at 479-480, 53 L Ed 2d 484, 97 S Ct 2376 (footnote omitted). This does not mean that in determining whether a regulation imposes an "undue burden" on the Roe right that we defer to the judgments made by state legislatures. "The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." Columbia Broadcasting System, Inc. v Democratic National Committee, 412 US 94, 103, 36 L Ed 2d 772, 93 S Ct 2080 (1973).

Legal Position Under the Charter — S. 7

41 Section 7 of the Charter provides:

> 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.

In the first place, it will be noted that s. 7 is not classified as a "fundamental freedom" under s. 2, such as freedom of conscience and religion, and freedom of thought, belief, opinion and expression. It is under the classification of "legal rights", such as the right to be secure against unreasonable search or seizure (s. 8), the right not to be arbitrarily detained or imprisoned (s. 9), the rights on arrest or detention (s. 10), or during criminal proceedings (s. 11), and the right not to be subjected to cruel and unusual treatment or punishment (s. 12).

42 In our opinion the heading is of little assistance to us. As Estey J. said in delivering the judgment of the Supreme Court of Canada in *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481 at 496, 9 D.L.R. (4th) 161, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169:

> Heterogeneous rights will be less likely shepherded by a heading than a homogeneous group of rights.
>
> ... in some situations, such as, in the case of "Legal Rights", which in the Charter is at the head of eight disparate sections, the heading will likely be seen as being only an announcement of the obvious.

43 The difficult question for consideration is whether the words "life, liberty and security of the person" should be given a broad interpretation, as they have in the United States, so as to include a right, although not an absolute right, for a pregnant woman to decide whether or not her pregnancy shall be terminated. The alternative view is that life, liberty and the security of the person should be limited to such matters as death, and restraints on physical liberty, such as arrest and detention.

44 In *R. v. Operation Dismantle*, [1983] 1 F.C. 745, 39 C.P.C. 120, 3 D.L.R. (4th) 193, 49 N.R. 363, affirmed [1985] 1 S.C.R. 441, 12 Admin. L.R. 16, 18 D.L.R. (4th) 481, 13 C.R.R. 287, 59 N.R. 1, two members of the Federal Court of Appeal of Canada (Pratte and Marceau JJ.) considered the meaning to be given to "life, liberty and security of the person" in s. 7 of the Charter. In the *Dismantle* case the principal allegation of the plaintiffs was that the testing of the Cruise missile in Canada posed a threat

to the lives and security of Canadians by increasing the risk of nuclear conflict, and thereby violated s. 7 of the Charter. The Federal Court of Appeal of Canada allowed an appeal from Cattanach J. and struck out the plaintiffs' statement of claim.

45 Pratte J. was of the opinion that the only security that was protected by s. 7 was security against arbitrary arrest or detention.

46 Marceau J. pointed out at p. 217 that the French version of s. 7 made it quite clear that s. 7 did not create several rights but only a single right. In his opinion, the purpose of s. 7 was to constitutionalize guarantees against arbitrary action by public authorities in the exercise of powers capable of affecting a citizen in his or her person. He considered that by speaking of the "right to life, liberty and security of the person" as a whole, and guaranteeing that this right will always be protected by the principles of fundamental justice, the provision is directly in line with s. 1(*a*) of the Canadian Bill of Rights, which itself was meant to confirm longstanding common law practice regarding procedural fairness. He felt that s. 7 cannot do more than protect "the life and the freedom of movement of the citizens against arbitrary action and despotism by people in power" [p. 218].

47 The majority in the Supreme Court of Canada concluded that Cabinet decisions are reviewable by the courts under s. 32(1)(*a*) of the Charter. However, they considered that the statement of claim did not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the Cruise missile in Canada was a violation or a threat of a violation of their rights under s. 7. Wilson J. was the only member of the court to deal with the interpretation of s. 7.

48 In Wilson J.'s opinion, it was not necessary to limit s. 7 to protection against arbitrary arrest or detention, as Pratte J. did, in order to agree that the central concern of the section is direct infringement by government upon the life, liberty and personal security of individual citizens. Even an independent, substantive right to life, liberty and security of the person cannot be absolute. It must accommodate the corresponding rights of others and the right of the state to protect the collectivity as well as the individual against external threats.

49 In *Singh v. Min. of Employment & Immigration; Thandi v. Min. of Employment & Immigration; Mann v. Min. of Employment & Immigration*, [1985] 1 S.C.R. 176, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422, 14 C.R.R. 13, 58 N.R. 1 [Fed.], the applications of the appellants for the redetermination of their refugee claims were remanded to the Immigration Appeal Board for a hearing on the merits in accordance with the principles of fundamental justice. Three of the members of the Supreme Court of Canada made their determination on the basis that the procedures followed by the Immigration Appeal Board were in conflict with s. 2(*e*) of the Canadian Bill of Rights. Ritchie J. did not participate in the judgment. The other three members of the court decided that the procedures were inconsistent with the requirements of fundamental justice under s. 7 of the Charter, as they did not give the refugee claimants an adequate opportunity to state their case and to know the case which they had to meet. Nor was it established that the procedures constituted a reasonable limit on the appellants' rights within s. 1 of the Charter.

50 Wilson J., in her reasons for the latter group of three judges, expressed the view that a deprivation of security constitutes an infringement of a person's right under s. 7 although he has not been deprived of life or liberty. In other words, even the "single right" theory does not require deprivation of all three elements in order to constitute an infringement of s. 7. While conceding that the concepts of the right to life, the right to liberty and the right to security of the person were capable of being given a broad meaning, she did not consider that it was necessary to determine whether these concepts should be given a broad interpretation.

51 The "right to liberty and security of the person" is also dealt with in art. 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paragraphs 1, 2, 3, 4 and 5 of that article provide:

> 1. Everyone has the right to liberty and security of person.
>
> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;
>
> (*a*) the lawful detention of a person after conviction by a competent court;
>
> (*b*) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(*c*) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(*d*) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(*e*) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(*f*) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(*c*) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

52 Article 5 is not really of assistance in determining whether s. 7 of the Charter should be given a broad interpretation or should be limited to matters of arbitrary arrest and detention. Nedjati, in his text Human Rights under the European Convention (1978), points out at p. 86:

> In the case of Article 5 the initial statement of the right guaranteed is qualified within paragraph (1) of the Article. The succeeding paragraphs of Article 5 then set out certain additional rights which may be claimed by a person who has been deprived of his liberty.

53 A narrow interpretation of art. 5 limiting it to matters of arrest and detention was given by the European Commission of Human Rights in its Decision 7 (October 1977), Decisions and Reports (No. 5573/72), and Decision 19 (October 1980), Decisions and Reports (No.7050/75).

54 Similarly, art. 9 of the International Covenant on Civil and Political Rights, 1966, is of little assistance in interpreting s. 7 of the Charter.

55 We have already pointed out in dealing with the Canadian Bill of Rights that the words "life, liberty, security of the person and enjoyment of property" appear in s. 1(*a*). However, the Canadian Bill of Rights was a statutory instrument and the legislative authority of Parliament had to be weighed when considering how far its language should be taken. The Charter, on the other hand, is a constitutional instrument and the courts have constitutional jurisdiction to review legislation. The meaning given to words in the Canadian Bill of Rights is not necessarily determinative of the meaning which should be given to the same words under the Charter. Le Dain J., who dissented in the result in the decision of the Supreme Court of Canada in *R. v. Therens*, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 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, but who spoke for the majority on the central question of the meaning of "detention", stated at pp. 120-21 [C.R.]:

> 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 ... 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 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.

56 The issue with which we are primarily concerned is whether one should be able to make personal decisions without unjustified government interference as part of a right of privacy. Confronted with this issue the American courts have placed the right to make these decisions under the broad blanket of a right of privacy and have held that it is subsumed under "liberty" of the person in the Fourteenth Amendment. As already noted, these personal decisions include the right to choose one's partner in marriage, and the right to decide whether or not to have children and how to rear and educate them. In the United States, the court moved quickly from the right of a person to decide whether they will have children to giving a pregnant woman the right to terminate her pregnancy. However, they held equally quickly that this was not an absolute right.

57 It is of assistance in interpreting the Charter to consider the interpretation which has been placed on similar words in the American Constitution. It must always be borne in mind that the American Constitution and our Constitution are in many ways very different, and that American jurisprudence respecting its Constitution has evolved over a lengthy period of time. We must also remember that in the United States the division of legislative powers is different from the division of powers in Canada between the federal government and the provinces. While no distinct right of privacy was contained in the American Constitution, such a right evolved through the decisions of the courts and became the basis for a right to abortion.

58 At the time when the Canadian Charter of Rights and Freedoms came into force, no broad right of privacy similar to the American right existed in Canadian law. No general right of privacy was included in the Canadian Constitution. However, the right to be secure against unreasonable search and seizure, contained in s. 8 of the Charter, provides a specific right of privacy.

59 Some rights have their basis in common law or statute law. Some are so deeply rooted in our traditions and way of life as to be fundamental and could be classified as part of life, liberty and security of the person. The right to choose one's partner in marriage and the decision whether or not to have children would fall in this category, as would the right to physical control of one's person, such as the right to clothe oneself, take medical advice and decide whether or not to act on this advice. As Tarnopolsky J.A. said in *R. v. Videoflicks Ltd.* (1984), 48 O.R. (2d) 395 at 433, 34 R.P.R. 97, 15 C.C.C. (3d) 353, 14 D.L.R. (4th) 10, 9 C.R.R. 193, 5 O.A.C. 1 (C.A.) :

> The concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes.

Or, as Cardozo J. put it in *Schloendorff v. Soc. of N.Y. Hosp.*, 211 N.Y. 125, 105 N.E. 92 at 93, 52 L.R.A. (N.S.) 505, Ann. Cas. 1915 C. 581 (C.A., 1914):

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body ...

Even such fundamental rights are not absolute. They may be controlled by the common law or by statute. They must accommodate the rights of others. The laws of bigamy and of consanguinity may control whom one can marry. Similarly, the law may protect the public against those who have communicable diseases and those who are unable to control themselves by reason of mental illness.

60 In our opinion it would place too narrow an interpretation on s. 7 to limit it to protection against arbitrary arrest and detention. However, it is not necessary for the purpose of this appeal to consider how broad a meaning should be given to life, liberty and security of the person. The issue is only whether a pregnant woman has a right to terminate her pregnancy which is broader in scope than that given by s. 251 of the Code, and whether s. 251 deprives her of this right otherwise than

in accordance with the principles of fundamental justice. One cannot overlook the fact that the situation respecting a woman's right to control her own person becomes more complex when she becomes pregnant, and that some statutory control may be appropriate. We agree with Parker A.C.J.H.C. in the court below that, bearing in mind the statutory prohibition against abortion in Canada which has existed for over 100 years, it could not be said that there is a right to procure an abortion so deeply rooted in our traditions and way of life as to be fundamental. A woman's only right to an abortion at the time the Charter came into force would accordingly appear to be that given to her by subs. (4) of s. 251.

61 It is necessary to go one step further and inquire whether s. 251 of the Code deprives a woman of her right to terminate her pregnancy otherwise than in accordance with the principles of fundamental justice. This necessarily leads to a consideration of what the principles of fundamental justice are and whether they are broad enough to encompass principles of substantive law, or only matters of procedure.

62 It is important to note that the Fourteenth Amendment of the American Constitution refers to depriving "any person of life, liberty or property, *without due process of law*". (The italics are mine.) There is similar wording in the Fifth Amendment:

> No person shall be ... deprived of life, liberty, or property, *without due process of law* ... [The italics are mine.]

Section 1(*a*) of the Canadian Bill of Rights refers to:

> (*a*) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by *due process of law* ... [The italics are mine.]

63 The minutes of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, Proceedings, 32nd Parl., Sess. 1 (1980-81), show that the words "the principles of fundamental justice" rather than the words "due process of law" were used in s. 7 in order to avoid the "substantive due process" interpretation given to the American provision. At vol. 7, p. 21, Professor Tarnopolsky (as he then was) said:

> In the last decade — in fact, in the last two decades — since the enactment of the Canadian Bill of Rights, there is no doubt that the due process clause has come in academic circles to mean more and more the over-all *penumbra* of fairness in the administration of justice. However, our courts have not yet adopted that interpretation, and there remains a fear in many circles that any reference to a due process clause, even without reference to property in this clause, could reintroduce the substantive "due process" interpretation in the United States.

64 In vol. 46, at p. 36, Mr. Barry Strayer, Q.C., the Assistant Deputy Minister, Public Law, of the Department of Justice, stated:

> Due process would certainly include the concept of procedural fairness that we think is covered by fundamental justice, but we think that "due process" would have the danger of going well beyond procedural fairness and to deal with substantive fairness which raises the possibility of the courts second guessing Parliaments or legislatures on the policy of the law as opposed to the procedure by which rights are to be dealt with. That has been the experience at times in the United States in the interpretation of the term "due process".

65 In vol. 46, at p. 43, Mr. Chrétien, the Minister of Justice, stated:

> The point, Mr. Crombie, that it is important to understand the difference is that we pass legislation here on abortion, criminal code, and we pass legislation on capital punishment; parliament has the authority to do that, and the court at this moment, because we do not have the due process of law written there, cannot go and see whether we made the right decision or the wrong decision in Parliament.
>
> If you write down the words, "due process of law" here, the advice I am receiving is the court could go behind our decision and say that their decision on abortion was not the right one, their decision on capital punishment was not the right one, and it is a danger, according to legal advice I am receiving, that it will very much limit the scope of the power of legislation by the Parliament and we do not want that; and it is why we do not want the words "due process of law". These are the two main examples that we should keep in mind.

> You can keep speculating on all the things that have never been touched, but these are two very sensitive areas that we have to cope with as legislators and my view is that Parliament has decided a certain law on abortion and a certain law on capital punishment, and it should prevail and we do not want the courts to say that the judgment of Parliament was wrong in using the constitution.

Role of the Court

66 It is important to reiterate once again that it is not the role of the courts to pass on the policy or wisdom of legislation. That is a matter for Parliament and the legislatures of the provinces. Whether a woman should have a right to terminate her pregnancy and at what stage and subject to what safeguards are policy considerations. In the United States the Supreme Court of the United States has dealt with them and determined a three-trimester procedure. What has been done in the United States would appear to have really been done as a matter of substantive due process.

67 Under s. 52 of the Constitution Act, 1982, the courts have a broad constitutional jurisdiction to determine whether any statutory provision is inconsistent with the Charter. To the extent of that inconsistency the provision is of no force and effect.

68 It is necessary to determine whether "principles of fundamental justice" in s. 7 contemplate only a procedural review or whether they also include the right to make a substantive review of the legislation.

Principles of Fundamental Justice

69 The words "principles of fundamental justice" are used in s. 2(*e*) of the Canadian Bill of Rights. Section 2(*e*) provides in part that 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 ...

In *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.], the Supreme Court of Canada considered the interpretation of the words "a fair hearing in accordance with the principles of fundamental justice". Fauteux C.J.C., in delivering the judgment of the majority, stated at p. 479:

> 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.

The majority concluded that the failure of the Crown to furnish the accused with a sample of his own breath when it was not required by law to do so did not deprive the accused of a fair trial. This case is not really of assistance in considering the ambit of "principles of fundamental justice" in s. 7 of the Charter, as it was only interpreting these words in the context of a fair hearing.

70 A similar issue came before this court in *Re Potma and R.* (1983), 41 O.R. (2d) 43, 31 C.R. (3d) 321, 18 M.V.R. 133, 2 C.C.C. (3d) 383, 144 D.L.R. (3d) 620, 3 C.R.R. 252 (leave to appeal to the Supreme Court of Canada refused 17th May 1983 [noted 41 O.R. (2d) 43n, 33 C.R. (3d) xxv, 144 D.L.R. (3d) 620n, 4 C.R.R. 17, 50 N.R. 400]). On a charge that the appellant drove with over 80 milligrams of alcohol in his blood, the court had to consider whether the inability to conduct an independent test of the ampoule amounted to a denial of the right to make full answer and defence, and a denial of a fair trial. Robins J.A., in delivering the judgment of this court, stated at pp. 391-92:

> The submission that the inability to conduct an independent test of the ampoules amounts to a denial of the right to make full answer and defence and hence to the denial of a fair trial was fully canvassed in the *Duke* case, *supra*. The considerations applicable to this issue are no different now than they were before the Charter. The concepts of "fundamental justice" and "fair hearing" relevant here are the same whether considered under ss. 7 and 11(*d*) of the Charter, under s. 2(*e*) and (*f*) of the *Bill of Rights*, or under the common law. In so far as this case is concerned, while the Charter accords recognition to the well-established rights asserted by the appellant, it effects no change in the law respecting those rights. Sections 7

> and 11(*d*) cannot be construed to operate so as to reverse the decision reached in the like circumstances of *Duke* that non-production of evidence of this kind does not infringe the right to a fair trial in accordance with fundamental justice.
>
> This is not to suggest that "the principles of fundamental justice" now recognized by the Charter of Rights and Freedoms are immutable. "Fundamental justice", like "natural justice" or "fair play", is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure. The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust.

The above dicta of Robins J.A. do not appear to confine the principles of fundamental justice in s. 7 of the Charter to a procedural review, as was the case in the Canadian Bill of Rights.

71 The Manitoba Court of Appeal has taken the position that only procedural fairness, and not the substance of legislation, can be reviewed under s. 7. In *R. v. Hayden*, 36 C.R. (3d) 187, [1983] 6 W.W.R. 655, 5 C.H.R.R. D/2121, [1984] 1 C.N.L.R. 148, 8 C.C.C. (3d) 33, 3 D.L.R. (4th) 381, 7 C.R.R. 325, 23 Man. R. (2d) 315 (leave to appeal to the Supreme Court of Canada refused 19th December 1983 [noted 36 C.R. (3d) xxiv, [1984] 2 C.N.L.R. 190, 8 C.C.C. (3d) 33n, 3 D.L.R. (4th) 361n, 26 Man. R. (2d) 318, 52 N.R. 386]), the Manitoba Court of Appeal had to consider whether s.97 (b) of the Indian Act, R.S.C. 1970, c. I-6, which provides that

> 97. A person who is found ...
>
> (*b*) intoxicated,
>
> on a reserve, is guilty of an offence ...

violates s. 7 of the Charter. Hall J.A., in delivering the judgment of the court, stated at pp. 35-36:

> ... the phrase "principles of fundamental justice" in the context of s. 7 of the Charter as a whole does not go beyond the requirement of fair procedure and was not intended to cover substantive requirements as to the policy of the law in question. To hold otherwise would require all legislative enactments creating offences to be submitted to the test of whether they offend the principles of fundamental justice. In other words, the policy of the law as determined by the Legislature would be measured against judicial policy of what offends fundamental justice. In terms of procedural fairness, that is an acceptable area for judicial review but it should not, in my view, be extended to consider the substance of the offence created.

The court, however, held that the impugned provision offended s. 1(*b*) of the Canadian Bill of Rights in treating an individual, on account of his race, unequally with others.

72 Other cases in which the principles of fundamental justice have been held to be limited to a review of procedural matters are *Re Jamieson and R.* (1982), 70 C.C.C. (2d) 430, 142 D.L.R. (3d) 54, 3 C.R.R. 193 (C.S. Que.), per Durand J. at p. 438, and *Re Mason and R.* (1983), 43 O.R. (2d) 321, *(*sub nom. *Re)* 35 C.R. (3d) 393 *Mason; Mason v. R. in Right of Can.*), 5 Admin. L.R. 16, 7 C.C.C. (3d) 426, 1 D.L.R. (4th) 712 (H.C.), per Ewaschuk J. at p. 397. On the other hand, appellate courts in British Columbia and Ontario have reached the opposite conclusion and have held in exceptional cases that substantive legislation can be reviewed and struck down where it would improperly abridge a person's right to life, liberty and security of the person contrary to the principles of fundamental justice.

73 In *Ref. re S. 94(2) of Motor Vehicle Act*, 33 C.R. (3d) 22, [1983] 4 W.W.R. 756, 42 B.C.L.R. 364, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, 5 C.R.R. 148, the British Columbia Court of Appeal had to consider whether s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, was consistent with the Charter. That section provided that a person who drives a motor vehicle while prohibited from driving or while his driver's licence has been suspended commits an absolute liability offence carrying a mandatory penalty of seven days' imprisonment. The court held that, considering the penalty, the imposition of absolute liability was inconsistent with the principles of fundamental justice in s. 7, and that these principles

were not restricted to procedural safeguards but extended to substantive law. The defendant had been denied the opportunity of proving that his action was due to an honest and reasonable mistake of fact or that he acted without mens rea.

74 The court adopted the reasoning of Dickson J. in delivering the judgment of the Supreme Court of Canada 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.]. He expressed the view that absolute liability offences carrying mandatory prison terms violated fundamental principles of penal liability. Such offences are usually part of minor regulatory legislation and the penalties for their breach are minimal. To impose a mandatory term of imprisonment for an absolute liability offence is excessively harsh and certainly abnormal.

75 In *R. v. Young* (1984), 46 O.R. (2d) 520, 40 C.R. (3d) 289, 13 C.C.C. (3d) 1, 10 C.R.R. 307, 3 O.A.C. 254, this court held that principles of fundamental justice in s. 7 were not limited to a matter of procedural fairness. In delivering the judgment of the Court, Dubin J.A. stated at p. 542:

> Having regard to the language of s. 7 of the Charter, read in light of its other provisions and when contrasted with the language of the *Bill of Rights*, I would conclude that the principles of fundamental justice referred to are not limited to the right to a fair hearing in accordance with the principles of natural justice.

76 The court concluded that it was contrary to the principles of fundamental justice under s. 7 to compel the accused to stand trial where the proceedings would have been an abuse of process. On 30th April 1976 the accused had sworn an affidavit pursuant to the Land Speculation Tax Act, 1974 (Ont.), c. 17, in connection with a transfer of property owned by a company. There was a disagreement between the ministry and the accused as to the proper interpretation of the relevant statutory provision. In October 1977 the ministry determined to resolve the matter by assessing the company. Although the good faith of the accused was not challenged, he had been under a cloud of suspicion with respect to potential proceedings. The matter was revived in January 1982 as a result of the actions of a citizens' committee, which had its own purposes to serve. On 5th April 1983 the accused was charged with fraud and perjury at a time when it was no longer possible to lay a charge under the Land Speculation Tax Act, which would have had less serious repercussions. His career and reputation were put in jeopardy over a matter which he thought had been resolved in his favour. At p. 551, Dubin J.A. stated:

> I am satisfied on the basis of the authorities that I have set forth above that there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases.

Once again the circumstances which gave rise to a substantive review under s. 7 were exceptional.

77 In *R. v. Stevens* (1983), 3 C.C.C. (3d) 198, 145 D.L.R. (3d) 563, 5 C.R.R. 139 (leave to appeal to the Supreme Court of Canada granted 6th June 1983), the accused was convicted under s. 146(1) of the Criminal Code of having intercourse with a female under the age of 14. Section 146(1) provided:

> 146. (1) Every male person who has sexual intercourse with a female person who
>
> (*a*) is not his wife, and
>
> (*b*) is under the age of fourteen years,
>
> whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

Although the complainant was 13 years and 11 months of age, the trial judge found that Stevens honestly and reasonably believed that she was 15. However, this was not a defence. This court upheld the conviction despite the contention that s. 146(1) infringed s. 7 of the Charter. Assuming without deciding that s. 7 permitted judicial review of the substantive content of legislation, the court did not think that s. 7 prevented Parliament from creating the crime of having sexual intercourse with a girl under 14 years of age and providing by clear and express language that mistake as to her age was not a defence.

78 In *R. v. Roche* (released 3rd June 1985, unreported [now reported 46 C.R. (3d) 160, 20 C.C.C. (3d) 524, 9 O.A.C. 391]), this court reached a different conclusion where there was no statutory provision excluding the defence of an honest and reasonable mistake as to the age of the complainant.

79 The accused was convicted of sexual assault under s. 246.1 of the Code, which provides:

> 246.1 (1) Every one who commits a sexual assault is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for ten years; or
>
> (*b*) an offence punishable on summary conviction.
>
> (2) Where an accused is charged with an offence under subsection (1) ... in respect of a person under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused is less than three years older than the complainant.

80 The complainant was 13 years and 11 months at the time of the incident and the accused was over 20. The trial judge found that the accused believed the complainant to be 15 years of age. At common law an honest belief in the existence of facts or circumstances which, if true, would have made the act with which the accused is charged an innocent one was a good defence and this defence is preserved by s. 7(3) of the Code.

81 The court agreed with the statement of Dickson J. in *R. v. Sault Ste. Marie*, supra, that absolute liability violates fundamental principles of penal liability. Brooke J.A., in delivering the judgment of this court, stated [at p. 170]:

> In the circumstances I think that s. 246.1 [should] be construed to accord with the fundamental principles of penal liability emphasized by Dickson J. in the passage above-quoted and the words of s. 7 of the Charter of Rights and Freedoms, "fundamental principles of justice". It is a fundamental principle of justice that a person should not be convicted of a crime if he honestly though mistakenly believes in circumstances which, if they were true, would render his conduct innocent. The section should not be construed to imply absolute liability for a serious crime rather than to afford the accused an opportunity to prove that his conduct was without criminal intent and that he acted lawfully because, if the circumstances were as he honestly and reasonably believed them to be, his conduct would be innocent.

Once again the situation is exceptional. To convict a person of a serious criminal offence without the existence of mens rea or an opportunity to show that his action was based on an honest and reasonable mistake of fact is not in accord with the fundamental principles of justice.

82 In *R.L. Crain Inc. v. Couture* (1983), 10 C.C.C. (3d) 119, 6 D.L.R. (4th) 478, 9 C.R.R. 287, 30 Sask. R. 191, Scheibel J. of the Saskatchewan Court of Queen's Bench held that s. 17 of the Combines Investigation Act, R.S.C. 1970, c. C-23, was inconsistent with s. 7 of the Charter, which protected a person against self-incrimination. Section 17 authorized the compelling of a person to assist in his own prosecution by authorizing a member of the Restrictive Trade Practices Commission to order his examination upon oath and require him to produce relevant documents. In this way the inquiry could be used to gather the evidence of suspected persons. In deciding whether a person had been deprived of his rights under s. 7 contrary to the principles of fundamental justice, Scheibel J. concluded that he was entitled in the circumstances to review the substance of the legislation.

83 Wilson J. in *Operation Dismantle*, supra, at p. 25, when considering s. 7 of the Charter, discussed a hypothetical situation in which the government might require a particular group to participate in experimental testing of a deadly nerve gas as an important part of Canada's defence effort. She found it hard to believe that such action would survive judicial review under the Charter.

84 After considering the above decisions, 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. While the limits of such review will evolve as the interpretation of the Charter unfolds, it is sufficient to say at this juncture that 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. We reiterate that the policy and wisdom of legislation should remain first and foremost a matter for Parliament and the legislatures.

85 Insofar as s. 251 of the Code is concerned, it embodies the existing policy of Parliament. We do not consider that s. 251 contains any exceptional provisions which would require this court to subject it to a substantive review. The 1969 amendments modified the somewhat Draconian provisions of the original subss. (1), (2) and (3) and made it clear that procuring an abortion would not be a crime if there were compliance with the amendments embodied in subss. (4), (5), (6) and (7). If s. 251 is to be further modified to give a pregnant woman greater rights to terminate her pregnancy, it is up to Parliament to enact the necessary legislation.

Procedural Review of Legislation

86 Quite apart from any substantive review of legislation, s. 251 must still meet the minimum acceptable standards insofar as matters of procedure are concerned. It must conform with the principles of natural justice by furnishing a fair hearing by an unbiased adjudicator after adequate notice to the parties. There is also a general duty to "act fairly" and not arbitrarily: *Nicholson v. Haldimand-Norfolk Reg. Bd. of Police Commrs.*, [1979] 1 S.C.R. 311, 78 C.L.L.C. 14,181, 88 D.L.R. (3d) 671, 23 N.R. 410 [Ont.]; *Martineau v. Matsqui Inst. Inmate Disciplinary Bd.*, [1978] 1 S.C.R. 118, 33 C.C.C. (2d) 366, 74 D.L.R. (3d) 1, 14 N.R. 285 [Ont.]; *Martineau v. Matsqui Inst. Disciplinary Bd.*, [1980] 1 S.C.R. 602, 13 C.R. (3d) 1, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, 106 D.L.R. (3d) 385, 30 N.R. 119 [Fed.]. In *R. v. Langevin* (1984), 45 O.R. (2d) 705, 39 C.R. (3d) 333, 11 C.C.C. (3d) 336, 8 D.L.R. (4th) 485, 9 C.R.R. 16, 3 O.A.C. 110, this court held at p. 723 that the term "fundamental justice" in s. 7 of the Charter constitutionally enshrines principles of natural justice and procedural fairness. In *R. v. Robson* (1985), 45 C.R. (3d) 68, 31 M.V.R. 220, 19 C.C.C. (2d) 137, 19 D.L.R. (4th) 112, the British Columbia Court of Appeal held that the roadside suspension of the accused's licence on mere suspicion that he had consumed alcohol, without any kind of notice or hearing, was procedurally unfair and was a deprivation of his liberty not in accordance with the principles of fundamental justice.

87 Counsel for the respondents contended that s. 251 did not conform with the minimum procedural standard of natural justice, including the obligation to act fairly and not arbitrarily, in the following respects:

> (a) a therapeutic abortion committee does not have to give reasons for its decisions or permit applicants to know what those reasons are and be given an opportunity to respond to them; and
>
> (b) in practice s. 251(4) is used arbitrarily.

In *Carruthers v. Therapeutic Abortion Ctees. of Lions Gate Hosp.* (1983), 4 Admin. L.R. 51, 6 D.L.R. (4th) 57, 50 N.R. 373 (leave to appeal to the Supreme Court of Canada refused 2nd February 1984 [noted 4 Admin. L.R. 51n, 6 D.L.R. (4th) 57n, 52 N.R. 398]), the Federal Court of Appeal held that no express or implied powers were given to therapeutic abortion committees and their decisions were not reviewable under the Federal Court Act, R.S.C. 1970, c. 10 (1st Supp.). In *Re Medhurst and Medhurst* (1984), 45 O.R. (2d) 575, 4 Admin. L.R. 126, 7 D.L.R. (4th) 335 (H.C.), Krever J. held that the decision of the therapeutic abortion committee was not made in the exercise of a statutory power of decision under the Judicial Review Procedure Act, R.S.O. 1980, c. 224. He expressed the opinion, at p. 582, that the common law as it related to certiorari might have a residual role to play and the decision-maker might be required to deliver up the "record" for review by the court.

88 We are in agreement with Parker A.C.J.H.C. in the court below that for the purposes of this appeal it is not necessary to decide whether the decision of a therapeutic abortion committee can be challenged on the grounds of fairness if it fails or refuses to give the reasons for its decision, because no specific decision of such a committee is being impugned. There was evidence that some committees did in fact give reasons when an application was rejected, but the rejection arose from a defect in the letter of referral, which was then corrected and resubmitted.

89 Accordingly, we have concluded that s. 251 of the Code is not in violation of s. 7 of the Charter as depriving any persons of their rights to life, liberty and security of the person except in accordance with the principles of fundamental justice. It is therefore not necessary to consider the application of s. 1 of the Charter.

(2) Is S. 251 Void for Vagueness?

90 Counsel for the respondent in his attack on s. 251 also argued that the section was void for "vagueness". The argument under this head was that the concepts of "health" and "miscarriage" in s. 251(4) yield an arbitrary application, being so vague and uncertain that it is difficult to understand what conduct is proscribed. It is fundamental justice that a person charged with an offence should know with sufficient particularity the nature of the offence alleged.

91 There was a far-ranging discussion by the respondents' counsel on the concept of "health" and the meaning of the term "miscarriage" and the way in which courts deal with the "vagueness" in the interpretation of municipal by-laws, and an extensive examination of American authorities.

92 In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus it is for the courts to say what meaning the statute will bear. Counsel was unable to give the court any authority for holding a statute void for uncertainty. In any event, there is no doubt that the respondents knew that the acts they proposed and carried out were in breach of the section. The fact that they did not approve of the law in this regard does not make it "uncertain". They could have no doubt but that the procuring of a miscarriage, which they proposed (and we agree with the trial judge that the phrase "procuring a miscarriage" is synonymous with "performing an abortion"), could be carried out only in an accredited or approved hospital after the securing of the required certificate in writing from the therapeutic abortion committee of that hospital.

93 A statement of principle made by the Supreme Court of the United States in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 at 495, 71 L. Ed. 2d 362, 102 S. Ct. 1186, rehearing denied 456 U.S. 950, 72 L. Ed. 2d 426, 102 S. Ct. 2023 (1982), is, in our view, applicable to the facts of the instant case:

> A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

94 Finally, the Supreme Court of Canada has spoken clearly and unanimously on this question. Dickson J., speaking for the majority of the court in *Morgentaler* (1975), supra, after reviewing the terms of the exception to s. 251, wrote at p. 675:

> Whether one agrees with the Canadian legislation or not is quite beside the point. Parliament has spoken unmistakably in clear and unambiguous language.

95 Although dissenting, as already noted, on other grounds, Laskin C.J.C. said at p. 634:

> The contention under point 2 is equally untenable as an attempt to limit the substance of legislation in a situation which does not admit of it. In submitting that the standard upon which therapeutic abortion committees must act is uncertain and subjective, counsel who make the submission cannot find nourishment for it even in *Doe v. Bolton*. There it was held that the prohibition of abortion by a physician except when "based upon his best clinical judgment that an abortion is necessary" did not prescribe a standard so vague as to be constitutionally vulnerable. *A fortiori*, under the approach taken here to substantive due process, the argument of uncertainty and subjectivity fails. It is enough to say that Parliament has fixed a manageable standard because it is addressed to a professional panel, the members of which would be expected to bring a practised judgment to the question whether "the continuation of the pregnancy ... would or would be likely to endanger ... life or health".

96 It would be unwise for the court to anticipate other questions in this area arising on particular facts not present here. As was said in *L.S.U.C. v. Skapinker*, supra, p. 383:

> The development of the *Charter*, as it takes place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken.

(3) Does S. 251(4) Violate the Procedural Protections in S. 7 of the Charter?

97 As a part of our answer to the first question we dealt with this question. As we pointed out, no specific decision of a committee is being impugned and there is no evidentiary foundation upon which a denial of a right of the respondents under the Charter could be based. We also do not view s. 251(4) on its face as offending the principles of fundamental justice.

(4) Does S. 251 Violate Freedom of Religion and Conscience Guaranteed by S. 2(a) of the Charter?

98 In the interval between the decision of the learned trial judge and the argument before us, the decision of the Supreme Court of Canada 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, 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, was handed down. This case was concerned with the constitutional validity of the Lord's Day Act, R.S.C. 1970, c. L-13, the argument being that it violated the Charter guarantee of freedom of conscience and religion.

99 In dealing with this subject, Dickson J., in delivering the reasons of the majority, said [at pp. 517-18]:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

And [at p. 524]:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.* (decision rendered 17th September 1984) ... 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.
>
> 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. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in *L.S.U.C. v. Skapinker* [supra] illustrates, be placed in its proper linguistic, philosophic and historical contexts.

And [at p. 526]:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure

> his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. I leave to another case the degree, if any, to which the government may, to achieve a vital interest or objective, engage in coercive action which s. 2(*a*) might otherwise prohibit.

100 Giving the words "freedom of conscience and religion" the most generous interpretation, we do not see any aspect of the legislation under review as infringing that right or falling within the Supreme Court's approach to s. 2(*a*). There is no religion that has, as part of its tenets or creed, the absolute right to an abortion. Some religions may indeed permit it under certain circumstances, but that does not make it part of its essential religious practice. Nor was it established that there was a set of beliefs that bound one's conscience in a way that required there be complete freedom at the instance of one individual, without more, to choose abortion.

101 As was stated by the trial judge [47 O.R. (2d) 353 at 412, 41 C.R. (3d) 193, 14 C.C.C. (3d) 12 D.L.R. (4th) 502, 11 C.R.R. 116, appeal quashed 48 O.R. (2d) 519, 41 C.R. (3d) 262, 16 C.C.C. (3d) 1, 14 D.L.R. (4th) 184, 14 C.R.R. 107]:

> ... the freedom of religion and conscience clause in the *Charter* was not designed to protect a denomination's policy position on [a secular] issue merely because the underpinnings of that position can be linked to a tenet of that religious group.

As we have said, Parliament attempted to balance the interests of pregnant women and potential life and, if there is in any incidental way an infringement on freedom of conscience (which we have difficulty in seeing), such infringement is demonstrably justified in this society. Other free and democratic societies have sought somewhat similar solutions to this vexing problem. England: Abortion Act, 1967; Australia: Criminal Law Consolidation Act, 1935-1975 (No. 2252 of 1935 — No. 14 of 1978), s. 82a (South Aus.); Criminal Law Consolidation Act and Ordinance, 1876-1960, s. 79A (Nor. Terr.); New Zealand: Crimes Act, 1961 (No. 43 of 1961), s. 187A (reprinted R.S. vol. 1, p. 635); Germany: paras. 218a, 218b STGB (Criminal Code); Israel: Penal Law, 5737-1977, ss. 312 to 321; Switzerland: art. 120 C.P. (Federal Criminal Code).

102 It is interesting to note, in interpreting the meaning and effect of s. 2(*a*) of the Charter, that art. 18(3) of the International Covenant on Civil and Political Rights states:

> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

(5) Do the Provisions of S. 251, Particularly S. 251(4), Subject Persons to Cruel and Unusual Punishment?

103 We cannot construe the terms of s. 251 as they now stand as inflicting punishment either on the medical profession, including the respondents, or on females. Nor do we see it as falling within "cruel and unusual treatment".

104 The recourse to s. 251(4) is predicated on the consent of the woman. The state is not empowered to subject the woman to the procedures established by s. 251(4), nor does it purport to do so. Once again, we do not see s. 251 as having any aspect of cruel and unusual punishment or treatment and we cannot give effect to the submissions in this regard.

105 In *Morgentaler* (1975), supra, at p. 631, Laskin C.J.C., in dealing with this argument, stated what is, in essence, our position:

> I am unable to agree that the mere prohibition of abortions save as permitted by s. 251(4)(5) involves any imposition of treatment; nor can it be said that a physician or other person who runs foul of the abortion law is subjected to cruel or unusual punishment if he is sentenced to a term of imprisonment for his criminal conduct.

(6) Is S. 251 "Inconsistent" with Ss. 15, 27 and 28 of the Charter? Are the Guarantees of Equality under the Law and Equal Benefit of and Equal Protection of the Law Violated by the Section?

106 It was argued before the trial judge that s. 251 violated s. 1(*b*) of the Bill of Rights. Section 15 of the Charter was not then in effect, so it was not raised at that time. On 17th April 1985 s. 15 came into effect and, although the Crown in right of Canada in its factum had argued that the invocation of s. 15 at this stage was an attempt to give it retrospective effect not warranted by its language, on the hearing of the appeal all counsel agreed that we should deal with the respondents' submissions under this section. Turning first to s. 1(*b*) of the Bill of Rights, it reads:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ...
>
> (*b*) the right of the individual to equality before the law and the protection of the law ...

107 The arguments here were twofold: that s. 251 was invalid on its face; and that there was inequality in its application so as to render it invalid.

108 Counsel for the respondents summarized his position with regard to s. 251 as follows:

> (i) It does not require qualified hospitals to set up therapeutic abortion committees, thereby creating unequal access to therapeutic abortions throughout Canada;
>
> (ii) It formulates requirements that ensure that many women throughout Canada will not have an opportunity to apply for a therapeutic abortion;
>
> (iii) It denies women who reside in areas of Canada where no therapeutic abortion committee has been established, or where there are no approved or accredited hospitals, an opportunity to apply for a therapeutic abortion;
>
> (iv) It formulates an ambiguous and vague standard which ensures that access to therapeutic abortions will be unequal throughout Canada.

109 As pointed out by the learned trial judge, on its face s. 251 does not discriminate between individuals or groups. The evidence, however, suggests that there is a disparity in the administration of the section due to the facts that some hospitals in some areas of this province do not have therapeutic abortion committees, and that the Attorney General for Quebec has decided not to enforce strict compliance with the provisions of s. 251(4). The uneven administration of the section has caused us concern and is confusing to the public, but the court does not have the power to administer the section or any of its subsections so as to direct or force the setting up of committees and maintaining continuing surveillance and control over their work. This is Parliament's concern.

110 Once again, this issue was addressed by Laskin C.J.C. in the course of his reasons in *Morgentaler* (1975), supra. The court there decided, after hearing counsel for the appellant and the two intervenants, that no case had been made out to require hearing counsel for the Crown on the constitutional validity of s. 251 or the effect of the Bill of Rights (p. 658). However, as stated, Laskin C.J.C. did deal with those arguments in the course of his dissenting reasons, and his discussion, as we have noted, was obviously not in conflict with the views of the entire court. He stated at pp. 634-36:

> Finally, in the catalogue of submissions under the *Canadian Bill of Rights* is point 5 which, understandably, shows concern for the effect of place or area of residence (where remote from hospitals or where there is a dearth of qualified physicians) and economic status on the availability and accessibility of the services under s. 251(4) and (5) of the *Criminal Code*, through which an abortion may be sought without risk of criminality. The contention that there is here a denial of equality before the law and the protection of the law necessarily assesses s. 251(4) and (5) according to whether it gives its advantages to all sections of the Canadian community, enabling them to avail themselves of it in whatever part of Canada they may be and regardless of their economic status. Assessment on this basis would make the operation of s. 251(4) and

> (5) depend on there being a certain distribution of physicians throughout the country and on the availability of hospitals in all areas. It would mean too that the Court would have to come to some conclusion on what distribution would satisfy equality before the law, and that the Court would have to decide how large or small an area must be within which an acceptable distribution of physicians and hospitals must be found. This is a reach for equality by judicially unmanageable standards, and is posited on the theory that the Court should either give directions for the achievement of relative equality of access to therapeutic abortion committees and approved hospitals to overcome an alleged legislative shortcoming, or should strike down not only subss. (4) and (5) of s. 251 (which would leave an unqualified prohibition of abortion) but the whole section as being inseverable.
>
> I do not regard s. 1(*b*) of the *Canadian Bill of Rights* as charging the courts with supervising the administrative efficiency of legislation or with evaluating the regional or national organization of its administration, in the absence of any touchstone in the legislation itself which would indicate a violation of s. 1(*b*) including the specified prohibitions of discrimination by reason of race, national origin, colour, religion or sex. There is nothing of this sort in s. 251. Nor is that section vulnerable to attack on any substantive ground inhering in the command of "equality before the law and the protection of the law". There may be situations where, in deter mining whether federal legislation is incompatible with s. 1(b) or other provisions of the *Canadian Bill of Rights*, the Court may have to examine and come to a conclusion on the purpose or object of the challenged legislation and decide whether its provisions bear a rational relation to that purpose. The present case does not raise this issue when there is nothing to show that s. 251 offends against the prohibited discriminations or is otherwise offensive to s. 1(*b*). I do not find any judicial basis for impeaching s. 251 under s. 1(*b*) of the *Canadian Bill of Rights* because not all persons affected by s. 251 may find it feasible because of geographical or economic considerations to take shelter under its exculpating terms.
>
> Whether s. 251 be viewed as primarily a criminal prohibition subject to a dispensing provision, or as establishing a forum and a formula for lawful abortions which must be followed on pain of criminality, I see nothing in it which warrants this Court in either blunting its operation or rendering it inoperative as incompatible with s. 1(*b*) of the *Canadian Bill of Rights*. Both the prohibition in s. 251 and its relieving terms are general in their application; and in qualifying the prohibition against the intentional procurement of a miscarriage by a requirement of certification of likely danger to life or health by a medical practitioner and interposing the safeguards of a medical screening committee and performance of the abortion in an accredited or approved hospital, Parliament has made a judgment which does not admit of any interference by the Courts. Nor can I regard Parliament's prescription of the number to constitute a therapeutic abortion committee, nor the limitation that the performance of authorized abortions be in an approved or accredited hospital as raising a judicially reviewable question. *Any unevenness in the administration of the relieving provisions is for Parliament to correct and not for the Courts to monitor as being a denial of equality before the law and the protection of the law*. [The italics are mine.]

111 As we have said, and as stated by Laskin C.J.C., it is for Parliament to deal with any unevenness or disparity in the administration of the relieving provisions of the section.

112 Counsel for the Attorney General of Ontario submitted that any rights that had been protected by s. 1(*b*) of the Bill of Rights are now effectively subsumed under ss. 15, 27 and 28 of the Charter, and she directed her argument accordingly to s. 15:

> 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Sections 27 and 28 read:

> 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.
>
> 28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

113 There is nothing on the face of s. 251 or inherent or implicit in its wording that discriminates between individuals on the basis of race, national or ethnic origin, colour, religion (we dealt with this subject earlier), sex, age or mental or physical disability.

114 It is true that abortion, as a matter of biological fact, relates only to women. However, that fact does not make the section discriminatory on the basis of sex. It could not apply to men, and the argument would be without any substance to say that the legislation is discriminatory or causes inequality before the law because it does not require men seeking an abortion to comply with s. 251. As Ritchie J. said in *Bliss v. A.G. Can.*, [1979] 1 S.C.R. 183 at 190, [1978] 6 W.W.R. 711, 78 C.L.L.C. 14,175, 92 D.L.R. (3d) 417, 23 N.R. 527:

> Any inequality between the sexes in this area is not created by legislation but by nature.

115 Counsel for the respondents, in his submissions under s. 15 of the Charter, argued that s. 251 was a "legislative classification which distributes benefits and burdens on the basis of gender". He submitted that it did not give women protection of the law because it forced women into situations where they "must" bypass committee and hospitalization requirements, and discriminated against "economically deprived" women under the guise of "protection". The respondents' arguments under s. 15 seemed to tail off into submissions that had more relevance to s. 7 of the Charter. We have already dealt with the submissions with regard to life, liberty and security (privacy) of the person in our answer to Q. 1, and there is no need to deal with them again here.

116 As we have stated, it may be that s. 251 has been administered unevenly, but the fact that s. 15 is now part of the supreme law of Canada does not give the court the obligation or the power to carry out the administration of the section. It may be that on the facts of individual cases the established inequality or discriminatory treatment could be such as to render the section inoperative in those cases. However, the submissions made to us were global and all-encompassing in an attempt to persuade the court that the section itself was discriminatory because in its administration it was possible to deny equality to all women before and under the law. We agree with the learned trial judge that there is no discrimination or inequality on the face of the section.

117 The argument that everyone has the right to determine what shall be done with his or her own body ignores the obvious balancing of interests that Parliament was seeking in enacting s. 251 in pursuit of a valid federal objective under s. 91(27). The section balances the life and health of the woman against the interests of the potential human life. Parliament has obviously determined that both are vital interests. To resort to arguments based on other medical procedures and on the importance of the private relationship between doctor and patient is not helpful. There is no other medical procedure like abortion. We do not see the objective of s. 251 as being "solely", to put the argument in counsel's own words, "to 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior". As Laskin C.J.C. pointed out, Parliament, in its judgment, has decreed that interference with the ordinary course of pregnancy is "socially undesirable conduct subject to punishment". The exception in s. 251(4) now qualifies the stringency of s. 251(1) and (2), but we are not persuaded that circumstances have so changed in this country since Laskin C.J.C. wrote those words that they are no longer valid and that Parliament no longer has the legislative power to enact the whole of s. 251.

118 In *Maher v. Roe*, 432 U.S. 464, 53 L. Ed. 2d 484, 97 S. Ct. 2376 (1977), the issue was whether Connecticut had breached the equal protection clause in the Fourteenth Amendment by providing for the medical expense incident to childbirth but not those incident to abortion. In his concurring opinion with the majority, Burger C.J. wrote (at pp. 481-82):

> Here, the State of Connecticut has determined that it will finance certain childbirth expenses. That legislative determination places no state-created barrier to a woman's choice to procure an abortion, and it does not require the State to provide it.

119 In the instant case, Parliament has not concerned itself with the administration of the legislation and, whatever disparity or inefficiency there may be in carrying out the procedures required, they are not mandated by the law itself.

(7) Is S. 251 Colourable Legislation, in Pith and Substance Relating to Matters of Health Within the Province and therefore Ultra Vires Parliament as Not Falling Within S. 92(27) of the Constitution Act, 1867?

120 Counsel for the respondents submitted that s. 251 of the Criminal Code was ultra vires the Parliament of Canada in that it was colourable legislation, being in "pith and substance" legislation relating to health, a subject matter within provincial legislative jurisdiction, and not competent criminal legislation under s. 91, head 27, of the Constitution Act, 1867.

121 Reliance was placed on the words of Rand J. in *Ref. re Validity of S. 5(a) of Dairy Indust. Act*, [1949] S.C.R. 1 at 49, [1949] 1 D.L.R. 433, affirmed *(*sub nom. *Can. Fed. of Agriculture v. A.G. Que.)* [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.), where he stated:

> 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.
>
> In examining the question, we are to consider not only the matters and conditions upon which the legislation will operate but as well its consequences; and in addition to what will be judicially noticed, evidence may be presented in a case which calls for it ...

122 Counsel argued that the rationale for the initial enactment of s. 251 has disappeared. On its face and in its effect, the argument went, it was legislation relating to the protection of women's health, a matter reserved for provincial legislation: *Schneider v. R. in Right of B.C.*, [1982] 2 S.C.R. 112 at 114 and 137-38, [1982] 6 W.W.R. 673, 39 B.C.L.R. 273, 68 C.C.C. (2d) 449, 139 D.L.R. (3d) 417, *(*sub nom. *Schneider v. B.C.)* 43 N.R. 91. The submission was that viva voce evidence and documentary evidence established the health risks caused by the committee and hospitalization requirements, and showed that the risks associated with the free-standing clinics were minimal and not of the same nature that earlier had obtained in the case of illegal abortions performed by non-medical persons.

123 However, this problem, as noted by the trial judge, was addressed by Laskin C.J.C. in *Morgentaler* (1975), supra. Once again, his judgment was obviously not in conflict with the majority reasoning. With deference, we find his reasoning persuasive [pp. 626-27]:

> What counsel sought to draw from *Roe v. Wade* and *Doe v. Bolton* was that the present s. 251 of the *Criminal Code* could no longer be supported as legislation for the protection of a pregnant woman's health, and hence that rationale could no longer justify the presence of s. 251 in the *Criminal Code*. This, however, is to attribute to Parliament a particular, indeed exclusive concern under s. 251 with health, to the exclusion of any other purpose that would make it a valid exercise of the criminal law power. I am unable to accept this assessment of the basis of s. 251. Perhaps the matter would have a different face if there was here the kind of material that moved the Courts in the *Margarine* reference (*Reference re Validity of s. 5(a) of the Dairy Industry Act* [supra]), to hold that the challenged s. 5(*a*) could no longer be supported as for the protection of health. Moreover, in that case there was no other supporting purpose open (apart from Parliament's power to control exports and imports of margarine). What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that interference by another, or even by the pregnant woman herself, with the ordinary course of conception is socially undesirable conduct subject to punishment. That was a judgment open to Parliament in the exercise of its plenary criminal law power, and the fact that there may be safe ways of terminating a pregnancy or that any woman or women claim a personal privilege to that end, becomes immaterial. I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation.

124 It should be noted also that Dickson J., speaking for the majority in that case, said at p. 672:

> Before considering possible defences it may be appropriate to observe that since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place; in 1969, the law was to some extent modified to exclude from criminal sanction abortions for therapeutic reasons carried out in compliance with prescribed conditions.

125 Rand J., in *Ref. re Validity of S. 5(a) of Dairy Indust. Act*, supra, having said the words relied on by the respondents (quoted above), went on to say at p. 50:

> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ...

126 The respondents' counsel emphasized that in the earlier *Morgentaler* case there had been no material or evidence before the court to establish the purpose of the legislation. That was not so in the instant case, and the evidence introduced, he argued, established that its purpose was to safeguard the health of the mother. However, we are of the view, as was the Supreme Court of Canada, that s. 251 serves wider ends than that argued, and ends which fall properly within the criminal law power as defined by Rand J. above.

127 As we have noted, s. 251 appears to be an attempt to balance the interests of the foetus with those of the mother by more narrowly defining the criminal activity with the introduction of the exception in s. 251(4). We cannot say that, in its present form, s. 251 is outside the ambit of the legislative power conferred on Parliament by s. 91, head 27, and, in our view, it is competent criminal legislation.

(8) Is S. 251 in Effect an Unconstitutional Delegation of Legislative Power to the Provincial Minister of Health, and an Abdication of the Criminal Law Power by Parliament?

128 On this question, as on the question whether s. 251 amounted to cruel or unusual punishment or treatment, we did not require a reply from the appellant and the intervenant.

129 It was argued that s. 251(4), (5) and (6) delegated the power to "deal with substantive criminal law" to provincial Ministers of Health and therapeutic abortion committees, and accordingly was an abdication of legislative authority by Parliament.

130 The granting of power to regulate a matter within the exclusive legislative authority of Parliament to a provincial board or minister of the Crown is not a violation of the constitutional principle against interdelegation: *Re Peralta and R. in Right of Ont.; Peralta v. Warner* (1985), 49 O.R. (2d) 705, 16 D.L.R. (4th) 259, 7 O.A.C. 283 (C.A.). There is, further, no delegation of any legislative power to a provincial legislature, nor has there been any exercise of federal legislative power by the province. There is, at most, an incorporation by reference into the federal legislation when it refers to persons or bodies constituted under competent provincial legislation. The provinces are permitted to establish the procedures through accredited hospitals and therapeutic abortion committees, which procedures, if followed, will support a defence to a criminal charge under the section. There has been neither delegation of criminal legislative jurisdiction by Parliament, nor any abdication of the criminal law power by it.

(9) Does S. 251 Confer Judicial Powers on Therapeutic Abortion Committees Akin to Those Exercised by S. 96 (of the Constitution Act, 1867) Judges, that is, County, District and Superior Court Judges?

131 Counsel also submitted that the legislation vested "judicial power" in therapeutic abortion committees exercised at the time of Confederation by county, district and superior courts. Section 96 vests the exclusive power to appoint judges to those courts in the Governor General. This was an argument which was difficult to follow because whatever power was being conferred on the committee was being conferred by Parliament and not by a provincial legislature.

132 In any event, there was no material to suggest that the function performed by a therapeutic abortion committee conformed broadly to any function exercised by a s. 96 judge in 1867. The committee does not determine the guilt or innocence of anyone, nor does it determine a dispute between parties. Such committees simply do not fall within the tests set out by the Supreme Court in *Ref. re Residential Tenancies Act*, [1981] 1 S.C.R. 714 at 734-35, 123 D.L.R. (3d) 554, 37 N.R. 158 [Ont.] and, in our view, no judicial function is being exercised by such committees.

That the Prosecution of the Respondents in Ontario was and Abuse of Process and a Breach of the Principles of Fundamental Justice Because They Would not be Prosecuted in Quebec

133 In our view, it is irrelevant to the proceedings in this province that proceedings on different facts in another province resulted in acquittals. Jury verdicts on earlier unrelated trials cannot have any legally conclusive effect on the trial in the instant case. Nor can prosecutorial forbearance in one province foreclose prosecutions in another province.

The Constitutional Validity of S. 605 of the Criminal Code Conferring on the Crown a Right of Appeal from an Acquittal

134 As part of his submissions in support of the motion to quash the appeal, counsel for the respondents contended that there was no right of appeal by the Crown from a jury acquittal. He submitted that s. 605(1)(*a*) of the Criminal Code, conferring on the Crown a right of appeal from a verdict of acquittal on a question of law alone in proceedings by indictment, contravenes ss. 7, 11(*d*) and 11(*h*) of the Charter.

History of the Crown's Right Of Appeal in Canada from an Acquittal in Proceedings on Indictment

135 At common law neither the Crown nor the accused had what could properly be described as an appeal in a criminal case, although certain limited forms of review were available. The remedy of a writ of error was applicable only where there was an error on the face of the record which consisted of the formal record of the proceedings, such as the indictment, the plea and the verdict, without reference to the evidence or the judge's charge. Errors of law or fact arising from the evidence, the reception or rejection of evidence and the judge's charge were outside the scope of the writ of error: see Stephen's History of the Criminal Law of England (1883), vol. 1, at pp. 308-10. Professor Friedland states that many writers were of the opinion that the Crown could bring a writ of error after an acquittal, but practically, because of the limited nature of the remedy, the Crown was limited to bringing a writ of error following an acquittal entered on a special verdict: see Double Jeopardy (1969), at p. 287.

136 Another limited form of review arose from the jurisdiction of the Court of Queen's Bench to grant new trials in cases of misdemeanour where, prior to trial, the case had been moved to the Queen's Bench by certiorari. It appears, however, that the court would not order a new trial after an acquittal save where the offence charged was quasi-civil in nature, such as an indictment for non-repair of a highway. If the accused was in danger of imprisonment a new trial would not be ordered: Double Jeopardy at pp. 285-86.

137 From early times the practice had existed under which, when a difficult point of law arose, the trial judge might refer the question to the judges for their opinion. This procedure applied only in trials in the superior courts, and if the procedure was invoked after an acquittal the opinion of the judges could not, of course, affect the acquittal. In 1848 the Court for Crown Cases Reserved was established in England by 11 & 12 Vict., c. 78 (hereafter the Crown Cases Act, 1848). The Crown Cases Act, 1848, provided that when any person had been convicted of any treason, felony or misdemeanour the judge, commissioner or Court of Quarter Sessions might in his or its discretion state a case for the opinion of the court. This procedure, of course, had no application where there was an acquittal.

138 The Crown Cases Act, 1848, was substantially adopted in Canada and prior to the enactment of the Criminal Code in 1892 the right of appeal in Canada in criminal cases tried on indictment was not materially different from that in England: see Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History" (1978), 16 Alta. L. Rev. 446, at pp. 448-54; Friedland, "New Trial after an Appeal from a Conviction" (1965), 84 L.Q. Rev. 48.

139 It is clear that prior to the enactment of the Criminal Code, 1892, the Crown in both England and Canada had no right of appeal from an acquittal, save for such limited remedy as may have existed on a writ of error, or on an application for a new trial in the Court of Queen's Bench. The Criminal Code, 1892, however, made a far-reaching and fundamental change. Section 743 of the Code abolished the writ of error and conferred on the Crown an appeal on any question of law reserved for the opinion of the Court of Appeal by the trial judge. If the trial judge refused to reserve the question, the Crown, with leave in writing of the Attorney General, could apply to the Court of Appeal for leave to appeal (s. 744). If leave to appeal was granted, a case was stated as if the question had been reserved. By a subsequent amendment leave of the Attorney General was no longer required. The result was that the Crown had a right of appeal from an acquittal on any question of law by leave of the trial judge or the Court of Appeal: see *Morgentaler* (1975), supra, at pp. 484-85. The accused had the same right of appeal as the Crown on a question of law. On an appeal by the Crown the Court of Appeal was empowered to confirm the ruling appealed from or to direct a new trial if it was of the opinion that the ruling was erroneous and there had been a mistrial in consequence. Where the accused appealed, the court could, if it allowed the appeal, in effect acquit the accused or direct a new trial (s. 746).

140 Under s. 746 a *person convicted* of any indictable offence,with leave of the trial judge, could apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. No similar application could be made by the Crown.

141 In two cases, decided following the enactment of the Code, Osler J. expressed concern that the provisions of the Code conferring a right of appeal on the Crown appeared to be contrary to the fundamental principles of English law and that cases ought to be extremely rare in which the court would think it right to place the accused a second time in jeopardy for the same offence: see *R. v. Burns* (1901), 4 C.C.C. 323 at 327-28 (Ont. C. A.); *R. v. Karn* (1903), 5 O.L.R. 704, 6 C.C.C. 479 (Ont. C.A.) at 484. In *R. v. Karn*, although the Court of Appeal held that the trial judge had erred in withdrawing the case from the jury, the court declined to order a new trial.

142 In 1923, by 13-14 Geo. V [1923 (Can.)], c. 41, all the sections of the Code relating to criminal appeals were repealed and replaced by what was practically a verbatim copy of the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), save that, unlike in England, the amendment to the Code conferred a right of appeal on the Crown against sentence, and empowered the court to grant a new trial when a conviction was quashed. The English Criminal Appeal Act did not confer a right of appeal on the Crown from an acquittal and the 1923 amendment took away the Crown's light of appeal from an acquittal on a question of law which had existed since 1892. This appears to have resulted from an oversight and the right of appeal by the Crown on a question of law from an acquittal was restored by 1930 (Can.), c. 11, s. 28, and is now contained in s. 605(1)(*a*) of the Code: see *Morgentaler* (1975), supra, per Pigeon J. at p. 485.

The Right of Appeal From an Acquittal on Indictment in Commonwealth Jurisdictions

143 Although the Crown has no right of appeal from an acquittal in England and in several of the Australian states, Canada is not unique among Commonwealth jurisdictions in conferring on the Crown a right of appeal on a question of law from an acquittal in proceedings on indictment.

A. England

144 Somewhat ironically, the concepts of double jeopardy and the sanctity of the jury's verdict were used in the 19th Century to deprive the *accused* of an effective appeal: Friedland, "New Trial After Appeal From Conviction" at p. 52. The English policy against allowing appeals by the Crown from acquittals and the ordering of second trials for offences tried on indictment is reflected in the Criminal Appeal Act, 1907, establishing the Court of Criminal Appeal. This Act made no provision for an appeal by the Crown from an acquittal and made no provision for ordering a new trial where a conviction is quashed. (The Court of Appeal has the power to direct a venire de novo where the first trial is a nullity, and to direct a new trial where an appeal is allowed solely on the basis of fresh evidence: see *Crane v. D.P.P.*, [1921] 2 A.C. 299 (H.L.), and Archbold's Pleading, Evidence and Practice in Criminal Cases, 41st ed. (1982), at pp. 725, 815-16 and 761.

145 Under s. 36 of the Criminal Justice Act, 1972 (Eng.), c. 71, where a person tried on indictment has been acquitted the Attorney General may refer a point of law which has arisen in the case to the court for its opinion. The reference does not, however, affect the acquittal.

B. New Zealand

146 The New Zealand Crimes Act, 1961 (R. S. vol. 1, p. 635), like the Canadian Criminal Code, traces back to the English Draft Code. Section 383 of the New Zealand Crimes Act, 1961, like s. 603 of the Code, gives the accused a right of appeal from his conviction or sentence. Section 380 is similar to the provisions of the Canadian Criminal Code prior to 1923 and, in effect, gives the Crown a right of appeal from an acquittal on a question of law with leave of the trial judge or the Court of Appeal. In addition, either the Crown or the accused at any time before the trial, with leave of the Court of Appeal, may appeal to the Court of Appeal in respect of matters arising before the trial, such as, for example, the refusal to grant a change of venue or the granting of or refusal to grant separate trials for persons jointly indicted: see Garrow and Willis's Criminal Law, 5th ed. (1968), at pp. 357-61.

C. The Australian States

147 In New South Wales under s. 5A(2) of the Criminal Appeal Act, 1912-69, Crown counsel with the written consent of the Attorney General may require the trial judge before whom an accused is acquitted to reserve for decision any question of law arising in connection with the trial. However, the determination of the question by the Court of Appeal does not in any way affect the verdict.

148 In Tasmania, the Attorney General may, with leave of the trial judge or the Court of Appeal, appeal to the Court of Appeal on a question of law alone, and the court, if it allows the appeal, may enter a conviction or direct a new trial: ss. 401(2) and 402(5) of the Tasmanian Criminal Code Act (No. 69 of 1924).

149 Under s. 688(2) of the Criminal Code of Western Australia (No. 28 of 1913; R.S. vol. 8) the Crown has a right of*appeal against an acquittal where the verdict of acquittal has been directed by the judge or where judgment was given in favour of the accused on a plea to the jurisdiction of the court to try the accused.

150 In the remaining states, the Crown has no right of appeal from an acquittal: Brett and Waller, Criminal Law, 4th ed. (1978), at pp. 55-56.

Whether the Right of Appeal Conferred On the Crown by S.605(1) of the Code Contravenes the Charter

151 We have already quoted s. 7, but once again it will be helpful to re-state it:

> 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.

Section 11 in part reads:

> 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 ...
>
> (*h*) if *finally* acquitted of the offence, not to be tried for it again, and, if finally found guilty and punished for the offence, not to be tried or punished for it again ... [The italics are mine.]

152 It is apparent that the principles of double jeopardy to which the pleas of autrefois acquit and autrefois convict give effect are encompassed by s. 11(*h*) of the Charter. The constitutional guarantee contained in s. 11(*h*) is, however, narrowly limited and on a literal reading does not cover the entire ambit of those pleas at common law and under the Code: see Morel, "Certain

Guarantees of Criminal Procedure (ss. 11(*b*), (*f*), (*h*), 12 and 14)", in Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (1982), at pp. 383-86; Friediand, A Century of Criminal Justice: Perspectives on the Development of Canadian Law (1984), at pp. 227-28. The pleas of autrefois acquit and autrefois convict do not, however, cover the entire concept of double jeopardy, which is also recognized by the doctrines of res judicata and issue estoppel: see *R. v. Gushue* (1976), 14 0. R. (2d) 620, 35 C.R. N.S. 304, 32 C.C.C. (2d) 189 at 196-97, 74 D. L. R. (3d) 473, affirmed [1980] 1 S. C. R. 798, 16 C. R. (3d) 39, 50 C. C. C. (2d) 417, 106 D.L.R. (3d) 152, 30 N.R. 204. It is unnecessary to decide whether the aspects of double jeopardy recognized by the defences of res judicata and issue estoppel might be protected under s. 7 of the Charter if they are not encompassed by s. 11(*h*). The question presented on this branch of the case falls to be determined under s. 11(*h*).

153 The Fifth Amendment to the Constitution of the United States reads, in part:

> ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ...

154 Mr. Manning relied heavily on the American authorities holding that the prohibition against double jeopardy prevents appeals by the state against acquittals. In *Kepner v. U.S.*, 195 U.S. 100, 49 L. Ed. 114, 24 S. Ct. 797 (1904), the Supreme Court of the United States, by a majority, held that an Act of Congress applicable to the Philippine Islands incorporating the Fifth Amendment provisions against double jeopardy prevented an appeal by the state against an acquittal which existed under traditional Philippine procedure.

155 The prohibition against double jeopardy is a common law concept and, as we have previously pointed out, there was no right of appeal in criminal cases within the usual meaning of the word at common law. Day J., delivering the majority opinion in *Kepner v. U.S.*, stated that the constitutional prohibition against double jeopardy must be construed with reference to the common law from which it was taken, the principles of which were well known to the framers of the Constitution. He said at pp. 125-26:

> In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken. I Kent, Com. 336. *United States v. Wong Kim Ark*, 169 U.S. 649, in which this court said:
>
> > In this, as in other respects, it [a constitutional provision] must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. *Minor v. Happersett*, 21 Wall. 162; *Ex parte Wilson*, 144 U.S. 417, 422; *Boyd v. United States*, 116 U.S. 616, 624, 625; *Smith v. Alabama*, 624 U.S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent's Com. 336; Bradley, J., in *Moore v. United States*, 91 U.S. 270, 274.
>
> At the common law, protection from second jeopardy for the same offense clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offense.

156 The appeal sought to be taken by the state in that case appears to have been a general appeal, not limited to questions of law. Day J. said at p. 133:

> The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; *to try him again upon the merit.v, even in an appellate court*, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning. [The italics are mine.]

157 Holmes J. (with whom White J. and McKenna J. concurred), in a strong dissent, said at p. 134:

> It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case.

158 Somewhat surprisingly, it might be thought, the Supreme Court in *Kepner v. U.S.* does not appear to have made any distinction between appeals by the state on questions of law and appeals on questions of fact following an acquittal. In *Palko*

v. Connecticut, 302 U.S. 319, 82 L. Ed. 288,58 S. Ct. 149 (1937), at issue was the constitutional validity of a Connecticut statute conferring on the state, with consent of the trial judge, an appeal on all questions of law in the same manner and to the same effect as if made by the accused. Cardozo J., delivering the opinion of the court, held that the Fifth Amendment's double jeopardy provisions limited only federal powers and the right of appeal conferred on the state in the Connecticut statute did not violate the due process guarantee of the Fourteenth Amendment applicable to the States. Cardozo J. said at p. 328:

> The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error.

159 Although Cardozo J. was dealing only with the Fourteenth Amendment, and not with the Fifth, he appears to have been sympathetic to the views of Holmes J. in *Kepner*, supra.

160 However, the Supreme Court of the United States some 30 years later in *Benton v. Maryland*, 395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969), overruled *Palko v. Connecticut* and held that the Fifth Amendment guarantee against double jeopardy was applicable to the states through the due process guarantee of the Fourteenth Amendment.

161 The current position, therefore, in the United States is that an appeal from an acquittal by either the states or the federal government is precluded by the Fifth Amendment.

162 Despite this judicial position, there is substantial support in academic writing in the United States for the view that the rule that an appeal by the state is barred by the prohibition against double jeopardy is illogical: see Mayers and Yarbrough, "*Bis Vexari*: New Trials and Successive Prosecutions" (1960), 74 Harvard L. Rev. 1, at pp. 8-13; Miller, "Appeals by the State in Criminal Cases" (1927), 36 Yale L.J. 486; Double Jeopardy, at pp. 283-84.

163 Unlike the situation that existed at common law when the framers of the American Constitution drafted the Fifth Amendment, the Crown in Canada had the right to appeal from an acquittal on a question of law alone for the better part of a century before the Charter was enacted. Such an appeal had thus become an established part of the criminal process prior to the advent of the Charter. In *Welch v. R.*, [1950] S.C.R. 412, 10 C.R. 97, 97 C.C.C. 177, [1950] 3 D.L.R. 64, the issue before the Supreme Court of Canada was whether the failure of the Ontario Court of Appeal to direct a new trial following the quashing of the appellant's conviction for manslaughter on the ground of misdirection by the trial judge precluded the Crown from re-trying the appellant on a fresh indictment.

164 Fauteux J., as he then was, delivering the majority judgment of the Supreme Court of Canada, held that in the absence of an order directing a new trial the appellant could not be re-tried. He said at p. 428:

> ... if on a valid indictment, the trial proceeds, with no defect as to jurisdiction, to verdict and judgment, then the procedure provided by the law for the trial of that issue, — or included issues, — is exhausted and the trial is brought to an end, *unless there is an appeal*. [The italics are mine.]

165 In *R. v. Jordan* (1971), 14 C.R.N.S. 225, 1 C.C.C. (2d) 385, 2 N.S.R. (2d) 594, the Nova Scotia Appeal Division allowed an appeal by the Crown against the dismissal by a County Court Judge of the Crown's appeal by way of trial de novo from the respondent's acquittal on summary conviction proceedings of a charge of unlawful possession of cannabis resin. The County Court Judge, in dismissing the Crown's appeal, held that an appeal by way of trial de novo constituted double jeopardy and deprived the accused of a fair hearing in accordance with the principles of fundamental justice contrary to the Canadian Bill of Rights. McKinnon C.J.N.S., in allowing the Crown's appeal, said at p. 391:

> In the case at bar, there had been but one charge upon which there has been no final adjudication, because the acquittal has been appealed by the Crown. The respondent, however, contends that this appeal by the Crown by way of a trial *de novo* constitutes double jeopardy. This contention is not in accordance with the English authorities referred to, nor is it in accord with the decided cases in this country.

166 It is unnecessary for the purposes of this appeal to decide whether an appeal by the Crown by way of trial de novo might in some circumstances, at any rate, contravene the principle that no person shall be placed twice in jeopardy for the same offence: see Double Jeopardy, p. 296. It is plain, however, that, despite the initial concern voiced by Osier J. that the provisions of the 1892 Code providing for an appeal on a question of law from an acquittal violated the double jeopardy principle, the right of the Crown to appeal on a question of law alone from an acquittal was an established part of the criminal process in this country at the advent of the Charter and when the Charter was enacted this right was not regarded as a violation of the double jeopardy principle.

167 It is to be observed that the Crown's right of appeal under s. 605(1)(*a*) of the Code against a judgment or verdict of acquittal of a trial court in proceedings on indictment is confined to "any ground of appeal that involves a question of law alone". Section 605(1)(*a*) does not confer on the Crown the right of appeal from an acquittal on questions of fact or questions of mixed fact and law, Consequently, where a trial is free from legal errors the Crown has no right of appeal on the ground that the verdict of acquittal is unreasonable or even that it is perverse.

168 Generally speaking, the double jeopardy principle precludes a second trial only when the first trial has proceeded to a verdict. Where the trial judge in the proper exercise of his discretion declares a mistrial and discharges the jury because they are unable to agree on a verdict or declares a mistrial to protect the accused against prejudicial evidence which has been wrongly admitted, the principle of double jeopardy does not prevent the accused from again being placed on trial for the offence. This is so because the accused was neither acquitted nor convicted at the first trial. If s. 11(*h*) had merely read: "Any person charged with an offence has the right, if *acquitted* of the offence, not to be tried for it again," the constitutional guarantee would not have precluded a second trial after a first trial in which the jury could not agree. It was unnecessary to insert the word "finally" in front of the word "acquitted" to exclude cases where the first trial had been abortive, since it had been clear for well over 100 years that the principle that a person cannot be put in peril twice for the same offence had no application where the first trial was abortive and no verdict was given: see *Winsor v. R.* (1865), L.R. I Q.B. 390, 10 Cox C.C. 276.

169 It is difficult to think that, if they had intended to abrogate such a well-established part of the Canadian criminal justice system as the Crown's right of appeal on a question of law alone from an acquittal, the framers of the Charter would have chosen the language they employed in s. 11(*h*). Rather, the language of s. 11(*h*) leads to the opposite conclusion and differs significantly from the language of the Fifth Amendment.

170 The meaning of the word "finally" was considered in *Linkletter v. Walker*, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965). The question was whether the rule in *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), rehearing denied 368 U.S. 871, 7 L. Ed. 2d 72, 82 S. Ct. 23, was to operate retrospectively upon cases *finally* decided prior to the decision in *Mapp v. Ohio*. The Supreme Court of the United States said in footnote 5 at p. 622:

> 5. By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v Ohio.

171 Two influential commentators on the Charter have expressed the view that the word "finally" was inserted in s. 11(*h*) to ensure that the provision did not prevent a new trial ordered by the Court of Appeal.

172 In A Century of Criminal Justice, Professor Friediand states at p. 228:

> The word "finally" in the Charter provision makes it clear that new trials can be ordered following an appeal from a conviction and reasonably clear that, unlike the situation in England or the United States, appeals from an acquittal are permitted in certain cases.

173 Professor Hogg in Constitutional Law of Canada, 2nd ed. (1985), states at p. 777:

> The word "finally" in s. 11(h) makes clear that a second trial is barred only if there was a final disposition of the charge against the accused in the earlier proceedings. If the earlier proceedings ended in a stay of proceedings, the accused can

be charged again and tried for the same offence. If a trial ended in a mistrial, or if a new trial was ordered on appeal, a second trial for the same offence would not be barred.

174 There are valid policy reasons for permitting the Crown to appeal from an acquittal on questions of law alone to ensure the correct and uniform interpretation of the criminal law.

175 Accordingly, in our view, s. 605(1)(*a*) of the Code, conferring on the Crown the right of appeal on a question of law alone from an acquittal, does not contravene the Charter.

Crown Appeal

176 Having rejected the attack on the constitutionality of s. 251 and the submissions in support of the motion to quash, it is now necessary to turn to the appeal by the Crown.

177 The Crown's right of appeal is limited to questions of law. Crown counsel urged that the learned trial judge erred in law in leaving the defence of necessity to the jury. In the alternative, Crown counsel submitted that, even if it might be said that there was some evidence upon which the defence of necessity could have been placed before the jury, the learned trial judge erred in instructing the jury that evidence was relevant to that defence when as a matter of law it was not and in failing to instruct the jury on other matters which were relevant to their proper consideration of that defence. Further, in the alternative, counsel for the Crown submitted that there should be a new trial by reason of the address of counsel for the respondents to the jury.

178 The charge was that the respondents conspired to procure the miscarriage of female persons contrary to s. 251(1) of the Criminal Code. The relevant provisions of s. 251 have already been quoted, but it will be helpful to restate them:

> 251. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and is liable to imprisonment for life.
>
> (2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and is liable to imprisonment for two years ...
>
> (4) Subsections (1) and (2) do not apply to
>
> (*a*) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
>
> (*b*) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means described in paragraph (a) for the purpose of carrying out her intention to procure her own miscarriage, if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of such female person has been reviewed,
>
> (*c*) has by certificate in writing stated that in its opinion the continuation of the pregnancy of such female person would or would be likely to endanger her life or health, and
>
> (*d*) has caused a copy of such certificate to be given to the qualified medical practitioner ...
>
> (6) For the purposes of subsections (4) and (5) and this subsection
>
> "accredited hospital" means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

> "approved hospital" means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;
>
> "board" means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;
>
> "Minister of Health" means
>
> (*a*) in the Provinces of Ontario, Quebec, New Brunswick, Manitoba, Newfoundland and Prince Edward Island, the Minister of Health ...

179 The ingredients of this substantive offence were conveniently summarized by Dickson J. in *Morgentaler* (1975), supra, at pp. 493-94, as follows:

> Subsection (1) defines the offence. The offence is committed when a person uses any means for the purpose of carrying out his intention of procuring the miscarriage of a female person. The means adopted may include the administration of a drug or other noxious thing, or the use of an instrument or manipulation of any kind. The appellant openly admits using an instrument for the purpose of procuring the miscarriage of Verona Parkinson. Subsection (2) provides that a pregnant female person who uses any means or permits any means to be used for the purpose of procuring her miscarriage is guilty of an indictable offence. Subsection (4) is of the utmost importance to any medical practitioner contemplating the use of any means to procure the miscarriage of a female person. This subsection is intended to afford, and does afford, a complete answer and defence to those who respect its terms. The subsection requires: (1) That the person procuring the miscarriage be a qualified medical practitioner; (2) The medical practitioner must not be a member of a therapeutic abortion committee for any hospital; (3) The medical practitioner must act in good faith; (4) The means used to procure the miscarriage must be used in a hospital accredited by the Canadian Council on Hospital Accreditation or approved by the provincial Minister of Health; (5) The hospital must have a therapeutic abortion committee comprised of not less than three members, each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital; (6) The committee at a meeting must review the case of the female person; (7) The committee, by a majority of the members, must have agreed to the issuance of a certificate; (8) The certificate must be in writing and must state that in the opinion of the committee *the continuation of the pregnancy of such female person would or would be likely to endanger her life or health*; (9) The committee must cause a copy of the certificate to be given to the medical practitioner who intends to procure the miscarriage. It is only too obvious, on reading s. 251, that, first, Parliament regards procuring abortion as a grave crime which carries with it the same maximum penalty as non-capital murder; secondly, Parliament has recognized that continuation of pregnancy may endanger the life or health of a pregnant woman, and has, therefore, made provision whereby pregnancy may be terminated by a qualified medical practitioner in an accredited or approved hospital; thirdly, and for the purposes of the present case, of paramount importance, the decision whether or not to terminate the pregnancy is not that of the doctor who intends to perform the operation but of at least three of his peers, specially appointed to consider and determine questions relating to terminations of pregnancy ...

180 The sole issue for the jury was whether the Crown had proved beyond a reasonable doubt that between the month of November 1982 and 5th July 1983 the respondents had agreed to procure the miscarriage of female persons contrary to the provisions of s. 251.

181 The Crown led evidence to establish that the three respondents had agreed to open a free-standing clinic in Toronto for the purpose of procuring the miscarriage of female persons. Their free-standing clinic was confined to providing medical services for procuring miscarriages. It was not a hospital accredited by the Canadian Council on Hospital Accreditation or approved by the provincial Minister of Health. It had no therapeutic abortion committee, and the decision of whether or not to terminate the pregnancy was that of the doctor and his patient. That the respondents had agreed to procure miscarriages of female persons at

this clinic was really not an issue at the trial. The intention to set up such a clinic was openly announced by Dr. Morgentaler as the spokesman fox the clinic.

182 In an affidavit filed in the Supreme Court of Ontario in support of an application to enjoin the police authorities from investigating and inquiring into the activities of the clinic established in Toronto, Dr. Morgentaler deposed in part as follows:

> 2. That since 1968 1 have operated a free standing abortion clinic in the Province of Quebec. *The purpose of such facilities is to permit pregnant women to exercise their freedom to choose to have a medically safe therapeutic abortion in humane and sanitary surroundings*.
>
> 3. That similar free standing clinics are now operated and funded by the government of the Province of Quebec and have been in operation for the last three years without harassment or interference from the AttorneyGeneral of Quebec or his agents and servants or police forces having jurisdiction in the Province of Quebec.
>
> 4. That the Morgentaler clinic in the Province of Quebec provides therapeutic abortion services to women throughout Canada including Ontario. On an average ten patients per week from Ontario are seen at the Morgentaler clinic in the Province of Quebec. I am informed and verily believe that the provisions for therapeutic abortions in section 251(4) of the *Criminal Code of Canada* are unworkable and deny women the right to choose to have a therapeutic abortion in accordance with principles which guarantee their security of the person.
>
> 5. *That I have therefore opened a free standing abortion clinic at 85 Harbord Street, in the City of Toronto, in the Province of Ontario, in order that pregnant women may have the right to exercise their freedom to choose to have a therapeutic abortion in humane and sanitary, surroundings and in accordance with the highest principles of medical practice*.
>
> 6. That all women who seek to exercise their freedom to choose to have a therapeutic abortion at the Morgentaler clinic are examined by a duly qualified medical practitioner. Such medical practitioner applies the World Health Organization definition of "health" in order to determine whether an abortion is required for reasons of health in the particular circumstances of each case.
>
> 7. That all medical practitioners who practise at the Morgentaler clinic are aware of the dangers of complications due to delay in the obtaining of abortions in that every week's delay increases the risk of major complications by twenty per cent.
>
> 8. That it is the policy of the Morgentaler clinic to perform abortions only on women who have first sought and been denied the right to exercise their fight to a therapeutic abortion by the "therapeutic abortion committee" of an "accredited hospital" as those phrases are defined in section 251 of the *Criminal Code*. Now shown to me and attached hereto as Exhibit "A" to this my Affidavit are the policy provisions referable to the Morgentaler clinic.
>
> 9. That in conjunction with providing women with the freedom to choose to have a medically safe therapeutic abortion the Morgentaler clinic will provide extensive auxiliary services such as the provision of staff counsellors and a reference listing of psychiatric and health advisors who are readily available to patients requiring their services ...
>
> 11. That I am of the belief that the proclamation of the *Canadian Charter of Rights and Freedoms* on the 17th day of April, 1982, has rendered section 25 1 of the *Criminal Code* of no force and effect. Section 25 1 of the Criminal Code is invalid on its face and its present enforcement violates the security of the person of all pregnant women who may wish to exercise their right to choose to have a medically safe and therapeutic abortion. *Further the attempted enforcement of section 251 of the Criminal Code would subject me to criminal prosecution for assisting women in exercising their constitutionally entrenched right to choose to have a therapeutic abortion in accordance with the highest recognized standards of medical practice*. [The italics are mine.]

183 The guidelines referred to by Dr. Morgentaler in his affidavit read in part as follows:

> **Eligibility**

All women 7 to 14 weeks pregnant who need an abortion and want one, are eligible. The abortion might be performed up to 16 weeks of pregnancy, counting from LMP (last menstrual period) or as evidenced by results of an ultrasound test.

Addition to Eligibility

For those women who arrive at the clinic and are not sure, or are ambivalent about wanting an abortion, no effort will be made to persuade them to have one. Alternatives to abortion will be discussed, such as continuation of the pregnancy, adoption etc. The pros and cons will be discussed by the counsellor and referrals may be done if necessary to psychologists, psychiatrists, or religious advisers. It should be made clear to the patient that the decision is hers and that the doctor or counsellor is unable to make the decision for her. Abortions in this clinic will only be provided to those who have made up their minds that they need and want an abortion, and that the alternatives are unacceptable.

Legal Aspects of Eligibility

The legality of this clinic is based on the precedent of three acquittals by jury in the case of Dr. Henry Morgentaler in Montreal. The common law defense of necessity was successfully used in these trials and is available if the doctor should be charged under Article 251 of the Criminal Code.

In order for the defense of necessity to be proven in court, should there be prosecution, it is necessary that certain facts be available and easily verified for this defense to be accepted by a jury. It can easily be proven that every week's delay (after 7 weeks) increases the risk of major complications by 20% and of death by 30%, which means that every day's delay increases the risk of complications by 3% and of death by 4%. *Eliminations of delays* and consequently protection of life and health will be a vital part of the defense of necessity.

In order to prove this it will be necessary to demonstrate that the patient was unable to obtain an abortion inside the system within a reasonable period of time. Given the conditions prevailing in Ontario at this time it should not be too difficult to prove that many women cannot obtain an abortion within a reasonable period of time.

In view of the above the following guidelines will be followed:

(a) For patients from Toronto

Any patient calling from the Toronto area who has not been referred by a social agency or by her own doctor will be given an appointment to see the doctor or counsellor. At that appointment the doctor will examine the patient and counsel her. If eligible the woman will be given another appointment for the abortion.

(b) For patients from outside the Toronto area where it may be difficult or impossible to obtain abortions.

For such patients less stringent requirements will be sought. The fact of travelling long distances and the general knowledge of unavailability of abortion in their area will be sufficient proof of the impossibility of obtaining an abortion within a reasonable period of time. In all cases a referral slip by a doctor would be helpful but should not be mandatory as many doctors might be reluctant to provide one.

The defence of necessity will also be based on the knowledge that the abortions performed at the Morgentaler Clinic are safer than those performed in hospitals. This claim will be based on the following factors:

1. General knowledge from U.S. and Quebec sources: Abortions in free standing clinics in the U.S. and Quebec are safer than in hospitals.

2. Study of complications by Dr. Henry Morgentaler compared to Badgley report.

3. Non-use of general anaesthesia. (avoidance of danger of general anaesthesia).

4. Use of perfected technique of vacuum suction currettage and D & E.

5. Improvements to method by Dr. Henry Morgentaler.

6. Specialized personnel, attitude and competence.

7. Use of N2O plus O2.

8. Atmosphere of acceptance and support. (Generally not available in hospitals to the same extent or not at all). [The italics are mine.]

184 In the same proceedings Dr. Smoling deposed in part as follows:

3. That I am informed and verily believe that *the present provisions in respect of abortion in section 251 of the Criminal Code of Canada are practically unworkable and unconstitutional on their face as they deprive women of the right to their security, of the person*.

4. That I am informed and verily believe that many women from Ontario and other provinces of Canada must travel to Quebec and to several of the United States to obtain a medically safe therapeutic abortion because many hospitals which are more geographically accessible are either unwilling or unable to comply with the provisions in section 251 (4) of the *Criminal Code*.

5. *That I have therefore set up a clinic in conjunction with Dr. Henry Morgentaler at 85 Harbord Street in the City of Toronto, at which facility, pregnant women will be able to exercise their freedom to choose to have a medically safe abortion in humane and sanitary surroundings in accordance with the highest recognized standards of medical practice ...*

9. That it is proposed to restrict the availability of abortion to women who have been unable to obtain an abortion after application to an "accredited hospital" in the Province of Ontario or any other province of Canada ...

12. That I am of the belief that the proclamation of the *Canadian Charter of Rights and Freedoms* on the 17th day of April, 1982, has rendered section 251 of the *Criminal Code* of no force and effect. Section 25 1 of the *Criminal Code* is invalid on its face and its present enforcement violates the security of all pregnant women who may wish to exercise their right to choose to have a medically safe therapeutic abortion. The present enforcement of section 251 of the *Criminal Code* further subjects me to criminal liability for assisting women in their constitutionally entrenched right to choose to have a therapeutic abortion in accordance with the highest recognized standards of medical practice. [The italics are mine.]

185 Amongst the material seized by the police, in addition to a copy of the guidelines referred to above, were copies of a form which contained the following pre-printed paragraph:

I _____ declare that I am unable to obtain an abortion in an accredited hospital within a reasonable period of time. The continuation of this pregnancy is a grave threat to my health for the following reasons: (state in your own words)

186 Throughout the trial the defence conceded that the respondents had agreed to establish a free-standing clinic in Toronto the purpose of which was to procure the miscarriage of female persons in a manner not authorized by s. 251 of the Criminal Code. They sought to be excused from this violation of the law on the basis of the legal "defence" of necessity. The learned trial judge left that defence to the jury.

The "Defence" of Necessity

187 The "defence" of necessity was thoroughly reviewed in the recent judgment of the Supreme Court of Canada in *Perka v. R.*, [1984] 2 S.C.R. 233, 42 C.R. (3d) 113, [1984] 6 W.W.R. 289, 14 C.C.C. (3d) 385, 13 D.L.R. (4th) 1, 55 N.R. 1 [B.C.]. In delivering the judgment of the majority, Dickson J. in part summarized the "defence" of necessity as follows at pp. 131-33:

I agree with this formulation of the rationale for excuses in the criminal law. In my view, this rationale extends beyond specific codified excuses and embraces the residual excuse known as the defence of necessity. 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.

Punishment of such acts, as Fletcher [Rethinking Criminal Law (1978)] notes at p. 813, can be seen as purposeless as well as unjust:

> ... involuntary conduct cannot be deterred and therefore it is pointless and wasteful to punish involuntary actors. This theory ... of pointless punishment, carries considerable weight in current Anglo-American legal thought.

Relating necessity to the principle that the law ought not to punish involuntary acts leads to a conceptualization of the defence that integrates it into the normal rules for criminal liability rather than constituting it as a sui generis exception and threatening to engulf large portions of the criminal law. Such a conceptualization accords with our traditional legal, moral and philosophic views as to what sorts of acts and what sorts of actors ought to be punished. In this formulation it is a defence which I do not hesitate to acknowledge and would not hesitate to apply to relevant facts capable of satisfying its necessary prerequisites.

c) Limitations on the Defence

If the defence of necessity is to form a valid and consistent part of our criminal law it must, as has been universally recognized, be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale. That rationale, as I have indicated, is the recognition that it is inappropriate to punish actions which are normatively "involuntary". The appropriate controls and limitations on the defence of necessity are, therefore, addressed to ensuring that the acts for which the benefit of the excuse of necessity is sought are truly "involuntary" in the requisite sense.

In *Morgentaler v. R.*, supra, I was of the view that any defence of necessity was restricted to instances of non-compliance "in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible". In my opinion, this restriction focuses directly on the "involuntariness" of the purportedly necessitous behaviour by providing a number of tests for determining whether the wrongful act was truly the only realistic reaction open to the actor or whether he was in fact making what in fairness could be called a choice. If he was making a choice, then the wrongful act cannot have been involuntary in the relevant sense.

The requirement that the situation be urgent and the peril be imminent, tests whether it was indeed unavoidable for the actor to act at all. In Lafave and Scott, Criminal Law [1972], p. 388, one reads:

> It is sometimes said that the defence of necessity does not apply except in an emergency — when the threatened harm is immediate, the threatened disaster imminent. Perhaps this is but a way of saying that, until the time conies when the threatened harm is immediate, there are generally options open to the defendant to avoid the harm, other than the option of disobeying the literal terms of the law — the rescue may appear, the storm may pass; and so the defendant must wait until that hope of survival disappears.

At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable.

The requirement that compliance with the law be "demonstrably impossible" takes this assessment one step further. Given that the accused had to act, could he nevertheless realistically have acted to avoid the peril or prevent the harm, without breaking the law? *Was there a legal way out?* I think this is what Bracton means when he lists "necessity" as a defence, providing the wrongful act was not "avoidable". The question to be asked is whether the agent had any real choice: could he have done otherwise'? If there is a reasonable legal alternative to disobeying the law, then the decision to disobey becomes a voluntary one, impelled by some consideration beyond the dictates of "necessity" and human instincts.

The importance of this requirement that there be no reasonable legal alternative cannot be over-stressed.

188 And at p. 137:

e) Onus of Proof

Although necessity is spoken of as a defence, in the sense that it is raised by the accused, the Crown always bears the burden of proving a voluntary act. The prosecution must prove every element of the crime charged. One such element is the voluntariness of the act. Normally, voluntariness can be presumed, but if the accused places before the court, through his own witnesses or through cross-examination of Crown witnesses, evidence sufficient to raise an issue that the situation created by external forces was so emergent that failure to act could endanger life or health and upon any reasonable view of the facts, compliance with the law was impossible, then the Crown must be prepared to meet that issue. There is no onus of proof on the accused.

189 This issue had earlier been considered by the Supreme Court of Canada in *Morgentaler* (1975), supra. In that case Dr. Morgentaler had been charged with the substantive offence of unlawfully procuring the miscarriage of a female person contrary to s. 25 1 of the Criminal Code. The facts of the case were set forth in the dissenting judgment of Laskin C.J.C. at pp. 465-66 as follows:

The appellant was charged with performing an illegal abortion on August 15, 1973, upon a 26-year-old unmarried female who had come to Canada from a foreign country in 1972 on a student visa. She was without family or close friends in Canada, ineligible to take employment and also ineligible for Medicare benefits. On becoming apprehensive of possible pregnancy in July, 1973, she consulted a physician in general practice who referred her to a gynecologist. He confirmed that she was pregnant, but refused assistance to procure an abortion. On her own initiative she canvassed five Montreal hospitals by telephone and learned that if an abortion was to be performed she would have to bear the fees of a surgeon and an anaesthetist, and could envisage two or three days' hospitalization at $140 per day. This was far beyond her means.

Throughout the period following her apprehension and the confirmation of her pregnancy and until the abortion performed by the appellant, she was anxious, unable to eat or sleep properly, prone to vomiting and quite depressed. Her condition had an adverse effect upon her studies and it was aggravated by her being told that the longer she delayed in having an abortion the more dangerous it would be. One hospital offered her an appointment (which would result in her case coming before the therapeutic abortion committee) at the end of August, 1973, when she would be eight to 10 weeks' pregnant, She got in touch with the appellant at the suggestion of a hospital or hospitals that she had contacted. There is some discrepancy between her evidence and that of the appellant as to the scope and nature of the conversation between them when she visited his clinic where the abortion was performed. In this appeal I think it proper to accept the evidence of the appellant who testified that his discussion with her went beyond asking whether she had previously had an abortion, when she realized she was pregnant and what his fee would be. He asserted that the conversation also encompassed reference to her country of origin, her vocation, her marital status and why an abortion was necessary. During the conversation the appellant said that he assessed the necessity of an abortion by reference to her state of anxiety, her inability to eat or sleep properly and the consequent adverse effect on her physical health. He also considered that her determination to have an abortion might lead her to do something foolish. The appellant was aware that his patient had approached a number of hospitals without success, but did not know that she had been offered an appointment at the end of August, 1973.

190 The majority of the Supreme Court of Canada in that case agreed with the conclusion of the Quebec Court of Appeal that the defence of necessity was not open to the accused on those facts. Pigeon J., in commenting on the reasons for judgment of the Quebec Court of Appeal, stated in part as follows at p. 482:

The views expressed by the other judges were not significantly different on this question. As I read them they were all of the view that there was no evidence of the urgent necessity which, as the Crown conceded may, in very exceptional circumstances, justify a violation of the criminal law, this being a common law defence preserved by s. 7(3) of the *Criminal*

Code. Before this Court, nothing was said that would tend to show that there was any evidence of an urgent necessity for effecting the abortion in disregard of s. 251, *Criminal Code*.

191 In more extended reasons on this issue, Dickson J. stated at pp. 499-500:

It is, therefore, clear that a medical practitioner who wishes to procure a miscarriage because continued pregnancy may endanger the life or health of his patient may legally do so if he secures the certificate mentioned in s. 251(4)(*c*). *The defence of necessity, whatever that vague phrase may import, does not entitle a medical practitioner, in circumstances of time and place such as those under consideration, to procure an abortion on his own opinion of the danger to life and health*.

Assuming the theoretical possibility of such a defence in the present case, it remains to be seen whether there is evidence to support it. Amid the general imprecision and philosophic uncertainty discernible among the authors as to reach and effect of a defence of necessity, the most definite assertion would seem to be that found in Kenny's *Outlines of Criminal Law*, 19th ed. (1966), where the author says, p. 73:

> Probably no such defence can be accepted in any case (1) where the evil averted was a lesser evil than the offence committed to avert it, or (2) where the evil could have been averted by anything short of the commission of that offence, or (3) where more harm was done than was necessary for averting the evil. Hence it is scarcely safe to lay down any more definite rule than that suggested by Sir James Stephen, viz. that 'it is just possible to imagine cases in which the expediency of breaking the law is so overwhelmingly great that people may be justified in breaking it; but these cases cannot be defined beforehand'.

Kenny says, p. 72:

> Yet, though theoretical writers have been willing to accept this ground of defence, there is no English case in which the defence has been actually raised with success;

Turning our attention to Kenny's (2), we must ask whether the evil averted could have been averted by anything short of the commission of the offence. This raises the question of the urgency of the operation performed by the appellant and whether the appellant could have complied with the law. *A defence of necessity, at the very least must rest upon evidence from which a jury could find (i) that the accused in good faith considered the situation so emergent that failure to terminate the pregnancy immediately could endanger life or health and (ii) that upon any reasonable view of the facts compliance with the law was impossible*. [The italics are mine.]

And at pp. 502-503:

The appellant conceded that from 10:00 a.m. until noon on the day in question he had completed six abortions. The evidence also disclosed that at the time of the operation Verona Parkinson was six to eight weeks' pregnant, leaving some four to six weeks before completion of the first trimester of pregnancy, and that she had an appointment with the Montreal General Hospital for August 28, 1973, 13 days after the appellant performed the abortion. The risk attendant upon abortion would have become greater the longer Verona Parkinson waited. Perhaps that is some evidence of urgency, but it does not go to establish impossibility.

Upon this evidence I think it perfectly clear the Court of Appeal did not err in concluding there was on the record little evidence of real and urgent medical need. More important, in answer to the question: "Was there any legal way out?" I think one must say that evidence from which a jury could conclude it was impossible for appellant to comply with the law is wholly wanting. The plain fact is that appellant made no attempt to bring himself within the bounds of legality in deciding to perform this abortion. Appellant failed to establish the second condition which Kenny says must be satisfied before the defence of necessity can be accepted in any case. I would hold, therefore, that the defence of necessity was not open to the appellant.

192 This is not a case where a physician is attended upon by a patient whose condition is such that the physician in good faith considers the situation so emergent that failure to terminate the pregnancy immediately could endanger the life or health of the patient and upon any reasonable view of the facts compliance with the law was impossible. That was the issue in the earlier cases involving Dr. Morgentaler, reference to which played such an important part in this trial and yet which really were quite irrelevant to the charge of conspiracy which the respondents faced.

193 Taking the most favourable view of the evidence for the defence in this case, the respondents were dissatisfied with the present law relating to abortions in Canada. They believed that every pregnant woman should have the freedom of choice as to whether to have an abortion or not. They thus agreed to establish a free-standing clinic. They agreed to procure miscarriages for female persons who had been rejected by a therapeutic abortion clinic on the basis that the continuation of their pregnancies would not endanger their life or health. They also agreed to perform miscarriages for pregnant women in Metropolitan Toronto who certified that they could not get a therapeutic abortion within a reasonable time. The statements to that effect were taken at face value. For those outside Metropolitan Toronto the fact that they had travelled some distance to attend the clinic was considered evidence in itself that they could not obtain a therapeutic abortion within a reasonable time, whether they were eligible for such abortion or not. They further agreed to procure miscarriages for female persons who did not desire to attend a therapeutic clinic because they found the procedures at such clinics to be distasteful. Evidence was tendered to show that many women in Ontario left the province to obtain abortions elsewhere, including Dr. Morgentaler's free-standing clinic in Montreal. They also agreed to procure miscarriages for all pregnant women in their second trimester on the theory that the procedures at the Morgentaler Clinic were safer for such women than the procedures carried out in a hospital.

194 It was their further contention that, notwithstanding the requirements of the Criminal Code, hospitals were unnecessary for the procuring of a miscarriage.

195 Dr. Morgentaler testified that any delay in carrying out the medical procedures increased the risk to life or health, although there was no evidence to suggest that the procedures adopted in hospitals in Ontario for procuring miscarriages exposed the patients to any serious risk to their life or health.

196 In short, the respondents admitted entering into an agreement of a global nature to procure miscarriages of all female persons who had made the decision to terminate their pregnancies. The medical procedure was to be carried out in a clinic which was not a hospital accredited by the Canadian Council on Hospital Accreditation or approved by the provincial Minister of Health, and there was to be no therapeutic abortion committee. Thus, the evidence for the defence supported the allegation of the Crown that the respondents had agreed to procure miscarriages of female persons contrary to s. 251 of the Criminal Code.

197 A detailed reference to the evidence in this case is not necessary. The position of the defence was made clear by their counsel in his address to the jury before calling evidence when he stated in part as follows:

> This is a case about personhood. This is a case about the security of the person, about liberty and about cruel and unusual treatment of women in this province. This is a case about abortion. Notwithstanding what some might say, that is precisely what this case is about, and it is sad, in a way, to discuss that particular subject and the subject of the dignity of women in a criminal trial setting. It is inappropriate. Nevertheless, this is where we carry out that discussion ...
>
> It is the position of the defence that there is no conspiracy here. There is merely a desire to bring a wanted and needed service, a medical service, a medical procedure, to women who, in turn, want and need that procedure. That is what this case is all about and we have to discuss it in terms of an indictment filed in the Supreme Court of Ontario signed by Alec Cooper, Crown counsel, an agent for the Attorney General.
>
> It becomes a public matter, a matter that is essentially private; a matter that should remain private is now public and it is public because the law enforcement agencies have prosecuted three doctors.
>
> The defence will attempt to show that what was done in Ontario in the opening up of this clinic was necessary, was justified, was a right and a decent thing to do to protect the dignity and security of the person of the women involved — to show that

it is necessary that women have a facility to go to outside of a hospital. They don't want to be in a hospital, they shouldn't have to go to a hospital, provided they get a very high standard of medical treatment — that they should not have to suffer the indignity of going before, on paper only, a Therapeutic Abortion Committee, where three doctor's review their case, three people they have never seen — three physicians who don't have to be in active practice, in the sense they don't have to be at the hospital, they don't have to be obstetricians and gynecologists, they can be pathologists or lab people. They get an opportunity to sit there, if there is a committee, and decide whether or not a woman should or should not have a therapeutic abortion after the decision has been agonized over by her, after she has consulted her physician, after she has probably consulted with her religious advisor and she has decided that for her, in her life situation, that this private matter should result in therapeutic abortion and then she has to go parading through the system — and you will hear about parading through the system. You will hear from people who work in Ontario ...

And you will hear about the Morgentaler Clinic in great detail, you will hear about the care and the dignity with which women are treated — how no one: is forced to have an abortion, but if they want one it is available, at an early time, where the dangers are less, the dangers of complications are greatly lessened by early treatment, as in many medical procedures; and keep in mind also when the evidence is going in that that is what we are talking about: medical procedures, not people sitting down to conspire to rob a bank, but medical procedures.

You will hear from people in the province of Quebec who are licensed physicians and who are also government employees working in governmentrun clinics for the last several years. You will hear from those physicians and you will hear them describe how they don't work in hospitals and there are no committees and women are given assurance from that very first telephone call that if they indeed decide to continue with their decision, their decision to have a therapeutic abortion, it will be available. That is some of the evidence that will be called ...

Notwithstanding the number of abortions performed, however large that number may seem to you, there is an additional need that is not being met in this province — women being forced to go outside the province, and for those who can't afford to go outside the province, you will hear about some of those situations. So keep in mind, when the evidence is called on behalf of the defence that doesn't have to be called, and the fact that it is called will indicate to you how important the defence thinks that evidence is to show necessity, to show justification for the acts done in Toronto.

The situation in the United States has changed dramatically in the last 10 years, 12 years, by reason of decisions of the Supreme Court of the United States. You will hear about the growth of abortion clinics throughout the country. You will hear about safety factors involved in establishing those clinics and about abortions being done in the first trimester and you will hear about abortions being done only in hospitals in the second trimester until a court case two years ago in the Supreme Court of the United States and now abortions in the second trimester can be performed at what has [sic] been called "free-standing clinics". "Free-standing" is a term that is used in describing a clinic that is away from a hospital. It can be a clinic for any purpose, for any purpose at all, it can be a free-standing clinic.It doesn't need all the bookkeeping facilities of a grand hospital, it is cheaper to the taxpayers, it is more readily accessible to the individuals who find the need to go there and, as you will hear, for teenagers who hate hospitals for any reason, it will mean that they will be able to get the abortions that they want at an earlier stage, thereby making it safer for them.

Hopefully, during this time you will appreciate that the evidence that is being called is an attempt to prove, through a microcosmic look at the system — obviously the evidence can't go on endlessly, that would be unfair to you, it would be unfair to the client, it would be unfair to the system — so we have to attempt, and what the defence will attempt to do is to show through about a dozen or so witnesses the system as it operates in Quebec, the system as it operates in the United States, the system as it operates in Ontario, in order to show that it is necessary and it was necessary to open a clinic such as the Morgentaler Clinic in Toronto.

198 In his closing address to the jury, about which more will be said later, counsel for the respondents continued the same theme and defined the issue for the jury as follows:

> This case is an important case and I think, there is no doubt in my mind, at least, l know that you will realize that what is at stake here is not merely the proving of ingredients of a Criminal Code offence. What is at stake here is the question of whether women in Ontario and in the rest of Canada ought to be entitled if they so choose to have a safe, medical procedure at a place where they feel more comfortable and where it is safe: at a clinic.
>
> The issue is whether those women who have made the very painful decision — make no mistake about it — there is no evidence in this case, and I would be shocked to learn of any evidence that existed, that any woman comes to the decision to have an abortion lightly. It is a very private matter: a matter between her, herself, her doctor, herself, and her conscience and her religious advisor, her boyfriend, whatever. Very private. What the law does, in my submission, is it rips away the privacy. It takes away the right of a woman to decide, because that decision is ripped out of her hands. That decision is transferred to a group called a "Therapeutic Abortion Committee", which, as you heard, has absolutely no medical value whatsoever. She is forced to go to a hospital. Teenagers don't like hospitals. Dr. Diane Sachs said they are afraid of hospitals and most people don't like hospitals.

199 The evidence tendered by the defence at trial was largely as outlined in defence counsel's opening address to the jury. A synopsis of the evidence of Dr. Morgentaler was accurately set forth in the respondents' statement as follows:

> 6. ... In the speech [given in November 1982], Dr. Morgentaler gave evidence of women bearing unwanted children and of women being forced to travel great distances because they are deprived of medical services for abortions by operation of section 251 of the *Code*. He also stated that governments don't care and that he has personally tried to change the law without success, and has been told that the government won't change the law. He stated that he came to Ontario because of the need for services. At that time, he had six Ontario women per week coming to his clinic in Montreal for abortions who were unable to obtain them in Ontario, and that to his knowledge many more were going to the United States for abortions. He stated that he was opening a clinic in Toronto so that women would not have to go elsewhere or suffer undue delay or danger by operation of section 251 of the *Criminal Code*, and therefore that he was coming to protect women's health, and that he was justified in doing so, and that his actions were legal by reason of the defence of necessity ...
>
> 7. Dr. Morgentaler himself gave evidence of the continuing need for abortion services in Canada beginning in the 1960's when, as a representative of the Humanist Movement, he presented a brief to a House of Commons committee to change the abortion law. He stated that he began doing abortions in 1968 when people came to him, and that at that time there appeared to be a real "epidemic" and a need for the service. Dr. Morgentaler testified that he has continuously lobbied governments since 1967 to have the abortion law changed.
>
> Dr. Morgentaler described the need and desperation of women who must go through the ordeal of long trips, of stress, of fatigue and of the indignity which they suffer as a result of the operation of section 251 of the *Criminal Code*. He stated that he offered his Toronto clinic as a pilot project to the Ontario government but was turned down.
>
> Dr. Morgentaler also gave evidence of the safety of the clinic, stating that it was medically safer than a hospital both from a psychological and physical point of view. *He stated that he treats women who are rejected b,v committees or women who at eleven to thirteen weeks' gestation do not wish to wait for the more dangerous, painful and traumatic saline procedure. Further, he treats women who do not want the humiliation and degradation of going through the committee system where they are often forced to see psychiatrists and to be examined by several physicians*.
>
> 8. Dr. Morgentaler also gave evidence of his continuous lobbying efforts to get the law changed.
>
> 9. In cross-examination, Dr. Morgentaler testified that the situation is getting worse, with more Ontario women going to his Montreal clinic for an abortion. He stated that the number is now nine women per week who come to his clinic who are unable to obtain the service in Ontario, and he therefore felt that something had to be done to help these women, and he reactivated his idea of opening a clinic in Toronto ...

11. Dr. Morgentaler testified that he opened the clinic to preserve the family, dignity, life and health of women which is jeopardized by a law which endangers the life and health of women and subjects them to indignity and delay. He confirmed that doctors feel that their hands are tied in Ontario by operation of the abortion law. [The italics are mine.]

200 Dr. Morgentaler's position at trial was crystallized in the following exchanges with Crown counsel:

Q. Doctor, not all the women who came to your clinic in Montreal were rejected by abortion committees in Ontario?

A. No, not all. Some were. And they told me so. Some didn't want to go through the process, the hassle of having to consult a doctor, be referred to a gynaecologist, appearing before a committee, having to plead they are insane or suicidal — this whole kind of indignity and humiliation and delays. This is why I get more and more women from Ontario who come in the second trimester.

Q. In Ontario you were prepared to do abortions on women who may not have been rejected by therapeutic abortion committees?

A. Well, the guidelines set out, set it out straight: we were going to do abortions for women who could not get into the system.

Q. Oh, you are saying that not just for women who were turned down, women who thought they couldn't get in the system?

A. That is correct. The idea was to provide a service for women who could not get it within a reasonable time, within the existing system and the additional idea was to provide a pilot project for the medical profession and for the Minister of Health to see how abortions can be done safely in a setting of compassion and warmth and understanding and caring for these women so that eventually this type of pilot project, like the C.L.S.C.s in Quebec, could be spread around the province.

Q. What if a woman said:

> I didn't want to bother with the hassle and red tape in Ontario.?

A. Well, the guidelines were very strict on that. We knew we would be possibly prosecuted and inquiries had to be made, a counsellor had to have an interview with each prospective patient, and documented on the file that attempts had been made to obtain an abortion within the system, and it was only if the delays were such that they would endanger the woman's health that she would be accepted.

Q. I know what it says on paper, because that is the defence of necessity: if a woman came in — be above board about this — and she wanted an abortion because she didn't want to bother with the red tape of the system, you would have allowed it to be done or done it yourself?

A. These were the guidelines and I gave instructions that these guidelines be followed.

Q. So that, if a woman came in who didn't fall within the categories you have mentioned and said: "I want an abortion. I don't want to be bothered with the red tape," you instructed your employees to turn her away?

A. Yes. The woman would be advised there were hospitals within the area [where she] could make an application to hospitals that provide abortion; *if she was satisfied she could get an abortion within the very short period of time, she had the option to go to the hospital and not pay any thing rather than come to the clinic*.

Q. What if these women were in the second trimester and didn't want to bother?

A. That is a different story. A woman in the second trimester would be exposed in Ontario to a saline abortion, ten times less safe than the "D and E" procedure we provide in our clinics in Montreal. It is obvious in a case like this we would do

a tremendous service to this woman by offering her a method which is ten times safer than what she would have had in an Ontario hospital after waiting five or six weeks before she could get it.

Q. There are doctors in Toronto who do D and Es?

A. I am not aware of any doctors in Toronto that do D and Es beyond 14 weeks.

Q. So you are only dealing with women from 14 to 16 weeks then?

A. There is only one or two, I believe, that go up to 14 weeks; most of them stop at 12 whereas we do from 12 to 16. You have this grey zone, and Dr. Grimes was talking about it, where the grey zone, based on erroneous medical knowledge that if a woman had reached 12 weeks she can no longer have a vacuum suction curettage, then she was instructed to wait another four weeks until she reaches 16 weeks and then she was subjected to a saline abortion.

This is very poor medical practice. It exposes women not only to tremendous emotional stress by waiting but real danger of tremendous complications and even possible death as a result of that procedure whereas if she can be accepted by the D and E method up to 13, 14, 16 weeks, her problem is solved. She does not have to wait that long. The stress is diminished and the danger to health and life.

Q. You would accept a woman at your Toronto clinic for an abortion who thought she couldn't get into the system, is that correct?

A. Who had documented evidence or proved that she could not get into the system, yes.

Q. What if she just said —

A. Well, we usually trust people in our clinics.

Q. If they say they couldn't —

A. We don't insist on all kinds of big certificates from five different specialists. We trust people. We are there to help people and we trust people.

Q. That is why I am surprised when you said "documentation".

A. Yes. Well, the guidelines are very clear on that: it has to be documented that the woman could not get into the system, and, as I said, in case of women coming from Sudbury who makes the long trip from Sudbury to Toronto, it is clear and obvious that she would come here because she could not get into the system or a woman travelling 700 miles from an outlying district in Ontario if she came down to Toronto; it is the same thing.

Women from Toronto, women from outlying districts, we try to accommodate people to subject them to the least possible stress.

It is a stressful thing as it is for a woman to make that decision. It is important she be given as much understanding and compassion and care as possible under the circumstances.

Q. Was it envisaged that your clinic in Toronto would refer women to Buffalo at all, where same-day abortions were available?

A. I don't remember anything about it. The idea was to establish a clinic here so women would not have to go to Buffalo or Montreal or anywhere else ...

Q. If there is a law of Canada that abortions have to be done in hospitals after a therapeutic abortion committee approves it, and you deliberately decide to do them other than inside the legal requirements, then you have decided to break the law.

> A .I decided to technically break the law in order to provide a necessary, necessary service for women in order to protect their life, their health, and their dignity.
>
> Q. At least you agree that, even if, even if it is technically, you decided to break the law?
>
> A. Yes. I decided to technically break the law in order to provide a necessary medical service and I felt justified in doing so in order to diminish suffering. I am sensitized to suffering. I have suffered myself in my life. I was in a German concentration camp. I know what suffering and injustice is. I am sensitized to injustice. I am sensitized to suffering. If 1, with my person, can do something to relieve suffering of people, I feel justified in doing so ...
>
> This is my major point, and let no one interfere with that, that women have a right to dignity, to security, to liberty of the person and liberty to make these choice:s for themselves. When they ask the medical profession for help, it should go out and say yes, we will help you under the best medical conditions. We offer you what is available: the most modern techniques in an atmosphere of caring and compassion. This is my position. [The italics are mine.]

201 With respect, we think that the defence of necessity was misconceived. As has previously been noted, before a defence of necessity is available the conduct of the accused must be truly involuntary, in the sense ascribed to that term in the precedents cited. There was nothing involuntary in the agreement entered into in this case by the respondents. As stated by Fletcher, Rethinking Criminal Law (1978), pp. 811-12:

> Planning, deliberating, relying on legal precedents — all of these are incompatible with the uncalculating response essential to "involuntary" conduct.

202 Furthermore, there must be evidence that compliance with the law was demonstrably impossible, and that there was no legal way out.

203 Not only did the defendants fail to make every reasonable effort to comply with the law, but they consciously agreed to violate it. Their dissatisfaction with the state of the law, although perhaps relevant to the issue of motive, afforded no basis for the defence of necessity.

204 The constitutional validity of s. 251 having been upheld by the trial judge, it was not an issue for the jury to weigh the merits of the law enacted by Parliament and to be invited to resolve the public debate on abortion. Yet, it was on the basis of the dissatisfaction with the law that the defence sought to rely on the legal defence of necessity. On this issue the trial judge accurately placed before the jury the theory of the defence as follows:

> I am dealing now with the next objection. The next objection, in dealing with the theory of the defence, I said, and I better read it to you: It is the theory of the defence that women in Ontario who find themselves with an unwanted pregnancy and who desire an abortion often discover that this medical service is unavailable to them due to the present state of the law and because of the necessity of having to obtain an abortion at a hospital with the approval of a therapeutic abortion committee, and that, even when the service is available, women who have qualified for an abortion are required to suffer delay which increases the risk to them, and I said to their "health". I should have said "health or life".
>
> The theory of the defence is that this situation was an emergency so pressing and so perilous that it was involuntary and that the accused had no other choice than to agree to open a clinic, in effect.

205 With respect, the defence of necessity is not premised on dissatisfaction with the law. The defence of necessity recognizes that the law must be followed, but there are certain factual situations which arise which may excuse a person for failure to comply with the law. It is not the law which can create an emergency giving rise to a defence of necessity, but it is the facts of a given situation which may do so.

206 This was not a case where two or more doctors agreed to procure the miscarriage of a female person who was in immediate need of medical services in order to avoid danger to her life or health, and in which case the defence of necessity

would be a live issue. The defence of necessity cannot be resorted to as an excuse for medical practitioners in Canada to agree in the circumstances of this case to procure abortions on their own opinion of the danger to life or Health and at a place of their own choosing in complete disregard of the provisions of s. 251 of the Criminal Code.

207 Although it was for the jury to weigh the evidence, it is the function of an appellate court to examine the record with a view to ascertaining whether there is any evidence to support a defence. On the record before us, including the evidence tendered by the Crown as well as for the defence, the defence of necessity was not open to the respondents, and the trial judge erred in leaving that defence to the jury.

Judge's Charge to the Jury

208 As an alternative to their submission that the learned trial judge erred in law in leaving the defence of necessity to the jury, Crown counsel submitted that even if it might be said that there was some evidence upon which the defence of necessity could have been placed before the jury, the learned trial judge erred in leaving to the jury evidence which he held to be relevant to that defence and upon which they could find a verdict of not guilty by reason of necessity.

209 For the reasons expressed above, in our opinion there was no evidence to support the defence of necessity in this case, but, even if there were, we think the learned trial judge erred in the manner in which he left this issue to the jury. Although the trial judge accurately and carefully instructed the jury as to the legal test of the defence of necessity, he erred in instructing the jury as to how that test could be met on the evidence before them. He painstakingly outlined all the evidence tendered by the defence, but erred in instructing the jury, in effect, that all the evidence tendered by the defence was relevant to the defence of necessity.

210 Nothing is to be gained by reviewing the charge in detail. Briefly stated, the learned trial judge instructed the jury in part that the evidence that some female persons go outside the province of Ontario to get an abortion, that the present abortion laws created inequality of access to rich and poor, and that there was dissatisfaction with the state of the law were all relevant to the defence of necessity.

211 He further instructed the jury that evidence that a free-standing clinic afforded safer medical procedures than an approved or accredited hospital could be considered by them as evidence of an emergency and thus relevant to the defence of necessity.

212 In that respect he instructed the jury as follows:

> On the point of emergency, I think I have already referred to it, but if I haven't I will again, that in some hospitals in Canada general anesthetic is used in first-trimester abortions when it is not needed. In free-standing clinics, there they use a local anesthetic, which is safer. That may be because hospitals require that certain operations have general anesthetics and that is the decision of the hospital board and the doctor performing the abortion may think the local anesthetic is better, but if he wants to operate in that hospital he has to go by the rules of the hospital and use the anesthetic.
>
> I don't think there is much argument about an anesthetic increasing the risks in various operations, not just abortions. I think it is common knowledge people do have to be careful about the anesthetic. They may suffer after-effects from it, or danger, even, if the doctor is negligent, and it could result in death.
>
> What, in effect, the defence is saying is: This evidence may go to show an increased. risk factor by reason of the procedure being done in a hospital.

213 He further instructed the jury that the acquittals of Dr. Morgentaler when he had earlier been charged with the substantive offences of illegally procuring an abortion and the fact that he was operating a free-standing clinic in Quebec without prosecution, and that free-standing clinics were said to be generally beneficial and permitted in the United States and in Quebec were all relevant to the defence of necessity.

214 He further left to the jury that the good faith of the respondents, although a fact.or, was in itself evidence which would avail them of the defence of necessity when he instructed the jury as follows:

> I have told you and read to you what the test of emergency was. In case there is any doubt about it, I will rephrase it another way for you to consider when considering whether the defence of necessity applies. You must ask yourselves whether at the time of the formation of the agreement, that is, whether at the time of the planning to set up a clinic the doctors in good faith considered the situation to be so emergent that failure to agree would endanger the life or health of the woman who seeks to terminate her pregnancy but cannot obtain an abortion or who cannot obtain one within a reasonable amount of time.

215 Furthermore, he erred in instructing the jury that the very fact that female persons were attending the Morgentaler Clinic was relevant to the legal defence of necessity when he instructed the jury as follows:

> Constable Kelman, I referred to his evidence about finding documents and so on at the clinic in reference to the conspiracy charge. But from some of those there are documents that you may consider in deciding whether they support the defence position that there was delay, such as the very fact that people were seeking abortions might indicate that there was a need for abortions.

Thus he confused an overall need for medical services with the defence of necessity.

216 He further erred in instructing the jury that they could find that there was "no legal way out" for the respondents because Dr. Morgentaler had exhausted his efforts to have the law changed when he instructed them as follows:

> Dr. Morgentaler's statement that he made on the tape [was] that the situation was an emergency and someone had to act. That is the defence. Counsel for the defence, in his address to you, said: "He lobbied; Parliament wouldn't act. Dr. Morgentaler lobbied, but there was no action. The obstacle was created by the law." So there are some different inferences than what I stressed. "It was necessary to bring this service to Ontario." But counsel then said, though: "The essential issue is whether you agree or disagree with abortion." That might go to motivation.

217 The fundamental error, in our opinion, was that the trial judge failed to distinguish between the defence of necessity as it may apply to a situation where a doctor is confronted with an emergency relating to a particular patient and an agreement to procure miscarriages contrary to law with respect to all women who desired to terminate their pregnancies.

218 As has been noted, the merit of the law was not a matter for the jury to consider on the issue of necessity. Yet, in many respects, the manner in which the learned trial judge related the evidence to the defence of necessity invited the jury to acquit the respondents if they accepted the evidence tendered on behalf of the defence as to the unsatisfactory state of the law.

219 We therefore agree with the alternative submission of counsel for the appellant that, if there were evidence to support a legal defence of necessity on this record, the learned trial judge erred in instructing the jury as to the manner in which that issue could be resolved.

Address to the Jury by Defence Counsel

220 Crown counsel contended that the submissions of the defence in the address to the jury contained a serious misstatement of the law calculated to cause the jury to proceed in the belief that they had the right to disregard the instructions of the trial judge as to the law applicable to the offence with which the accused were charged.

221 It is clear that throughout his address to the jury defence counsel forcefully urged them to find that s. 251 of the Criminal Code was bad law because generally it was unfair and harmful to women who wished to undergo an abortion. In support of his submissions he relied upon evidence which he had called to that effect. Normally such evidence would not be admissible. One cannot defend a criminal case by putting the law on trial and asking a jury to condemn a decision of Parliament in enacting or continuing a law because the jury thinks that it is, at the moment, bad law. However, this evidence, which was perhaps admissible in the absence of the jury to consider the issue of the constitutional validity of the section, was admitted at the trial as relevant to the defences of justification and necessity. As we noted, it was the theory of the defence that the law was bad and that it caused a global emergency in Ontario. This was the justification for the agreement between the accused to perform the abortions at their clinic, and was the foundation of the defence of necessity. But underlying the whole address was a powerful

plea to acquit the accused because the law was bad law. Defence counsel urged that it was the right of the jury, notwithstanding the direction of the trial judge as to the law applicable to the offence, to consider that law and decide that it should not be followed and applied. This was the principal theme.

222 The address was a long one, but it can be summarized in this way. Defence counsel submitted to the jury that the issue was not merely the guilt or innocence of the three accused, but, because they "represented" Canadian women, the question was whether or not women in Ontario and the rest of Canada should be entitled to have an abortion at the place of their choice. Relying on the evidence to which we have referred, he urged the jury to find that the law was bad law, harmful and unfair. He forcefully criticized the government of Canada for failing to change the law and the government of Ontario for failing to permit the establishment of clinics and for prosecuting under the section in question. He submitted that politicians who were responsible to the people who elected them would do nothing or, alternatively, would take forever to change the law because they were obliged to give reasons in Parliament for their decision. He submitted that it was up to the jury to change the law. He said this was so because the jurors could not be compelled to give reasons for their verdict. They were the proper tribunal to change the law by refusing to follow and apply the law if they thought it was bad law. By so doing, the jury would tell the government to change the law. This was the theme of the address from beginning to end, and so, read as a whole, it was far stronger than simply telling them, as he did at one point: "I think you have to say to yourselves: 'Is this a good law or a bad law? Is this a law which should be followed or should not be?' " And then he said:

> The judge will tell you what the law is. He will tell you about the ingredients of the offence, what the Crown has to prove, what the defences may be or may not be, and you must take the law from him. But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn't be applied.

223 There was no objection taken by Crown counsel to the submissions of defence counsel in his address to the jury either during or after the address. Indeed, rather than objecting, Crown counsel chose to answer each of the issues raised in the address when he went to the jury. However, he emphasized to the jury that it was for Parliament and not for juries to pass the laws and to change them. He stressed that the jury was not entitled to say they would not apply the law because they disagreed with it. He said:

> A judge isn't entitled to say that he will not enforce the law because it disagrees with his or her personal beliefs. He may think the law is perfectly stupid, but that is not his duty, nor is it for you to say the values reflected in our abortion laws are wrong. It is not for you to say our Members of Parliament were in error. You are not Members of Parliament authorized by the electorate of this country. And it is wrong for Mr. Manning to say if you do not like the law you cannot enforce it. It is not our system, never has been and, I hope, never will be. To acquit the accused in this case you have to say abort:ion is an offence that is above the rest of the offences in the Criminal Code, that Dr. Morgentaler has a special status, that he is above the law.

224 It is clear from the trial judge's charge that he regarded what was said by defence counsel as a serious misstatement of the law. In our opinion, he was right. It was of such gravity as to place the whole trial in jeopardy. No doubt, in an effort to save the trial rather than to declare a mistrial, the trial judge went some distance to contradict what defence counsel had told the jury and, of course, to correctly instruct them that they must apply the law as he gave it to them to the facts as they found them in rendering a true verdict. He specifically told the jury that they could not ignore the law and do what they wanted. He told the jury that it was wrong for Mr. Manning to say that in reaching their verdict they should have regard to the consequences of their verdict. They were not legislators and were not deciding the case to send a message to the government that the abortion laws were good laws or bad laws.

225 In this court the respondent argued that, having regard to the forceful direction given by the trial judge, the appellant's submissions did not raise any question of law alone which could be determined by this court. He contended that the appeal was simply an attempt to appeal a verdict which the appellant viewed as a perverse verdict when no such appeal was possible.

226 In our view, defence counsel was wrong in urging the jury that they had the right to decide whether to apply the law the trial judge instructed them was applicable. The defence submission was a direct attack on the role and authority of the trial

judge and a serious misstatement to the jury as to its duty and right in carrying out its oath. In our system, the authority and duty of the judge and jury in a criminal case is well understood and followed. No further elaboration is necessary than the statement of Lord Oaksey in *Joshua v. R.*, [1955] A.C. 121, [1955] 2 W.L.R. 8, [1955] 1 All E.R. 22 (P.C.). At p. 130, giving the judgment of the Judicial Committee, he said:

> It is a general principle of British law that, on a trial by jury, it is for the judge to direct the jury on the law and, in so far as he thinks necessary, on the facts, but the jury, whilst they must take the law from the judge, are the sole judges on the facts.

227 It is true that, because the jury is asked for a general verdict of guilty or not guilty, they have the power to bring in a verdict of acquittal which is perverse, in the sense that it "flies in the teeth of the facts and the law". This is perhaps more than the right to be wrong. But the jury has no right not to apply the law that the trial judge has instructed them to apply. Or, put another way, the jury has no right to do what they like according to their view of the law or what they think the law should be.If the jury has no such right, it is clearly wrong to tell them to the contrary. As long ago as *R. v. Shipley* (1784), 4 Doug. K.B. 73, 99 E.R. 774 at 828, Ashurst J. said:

> I admit the jury have the power of finding a verdict against the law, and so they have of finding a verdict against evidence, but I deny that they have a right to do so.

228 If it were otherwise, it would seriously weaken the system which our community relies upon for a true verdict on the only issue which the jury may properly consider, being the question of the guilt or innocence of the accused given into their charge on the offences specified in the indictment.

229 The same principles apply in the United States of America. *U.S. v. Moylan; U.S. v. Berrigan; U.S. v. Lewis*, 417 F. 2d 1002, certiorari denied 397 U.S. 910, 25 L. Ed. 2d 91, 90 S. Ct. 908 (1970), is a judgment of the United States Court of Appeals, Fourth Circuit. There the defendant appealed from her conviction. She contended in effect that the trial judge was wrong in not instructing the jury that they had the power to acquit even though the jury thought the defendant had committed the offence charged and also that the defendant's counsel should have been permitted to argue this was so to the jury in the face of the judge's instruction. After recognizing the power of the jury to acquit even if the verdict is contrary to the law as given by the judge and contrary to the evidence, so long as the jury is asked for a general verdict, the court upheld the decision of the trial judge and rejected these submissions. In so doing, the court said at p. 1006:

> The Supreme Court, in the landmark case of Sparf and Hansen v. United States, 156 U.S. 51, 15 S. Ct. 273, 39 L. Ed. 343 (1895), affirmed the right and duty of the judge to instruct on the law, and since that case the issue has been settled for three-quarters of a century.

The court referred specifically to a passage of Harlan J. at p. 1007, where he said:

> But upon principle, where the matter is not controlled by express constitutional or statutory provisions, it cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court ... We must hold firmly to the doctrine that in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence.

230 What was said there is apt here. The submission of defence counsel was a forceful plea to the jury to nullify a law passed by Parliament. The jury was told to exercise a right that the jury did not have, to determine not to apply that law in the face of the instructions given by the trial judge. In effect, this was a statement to the jury that they were the final arbiters of the law to be applied in deciding the guilt or innocence of the accused. This was a serious error in this trial and in our view it raises a question of law alone which can be determined by this court: see *Boucher v. R.*, [1955] S.C.R. 16, 20 C.R. 1, 110 C.C.C. 263. The trial judge sought to correct the error but, in our opinion, it is unrealistic to suggest that this was possible. The appellant Crown must succeed on this ground also.

Conclusion

231 From the foregoing it is clear that there were errors in law in the trial and they were substantial. The fact that an error in law has occurred does not of necessity entitle the Crown to have a verdict of acquittal set aside. We have taken into consideration that Crown counsel did not clearly object to inadmissible evidence being introduced during the trial, nor did he clearly take the position before the trial judge that the defence of necessity should not have been left to the jury until after the trial judge had charged the jury.

232 However, the errors at trial were so fundamental that there has been no trial according to law. The defence of necessity was not available to the respondents on the evidence in this case and yet the trial judge left that defence to the jury, and, from a practical point of view, it was the only defence in law which the trial judge left to them.

233 Furthermore, the jury were instructed that evidence was relevant to the defence of necessity when in fact it was irrelevant to that issue. In addition, the jury may well have been influenced by the serious misstatements of law by defence counsel in his address.

234 The Crown has satisfied the burden that in light of those fundamental errors the verdict cannot stand.

235 Accordingly, the appeal is allowed, the verdict of acquittal is set aside, and a new trial is directed.

236 Counsel for the respondents submitted that, whether they were successful on the appeal or not, they should be awarded costs. He was of the view that we had that power under s. 24(1) of the Charter. However, s. 610(3) of the Criminal Code clearly states that the court does not have the power to award costs in appeals such as the instant one and, in any event, we would not be disposed to award costs in this case.

237 We wish to say again, because there appears to be some misunderstanding on the part of certain segments of the news media as to the role of the court in this case, that we have not determined whether the policy of Parliament on this issue is good or bad, right or wrong. To repeat, that is neither our jurisdiction nor our function!

Appeal allowed; acquittal set aside; new trial ordered.

2004 BCCA 77
British Columbia Court of Appeal

R. v. Nahar

2004 CarswellBC 299, 2004 BCCA 77, [2004] B.C.W.L.D. 313, [2004] B.C.J. No. 278, 181 C.C.C. (3d) 449, 193 B.C.A.C. 217, 20 C.R. (6th) 30, 23 B.C.L.R. (4th) 269, 316 W.A.C. 217, 60 W.C.B. (2d) 497

Regina (Respondent) and Dilbag Singh Nahar (Appellant)

Donald, Saunders, Lowry JJ.A.

Heard: December 10, 2003
Judgment: February 18, 2004
Docket: Vancouver CA030015

Proceedings: affirming *R. v. Nahar* (2002), 2002 BCSC 928, 2002 CarswellBC 1459 (B.C. S.C.)

Counsel: J.M. Doyle for Appellant
K.J. Gillett for Respondent / Crown

***Lowry J.A.*:**

1 On May 19, 2001, Dilbag Singh Nahar stabbed his wife, Kanwaljeet Kaur Nahar, to death. He was tried and convicted of murder in the second degree before Mr. Justice Fraser [2002 BCSC 928]. The sole defence raised was that of provocation. The issues on this appeal are whether the learned trial judge erred in refusing to admit the opinion of a witness who he found was not qualified to give the evidence sought in support of the defence, and whether, in any event, Fraser J. erred in failing to take Mr. Nahar's cultural background into account in concluding that the defence of provocation was not available to him. It appears to me that the disposition of the appeal, if it were allowed, would be to order a new trial.

The Case As Tried

2 It is Mr. Nahar's contention that the proper verdict would be manslaughter. He maintains that he killed his wife in the heat of passion provoked by her conduct during a confrontation over what had been a history of disrespect and defiance on the part of Ms. Nahar. During the three years they were married, she is said to have smoked, consumed alcohol, and socialized with other men, generally behaving in a manner that was completely at odds with the culture and traditions of the Sikh community in which they were raised.

3 The trial judge put the case as follows:

> [4] Central to the case is evidence as to the shared expectations among the Sikh community, and the Indo-Canadian community at large, as to the proper conduct of a married woman and as to the importance attached to these expectations. The case for the defence, reduced to its simplest terms, is that the words and actions of [Ms]. Nahar, just before she was killed, amounted to a sudden and unexpected insult of such a nature as to be sufficient to deprive an ordinary person of the power of self control and that Mr. Nahar acted on that insult on the sudden and before there was time for his passion to cool. The testimony of Mr. Nahar was that [Ms]. Nahar spoke defiantly to him about her relationships with other men and then attempted to push him out of her basement suite.

4 Mr. Nahar immigrated to this country from the Punjab in 1995. About three years later, he returned to participate in an arranged marriage that was expected to facilitate the immigration of his wife's parents to Canada. He was 20 years old; his wife was 17. Although the marriage was arranged, at least to Mr. Nahar's perception, he and his wife had a loving relationship.

5 To begin, the couple lived with Mr. Nahar's parents, but things did not go well. Ms. Nahar was attracted to the company of other men and in time she began to associate with a group of young Sikh women who did not accept the conventional norms of their community that preclude married women from smoking cigarettes, consuming alcohol, and consorting with men. She was defiant and disrespectful, choosing to do as she pleased. Behaviour such as Ms. Nahar displayed can be expected to reflect adversely on both the woman and her husband in terms of their family relationships and standing in the Sikh community. It caused continuing confrontation with Mr. Nahar, prompting heated arguments between the two of them.

6 Ms. Nahar became pregnant soon after arriving in Canada. She ultimately ran away from Mr. Nahar's parents' home. She lived with his sister until the birth of their daughter, returned to her in-laws' home very briefly, and then ran away again, ending up in hospital where she was treated for depression for two months. She then moved with her baby into a basement suite in the fall of 2000.

7 Mr. Nahar soon moved into the suite and lived there until he was accused of assaulting his wife in January 2001 and a no contact order was put in place. The relationship was tumultuous. Ms. Nahar's behaviour and her defiance persisted. Arguments over her conduct were frequent and at times they became violent. She would swear and throw things. On one occasion, Mr. Nahar struck her causing her to suffer two black eyes. Mr. Nahar sought relief in the consumption of alcohol.

8 Despite the no contact order (which was ultimately set aside), Mr. Nahar went to his wife's suite, sometimes at her invitation, on many occasions. The continuing arguments resulted in his being told to leave, which he always did. On the night of her death, Mr. Nahar had been at his parents' home with the baby. He had consumed some alcohol. After having what he says was an affectionate conversation with his wife on the telephone, he went to see her. She let him in and he then engaged her in the same discussion about her behaviour over which they had argued so much. She walked from the living room into the bedroom, apparently to avoid the conversation, but he followed her there and back to the living room. At his trial, Mr. Nahar described what happened next as follows:

> . . . I continued talking to her as to why she goes out with boys, why she drinks. And she said, "What have you to do with it?" Then she started like swearing at me. Said, "Go, run away from here. I don't want to talk to you".
>
> And I said, "You don't need me. You need other men?" And she said, "Yes. I do go and I will go. You can't do anything to me. You can't stop me". Then I became angry and then I don't know what happened.

Mr. Nahar testified that his wife was trying to push him out the door of the suite defiantly insisting that he could not stop her and that she would "keep on going". Mr. Nahar says that his brain became numb and he became as if he were blind.

9 What he was apparently unable to remember was that he picked up a kitchen knife and stabbed his wife in the chest, puncturing her aorta, and then in the neck, cutting her jugular veins. Both wounds were fatal.

10 Section 232 of the *Criminal Code* provides:

> (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.
>
> (2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.
>
> [. . .]

11 The defence has been considered most recently by the Supreme Court of Canada in *R. v. Thibert*, [1996] 1 S.C.R. 37, 131 D.L.R. (4th) 675, 104 C.C.C. (3d) 1 (S.C.C.) and by this Court in *R. v. Gibson* (2001), 90 B.C.L.R. (3d) 247, 153 C.C.C. (3d) 465, 2001 BCCA 297 (B.C. C.A.). It consists of an objective and a subjective element. The first is that the wrongful act or insult suddenly inflicted must have been such as would have deprived an ordinary person of the power of self-control; the

second is that the accused acted on the sudden before there was time for his passion to cool, i.e., that his or her self-control was actually lost. The burden of proof rests on the Crown. It must prove that there is, on the evidence, no reasonable doubt that at least one of the two elements is not established.

12 The trial judge concluded that it was likely Mr. Nahar did not intend to kill his wife until the moment before he picked up the knife. He said he considered himself bound to entertain a reasonable doubt with respect to the subjective element of the defence. He then turned to the objective element and said:

> [33] But the law does not allow the determination of guilt or innocence to rest solely on the personality of the accused. It requires, before there can be an acquittal [i.e., a conviction for manslaughter], that an ordinary person sharing the personal characteristics of the accused would have been provoked [i.e., lost control]. As to this, I am satisfied beyond a reasonable doubt that even if the events of 19th May 2001 were as they were testified to by Mr. Nahar, an ordinary man would not have been raised to a heat of passion. It is not clear to me what kind of familiar insult offered up one last time might provoke the ordinary person, but what Mr. Nahar described does not measure up to it.
>
> [34] I find the accused guilty of second degree murder.

13 I first consider the admissibility of the opinion evidence that the trial judge rejected and then turn to the case argued on this appeal against his conclusion on the objective element.

The Opinion Evidence

14 The witness who was called to give his opinion was Dr. Cameron Vickram who describes himself as a Registered Psychotherapist. He and Dr. David Wong, a Registered Psychologist, operate a clinic in Surrey, being one of the Lower Mainland Family Treatment Clinics. They prepared a report after they interviewed Mr. Nahar and after he was subjected to psychological testing.

15 Although he is not a Sikh, Dr. Vickram was born in the Punjab in the same village as Mr. Nahar. He is associated with the Sikh community and is knowledgeable about its customs and traditions. But the trial judge refused to permit him to express what he understood was the opinion that was sought and which he described as an "assessment of the accused individually vis-à-vis his disposition to be provoked or as to how the accused individually fits into the cultural norms of the Sikh community". In Fraser J.'s view, Dr. Vickram was not sufficiently qualified to do so.

16 Fraser J. determined that Dr. Vickram is not a psychologist, is not registered in any known professional capacity in this province, and has no formal training in that field. He is a social worker. Fraser J. found Dr. Vickram's *curriculum vitae* to be a document on which it was difficult to place any reliance.

17 It is now accepted that Dr. Vickram was not qualified to express an opinion about Mr. Nahar's propensity to be provoked, but it is contended that, because he has special knowledge of the culture and traditions of the Sikh community, Dr. Vickram ought to have been permitted to express an opinion on the effect the conduct attributed to Ms. Nahar would have had on any married Sikh man in provoking him to violence. This is said to be so even though no attempt was made to adduce an opinion of that kind. In the course of seeking to qualify Dr. Vickram to express an opinion, counsel did ask him if he was able to express an opinion about the effect of such conduct on "any Sikh man, or indeed, this particular Sikh man". Dr. Vickram answered affirmatively saying he thought he had done so in his report.

18 In fact, his report, which appears not to have been shown to the trial judge, contains no expression of opinion about Sikh men generally. From the interview he conducted, Dr. Vickram did little more than chronicle the events leading to the stabbing from the time the couple were married, as relayed to him by Mr. Nahar. He simply commented that Ms. Nahar's behaviour caused Mr. Nahar "extreme embarrassment" in his community and "tremendous frustration" and "provocation".

19 In considering the admissibility of opinion evidence, it is important to recognize that such evidence is, of course, normally not admissible. Witnesses are generally not permitted to testify to the opinions they hold. The principal exception to that rule is

the opinion of an expert witness. Evidence of such witnesses is admissible to prove a relevant fact, or to prove relevant facts, where such cannot be satisfactorily proven in some other way.

20 However, it is only where it is necessary that such facts be proven by opinion evidence that it is admitted; it is necessary only where the subject matter of the opinion is beyond the common understanding of the trier of fact - where judge and jury cannot be expected to draw the correct inference from the underlying facts or come to a proper factual conclusion that is essential to the resolution of an issue based on those facts. Thus, to be admissible, the opinion of an expert must be both relevant and necessary and it must be proffered by a witness who is properly qualified to express it: *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419, 89 C.C.C. (3d) 402 (S.C.C.).

21 It is for this reason that, when seeking to adduce the opinion of an expert witness, it is important that counsel state what fact or facts the opinion is being proffered to prove. This is unquestionably the starting point to a determination that the opinion is both relevant and necessary. It cannot be overlooked. Clearly, if the fact or facts to be proven, though relevant, are not such that proof must be made by adducing the opinion, it fails to meet the threshold of admissibility straight away. No expertise, however impressive, can justify its being admitted into evidence.

22 Counsel should always state the fact or facts that an opinion to be tendered in evidence is said to prove. But unfortunately, that is not what happened in this case. At the outset of the *voir dire* that was conducted, counsel said only that the evidence of Dr. Vickram was being tendered to provide an opinion with respect to "the cultural characteristics of the accused to assist the court on the issue of provocation". Counsel did not state what fact the opinion would prove. Indeed, it is less than clear from the transcript that the trial judge was even told what opinion Dr. Vickram actually held. It is now said that what Mr. Nahar sought to prove was that, because of his cultural background, he, like other Sikh men, was more vulnerable to being provoked to the violence that took his wife's life than a person from a different cultural background would have been.

23 Mr. Nahar's vulnerability to being provoked was a relevant consideration, but I do not see on what basis Dr. Vickram was qualified to express any opinion in that regard. Most importantly, I do not consider it was necessary that Mr. Nahar's vulnerability be proven by opinion evidence.

24 The trial judge said that Dr. Vickram knew much more about the Sikh community than he knew, or that the citizens of this province could generally be expected to know, so that the requirement of necessity was satisfied. But, in my respectful view, that is somewhat beside the point. It is not enough that the witness know more about the subject matter of his testimony, but rather whether, once the factual basis has been established, the proper inference to be drawn on a question of fact that goes to a particular issue is within the common understanding of the trier of fact. The question must be whether, given a proper factual basis upon which to assess Mr. Nahar's cultural background, a conclusion that men like him would be more vulnerable to being provoked by the behaviour attributed to his wife than others would be is beyond common understanding. In the circumstances of this case, I do not see why that should be so. The question appears to me to be one that a judge would be entirely competent to answer.

25 There is one further related point that is taken on this appeal. While the trial judge did not permit Dr. Vickram to express any opinion, he did rule that he could "describe Sikh cultural norms as to the proper role of a wife" or, as clarified, "the cultural role of married women in the Sikh culture". It is now said that the ruling was too narrow because it was limited to questions about the woman's role and denied the defence the opportunity of adducing evidence about the relationship between men and woman in the Sikh culture, thereby precluding any questions about the effect of a married woman's social behaviour on her husband.

26 I do not, however, consider that the ruling placed any such restriction on the defence or that it was understood at the time to do so. Indeed the examination in chief of Dr. Vickram concludes with a series of questions directed specifically at the impact that a married woman's behaviour may have on her husband in the Sikh community.

The Objective Element

27 Insofar as it relates to the objective element, s. 232(2) of the *Criminal Code* provides that, for the purposes of the section, provocation is a wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power

of self-control. Mr. Nahar contends that, for various reasons, the trial judge erred in concluding that there was no reasonable doubt that an ordinary person would not have lost his power of self-control as he apparently did.

28 It is first said that the trial judge erred in addressing the subjective element before the objective. The contention, as I understand it, is that it was not open to him to have determined that there was reasonable doubt as to whether Mr. Nahar lost his self-control and then to have concluded that there was no such doubt that the ordinary person would not, in the circumstances, have lost his self-control. Fraser J. is said to have immediately erred by adopting a wrong analysis.

29 I consider there to be no merit in this contention. The two elements are separate and distinct. Each stands on its own and can be assessed in the order the judge finds appropriate in any given case. Certainly, on the authority cited, the usual approach is to assess the objective element first because, if it cannot be said that the ordinary person would have lost his self-control, it becomes unnecessary to assess the subjective element. But there is no requirement that a judge proceed in that way.

30 More substantively, it is said that the trial judge erred in his application of s. 232(2) of the *Criminal Code* in that there was a body of evidence which, in a consideration of the objective element, had to be assessed in order to determine whether an ordinary man, of the accused's background, would, in the circumstances, have lost his power of self-control. Perhaps more accurately, it is contended that, despite what he said was central to the case as quoted above, it is not clear from the reasons for his judgment that the trial judge took into account the implications of Mr. Nahar having been raised in the Sikh culture where behaviour of a married woman such as is attributed to Ms. Nahar is said to be particularly intolerable and embarrassing to a married man. It is said that, in the context of the case, the ordinary person must be a person from that cultural background to whom Ms. Nahar's ongoing behaviour, and what she said and did immediately before Mr. Nahar stabbed her, would have been as significant as it was to Mr. Nahar. This, it is said, Fraser J. was required to consider and it is not clear that he did so.

31 In *R. v. Gibson*, *supra*, at paras. 57 and 58, this Court relied on what was said in *R. v. Hill* (1985), [1986] 1 S.C.R. 313, 27 D.L.R. (4th) 187, 25 C.C.C. (3d) 322 (S.C.C.), by Dickson C.J.C. at pp. 324-25 (S.C.R.) and by McIntyre J. at p. 336 in stating that the purpose of the objective element was to define the boundaries of the conduct accommodated by the defence.

32 In *R. v. Thibert*, *supra*, Cory J., writing for a majority of three, discussed the development of the concept of the ordinary person in English and Canadian law, observing that the courts have moved from a narrow non-contextual approach to a broader assessment that requires the relevant background circumstances to be considered (para. 14) including the relationship between the deceased and the accused (para. 17). He drew in part on what was said by Dickson C.J.C. in *R. v. Hill* at pp. 331-32 that "particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test of provocation" and that the trier of fact should "assess what an ordinary person would have done if subjected to the same circumstances as the accused". Cory J. said that the ordinary person must be taken to have experienced the same series of acts or insults as those experienced by the accused (para. 18).

33 He summarized as follows at para. 19:

> In summary then, the wrongful act or insult must be one which could, in light of the past history of the relationship between the accused and the deceased, deprive an ordinary person, of the same age, and sex, and sharing with the accused such other factors as would give the act or insult in question a special significance, of the power of self-control.

34 Thus, in assessing the objective element, on what was said in *R. v. Thibert*, those factors that would give the wrongful act or insult a special significance to the accused are to be taken into account as being shared by the ordinary person. While that case involved no consideration of cultural background, factors that give an act or insult a special significance could be said to include the implications of an accused person having been raised in a particular culture.

35 *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C. C.A.) is a decision of this court that involved a Vietnamese man who suspected his common law wife of infidelity. He strangled her when she arrived home late one night refusing to say where she had been. His defence was provocation. He was tried and convicted of murder before a judge sitting with a jury. It was held that the jury was properly instructed not to consider the reaction an average Vietnamese male would have, as a result of his cultural background, to infidelity on the part of his wife. The accused had testified that his wife's behaviour had caused him to lose face and honour

and that it had a special importance to him because of his upbringing. There was other evidence that a wife's infidelity would be a great blow to the average Vietnamese male.

36 The case was of course decided before *R. v. Thibert* but the judgments in *R. v. Hill* were quoted at length. The conclusion was expressed at p. 38 as follows:

> I think it was proper for the jury in this case at bar to be told to consider the effect of the words ascribed to the deceased on the ordinary married man who, because of a history of the relationship between the spouses, had a belief that his wife was not being faithful to him. The fact that the husband was Vietnamese and came from a certain cultural background might have been relevant to the first question [the objective element] if a racial slur had been involved, but that is not the case . . . .

37 However, counsel make no reference to *R. v. Ly* on this appeal. It appears to be accepted that, based on Cory J.'s discussion of the objective element in *R. v. Thibert*, the ordinary person must have been one who shared Mr. Nahar's cultural background so that the implications of his being a Sikh, and having been raised in the Sikh tradition, were to be taken into account in measuring the gravity of the insult which is said to have caused him to stab his wife.

38 That being so, the question the trial judge was required to consider was not merely whether an ordinary married man would be severely distressed by the behaviour attributed to Ms. Nahar and her conduct just before she was stabbed. It was rather whether, having regard for the cause and duration of the couple's troubled relationship, an insult that carried the same emotional impact for an ordinary young married man of the same cultural background as it apparently carried for Mr. Nahar, would cause such a man to lose his power of self-control.

39 In my view, it was certainly open to the trial judge to conclude there was no reasonable doubt that, even taking into account Mr. Nahar's cultural background, the ordinary person would not in the circumstances have lost his power of self-control. Indeed, I consider that was the only sound conclusion. Further, from what Fraser J. said was central to the case at the outset, it appears clear to me that, in assessing the objective element, he was mindful of the evidence that bore on Mr. Nahar's cultural background.

40 In *R. v. Hill*, *supra*, Dickson C.J.C. made the point that the attributes to be ascribed to the ordinary person in any given case are a matter of common sense. He was addressing the question of what instructions must be given to a jury in that regard when, at p. 332, he said:

> I should also add that my conclusion that certain attributes can be ascribed to the ordinary person is not meant to suggest that a trial judge must in each case tell the jury what specific attributes it is to ascribe to the ordinary person. The point I wish to emphasize is simply that in applying their common sense to the factual determination of the objective test, jury members will quite naturally and properly ascribe certain characteristics to the "ordinary person".

By the same token, I do not consider a judge must articulate the attributes to be ascribed to the ordinary person in giving reasons for judgment where the defence of provocation is raised. It is a matter of the application of common sense in the circumstances established by the evidence.

41 It follows that I cannot accede to the contention that the trial judge wrongly applied s. 232(2) of the *Criminal Code* because he may not have considered the ordinary person to have come from the same cultural background as Mr. Nahar.

42 It is, however, said that there is doubt that he was correct in his consideration of the objective element for other reasons.

43 It is first said that a difficulty he expressed with a statement from a legal text quoted by Cory J. in *R. v. Thibert* leaves doubt that the objective element was properly assessed.

44 As part of his consideration of the subjective test, Cory J. said at para. 20:

> In *R. v. Tripodi*, [1955] S.C.R. 438, Rand J. interpreted "sudden provocation" to mean that "the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame" (p. 443). To this definition, I would add that the background and history of the relationship

between the accused and the deceased should be taken into consideration. This is particularly appropriate if it reveals a long history of insults, leveled at the accused by the deceased. This is so even if the insults might induce a desire for revenge so long as immediately before the last insult, the accused did not intend to kill. Glanville Williams adopts this position in his *Textbook of Criminal Law* (2nd ed. 1983). At page 530, he puts it in this way: "affronts over a long period of time inducing the desire for revenge do not preclude the defence of provocation, if immediately before the last affront the defendant did not intend to kill". He adds further that, "the last affront may be comparatively trivial, merely the last straw that makes the worm turn, so to speak".

45 In his assessment of the subjective test, the trial judge said that he interpreted the quote from the text to mean that, if made immediately before the homicide, an insult made many times before can amount to provocation. He said he found it difficult to "fit" that idea into the concept of "sudden" or "unexpected" provocation. It is now said that he erred in suggesting that it was the provocation that had to be sudden. It is said that it is the accused who must have acted on the sudden.

46 I consider the *Criminal Code* (s. 232(1)) to be clear in providing that both provocation and the accused's response (s. 232(2)) have to be sudden. The statement in the text quoted by Cory J. does not mean that repeated insults amount to provocation, but only that repeated insults do not foreclose the defence. There must still be a sudden, unexpected wrongful act or insult, however trivial it may be, that causes the accused to react on the sudden in a loss of his power of self-control.

47 In any event, I do not see how what the trial judge said in considering the subjective test bears on his assessment of the objective element.

48 It is then said that the statement the trial judge made at the conclusion of his assessment of the objective element quoted above was inconsistent with the burden of proof borne by the Crown. He effectively said that he was satisfied beyond a reasonable doubt that an ordinary man would not, in the circumstances, have been raised to a heat of passion and then he added that he did not know what last insult might have caused an ordinary person to lose his power of self-control. This is said to amount to a lack of clarity that impairs the conclusion that the Crown had proven its case beyond a reasonable doubt. It is said to be a doubt the trial judge did not have, but for a reason he could not express.

49 The statement is simply an expression that what, if anything, might have amounted to an insult in the circumstances that would have caused an ordinary person to lose his power of self-control was not apparent. It was not necessary to the judgment and certainly does not impair the conclusion that the Crown had proven its case beyond a reasonable doubt.

50 In this case, it was not contested that, after many months of confrontation over behaviour attributed to Ms. Nahar that Mr. Nahar understandably could not accept, what became their last confrontation led to violence as had on occasion happened in the past. Nothing that happened could have been unexpected to Mr. Nahar. His wife told him that she was going to continue to do as she pleased and that there was nothing he could do about it. She tried to push him out the door and he became angry, so much so that he apparently lost his power of self-control. It was entirely open to the trial judge to conclude as he did that a young married man faced with the same circumstances would not have lost his power of self-control. In my view, he has not been shown to have made any error in reaching that conclusion.

51 I would dismiss the appeal.

***Donald J.A.*:**

I agree.

***Saunders J.A.*:**

I agree.

Appeal dismissed.

R.D.S. *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Women's Legal Education and Action Fund, the National Organization of Immigrant and Visible Minority Women of Canada, the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada *Interveners*

INDEXED AS: R. *v.* S. (R.D.)

File No.: 25063.

1997: March 10; 1997: September 26.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Courts — Judges — Impartiality — Reasonable apprehension of bias — Testimony of the only two witnesses (accused and police officer) at odds and that of accused accepted — Police officer white and accused a black youth — Oral reasons making reference to police and racism in general context — Youth Court Judge's comments not tied to officer appearing before the Court — Whether reasonable apprehension of bias.

A white police officer arrested a black 15-year-old who had allegedly interfered with the arrest of another youth. The accused was charged with unlawfully assaulting a police officer, unlawfully assaulting a police officer with the intention of preventing an arrest, and unlawfully resisting a police officer in the lawful execution of his duty. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court Judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons,

R.D.S. *Appelant*

c.

Sa Majesté la Reine *Intimée*

et

Le Fonds d'action et d'éducation juridiques pour les femmes, l'Organisation nationale des femmes immigrantes et des femmes appartenant à une minorité visible au Canada, l'African Canadian Legal Clinic, l'Afro-Canadian Caucus of Nova Scotia et le Congrès des femmes noires du Canada *Intervenants*

RÉPERTORIÉ: R. *c.* S. (R.D.)

N° du greffe: 25063.

1997: 10 mars; 1997: 26 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Tribunaux — Juges — Impartialité — Crainte raisonnable de partialité — Les témoignages des deux seuls témoins (l'accusé et un policier) diffèrent et celui de l'accusé est accepté — Le policier est de race blanche et l'accusé est un jeune Noir — Des motifs prononcés oralement font référence aux policiers et au racisme dans un contexte général — Les remarques du juge du tribunal pour adolescents ne visent pas le policier qui a comparu devant la Cour — Y a-t-il crainte raisonnable de partialité?

Un policier de race blanche a arrêté un jeune Noir âgé de quinze ans à qui l'on reprochait d'avoir gêné l'arrestation d'un autre jeune. L'inculpé a été accusé d'avoir illégalement exercé des voies de fait contre un policier, d'avoir illégalement exercé des voies de fait contre un policier dans l'intention d'empêcher une arrestation et d'avoir illégalement résisté à un policier agissant dans l'exercice de ses fonctions. Le policier et l'accusé étaient les deux seuls témoins et leurs versions des événements pertinents étaient largement différentes. Le juge du tribunal pour adolescents a apprécié les témoi-

the Judge remarked in response to a rhetorical question by the Crown, that police officers had been known to mislead the court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. She also stated that her comments were not tied to the police officer testifying before the court. The Crown challenged these comments as raising a reasonable apprehension of bias. After the reasons had been given and after an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, the Judge issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made. The Crown's appeal was allowed and a new trial was ordered on the basis that the Judge's remarks gave rise to a reasonable apprehension of bias. This judgment was upheld by a majority of the Nova Scotia Court of Appeal. At issue here is whether the Judge's comments in her reasons gave rise to a reasonable apprehension of bias.

gnages et a conclu que l'accusé devait être acquitté. Dans des motifs prononcés oralement, le juge a fait remarquer en réponse à une question de pure forme du ministère public qu'il était déjà arrivé que des policiers trompent la cour et réagissent avec excès, particulièrement vis-à-vis de groupes non blancs, et que cela semblait dénoter un état d'esprit suspect. Elle a également déclaré que ses remarques ne visaient pas le policier qui a témoigné devant la cour. Le ministère public a contesté ces remarques parce qu'elles suscitaient une crainte raisonnable de partialité. Après le prononcé de ses motifs et le dépôt de l'appel du ministère public devant la Cour suprême de la Nouvelle-Écosse (Section de première instance), le juge a déposé des motifs supplémentaires où elle s'est expliquée plus en détail sur ses impressions quant à la crédibilité des deux témoins et sur le contexte dans lequel elle avait formulé ses commentaires. L'appel du ministère public a été accueilli et la tenue d'un nouveau procès a été ordonnée pour le motif que les remarques du juge avaient suscité une crainte raisonnable de partialité. Cette décision a été confirmée dans un arrêt majoritaire de la Cour d'appel de la Nouvelle-Écosse. La question litigieuse dans le présent pourvoi consiste à savoir si les commentaires faits par le juge ont suscité une crainte raisonnable de partialité.

Held (Lamer C.J. and Sopinka and Major JJ. dissenting): The appeal should be allowed.

Arrêt (le juge en chef Lamer et les juges Sopinka et Major sont dissidents): Le pourvoi est accueilli.

(1) *Consideration of Supplementary Reasons*

Per curiam: The supplementary reasons issued by the Youth Court Judge after the appeal had been filed could not be taken into account in assessing whether her reasons gave rise to a reasonable apprehension of bias.

(1) *Prise en considération des motifs supplémentaires*

La Cour: Les motifs supplémentaires déposés par le juge du tribunal pour adolescents après le dépôt de l'appel ne pouvaient être pris en considération pour déterminer si ses motifs ont suscité une crainte raisonnable de partialité.

(2) *Reasonable Apprehension of Bias*

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: The courts should be held to the highest standards of impartiality. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. The trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. Judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.

(2) *Crainte raisonnable de partialité*

Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major: Les cours de justice devraient respecter les plus hautes normes d'impartialité. L'équité et l'impartialité doivent être à la fois subjectivement présentes et objectivement démontrées dans l'esprit de l'observateur renseigné et raisonnable. Si les paroles ou les actes du juge qui préside suscitent, chez l'observateur renseigné et raisonnable, une crainte raisonnable de partialité, cela rend le procès inéquitable. Les juges doivent être particulièrement sensibles à la nécessité non seulement d'être équitables, mais de paraître, aux yeux de tous les observateurs raisonnables, équitables envers les Canadiens de toute race, religion, nationalité et origine ethnique.

If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. A reasonable apprehension of bias, if it arises, colours the entire trial proceedings and cannot be cured by the correctness of the subsequent decision. The mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from the judge's other words or conduct. However, if the judge's words or conduct, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

The basic interests of justice require that the appellate courts, notwithstanding their deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, retain some scope to review that determination given the serious and sensitive issues raised by an allegation of bias.

Impartiality can be described as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues. Whether a decision-maker is impartial depends on whether the impugned conduct gives rise to a reasonable apprehension of bias. Actual bias need not be established because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.

The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a

Si les paroles ou la conduite du juge suscitent une crainte de partialité ou dénotent réellement sa partialité, celui-ci excède sa compétence. On peut remédier à cet excès de compétence en présentant une requête en récusation adressée au juge présidant l'instance si celle-ci se poursuit, ou en demandant l'examen en appel de la décision du juge. S'il y a crainte raisonnable de partialité, c'est l'ensemble des procédures du procès qui sont viciées et la décision subséquente aussi bien fondée soit-elle ne peut y remédier. Le simple fait que le juge paraît, sur certains points, avoir tiré des conclusions justes quant à la crédibilité ou qu'il arrive à un résultat correct ne peut dissiper les effets de la crainte raisonnable de partialité que d'autres paroles ou actes du juge ont pu susciter. Toutefois, si les paroles ou la conduite du juge, eu égard au contexte, ne suscitent pas de crainte raisonnable de partialité, ses conclusions n'en seront pas entachées, quelque inquiétantes qu'elles puissent être.

Les intérêts fondamentaux de la justice exigent que les cours d'appel, malgré la norme d'examen fondée sur la retenue qu'elles ont adoptée dans l'analyse des conclusions factuelles des tribunaux d'instance inférieure, dont les conclusions relatives à la crédibilité des témoins, conservent un certain regard sur cette détermination vu les questions graves et délicates que soulève l'allégation de partialité.

L'impartialité peut être décrite comme l'état d'esprit de l'arbitre désintéressé eu égard au résultat et susceptible d'être persuadé par la preuve et les arguments soumis. Par contraste, la partialité dénote un état d'esprit prédisposé de quelque manière à un certain résultat ou fermé sur certaines questions. Lorsqu'on allègue la partialité du décideur, le critère à appliquer consiste à se demander si la conduite particulière suscite une crainte raisonnable de partialité. Il n'est pas nécessaire d'établir l'existence de la partialité dans les faits parce qu'il est habituellement impossible de déterminer si le décideur a abordé l'affaire avec des idées réellement préconçues.

La crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. Ce critère consiste à se demander à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Ce critère comporte un double élément objectif: la personne examinant l'allégation de partialité doit être raisonnable, et la crainte de partialité doit elle-même être raisonnable eu égard aux circonstances de l'affaire. De plus, la personne raisonnable doit être une personne bien renseignée, au courant de l'ensemble des circonstances pertinentes, y compris des tra-

part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence. The test applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic.

The requirement for neutrality does not require judges to discount their life experiences. Whether the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements depends on the facts. A very significant difference exists between cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility.

Consideration of whether the existence of anti-black racism in society is a proper subject for judicial notice would be inappropriate here because an intervener and not the appellant put forward the argument with respect to judicial notice.

The individualistic nature of a determination of credibility and its dependence on intangibles such as demeanour and the manner of testifying requires the judge, as trier of fact, to be particularly careful and to appear to be neutral. When making findings of credibility a judge should avoid making any comment that might suggest that the determination of credibility is based on generalizations or stereotypes rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made.

ditions historiques d'intégrité et d'impartialité, et consciente aussi du fait que l'impartialité est l'une des obligations que les juges ont fait le serment de respecter. La personne raisonnable est également censée connaître la réalité sociale sous-jacente à une affaire donnée, et être sensible par exemple à l'ampleur du racisme ou des préjugés fondés sur le sexe dans une collectivité donnée. La jurisprudence indique qu'il faut établir une réelle probabilité de partialité et qu'un simple soupçon est insuffisant. L'existence d'une crainte raisonnable de partialité sera entièrement fonction des faits. Il faut faire preuve de rigueur pour conclure à la partialité et la charge d'établir la partialité incombe à la personne qui en allègue l'existence. Le critère s'applique également à tous les juges, indépendamment de leur formation, de leur sexe, de leur race, de leur origine ethnique et de toute autre caractéristique.

Rester neutre pour le juge ce n'est pas faire abstraction de toute son expérience de la vie. Les faits détermineront s'il convient, au vu des circonstances, de prendre en considération le contexte social et si les paroles prononcées suscitent une crainte raisonnable de partialité. Il existe une différence très importante entre les affaires dans lesquelles le contexte social est invoqué pour assurer l'adéquation du droit et de la réalité sociale et celles comme la présente espèce, où le contexte social est apparemment utilisé pour trancher une question de crédibilité.

Il ne convient pas d'étudier la question de savoir s'il appartenait au juge de prendre connaissance d'office de l'existence dans la société de racisme anti-noir parce que l'argument relatif à la connaissance d'office a été avancé par un intervenant et non par l'appelant.

C'est en raison de la nature personnelle de la détermination de la crédibilité et du fait qu'elle repose sur des éléments intangibles comme le comportement et la manière de témoigner que le juge, en tant que juge des faits, est tenu de prendre bien soin d'être et de paraître neutre. Il vaut mieux que le juge appelé à statuer sur la crédibilité évite de faire tout commentaire qui pourrait donner l'impression qu'il a jugé de la crédibilité en s'appuyant sur des généralisations ou des stéréotypes plutôt que sur des démonstrations précises de la véracité ou du manque d'honnêteté du témoin au procès. Quand ils commencent leur déposition, tous les témoins doivent être traités sur un pied d'égalité, sans considération de race, religion, nationalité, sexe, occupation ou autre caractéristique. C'est seulement après qu'un témoin a été jaugé et évalué qu'on peut décider de sa crédibilité.

Situations where there is no evidence linking the generalization to the particular witness might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. Although the particular generalization might be well-founded, reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility.

That judges should avoid making comments based on generalizations when assessing the credibility does not lead automatically to a conclusion of reasonable apprehension of bias. In some limited circumstances, the comments may be appropriate.

The argument that the trial was rendered unfair for failure to comply with "natural justice" could not be accepted. Neither the police officer nor the Crown was on trial.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Judges, while they can never be neutral in the sense of being purely objective, must strive for impartiality. Their differing experiences appropriately assist in their decision-making process so long as those experiences are relevant, are not based on inappropriate stereotypes, and do not prevent a fair and just determination based on the facts in evidence.

The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The reasonable person must know and understand the judicial process, the nature of judging and the community in which the alleged crime occurred. He or she demands that judges achieve impartiality and will be properly influenced in their deliberations by their individual perspectives. Finally, the reasonable person expects judges to undertake an open-minded, carefully considered and dispassionately deliberate investigation of the complicated reality of each case before them.

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony from expert witnesses, from academic studies properly placed

Si aucune preuve ne relie la généralisation à un témoin en particulier, le juge pourrait, en pareille situation, prêter le flanc à des allégations de partialité du fait qu'il aurait préjugé de la crédibilité du témoin en fonction de généralisations stéréotypées. Bien que la généralisation en cause ne soit peut-être pas sans fondement, les gens raisonnables et renseignés peuvent avoir l'impression que le juge a basé son évaluation de la crédibilité sur cette donnée, au lieu de procéder à une réelle appréciation de la preuve constituée par la déposition de ce témoin en particulier.

Affirmer que les juges doivent éviter de faire des commentaires basés sur des généralisations lorsqu'ils apprécient la crédibilité de témoins n'amène pas *ipso facto* à conclure qu'il en résulte une crainte raisonnable de partialité. Dans un certain nombre de cas limité, les commentaires peuvent être à propos.

L'argument selon lequel le procès avait été inéquitable parce qu'il y avait eu transgression des règles de justice naturelle était indéfendable. Ce n'était pas le procès du policier, ni celui du ministère public.

Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Si le juge ne peut jamais être neutre, c'est-à-dire parfaitement objectif, il peut et doit néanmoins s'efforcer d'atteindre l'impartialité. Ce critère suppose donc qu'il est légitime que l'expérience personnelle de chaque juge soit mise à profit et marque ses jugements, à condition que cette expérience ait un rapport avec la cause qu'il entend, qu'elle ne soit pas fondée sur des stéréotypes malvenus, et qu'elle n'empêche pas la résolution équitable et juste de l'affaire à la lumière des faits admis en preuve.

La crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. La personne raisonnable doit connaître et comprendre le processus judiciaire, l'exercice de la justice ainsi que la collectivité où le crime reproché a été commis. La personne raisonnable exige que le juge fasse preuve d'impartialité et soit à juste titre influencé dans ses délibérations par sa propre conception du monde. Enfin, elle s'attend à ce que le juge procède avec un esprit ouvert à l'examen prudent, détaché et circonspect de la réalité complexe de chaque affaire dont il est saisi.

L'examen du contexte par le juge permet de définir le cadre nécessaire à l'interprétation et à l'application de la loi. Le juge peut se faire une idée claire du contexte ou de l'historique, ce qui est essentiel pour rendre justice, en faisant fond sur les témoignages d'experts, sur les

before the court, and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is a precondition of impartiality. A reasonable person, far from being troubled by this process, would see it as an important aid to judicial impartiality.

The reasonable person approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. He or she understands the impossibility of judicial neutrality but demands judicial impartiality. This person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality. Before finding a reasonable apprehension of bias, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. Awareness of the context within which a case occurred would not constitute evidence that the judge was not approaching the case with an open mind fair to all parties; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

(3) *Application of the Test*

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: The oral reasons at issue should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment. They indicated that the Youth Court Judge approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which was entirely proper and conducive to a fair and just resolution of the case before her. Although the Judge did not make a finding of racism, there was evidence on which such a finding could be made.

ouvrages de doctrine dûment produits en preuve ainsi que sur sa propre compréhension et son expérience de la société au sein de laquelle il vit et travaille. Ce processus d'ouverture est une condition préalable à l'impartialité. Loin d'être préoccupée par ce processus, la personne raisonnable y voit un important outil de l'impartialité du juge.

La personne raisonnable aborde la question de savoir s'il y a une crainte raisonnable de partialité, bien au fait de la complexité et du contexte des points litigieux. Elle comprend qu'il est impossible au juge d'être neutre, mais elle exige son impartialité. Elle connaît la dynamique raciale de la collectivité locale et, en tant que membre de la société canadienne, elle souscrit aux principes d'égalité. Cette personne raisonnable ne conclurait pas que les actes d'un juge suscitent une crainte raisonnable de partialité sans une preuve établissant clairement qu'il a indûment fait intervenir son point de vue dans son jugement; cette exigence découle de la présomption d'impartialité du juge. La sensibilisation au contexte dans lequel l'affaire a eu lieu ne saurait prouver que le juge n'a pas abordé l'affaire en faisant preuve d'ouverture d'esprit à l'égard de toutes les parties; au contraire, elle est dans le droit fil de la plus haute tradition d'impartialité judiciaire.

(3) *Application du critère*

Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Il faut lire l'intégralité des motifs prononcés oralement, et les passages attaqués doivent être interprétés à la lumière du procès en première instance, pris dans son ensemble, et compte tenu des autres passages du jugement. Ces motifs montrent que le juge du tribunal pour adolescents a examiné l'affaire avec un esprit ouvert, qu'elle s'est servie de son expérience et de sa connaissance de la collectivité pour comprendre la réalité de l'affaire, et qu'elle a appliqué la règle fondamentale de la preuve hors de tout doute raisonnable. Ses observations étaient entièrement fondées sur l'affaire qui lui était soumise. Elle les a faites après avoir pesé le témoignage contradictoire des deux témoins et en réponse aux arguments du ministère public. Ses observations étaient entièrement justifiées par la preuve produite. En dirigeant son attention vers la dynamique raciale de l'affaire, elle s'est tout simplement efforcée de rendre justice à la lumière du contexte, ce qui était tout à fait légitime et de nature à favoriser la résolution juste et équitable de l'affaire. Bien que le juge n'ait pas conclu à l'existence de racisme, il y avait des éléments de preuve sur la foi desquels elle aurait pu le faire.

The impugned comments were not unfortunate, unnecessary, or close to the line. They reflected an entirely appropriate recognition of the facts in evidence and of the context within which this case arose — a context known to the judge and to any well-informed member of the community.

Per Cory and Iacobucci JJ.: The Youth Court Judge conducted an acceptable review of all the evidence before making the impugned comments.

The generalized remarks about a history of racial tension between police officers and visible minorities were not linked by the evidence to the actions of the police officer here. They were worrisome and came very close to the line. Yet, however troubling when read individually, they were not made in isolation and must all be read in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know. A reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias or that they tainted her earlier findings of credibility. The high standard for a finding of reasonable apprehension of bias was not met.

Per Lamer C.J. and Sopinka and Major JJ. (dissenting): A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real or apprehended. Evidence showing propensity has been repeatedly rejected. Trial judges must base their findings on the evidence before them. Notwithstanding the opportunity to do so, no evidence was introduced showing that this police officer was racist and that racism motivated his actions or that he lied.

The Youth Court Judge's statements were not simply a review of the evidence and her reasons for judgment in which she was relying on her life experience. Even though a judge's life experience is an important ingredient in the ability to understanding human behaviour, to weighing the evidence and to determining credibility, it is not a substitute for evidence. No evidence supported the conclusions that the Judge reached. Her comments fell into stereotyping the police officer. Judges, as arbiters of truth, cannot judge credibility based on irrelevant

Les observations attaquées n'étaient pas malheureuses ni inutiles et elles ne frôlaient pas la limite. Elles traduisaient une appréciation judicieuse des faits admis en preuve ainsi que du contexte dans lequel l'affaire s'est produite, ce contexte étant connu du juge ainsi que de tout membre bien informé de la collectivité.

Les juges Cory et Iacobucci: Le juge du tribunal pour adolescents a fait un examen acceptable de toute la preuve avant de faire les commentaires contestés.

Les remarques générales voulant que, historiquement, une tension raciale a pu être observée dans les rapports entre les policiers et les minorités visibles, n'étaient pas liées par un élément de preuve aux actes du policier en l'espèce. Ces remarques ont inspiré de l'inquiétude et frôlaient la limite. Néanmoins, quelque inquiétantes qu'aient été ces remarques, prises isolément, il est essentiel de noter qu'elles s'inscrivent dans un contexte. Il est indispensable de lire toutes les remarques en tenant compte du contexte de l'ensemble de la procédure et en étant conscient de toutes les circonstances que l'observateur raisonnable est censé connaître. Une personne raisonnable et renseignée, au courant de l'ensemble des circonstances, ne conclurait pas qu'elles ont suscité une crainte raisonnable de partialité ni qu'elles ont entaché les conclusions antérieures du juge sur la crédibilité. La norme rigoureuse qui permet de conclure à l'existence d'une crainte raisonnable de partialité n'a pas été respectée.

Le juge en chef Lamer et les juges Sopinka et Major (dissidents): Un procès équitable est un procès fondé sur le droit, dont le résultat est déterminé par la preuve et qui est exempt de toute partialité, réelle ou apparente. La production d'éléments de preuve visant à établir la propension a été maintes fois interdite. Le juge du procès doit fonder ses conclusions sur la preuve qui lui est présentée. L'appelant pouvait produire des éléments de preuve établissant que l'agent de police était raciste, que le racisme a motivé ses actes ou qu'il a menti, mais il ne l'a pas fait.

Les déclarations du juge du tribunal pour adolescents n'étaient pas qu'une revue de la preuve et ne constituaient pas les motifs de son jugement dans lequel elle s'est fiée à son expérience de la vie. Bien que l'expérience de la vie d'un juge soit un élément important de son aptitude à comprendre le comportement humain, à soupeser la preuve et à apprécier la crédibilité, elle ne peut se substituer à la preuve. Le juge ne disposait d'aucun élément de preuve lui permettant de tirer les conclusions qu'elle a tirées. Ses commentaires dénotaient une

witness characteristics. All witnesses must be placed on equal footing before the court.

What the Judge actually intended by the impugned statements is irrelevant conjecture. Given the concern for both the fairness and the appearance of fairness of the trial, the absence of evidence to support the judgment is an irreparable defect.

Cases Cited

By Cory J.

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **considered:** *R. v. Parks* (1993), 15 O.R. (3d) 324, leave to appeal denied, [1994] 1 S.C.R. x; *Pirbhai Estate v. Pirbhai*, [1987] B.C.J. No. 2685 (QL), leave to appeal denied, [1988] 1 S.C.R. xii; *Foto v. Jones* (1974), 45 D.L.R. (3d) 43; **referred to:** *R. v. Wald* (1989), 47 C.C.C. (3d) 315; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631; *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537; *R. v. Gushman*, [1994] O.J. No. 813 (QL); *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *R. v. W. (R.)*, [1992] 2 S.C.R. 122; *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Généreux*, [1992] 1 S.C.R. 259; *Liteky v. U.S.*, 114 S.Ct. 1147 (1994); *R. v. Bertram*, [1989] O.J. No. 2123 (QL); *R. v. Stark*, [1994] O.J. No. 406 (QL); *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. v. Elrick*, [1983] O.J. No. 515 (QL); *R. v. Lin*, [1995] B.C.J. No. 982 (QL); *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850; *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577; *R. v. Gough*, [1993] 2 W.L.R. 883; *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Wilson* (1996), 29 O.R. (3d) 97; *R. v . Glasgow* (1996), 93 O.A.C. 67; *White v. The King*, [1947] S.C.R. 268; *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337; *R. v. Teskey* (1995), 167 A.R. 122.

By L'Heureux-Dubé and McLachlin JJ.

Applied: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; **referred to:** *Valente v. The Queen*, [1985] 2 S.C.R. 673 ; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la ma-*

opinion toute faite du policier. Le juge, à titre d'arbitre de la vérité, ne peut pas juger de la crédibilité des témoins en se fondant sur des caractéristiques sans pertinence. Tous les témoins doivent être sur un pied d'égalité devant le tribunal.

Il ne convient pas de former des conjectures sur ce que le juge du procès a vraiment voulu dire. Vu l'importance tant de l'équité du procès que de l'impression d'équité qu'il laisse, l'absence de preuves pour appuyer le jugement est un vice irréparable.

Jurisprudence

Citée par le juge Cory

Arrêt appliqué: *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; **arrêts examinés:** *R. c. Parks* (1993), 15 O.R. (3d) 324, autorisation de pourvoi refusée, [1994] 1 R.C.S. x; *Pirbhai Estate c. Pirbhai*, [1987] B.C.J. No. 2685 (QL), autorisation de pourvoi refusée, [1988] 1 R.C.S. xii; *Foto c. Jones* (1974), 45 D.L.R. (3d) 43; **arrêts mentionnés:** *R. c. Wald* (1989), 47 C.C.C. (3d) 315; *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623; *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631; *R. c. Curragh Inc.*, [1997] 1 R.C.S. 537; *R. c. Gushman*, [1994] O.J. No. 813 (QL); *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833; *R. c. W. (R.)*, [1992] 2 R.C.S. 122; *Huerto c. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100; *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Généreux*, [1992] 1 R.C.S. 259; *Liteky c. U.S.*, 114 S.Ct. 1147 (1994); *R. c. Bertram*, [1989] O.J. No. 2123 (QL); *R. c. Stark*, [1994] O.J. No. 406 (QL); *The King c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256; *R. c. Elrick*, [1983] O.J. No. 515 (QL); *R. c. Lin*, [1995] B.C.J. No. 982 (QL); *R. c. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850; *Metropolitan Properties Co. c. Lannon*, [1969] 1 Q.B. 577; *R. c. Gough*, [1993] 2 W.L.R. 883; *R. c. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. Wilson* (1996), 29 O.R. (3d) 97; *R. c. Glasgow* (1996), 93 O.A.C. 67; *White c. The King*, [1947] R.C.S. 268; *Brouillard c. La Reine*, [1985] 1 R.C.S. 39; *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337; *R. c. Teskey* (1995), 167 A.R. 122.

Citée par les juges L'Heureux-Dubé et McLachlin

Arrêt appliqué: *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; **arrêts mentionnés:** *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Lippé*, [1991] 2 R.C.S. 114; *Ruffo c. Conseil de la*

gistrature, [1995] 4 S.C.R. 267; *United States v. Morgan*, 313 U.S. 409 (1941); *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833; *R. v. Bartle*, [1994] 3 S.C.R. 173; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Parks* (1993), 15 O.R. (3d) 324; *Moge v. Moge*, [1992] 3 S.C.R. 813; *R. v. Smith* (1991), 109 N.S.R. (2d) 394; *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91; *R. v. Burns*, [1994] 1 S.C.R. 656.

By Major J. (dissenting)

Metropolitan Properties Co. v. Lannon, [1969] 1 Q.B. 577; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

Statutes and Regulations Cited

Act to amend the Criminal Code and the Canada Evidence Act, S.C. 1987, c. 24, s. 18.

Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, S.C. 1980-81-82-83, c. 125, s. 5.

Canadian Charter of Rights and Freedoms, ss. 7, 11(*d*), 15, 27.

Criminal Law Amendment Act, 1975, S.C. 1974-75-76, c. 93, s. 8.

Authors Cited

Blackstone, Sir William. *Commentaries on the Laws of England*, Book III. Oxford: Clarendon Press, 1778.

Canadian Judicial Council. *Commentaries on Judicial Conduct*. Cowansville, Que.: Yvon Blais, 1991.

Cardozo, Benjamin N. *The Nature of the Judicial Process.* New Haven: Yale University Press, 1921.

Devlin, Richard F. "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408.

Nedelsky, Jennifer. "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill L.J.* 91.

Nova Scotia. Royal Commission on the Donald Marshall, Jr., Prosecution. *Royal Commission on the Donald Marshall Jr. Prosecution*. Halifax: The Commission, 1989.

Omatsu, Maryka. "The Fiction of Judicial Impartiality" (1997), 9 *C.J.W.L.* 1.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*. Concord, Ont.: Irwin Law, 1996.

magistrature, [1995] 4 R.C.S. 267; *United States c. Morgan*, 313 U.S. 409 (1941); *R. c. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50; *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833; *R. c. Bartle*, [1994] 3 R.C.S. 173; *R. c. Lavallee*, [1990] 1 R.C.S. 852; *R. c. Parks* (1993), 15 O.R. (3d) 324; *Moge c. Moge*, [1992] 3 R.C.S. 813; *R. c. Smith* (1991), 109 N.S.R. (2d) 394; *Nova Scotia (Minister of Community Services) c. S.M.S.* (1992), 110 N.S.R. (2d) 91; *R. c. Burns*, [1994] 1 R.C.S. 656.

Citée par le juge Major (dissident)

Metropolitan Properties Co. c. Lannon, [1969] 1 Q.B. 577; *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; *The King c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 7, 11*d*), 15, 27.

Loi de 1975 modifiant le droit criminel, S.C. 1974-75-76, ch. 93, art. 8.

Loi modifiant le Code criminel en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives à d'autres lois, S.C. 1980-81-82-83, ch. 125, art. 5.

Loi modifiant le Code criminel et la Loi sur la preuve au Canada, L.C. 1987, ch. 24, art. 18.

Doctrine citée

Blackstone, sir William. *Commentaires sur les lois anglaises*, t. 5. Traduit de l'anglais par N.M. Chompré. Paris: Bossange, 1823.

Cardozo, Benjamin N. *The Nature of the Judicial Process.* New Haven: Yale University Press, 1921.

Conseil canadien de la magistrature. *Propos sur la conduite des juges*. Cowansville, Qué.: Yvon Blais, 1991.

Devlin, Richard F. «We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.» (1995), 18 *Dalhousie L.J.* 408.

Nedelsky, Jennifer. «Embodied Diversity and the Challenges to Law» (1997), 42 *R.D. McGill* 91.

Nouvelle-Écosse. Commission royale sur les poursuites intentées contre Donald Marshall fils. *Commission royale sur les poursuites intentées contre Donald Marshall fils*. Halifax: La Commission, 1989.

Omatsu, Maryka. «The Fiction of Judicial Impartiality» (1997), 9 *R.F.D.* 1.

Paciocco, David M., and Lee Stuesser. *The Law of Evidence*. Concord, Ont.: Irwin Law, 1996.

APPEAL from a judgment of the Nova Scotia Court of Appeal (1995), 145 N.S.R. (2d) 284, 418 A.P.R. 284, 102 C.C.C. (3d) 233, 45 C.R. (4th) 361, dismissing an appeal from a judgment of the Nova Scotia Supreme Court (Trial Division), [1995] N.S.J. No. 184 (QL), allowing an appeal from acquittal by Sparks F.C.J. with oral reasons December 2, 1994, with supplementary written reasons, [1994] N.S.J. No. 629 (QL). Appeal allowed, Lamer C.J. and Sopinka and Major JJ. dissenting.

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (1995), 145 N.S.R. (2d) 284, 418 A.P.R. 284, 102 C.C.C. (3d) 233, 45 C.R. (4th) 361, qui a rejeté l'appel formé contre le jugement de la Cour suprême de la Nouvelle-Écosse (Section de première instance), [1995] N.S.J. No. 184 (QL), qui avait accueilli l'appel formé contre l'acquittement ordonné par le juge Sparks dans des motifs prononcés oralement le 2 décembre 1994 et des motifs écrits supplémentaires, [1994] N.S.J. No. 629 (QL). Pourvoi accueilli, le juge en chef Lamer et les juges Sopinka et Major sont dissidents.

Burnley A. Jones and *Dianne Pothier*, for the appellant.

Burnley A. Jones et *Dianne Pothier*, pour l'appelant.

Robert E. Lutes, Q.C., for the respondent.

Robert E. Lutes, c.r., pour l'intimée.

Yola Grant and *Carol Allen*, for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada.

Yola Grant et *Carol Allen*, pour les intervenants le Fonds d'action et d'éducation juridiques pour les femmes et l'Organisation nationale des femmes immigrantes et des femmes appartenant à une minorité visible au Canada.

April Burey, for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada.

April Burey, pour les intervenants l'African Canadian Legal Clinic, l'Afro-Canadian Caucus of Nova Scotia et le Congrès des femmes noires du Canada.

The reasons of Lamer C.J. and Sopinka and Major JJ. were delivered by

Version française des motifs du juge en chef Lamer et des juges Sopinka et Major rendus par

MAJOR J. (dissenting) — I have read the reasons of Justices L'Heureux-Dubé and McLachlin and those of Justice Cory and respectfully disagree with the conclusion they reach.

LE JUGE MAJOR (dissident) — J'ai lu les motifs des juges L'Heureux-Dubé et McLachlin ainsi que ceux du juge Cory et je suis malheureusement dans l'obligation d'exprimer mon désaccord avec la conclusion qu'ils tirent. 1

The appellant (accused) R.D.S. was a young person charged with assault on a peace officer. At trial, the Crown's only evidence came from the police officer allegedly assaulted. The appellant testified as the only witness in his defence. The testimony of the two witnesses differed in material respects. The trial judge gave judgment immediately after closing arguments and acquitted the appellant.

L'appelant R.D.S., alors adolescent, a été accusé d'avoir exercé des voies de fait contre un agent de la paix. Au procès, le ministère public a cité comme seul témoin le policier qui aurait subi les voies de fait. Seul l'appelant a témoigné en défense. Ces deux témoignages différaient sur des points importants. Le juge du procès a rendu jugement à la clôture des débats et a acquitté l'appelant. 2

This appeal should not be decided on questions of racism but instead on how courts should decide

Le présent pourvoi ne porte pas sur des questions de racisme, mais plutôt sur la façon dont les 3

cases. In spite of the submissions of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial. A fair trial is one that is based on the law, the outcome of which is determined by the evidence, free of bias, real or apprehended. Did the trial judge here reach her decision on the evidence presented at the trial or did she rely on something else?

tribunaux doivent trancher les litiges. En dépit des observations présentées par l'appelant et les intervenants en son nom, l'affaire concerne essentiellement la conduite du procès. Un procès équitable est un procès fondé sur le droit, dont le résultat est déterminé par la preuve et qui est exempt de toute partialité, réelle ou apparente. En l'espèce, le juge du procès a-t-elle fondé sa décision sur la preuve présentée au procès ou s'est-elle appuyée sur autre chose?

4 In the course of her judgment the trial judge said:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit. [Emphasis added.]

Au cours de son jugement, le juge du procès a déclaré:

> [TRADUCTION] Le ministère public dit, bien, pourquoi le policier aurait-il dit que les événements se sont déroulés comme il les a relatés à la Cour ce matin? Je ne dis pas que l'agent a trompé la Cour, bien qu'on sache que des policiers l'aient fait dans le passé. Je ne dis pas que le policier a réagi de façon excessive, même s'il arrive effectivement que des policiers réagissent avec excès, particulièrement lorsqu'ils ont affaire à des groupes non blancs. Cela me semble dénoter en soi un état d'esprit suspect. Je crois que nous sommes vraisemblablement en présence dans cette affaire-ci d'un jeune policier qui a réagi de façon excessive. J'accepte le témoignage de [R.D.S.] selon lequel on lui a intimé de se taire, sous peine d'être arrêté. Cela semble conforme à l'attitude courante du jour.
>
> Quoi qu'il en soit, vu mes remarques et l'ensemble de la preuve soumise à la cour, je n'ai d'autre choix que de prononcer l'acquittement. [Je souligne.]

5 In view of the manner in which this appeal was argued, it is necessary to consider two points. First, we should consider whether the trial judge in her reasons, properly instructed herself on the evidence or was an error of law committed by her. The second, and somewhat intertwined question, is whether her comments above could cause a reasonable observer to apprehend bias. The offending comments in the statement are:

(i) "police officers have been known to [mislead the court] in the past";

(ii) "police officers do overreact, particularly when they are dealing with non-white groups";

Compte tenu de la façon dont les arguments ont été présentés dans le présent pourvoi, il faut examiner deux points. Premièrement, nous devons nous demander si le juge du procès, dans ses motifs, s'est correctement rappelé la preuve ou si elle a commis une erreur de droit. Deuxièmement, et ce point est en quelque sorte étroitement lié au premier, il s'agit de savoir si ses commentaires, reproduits ci-dessus, pourraient susciter une crainte de partialité chez un observateur raisonnable. Les commentaires controversés sont les suivants:

(i) «on sa[it] que des policiers [ont trompé la cour] dans le passé»;

(ii) «il arrive effectivement que des policiers réagissent avec excès, particulièrement lorsqu'ils ont affaire à des groupes non blancs»;

(iii) "[t]hat to me indicates a state of mind right there that is questionable";

(iv) "[i]t seems to be in keeping with the prevalent attitude of the day"; and,

(v) "based upon my comments and based upon all the evidence before the court I have no other choice but to acquit."

The trial judge stated that "police officers have been known to [mislead the court] in the past" and that "police officers do overreact, particularly when they are dealing with non-white groups" and went on to say "[t]hat to me indicates a state of mind right there that is questionable." She in effect was saying, "sometimes police lie and overreact in dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused." This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. The trial judge might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.

Our jurisprudence has repeatedly prohibited the introduction of evidence to show propensity. In the present case had the police officer been charged with assault the trial judge could not have reasoned that as police officers have been known to mislead the Court in the past that based on that evidence she rejected this police officers credibility and found him guilty beyond reasonable doubt.

In the same vein, statistics show that young male adults under the age of 25 are responsible for more accidents than older drivers. It would be unacceptable for a court to accept evidence of that

(iii) «[c]ela me semble dénoter en soi un état d'esprit suspect»;

(iv) «[c]ela semble conforme à l'attitude courante du jour»;

(v) «vu mes remarques et l'ensemble de la preuve soumise à la cour, je n'ai d'autre choix que de prononcer l'acquittement».

6 Ayant déclaré que l'«on sa[it] que des policiers [ont trompé la cour] dans le passé» et qu'«il arrive effectivement que des policiers réagissent avec excès, particulièrement lorsqu'ils ont affaire à des groupes non blancs», le juge du procès ajoute que «[c]ela me semble dénoter en soi un état d'esprit suspect». Ce qui revenait à dire en fait: «il arrive parfois que des policiers mentent et réagissent avec excès lorsqu'ils ont affaire à des non-Blancs, par conséquent, je soupçonne que cet agent de police a pu mentir et réagir avec excès à l'endroit de l'accusé non blanc». Cette généralisation stéréotypée faisant de tous les policiers des menteurs et des racistes a été appliquée à l'agent de police concerné en l'espèce. On pourrait penser que le juge du procès accorde moins d'importance à la déposition du policier parce qu'il témoigne dans un procès intenté contre un accusé appartenant à une autre race. La question de savoir s'il y a du racisme dans notre société n'a rien à voir. Il s'agit de savoir si la cour disposait d'éléments de preuve à partir desquels elle pouvait conclure que les actes de cet agent de police en particulier étaient motivés par le racisme. Aucune preuve en ce sens n'a été présentée au procès.

7 Notre jurisprudence a maintes fois interdit la production d'éléments de preuve visant à établir la propension. En l'espèce, si le policier avait été accusé de voies de fait, le juge du procès n'aurait pas pu alléguer la notoriété du fait que des policiers ont trompé la cour dans le passé pour conclure, sur la foi de cette preuve, que ce policier n'était pas crédible et pour le déclarer coupable hors de tout doute raisonnable.

8 Dans le même esprit, les statistiques montrent que les jeunes adultes de sexe masculin, âgés de moins de 25 ans, sont responsables d'un nombre plus élevé d'accidents que les conducteurs plus

fact to find a defendant liable in negligence yet that is the consequence of the trial judge's reasoning in this appeal.

9 It is possible to read the trial judge's reference to the "prevalent attitude of the day" as meaning her view of the prevalent attitude in society today. If the trial judge used the "prevalent attitude of society" towards non-whites as evidence upon which to draw an inference in this case, she erred, as there were no facts in evidence from which to draw that inference. It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to "shut up," we should infer that this police officer told this appellant minority youth to "shut up." This reasoning is flawed.

10 Trial judges have to base their findings on the evidence before them. It was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done. For the trial judge to infer that based on her general view of the police or society is an error of law. For this reason there should be a new trial.

11 In addition to not being based on the evidence, the trial judge's comments have been challenged as giving rise to a reasonable apprehension of bias. The test for finding a reasonable apprehension of bias has challenged courts in the past. It is interchangeably expressed as a "real danger of bias," a "real likelihood of bias," a "reasonable suspicion of bias" and in several other ways. An attempt at a new definition will not change the test. Lord Denning M.R. captured the essence of the inquiry in his judgment in *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.), at p. 599:

> [I]n considering whether there was a real likelihood of bias, the court does not look at the mind of the justice

âgés. Il serait inacceptable que le tribunal admette ce fait en preuve pour conclure à la responsabilité pour cause de négligence du défendeur. Pourtant, c'est la conséquence à laquelle conduit le raisonnement du juge du procès dans le présent pourvoi.

On peut penser que les mots «l'attitude courante du jour» reflétaient l'opinion du juge du procès sur ce qu'est l'attitude courante dans la société de nos jours. Si le juge s'est servie de l'«attitude courante dans la société» à l'égard des non-Blancs comme d'un élément de preuve pour tirer une conclusion en l'espèce, elle a commis une erreur, étant donné qu'aucun fait mis en preuve ne permettait de tirer cette conclusion. Ce serait raisonner par stéréotypes que de dire: étant donné que la société est raciste et que, dans les faits, elle fait «taire» les minorités, nous devrions conclure que cet agent de police a dit à ce jeune appelant appartenant à une minorité de «se taire». Ce raisonnement est fautif.

Le juge du procès doit fonder ses conclusions sur la preuve qui lui est présentée. Il était loisible à l'appelant de produire des éléments de preuve établissant que l'agent de police était raciste, que le racisme a motivé ses actes ou qu'il a menti. Cela n'a pas été fait. Le juge du procès a commis une erreur de droit en se fondant sur l'opinion qu'elle a en général de la police ou de la société pour tirer ces conclusions. Pour ce motif, je suis d'avis qu'il doit y avoir un nouveau procès.

Les commentaires du juge du procès ont été contestés parce qu'en plus de ne pas être fondés sur la preuve, ils suscitaient une crainte raisonnable de partialité. Dans le passé, les tribunaux ont connu certaines difficultés d'application du critère de crainte raisonnable de partialité. Cette notion est rendue notamment par des expressions interchangeables telles que «danger réel de partialité», «réelle probabilité de partialité», «soupçon raisonnable de partialité». Proposer une nouvelle définition ne changera pas le critère. Le maître des rôles lord Denning a cerné l'essence de l'examen à effectuer dans l'arrêt *Metropolitan Properties Co. c. Lannon*, [1969] 1 Q.B. 577 (C.A.), à la p. 599:

> [TRADUCTION] [P]our trancher la question de savoir s'il y avait une réelle probabilité de partialité, la cour ne

himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg.* v. *Huggins*; and *Rex* v. *Sunderland Justices, per* Vaughan Williams L.J. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg.* v. *Camborne Justice, Ex parte Pearce*, and *Reg.* v. *Nailsworth Licensing Justices, Ex parte Bird*. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."

See also *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

The appellant and the interveners argued that the trial judge's statements were simply a review of the evidence and were her reasons for judgment. They said she was relying on her life experience and to deny that is to deny reality. I disagree.

The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for

scrute pas l'esprit du juge ou du président du tribunal, ni de quiconque exerce une fonction judiciaire. La cour ne se demande pas s'il existe une réelle probabilité que l'intéressé avantage ou a de fait avantagé une partie aux dépens de l'autre. La cour s'intéresse à l'impression produite. Même si le juge était on ne peut plus impartial, dans la mesure où des personnes sensées estiment que, compte tenu des circonstances, il y a une réelle probabilité de partialité de sa part, il ne doit pas siéger. S'il siège, sa décision ne peut pas être maintenue: voir *Reg.* c. *Huggins* et les motifs du lord juge Vaughan Williams dans l'arrêt *Rex* c. *Sunderland Justices*. Cela dit, il doit y avoir une réelle probabilité de partialité. Suppositions et conjectures ne suffisent pas; voir *Reg.* c. *Camborne Justice, Ex parte Pearce* et *Reg.* c. *Nailsworth Licensing Justices, Ex parte Bird*. Il faut que les circonstances soient telles qu'une personne raisonnable puisse penser qu'il est probable ou vraisemblable que le juge ou le président favorise ou a favorisé injustement l'une des parties aux dépens de l'autre. La cour ne cherchera pas à savoir si le juge a effectivement favorisé injustement l'une des parties. Il suffit que des personnes raisonnables puissent le penser. La raison en est évidente. La justice suppose un climat de confiance qui ne peut subsister si des personnes sensées ont l'impression que le juge a fait preuve de partialité.

Voir également *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369; *The King c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256.

12 L'appelant et les intervenants ont soutenu que les déclarations du juge du procès n'étaient qu'une revue de la preuve et constituaient les motifs de son jugement. Ils ont affirmé que le juge du procès s'est fié à son expérience de la vie et que, nier ce fait, c'est nier la réalité. Je ne suis pas d'accord.

13 L'expérience de la vie de ce juge — et il en est ainsi de tous les juges de première instance — est un élément important de son aptitude à comprendre le comportement humain, à soupeser la preuve et à apprécier la crédibilité. Elle intervient dans une myriade de décisions qui doivent être prises dans le cours de la plupart des procès. Elle n'est cependant d'aucune utilité pour tirer des conclusions qui ne s'appuient sur aucun élément de preuve. Le fait que, à d'autres occasions, des agents de police ont menti ou réagi avec excès, n'est pas pertinent. L'expérience de la vie ne peut

evidence. There was no evidence before the trial judge to support the conclusions she reached.

14 The trial judge could not decide this case based on what some police officers did in the past without deciding that all police officers are the same. As stated, the appellant was entitled to call evidence of the police officer's conduct to show that there was in fact evidence to support either his bias or racism. No such evidence was called. The trial judge presumably called upon her life experience to decide the issue. This she was not entitled to do.

15 The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the court decides the issues. Our system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts.

16 Canadian courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. If a judge in a sexual assault case instructed the jury or him- or herself that because the complainant was a prostitute he or she probably consented, or that prostitutes are likely to lie about such things as sexual assault, that decision would be reversed. Such presumptions have no place in a system of justice that treats all witnesses equally. Our jurisprudence prohibits tying credibility to something as irrelevant as gender, occupation or perceived group predisposition.

17 Similarly, we have eliminated the requirement for corroboration of the complainant's evidence. The absolute requirement of corroboration for particular sexual offences and the lesser requirement of a warning to the jury about relying on the vic-

se substituer à la preuve. Le juge du procès ne disposait d'aucun élément de preuve lui permettant de tirer les conclusions qu'elle a tirées.

Le juge du procès ne pouvait pas trancher en se fondant sur ce que des agents de police avaient fait dans le passé sans décider que tous les agents de police sont les mêmes. Comme je l'ai dit, il était loisible à l'appelant de présenter des éléments de preuve relatifs à la conduite de l'agent de police pour montrer que ses allégations de partialité ou de racisme s'appuyaient sur des faits. Aucune preuve de ce genre n'a été produite. Vraisemblablement, le juge du procès s'en est remis à son expérience de la vie pour statuer sur la question. Elle n'avait pas le droit de le faire.

Le processus contradictoire est la pierre angulaire de notre jurisprudence. Le caractère contradictoire des poursuites pénales est moins prononcé parce que le ministère public a l'obligation de présenter toute la preuve équitablement. Chaque partie doit établir les faits au moyen d'éléments de preuve à partir desquels la cour tranche. Notre système judiciaire, contrairement à d'autres, ne permet pas au juge de procéder lui-même à des recherches en vue d'élucider les circonstances.

Les tribunaux canadiens se sont, au cours des dernières années, opposés au classement des personnes en catégories de comportement prévisible. Si le juge, dans une affaire d'agression sexuelle, donnait comme directive au jury ou se rappelait qu'étant prostituée la personne qui a porté plainte a probablement consenti, ou que les prostitués sont susceptibles de mentir sur des questions comme l'agression sexuelle, sa décision serait infirmée. De telles présomptions n'ont aucune place dans un système judiciaire qui traite tous les témoins sur un pied d'égalité. Notre jurisprudence interdit de lier la crédibilité à des choses aussi peu pertinentes que le sexe, la profession ou une apparente prédisposition chez les individus d'un groupe.

De même, l'exigence d'une corroboration du témoignage du plaignant a été éliminée. L'exigence absolue d'une corroboration dans le cas de certaines infractions à caractère sexuel et l'exigence, de moindre rigueur, d'une mise en garde

tim's uncorroborated testimony have been abolished: see *Criminal Law Amendment Act, 1975*, S.C. 1974-75-76, c. 93, s. 8, and S.C. 1980-81-82-83, c. 125, s. 5. Also eliminated is the need for corroboration in cases where a prosecution is based on the unsworn evidence of children: see S.C. 1987, c. 24, s. 18. The elimination of corroboration shows the present evolution away from stereotyping various classes of witnesses as inherently unreliable.

aux jurés contre l'utilisation du témoignage non corroboré de la victime comme fondement de leur décision ont été abolies; voir *Loi de 1975 modifiant le droit criminel*, S.C. 1974-75-76, ch. 93, art. 8, et S.C. 1980-81-82-83, ch. 125, art. 5. A aussi été supprimée la nécessité d'une corroboration dans les affaires où la poursuite est fondée sur le témoignage non assermenté d'un enfant; voir L.C. 1987, ch. 24, art. 18. L'élimination de l'exigence d'une corroboration montre l'évolution actuelle, soit une distanciation face aux stéréotypes donnant comme peu fiable la déposition de certains témoins en raison de leur appartenance à certaines catégories de personnes.

It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the history of the Canadian justice system that many thought had past. This reasoning, with respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.

18 On peut difficilement qualifier de progressiste le stéréotype suivant lequel les agents de police sont susceptibles de mentir dans une déposition contre un non-Blanc. Cela nous ramènerait à une époque de l'histoire du système judiciaire canadien que beaucoup croyaient révolue. Ce raisonnement à l'égard des agents de police n'est pas plus légitime que les stéréotypes à l'égard des femmes, des enfants ou des minorités.

In my opinion the comments of the trial judge fall into stereotyping the police officer. She said, among other things, that police officers have been known to mislead the courts, and that police officers overreact when dealing with non-white groups. She then held, in her evaluation of this particular police officer's evidence, that these factors led her to "a state of mind right there that is questionable". The trial judge erred in law by failing to base her conclusions on evidence.

19 Selon moi, les commentaires du juge du procès dénotent une opinion toute faite des agents de police. Le juge du procès a dit, entre autres, qu'on sait que des policiers ont trompé la cour et qu'ils réagissent de façon excessive lorsqu'ils ont affaire à des groupes non blancs. Elle a ensuite affirmé, dans son appréciation du témoignage rendu par le policier en question, que ces facteurs l'amenaient à conclure à «un état d'esprit suspect». Le juge du procès a commis une erreur de droit en ne fondant pas ses conclusions sur la preuve.

Judges, as arbiters of truth, cannot judge credibility based on irrelevant witness characteristics. All witnesses must be placed on equal footing before the court.

20 Le juge, à titre d'arbitre de la vérité, ne peut pas juger de la crédibilité des témoins en se fondant sur des caractéristiques sans pertinence. Tous les témoins doivent être sur un pied d'égalité devant le tribunal.

The trial judge concluded the impugned part of her reasons with the following: "[a]t any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit." What did she mean by basing her judgment, in part, upon her own comments? Did

21 Le juge du procès a conclu la partie contestée de ses motifs de la façon suivante: «[q]uoi qu'il en soit, vu mes remarques et l'ensemble de la preuve soumise à la cour, je n'ai d'autre choix que de prononcer l'acquittement». Que voulait-elle dire en déclarant fonder en partie son jugement sur ses

she mean based on her stereotyping of police officers? Or, did she mean based on her comments analysing the evidence of the parties? Based on the trial record what is clear is that the trial judge did not reach her conclusion on any facts presented at the trial.

22 It is irrelevant conjecture as to what the trial judge actually intended by these statements. I agree with my colleague Cory J., that there are other plausible explanations of these impugned comments. It may be that all of her remarks were merely intended as a hypothetical response to the Crown's suggestion that the police officer had no reason to lie, and therefore innocuous. However, we are concerned with both the fairness and the appearance of fairness of the trial, and the absence of evidence to support the judgment is an irreparable defect.

23 I agree with the approach taken by Cory J. with respect to the nature of bias and the test to be used to determine if the words or actions of a judge give rise to apprehension of bias. However, I come to a different conclusion in the application of the test to the words of the trial judge in this case. It follows that I disagree with the approach to reasonable apprehension of bias put forward by Justices L'Heureux-Dubé and McLachlin.

24 The error of law that I attribute to the trial judge's assessment of the evidence or lack of evidence is sufficiently serious that a new trial is ordered.

25 In the result, I would uphold the disposition of Flinn J.A. in the Court of Appeal (1995), 145 N.S.R. (2d) 284, and dismiss the appeal.

The reasons of La Forest and Gonthier JJ. were delivered by

26 GONTHIER J. — I have had the benefit of the reasons of Justice Cory, the joint reasons of Justices L'Heureux-Dubé and McLachlin and the reasons

propres commentaires? Voulait-elle dire qu'elle se fondait sur ses propres idées préconçues sur les agents de police? Ou, voulait-elle dire qu'elle se fondait sur la partie de ses commentaires analysant la preuve des parties? Il ressort clairement du dossier que le juge du procès n'a pas tiré sa conclusion à partir des faits présentés au procès.

Il ne convient pas de former des conjectures sur ce que le juge du procès a vraiment voulu dire. Je suis d'accord avec le juge Cory pour dire que d'autres explications plausibles peuvent éclaircir les commentaires contestés. Il se peut que, par ces remarques, elle ait voulu simplement répondre à l'affirmation du ministère public selon laquelle l'agent de police n'avait aucune raison de mentir, d'où leur caractère inoffensif. Toutefois, nous sommes intéressés tant par l'équité du procès que par l'impression d'équité qu'il laisse, et l'absence de preuves pour appuyer le jugement est un vice irréparable.

Je suis d'accord avec l'approche retenue par le juge Cory en ce qui concerne la nature de la partialité et le critère à appliquer pour déterminer si les paroles ou les actes du juge suscitent une crainte de partialité. Cependant, j'en viens à une conclusion différente sur l'application du critère aux paroles prononcées par le juge du procès en l'espèce. Il s'ensuit que je ne puis souscrire à l'approche adoptée à l'égard du critère de la crainte raisonnable de partialité que proposent les juges L'Heureux-Dubé et McLachlin.

L'erreur de droit que j'attribue au juge du procès relativement à son appréciation de la preuve ou à l'absence de preuve est suffisamment grave pour qu'un nouveau procès soit ordonné.

En définitive, je maintiendrais le dispositif du juge Flinn de la Cour d'appel (1995), 145 N.S.R. (2d) 284, et je rejetterais le pourvoi.

Version française des motifs des juges La Forest et Gonthier rendus par

LE JUGE GONTHIER — J'ai eu l'avantage de lire les motifs du juge Cory, les motifs conjoints des juges L'Heureux-Dubé et McLachlin ainsi que les

of Justice Major. I agree with Cory J. and L'Heureux-Dubé and McLachlin JJ. as to the disposition of the appeal and with their exposition of the law on bias and impartiality and the relevance of context. However, I am in agreement with and adopt the joint reasons of L'Heureux-Dubé and McLachlin JJ. in their treatment of social context and the manner in which it may appropriately enter the decision-making process as well as their assessment of the trial judge's reasons and comments in the present case.

The following are the reasons delivered by

L'HEUREUX-DUBÉ AND MCLACHLIN JJ. —

I. Introduction

We have read the reasons of our colleague, Justice Cory, and while we agree that this appeal must be allowed, we differ substantially from him in how we reach that outcome. As a result, we find it necessary to write brief concurring reasons.

We endorse Cory J.'s comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity. However, we approach the test for reasonable apprehension of bias and its application to the case at bar somewhat differently from our colleague.

In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.

motifs du juge Major. Je suis d'accord avec le juge Cory ainsi qu'avec les juges L'Heureux-Dubé et McLachlin quant au dispositif du pourvoi, à l'exposé des règles de droit relatives à la partialité et à l'impartialité ainsi qu'à l'incidence du contexte. Cependant, je fais miens les motifs des juges L'Heureux-Dubé et McLachlin en ce qui a trait au contexte social et à l'influence qu'il peut à juste titre exercer sur le processus décisionnel de même que pour ce qui est de l'évaluation des motifs et des commentaires du juge du procès en l'espèce.

Version française des motifs rendus par

LES JUGES L'HEUREUX-DUBÉ ET MCLACHLIN —

I. Introduction

27 Nous avons pris connaissance des motifs de notre collègue le juge Cory, et, tout en convenant avec lui qu'il y a lieu d'accueillir le pourvoi, nous ne sommes pas d'accord sur la façon de parvenir à cette solution. Nous estimons, par conséquent, nécessaire de rédiger de brefs motifs concordants.

28 Nous endossons les observations du juge Cory sur l'art de juger dans une société multiculturelle, sur l'importance de la perspective et du contexte social dans le processus décisionnel et sur la présomption d'intégrité du juge. Cependant, nous abordons de manière quelque peu différente le test de la crainte raisonnable de partialité et son application en l'espèce.

29 À notre avis, le test développé par la jurisprudence quant à la crainte raisonnable de partialité reflète cette réalité qui veut que si le juge ne peut jamais être tout à fait neutre, c'est-à-dire parfaitement objectif, il peut et il doit, néanmoins, s'efforcer d'atteindre l'impartialité. Ce test suppose donc qu'il est inévitable et légitime que l'expérience personnelle de chaque juge soit mise à profit et se reflète dans ses jugements, à condition que cette expérience soit pertinente, qu'elle ne soit pas fondée sur des stéréotypes inappropriés, et qu'elle n'entrave pas la résolution juste et équitable de l'affaire à la lumière des faits mis en preuve.

30 We find that on the basis of these principles, there is no reasonable apprehension of bias in the case at bar. Like Cory J. we would, therefore, overturn the findings by the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal that a reasonable apprehension of bias arises in this case, and restore the acquittal of R.D.S. This said, we disagree with Cory J.'s position that the comments of Judge Sparks were unfortunate, unnecessary, or close to the line. Rather, we find them to reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose — a context known to Judge Sparks and to any well-informed member of the community.

Nous concluons à la lumière de ces principes qu'il ne peut y avoir crainte raisonnable de partialité en l'espèce. Nous convenons donc avec le juge Cory qu'il y a lieu d'infirmer la conclusion tirée par la Cour suprême de la Nouvelle-Écosse (Section de première instance) et par les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse qu'il y ait en l'espèce une crainte raisonnable de partialité, et de rétablir l'acquittement de R.D.S. Cela dit, nous ne partageons pas l'avis du juge Cory selon lequel les observations du juge Sparks étaient malheureuses ou inutiles ou qu'elles frôlaient la limite acceptable. Au contraire, nous estimons qu'elles traduisent une appréciation tout à fait appropriée des faits mis en preuve ainsi que du contexte dans lequel l'affaire s'est déroulée, contexte connu du juge Sparks ainsi que de tout membre bien informé de la collectivité.

II. The Test for Reasonable Apprehension of Bias

II. Le test applicable à la crainte raisonnable de partialité

31 The test for reasonable apprehension of bias is that set out by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. Though he wrote dissenting reasons, de Grandpré J.'s articulation of the test for bias was adopted by the majority of the Court, and has been consistently endorsed by this Court in the intervening two decades: see, for example, *Valente v. The Queen*, [1985] 2 S.C.R. 673; *R. v. Lippé*, [1991] 2 S.C.R. 114; *Ruffo v. Conseil de la magistrature*, [1995] 4 S.C.R. 267. De Grandpré J. stated, at pp. 394-95:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information . . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> The grounds for this apprehension must, however, be substantial and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

Le test applicable à la crainte raisonnable de partialité a été énoncé par le juge de Grandpré dans *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369. Bien qu'il ait été dissident, le test qu'il a formulé a été adopté par la majorité et a été constamment repris par notre Cour au cours des deux décennies subséquentes: voir par exemple *Valente c. La Reine*, [1985] 2 R.C.S. 673; *R. c. Lippé*, [1991] 2 R.C.S. 114; *Ruffo c. Conseil de la magistrature*, [1995] 4 R.C.S. 267. Le juge de Grandpré a déclaré, aux pp. 394 et 395:

> . . . la crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. [. . .] [C]e critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. Croirait-elle que, selon toute vraisemblance, [le décideur], consciemment ou non, ne rendra pas une décision juste?»
>
> Toutefois, les motifs de crainte doivent être sérieux et je [. . .] refuse d'admettre que le critère doit être celui d'«une personne de nature scrupuleuse ou tatillonne».

As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": *United States v. Morgan*, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in *Commentaries on the Laws of England*, Book III, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at p. 417, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), at pp. 60-61.

32 Ainsi que le fait observer le juge Cory au par. 92, la portée de l'obligation d'agir équitablement définie par le juge de Grandpré et la rigueur avec laquelle elle s'applique varieront grandement selon le rôle et les fonctions du tribunal en question. Bien que les procédures judiciaires soient généralement davantage soumises aux impératifs de justice naturelle que ne le sont les instances administratives, les juges des tribunaux judiciaires, de par leur position, ont néanmoins, bénéficié d'une déférence considérable de la part des cours d'appel appelées à examiner une allégation de crainte raisonnable de partialité. C'est que les juges [TRADUCTION] «sont tenus pour avoir une conscience et une discipline intellectuelle et être capables de trancher équitablement un litige à la lumière de ses circonstances propres»: *United States c. Morgan*, 313 U.S. 409 (1941), à la p. 421. Cette présomption d'impartialité a une importance considérable puisque, comme l'a fait observer Blackstone, aux pp. 21 et 22, dans *Commentaires sur les lois anglaises* (1823), t. 5, cité au renvoi 49 de l'article de Richard F. Devlin intitulé «We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S» (1995), 18 *Dalhousie L.J.* 408, à la p. 417, «la loi ne peut supposer de la faveur, de la partialité, dans un juge, qui, avant tout, s'est engagé par serment à administrer la justice avec une sévère intégrité, et dont l'autorité dépend en grande partie de l'idée qu'on a conçue de lui à cet égard». C'est ainsi que les cours d'appel ont hésité à conclure à la partialité ou à l'existence d'une crainte raisonnable de partialité en l'absence d'une preuve concluante en ce sens: *R. c. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), aux pp. 60 et 61.

Notwithstanding the strong presumption of impartiality that applies to judges, they will nevertheless be held to certain stringent standards regarding bias — "a reasonable apprehension that the judge might not act in an entirely impartial manner is ground for disqualification": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at pp. 842-43.

33 Malgré cette forte présomption d'impartialité, les juges sont tenus à certaines normes strictes pour ce qui est de la partialité car la «crainte raisonnable que le juge pourrait ne pas agir d'une façon complètement impartiale est un motif de récusation»: *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833, aux pp. 842 et 843.

In order to apply this test, it is necessary to distinguish between the impartiality which is required

34 Afin d'appliquer le test, il est nécessaire d'établir une distinction entre l'impartialité, à laquelle

of all judges, and the concept of judicial neutrality. The distinction we would draw is that reflected in the insightful words of Benjamin N. Cardozo in *The Nature of the Judicial Process* (1921), at pp. 12-13 and 167, where he affirmed the importance of impartiality, while at the same time recognizing the fallacy of judicial neutrality:

> There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.
>
> . . .
>
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge.

35 Cardozo recognized that objectivity was an impossibility because judges, like all other humans, operate from their own perspectives. As the Canadian Judicial Council noted in *Commentaries on Judicial Conduct* (1991), at p. 12, "[t]here is no human being who is not the product of every social experience, every process of education, and every human contact". What is possible and desirable, they note, is impartiality:

> . . . the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

sont tenus tous les juges, et la neutralité. Cette distinction fait écho aux propos de Benjamin N. Cardozo dans *The Nature of the Judicial Process* (1921), aux pp. 12, 13 et 167, où il a affirmé l'importance de l'impartialité tout en reconnaissant l'illusion de la neutralité du juge:

> [TRADUCTION] Il y a en chacun de nous une tendance, qu'on peut appeler philosophie ou autre chose, qui donne cohérence et orientation à la pensée et à l'action. Le juge ne peut pas plus se soustraire à ce courant que le commun des mortels. Sa vie durant, des forces dont il n'a pas conscience et qu'il ne peut nommer, l'ont entraîné – instincts, atavismes, croyances traditionnelles, convictions acquises; et la résultante est une perspective sur la vie, une conception des besoins sociaux . . . Chaque problème qui se pose à l'esprit se détache sur cette toile de fond. Nous pouvons essayer de voir les choses le plus objectivement possible. Il n'empêche que nous ne pouvons les voir avec d'autres yeux que les nôtres propres.
>
> . . .
>
> Dans notre subconscient se trouvent enfouies d'autres forces, préférences et aversions, prédilections et préventions, tout un ensemble d'instincts, d'émotions, d'habitudes et de convictions, qui font l'être humain, qu'il soit juge ou justiciable.

Cardozo reconnaît que l'objectivité est chose impossible parce que les juges, comme tous les autres êtres humains, sont conditionnés par leur propre perspective. Ainsi que l'a noté le Conseil canadien de la magistrature dans ses *Propos sur la conduite des juges* (1991), à la p. 15, «[t]out être humain est le produit de son expérience sociale, de son éducation et de ses contacts avec ceux et celles qui partagent le monde avec nous». Ce qui est possible et souhaitable, selon le Conseil, c'est l'impartialité:

> La sagesse que l'on exige d'un juge lui impose d'admettre, de permettre consciemment, et peut-être de remettre en question, l'ensemble des attitudes et des sympathies que ses concitoyens sont libres d'emporter à la tombe sans en avoir vérifié le bien-fondé.
>
> La véritable impartialité n'exige pas que le juge n'ait ni sympathie ni opinion. Elle exige que le juge soit libre d'accueillir et d'utiliser différents points de vue en gardant un esprit ouvert.

III. The Reasonable Person

The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, *supra*.) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

It follows that one must consider the reasonable person's knowledge and understanding of the judicial process and the nature of judging as well as of the community in which the alleged crime occurred.

A. *The Nature of Judging*

As discussed above, judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. As David M. Paciocco and Lee Stuesser write in their book *The Law of Evidence* (1996), at p. 277:

In general, the trier of fact is entitled simply to apply common sense and human experience in determining whether evidence is credible and in deciding what use, if

III. La personne raisonnable

L'existence d'une crainte raisonnable de partialité ou son absence est déterminée par référence à une personne raisonnable, bien renseignée, qui étudierait la question en profondeur, de façon réaliste et pratique (*Committee for Justice and Liberty*, précité). Cette personne n'est pas «de nature scrupuleuse ou tatillonne», c'est plutôt une personne sensée qui connaît les circonstances de la cause. 36

Il s'ensuit que ce qui entre en ligne de compte, ce sont la connaissance et la compréhension que la personne raisonnable a du processus judiciaire et de l'exercice de la justice ainsi que de la collectivité où le crime reproché a été commis. 37

A. *La nature de l'art de juger*

Comme nous l'avons déjà noté, il est indubitable que dans une société bilingue, multiraciale et multiculturelle, chaque juge aborde l'exercice de la justice dans une perspective qui lui est propre. Il aura certainement été conditionné et formé par ses expériences personnelles, et on ne peut s'attendre à ce qu'il s'en départisse dès qu'il est nommé juge. En fait, pareille transformation priverait la société du bénéfice des précieuses connaissances acquises alors qu'il était encore avocat. De même, elle empêcherait la réunion d'une diversité d'expériences au sein de la magistrature. La personne raisonnable ne s'attend pas à ce que le juge joue le rôle d'un figurant neutre; elle exige cependant qu'il fasse preuve d'impartialité lorsqu'il rend justice. 38

Il est manifeste, et la personne raisonnable s'y attend, que le juge des faits est à juste titre influencé dans ses délibérations par sa propre conception du monde dans lequel ont eu lieu les faits litigieux. En effet, il doit s'appuyer sur ses acquis antérieurs pour exercer ses fonctions juridictionnelles. Ainsi que l'ont écrit David M. Paciocco et Lee Stuesser dans *The Law of Evidence* (1996), à la p. 277: 39

[TRADUCTION] *En général, le juge des faits est habilité simplement à appliquer le bon sens et l'expérience humaine pour décider si la preuve est digne de foi et*

any, to make of it in coming to its finding of fact. [Emphasis in original.]

40 At the same time, where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law. Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them. The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.

41 It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context in which the alleged crime occurred.

42 Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill L.J.* 91, at p. 107, offers the following comment:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked

quel usage, le cas échéant, il peut en faire pour tirer ses conclusions de faits. [En italique dans l'original.]

Par contre, quand il s'agit de savoir quelle règle de droit il faut appliquer aux conclusions de faits, ce sont les principes juridiques qui s'imposent et non les croyances personnelles du juge qui peuvent aller à l'encontre de ces principes. Qui plus est, bien que sa compréhension de la nature humaine influe légitimement sur ses conclusions concernant la crédibilité ou les faits, le juge ne doit les tirer qu'après avoir fait preuve d'ouverture d'esprit à l'égard de toutes les parties au litige et après avoir examiné leurs prétentions. La personne raisonnable, à travers les yeux de laquelle est évaluée la crainte de partialité, s'attend à ce que le juge procède avec un esprit ouvert à l'examen prudent, détaché et circonspect de la réalité complexe de chaque affaire dont il est saisi.

À l'évidence, tous les litiges soumis à la justice sont, à des degrés divers, complexes. Il ne s'agit pas seulement de savoir qui a fait quoi à qui; les points de fait et de droit à résoudre dans un cas donné ne sont pas soulevés dans un vacuum. Au contraire, ils sont le fait de nombreux agents et sont influencés par les innombrables forces qui s'exercent sur eux dans un contexte donné. Le juge, qui se prononce sur les faits, doit s'enquérir de ces forces. En somme, il doit être conscient du contexte dans lequel le crime reproché a été commis.

Il n'est pas inusité que le juge examine le contexte factuel, social et psychologique dans lequel naît le litige. De fait, l'examen délibéré du contexte est maintenant reconnu comme une mesure favorisant l'impartialité du juge. À ce propos, le professeur Jennifer Nedelsky, dans son article intitulé «Embodied Diversity and the Challenges to Law» (1997), 42 *R.D. McGill* 91, fait le commentaire suivant à la p. 107:

> [TRADUCTION] Ce qui nous permet de juger vraiment, de nous écarter de nos particularités et préférences personnelles, c'est la faculté d'ouvrir notre esprit. Nous y arrivons en prenant en considération différentes perspectives. C'est le moyen de sortir de l'aveuglement de notre subjectivité. Plus nous sommes en mesure de tenir compte de vues différentes, moins nous sommes suscep-

into one perspective . . . . It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. For example, in a case involving alleged police misconduct in denying an accused's right to counsel, this Court inquired not simply into whether the accused had been read their *Charter* rights, but also used a contextual approach to ensure that the purpose of the constitutionally protected right was fulfilled: *R. v. Bartle*, [1994] 3 S.C.R. 173. The Court, placing itself in the position of the accused, asked how the accused would have experienced and responded to arrest and detention. Against this background, the Court went on to determine what was required to make the right to counsel truly meaningful. This inquiry provided the Court with a larger picture, which was in turn conducive to a more just determination of the case.

An understanding of the context or background essential to judging may be gained from testimony from expert witnesses in order to put the case in context: *R. v. Lavallee*, [1990] 1 S.C.R. 852, *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), and *Moge v. Moge*, [1992] 3 S.C.R. 813, from academic studies properly placed before the Court; and from the judge's personal understanding and experience of the society in which the judge lives and works. This process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition.

A reasonable person far from being troubled by this process, would see it as an important aid to judicial impartiality.

B. *The Nature of the Community*

The reasonable person, identified by de Grandpré J. in *Committee for Justice and Liberty*, *supra*, is an informed and right-minded member of the community, a community which, in Canada, supports the fundamental principles

tibles d'être enfermés dans une seule perspective [. . .] C'est cette faculté d'ouvrir notre esprit qui rend possible le jugement indépendant et impartial.

43 L'examen du contexte par le juge permet de définir la toile de fond nécessaire à l'interprétation et à l'application de la loi. Par exemple, dans une affaire où la police avait été accusée d'inconduite pour avoir dénié à l'accusé le droit de consulter un avocat, la Cour ne s'est pas contentée de vérifier si les agents avaient fait lecture à l'accusé des droits que lui garantit la *Charte canadienne des droits et libertés*, elle a adopté une approche contextuelle pour s'assurer que l'objectif du droit protégé par la Constitution était réalisé: *R. c. Bartle*, [1994] 3 R.C.S. 173. La Cour, se mettant à la place de l'accusé, s'est demandé comment celui-ci aurait réagi à l'arrestation et la détention. Dans ce contexte, elle a déterminé ce qui était nécessaire pour que le droit à l'assistance d'un avocat prenne tout son sens. Cet examen lui a donné une vue d'ensemble de l'affaire, ce qui a abouti à une décision plus juste.

44 Le juge peut se faire une idée claire du contexte ou de l'historique, ce qui est essentiel pour rendre justice, en s'appuyant sur les témoignages d'experts qui replacent l'affaire dans son contexte (*R. c. Lavallee*, [1990] 1 R.C.S. 852, *R. c. Parks* (1993), 15 O.R. (3d) 324 (C.A.), et *Moge c. Moge*, [1992] 3 R.C.S. 813), sur les ouvrages de doctrine dûment produits en preuve ainsi que sur sa propre compréhension et son expérience de la société au sein de laquelle il vit et travaille. Ce processus d'ouverture est non seulement conforme à l'impartialité, il peut aussi à juste titre être considéré comme une condition préalable essentielle.

45 Loin d'être préoccupée par ce processus, la personne raisonnable y verrait un important outil de l'impartialité du juge.

B. *La nature de la collectivité*

46 La personne raisonnable dont parle le juge de Grandpré dans l'arrêt *Committee for Justice and Liberty*, précité, est un membre informé et sensé de la collectivité qui, au Canada, souscrit aux principes constitutionnalisés par la *Charte*. Ces prin-

entrenched in the Constitution by the *Canadian Charter of Rights and Freedoms*. Those fundamental principles include the principles of equality set out in s. 15 of the *Charter* and endorsed in nationwide quasi-constitutional provincial and federal human rights legislation. The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter*'s equality provisions. These are matters of which judicial notice may be taken. In *Parks*, *supra*, at p. 342, Doherty J.A., did just this, stating:

Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

47 The reasonable person is not only a member of the Canadian community, but also, more specifically, is a member of the local communities in which the case at issue arose (in this case, the Nova Scotian and Halifax communities). Such a person must be taken to possess knowledge of the local population and its racial dynamics, including the existence in the community of a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues: *Royal Commission on the Donald Marshall Jr. Prosecution* (1989); *R. v. Smith* (1991), 109 N.S.R. (2d) 394 (Co. Ct.). The reasonable person must thus be deemed to be cognizant of the existence of racism in Halifax, Nova Scotia. It follows that judges may take notice of actual racism known to exist in a particular society. Judges have done so with respect to racism in Nova Scotia. In *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91 (Fam. Ct.), it was stated at p. 108:

[Racism] is a pernicious reality. The issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report (sub. nom. *Royal Commission on the Donald Marshall, Jr., Prosecution*). A per-

cipes fondamentaux embrassent les principes d'égalité prévus à l'art. 15 de la *Charte* et consacrés au pays par les lois quasi constitutionnelles fédérales et provinciales sur les droits de la personne. La personne raisonnable est censée connaître le passé de discrimination dont ont souffert les groupes défavorisés de la société canadienne que protègent les dispositions de la *Charte* relatives aux droits à l'égalité. Il s'agit de facteurs dont le juge peut prendre connaissance d'office. C'est ce qu'a fait le juge Doherty de la Cour d'appel dans *Parks*, précité, en déclarant ce qui suit à la p. 342:

[TRADUCTION] Le racisme, en particulier le racisme antinoir, est partie intégrante de la mentalité de notre société. Une couche importante de la société professe ouvertement des vues racistes. Une couche plus large encore est inconsciemment influencée par des stéréotypes raciaux négatifs. De surcroît, nos institutions, y compris la justice pénale, reflètent ces stéréotypes négatifs qu'elles perpétuent.

La personne raisonnable fait non seulement partie de la société canadienne, mais, plus particulièrement, des collectivités où l'affaire a pris naissance (en l'espèce, la Nouvelle-Écosse et Halifax). Cette personne est censée connaître la population locale et sa dynamique raciale, y compris son passé de discrimination généralisée et systémique contre les Noirs et les Autochtones, ainsi que les heurts retentissants entre la police et les minorités visibles sur des questions de police: *Commission royale sur les poursuites intentées contre Donald Marshall fils* (1989); *R. c. Smith* (1991), 109 N.S.R. (2d) 394 (C. cté). La personne raisonnable doit donc être réputée au fait de l'existence du racisme à Halifax (Nouvelle-Écosse). Il s'ensuit que le juge peut prendre connaissance d'office du racisme dont l'existence est notoire dans une société donnée. C'est ce qu'ont fait les juges pour ce qui est du racisme en Nouvelle-Écosse. Dans l'affaire *Nova Scotia (Minister of Community Services) c. S.M.S.* (1992), 110 N.S.R. (2d) 91 (Trib. fam.), le tribunal s'exprime ainsi à la p. 108:

[TRADUCTION] [Le racisme] est une réalité pernicieuse. Son existence en Nouvelle-Écosse a été bien documentée dans le rapport d'enquête sur l'affaire Marshall (c'est-à-dire la *Commission royale sur les poursuite*

son would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually, but also systemically and institutionally.

intentées contre Donald Marshall fils). Il faudrait être stupide, suffisant ou ignorant pour ne pas en reconnaître la présence, non seulement chez les individus, mais aussi au sein du système et des institutions.

We conclude that the reasonable person contemplated by de Grandpré J., and endorsed by Canadian courts is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.

48 Nous concluons que la personne raisonnable, dont parle le juge de Grandpré et qu'ont adoptée les tribunaux canadiens, aborde la question de savoir s'il y a crainte raisonnable de partialité avec une compréhension nuancée et contextuelle des éléments en litige. Elle comprend qu'il est impossible au juge d'être neutre, mais elle exige son impartialité. Elle connaît la dynamique raciale de la collectivité locale et, en tant que membre de la société canadienne, elle souscrit aux principes d'égalité.

Before concluding that there exists a reasonable apprehension of bias in the conduct of a judge, the reasonable person would require some clear evidence that the judge in question had improperly used his or her perspective in the decision-making process; this flows from the presumption of impartiality of the judiciary. There must be some indication that the judge was not approaching the case with an open mind fair to all parties. Awareness of the context within which a case occurred would not constitute such evidence; on the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

49 Cette personne raisonnable ne conclurait pas que les actes d'un juge suscitent une crainte raisonnable de partialité sans une preuve établissant clairement qu'il a indûment fait intervenir son point de vue dans son jugement; cette exigence découle de la présomption d'impartialité du juge. Il faut qu'il y ait une indication que le juge n'a pas abordé l'affaire avec un esprit ouvert et équitable envers toutes les parties. La connaissance du contexte dans lequel l'affaire a eu lieu ne saurait constituer une telle preuve; au contraire, elle est la marque de la plus haute tradition d'impartialité judiciaire.

IV. Application of the Test to the Facts

IV. Application du test aux faits de l'espèce

In assessing whether a reasonable person would perceive the comments of Judge Sparks to give rise to a reasonable apprehension of bias, it is important to bear in mind that the impugned reasons were delivered orally. As Professor Devlin puts it in "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.", *supra*, at p. 414:

50 Pour évaluer si une personne raisonnable percevrait les propos tenus par le juge Sparks comme susceptibles de donner lieu à une crainte raisonnable de partialité, il est important de rappeler que les motifs attaqués ont été prononcés oralement à l'audience même. Ainsi que l'a fait observer le professeur Devlin dans «We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R.* v. *R.D.S.*», *loc. cit.*, à la p. 414:

> Trial judges have a heavy workload that allows little time for meticulously thought-through reasoning. This is particularly true when decisions are delivered orally immediately after counsel have finished their arguments.

> [TRADUCTION] Les juges de première instance ont une lourde charge de travail qui ne leur donne guère le temps de motiver par le menu leurs décisions. Il en est particulièrement ainsi des jugements rendus oralement dès la clôture des débats.

(See also *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664.)

It follows that for the purposes of this appeal, the oral reasons issued by Judge Sparks should be read in their entirety, and the impugned passages should be construed in light of the whole of the trial proceedings and in light of all other portions of the judgment.

51 Judge Sparks was faced with contradictory testimony from the only two witnesses, the appellant R.D.S., and Constable Stienburg. Both testified as to the events that occurred and were subjected to cross-examination. As trier of fact, Judge Sparks was required to assess their testimony, and to determine whether or not, on the evidence before her, she had a reasonable doubt as to the guilt of the appellant R.D.S. It is evident in the transcript that Judge Sparks proceeded to do just that.

52 Judge Sparks briefly summarized the contradictory evidence offered by the two witnesses, and then made several observations about credibility. She noted that R.D.S. testified quite candidly, and with considerable detail. She remarked that contrary to the testimony of Constable Stienburg, it was the evidence of R.D.S. that when he arrived on the scene on his bike, his cousin was handcuffed and not struggling in any way. She found the level of detail that R.D.S. provided to have "a ring of truth", and found him to be "a rather honest young boy". In the end, while Judge Sparks specifically noted that she did not accept all the evidence given by R.D.S., she nevertheless found him to have raised a reasonable doubt by raising queries in her mind as to what actually occurred.

53 It is important to note that having already found R.D.S. to be credible, and having accepted a sufficient portion of his evidence to leave her with a reasonable doubt as to his guilt, Judge Sparks necessarily disbelieved at least a portion of the conflicting evidence of Constable Stienburg. At that point, Judge Sparks made reference to the submissions of the Crown that "there's absolutely no reason to attack the credibility of the officer", and

(Voir aussi *R. c. Burns*, [1994] 1 R.C.S. 656, à la p. 664.)

Il s'ensuit que, dans le cadre du présent pourvoi, il faut lire l'intégralité des motifs prononcés oralement par le juge Sparks, et les passages attaqués doivent être interprétés à la lumière de l'ensemble des procédures de première instance, et compte tenu des autres passages du jugement.

Le juge Sparks a entendu les témoignages contradictoires des deux seuls témoins, l'appelant R.D.S. et l'agent de police Stienburg. L'un et l'autre ont témoigné sur ce qui s'était passé et ils ont été contre-interrogés. À titre de juge des faits, le juge Sparks devait peser leurs témoignages respectifs et décider si, à la lumière de la preuve produite, elle avait un doute raisonnable quant à la culpabilité de l'appelant R.D.S. Il ressort de la transcription des débats que c'est exactement ce qu'elle a fait.

Le juge Sparks a brièvement récapitulé les témoignages contradictoires des deux témoins, puis a fait plusieurs observations en matière de crédibilité. Elle a noté que R.D.S. témoignait en toute franchise et donnait beaucoup de détails. Elle a fait remarquer que, contrairement à l'agent Stienburg, R.D.S. a témoigné qu'à son arrivée à bicyclette sur les lieux, son cousin avait les menottes aux poignets et ne se débattait pas du tout. Elle a trouvé que l'abondance des détails donnés par R.D.S. avait [TRADUCTION] «l'accent de la vérité» et que celui-ci était [TRADUCTION] «un garçon plutôt honnête». Enfin, tout en notant expressément qu'elle n'ajoutait pas foi à la totalité du témoignage de R.D.S., elle a conclu qu'il avait soulevé un doute raisonnable en suscitant dans son esprit des questions sur ce qui s'était réellement passé.

Il est important de noter qu'ayant jugé R.D.S. digne de foi et ayant trouvé suffisamment d'éléments dans son témoignage pour susciter un doute raisonnable sur sa culpabilité, le juge Sparks rejetait par le fait même une partie au moins du témoignage contradictoire de l'agent Stienburg. Elle a alors rappelé la prétention du ministère public selon laquelle [TRADUCTION] «il n'y a absolument aucune raison d'attaquer la crédibilité du policier»

then addressed herself to why there might, in fact, be a reason to attack the credibility of the officer in this case. It is in this context that Judge Sparks made the statements which have prompted this appeal:

> The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.
>
> At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.

et a expliqué ensuite pourquoi il pourrait y avoir en fait une raison de le faire dans le cas présent. C'est dans ce contexte qu'elle a fait l'observation suivante qui est à l'origine du présent pourvoi:

> [TRADUCTION] Le ministère public dit, bien, pourquoi le policier aurait-il dit que les événements se sont déroulés comme il les a relatés à la Cour ce matin? Je ne dis pas que l'agent a trompé la Cour, bien qu'on sache que des policiers l'aient fait dans le passé. Je ne dis pas que le policier a réagi de façon excessive, même s'il arrive effectivement que des policiers réagissent avec excès, particulièrement lorsqu'ils ont affaire à des groupes non blancs. Cela me semble dénoter en soi un état d'esprit suspect. Je crois que nous sommes vraisemblablement en présence dans cette affaire-ci d'un jeune policier qui a réagi de façon excessive. J'accepte le témoignage de [R.D.S.] selon lequel on lui a intimé de se taire, sous peine d'être arrêté. Cela semble conforme à l'attitude courante du jour.
>
> Quoi qu'il en soit, vu mes remarques et l'ensemble de la preuve soumise à la cour, je n'ai d'autre choix que de prononcer l'acquittement.

These remarks do not support the conclusion that Judge Sparks found Constable Stienburg to have lied. In fact, Judge Sparks did quite the opposite. She noted firstly, that she was not saying Constable Stienburg had misled the court, although that could be an explanation for his evidence. She then went on to remark that she was not saying that Constable Stienburg had overreacted, though she was alive to that possibility given that it had happened with police officers in the past, and in particular, it had happened when police officers were dealing with non-white groups. Finally, Judge Sparks concluded that, though she was not willing to say that Constable Stienburg did overreact, it was her belief that he probably overreacted. And, in support of that finding, she noted that she accepted the evidence of R.D.S. that "he was told to shut up or he would be under arrest".

54 Ces observations ne permettent pas de conclure que le juge Sparks a statué que l'agent Stienburg avait menti. En fait, elle dit exactement le contraire. Elle a noté pour commencer qu'elle ne disait pas qu'il avait trompé la cour, bien que cela puisse expliquer son témoignage. Elle a ensuite fait remarquer qu'elle ne disait pas qu'il avait réagi de façon excessive, bien qu'elle reconnaisse cette possibilité étant donné que des agents de police l'avaient fait par le passé, en particulier lorsqu'ils avaient affaire à des groupes non blancs. Enfin, elle a conclu que tout en n'étant pas disposée à dire que l'agent Stienburg avait effectivement réagi de façon excessive, elle pensait qu'il l'avait vraisemblablement fait. Et à l'appui de cette conclusion, elle a fait remarquer qu'elle ajoutait foi à l'affirmation de R.D.S. selon laquelle l'agent de police «lui a intimé de se taire, sous peine d'être arrêté».

At no time did Judge Sparks rule that the probable overreaction by Constable Stienburg was motivated by racism. Rather, she tied her finding of probable overreaction to the evidence that Constable Stienburg had threatened to arrest the appellant R.D.S. for speaking to his cousin. At the same

55 À aucun moment le juge Sparks n'a statué que la réaction vraisemblablement excessive de l'agent de police Stienburg était motivée par le racisme. Au contraire, elle a lié sa conclusion relative à la réaction vraisemblablement excessive à la preuve établissant que l'agent de police Stienburg avait

time, there was evidence capable of supporting a finding of racially motivated overreaction. At an earlier point in the proceedings, she had accepted the evidence that the other youth arrested that day, was handcuffed and thus secured when R.D.S. approached. This constitutes evidence which could lead one to question why it was necessary for both boys to be placed in choke holds by Constable Stienburg, purportedly to secure them. In the face of such evidence, we respectfully disagree with the views of our colleagues Cory and Major JJ. that there was no evidence on which Judge Sparks could have found "racially motivated" overreaction by the police officer.

menacé d'arrêter l'appelant R.D.S. parce que celui-ci parlait à son cousin. Au surplus, il y avait des éléments de preuve susceptibles d'appuyer une conclusion qu'il y avait eu réaction excessive fondée sur le racisme. Le juge Sparks avait accepté plus tôt le témoignage selon lequel l'autre adolescent arrêté ce jour-là, était menotté, et donc maîtrisé, lorsque R.D.S. est arrivé sur les lieux. Il s'agit d'une preuve qui pourrait amener quelqu'un à se demander pourquoi l'agent de police Stienburg avait estimé nécessaire d'appliquer une prise d'étranglement aux deux garçons, soi-disant pour les maîtriser. Devant une telle preuve, nous ne pouvons partager l'avis de nos collègues les juges Cory et Major voulant qu'il n'y ait eu aucune preuve à partir de laquelle le juge Sparks aurait pu conclure à une réaction excessive «fondée sur la discrimination raciale» de la part de l'agent de police.

56 While it seems clear that Judge Sparks did not in fact relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.

S'il semble clair que le juge Sparks n'a pas dans les faits établi un rapport entre la réaction vraisemblablement excessive de l'agent de police et la race de l'appelant R.D.S., il faut noter que même si elle avait choisi d'imputer l'attitude de l'agent à la dynamique raciale de la situation, elle n'aurait pas forcément commis une erreur. En tant que membre de la collectivité, il lui était loisible de prendre en considération l'existence notoire du racisme dans cette collectivité et d'apprécier la preuve quant à ce qui s'est produit en tenant compte de ce contexte.

57 That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities. As found by Freeman J.A. in his dissenting judgment at the Court of Appeal (1995), 145 N.S.R. (2d) 284, at p. 294:

Le fait que le juge Sparks ait reconnu que les agents de police réagissent quelquefois de façon excessive quand ils ont affaire à des groupes non blancs signifie tout simplement qu'en rendant son jugement, elle avait parfaitement conscience de la dynamique raciale notoire qui a pu exister dans les relations entre agents de police et minorités visibles. Ainsi que l'a fait observer le juge Freeman de la Cour d'appel dans ses motifs dissidents (1995), 145 N.S.R. (2d) 284, à la p. 294:

> The case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence. Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own com-

> [TRADUCTION] L'affaire était délicate en raison de son aspect racial, c'était la confrontation classique entre un agent de police blanc représentant le pouvoir de l'État et un adolescent noir inculpé d'une infraction. Le juge Sparks se devait d'être sensible aux nuances et aux

mon sense which is necessarily informed by her own experience and understanding.

Given these facts, the question is whether a reasonable and right-minded person, informed of the circumstances of this case, and knowledgeable about the local community and about Canadian *Charter* values, would perceive that the reasons of Judge Sparks would give rise to a reasonable apprehension of bias. In our view, they would not. The clear evidence of prejudgment required to sustain a reasonable apprehension of bias is nowhere to be found.

Judge Sparks' oral reasons show that she approached the case with an open mind, used her experience and knowledge of the community to achieve an understanding of the reality of the case, and applied the fundamental principle of proof beyond a reasonable doubt. Her comments were based entirely on the case before her, were made after a consideration of the conflicting testimony of the two witnesses and in response to the Crown's submissions, and were entirely supported by the evidence. In alerting herself to the racial dynamic in the case, she was simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution of the case before her.

V. Conclusion

In the result, we agree with Cory J. as to the disposition of this case. We would allow the appeal, overturn the findings of the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal, and restore the acquittal of the appellant R.D.S.

The judgment of Cory and Iacobucci JJ. was delivered by

CORY J. — In this appeal, it must be determined whether a reasonable apprehension of bias arises

sous-entendus, et de s'en remettre à son propre sens commun, lequel est nécessairement teinté par son expérience et sa vision du monde.

58 Dans ce contexte, il faut se demander si une personne raisonnable et sensée, informée des circonstances de l'affaire et au fait de la situation locale ainsi que des valeurs consacrées par la *Charte*, estimerait que les motifs de jugement prononcés par le juge Sparks suscitent une crainte raisonnable de partialité. À notre avis, une personne raisonnable ne le penserait pas. Il n'y a pas de preuve établissant clairement l'existence d'un préjugé justifiant une crainte raisonnable de partialité.

59 Les motifs prononcés oralement par le juge Sparks montrent qu'elle a examiné l'affaire avec un esprit ouvert, qu'elle s'est servie de son expérience et de sa connaissance de la collectivité pour comprendre la réalité de l'affaire, et qu'elle a appliqué la règle fondamentale de la preuve hors de tout doute raisonnable. Ses observations étaient entièrement fondées sur la preuve devant elle, après avoir pesé le témoignage contradictoire des deux témoins et en réponse aux arguments du ministère public. Enfin, ces observations étaient entièrement justifiées par la preuve produite. En se montrant attentive à la dynamique raciale de l'affaire, elle s'est tout simplement efforcée de rendre justice à la lumière du contexte, ce qui était, à notre avis, tout à fait légitime et de nature à favoriser la résolution juste et équitable de l'affaire.

V. Conclusion

60 En définitive, nous partageons l'avis du juge Cory quant à la façon de trancher le pourvoi. Nous sommes d'avis d'accueillir le pourvoi, d'infirmer les conclusions de la Cour suprême de la Nouvelle-Écosse (Section de première instance) et de la majorité de la Cour d'appel de la Nouvelle-Écosse, et de rétablir le verdict d'acquittement de l'appelant R.D.S.

Version française du jugement des juges Cory et Iacobucci rendu par

61 LE JUGE CORY — Dans le présent pourvoi, il faut déterminer si les commentaires qu'a formulés

from comments made by the trial judge in providing her reasons for acquitting the accused.

I. Facts

62 R.D.S. is an African-Canadian youth. When he was 15 years of age he was charged with three offences: unlawfully assaulting Constable Donald Stienburg; unlawfully assaulting Constable Stienburg with the intention of preventing the arrest of N.R.; and unlawfully resisting Constable Stienburg in the lawful execution of his duty.

63 The Crown proceeded with the charges by way of summary conviction. There were only two witnesses at the trial: R.D.S. himself and Constable Stienburg. Their accounts of the relevant events differed widely. The credibility of these witnesses would determine the outcome of the charges.

A. *Constable Stienburg's Evidence*

64 Constable Stienburg testified that he was in his police cruiser with his partner when a radio transmission alerted them that other officers were in pursuit of a stolen van. In the car was a "ride-along", Leslie Lane, who was unable to testify at the trial. The occupants of the stolen van were described as "non-white" youths. When Constable Stienburg and his partner arrived at the designated area they saw two black youths running across the street in front of them. Constable Stienburg detained one of the individuals, N.R., while his partner pursued the other. He testified that there were a number of other people standing around at the time.

65 N.R. was detained outside the police car since the "ride along" was in the back seat. While Constable Stienburg was standing by the side of the road with N.R., the accused, R.D.S., came towards Constable Stienburg on his bicycle. Constable Stienburg testified that R.D.S. ran into his legs, and while still on the bicycle, yelled at him and pushed him. R.D.S. was then arrested for interfering with the arrest of N.R., and Constable

le juge du procès en motivant sa décision d'acquitter l'accusé suscitent une crainte raisonnable de partialité.

I. Les faits

R.D.S. est un jeune afro-canadien. À l'âge de 15 ans, il a été accusé de trois infractions: avoir illégalement exercé des voies de fait contre l'agent de police Donald Stienburg, avoir illégalement exercé des voies de fait contre l'agent Stienburg dans l'intention d'empêcher l'arrestation de N.R. et avoir illégalement résisté à l'agent Stienburg agissant dans l'exercice de ses fonctions.

Le ministère public a procédé par voie sommaire. Deux personnes seulement ont témoigné au procès: R.D.S. lui-même et l'agent Stienburg. Ils ont donné des versions des événements largement différentes. Le sort des accusations reposait sur la crédibilité des témoins.

A. *Le témoignage de l'agent Stienburg*

L'agent Stienburg a témoigné qu'il était dans sa voiture de patrouille avec son collègue lorsqu'une transmission radio les a prévenus que d'autres agents étaient à la poursuite d'une camionnette volée. Dans la voiture se trouvait un «passager», Leslie Lane, qui n'a pu témoigner au procès. Les occupants de la camionnette volée ont été identifiés comme étant des adolescents «non blancs». Lorsque l'agent Stienburg et son collègue sont arrivés à l'endroit indiqué, ils ont vu deux jeunes Noirs traverser la rue en courant devant eux. L'agent Stienburg s'est emparé de l'un des individus, N.R., pendant que son collègue se mettait à la poursuite de l'autre. Il a témoigné que plusieurs personnes se trouvaient alors sur les lieux.

N.R. a été détenu à l'extérieur de la voiture de police étant donné que le «passager» prenait place sur le siège arrière. Tandis que l'agent Stienburg se tenait sur le bord de la route avec N.R., l'accusé, R.D.S., s'est dirigé vers lui à bicyclette. L'agent Stienburg a témoigné que R.D.S. lui a foncé dans les jambes et, toujours à bicyclette, l'a poussé en criant. R.D.S. a alors été arrêté pour avoir entravé l'arrestation de N.R. et l'agent Stienburg a

Stienburg called for back-up. Constable Stienburg stated that he put both R.D.S. and N.R. in "a neck restraint". When R.D.S. was finally brought to the police station, he was read his rights, and charged with the three offences.

In cross-examination, it was suggested to Constable Stienburg that R.D.S. had been overcharged. It was pointed out that R.D.S. had no prior record and it was suggested, although not particularly clearly, that R.D.S. had been singled out because he was black.

B. *Testimony of R.D.S.*

R.D.S. testified that he remembered that the weather on the particular day was misty and humid. While riding his bike from his grandmother's to his mother's house he saw the police car and the crowd standing beside it. A friend told him that his cousin N.R. had been arrested. R.D.S. approached the crowd, and stopped his bike when he saw N.R. and the officer. R.D.S. then tried to talk to N.R. to ask him what had happened and to find out if he should tell N.R.'s mother. Constable Stienburg told him: "Shut up, shut up, or you'll be under arrest too". When R.D.S. continued to ask N.R. if he should call his mother, Constable Stienburg arrested R.D.S. and put him in a choke hold. R.D.S. indicated that he could not breathe, and that he heard a woman tell the officer to "Let that kid go . . . ." He also heard her ask for his phone number. He could not talk so N.R. gave the number to her. R.D.S. indicated that the crowd standing around were all "little kids" under the age of 12. He denied that he ran into anyone or that he intended to run into anyone on his bike. He also testified that his hands remained on the handlebars, and he did not push the officer.

In cross-examination, he indicated that the reason he approached the crowd was because he was "being nosey". He remembered that N.R. was handcuffed when he arrived. Both R.D.S. and N.R. were placed in a choke hold at the same time. He repeated his denial that he touched the officer

demandé des renforts. Il a déclaré qu'il avait maîtrisé R.D.S. et N.R. en leur faisant une clé autour du cou. R.D.S. a finalement été conduit au poste de police où on lui a fait lecture de ses droits, et il a été inculpé des trois infractions.

66 En contre-interrogatoire, on a demandé à l'agent Stienburg si les accusations portées contre R.D.S. n'étaient pas excessives. On a souligné que R.D.S. n'avait pas de casier judiciaire, et on a laissé entendre, sans toutefois que cela soit particulièrement clair, qu'on s'en était pris à lui parce qu'il était Noir.

B. *Le témoignage de R.D.S.*

67 R.D.S. a témoigné qu'il se rappelait que, ce jour-là, le temps était brumeux et humide. Alors qu'il se rendait à bicyclette de la maison de sa grand-mère à celle de sa mère, il a aperçu la voiture de police et l'attroupement qui s'était formé autour. Un ami lui a dit que son cousin N.R. avait été arrêté. R.D.S. s'est approché, puis a arrêté sa bicyclette en voyant N.R. et le policier. Il a alors tenté de parler à N.R. pour lui demander ce qui était arrivé et voir s'il devait prévenir la mère de ce dernier. L'agent Stienburg lui a dit: [TRADUCTION] «Tais-toi, tais-toi ou tu vas être arrêté toi aussi». R.D.S. continuant de demander à N.R. s'il devait appeler sa mère, l'agent Stienburg l'a arrêté en lui faisant une prise d'étranglement. R.D.S. a dit avoir été incapable de respirer et avoir entendu une femme dire au policier: [TRADUCTION] «Laissez cet enfant partir . . .» Il l'a également entendue demander son numéro de téléphone. Comme il ne pouvait pas parler, N.R. lui a donné le numéro. R.D.S. a indiqué que les curieux qui s'étaient rassemblés autour étaient tous des [TRADUCTION] «gamins» de moins de 12 ans. Il a nié s'être lancé sur qui que ce soit avec sa bicyclette ou avoir eu cette intention. Il a également déclaré qu'il avait gardé les mains sur le guidon, et qu'il n'avait pas poussé le policier.

68 En contre-interrogatoire, il a expliqué qu'il s'était approché de l'attroupement parce qu'il était [TRADUCTION] «fouineur». Il a dit se rappeler qu'à son arrivée N.R. avait les menottes. R.D.S. et N.R. ont tous deux été immobilisés par une prise d'étranglement au même moment. Il a répété ne

either with his bicycle or his hands. He also denied that he said anything to Constable Stienburg prior to his arrest. He indicated that all his questions were directed to N.R.

C. *History of Proceedings*

69 In Youth Court, Judge Sparks weighed the evidence of the two witnesses and determined that R.D.S. should be acquitted. In her oral reasons, she made comments which were challenged as raising a reasonable apprehension of bias. They are the subject of this appeal. After the reasons had been given and an appeal to the Nova Scotia Supreme Court (Trial Division) had been filed by the Crown, Judge Sparks issued supplementary reasons which outlined in greater detail her impressions of the credibility of both witnesses and the context in which her comments were made.

70 In the Trial Division, Glube C.J.S.C., sitting as summary conviction appeal judge, allowed the Crown's appeal. She held in oral reasons that a new trial was warranted on the basis that the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This decision was upheld in the Nova Scotia Court of Appeal by Flinn J.A. and Pugsley J.A., Freeman J.A. dissenting.

II. Judgments Below

A. *Youth Court*

71 In her oral reasons, Judge Sparks reviewed the details of Constable Stienburg's testimony, and noted that R.D.S.'s evidence was directly opposed to it. In describing R.D.S.'s testimony, she observed that she was impressed with his clear recollection of the weather conditions on that day, and his candour in pointing out that he was simply being nosey in approaching the crowd. She also noted that his description of being placed in the choke hold was vivid. R.D.S. stated clearly that

pas avoir touché le policier, que ce soit avec sa bicyclette ou avec ses mains. Il a également nié avoir dit quoi que ce soit à l'agent Stienburg avant son arrestation, affirmant que toutes ses questions s'adressaient à N.R.

C. *Historique des procédures*

Au tribunal pour adolescents, le juge Sparks a apprécié le témoignage des deux témoins et a conclu que R.D.S. devait être acquitté. Dans des motifs prononcés oralement, elle a formulé des commentaires qui ont été contestés parce qu'ils suscitaient une crainte raisonnable de partialité. Ils font l'objet du présent pourvoi. Après le prononcé de ses motifs et le dépôt de l'appel du ministère public devant la Cour suprême de la Nouvelle-Écosse (Section de première instance), le juge Sparks a déposé des motifs supplémentaires où elle s'est expliquée plus en détail sur ses impressions quant à la crédibilité des deux témoins et sur le contexte dans lequel elle avait formulé ses commentaires.

En section de première instance, le juge en chef Glube, siégeant en appel des décisions de la cour des poursuites sommaires, a accueilli l'appel du ministère public. Elle a conclu dans des motifs prononcés oralement que la tenue d'un nouveau procès était justifiée parce que les remarques du juge Sparks avaient suscité une crainte raisonnable de partialité. Cette décision a été confirmée en Cour d'appel de la Nouvelle-Écosse par les juges Flinn et Pugsley, le juge Freeman étant dissident.

II. Jugements des instances inférieures

A. *Le tribunal pour adolescents*

Dans ses motifs oraux, le juge Sparks a examiné en détail le témoignage de l'agent Stienburg, soulignant que celui de R.D.S. était radicalement contraire. En décrivant le témoignage de R.D.S., elle a dit avoir été impressionnée par la précision de son souvenir des conditions météo ce jour-là et par la candeur dont il avait fait preuve en expliquant que c'était son côté fouineur qui l'avait poussé à s'approcher de la foule. Elle a également relevé sa description frappante de la prise d'étranglement.

when he was placed in the choke hold, he could not speak and had difficulty breathing. In fact, he was unable to respond when a woman asked him for his phone number so she could notify his mother.

R.D.S. a raconté clairement que lorsqu'on lui a appliqué cette prise, il ne pouvait pas parler et avait de la difficulté à respirer. De fait, il a été incapable de répondre lorsqu'une femme lui a demandé son numéro de téléphone afin de prévenir sa mère.

The Youth Court Judge paid particular attention to R.D.S.'s testimony that N.R. was handcuffed when R.D.S. arrived on the scene. This aspect of R.D.S.'s testimony suggested that N.R. was not a threat to the officer. Significantly, Constable Stienburg did not mention that N.R. was handcuffed, and gave the court the distinct impression that he had difficulty restraining N.R. In Judge Sparks' view, R.D.S.'s testimony that N.R. was handcuffed had "a ring of truth" to it, which raised questions in her mind about the divergence between R.D.S.'s evidence and the evidence of Constable Stienburg on this point.

72 Le juge du tribunal pour adolescents a attaché une importance particulière à la déclaration de R.D.S. selon laquelle N.R. avait les menottes aux poignets lorsqu'il est arrivé sur les lieux. Cet aspect du témoignage de R.D.S. donnait à penser que N.R. ne constituait pas une menace pour le policier. Fait à noter, l'agent Stienburg n'a pas indiqué que N.R. était menotté, donnant à la cour la nette impression qu'il avait de la difficulté à maîtriser N.R. De l'avis du juge Sparks, le témoignage de R.D.S. sur les menottes que portait N.R. avait [TRADUCTION] «l'accent de la vérité», ce qui a soulevé des questions dans son esprit sur les divergences entre le témoignage de R.D.S. et celui de l'agent Stienburg sur ce point.

In general, Judge Sparks described R.D.S's demeanour as "positive", even though he was not particularly articulate. She found him to be a "rather honest young boy". In particular, she was struck by his openness in acknowledging his own "nosiness" and by his surprise at the hostility of the police officer. Judge Sparks indicated that she was not saying that she accepted everything that R.D.S. said, but noted that "certainly he has raised a doubt in my mind". She still had queries about "what actually transpired on the afternoon of October the 17th". As a result, she concluded that the Crown had not discharged its evidentiary burden to prove all the elements of the offence beyond a reasonable doubt.

73 De façon générale, le juge Sparks a qualifié le comportement de R.D.S. de [TRADUCTION] «positif», même s'il ne s'exprimait pas très clairement. Elle a estimé que c'était un [TRADUCTION] «garçon plutôt honnête». Elle a été frappée, en particulier, par la spontanéité avec laquelle il a reconnu être «fouineur» et par son étonnement devant l'hostilité du policier. Faisant remarquer qu'elle ne voulait pas dire qu'elle acceptait tout ce que R.D.S. avait dit, le juge Sparks a ajouté qu'il avait [TRADUCTION] «certainement soulevé un doute dans [s]on esprit». Elle a dit qu'elle continuait de s'interroger sur [TRADUCTION] «ce qui s'était réellement passé dans l'après-midi du 17 octobre». Aussi a-t-elle conclu que le ministère public ne s'était pas acquitté du fardeau qui lui incombait de prouver tous les éléments de l'infraction hors de tout doute raisonnable.

She concluded her reasons with the controversial remarks that gave rise to this appeal. They are as follows:

74 Le juge Sparks a terminé ses motifs sur les remarques controversées qui ont donné lieu au présent pourvoi. Les voici:

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Consta-

[TRADUCTION] Le ministère public dit, bien, pourquoi le policier aurait-il dit que les événements se sont déroulés comme il les a relatés à la Cour ce matin? Je ne

ble has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.

In conclusion, she agreed with the defence counsel that the accused had been overcharged, and that the first two counts duplicated each other. However, nothing turned on this since she dismissed all three charges.

B. *Nova Scotia Supreme Court (Trial Division),* [1995] N.S.J. No. 184 (QL)

75 On appeal, Glube C.J.S.C. expressed the view that she could not consider the supplementary reasons provided by the Youth Court Judge. The decision was, in her view, made in the oral reasons at the original trial, and the supplementary reasons did not form the basis for the Crown's appeal. If Judge Sparks had intended to issue additional reasons, she should have indicated this to counsel either at the trial or shortly thereafter. Both parties agreed that Judge Sparks was *functus officio* when she issued her supplementary reasons, and that they could not be considered. Glube C.J.S.C. indicated that her own review of the case law supported this conclusion.

76 Glube C.J.S.C. then considered the allegations of actual and apprehended bias made by the Crown on the basis of Judge Sparks' final remarks in her oral reasons. She rejected the defence's argument that there is no appeal on questions of fact and summarized the general principles pertaining to appellate review of those findings. She observed,

dis pas que l'agent a trompé la Cour, bien qu'on sache que des policiers l'aient fait dans le passé. Je ne dis pas que le policier a réagi de façon excessive, même s'il arrive effectivement que des policiers réagissent avec excès, particulièrement lorsqu'ils ont affaire à des groupes non blancs. Cela me semble dénoter en soi un état d'esprit suspect. Je crois que nous sommes vraisemblablement en présence dans cette affaire-ci d'un jeune policier qui a réagi de façon excessive. J'accepte le témoignage de [R.D.S.] selon lequel on lui a intimé de se taire, sous peine d'être arrêté. Cela semble conforme à l'attitude courante du jour.

Quoi qu'il en soit, vu mes remarques et l'ensemble de la preuve soumise à la cour, je n'ai d'autre choix que de prononcer l'acquittement.

En conclusion, elle a convenu avec l'avocat de la défense que l'accusé avait fait l'objet d'accusations excessives, et que les deux premiers chefs se chevauchaient. Toutefois, cela n'a eu aucune incidence puisqu'elle a rejeté les trois accusations.

B. *La Cour suprême de la Nouvelle-Écosse (Section de première instance),* [1995] N.S.J. No. 184 (QL)

En appel, le juge en chef Glube était d'avis qu'elle ne pouvait prendre en considération les motifs supplémentaires du juge du tribunal pour adolescents. Selon elle, la décision avait été rendue dans les motifs oraux prononcés au procès lui-même, et les motifs supplémentaires ne constituaient pas le fondement de l'appel du ministère public. Si le juge Sparks avait projeté de déposer des motifs supplémentaires, elle aurait dû en informer les avocats au procès ou peu après. Les deux parties ont convenu que le juge Sparks était *functus officio* lorsqu'elle a déposé ses motifs supplémentaires, et que ceux-ci ne pouvaient être pris en considération. Le juge en chef Glube a indiqué que son propre examen de la jurisprudence étayait cette conclusion.

Le juge en chef Glube a ensuite examiné les allégations de partialité, réelle et apparente, faites par le ministère public sur la base des remarques qu'a formulées le juge Sparks à la fin de ses motifs oraux. Elle a rejeté l'argument de la défense voulant qu'il n'y ait pas d'appel sur des questions de fait, et elle a résumé les principes généraux régis-

at para. 17, that a Crown's appeal from an acquittal will only succeed "where the verdict is unreasonable or not supported by the evidence".

sant l'examen en appel de ces conclusions de fait. Elle a souligné, au par. 17, que l'appel du ministère public contre un acquittement ne pourra être accueilli que [TRADUCTION] «si le verdict est déraisonnable ou non fondé sur la preuve».

She expressed the view that if a reasonable apprehension of bias arises, the verdict would not be supported by the evidence. Relying on *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. C.A.), she indicated that the entitlement to an impartial decision-maker applies to the Crown as well as the accused. The principles of fundamental justice "includ[e] natural justice and a duty to act fairly" (para. 21). These principles impose a duty on the decision-maker to be and to appear to be impartial. If these principles apply to administrative tribunals, they must apply even more to courts.

77 Elle s'est dite d'avis que s'il y avait crainte raisonnable de partialité, le verdict ne serait pas fondé sur la preuve. Invoquant l'arrêt *R. c. Wald* (1989), 47 C.C.C. (3d) 315 (C.A. Alb.), elle a indiqué que le droit à un décideur impartial s'appliquait autant au ministère public qu'à l'accusé. Les principes de justice fondamentale [TRADUCTION] «inclu[en]t la justice naturelle et le devoir d'agir équitablement» (par. 21). Ces principes imposent au décideur l'obligation d'être et de paraître impartial. Si ces principes s'appliquent aux tribunaux administratifs, ils s'appliquent a fortiori aux tribunaux judiciaires.

Glube C.J.S.C. found nothing in the transcript of the hearing itself that would give rise to an impression that Judge Sparks was biased. Furthermore, if the reasons of Judge Sparks had ended with her conclusion that the Crown had not satisfied its burden of proof, there would be no basis for the appeal. Judge Sparks had made clear findings of credibility that favoured the accused. Unfortunately, however, she went on and made the impugned comments. Glube C.J.S.C. was of the view that there was no basis in the evidence for Judge Sparks' statements. In particular, there was no evidence of the "prevalent attitude of the day" (para. 24). She stated at para. 25 that "judges must be extremely careful to avoid expressing views which do not form part of the evidence".

78 Selon le juge en chef Glube, rien dans la transcription de l'audience elle-même ne donne à penser que le juge Sparks était partiale. De plus, si celle-ci s'était bornée à conclure que le ministère public ne s'était pas acquitté du fardeau de preuve qui lui incombait, il n'y aurait pas eu de motif d'appel. Le juge Sparks avait, sur la question de la crédibilité, tiré des conclusions nettement favorables à l'accusé. Malheureusement, toutefois, elle a poursuivi en formulant les remarques contestées. Le juge en chef Glube s'est dite d'avis que rien dans la preuve ne permettait d'étayer les déclarations du juge Sparks. En particulier, il n'y avait aucune preuve quant à «l'attitude courante du jour» (par. 24). Le juge en chef Glube a dit, au par. 25, que [TRADUCTION] «les juges doivent éviter soigneusement d'exprimer des opinions qui ne font pas partie de la preuve».

She found that the test for reasonable apprehension of bias is an objective one, based on what the reasonable, right-minded person with knowledge of the facts would conclude. In her view, the reasonable person would conclude that there was a reasonable apprehension of bias on the part of Judge Sparks, in spite of her thorough review of the facts and her findings of credibility. As a result, a new trial was warranted.

79 Le juge en chef Glube a estimé que le critère de la crainte raisonnable de partialité était un critère objectif, fondé sur ce qu'une personne raisonnable et sensée, au courant des faits, conclurait. À son avis, la personne raisonnable conclurait qu'il y avait une crainte raisonnable de partialité de la part du juge Sparks, en dépit de son examen détaillé des faits et de ses conclusions touchant la crédibilité des témoins. En conséquence, la tenue d'un nouveau procès était justifiée.

C. *Court of Appeal* (1995), 145 N.S.R. (2d) 284

(i) Flinn J.A. (Pugsley J.A. concurring)

80 Flinn J.A. noted that the Crown can only appeal a summary conviction acquittal on a question of law with leave of the court. If the summary conviction appeal court judge made no error of law, then there is no appeal from her decision. He then rejected the accused's argument that Glube C.J.S.C. had improperly reexamined and redetermined issues of credibility. Since her decision was based on reasonable apprehension of bias, she did not err in law in declining to defer to the trial judge's findings.

81 Flinn J.A. reviewed the test for reasonable apprehension of bias. He concluded that bias reflects the inability of the judge to act impartially. The test is objective and the standard of reasonableness applies to the person who perceives the bias, as well as the apprehension of bias itself. The test requires a consideration of what the reasonable, right-minded person, with knowledge of all the facts, would think with regard to the apprehension of bias. The apprehension must be reasonable, and suspicion or conjecture is not enough. Finally, it is not necessary to show that actual bias influenced the result.

82 In Flinn J.A.'s opinion, Glube C.J.S.C. made no error in applying the test to the decision of the Youth Court Judge. She was correct to point out that there was no evidence to justify Judge Sparks' comments. Whether or not the comments reflected "an unfortunate social reality", the issue was whether Judge Sparks considered factors not in evidence when she made her critical findings of credibility and decided to acquit the accused. Judge Sparks used her general comments to conclude that Constable Stienburg overreacted. There was no evidence regarding "the prevalent attitude of the day" or the reasons why the officer overreacted. Concerns regarding overreaction were not canvassed in cross-examination of the officer, and

C. *La Cour d'appel* (1995), 145 N.S.R. (2d) 284

(i) Le juge Flinn (avec l'appui du juge Pugsley)

Le juge Flinn a fait remarquer qu'en matière de procédure sommaire, le ministère public ne pouvait interjeter appel d'un acquittement que sur une question de droit avec l'autorisation de la cour. Si le juge siégeant en appel des décisions de la cour des poursuites sommaires n'a commis aucune erreur de droit, sa décision ne peut être portée en appel. Le juge Flinn a ensuite rejeté l'argument de l'accusé voulant que le juge en chef Glube ait à tort réexaminé et réévalué les questions de crédibilité. Sa décision étant fondée sur l'existence d'une crainte raisonnable de partialité, elle n'a pas commis d'erreur de droit en refusant de s'en remettre aux conclusions du juge du procès.

Le juge Flinn a analysé le critère de la crainte raisonnable de partialité, concluant que cette notion recouvrait l'incapacité du juge d'agir de façon impartiale. Il s'agit d'un critère objectif, et la norme du caractère raisonnable s'applique tant à la personne qui perçoit la partialité qu'à la crainte de partialité elle-même. Le critère nécessite l'examen de ce qu'une personne raisonnable et sensée, au courant de tous les faits, penserait de la crainte de partialité. La crainte doit être raisonnable, et le soupçon ou la conjecture ne sont pas suffisants. Enfin, il n'est pas nécessaire de démontrer que le résultat est le fruit de la partialité dans les faits.

De l'avis du juge Flinn, le juge en chef Glube n'a pas commis d'erreur en appliquant le critère à la décision du juge du tribunal pour adolescents. Elle a souligné à juste titre qu'aucune preuve ne justifiait les remarques du juge Sparks. Indépendamment de la possibilité que les remarques traduisent [TRADUCTION] «une réalité sociale regrettable», la question était de savoir si le juge Sparks a pris en considération des facteurs ne faisant pas partie de la preuve lorsqu'elle a tiré ses conclusions cruciales sur la crédibilité des témoins et décidé d'acquitter l'accusé. Le juge Sparks s'est fondée sur ses commentaires généraux pour conclure que l'agent Stienburg avait eu une réaction excessive. Or, il n'y avait rien dans la preuve con-

the officer had no opportunity to address these concerns in his testimony.

As a result, Flinn J.A. was of the view that "[t]he unfortunate use of these generalizations, by the Youth Court judge" would lead a reasonable, fully informed person to conclude that Judge Sparks had based her findings of credibility at least partially on the basis of matters not in evidence. This was unfair. The appeal was therefore dismissed.

Finally, Flinn J.A. rejected the argument that Glube C.J.S.C. had inappropriately adopted a formal equality approach to the question of reasonable apprehension of bias. He agreed with the Crown that the appellant's *Charter* argument on this point was not properly raised by the appeal, and in any event, that Glube C.J.S.C.'s approach was not inappropriate.

(ii) Freeman J.A. (dissenting)

Freeman J.A. agreed with the articulation of the law set out by the majority. However, he was of the view at p. 292 that "it was perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective". He was not satisfied that this gave rise to a perception that she was biased.

He indicated that although it was not clear what Judge Sparks meant by her reference to the "prevalent attitude of the day", it was possible that she was referring to the attitudes exhibited on the day of R.D.S.'s arrest. There was evidence before her on that point. At any rate, he was prepared to give Judge Sparks the benefit of the doubt on this remark, and to regard it as a neutral factor in the

cernant «l'attitude courante du jour» ou les raisons de la réaction excessive du policier. La possibilité d'une réaction excessive n'a pas été abordée dans le contre-interrogatoire du policier et ce dernier n'a pas eu l'occasion de s'expliquer à ce sujet en témoignage.

83 En conséquence, le juge Flinn s'est dit d'avis que [TRADUCTION] «[l]'usage malheureux que le juge du tribunal pour adolescents a fait de ces généralisations» conduirait une personne raisonnable, pleinement renseignée, à conclure que, au moins en partie, le juge Sparks a tiré ses conclusions relatives à la crédibilité des témoins sur la foi d'éléments qui n'étaient pas en preuve. Cela était inéquitable. L'appel a donc été rejeté.

84 Enfin, le juge Flinn a rejeté l'argument voulant que le juge en chef Glube ait à tort adopté une perspective d'égalité formelle eu égard à la question de la crainte raisonnable de partialité. Il a convenu avec le ministère public que l'argument fondé sur la *Charte canadienne des droits et libertés* qu'a invoqué l'appelant sur ce point n'était pas proprement soulevé en appel et que, en tout état de cause, la méthode adoptée par le juge Glube n'était pas inappropriée.

(ii) Le juge Freeman (dissident)

85 Le juge Freeman a souscrit à l'analyse du droit exposée par les juges majoritaires. Il a toutefois exprimé l'avis, à la p. 292, que [TRADUCTION] «le juge du procès était parfaitement fondée, dans l'appréciation des témoignages qui lui ont été présentés, à prendre en considération l'aspect racial». Il n'a pas acquis la conviction que cela ait fait naître une crainte de partialité de sa part.

86 Le juge Freeman a indiqué que bien qu'on ne sache pas exactement ce que le juge Sparks voulait dire quand elle a parlé de «l'attitude courante du jour», il était possible qu'elle ait fait ainsi allusion aux attitudes manifestées le jour de l'arrestation de R.D.S. Des éléments de preuve lui avaient été soumis sur ce point. Quoi qu'il en soit, le juge Freeman s'est dit disposé à donner au juge Sparks le bénéfice du doute sur cette remarque, et à tenir celle-ci pour un facteur neutre dans la décision.

decision. The only remaining remarks related to the possible racism of the police.

87 Freeman J.A. was struck by the delicate racial dynamics of the courtroom. In his view, at p. 294, "Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding". He noted the unfortunate truth that most individuals generally know that police officers have on occasion misled the court or overreacted when dealing with non-white groups. Judge Sparks did not state that the officer did either of these things. Such a finding would have required evidence.

88 Judge Sparks did state that the officer overreacted, but she related it to her finding that she believed R.D.S.'s statement that the officer told him to shut up or he would be under arrest. This was not a biased conclusion, since it indicated her concern that the charges might have arisen more as a result of R.D.S.'s verbal interference, than of any physical act. There was certainly some evidence on which Judge Sparks could conclude that the officer overreacted, and this determination was within her purview. If the finding of overreaction did not give rise to a reasonable apprehension of bias, Freeman J.A. was not satisfied that any other comments made by Judge Sparks would do so. He would have allowed the appeal.

III. Issues

89 Only one issue arises on this appeal:

Did the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension of bias?

IV. Analysis

A. *Can this Court Consider Judge Sparks' Supplementary Reasons*?

Seules restaient les remarques se rapportant à la possibilité de racisme de la part de la police.

Le juge Freeman a été frappé par la délicate dynamique raciale qui régnait dans la salle d'audience. À son avis, [TRADUCTION] «[l]e juge Sparks se devait d'être sensible aux nuances et aux sous-entendus, et de s'en remettre à son propre sens commun, lequel est nécessairement teinté par son expérience et sa vision du monde» (p. 294). Il a pris acte de la triste réalité, savoir qu'il est de commune renommée que les policiers trompent à l'occasion la cour ou réagissent parfois de façon excessive lorsqu'ils ont affaire à des groupes non blancs. Le juge Sparks n'a pas dit que le policier avait fait l'un ou l'autre. Une telle conclusion aurait exigé d'être étayée par la preuve.

Certes, le juge Sparks a dit que le policier avait réagi de façon excessive, mais elle a relié cette conclusion à la déclaration de R.D.S., à laquelle elle ajoutait foi, voulant que le policier lui ait dit de se taire, sinon il serait arrêté. Cette conclusion n'était pas partiale, car elle traduisait sa préoccupation que les accusations aient pu résulter davantage de l'intervention verbale de R.D.S. que d'un acte physique. La conclusion du juge Sparks que le policier avait réagi de manière excessive pouvait manifestement s'appuyer sur certains éléments de preuve, et cette conclusion était de son ressort. Si la conclusion relative à la réaction excessive ne suscitait pas une crainte raisonnable de partialité, aucune autre remarque du juge Sparks ne pouvait, selon le juge Freeman, susciter pareille crainte. Il aurait accueilli l'appel.

III. Les questions en litige

Le présent pourvoi soulève une seule question:

Les commentaires faits par le juge Sparks dans ses motifs suscitent-ils une crainte raisonnable de partialité?

IV. Analyse

A. *Notre Cour peut-elle prendre en considération les motifs supplémentaires du juge Sparks*?

Glube C.J.S.C. correctly concluded that the supplementary reasons issued by Judge Sparks after the appeal had been filed could not be taken into account in assessing whether or not the reasons of Judge Sparks gave rise to a reasonable apprehension of bias. The parties did not dispute this determination in the Court of Appeal. In this Court, the appellant did not raise this issue in argument and proceeded on the basis that the supplementary reasons were not before the Court. The respondent Crown submitted in oral argument that the supplementary reasons should be considered as part of the overall picture in determining whether a reasonable apprehension of bias arose from Judge Sparks' conduct. The Crown appeared to be suggesting that the very fact of their issuance, as well as their substance, was an important factor in the impression of bias that was created. At this late stage it would be most unfair to accept that submission. Accordingly, the supplementary reasons should not be considered.

Le juge en chef Glube a conclu à juste titre que les motifs supplémentaires déposés par le juge Sparks après le dépôt de l'appel ne pouvaient être pris en considération pour déterminer si ses motifs ont suscité une crainte raisonnable de partialité. Les parties n'ont pas contesté cette décision de la Cour d'appel. Devant notre Cour, l'appelant n'a pas soulevé cette question dans sa plaidoirie, tenant pour acquis que les motifs supplémentaires n'étaient pas devant la Cour. Le ministère public intimé a fait valoir oralement que les motifs supplémentaires devaient être pris en considération en tant qu'élément du portrait général pour apprécier si la conduite du juge Sparks a suscité une crainte raisonnable de partialité. Le ministère public a paru sous-entendre que le fait même de leur existence, autant que leur contenu, était un facteur important dans l'impression de partialité qui a été créée. À ce stade avancé, il serait hautement inéquitable d'accepter pareil argument. En conséquence, il ne convient pas de prendre en considération les motifs supplémentaires.

B. *Ascertaining the Existence of a Reasonable Apprehension of Bias*

(i) Fair Trial and The Right to an Unbiased Adjudicator

A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

It is a well-established principle that all adjudicative tribunals and administrative bodies owe a duty of fairness to the parties who must appear before them. See for example *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at p. 636. In order to fulfil this duty the decision-maker must be and appear to be unbiased. The scope of this duty and the rigour with which it is applied will vary with the nature of the tribunal in question.

B. *Appréciation de l'existence d'une crainte raisonnable de partialité*

(i) Procès équitable et droit à un arbitre impartial

Pour mériter le respect et la confiance de la société, le système de justice doit faire en sorte que les procès soient équitables et qu'ils paraissent équitables aux yeux de l'observateur renseigné et raisonnable. Tel est le but fondamental assigné au système de justice dans une société libre et démocratique.

C'est un principe bien établi que tous les tribunaux juridictionnels et les corps administratifs sont tenus d'agir équitablement envers les parties qui ont à comparaître devant eux. Voir à titre d'exemple *Newfoundland Telephone Co. c. Terre-Neuve (Board of Commissioners of Public Utilities)*, [1992] 1 R.C.S. 623, à la p. 636. Afin de remplir cette obligation, le décideur doit être impartial et paraître impartial. La portée de cette obligation et la rigueur avec laquelle elle s'applique varieront suivant la nature du tribunal en question.

93 For very good reason it has long been determined that the courts should be held to the highest standards of impartiality. *Newfoundland Telephone*, *supra*, at p. 638; *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631, at pp. 660-61. This principle was recently confirmed and emphasized by the majority in *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, at para. 7, where it was said "[t]he right to a trial before an impartial judge is of fundamental importance to our system of justice". The right to trial by an impartial tribunal has been expressly enshrined by ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Pour une excellente raison, on a décidé depuis longtemps que les cours de justice devaient respecter les plus hautes normes d'impartialité. Arrêts *Newfoundland Telephone*, précité, à la p. 638; *Idziak c. Canada (Ministre de la Justice)*, [1992] 3 R.C.S. 631, aux pp. 660 et 661. Ce principe a été récemment confirmé et mis en relief dans l'arrêt *R. c. Curragh Inc.*, [1997] 1 R.C.S. 537, au par. 7, où les juges majoritaires ont dit que «[l]e droit à un procès devant un juge impartial est d'une importance fondamentale pour notre système de justice». Le droit à un procès devant un tribunal impartial a été élevé au rang de droit constitutionnel par l'art. 7 et l'al. 11*d*) de la *Charte*.

94 Trial judges in Canada exercise wide powers. They enjoy judicial independence, security of tenure and financial security. Most importantly, they enjoy the respect of the vast majority of Canadians. That respect has been earned by their ability to conduct trials fairly and impartially. These qualities are of fundamental importance to our society and to members of the judiciary. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.

Les juges qui instruisent les procès au Canada exercent de larges pouvoirs. Ils jouissent de l'indépendance, de l'inamovibilité ainsi que de la sécurité financière. Mais avant tout, ils jouissent du respect de la vaste majorité des Canadiens. Ce respect, ils le doivent à leur capacité de veiller à la conduite des procès en toute équité et impartialité. Ces qualités revêtent une importance fondamentale pour la société et les membres de la magistrature. L'équité et l'impartialité doivent être à la fois subjectivement présentes et objectivement démontrées dans l'esprit de l'observateur renseigné et raisonnable. Si les paroles ou les actes du juge qui préside suscitent, chez l'observateur renseigné et raisonnable, une crainte raisonnable de partialité, cela rend le procès inéquitable.

95 Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the *Charter*. Section 27 provides that the *Charter* itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass

Le Canada n'est pas une société fermée, homogène. Il s'enrichit de la présence et de la contribution de citoyens appartenant à de nombreuses races, nationalités et origines ethniques. Le caractère multiculturel de la société canadienne est reconnu à l'art. 27 de la *Charte*, qui porte que l'interprétation de la *Charte* elle-même doit concorder avec l'objectif de promouvoir le maintien et la valorisation du patrimoine multiculturel des Canadiens. Encore nos juges doivent-ils être particulièrement sensibles à la nécessité non seulement d'être équitables, mais de paraître, aux yeux de tous les observateurs raisonnables, équitables envers les Canadiens de toute race, religion, nationalité et origine ethnique. Cette tâche est beaucoup

unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.

Usually, in a criminal trial, actual or perceived judicial bias is alleged by the accused. However, nothing precludes the Crown from making a similar allegation. Indeed it has a duty to make such a submission in appropriate circumstances. Even in the absence of explicit constitutional protection, it is an important principle of our legal system that a trial must be fair to all parties — to the Crown as well as to the accused. See, for example, *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.). In *Curragh*, *supra*, this Court recently upheld an allegation of perceived bias arising from the conduct of a trial judge towards a Crown attorney. In a slightly different context, it has been held that if a judge forms or appears to form a biased opinion against a Crown witness, for example, a sexual assault complainant, the trial may be unfair to the Crown: *Wald*, *supra*, at p. 336.

The question which must be answered in this appeal is whether the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension that she was not impartial as between the Crown and the accused. The Crown's position, in essence, is that Judge Sparks did not give the essential and requisite appearance of impartiality because her comments indicated that she prejudged an issue in the case, or to put it another way, she reached her determination on the basis of factors which were not in evidence.

(ii) Standard of Review

Before dealing with the issue of apprehended bias, it is necessary to address an argument raised by the appellant and the interveners African-Canadian Legal Clinic et al. They stressed that this appeal turns entirely on findings of credibility. There were only two witnesses, and their evidence

plus difficile au Canada qu'elle ne le serait dans une société homogène. Des remarques qui passeraient inaperçues dans d'autres sociétés pourraient fort bien susciter une crainte raisonnable de partialité au Canada.

96 Habituellement, c'est l'accusé qui, dans un procès criminel, allègue la partialité, réelle ou apparente, du tribunal. Toutefois, rien n'empêche le ministère public de faire une allégation similaire. Il y est même tenu lorsque les circonstances l'exigent. Même s'il ne fait pas l'objet d'une protection constitutionnelle explicite, c'est un important principe de notre système juridique que le procès doit être équitable pour toutes les parties — pour le ministère public comme pour l'accusé. Voir à titre d'exemple *R. c. Gushman*, [1994] O.J. No. 813 (Div. gén.). Dans l'arrêt *Curragh*, précité, notre Cour a récemment maintenu une allégation de crainte de partialité suscitée par la conduite du juge du procès envers un substitut du procureur général. Dans un contexte légèrement différent, on a conclu que si le juge forme ou paraît former une opinion partiale contre un témoin du ministère public, par exemple la victime d'une agression sexuelle, il y a possibilité que le procès soit inéquitable envers le ministère public: arrêt *Wald*, précité, à la p. 336.

97 Dans le présent pourvoi, il faut répondre à la question de savoir si, en raison des commentaires qu'elle a faits dans ses motifs, on peut raisonnablement craindre qu'entre le ministère public et l'accusé, le juge Sparks n'était pas impartiale. Avant tout, le ministère public soutient que le juge Sparks n'a pas donné l'essentielle et nécessaire impression d'impartialité parce qu'il ressort de ses commentaires qu'elle avait une opinion préconçue sur un aspect de l'affaire ou, en d'autres termes, qu'elle est arrivée à une décision en se fondant sur des éléments qui n'étaient pas en preuve.

(ii) Norme de révision

98 Avant d'aborder la question de la crainte de partialité, il est nécessaire d'examiner un argument soulevé par l'appelant et les intervenants, l'African-Canadian Legal Clinic et autres. Ceux-ci ont fait valoir que l'issue du présent pourvoi est entièrement fonction des conclusions relatives à la cré-

was contradictory. Judge Sparks' role was therefore simply to determine the issue of credibility. The appellant and the interveners argued that it is a well-established principle of law that appellate courts should defer to such findings, and that Glube C.J.S.C. improperly reviewed Judge Sparks' findings of credibility. In my view, these submissions are not entirely correct.

dibilité des témoins. Il n'y a eu que deux témoins et leurs témoignages sont contradictoires. Le juge Sparks devait donc simplement trancher la question de leur crédibilité. L'appelant et les intervenants ont soutenu que, suivant un principe de droit reconnu, les cours d'appel doivent faire montre de retenue à l'égard de telles conclusions, et que c'est à tort que le juge en chef Glube a révisé les conclusions du juge Sparks à ce sujet. À mon avis, ces observations ne sont pas tout à fait justes.

99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh*, *supra*, at para. 5; *Gushman*, *supra*, at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh*, *supra*, at para. 5.

Si les paroles ou la conduite du juge suscitent une crainte de partialité ou dénotent réellement sa partialité, il excède sa compétence. Voir les décisions *Curragh*, précitée, au par. 5; *Gushman*, précitée, au par. 28. On peut remédier à cet excès de compétence en présentant une requête en récusation adressée au juge présidant l'instance si celle-ci se poursuit, ou en demandant l'examen en appel de la décision du juge. Dans le cadre de l'examen en appel, on a jugé récemment que la «conclusion correctement tirée qu'il existe une crainte raisonnable de partialité mène habituellement, de façon inexorable, à la décision qu'il doit y avoir un nouveau procès»: arrêt *Curragh*, précité, au par. 5.

100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone*, *supra*, at p. 645; see also *Curragh*, *supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances": *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at p. 843. However, if the words or conduct of the judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.

S'il y a crainte raisonnable de partialité, c'est l'ensemble des procédures du procès qui sont viciées et la décision subséquente aussi bien fondée soit-elle ne peut y remédier. Voir l'arrêt *Newfoundland Telephone*, précité, à la p. 645; voir aussi l'arrêt *Curragh*, précité, au par. 6. Ainsi, le simple fait que le juge paraît, sur certains points, avoir tiré des conclusions justes quant à la crédibilité ou qu'il arrive à un résultat correct ne peut dissiper les effets de la crainte raisonnable de partialité que d'autres paroles ou actes du juge ont pu susciter. Dans le contexte d'une requête en récusation du juge siégeant dans une poursuite donnée, on a statué que lorsqu'il y a crainte raisonnable de partialité, «on ne peut rendre une décision finale à partir de conclusions sur la crédibilité formulées dans de pareilles conditions»: *Blanchette c. C.I.S. Ltd.*, [1973] R.C.S. 833, à la p. 843. Toutefois, si les paroles ou la conduite du juge, eu égard au contexte, ne suscitent pas de crainte raisonnable de partialité, ses conclusions n'en seront pas entachées, quelque inquiétantes qu'elles puissent être.

Therefore, while the appellant is correct that appellate courts have wisely adopted a deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, it is somewhat misleading to characterize the issue in this appeal as one of credibility alone. If Judge Sparks' findings of credibility were tainted by bias, real or apprehended, they would be made without jurisdiction, and would not warrant appellate deference. On the other hand, if her findings were not tainted by bias, then the case turned entirely on her findings of credibility and an appellate court should not interfere with those findings, unless they were clearly unreasonable or not supported by the evidence. See for example, *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at pp. 131-32.

Par conséquent, si l'appelant a raison de dire que les cours d'appel ont, avec sagesse, adopté une norme d'examen fondée sur la retenue en ce qui concerne l'analyse des conclusions factuelles des tribunaux d'instance inférieure, dont les conclusions relatives à la crédibilité des témoins, il est quelque peu trompeur de définir la question en litige dans le présent pourvoi comme se ramenant à une question de crédibilité. Si les conclusions du juge Sparks sur la crédibilité étaient entachées de partialité ou de crainte de partialité, elles avaient été tirées sans compétence, et elles ne justifiaient pas le respect de la cour d'appel. Par contre, si ses conclusions n'étaient pas entachées de partialité, alors l'affaire portait entièrement sur lesdites conclusions et la cour d'appel ne devait pas les modifier, sauf si elles étaient manifestement déraisonnables ou ne s'appuyaient pas sur la preuve. Voir à titre d'exemple *R. c. W. (R.)*, [1992] 2 R.C.S. 122, aux pp. 131 et 132. 101

Thus the sole issue is whether Judge Sparks' reasons demonstrated actual or perceivable bias. If they did, then Glube C.J.S.C. not only had the jurisdiction to overturn them but also an obligation to order a new trial. A judicial determination at first instance that real or apprehended bias exists may itself be worthy of some deference by appellate courts: *Huerto v. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100 (Sask. C.A.), at p. 105. However, an allegation of judicial bias raises such serious and sensitive issues that the basic interests of justice require appellate courts to retain some scope to review that determination.

Ainsi, la seule question est de savoir si les motifs du juge Sparks dénotaient une partialité réelle ou apparente. Dans l'affirmative, non seulement le juge en chef Glube avait-elle compétence pour les écarter, mais elle avait l'obligation d'ordonner un nouveau procès. La détermination en première instance qu'il y a partialité ou crainte de partialité peut, en soi, justifier une certaine retenue de la part des cours d'appel: *Huerto c. College of Physicians and Surgeons* (1996), 133 D.L.R. (4th) 100 (C.A. Sask.), à la p. 105. Toutefois, une allégation de partialité judiciaire soulève des questions si graves et délicates que les intérêts fondamentaux de la justice exigent que les cours d'appel conservent un certain regard sur cette détermination. 102

(iii) What is Bias?

(iii) Qu'est-ce que la partialité?

It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. See Prof. Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racial-

Il est peut-être utile de commencer par définir ce qu'on entend par impartialité. Lorsqu'ils décident s'il y a partialité dans une affaire donnée, les tribunaux ont assez rarement l'occasion d'explorer la définition de la partialité. Dans le présent pourvoi toutefois, cette tâche est essentielle pour bien saisir le sens de l'allégation que formule le ministère public à l'endroit du juge Sparks. Voir le professeur Richard F. Devlin, «We Can't Go On Toge- 103

ized Perspective in R. v. R.D.S." (1995), 18 *Dalhousie L.J.* 408, at pp. 438-39.

ther with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S.» (1995), 18 *Dalhousie L.J.* 408, aux pp. 438 et 439.

104 In *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, Le Dain J. held that the concept of impartiality describes "a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case". He added that "[t]he word 'impartial' . . . connotes absence of bias, actual or perceived". See also *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 283. In a more positive sense, impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions.

Dans l'arrêt *Valente c. La Reine*, [1985] 2 R.C.S. 673, à la p. 685, le juge Le Dain a conclu que la notion d'impartialité désigne «un état d'esprit ou une attitude du tribunal vis-à-vis des points en litige et des parties dans une instance donnée». Il a ajouté: «[l]e terme «impartial» [. . .] connote une absence de préjugé, réel ou apparent». Voir également *R. c. Généreux*, [1992] 1 R.C.S. 259, à la p. 283. Dans un sens plus positif, l'impartialité peut être décrite — peut-être de façon quelque peu inexacte — comme l'état d'esprit de l'arbitre désintéressé eu égard au résultat et susceptible d'être persuadé par la preuve et les arguments soumis.

105 In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. A helpful explanation of this concept was provided by Scalia J. in *Liteky v. U.S.*, 114 S.Ct. 1147 (1994), at p. 1155:

> The words [bias or prejudice] connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). [Emphasis in original.]

Par contraste, la partialité dénote un état d'esprit prédisposé de quelque manière à un certain résultat ou fermé sur certaines questions. Le juge Scalia a fourni une explication intéressante de cette notion dans *Liteky c. U.S.*, 114 S.Ct. 1147 (1994), à la p. 1155:

> [TRADUCTION] Les termes [partialité ou préjugé] connotent une disposition ou une opinion favorable ou défavorable qui, pour une raison ou une autre, est *erronée* ou *inappropriée*, soit parce qu'elle est injustifiée ou qu'elle repose sur des connaissances que le sujet ne devrait pas posséder (par exemple, dans un procès criminel, le juré qui devient partial ou est de parti pris après avoir reçu des éléments de preuve inadmissibles concernant les activités criminelles antérieures du défendeur), ou parce qu'elle est excessive (par exemple, le juré dans un procès criminel qui est si offusqué par la preuve des activités criminelles antérieures du défendeur, légalement admise, qu'il votera la culpabilité quels que soient les faits). [En italique dans l'original.]

Scalia J. was careful to stress that not every favourable or unfavourable disposition attracts the label of bias or prejudice. For example, it cannot be said that those who condemn Hitler are biased or prejudiced. This unfavourable disposition is objectively justifiable — in other words, it is not "wrongful or inappropriate": *Liteky*, *supra*, at p. 1155.

Le juge Scalia a pris soin de souligner que ce ne sont pas toutes les dispositions favorables ou défavorables qui justifieront qu'on parle de partialité ou de préjugé. Ainsi, on ne saurait prétendre que ceux qui condamnent Hitler sont partiaux ou ont un parti pris. Cette disposition défavorable est objectivement justifiable — en d'autres termes, elle n'est pas «erronée ou inappropriée»: *Liteky*, précité, à la p. 1155.

A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman*, *supra*, at para. 29.

Doherty J.A. in *R. v. Parks* (1993), 15 O.R. (3d) 324 (C.A.), leave to appeal denied, [1994] 1 S.C.R. x, held that partiality and bias are in fact not the same thing. In addressing the question of potential partiality or bias of jurors, he noted at p. 336 that:

> Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.

In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence: *Parks*, *supra*, at pp. 336-37.

This analysis is certainly not exhaustive. Different factors may determine the issue where, for example, the allegation relates to direct pecuniary bias or some other personal interest in the outcome of a case. Yet the concepts articulated can be used as guiding principles in the consideration of this case.

Ces principes sont exposés de manière similaire dans *R. c. Bertram*, [1989] O.J. No. 2123 (H.C.), où le juge Watt a fait observer ceci, aux pp. 51 et 52: 106

> [TRADUCTION] Dans la langue courante, le terme partialité désigne une tendance, une inclination ou une prédisposition conduisant à privilégier une partie plutôt qu'une autre ou un résultat particulier. Dans le domaine des procédures judiciaires, c'est la prédisposition à trancher une question ou une affaire d'une certaine façon qui ne permet pas au juge d'être parfaitement ouvert à la persuasion. La partialité est un état d'esprit qui infléchit le jugement et rend l'officier judiciaire inapte à exercer ses fonctions impartialement dans une affaire donnée.

Voir également *R. c. Stark*, [1994] O.J. No. 406 (Div. gén.), au par. 64; *Gushman*, précité, au par. 29.

Dans l'arrêt *R. c. Parks* (1993), 15 O.R. (3d) 324 (C.A.), autorisation de pourvoi refusée, [1994] 1 R.C.S. x, le juge Doherty a conclu que partialité et préjugé recouvraient en fait deux notions différentes. Analysant la question de la partialité ou des préjugés potentiels des jurés, il a souligné ceci à la 336: 107

> [TRADUCTION] La partialité se dégage à la fois de l'état d'esprit et du comportement. Elle évoque la personne qui a certaines idées préconçues et qui, malgré les mesures de protection destinées à contrer leur présence au procès, laissera ces préjugés influencer son verdict.

Pour établir la partialité, il ne suffit donc pas de démontrer qu'un juré en particulier a certaines croyances, certaines opinions, voire même certains préjugés. Il faut établir que ces croyances, opinions ou préjugés empêchent le juré (ou, ajouterais-je, tout autre décideur) de mettre de côté toute idée préconçue et de parvenir à une décision fondée sur la preuve: *Parks*, précité, aux pp. 336 et 337.

Cette analyse n'est évidemment pas exhaustive. D'autres facteurs peuvent entrer en jeu lorsque, par exemple, l'allégation se rapporte à un parti pris financier direct ou à quelque autre intérêt personnel dans le résultat d'une affaire. Les notions dégagées peuvent toutefois guider notre analyse dans la présente espèce. 108

(iv) The Test for Finding a Reasonable Apprehension of Bias

109 When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. *Idziak*, *supra*, at p. 660. It has long been held that actual bias need not be established. This is so because it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind. See *Newfoundland Telephone*, *supra*, at p. 636.

110 It was in this context that Lord Hewart C.J. articulated the famous maxim: "[it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done": *The King v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259. The Crown suggested that this maxim provided a separate ground for review of Judge Sparks' decision, and implied that the threshold for appellate intervention is lower when reviewing a decision for "appearance of justice" than for "appearance of bias". This submission cannot be sustained. The *Sussex Justices* case involved an allegation of bias. The requirement that justice should be seen to be done simply means that the person alleging bias does not have to prove actual bias. The Crown can only succeed if Judge Sparks' reasons give rise to a reasonable apprehension of bias.

111 The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. . . ."

(iv) Le critère à appliquer en matière de crainte raisonnable de partialité

Lorsqu'on allègue la partialité du décideur, le critère à appliquer consiste à se demander si la conduite particulière suscite une crainte raisonnable de partialité. Voir arrêt *Idziak*, précité, à la p. 660. On reconnaît depuis longtemps qu'il n'est pas nécessaire d'établir l'existence de la partialité dans les faits. Il est en effet habituellement impossible de déterminer si le décideur a abordé l'affaire avec des idées réellement préconçues. Voir arrêt *Newfoundland Telephone*, précité, à la p. 636.

C'est dans ce contexte que le lord juge en chef Hewart a énoncé la célèbre maxime: [TRADUCTION] «[il] est essentiel que non seulement justice soit rendue, mais que justice paraisse manifestement et indubitablement être rendue»: *The King c. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, à la p. 259. Le ministère public a avancé que cette maxime constituait un motif distinct d'examen de la décision du juge Sparks, laissant entendre que les cours d'appel interviennent plus volontiers dans les cas où l'«impression de justice» est en jeu que dans les cas où il s'agit d'«apparence de partialité». Cet argument est mal fondé. L'affaire *Sussex Justices* concernait une allégation de partialité. L'exigence que justice paraisse être rendue signifie simplement que la personne qui allègue la partialité n'est pas tenue de prouver l'existence de cette partialité dans les faits. Le ministère public ne peut avoir gain de cause que si les motifs du juge Sparks suscitent une crainte raisonnable de partialité.

Dans ses motifs de dissidence dans l'arrêt *Committee for Justice and Liberty c. Office national de l'énergie*, [1978] 1 R.C.S. 369, à la p. 394, le juge de Grandpré a exposé avec beaucoup de clarté la façon dont il convient d'appliquer le critère de la partialité:

> [L]a crainte de partialité doit être raisonnable et le fait d'une personne sensée et raisonnable qui se poserait elle-même la question et prendrait les renseignements nécessaires à ce sujet. [. . .] [C]e critère consiste à se demander «à quelle conclusion en arriverait une personne bien renseignée qui étudierait la question en profondeur, de façon réaliste et pratique. . .»

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram*, *supra*, at pp. 54-55; *Gushman*, *supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R. v. Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark*, *supra*, at para. 74; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community.

C'est ce critère qui a été adopté et appliqué au cours des deux dernières décennies. Il comporte un double élément objectif: la personne examinant l'allégation de partialité doit être raisonnable, et la crainte de partialité doit elle-même être raisonnable eu égard aux circonstances de l'affaire. Voir les décisions *Bertram*, précitée, aux pp. 54 et 55; *Gushman*, précitée, au par. 31. La personne raisonnable doit de plus être une personne bien renseignée, au courant de l'ensemble des circonstances pertinentes, y compris [TRADUCTION] «des traditions historiques d'intégrité et d'impartialité, et consciente aussi du fait que l'impartialité est l'une des obligations que les juges ont fait le serment de respecter»: *R. c. Elrick*, [1983] O.J. No. 515 (H.C.), au par. 14. Voir aussi *Stark*, précité, au par. 74; *R. c. Lin*, [1995] B.C.J. No. 982 (C.S.), au par. 34. À ceci j'ajouterais que la personne raisonnable est également censée connaître la réalité sociale sous-jacente à une affaire donnée, et être sensible par exemple à l'ampleur du racisme ou des préjugés fondés sur le sexe dans une collectivité donnée.

The appellant submitted that the test requires a demonstration of "real likelihood" of bias, in the sense that bias is probable, rather than a "mere suspicion". This submission appears to be unnecessary in light of the sound observations of de Grandpré J. in *Committee for Justice and Liberty*, *supra*, at pp. 394-95:

112 L'appelant a fait valoir que le critère exige que soit démontrée une «réelle probabilité» de partialité, par opposition au «simple soupçon». Cet argument paraît inutile à la lumière des justes observations du juge de Grandpré dans l'arrêt *Committee for Justice and Liberty*, précité, aux pp. 394 et 395:

> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

> Je ne vois pas de différence véritable entre les expressions que l'on retrouve dans la jurisprudence, qu'il s'agisse de «crainte raisonnable de partialité», «de soupçon raisonnable de partialité», ou «de réelle probabilité de partialité». Toutefois, les motifs de crainte doivent être sérieux et je suis complètement d'accord avec la Cour d'appel fédérale qui refuse d'admettre que le critère doit être celui d'«une personne de nature scrupuleuse ou tatillonne». [Je souligne.]

Nonetheless the English and Canadian case law does properly support the appellant's contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough. See *R. v. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. v. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. v. Gough*, [1993] 2 W.L.R. 883 (H.L.);

Néanmoins, la jurisprudence anglaise et canadienne appuie avec raison la prétention de l'appelant selon laquelle il faut établir une réelle probabilité de partialité car un simple soupçon est insuffisant. Voir *R. c. Camborne Justices, Ex parte Pearce*, [1954] 2 All E.R. 850 (Q.B.D.); *Metropolitan Properties Co. c. Lannon*, [1969] 1 Q.B. 577 (C.A.); *R. c. Gough*, [1993] 2 W.L.R. 883 (H.L.);

Bertram, *supra*, at p. 53; *Stark*, *supra*, at para. 74; *Gushman*, *supra*, at para. 30.

113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

114 The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram*, *supra*, at p. 28; *Lin*, *supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

115 Finally, in the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

(v) Judicial Integrity and the Importance of Judicial Impartiality

116 Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the

Bertram, précité, à la p. 53; *Stark*, précité, au par. 74; *Gushman*, précité, au par. 30.

Peu importe les mots précis utilisés pour définir le critère, ses diverses formulations visent à souligner la rigueur dont il faut faire preuve pour conclure à la partialité, réelle ou apparente. C'est une conclusion qu'il faut examiner soigneusement car elle met en cause un aspect de l'intégrité judiciaire. De fait, l'allégation de crainte raisonnable de partialité met en cause non seulement l'intégrité personnelle du juge, mais celle de l'administration de la justice toute entière. Voir la décision *Stark*, précitée, aux par. 19 et 20. Lorsqu'existent des motifs raisonnables de formuler une telle allégation, les avocats ne doivent pas redouter d'agir. C'est toutefois une décision sérieuse qu'on ne doit pas prendre à la légère.

La charge d'établir la partialité incombe à la personne qui en allègue l'existence: *Bertram*, précité, à la p. 28; *Lin*, précité, au par. 30. De plus, la crainte raisonnable de partialité sera entièrement fonction des faits de l'espèce.

Enfin, dans le contexte du présent pourvoi, il est vital de ne pas perdre de vue que le critère de la crainte raisonnable de partialité s'applique également à tous les juges, indépendamment de leur formation, leur sexe, leur race, leur origine ethnique et toute autre caractéristique. Il n'est pas plus probable que le juge noir soit prévenu en faveurs des justiciables noirs que le juge blanc ne le soit en faveur des justiciables blancs. Tous les juges de toute race, couleur, religion ou origine nationale jouissent de la même présomption d'intégrité judiciaire et ont droit à l'application du même critère rigoureux dans l'examen de la partialité. De façon semblable, tous les juges sont assujettis aux mêmes obligations fondamentales d'être impartiaux et de paraître impartiaux.

(v) L'intégrité de la magistrature et l'importance de son impartialité

Le serment que prononce le juge lorsqu'il entre en fonctions est souvent le moment le plus important de sa carrière. À la fierté et à la joie se mêle en ce moment le sentiment de la lourde responsabilité

office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

qui accompagne cette charge. C'est un moment empreint de solennité, un moment déterminant qui restera gravé dans la mémoire du juge. Par ce serment, il s'engage à rendre la justice avec impartialité. Ce serment marque la réalisation des rêves d'une vie. Il n'est jamais prononcé à la légère. Durant toute leur carrière, les juges canadiens s'efforcent d'écarter les préjugés personnels qui sont le lot commun de tous les humains pour faire en sorte que les procès soient équitables et qu'ils paraissent manifestement équitables. Leur taux de réussite dans cette tâche difficile est élevé.

Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), and *Lin*, *supra*. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias. See *Smith & Whiteway*, *supra*, at para. 64; *Lin*, *supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

117 Les tribunaux ont reconnu à juste titre l'existence d'une présomption voulant que les juges respectent leur serment professionnel. Voir *R. c. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.), et *Lin*, précité. C'est l'une des raisons pour lesquelles une allégation d'apparence de partialité doit être examinée selon une norme rigoureuse. En dépit cependant de cette norme stricte, il est possible de combattre la présomption par une «preuve convaincante» démontrant qu'un aspect de la conduite du juge suscite une crainte raisonnable de partialité. Voir *Smith & Whiteway*, précité, au par. 64; *Lin*, précité, au par. 37. La présomption d'intégrité judiciaire ne peut jamais libérer un juge de sa promesse d'impartialité.

It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

118 Il est juste et bon que les juges soient tenus de respecter les plus hautes normes d'impartialité car ils sont appelés à statuer sur les droits les plus fondamentaux des parties. Cela vaut autant pour les litiges entre les citoyens que pour ceux entre les particuliers et l'État. Tout commentaire fait par un juge à l'audience est pesé et évalué par la collectivité et par les parties. Les juges doivent être conscients qu'ils sont constamment jugés et ils doivent faire tout leur possible pour remplir leur fonction avec neutralité et équité. Cela doit être la règle cardinale qui guide leur conduite.

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial

119 Rester neutre pour le juge ce n'est pas faire abstraction de toute l'expérience de la vie à laquelle il doit peut-être son aptitude à arbitrer les litiges. On a fait observer que l'obligation d'impartialité

does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

ne veut pas dire qu'un juge n'amène pas ou ne peut pas amener avec lui sur le banc de nombreuses sympathies, antipathies ou attitudes. Tout être humain est le produit de son expérience sociale, de son éducation et de ses contacts avec ceux et celles qui partagent le monde avec nous. Un juge qui n'aurait pas connu ces expériences passées — à supposer que cela soit possible — manquerait probablement des qualités humaines dont a besoin un juge. La sagesse que l'on exige d'un juge lui impose d'admettre consciemment, et peut-être de remettre en question, l'ensemble des attitudes et des sympathies que ses concitoyens sont libres d'emporter à la tombe sans en avoir vérifié le bien-fondé.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

La véritable impartialité n'exige pas que le juge n'ait ni sympathie ni opinion. Elle exige que le juge soit libre d'accueillir et d'utiliser différents points de vue en gardant un esprit ouvert.

(Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991), at p. 12.)

(Conseil canadien de la magistrature, *Propos sur la conduite des juges* (1991), à la p. 15.)

It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging. See for example the discussion by the Honourable Maryka Omatsu, "The Fiction of Judicial Impartiality" (1997), 9 *C.J.W.L.* 1. See also Devlin, *supra*, at pp. 408-9.

De toute évidence, le bon juge a une vaste expérience personnelle et professionnelle, qu'il met à profit pour trancher les litiges avec sensibilité et compassion. Si l'on a décidé d'encourager la nomination de juges appartenant à des groupes plus variés, c'est qu'on a estimé à juste titre que les femmes et les minorités visibles apporteraient une perspective importante à la tâche difficile de rendre justice. Voir par exemple l'analyse de l'honorable Maryka Omatsu, «The Fiction of Judicial Impartiality» (1997), 9 *R.F.D.* 1. Voir aussi Devlin, *loc. cit.*, aux pp. 408 et 409.

120 Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.

Peu importe leur formation, leur sexe, leur origine ethnique ou raciale, tous les juges ont l'obligation fondamentale envers la collectivité de rendre des décisions impartiales et de paraître impartiaux. Il s'ensuit que les juges doivent s'efforcer de ne prononcer aucune parole et de n'accomplir aucun acte durant le procès ou en rendant jugement qui puisse donner à une personne raisonnable et bien renseignée l'impression qu'une question a été jugée prématurément ou tranchée sur la foi de suppositions ou de généralisations stéréotypées.

(vi) Should Judges Refer to Aspects of Social Context in Making Decisions?

It is the submission of the appellant and interveners that judges should be able to refer to social context in making their judgments. It is argued that they should be able to refer to power imbalances between the sexes or between races, as well as to other aspects of social reality. The response to that submission is that each case must be assessed in light of its particular facts and circumstances. Whether or not the use of references to social context is appropriate in the circumstances and whether a reasonable apprehension of bias arises from particular statements will depend on the facts of the case.

At the outset, I would note that this appeal was not put forward by the appellant as engaging the principles of judicial notice. Rather it was the appellant's contention that the references to social context by Judge Sparks simply made use of her background, experience and knowledge of social conditions to assist her in the analysis of the persons involved in the case. One of the interveners did argue that the principles of judicial notice apply in this case. However, since the appellant did not put forward this position, it would be inappropriate to consider the question as to whether the existence of anti-black racism in society is a proper subject for judicial notice.

Certainly judges may, on the basis of expert evidence adduced, refer to relevant social conditions in reasons for judgment. In some circumstances, those references are necessary, so that the law may evolve in a manner which reflects social reality. For example, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, expert evidence of the psychological experiences of battered women was used to inform the standard of reasonableness to be applied when self-defence is invoked by women who have been victims of domestic violence.

In *Lavallee*, the references to social context were based on expert evidence and were used solely to develop the relevant legal principle. In an individual case, however, it is still the responsibil-

(vi) Le contexte social doit-il jouer dans les décisions des juges?

121 L'appelant et les intervenants ont soutenu que les juges devraient être habilités à tenir compte du contexte social dans leur décision. On a affirmé qu'ils devraient pouvoir tenir compte de l'inégalité de pouvoir entre les sexes et les races, ainsi que d'autres aspects de la réalité sociale. La réponse à cet argument est que chaque cas doit être examiné selon les faits et ses circonstances propres. Les faits de l'espèce détermineront s'il convient, au vu des circonstances, de prendre en considération le contexte social et si les paroles prononcées suscitent une crainte raisonnable de partialité.

122 Tout d'abord, je ferai remarquer que dans le présent pourvoi l'appelant n'entend pas arguer des principes de la connaissance d'office. Il affirme plutôt qu'en tenant compte du contexte social, le juge Sparks a simplement fait fond sur ses antécédents, son expérience et ses connaissances des conditions sociales pour mieux analyser les personnes en cause. L'un des intervenants a bel et bien fait valoir que les principes de la connaissance d'office étaient applicables. Toutefois, comme l'appelant n'a pas avancé un tel argument, il ne convient pas d'étudier la question de savoir s'il appartenait au juge de prendre connaissance d'office de l'existence dans la société de racisme anti-noir.

123 Sans aucun doute, les juges peuvent, en s'appuyant sur les témoignages d'experts, se référer dans les motifs de leur jugement aux conditions sociales pertinentes. Parfois, il est indispensable de s'y référer, afin que l'évolution du droit traduise la réalité sociale. Par exemple, dans *R. c. Lavallee*, [1990] 1 R.C.S. 852, le témoignage d'expert relatif aux expériences psychologiques des femmes battues a servi à définir la norme du caractère raisonnable applicable lorsque la légitime défense est invoquée par les femmes victimes de violence conjugale.

124 Dans *Lavallee*, les références au contexte social reposaient sur un témoignage d'expert, et elles n'ont servi qu'à énoncer le principe de droit pertinent. Dans chaque cas, cependant, il incombe tou-

ity of the woman putting forward the defence to establish that the general principles about women's experiences of domestic violence actually apply. The trier of fact still retains the important task of determining whether the evidence of a battered woman of her experiences in the particular case is in fact believable — in other words, whether the generalizations about social reality apply to the individual female accused. See *Lavallee*, *supra*, at p. 891.

125 Similarly, judges have recently made use of expert evidence of social conditions in order to develop the appropriate legal framework to be utilized for ensuring juror impartiality. In *Parks*, *supra*, Doherty J.A. referred to a body of studies and reports documenting the prevalence of anti-black racism in the Metropolitan Toronto area. On the basis of his conclusions, at p. 338, that anti-black racism is a "grim reality" in that community he developed a legal framework permitting jurors to be challenged for cause on the basis of racial preconceptions. This legal framework is applicable in circumstances where a realistic possibility exists that such preconceptions might threaten juror impartiality.

126 Other cases have applied and extended these principles on the basis of expert knowledge of the social context existing in the particular community, or in the particular relationships between parties to the case. See, for example, *R. v. Wilson* (1996), 29 O.R. (3d) 97 (C.A.); *R. v . Glasgow* (1996), 93 O.A.C. 67.

127 In *Parks* and *Lavallee*, for instance, the expert evidence of social context was used to develop principles of general application in certain kinds of cases. These principles are legal in nature, and are structured to ensure that the role of the trier of fact in a particular case is not abrogated or usurped. It is clear therefore that references to social context based upon expert evidence are sometimes permissible and helpful, and that they do not automatically give rise to suspicions of judicial bias. However, there is a very significant difference between cases such as *Lavallee* and *Parks* in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases,

jours à la femme qui fait valoir ce moyen de défense d'établir que les principes généraux concernant les expériences de violence conjugale s'appliquent effectivement à elle. La tâche importante de déterminer si l'on peut ajouter foi au témoignage de la femme battue sur ce qu'elle-même a vécu continue d'appartenir au juge des faits — autrement dit, c'est à lui de décider si les généralisations au sujet de la réalité sociale s'appliquent à l'accusée. Voir *Lavallee*, précité, à la p. 891.

De même, des juges ont récemment utilisé le témoignage d'expert sur les conditions sociales pour établir un cadre juridique propre à garantir l'impartialité des jurés. Dans l'arrêt *Parks*, précité, le juge Doherty s'est reporté à une série d'études et de rapports sur l'ampleur du racisme anti-noir dans l'agglomération torontoise. Après avoir noté que ce type de racisme constituait une [TRADUCTION] «triste réalité» (à la p. 338) dans ce milieu, il a établi un cadre juridique pour la récusation motivée des jurés ayant des idées préconçues d'ordre racial. Ce cadre juridique est applicable dans toute cause où s'observe une possibilité réaliste que de telles idées préconçues compromettent l'impartialité d'un juré.

Ces principes ont été appliqués et élargis dans d'autres causes où une preuve d'expert avait établi le contexte social relativement à une collectivité donnée ou aux rapports entre les parties au litige. Voir, par exemple, *R. c. Wilson* (1996), 29 O.R. (3d) 97 (C.A.); *R. c. Glasgow* (1996), 93 O.A.C. 67.

Dans les arrêts *Parks* et *Lavallée*, par exemple, le témoignage d'expert concernant le contexte social a servi à établir des principes d'application générale pour certains types de cas. Ce sont des principes de droit conçus de façon à ne pas enlever au juge des faits la tâche qui lui revient dans un cas donné. De toute évidence, les références au contexte social fondées sur des témoignages d'experts sont donc, dans certains cas, acceptables et utiles, et ne font pas naître automatiquement des soupçons de partialité. Toutefois, il y a une différence très importante entre des affaires comme *Lavallee* et *Parks*, dans lesquelles le contexte social est invoqué pour assurer l'adéquation du droit et de la

such as this one, where social context is apparently being used to assist in determining an issue of credibility.

(vii) Use of Social Context in Assessing Credibility

It is, of course, true that the assessment of the credibility of a witness is more of an "art than a science". The task of assessing credibility can be particularly daunting where a judge must assess the credibility of two witnesses whose testimony is diametrically opposed. It has been held that "[t]he issue of credibility is one of fact and cannot be determined by following a set of rules . . .": *White v. The King*, [1947] S.C.R. 268, at p. 272. It is the highly individualistic nature of a determination of credibility, and its dependence on intangibles such as demeanour and the manner of testifying, that leads to the well-established principle that appellate courts will generally defer to the trial judge's factual findings, particularly those pertaining to credibility. See, for example, *W. (R.)*, *supra*.

However, it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial. It is true that judges do not have to remain passive, or to divest themselves of all their experience which assists them in

réalité sociale, et celles comme la présente espèce, où le contexte social est apparemment utilisé pour trancher une question de crédibilité.

(vii) Utilisation du contexte social dans l'appréciation de la crédibilité

128 Bien entendu, il est vrai que l'évaluation de la crédibilité d'un témoin est plus «un art qu'une science». La tâche d'apprécier la crédibilité peut être particulièrement ardue pour le juge qui doit évaluer les témoignages radicalement contraires de deux témoins. Il a déjà été décidé que [TRADUCTION] «[l]a crédibilité est une question de fait et ne peut pas être déterminée selon des règles fixes. . .»: *White c. The King*, [1947] R.C.S. 268, à la p. 272. La détermination de la crédibilité est par nature très personnelle et repose sur des éléments intangibles comme le comportement et la manière de témoigner; c'est pourquoi il y a un principe bien établi qui veut que les cours d'appel défèrent généralement aux conclusions de fait du juge du procès, en particulier celles concernant la crédibilité. Voir par exemple l'arrêt *W. (R.)*, précité.

129 Toutefois, c'est aussi en raison de la nature personnelle de la détermination de la crédibilité que le juge, en tant que juge des faits, est tenu de prendre bien soin d'être et de paraître neutre. En s'acquittant de cette obligation, le juge s'engage dans une entreprise délicate. D'une part, il lui est manifestement permis de recourir au sens commun et aux enseignements tirés de son expérience personnelle pour observer un témoin et évaluer sa véracité en tenant compte, en particulier, de facteurs tels que la déposition qu'il a faite et son comportement. D'autre part, le juge doit éviter d'apprécier la crédibilité du témoin sur la foi de généralisations ou d'éléments non versés en preuve.

130 À l'évidence, il vaut mieux que le juge appelé à statuer sur la crédibilité évite de faire tout commentaire qui pourrait donner l'impression qu'il a jugé de la crédibilité en s'appuyant sur des généralisations plutôt que sur des démonstrations précises de la véracité ou du manque d'honnêteté du témoin au procès. Il est vrai que les juges n'ont pas à rester passifs ni à faire abstraction de toute leur expérience qui les aide à tirer des conclusions de fait.

their judicial fact finding. See *Brouillard v. The Queen*, [1985] 1 S.C.R. 39; *Commentaries on Judicial Conduct, supra*, at p. 12. Yet judges have wide authority and their public utterances are closely scrutinized. Neither the parties nor the informed and reasonable observer should be led to believe by the comments of the judge that decisions are indeed being made based on generalizations.

Voir *Brouillard c. La Reine*, [1985] 1 R.C.S. 39; *Propos sur la conduite des juges*, *op. cit.*, à la p. 15. Néanmoins, les juges ont un large pouvoir et les propos qu'ils tiennent en public sont passés au crible. Le juge ne doit pas, par ses commentaires, amener les parties ou l'observateur renseigné et raisonnable à croire qu'il s'est, de fait, basé sur des généralisations.

131 At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made. Obviously the evidence of a policeman, or any other category of witness, cannot be automatically preferred to that of accused persons, any more than the testimony of blue eyed witnesses can be preferred to those with gray eyes. That must be the general rule. In particular, any judicial indication that police evidence is always to be preferred to that of a black accused person would lead the reasonable and knowledgeable observer to conclude that there was a reasonable apprehension of bias.

Quand ils commencent leur déposition, tous les témoins doivent être traités sur un pied d'égalité, sans considération de race, religion, nationalité, sexe, occupation ou autre caractéristique. C'est seulement après qu'un témoin a été jaugé et évalué qu'on peut décider de sa crédibilité. De toute évidence, le témoignage d'un policier ou de quelque autre catégorie de témoins, ne saurait être automatiquement préféré à celui de l'accusé, tout comme l'on ne saurait préférer le témoignage des témoins aux yeux bleus à celui des témoins aux yeux gris. Voilà la règle générale à suivre. En particulier, toute indication, de la part du juge, qu'il convient de toujours préférer le témoignage des policiers à celui des accusés noirs amènerait l'observateur raisonnable et renseigné à conclure à la crainte raisonnable de partialité.

132 In some circumstances it may be acceptable for a judge to acknowledge that racism in society might be, for example, the motive for the overreaction of a police officer. This may be necessary in order to refute a submission that invites the judge as trier of fact to presume truthfulness or untruthfulness of a category of witnesses, or to adopt some other form of stereotypical thinking. Yet it would not be acceptable for a judge to go further and suggest that all police officers should therefore not be believed or should be viewed with suspicion where they are dealing with accused persons who are members of a different race. Similarly, it is dangerous for a judge to suggest that a particular person overreacted because of racism unless there is evidence adduced to sustain this finding. It would be equally inappropriate to suggest that female complainants, in sexual assault cases, ought to be believed more readily than male accused per-

Il peut parfois être acceptable que le juge reconnaisse, par exemple, que la réaction excessive d'un agent peut s'expliquer par le racisme dans la société, et ce, pour réfuter l'argument invitant le juge, en tant que juge des faits, à présumer qu'une catégorie de témoins dira la vérité ou mentira, ou à adopter une autre forme d'opinion stéréotypée. Néanmoins, il serait inacceptable qu'un juge aille plus loin et qu'il affirme qu'en conséquence, il y a lieu de ne pas croire le témoignage des policiers, ou de douter de ce témoignage, quand il vise des accusés appartenant à une autre race. De même, il est dangereux qu'un juge indique qu'une personne en particulier a eu une réaction excessive à cause du racisme, sauf si la preuve étaye cette conclusion. Il serait tout aussi contre-indiqué d'affirmer que, dans les affaires d'agression sexuelle, il faut croire davantage les plaignantes que les accusés, pour la seule raison qu'historiquement, en matière

sons solely because of the history of sexual violence by men against women.

If there is no evidence linking the generalization to the particular witness, these situations might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. This does not mean that the particular generalization — that police officers have historically discriminated against visible minorities or that women have historically been abused by men — is not true, or is without foundation. The difficulty is that reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility. As a general rule, judges should avoid placing themselves in this position.

To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.

Before applying these principles to the facts of this case, it may be helpful to review some selected examples of the way in which courts have dealt with allegations of bias in similar cases.

(viii) How Have Courts Addressed Allegations of Judicial Bias?

Allegations of reasonable apprehension of bias are entirely fact-specific. It follows that other cases in which courts have dealt with similar allegations

de violence sexuelle, les femmes ont été les victimes et les hommes, les agresseurs.

133 Si aucune preuve ne relie la généralisation à un témoin en particulier, le juge pourrait, en pareille situation, prêter le flanc à des allégations de partialité du fait qu'il aurait préjugé de la crédibilité du témoin en fonction de généralisations stéréotypées. Ce qui ne veut pas dire que la généralisation en cause — selon laquelle les policiers ont, historiquement, agi de manière discriminatoire à l'endroit des minorités visibles ou selon laquelle les femmes ont, historiquement, été l'objet de violence exercée par les hommes — est fausse, ou sans fondement. Ce qui fait problème c'est que les gens raisonnables et renseignés peuvent avoir l'impression que le juge a basé son évaluation de la crédibilité sur cette donnée, au lieu de procéder à une réelle appréciation de la preuve constituée par la déposition de ce témoin en particulier. En règle générale, les juges doivent éviter de s'exposer ainsi.

134 Formuler la proposition générale que les juges doivent éviter de faire des commentaires basés sur des généralisations lorsqu'ils apprécient la crédibilité de témoins n'amène pas *ipso facto* à la conclusion que, lorsqu'un juge agit ainsi, il en résulte une crainte raisonnable de partialité. Dans un certain nombre de cas limité, les commentaires peuvent être à propos. De plus, si malheureux puissent-ils paraître, pris isolément, ces commentaires doivent être examinés selon le contexte, du point de vue de la personne raisonnable et renseignée qui est censée connaître toutes les circonstances pertinentes de l'affaire, y compris la présomption d'intégrité judiciaire et le contexte social sous-jacent.

135 Avant d'appliquer ces principes aux faits de l'espèce, j'estime utile de passer en revue certains exemples de la façon dont les tribunaux ont tranché des allégations de partialité dans des causes semblables.

(viii) Réponses des tribunaux dans les cas d'allégation de partialité

136 L'allégation de crainte raisonnable de partialité est entièrement fonction des faits de l'espèce. Il s'ensuit que les autres affaires dans lesquelles les

are of very limited precedential value. It is simply not possible to look at an individual case and conclude that the determination of the presence or absence of bias in that case must apply to the case at bar. Nonetheless, it is helpful to review some selected cases in which similar allegations have been made if only to observe the benchmarks against which the allegations were measured.

tribunaux ont étudié des allégations semblables ont une valeur très limitée à titre de précédent. Il n'est tout simplement pas possible de se fonder sur un cas individuel pour conclure que la détermination de la présence ou de l'absence de partialité dans ce cas précis doit s'appliquer au cas qui nous occupe. Néanmoins, il est utile d'examiner certaines affaires choisies où des allégations semblables ont été faites ne serait-ce que pour observer les critères selon lesquels elles ont été jaugées.

137 Thus, in *Bertram*, *supra*, some comments made by the trial judge during the course of a sentencing hearing suggested that he was predisposed to give effect to a joint sentencing submission before he had heard the details of the submission. Although the comments were described at p. 60 as "wholly inappropriate", Watt J. indicated that the remarks must not be looked at in isolation. On the basis of a review of the whole proceedings, Watt J. concluded that no reasonable apprehension of bias arose from the trial judge's conduct because he had on other occasions stressed his willingness to hear submissions on the question that he appeared to have predetermined. In the circumstances, therefore, it could not be said that a reasonable person hearing his comments, with knowledge of the case, would conclude that he might not be impartial. See also *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337 (Bd. Inq.), at pp. 345-47; *R. v. Teskey* (1995), 167 A.R. 122 (Q.B.); *Lin*, *supra*.

Ainsi, dans l'affaire *Bertram*, précitée, certains commentaires faits par le juge du procès au cours de la détermination de la peine donnaient à penser qu'il était prédisposé à donner suite à une proposition conjointe quant à la peine avant même d'en avoir entendu les détails. Bien qu'il ait affirmé, à la p. 60, que les commentaires avaient été faits [TRADUCTION] «très mal à propos», le juge Watt a indiqué qu'il ne fallait pas prendre ces remarques isolément. Après un examen de l'ensemble de la procédure, le juge Watt a conclu que la conduite du juge du procès ne suscitait aucune crainte raisonnable de partialité parce qu'il avait à d'autres moments souligné être disposé à entendre les arguments sur la question qu'il semblait avoir tranchée prématurément. Aussi a-t-il estimé, au vu des circonstances, qu'on ne pouvait pas dire qu'une personne raisonnable, au courant de l'affaire, conclurait à la possibilité qu'il ne soit pas impartial. Voir aussi *Inquiry pursuant to s. 13(2) of Territorial Court Act, Re*, [1990] N.W.T.R. 337 (Comm. d'enq.), aux pp. 345 à 347; *R. c. Teskey* (1995), 167 A.R. 122 (B.R.); *Lin*, précité.

138 In *Pirbhai Estate v. Pirbhai*, [1987] B.C.J. No. 2685, leave to appeal denied, [1988] 1 S.C.R. xii, the British Columbia Court of Appeal considered an allegation of reasonable apprehension of bias. The trial judge, in assessing the credibility of a witness commented that the demeanour of the witness had been shifty and evasive. The trial judge then said at p. 5, "[i]t is obvious to me that he carried on a successful business in Pakistan in a corrupt society . . . ." Seaton J.A. looked at the whole proceeding, and held, at pp. 5-6, that "I think the remarks unfortunate, but that no reasonable person reading them would apprehend any

Dans *Pirbhai Estate c. Pirbhai*, [1987] B.C.J. No. 2685, autorisation de pourvoi refusée, [1988] 1 R.C.S. xii, la Cour d'appel de la Colombie-Britannique était saisie d'une allégation de crainte raisonnable de partialité. Au sujet de la crédibilité d'un témoin, le juge du procès avait fait remarquer que le témoin avait donné des réponses ambiguës et évasives. Le juge du procès avait dit ensuite à la p. 5: [TRADUCTION] «[i]l m'apparaît évident qu'il a exploité une entreprise prospère au Pakistan dans une société corrompue . . .» Le juge Seaton a considéré l'ensemble de la procédure et a conclu en ces termes aux pp. 5 et 6 : [TRADUCTION] «Je pense

bias on the part of the trial judge in this case". The remainder of the trial judge's reasons revealed that he came to his conclusions on credibility on the basis of the evidence, not on the basis of the kind of bias or prejudice suggested by his comments about the "corrupt society".

que ces remarques sont malheureuses, mais qu'aucune personne raisonnable en en prenant connaissance ne craindrait que le juge du procès ne soit partial dans cette cause.» Il appert du reste des motifs du juge du procès qu'il a tiré ses conclusions concernant la crédibilité sur la foi de la preuve et non sur la foi du genre de parti pris ou de préjugé que semblaient indiquer ses commentaires au sujet de la «société corrompue».

By contrast, a reasonable apprehension of bias was found in *Foto v. Jones* (1974), 45 D.L.R. (3d) 43 (Ont. C.A.). In that case, at p. 44, the trial judge in finding that the plaintiff in the case was not a credible witness stated that: "I regret to have to say that too many newcomers to our country have as yet not learned the necessity of speaking the whole truth. . . . They have not learned that frankness is essential to our system of law and justice". The Court of Appeal concluded that a reasonable apprehension of bias arose in that these were not acceptable ingredients of any judgment, and ought not to influence or appear to influence the trial judge's determination of credibility.

139 Par contraste, la cour a conclu à une crainte raisonnable de partialité dans *Foto c. Jones* (1974), 45 D.L.R. (3d) 43 (C.A. Ont.). Dans cette affaire, le juge du procès, concluant que le plaignant n'était pas un témoin crédible, avait dit ceci à la p. 44: [TRADUCTION] «Je regrette d'avoir à dire que trop de nouveaux arrivants dans notre pays n'ont pas encore appris la nécessité de dire toute la vérité. [. . .] Ils n'ont pas appris que la franchise est essentielle à notre système de droit et de justice.» La Cour d'appel a conclu à l'existence d'une crainte raisonnable de partialité parce que de tels éléments ne devraient jamais jouer dans un jugement et qu'ils ne devraient pas influencer ni paraître influencer la décision du juge du procès sur la crédibilité.

In the current appeal, the Crown's position is that in *Foto*, *supra*, the circumstances are precisely the same as in the case at bar. I disagree. In *Foto*, *supra*, the remarks of the trial judge were fundamental to his findings of credibility, and appeared to be the sole basis on which the witness was disbelieved. This is not the situation in the current appeal, which has to be assessed on its own particular facts, and in its own context.

140 Dans le présent pourvoi, le ministère public soutient que les circonstances constatées dans l'arrêt *Foto*, précité, sont précisément identiques à celles de la présente espèce. Je ne suis pas d'accord. Dans cet arrêt-là, les remarques du juge du procès ont joué un rôle fondamental dans sa décision sur la crédibilité et ont semblé être le seul fondement du rejet du témoignage. Telle n'est pas la situation dans la présente espèce, laquelle doit être analysée suivant ses faits propres et son contexte.

These examples demonstrate that allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.

141 Ces exemples montrent que les allégations de crainte de partialité ne seront généralement pas admises à moins que la conduite reprochée, interprétée selon son contexte, ne crée véritablement l'impression qu'une décision a été prise sur la foi d'un préjugé ou de généralisations. Voici le principe primordial qui se dégage de cette jurisprudence: les commentaires ou la conduite reprochés ne doivent pas être examinés isolément, mais bien selon le contexte des circonstances et par rapport à l'ensemble de la procédure.

C. *Application of These Principles to the Facts*

142 Did Judge Sparks' comments give rise to a reasonable apprehension of bias? In order to answer that question, the nature of the Crown's allegation against Judge Sparks must be clearly understood. At the outset, it must be emphasized that it is obviously not appropriate to allege bias against Judge Sparks simply because she is black and raised the prospect of racial discrimination. Further, exactly the same high threshold for demonstrating reasonable apprehension of bias must be applied to Judge Sparks in the same manner it would be to all judges. She benefits from the presumption of judicial integrity that is accorded to all who swear the judicial oath of office. The Crown bears the onus of displacing this presumption with "cogent evidence".

143 Similarly, her finding that she could not accept the evidence of Constable Stienburg cannot raise a reasonable apprehension of bias. Neither Constable Stienburg nor any other police officer has an automatic right to be believed, any more than does the accused R.D.S. or any other accused. Police officers cannot expect to be immune from a finding that their testimony is not credible on some occasions. The basic function of a trial judge to determine issues of credibility and make findings of fact would be rendered meaningless if the credibility of police officers were to be accepted without question whenever their evidence diverged from that given by another witness. An unfavourable finding relating to the credibility of Constable Stienburg could only give rise to an apprehension of bias if it could reasonably be perceived to have been made on the basis of stereotypical generalizations, or as Scalia J. put it in *Liteky*, *supra*, on the basis of "wrongful or inappropriate" opinions not justified in the evidence.

144 The Crown contended that the real problem arising from Judge Sparks' remarks was the inability of the Crown and Constable Stienburg to respond to the remarks. In other words, the Crown attempted to put forward an argument that the trial was rendered unfair for failure to comply with

C. *Application de ces principes aux faits*

Les commentaires faits par le juge Sparks dans ses motifs suscitent-ils une crainte raisonnable de partialité? Pour répondre à cette question, il faut bien comprendre la nature de l'allégation du ministère public. Il faut tout d'abord souligner qu'il est de toute évidence mal à propos d'imputer un parti pris au juge Sparks simplement parce qu'elle est Noire et qu'elle a évoqué la possibilité de discrimination raciale. En outre, il faut appliquer au juge Sparks comme à tout autre juge la même norme rigoureuse pour déterminer la crainte raisonnable de partialité. Elle bénéficie de la présomption d'intégrité judiciaire qui joue en faveur de tous les juges qui ont prononcé le serment professionnel. Le ministère public a la charge de réfuter la présomption par des «preuves convaincantes».

La conclusion qu'elle a tirée, selon laquelle elle ne pouvait pas accepter le témoignage de l'agent Stienburg, ne saurait non plus susciter une crainte raisonnable de partialité. Ni l'agent Stienburg ni quelque policier que ce soit ne jouit automatiquement du droit d'être cru, pas plus d'ailleurs que l'accusé R.D.S. ni aucun autre accusé. Les policiers ne peuvent s'attendre à être immunisés contre la conclusion que leur témoignage n'est pas digne de foi dans certains cas. La fonction essentielle du juge, qui est de trancher les questions de crédibilité et d'en arriver à des conclusions sur les faits, perdrait tout son sens si la crédibilité des policiers devait être reconnue aveuglément, chaque fois que leur déposition s'oppose à celle d'un autre témoin. Une conclusion défavorable concernant la crédibilité de l'agent Stienburg ne pourrait susciter une crainte de partialité que si elle donnait raisonnablement l'impression qu'elle est basée sur des généralisations stéréotypées ou, pour reprendre les propos du juge Scalia dans l'arrêt *Liteky*, précité, sur des opinions [TRADUCTION] «erronées ou inappropriées», non justifiées par la preuve.

Le ministère public a soutenu qu'en fait, ce qui faisait problème c'était que le ministère public et l'agent Stienburg n'aient pas pu répondre aux remarques du juge Sparks. Autrement dit, il a tenté de faire valoir que le procès avait été inéquitable parce qu'il y avait eu transgression des règles de

"natural justice". This cannot be accepted. Neither Constable Stienburg nor the Crown was on trial. Rather, it is essential to consider whether the remarks of Judge Sparks gave rise to a reasonable apprehension of bias. This is the only basis on which this trial could be considered unfair.

Before finding that a reasonable apprehension of bias did arise Glube C.J.S.C. found that Judge Sparks conducted an acceptable review of all the evidence before making the comments that are the subject of the controversy. She concluded that if the decision had ended after the general review of the evidence and the resulting assessments of credibility, there would be no basis on which to impugn Judge Sparks' decision. I agree completely with this assessment. It is with the finding of a reasonable apprehension of bias that I must, with respect, differ.

A reading of Judge Sparks' reasons indicates that before she made the challenged comments, she had a reasonable doubt as to the veracity of the officer's testimony and had found R.D.S. to be a credible witness. She gave convincing reasons for these findings. It is clear that Judge Sparks was well aware that the burden rested on the Crown to prove all the elements of the offence beyond a reasonable doubt, and she applied that burden. None of the bases for reaching these initial conclusions on credibility was based on generalizations or stereotypes. Her reasons for rejecting or accepting testimony could be applied to any witness, regardless of race or gender.

Did Judge Sparks' subsequent comments about race taint her findings of credibility? The unfortunate remarks took this form:

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I am not saying that the Constable has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do

justice naturelle. Cet argument est indéfendable. Ce n'était pas le procès de l'agent Stienburg, ni celui du ministère public. La question qui se pose est bien plutôt essentiellement de savoir si les remarques du juge Sparks ont suscité une crainte raisonnable de partialité. Voilà la seule raison pour laquelle ce procès pourrait être tenu pour inéquitable.

145 Le juge en chef Glube, qui a conclu à la crainte raisonnable de partialité, a estimé que le juge Sparks avait fait un examen acceptable de toute la preuve avant de faire les commentaires controversés. Elle a conclu que si le juge Sparks avait clos sa décision après son examen général de la preuve et ses conclusions quant à la question de la crédibilité, il n'y aurait pas eu de motif d'en appeler de sa décision. Je suis tout à fait d'accord là-dessus. Toutefois, je me trouve malheureusement dans l'obligation d'exprimer mon désaccord avec la conclusion du juge en chef sur la crainte raisonnable de partialité.

146 Il ressort des motifs du juge Sparks, qu'avant de faire les remarques contestées, elle a eu un doute raisonnable quant à la véracité du témoignage du policier et qu'elle a estimé que R.D.S. était un témoin crédible. Elle a motivé ces conclusions de manière convaincante. De toute évidence, le juge Sparks a tenu compte de la charge incombant au ministère public de prouver tous les éléments de l'infraction hors de tout doute raisonnable et elle a vérifié s'il s'était acquitté de cette charge. Ses conclusions initiales sur la crédibilité ne reposaient aucunement sur des généralisations ou des stéréotypes. Ses motifs de rejet ou d'acceptation des témoignages pouvaient s'appliquer à n'importe quel témoin, sans égard à sa race ou à son sexe.

147 Les commentaires qu'a faits ensuite le juge Sparks sur les relations raciales ont-ils entaché ses conclusions sur la crédibilité? Voici la teneur de ces remarques:

[TRADUCTION] Le ministère public dit, bien, pourquoi le policier aurait-il dit que les événements se sont déroulés comme il les a relatés à la Cour ce matin? Je ne dis pas que l'agent a trompé la Cour, bien qu'on sache que des policiers l'aient fait dans le passé. Je ne dis pas que le policier a réagi de façon excessive, même s'il

overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day.

arrive effectivement que des policiers réagissent avec excès, particulièrement lorsqu'ils ont affaire à des groupes non blancs. Cela me semble dénoter en soi un état d'esprit suspect. Je crois que nous sommes vraisemblablement en présence dans cette affaire-ci d'un jeune policier qui a réagi de façon excessive. J'accepte le témoignage de [R.D.S.] selon lequel on lui a intimé de se taire, sous peine d'être arrêté. Cela semble conforme à l'attitude courante du jour.

148 The statement that police officers have been known to mislead the court, or to overreact is not in itself offensive. Police officers are subject to the same human frailties that affect and shape the actions of everyone. The remarks become more troubling, however, when it is stated that police officers do overreact in dealing with non-white groups.

La remarque selon laquelle on sait que des policiers ont trompé la cour ou ont réagi de façon excessive dans le passé n'est pas en soi critiquable. Les policiers sont sujets à toutes les faiblesses de la nature humaine qui déterminent les actions de chacun. Toutefois, ce qui inquiète davantage c'est le passage où le juge dit qu'il arrive effectivement que des policiers réagissent avec excès, lorsqu'ils ont affaire à des groupes non blancs.

149 The history of anti-black racism in Nova Scotia was documented recently by the *Royal Commission on the Donald Marshall Jr. Prosecution* (1989). It suggests that there is a realistic possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination. I do not propose to review and comment upon the vast body of sociological literature referred to by the parties. It was not in evidence at trial. In the circumstances it will suffice to say that they indicate that racial tension exists at least to some degree between police officers and visible minorities. Further, in some cases, racism may have been exhibited by police officers in arresting young black males.

L'histoire du racisme anti-noir en Nouvelle-Écosse a été documentée récemment par la *Commission royale sur les poursuites intentées contre Donald Marshall fils* (1989), qui a conclu à la possibilité réaliste que les actions des policiers dans leurs relations avec les minorités visibles soient empreintes à la fois de préjugés et de discrimination. Je ne me propose pas d'examiner et de commenter la longue liste des ouvrages sociologiques cités par les parties. Elle n'a pas été versée en preuve au procès. Vu les circonstances, qu'il suffise de dire qu'elle dénote la présence de tension raciale, du moins dans une certaine mesure, entre les policiers et les minorités visibles. Par surcroît, les policiers ont peut-être parfois fait preuve de racisme en arrêtant des jeunes hommes de race noire.

150 However, there was no evidence before Judge Sparks that would suggest that anti-black bias influenced this particular police officer's reactions. Thus, although it may be incontrovertible that there is a history of racial tension between police officers and visible minorities, there was no evidence to link that generalization to the actions of Constable Stienburg. The reference to the fact that police officers may overreact in dealing with non-white groups may therefore be perfectly supportable, but it is nonetheless unfortunate in the circum-

Toutefois, aucun élément de preuve soumis au juge Sparks ne semble indiquer que des préjugés anti-noir aient influencé les réactions du policier en cause. Ainsi, bien qu'il soit peut-être incontestable qu'historiquement, une tension raciale a pu être observée dans les rapports entre les policiers et les minorités visibles, aucun élément de preuve ne permet d'établir un lien entre cette généralisation et les actes de l'agent Stienburg. Il peut donc être parfaitement défendable de faire mention du fait que les policiers réagissent peut-être avec excès

stances of this case because of its potential to associate Judge Sparks' findings with the generalization, rather than the specific evidence. This effect is reinforced by the statement "[t]hat to me indicates a state of mind right there that is questionable" which immediately follows her observation.

There is a further troubling comment. After accepting R.D.S.'s evidence that he was told to shut up, Judge Sparks added that "[i]t seems to be in keeping with the prevalent attitude of the day". Again, this comment may create a perception that the findings of credibility have been made on the basis of generalizations, rather than the conduct of the particular police officer. Indeed these comments standing alone come very close to indicating that Judge Sparks predetermined the issue of credibility of Constable Stienburg on the basis of her general perception of racist police attitudes, rather than on the basis of his demeanour and the substance of his testimony.

The remarks are worrisome and come very close to the line. Yet, however troubling these comments are when read individually, it is vital to note that the comments were not made in isolation. It is necessary to read all of the comments in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know.

The reasonable and informed observer at the trial would be aware that the Crown had made the submission to Judge Sparks that "there's absolutely no reason to attack the credibility of the officer". She had already made a finding that she preferred the evidence of R.D.S. to that of Constable Stienburg. She gave reasons for these findings that could appropriately be made based on the evidence adduced. A reasonable and informed person hearing her subsequent remarks would conclude that she was exploring the possible reasons why Constable Stienburg had a different perception of events than R.D.S. Specifically, she was rebutting the unfounded suggestion of the Crown that a

lorsqu'ils ont affaire à des groupes non blancs, mais cette remarque est néanmoins malheureuse, au vu des circonstances de l'espèce, car elle risque d'associer les conclusions du juge Sparks à la généralisation plutôt qu'à la preuve produite. Cet effet est renforcé par les propos suivants: «[c]ela me semble dénoter en soi un état d'esprit suspect», qui suivent immédiatement le commentaire.

151 Une autre remarque inspire de l'inquiétude. Après avoir accepté le témoignage de R.D.S. selon lequel on lui a intimé de se taire, le juge Sparks a ajouté: «[c]ela semble conforme à l'attitude courante du jour.» Encore une fois, ce commentaire peut créer l'impression que ses conclusions sur la crédibilité ont été tirées sur la foi de généralisations, plutôt qu'à partir de la conduite du policier en cause. En effet, prise isolément, cette remarque semble presque indiquer que le juge Sparks a tranché d'avance la question de la crédibilité de l'agent Stienburg en se basant sur la façon dont elle perçoit en général les attitudes racistes des policiers, plutôt qu'en se fondant sur le comportement et le contenu du témoignage de ce dernier.

152 Ces remarques inspirent de l'inquiétude et frôlent la limite. Néanmoins, quelque inquiétantes que soient ces remarques, prises isolément, il est essentiel de noter qu'elles s'inscrivent dans un contexte. Il est indispensable de lire toutes les remarques en tenant compte du contexte de l'ensemble de la procédure et en étant conscient de toutes les circonstances que l'observateur raisonnable est censé connaître.

153 L'observateur raisonnable et renseigné, assistant au procès, saurait que le ministère public a fait valoir au juge Sparks qu'[TRADUCTION] «il n'y a absolument aucune raison d'attaquer la crédibilité du policier». Celle-ci avait déjà indiqué qu'elle préférait le témoignage de R.D.S. à celui de l'agent Stienburg. Les motifs qu'elle a donnés pour étayer cette conclusion étaient justifiés par la preuve. Une personne raisonnable et renseignée, entendant les remarques qu'elle a faites ensuite, conclurait qu'elle explorait les raisons possibles pour lesquelles l'agent Stienburg n'avait pas perçu les événements de la même façon que R.D.S. Plus précisément, elle s'employait à réfuter l'argument,

police officer by virtue of his occupation should be more readily believed than the accused. Although her remarks were inappropriate they did not give rise to a reasonable apprehension of bias.

154 A reasonable and informed person observing the entire trial and hearing the reasons would be aware that Judge Sparks did not conclude that Constable Stienburg misled the court or overreacted on the basis of the racial dynamics of the situation. This is clear from her observation "I am not saying that the Constable has misled the court" and "I am not saying that the officer overreacted". Although she went on to suggest that she believed he probably did overreact, she did not say that he did so because he was discriminating against R.D.S. on the basis of race. She links her findings that Constable Stienburg overreacted to the statement made to R.D.S.: "Shut up, shut up, or you'll be under arrest too".

155 Judge Sparks suggested that Constable Stienburg overreacted on some basis. Although she noted that he was young, she was careful not to make a final determination as to the reason for his overreaction. In fact, it was not necessary for her to resolve the question as to why the officer might have overreacted. The reasonable and informed observer would know that the Crown at all times bore the onus of proving the offence beyond a reasonable doubt. It was obvious that Judge Sparks had a reasonable doubt on the evidence. As long as she had a reasonable doubt regarding the veracity of the officer's testimony, R.D.S. was entitled to an acquittal. Judge Sparks' remarks could reasonably be taken as demonstrating her recognition that the Crown was required to prove its case, and that it was not entitled to use presumptions of credibility to satisfy its obligation.

156 Judge Sparks accepted the evidence of R.D.S. that he was told to shut up or he would be under arrest because that was the "prevalent attitude of

dénué de fondement, qui a été avancé par le ministère public et selon lequel il convenait de croire plus volontiers le policier, en raison de la fonction qu'il remplit, que l'accusé. Pour inappropriées que soient ses remarques, elles ne suscitaient pas de crainte raisonnable de partialité.

Une personne raisonnable et renseignée, observant l'ensemble du procès et entendant les motifs du juge Sparks, se rendrait compte que celle-ci n'a pas conclu que l'agent Stienburg avait trompé la cour ou agi de manière excessive, en se basant sur la dynamique raciale en jeu. Cela se dégage à l'évidence de ses observations: [TRADUCTION] «Je ne dis pas que l'agent a trompé la Cour» et «Je ne dis pas que le policier a réagi de façon excessive». Quoiqu'elle ait dit également croire qu'il avait vraisemblablement réagi de façon excessive, elle n'a pas dit que c'était par discrimination raciale à l'endroit de R.D.S. Elle a relié la conclusion que le policier avait réagi de façon excessive à la déclaration de R.D.S. voulant que le policier lui ait dit: [TRADUCTION] «Tais-toi, tais-toi ou tu vas être arrêté toi aussi».

Le juge Sparks a indiqué que, pour une raison quelconque, l'agent Stienburg avait réagi de façon excessive. Elle a certes souligné qu'il était jeune, mais a pris bien soin de ne pas se prononcer de manière définitive sur la raison de sa réaction excessive. En fait, elle n'avait pas à statuer sur cette raison. L'observateur raisonnable et renseigné saurait que le ministère public avait, du début jusqu'à la fin de la procédure, la charge de prouver l'infraction hors de tout doute raisonnable. De toute évidence, la preuve a soulevé un doute dans l'esprit du juge Sparks. Dans la mesure où elle avait un doute raisonnable quant à la véracité du témoignage du policier, R.D.S. avait droit à l'acquittement. Les remarques du juge Sparks pouvaient raisonnablement être interprétées comme une reconnaissance de l'obligation incombant au ministère public de prouver l'infraction, et de l'interdiction concomitante de recourir à des présomptions de crédibilité pour s'en acquitter.

Le juge Sparks a accepté le témoignage de R.D.S. selon lequel on lui a intimé de se taire, sous peine d'être arrêté, parce que cela semblait con-

the day". This comment is particularly unfortunate because of its potential to associate her findings of credibility with generalizations. However, it is ambiguous. It is not clear whether it refers to a prevalent attitude of anti-black racism, or the attitude that prevailed on the day in question. I accept that it refers to the specific day of the incident.

forme à «l'attitude courante du jour». Cette remarque est particulièrement malheureuse à cause du risque que les conclusions du juge sur la crédibilité ne soient associées à des généralisations. Elle est cependant ambiguë. On n'est pas certain qu'elle y parle de l'attitude courante que représente le racisme anti-noir ou de l'attitude courante le jour en question. Je suis d'avis qu'elle parlait du jour précis où l'incident s'est produit.

Finally, she concluded that "[a]t any rate", on the basis of her comments and all the evidence in the case, she was obliged to acquit. A reasonable, informed person reading the concluding statement would perceive that she has reached her determination that R.D.S. should be acquitted on the basis of all the evidence presented. The perception that her impugned remarks were made in response to the Crown's suggestion that she should automatically believe the police officer is reinforced by her use of the words "[a]t any rate".

157 Finalement, elle est arrivée à la conclusion que [TRADUCTION] «[q]uoi qu'il en soit», vu ses remarques et l'ensemble de la preuve soumise à la cour, elle n'avait d'autre choix que de prononcer l'acquittement. Une personne raisonnable et renseignée, lisant les dernières remarques du juge, s'apercevrait qu'elle a tiré sa conclusion selon laquelle il convenait d'acquitter R.D.S. sur la foi de l'ensemble de la preuve. L'emploi des mots «[q]uoi qu'il en soit» renforce l'impression que ses remarques contestées ont été faites en réponse à l'argument du ministère public voulant qu'elle doive automatiquement croire le policier.

A high standard must be met before a finding of reasonable apprehension of bias can be made. Troubling as Judge Sparks' remarks may be, the Crown has not satisfied its onus to provide the cogent evidence needed to impugn the impartiality of Judge Sparks. Although her comments, viewed in isolation, were unfortunate and unnecessary, a reasonable, informed person, aware of all the circumstances, would not conclude that they gave rise to a reasonable apprehension of bias. Her remarks, viewed in their context, do not give rise to a perception that she prejudged the issue of credibility on the basis of generalizations, and they do not taint her earlier findings of credibility.

158 Toute conclusion quant à une crainte raisonnable de partialité doit satisfaire à une norme rigoureuse. Quelque inquiétantes que puissent être les remarques du juge Sparks, le ministère public ne s'est pas acquitté de la charge de présenter les preuves convaincantes nécessaires pour mettre en doute son impartialité. Bien que ses commentaires, pris isolément, aient été malheureux et inutiles, une personne raisonnable et renseignée, au courant de l'ensemble des circonstances, ne conclurait pas qu'ils suscitent une crainte raisonnable de partialité. Ses remarques, interprétées selon le contexte, ne créent pas l'impression qu'elle a tranché d'avance la question de la crédibilité, en se basant sur des généralisations, et elles n'entachent pas ses conclusions antérieures sur la crédibilité.

Both Glube C.J.S.C. and the majority of the Court of Appeal correctly articulated the test to be applied when a reasonable apprehension of bias is alleged. However, in applying the test to the facts and circumstances of this case they failed to consider the impugned comments in context and to take into account the high threshold that must be

159 Le juge en chef Glube et les juges majoritaires de la Cour d'appel ont énoncé correctement le critère selon lequel il faut apprécier toute allégation de crainte raisonnable de partialité. Toutefois, en appliquant ce critère aux faits et aux circonstances de l'espèce, ils n'ont pas tenu compte du contexte des remarques contestées et n'ont pas pris en con-

met in order to find that a reasonable apprehension of bias has been established.

V. Conclusion

160 In the result the judgments of the Court of Appeal and of Glube C.J.S.C. are set aside and the decision of Judge Sparks dismissing the charges against R.D.S. is restored. I must add that since writing these reasons I have had the opportunity of reading those of Major J. It is readily apparent that we are in agreement as to the nature of bias and the test to be applied in order to determine whether the words or actions of a trial judge raise a reasonable apprehension of bias. The differences in our reasons lies in the application of the principles and test we both rely upon to the words of the trial judge in this case. The principles and the test we have both put forward and relied upon are different from and incompatible with those set out by Justices L'Heureux-Dubé and McLachlin.

Appeal allowed, LAMER C.J. *and* SOPINKA *and* MAJOR JJ. *dissenting*.

Solicitor for the appellant: Dalhousie Legal Aid Service, Halifax.

Solicitor for the respondent: The Attorney General of Nova Scotia, Halifax.

Solicitor for the interveners the Women's Legal Education and Action Fund and the National Organization of Immigrant and Visible Minority Women of Canada: Women's Legal Education and Action Fund, Toronto.

Solicitor for the interveners the African Canadian Legal Clinic, the Afro-Canadian Caucus of Nova Scotia and the Congress of Black Women of Canada: African Canadian Legal Clinic, Toronto.

sidération la norme rigoureuse à laquelle il faut satisfaire pour conclure à la crainte raisonnable de partialité.

V. Conclusion

En conséquence, les jugements de la Cour d'appel et du juge en chef Glube sont annulés et la décision du juge Sparks rejetant les accusations portées contre R.D.S. est rétablie. Je dois ajouter que depuis la rédaction des présents motifs, j'ai eu l'occasion de prendre connaissance de ceux du juge Major. À l'évidence, nous sommes d'accord sur la nature de la partialité et sur le critère à appliquer pour déterminer si les paroles ou les actes du juge du procès suscitent une crainte raisonnable de partialité. Nos divergences tiennent à l'application en l'espèce des principes et du critère que nous invoquons tous les deux lesquels sont différents de ceux qui ont été énoncés par les juges L'Heureux-Dubé et McLachlin et ne sont pas conciliables avec ces derniers.

Pourvoi accueilli, le juge en chef LAMER *et les juges* SOPINKA *et* MAJOR *sont dissidents.*

Procureur de l'appelant: Dalhousie Legal Aid Service, Halifax.

Procureur de l'intimée: Le procureur général de la Nouvelle-Écosse, Halifax.

Procureur des intervenants le Fonds d'action et d'éducation juridiques pour les femmes et l'Organisation nationale des femmes immigrantes et des femmes appartenant à une minorité visible au Canada: Fonds d'action et d'éducation juridiques pour les femmes, Toronto.

Procureur des intervenants l'African Canadian Legal Clinic, l'Afro-Canadian Caucus of Nova Scotia et le Congrès des femmes noires du Canada: African Canadian Legal Clinic, Toronto.

1951 CarswellOnt 310
Ontario District Court of the District of Parry Sound

R. v. Tuttle

1951 CarswellOnt 310, [1951] O.W.N. 750, 101 C.C.C. 249

Rex v. Tuttle

Little Co. Ct. J.

Judgment: August 21, 1951

Counsel: *A.G. Burbidge*, for the informant, appellant.
A.T. Smith, for the accused, respondent.

Subject: Criminal; Public
Headnote
Criminal Law -- General principles involving criminal law — Regulatory offences — Absolute liability
Fish and Wildlife --- Offences — Illegal possession — Wildlife
Game Laws — Offences — Mens rea — Possession of Beaver Carcass — Carcass Imported from Country where Acquisition Legal — The Game and Fisheries Act, R.S.O. 1950, c. 153, ss. 1(k), 30(1), 48(1).

An appeal by the informant from the acquittal of the respondent by a magistrate.

***Little Co. Ct. J.*:**

1 This is an appeal by the Crown in the form of a trial *de novo* following the acquittal of the respondent by Magistrate W.O. Langdon on 3rd October 1950 upon a charge of unlawfully possessing part of a beaver carcass, contrary to s. 27(1) of The Game and Fisheries Act, 1946 (Ont.), c. 33 (now s. 30(1) of R.S.O. 1950, c. 153), and regulations thereunder.

2 Shortly prior to 23rd September 1950 William A. Humphrey, conservation officer of the fish and wild life division of the Department of Lands and Forests, stationed at Powassan, received a complaint that the respondent was in possession of illegal quantities of partridge and pickerel and, after obtaining a search warrant, he proceeded on 23rd September to the summer residence of the respondent at Sunset Cove in the township of Nipissing in the district of Parry Sound. No illegal quantities of fish or game were found. On being informed that the respondent had a deep-freeze unit at Waltonian Inn on Lake Nipissing, Officer Humphrey, accompanied by Officers William St. Pierre and Ron Menzies, went to Waltonian Inn unaccompanied by the respondent, who did not wish to go, and there searched the deep-freeze unit in the name of the respondent. No fish or game whatsoever was found except a parcel which the three officers agreed contained part of a beaver carcass with the word "Beaver" written on the outside. The three officers returned to see the respondent, who admitted that the deep-freeze unit was his and also that he was the owner of the package of beaver-meat. He informed the officers that he had brought the beaver-meat from his home in the State of Pennsylvania, where he had obtained it legally from one Jesse Spragge. He suggested that the officers telephone to Mr. Spragge in the United States to check the authenticity of his statement, but they refused to do so, saying they were going to place all the facts before their superior officer. The result was the laying of the charge now before the Court.

3 The respondent gave evidence and on all material points confirmed the evidence of the conservation officers, Humphrey and St. Pierre. He also stated that he was a resident of Bradford, Pennsylvania, but had been a resident during the summer months and a taxpayer in the township of Nipissing for a period of 28 years. At no time during that period had he faced any charges of any kind and he had always observed the laws of the Province as far as he knew. He swore that he was much interested in conservation of wild life and, in fact, was vice-president of one of the largest conservation clubs in the State of Pennsylvania. Although not an expert qualified to advise the Court on the law in Pennsylvania, he stated that anyone who obtained a hunting

licence in Pennsylvania could, during the open season, trap beaver. He stated that the season opened on 1st February and that shortly thereafter Jesse Spragge gave him the beaver carcass, which he claimed to have legally trapped during the open season. Immediately thereafter some of the carcass was eaten by the respondent and his family and the rest was put in his deep-freeze container in his home. He stated that an American coming into Canada is permitted to bring in four days' supply of food and that this parcel of beaver-meat was brought into Canada in that category and placed in the deep-freeze unit at Waltonian Inn. He claimed that he did not regard beaver as game but had made no inquiries regarding the same and was definitely unaware that he might be committing a breach of the Act by having it in his possession in Ontario.

4 There is, therefore, practically no dispute on the facts and at the conclusion of the case Crown counsel said he was prepared to admit the truth of the respondent's story and yet still argue that there was an infraction of the provisions of s. 27(1) of the Act. The Court was also impressed with the evidence of the respondent and has no hesitation in accepting that evidence as to what actually occurred.

5 Counsel for the respondent in a very able argument contended that the respondent should be acquitted because of the fact that the beaver-meat was part of the carcass of a beaver located in the State of Pennsylvania and therefore was not game which was the subject of legislation by the Ontario Legislature. Counsel referred first of all to the case of *Reg. v. Robertson* (1886), 3 Man. R. 613, reading the digest found in 11 Can. Abr. 343, as follows: "Acts for the protection of game may be passed by the provinces by virtue of their control of both 'Property and Civil Rights in the Province' and 'Matters of a merely local or private nature in the Province'. Such Acts may be enforced by the imposition of punishments and may prohibit the issue of a writ of certiorari in respect to convictions for such offences." In the same case Killam J., at p.620, said: "The object of the Act, or the portion relating to the protection of game, is essentially local. It is to secure the increase, or to prevent, at any rate as far as possible, the decrease of the supply of game within the province, in order that the people of the province may enjoy the sport of pursuing and killing the birds and other animals mentioned in the Act, or may have at hand a ready supply of them for food or for profit. All of the enactments against having them in possession or exporting them, are evidently so many accessories to the prohibition upon the killing at certain seasons, and all are plainly directed to the purpose mentioned."

6 Counsel referred further to the statement of McPhillips J.A. in the case of *McKinnon v. Lewthwaite* (1914), 20 B.C.R. 55 at 67, 7 W.W.R. 25, 20 D.L.R. 220, as follows: "It is in the interests of justice that in the construction of statute law applicable throughout the Dominion, there should be a uniformity of judicial opinion where at all possible." Further, in the case of *Rex v. Hoffman*, [1923] 3 W.W.R. 746, 41 C.C.C. 124, [1923] 4 D.L.R. 466, Martin J.A. said: "A meaning should not be attributed to language used by Parliament which would not only not carry out its object but would produce consequences which are absurd, and which would render the legislation futile."

7 Counsel argued that as it was agreed that the Ontario Legislature could not pass legislation making it an offence to trap, hunt, take or kill beaver in the State of Pennsylvania, and since the enactment regarding possession was an accessory to the prohibition upon trapping, hunting, taking or killing, it was not an offence to possess in Ontario a beaver carcass obtained in the State of Pennsylvania. In other words, the object which the Legislature had in mind in passing the legislation was to protect wild life actually existing or to exist in future in the Province of Ontario and not elsewhere.

8 In determining the question, I shall consider first the meaning of the word "possession". In the case of *Rex v. Campbell*, [1938] O.W.N. 383, [1938] 4 D.L.R. 773, Urquhart J. referred to the fact that there are a number of definitions of "possession", and at pp. 384-5 he quoted the definition in s. 5(*b*) of The Criminal Code, R.S.C. 1927, c. 36, as follows:

> (b) having in one's possession includes not only having in one's own personal possession, but also knowingly
>
> (i) having in the actual possession or custody of any other person, and
>
> (ii) having in any place (whether belonging to or occupied by one's self or not), for the use or benefit of one's self or of any other person.

9 Urquhart J. further stated that in the particular case which he was trying, being for unlawful possession of beaver skins under The Game and Fisheries Act, though the above definition was not in itself applicable, it "expresses closely what is involved in the meaning of 'possession' under The Game and Fisheries Act".

10 Although it was not argued that the respondent was not in possession of a beaver carcass, nevertheless I am actually finding from the facts and from the above definition that the respondent did actually possess the beaver carcass on 23rd September 1950. Did he, however, possess it illegally? Section 27(1) [now s. 30(1)] of The Game and Fisheries Act, under which this charge was laid, reads as follows: "No person shall at any time trap, hunt, take or kill, or attempt to trap, hunt, take or kill, any beaver or possess the carcass, pelt or any part of any beaver, except during such period and on such terms and conditions as the Lieutenant-Governor in Council may prescribe." In interpreting this statute I am adopting the language used by Lord Atkinson in *The City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384 at 387, 59 D.L.R. 399, [1921] 2 W.W.R. 214:

> "In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense. In *Grey v. Pearson* (1857), 6 H.L. Cas. 61 at 106, Lord Wensleydale said: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.'" Lord Atkinson points out that this passage was quoted with approval by Lord Blackburn in *Caledonian Railway Company v. North British Railway Company* (1881), 6 App. Cas. 114 at 131, and by Jessel M.R. in *Ex parte Walton; In re Levy* (1881), 17 Ch. D. 746 at 751.

11 I would also refer to the case of *The Canadian Pacific Railway Company v. The James Bay Railway Company* (1905), 36 S.C.R. 42, in which Nesbitt J. says, at p. 88: "The purpose is expressed by the terms of the statute which are absolutely controlling as to the legislative intent, and while a construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed, yet if Parliament has explained its own meaning too unequivocally to be mistaken the courts must adopt that meaning."

12 Furthermore, in *The Canadian Northern Railway Company v. The City of Winnipeg*, 54 S.C.R. 589 at 593-4, 36 D.L.R. 222, [1917] 2 W.W.R. 100, Fitzpatrick C.J.C. says:

> It is reasonably clear what the legislature said and also what it intended; further that it did not say what it intended and that without disregarding the words of the statutes it is difficult to give effect to the intention.
>
> Although a statute is to be construed according to the intent of them that made it, if the language admits of no doubt or secondary meaning it is simply to be obeyed.

13 The Chief Justice also quoted the following passage from Lord Watson's speech in *Salomon v. A. Salomon and Company, Limited*, [1897] A.C. 22 at 38: "In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

14 In the case at bar there seems no question but that the intention of the Legislature was to protect wild life within the Province of Ontario, but in order to effect this purpose the Legislature has the power to pass such laws and regulations as it deems necessary. The Legislature has, therefore, enacted under s. 27 above that "no person shall ... possess the carcass, pelt or any part of any beaver". The important words to consider outside of the word "beaver" are "any part of any beaver". There can be no doubt as to the all-embracing meaning of these words. If the Legislature had wished to restrict this meaning to game which originated in Ontario, it could quite easily have done so; instead, however, it chose to use the words "any part" and "any

beaver", which can have only one meaning, namely, beaver which may have originated anywhere. There is no question that this is the ordinary meaning of the words used by the Legislature and it is the one which must be followed by the Court.

15 When I examine the Act further, however, I am still more convinced that the intention of the Legislature was to cover beaver irrespective of their origin. I would refer to s. 45(1) [now s. 48(1)] of the Act, which reads as follows: "Nothing in this Act shall prevent the importation of game into Ontario from any place outside of Ontario where it is accompanied by an affidavit or statutory declaration, satisfactory to the Department, that the game was legally taken." There is no question that under the definition of "game" contained in s. 1(*i*) [now s. 1(*k*)] of the Act, the part of the beaver carcass found in the respondent's possession is game and that if he had made inquiries before bringing the carcass into the Province he could have complied with s. 45 and if he had so complied he would have been legally in possession of the game within Ontario.

16 I must, therefore, find that the respondent was illegally in possession of part of a beaver carcass in Ontario on 23rd September last, and is guilty of an infraction of s. 27(1) of the Act.

17 I must add that I have reached the above decision rather reluctantly as, frankly, I think this is one of those technical infractions of the Act with respect to which a charge should not have been laid. I, of course, realize the position of the Crown that the defence in this case might be adopted by many others if the law were not strictly enforced. In this case, however, there seems no doubt as to the true situation as I was much impressed by the honest and straightforward way in which the respondent gave his evidence.

18 I am, therefore, allowing the appeal and finding the respondent guilty as charged, but will suspend sentence for a period of one year. I make no order as to costs.

Appeal allowed.

RJR-MacDonald Inc. *Appellant*

v.

The Attorney General of Canada *Respondent*

and

Imperial Tobacco Ltd. *Appellant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Attorney General for Ontario, the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, and the Canadian Lung Association *Interveners*

INDEXED AS: RJR-MACDONALD INC. *v.* CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1994: November 29, 30; 1995: September 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Charter of Rights — Freedom of expression — Commercial advertising — Cigarette advertising banned — Whether or not legislation validly enacted under criminal law

RJR-MacDonald Inc. *Appelante*

c.

Le procureur général du Canada *Intimé*

et

Imperial Tobacco Ltd. *Appelante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

Le procureur général de l'Ontario, la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, l'Association médicale canadienne et l'Association pulmonaire du Canada *Intervenants*

RÉPERTORIÉ: RJR-MACDONALD INC. *c.* CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1994: 29, 30 novembre; 1995: 21 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit constitutionnel — Partage des compétences — Charte des droits — Liberté d'expression — Publicité commerciale — Publicité de la cigarette interdite — Les dispositions législatives ont-elles été validement adop-

power or under peace, order and good government clause — If so, whether or not Act's provisions infringing s. 2(b) Charter right to freedom of expression — If so, whether or not infringements justifiable under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Constitution Act, 1867, Preamble, s. 91(27) — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 4, 5, 6, 8, 9.

The *Tobacco Products Control Act* (the "Act") broadly prohibited (with specified exceptions) all advertising and promotion of tobacco products and the sale of a tobacco product unless its package includes prescribed unattributed health warnings and a list of toxic constituents. The legislative scheme targeted three distinct categories of commercial activity: advertising, promotion and labelling. The Act, except for a prohibition on the distribution of free samples of tobacco products, did not proscribe the sale, distribution or use of tobacco products.

These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The appellant RJR-MacDonald Inc. sought a declaration that the Act was wholly *ultra vires* Parliament and invalid as an unjustified infringement of freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The appellant Imperial Tobacco Ltd. sought the same order, but only in respect of ss. 4 and 5 (advertisement of tobacco products), and ss. 6 and 8 (promotion of tobacco products). The two motions were heard together in the Quebec Superior Court which declared the whole of the Act *ultra vires* the Parliament of Canada and as well found it to be of no force or effect as an unjustified infringement of s. 2(*b*) of the *Charter*. The Quebec Court of Appeal reversed this judgment. The constitutional questions considered by this Court queried: (1) whether Parliament had legislative competence to enact the Act under either the peace, order and good government of Canada clause or the criminal law power, and (2) whether the Act infringed the right to freedom of expression protected by s. 2(*b*) of the *Charter* and, if so, whether it was saved under s. 1.

Held (La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. dissenting): The appeals should be allowed. The first constitutional question dealing with the legisla-

tées dans le cadre de la compétence en matière de droit criminel ou en vertu de la disposition relative à la paix, à l'ordre et au bon gouvernement? — Dans l'affirmative, les dispositions de la Loi violent-elles la liberté d'expression garantie à l'art. 2b) de la Charte? — Dans l'affirmative, les violations sont-elles justifiables en vertu de l'article premier? — Charte canadienne des droits et libertés, art. 1, 2b) — Loi constitutionnelle de 1867, préambule, art. 91(27) — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 4, 5, 6, 8, 9.

La *Loi réglementant les produits du tabac* (la «Loi») comporte une interdiction générale (sous réserve d'exceptions précises) de toute publicité et promotion en faveur des produits du tabac et de la vente de ces produits à moins que leur emballage ne comporte les mises en garde non attribuées prévues et une liste de leurs substances toxiques. Le régime législatif vise trois catégories distinctes d'activité commerciale: la publicité, la promotion et l'étiquetage. Sauf pour ce qui est de l'interdiction de distribuer des échantillons gratuits, la Loi n'interdit pas la vente, la distribution ou l'usage des produits du tabac.

Les présents litiges ont commencé par deux requêtes distinctes visant à obtenir des jugements déclaratoires devant la Cour supérieure du Québec. L'appelante RJR-MacDonald Inc. a demandé que la Loi soit déclarée complètement *ultra vires* du Parlement du Canada et non valide du fait qu'elle constitue une violation injustifiée de la liberté d'expression garantie à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. L'appelante Imperial Tobacco Ltd. a demandé la même ordonnance, mais seulement relativement aux art. 4 et 5 (publicité en faveur des produits du tabac) et aux art. 6 et 8 (promotion des produits du tabac). Les deux requêtes ont été entendues en même temps par la Cour supérieure du Québec, qui a déclaré l'ensemble de la Loi *ultra vires* du Parlement du Canada et a affirmé que la Loi était inopérante du fait qu'elle constituait une violation injustifiée de l'al. 2*b*) de la *Charte*. La Cour d'appel du Québec a infirmé cette décision. Notre Cour a examiné les questions constitutionnelles visant à déterminer: (1) si le Parlement avait la compétence nécessaire pour adopter la Loi soit pour la paix, l'ordre et le bon gouvernement du Canada, soit dans le cadre de sa compétence en matière de droit criminel, et (2) si la Loi porte atteinte à la liberté d'expression garantie à l'al. 2*b*) de la *Charte* et, dans l'affirmative, si elle est sauvegardée par l'article premier.

Arrêt (les juges La Forest, L'Heureux-Dubé, Gonthier et Cory sont dissidents): Les pourvois sont accueillis. La première question constitutionnelle traitant de la compé-

tive competence of Parliament to enact the legislation under the criminal law power or for the peace, order and good government of Canada should be answered in the positive. With respect to the second constitutional question, ss. 4 (re advertising), 8 (re trade mark use) and 9 (re unattributed health warnings) of the Act are inconsistent with the right of freedom of expression as set out is 2(*b*) of the *Charter* and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would find that they constitute a reasonable limit. Given that ss. 5 (re retail displays) and 6 (re sponsorships) could not be cleanly severed from ss. 4, 8 and 9, all are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*.

Division of Powers

(i) *Criminal Law Power*

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Iacobucci JJ. (Sopinka and Major JJ. dissenting): The legislation was validly enacted under the criminal law power.

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ.: The legislation was validly enacted under the criminal law power, and it was accordingly unnecessary to consider whether it fell under the peace, order and good government clause. The criminal law power is plenary in nature, defined broadly, and not frozen in time or confined to a fixed domain of activity. The legislation must not, however, be colourable; some legitimate public purpose must underlie the prohibition.

The *Tobacco Products Control Act* is, in pith and substance, criminal law. Parliament's purpose was to prohibit three categories of acts: advertisement of tobacco products (ss. 4 and 5), promotion of tobacco products (ss. 6 to 8) and sale of tobacco products without printed health warnings (s. 9). The penal sanctions accompanying these prohibitions created a *prima facie* indication that the Act was criminal law. The Act also has an underlying criminal public purpose directed at some injurious effect upon the public — the detrimental health effects caused by tobacco consumption which were clearly demonstrated by the attorney general at trial.

tence du Parlement de légiférer en matière de droit criminel ou pour la paix, l'ordre et le bon gouvernement du Canada reçoit une réponse positive. Pour ce qui est de la seconde question constitutionnelle, les art. 4 (la publicité), 8 (les marques) et 9 (les messages non attribués relatifs à la santé) de la Loi sont incompatibles avec le droit à la liberté d'expression garanti à l'al. 2*b*) de la *Charte* et n'apportent pas une limite raisonnable à l'exercice de ce droit, dont la justification puisse se démontrer au sens de l'article premier. Les juges La Forest, L'Heureux-Dubé, Gonthier et Cory sont d'avis qu'ils apportent une limite raisonnable. Vu que les art. 5 (commerce au détail) et 6 (parrainage) ne peuvent pas nettement être distingués des art. 4, 8 et 9, ils sont tous inopérants aux termes de l'art. 52 de la *Loi constitutionnelle de 1982*.

Partage des compétences

(i) *Compétence en matière de droit criminel*

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin et Iacobucci (les juges Sopinka et Major sont dissidents): La loi a été validement adoptée en vertu de la compétence en matière de droit criminel.

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Gonthier, Cory et Iacobucci: La Loi constitue un exercice valide de la compétence en matière de droit criminel, et il était inutile d'examiner si elle relève de la compétence de légiférer pour la paix, l'ordre et le bon gouvernement. La compétence en matière de droit criminel est de nature plénière, sa portée est définie largement et sa définition n'est pas gelée à une époque déterminée ni restreinte à un domaine d'activité fixe. La loi ne doit pas être spécieuse; l'interdiction doit se fonder sur un objectif public légitime.

La *Loi réglementant les produits du tabac* est, de par son caractère véritable, une loi en matière de droit criminel. L'objectif du Parlement était d'interdire trois catégories d'actes: la publicité en faveur des produits du tabac (art. 4 et 5), la promotion des produits du tabac (art. 6 à 8) et la vente des produits du tabac dont l'emballage ne comporterait pas de messages relatifs à la santé (art. 9). Les sanctions pénales dont ces interdictions sont assorties créent une indication à première vue que la Loi est de droit criminel. La Loi a également un objectif public sous-jacent du droit criminel dirigé contre un effet nuisible pour le public — les effets nocifs de l'usage du tabac sur la santé, que le procureur général a clairement établis en première instance.

"Health" is not an enumerated head under the *Constitution Act, 1867*, and may be dealt with by valid federal or provincial legislation depending on the circumstances and nature and scope of the problem in question. The protection of health is one of the ordinary ends of the federal criminal law power. The scope of that power includes, for example, the right to legislate with respect to dangerous goods, including health warnings on dangerous goods. This legislation was not colourable. Its purpose is to protect Canadians against the serious health hazards that flow from the consumption of tobacco. Parliament's decision to criminalize tobacco advertisement and promotion is a valid exercise of the criminal law power. The Act has the requisite "criminal public purpose" even though Parliament has not criminalized the "evil" ultimately aimed at but rather an activity ancillary to the "evil". A prohibition upon the sale or consumption of tobacco is not now a practical policy option, given the addictive nature of tobacco products, and the large number of Canadians who smoke. It would be absurd to limit Parliament's power to legislate in this emerging area of public concern simply because it cannot as a practical matter impose a prohibition more specifically aimed at the evil. The constitutionality of such legislation has recently been upheld in other cases.

The legislation, while not serving a "public purpose commonly recognized as being criminal in nature", is nevertheless a valid exercise of the criminal law power. The definition of the criminal law is not "frozen as of some particular time" and the criminal law power includes the power to create new crimes. The existence of exemptions within the legislation does not transform it from criminal to regulatory legislation. Broad status-based exemptions to criminal legislation do not detract from the legislation's criminal nature; they help define the crime by clarifying its contours.

Per McLachlin J.: Parliament may impose advertising bans and require health warnings on tobacco products under its criminal law power.

Per Sopinka and Major JJ.: Section 9 of the *Tobacco Products Control Act* falls within Parliament's power under s. 91(27) of the *Constitution Act, 1867*, but ss. 4, 5, 6, and 8 which prohibit all advertising and promotion

La «santé» n'est pas un chef de compétence énuméré dans la *Loi constitutionnelle de 1867*, et la compétence en cette matière peut validement être exercée dans le cadre de lois fédérales ou provinciales, selon les circonstances et selon la nature et la portée du problème en question. La protection de la santé constitue un des buts habituels de la compétence fédérale en matière de droit criminel. Cette compétence comprend, par exemple, le droit de légiférer à l'égard des marchandises dangereuses, notamment à l'égard des mises en garde relatives à la santé. La loi en cause n'était pas spécieuse. Elle a pour objet de protéger les Canadiens contre les graves dangers de l'usage du tabac. La décision du Parlement de criminaliser la publicité et la promotion du tabac constitue un exercice valide de sa compétence en matière de droit criminel. La Loi vise un «objectif public du droit criminel» même si le Parlement n'a pas criminalisé le «mal» visé mais plutôt un aspect secondaire du «mal». Une interdiction de vente ou d'usage du tabac ne constitue pas une option politique pratique pour le moment, étant donné la dépendance que suscitent les produits du tabac et le grand nombre de Canadiens qui fument. Il serait absurde de restreindre la compétence du Parlement de légiférer dans ce nouveau domaine d'intérêt public simplement parce qu'il ne peut pas, d'un point de vue pratique, imposer une interdiction visant plus précisément le mal. La constitutionnalité de lois de ce genre a récemment été maintenue.

Bien qu'elle ne serve pas «une fin publique communément reconnue comme étant de nature criminelle» la Loi constitue néanmoins un exercice valide de la compétence en matière de droit criminel. La définition du droit criminel n'est pas «gelé[e] à une époque déterminée», et la compétence de légiférer en matière de droit criminel comprend celle de définir de nouveaux crimes. Le fait qu'il existe des exemptions dans une loi n'en fait pas un texte réglementaire plutôt qu'un texte relevant du droit criminel. La création d'une exemption générale, fondée sur le statut, à l'application d'une loi en matière criminelle n'a pas pour effet d'enlever à la loi son caractère de droit criminel, elle contribue plutôt à définir l'infraction en en clarifiant les particularités.

Le juge McLachlin: En vertu de sa compétence en matière de droit criminel, le Parlement peut imposer des interdictions sur la publicité et exiger l'apposition de mises en garde relatives à la santé sur les produits du tabac.

Les juges Sopinka et Major: L'article 9 de la *Loi réglementant les produits du tabac* relève de la compétence du Parlement en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*, mais les art. 4, 5, 6 et 8, qui

of tobacco products and restrict the use of tobacco trademarks, do not. The criminal law power encompasses the right to legislate against dangerous foods and drugs, including tobacco products. Manufacturers of tobacco products are under a duty to disclose and warn of the dangers inherent in the consumption of tobacco products and failure to do so can validly constitute a crime.

The prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole lies at the heart of the criminal law. Matters posing a significant and serious risk of harm or causing significant and serious harm to public health, safety or security can be proscribed by Parliament as criminal. Lesser threats to society and its functioning are addressed through non-criminal regulation.

Care must be taken not to overstate the objective because its importance may be exaggerated and the analysis compromised. The objective of the advertising ban and trade mark usage restrictions is to prevent Canadians from being persuaded by advertising and promotion to use tobacco products.

The undesirability of this form of expression does not pose such a grave and serious danger to public health as to make it criminal. The Act lacked a typically criminal public purpose and is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of the criminal law power. Those areas where ancillary activities have been criminalized, rather than the core activity itself, concern matters which have traditionally been subject to criminal sanctions and pose significant and serious dangers in and of themselves. Parliament could have criminalized tobacco use but chose not to.

Broad-based exemptions are a factor which may lead a court to conclude that the proscribed conduct is not truly criminal. The prohibitions on advertising cannot be upheld as a valid exercise of the criminal law power given the broad-based exemptions allowing for tobacco advertising in imported publications and given that the Act does not engage a typically criminal public purpose.

interdisent toute publicité et promotion en faveur des produits du tabac et restreignent l'utilisation des marques de tabac, n'en relèvent pas. La compétence en matière de droit criminel comprend le droit de légiférer contre les produits dangereux et les drogues, y compris les produits du tabac. Les fabricants de produits du tabac ont l'obligation de mettre en garde contre les dangers inhérents à la consommation du tabac, et l'omission de le faire peut validement constituer un crime

L'interdiction de tout comportement qui entrave le bon fonctionnement de la société ou qui compromet la sécurité de la société dans son ensemble est au cœur du droit criminel. Tout ce qui pose un risque de préjudice grave et important ou qui entraîne pour la sécurité et la santé du public un préjudice grave ou important peut être interdit par le Parlement comme relevant du droit criminel. Les menaces moins graves pour la société et son fonctionnement sont ciblées dans les régimes de réglementation qui ne relèvent pas du droit criminel.

Il faut veiller à ne pas surestimer l'objectif parce qu'on risque d'en exagérer l'importance et d'en compromettre l'analyse. L'objectif de l'interdiction de publicité et des restrictions à l'usage des marques est d'empêcher la population canadienne de se laisser convaincre par la publicité et la promotion de faire usage du tabac.

Le fait que cette forme d'expression soit indésirable ne présente pas un risque grave et important pour la santé publique au point de la rendre criminelle. La Loi est dénuée d'un objectif public habituellement reconnu du droit criminel et est trop éloignée des effets nocifs ou indésirables de l'utilisation du tabac pour constituer un exercice valide de la compétence en matière de droit criminel. Les domaines où les activités secondaires ont été criminalisées, plutôt que l'activité principale même, portent sur des sujets qui ont toujours fait l'objet de sanctions pénales et comportent en soi des dangers graves et importants. Le Parlement aurait pu criminaliser l'usage du tabac, mais il a choisi de ne pas le faire.

L'existence d'exemptions générales est un facteur qui peut mener un tribunal à conclure que le comportement interdit n'est pas véritablement criminel. L'interdiction de publicité ne peut pas être maintenue à titre d'exercice valide de la compétence en matière de droit criminel compte tenu des exemptions générales qui permettent la publicité en faveur du tabac dans les publications importées et du fait que la Loi ne relève pas d'un objectif public habituellement reconnu du droit criminel.

Charter Issues

(i) *Infringement*

Per Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.: The impugned sections infringed freedom of expression guaranteed in s. 2(b) of the Charter.

Per La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: The prohibition on advertising and promotion under the Act infringed appellants' right to freedom of expression under s. 2(*b*) of the *Charter*.

Per Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major JJ.: The prohibition on advertising and promotion of tobacco products violated the right to free expression. Since freedom of expression necessarily entails the right to say nothing or the right not to say certain things, the requirement that tobacco manufacturers place an unattributed health warning on tobacco packages combined with the prohibition against displaying any writing on their packaging other than the name, brand name, trade mark, and other information required by legislation too infringed this right. Section 7, which prohibits the free distribution of any tobacco product in any form, is closely connected to the law's objective and should stand.

(ii) *Section 1 Analysis*

Per Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major JJ.: The impugned sections were not justified under s. 1 of the Charter. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would have found the impugned sections justified and therefore saved under s. 1.

Per Sopinka, McLachlin and Major JJ.: The appropriate test in a s. 1 analysis is that found in s. 1 itself: whether the infringement is reasonable and demonstrably justified in a free and democratic society. No conflict exists between the words of s. 1 and the jurisprudence founded upon *Oakes*. The word "demonstrably" in s. 1 is critical: the process is neither one of mere intuition nor of deference to Parliament's choice. 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

Questions relatives à la _Charte_

(i) *Violation*

Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major: Les dispositions contestées violent la liberté d'expression garantie à l'al. 2b) de la Charte.

Les juges La Forest, L'Heureux-Dubé, Gonthier et Cory: L'interdiction de publicité et de promotion imposée par la Loi viole le droit des appelantes à la liberté d'expression garanti à l'al. 2*b*) de la *Charte*.

Le juge en chef Lamer et les juges Sopinka, McLachlin, Iacobucci et Major: L'interdiction imposée sur la publicité et la promotion des produits du tabac constitue une violation du droit à la liberté d'expression. Comme la liberté d'expression comporte nécessairement le droit de ne rien dire ou encore le droit de ne pas dire certaines choses, l'obligation imposée aux fabricants de tabac d'inscrire sur les emballages des produits du tabac des messages non attribués relatifs à la santé, conjuguée à l'interdiction d'apposer sur l'emballage d'un produit des mentions autres que la désignation, le nom, la marque et les renseignements prévus par une loi, constitue une violation de ce droit. L'article 7, qui interdit la distribution gratuite des produits du tabac, sous quelque forme que ce soit, se rattache étroitement à l'objectif de la loi et devrait être déclaré valide.

(ii) *Analyse relative à l'article premier*

Le juge en chef Lamer et les juges Sopinka, McLachlin, Iacobucci et Major: Les dispositions contestées ne sont pas justifiées en vertu de l'article premier de la Charte. Les juges La Forest, L'Heureux-Dubé, Gonthier et Cory auraient conclu que les dispositions contestées étaient justifiées et qu'elles étaient par conséquent sauvegardées par l'article premier.

Les juges Sopinka, McLachlin et Major: Le critère approprié applicable à une analyse fondée sur l'article premier se trouve dans la disposition même et consiste à déterminer si la violation est raisonnable et peut se justifier dans le cadre d'une société libre et démocratique. Il n'existe pas d'incompatibilité entre le libellé de l'article premier et la jurisprudence fondée sur l'arrêt *Oakes*. Les mots «puisse se démontrer» sont importants. En effet, il ne s'agit pas de procéder par simple intuition ou d'affirmer qu'il faut avoir de l'égard pour le choix du Parlement. Bien qu'ils doivent demeurer conscients du contexte socio-politique de la loi attaquée et reconnaître les difficultés qui y sont propres en matière de preuve, les

which the law may achieve in relation to the seriousness of the infringement.

Context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis. The *Oakes* test must be applied flexibly, having regard to the factual and social context of each case. This contextual approach does not reduce the obligation on the state to demonstrate that the limitation on rights imposed by the law is reasonable and justified. The deference accorded to Parliament may vary with the social context but must not be carried to the point of relieving the government of its *Charter*-based burden of demonstrating the limits it has imposed on guaranteed rights to be reasonable and justifiable. To do so would diminish the role of the courts in the constitutional process and weaken the structure of rights. The civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate.

Courts of appeal, as a general rule, decline to interfere with findings of fact by a trial judge unless they are unsupported by the evidence or based on clear error. In the context of the s. 1 analysis, more deference may be required where findings are based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy-oriented evidence. Appellate courts generally are not as constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation because the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts.

The objective should not be overstated. The objective relevant to the s. 1 analysis is that of the infringing measure, since only the infringing measure must be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. The objective of the impugned measures, however, is somewhat narrower than the objectives of the wider legisla-

tribunaux doivent néanmoins insister pour que, avant qu'il ne supprime un droit protégé par la Constitution, l'État fasse une démonstration raisonnée du bien visé par la loi par rapport à la gravité de la violation.

Les concepts de contexte, de respect et d'application d'une norme de preuve souple et réaliste sont des aspects essentiels de l'analyse fondée sur l'article premier. Le critère formulé dans *Oakes* doit être appliqué avec souplesse, compte tenu du contexte factuel et social de chaque cas particulier. Cette analyse contextuelle n'a pas pour effet de diminuer l'obligation qu'a l'État de démontrer que la restriction des droits est raisonnable et justifiée. Le respect accordé au Parlement peut varier en fonction du contexte social, mais il ne doit pas aller jusqu'au point de libérer le gouvernement de l'obligation que la *Charte* lui impose de démontrer que les restrictions qu'il apporte aux droits garantis sont raisonnables et justifiables. Agir ainsi reviendrait à diminuer le rôle des tribunaux à l'intérieur du processus constitutionnel et à affaiblir la structure des droits. La norme de preuve qui convient, à toutes les étapes de l'analyse de la proportionnalité, est celle qui s'applique en matière civile, c'est-à-dire la preuve selon la prépondérance des probabilités.

En règle générale, une cour d'appel refuse de modifier les conclusions de fait du juge de première instance, sauf si ces conclusions ne s'appuient pas sur la preuve ou sont fondées sur une erreur manifeste. Dans le contexte de l'analyse fondée sur l'article premier, il pourrait bien être nécessaire de faire preuve d'une plus grande retenue à l'égard de conclusions fondées sur une preuve de nature purement factuelle, qu'à l'égard de conclusions que le juge de première instance aurait tirées après l'examen de la preuve en matière de sciences humaines et d'autres questions de principe. En règle générale, dans le contexte d'une analyse fondée sur l'article premier, une cour d'appel n'est pas liée par les conclusions du juge de première instance au même degré qu'elle l'est dans le cadre d'un litige de nature non constitutionnelle, puisque l'incidence de la violation sur les droits constitutionnels doit souvent être évaluée dans le cadre d'un vaste examen de facteurs sociaux, économiques et politiques, qui vient s'ajouter à celui de faits scientifiques.

Il faut veiller à ne pas surestimer l'objectif. Aux fins d'une analyse fondée sur l'article premier, l'objectif pertinent est celui de la mesure attentatoire puisque c'est cette dernière que l'on cherche à justifier. Si l'on formule l'objectif d'une façon trop large, on risque d'en exagérer l'importance et d'en compromettre l'analyse. Cependant, l'objectif des mesures contestées est un peu

tive and policy scheme in which the Act is found. The advertising ban and trade mark usage restrictions are to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products. The mandatory package warning is to discourage people who see the package from tobacco use. Both constitute important objectives. The critical question, however, is not the evil tobacco works generally in our society, but the evil which the legislation addresses.

The extent to which this Court should defer to the trial judge's findings depends on whether the findings relate to purely factual matters or whether they relate to complex social science evidence from which it is difficult to draw firm factual and scientific conclusions. Less deference should be accorded to the trial judge's finding that the complete ban on advertising was not rationally connected to the aim of reducing advertising-induced consumption. Much of the evidence adduced on this point was social science evidence predictive of human behaviour from which it was difficult to draw firm factual conclusions.

The impugned provisions mandating a complete ban and unattributed package warnings do not minimally impair the right to free expression. Under the minimal impairment analysis, the trial judge did not rely on problematic social science data, but on the fact that the government had adduced no evidence to show that less intrusive regulation would not achieve its goals as effectively as an outright ban. Nor had the government adduced evidence to show that attributed health warnings would not be as effective as unattributed warnings on tobacco packaging.

The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically

plus restreint que les objectifs plus vastes du régime complexe dans lequel s'inscrit la Loi sur le plan législatif et sur celui des principes. L'interdiction de publicité et les restrictions à l'usage des marques visent à empêcher la population canadienne de se laisser convaincre par la publicité et la promotion de faire usage du tabac. L'objectif de la mise en garde obligatoire est de dissuader les gens qui voient l'emballage de faire usage du tabac. Dans les deux cas, il s'agit d'objectifs importants. La question cruciale, toutefois, n'est pas le mal que le tabac cause dans l'ensemble de notre société, mais bien le mal auquel s'attaque la loi.

La mesure dans laquelle notre Cour devrait faire preuve de retenue à l'égard des conclusions du juge de première instance dépend de la réponse à la question de savoir si les conclusions se rapportent à des questions purement factuelles ou à des éléments de preuve complexes en matière de sciences humaines à partir desquels il est difficile de tirer de solides conclusions factuelles et scientifiques. Il y a lieu de faire preuve d'une moins grande retenue à l'égard de la conclusion du juge de première instance selon laquelle l'interdiction totale de publicité n'avait pas de lien rationnel avec l'objectif de diminution de la consommation provoquée par la publicité. La majeure partie de la preuve présentée sur ce point consistait en des données en matière de sciences humaines concernant le comportement humain prévisible, à partir desquelles il était difficile de tirer de solides conclusions factuelles.

Les dispositions attaquées, qui interdisent toute publicité et exigent l'apposition de mises en garde non attribuées sur les emballages, ne constituent pas une atteinte minimale à la liberté d'expression. Dans le cadre de l'analyse de l'atteinte minimale, le juge de première instance ne s'est pas fié à des données problématiques en matière de sciences humaines mais plutôt au fait que le gouvernement n'avait pas présenté d'éléments de preuve établissant qu'un règlement moins attentatoire n'atteindrait pas ses objectifs aussi efficacement qu'une interdiction totale. Le gouvernement n'avait pas non plus présenté d'éléments de preuve pour établir que des mises en garde attribuées sur les emballages des produits du tabac ne seraient pas aussi efficaces que des mises en garde non attribuées.

Le lien causal entre l'atteinte aux droits et l'avantage recherché peut parfois être établi par une preuve scientifique démontrant, à la suite d'une observation répétée, que l'un influe sur l'autre. Par contre, dans les cas où une loi vise une modification du comportement humain, comme dans le cas de la *Loi réglementant les produits du tabac*, le lien causal pourrait bien ne pas être mesura-

measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective. Here, no direct evidence of a scientific nature showed a causal link between advertising bans and decrease in tobacco consumption. A link, established on a balance of probabilities and based on reason, existed between certain forms of advertising, warnings and tobacco consumption. No causal connection existed however, whether based on direct evidence or logic and reason, between the objective of decreasing tobacco consumption and s. 8's absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products. Section 8 failed the rational connection test.

A complete ban on a form of expression is more difficult to justify than a partial ban. The government must show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

As a matter of reason and logic, lifestyle advertising is designed to increase consumption. Purely informational or brand preference advertising, however, has not been shown to have this effect. Several less intrusive alternative measures would be a reasonable impairment of the right to free expression, given the important objective and the legislative context.

Allowing Parliament to choose such measures as it sees fit by contrasting the importance of Parliament's objective with the low value of the expression at issue raises a number of concerns. First, to argue that the importance of the legislative objective justifies more deference to the government at the stage of evaluating minimal impairment, is to engage in the balancing between objective and deleterious effect contemplated by the third stage of the proportionality analysis in *Oakes*. Second, just as care must be taken not to overvalue the legislative objective beyond its actual parameters, so care must be taken not to undervalue the expression at issue. Third, a great deal of reliance is placed on the fact that the appellants are motivated by profit. Motivation to profit is irrelevant to the determination of

ble du point de vue scientifique. Dans ces cas, notre Cour s'est montrée disposée à reconnaître l'existence d'un lien causal entre la violation et l'avantage recherché sur le fondement de la raison ou de la logique, sans insister sur la nécessité d'une preuve directe de lien entre la mesure attentatoire et l'objectif législatif. En l'espèce, il n'existait aucune preuve directe de nature scientifique de l'existence d'un lien causal entre une interdiction de publicité et la diminution de l'usage du tabac. On a établi, suivant la prépondérance des probabilités, l'existence d'un lien fondé sur la raison entre certaines formes de publicité, les mises en garde et l'usage du tabac. Cependant, il n'existait pas de lien causal, fondé sur une preuve directe ou sur la logique ou la raison, entre l'objectif de diminution de l'usage du tabac et l'interdiction absolue, imposée par l'art. 8, quant à l'usage des marques sur des articles autres que les produits du tabac. L'article 8 ne satisfait pas au critère du lien rationnel.

Il est plus difficile de justifier l'interdiction totale d'une forme d'expression que son interdiction partielle. Le gouvernement doit établir que seule une interdiction totale lui permettra d'atteindre son objectif. Si, comme en l'espèce, aucune preuve n'a été présentée pour démontrer qu'une interdiction partielle serait moins efficace qu'une interdiction totale, on n'a pas établi la justification requise en vertu de l'article premier visant à sauvegarder la violation de la liberté d'expression.

D'un point de vue rationnel et logique, la publicité de style de vie vise à accroître la consommation, mais rien n'indique que la publicité purement informative ou de fidélité aux marques a cet effet. Plusieurs autres mesures, par ailleurs moins envahissantes, constitueraient une atteinte raisonnable au droit à la liberté d'expression, étant donné l'importance de l'objectif et du contexte législatif.

Permettre au Parlement de choisir les mesures qu'il juge appropriées en comparant l'importance de l'objectif qu'il vise et la faible valeur de l'expression en cause soulève certaines préoccupations. Premièrement, soutenir que l'importance de l'objectif législatif justifie un plus grand respect envers le gouvernement à l'étape de l'évaluation de l'atteinte minimale, c'est procéder à la pondération des effets objectifs et des effets préjudiciables, prévue à la troisième étape de l'analyse de la proportionnalité dans l'arrêt *Oakes*. Deuxièmement, tout comme il faut prendre soin de ne pas surestimer l'objectif législatif par rapport à ses véritables paramètres, il faut veiller à ne pas sous-estimer l'importance de l'expression en cause. Troisièmement, une grande importance est accordée au fait que les appelantes sont moti-

whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.

The requirement that the warning be unattributed pursuant to s. 9 of the Act fails to meet the minimum impairment requirement of proportionality. The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. For the reasons given with respect to the advertising ban, a lower level of constitutional scrutiny is not justified in deciding whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulations.

Per Lamer C.J. and Iacobucci J.: The *Tobacco Products Control Act* did not minimally impair the appellants' s. 2(*b*) *Charter* rights. An attenuated minimal impairment analysis could unduly dilute the s. 1 principles as originally cast in *Oakes* and related cases creating the risk that *Charter* violations would be too easily justified, with the result that *Charter* values would be too easily undercut.

The Act was rationally connected to its goal of protecting Canadians from the health risks associated with tobacco use. Rational connection is to be established, upon a civil standard, through reason, logic or common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or common sense but is by no means dispositive or determinative. The Act, however, was not "social engineering". Agreement was expressed with the approach described by La Forest J. relative to appellate court intervention on legislative or social facts found by a trial judge.

Minimal impairment analysis requires consideration of whether or not the legislature turned its mind to alternative and less rights-impairing means to promote its legislative goal. Here, evidence related to the options considered as alternatives to the total ban was withheld from the factual record. In cases like these involving wide public interest constitutional litigation, government should remain non-adversarial and make full disvées par le profit. La volonté de faire un profit ne constitue pas une considération pertinente lorsqu'il s'agit de déterminer si le gouvernement a établi que la loi est raisonnable ou justifiée en tant qu'atteinte à la liberté d'expression.

L'exigence de la non-attribution des mises en garde, prévue à l'art. 9 de la Loi, ne satisfait pas à l'exigence de l'atteinte minimale de la proportionnalité. Le gouvernement est clairement justifié d'exiger des appelantes qu'elles apposent des mises en garde sur les emballages des produits du tabac. Pour les motifs exposés relativement à l'interdiction de publicité, il n'est pas justifié de procéder à une analyse constitutionnelle moins approfondie afin de décider s'il était nécessaire d'interdire aux appelantes d'attribuer le message au gouvernement et s'il était nécessaire de les empêcher d'apposer sur leur emballage des renseignements autres que ceux autorisés par règlement.

Le juge en chef Lamer et le juge Iacobucci: La *Loi réglementant les produits du tabac* ne constitue pas une atteinte minimale aux droits garantis aux appelantes par l'al. 2*b*) de la *Charte*. Une analyse assouplie de l'atteinte minimale risque de trop diluer les principes d'application de l'article premier par rapport à leur formulation initiale dans l'arrêt *Oakes* et les arrêts connexes, créant ainsi un risque que les violations de la *Charte* ne soient trop facilement justifiées et, de ce fait, que les valeurs protégées par la *Charte* ne soient trop facilement contrecarrées.

La Loi a un lien rationnel avec son objectif de protéger les Canadiens contre les méfaits de l'usage du tabac sur la santé. Le lien rationnel doit être établi, selon la norme de preuve en matière civile, par la raison, la logique ou le simple bon sens. L'existence d'une preuve scientifique n'a une valeur probante que lorsqu'il s'agit d'établir la raison, la logique ou le bon sens, mais elle n'est en aucune façon déterminante. Toutefois, la Loi n'est pas une forme d'«ingénierie sociale». La méthode décrite par le juge La Forest relativement à l'intervention des cours d'appel en ce qui concerne les faits législatifs ou sociaux constatés par le juge de première instance est acceptée.

Dans l'analyse de l'atteinte minimale, il faut déterminer si le législateur a examiné d'autres mesures moins attentatoires pour atteindre l'objectif législatif en question. En l'espèce, des éléments de preuve concernant les options envisagées comme solutions de rechange à l'interdiction totale ont été supprimés du dossier de la preuve factuelle. Dans les cas où, comme en l'espèce, il s'agit d'un litige d'un grand intérêt public en matière

closure. The total prohibition on advertising (the full rights-impairing option) is only constitutionally acceptable if information is provided that such a total prohibition is necessary in order for the legislation to achieve a pressing and substantial goal. When the evidence is unclear whether a partial prohibition is as effective as a full prohibition, the *Charter* requires that the legislature enact the partial denial of the implicated *Charter* right. The tailoring required to meet minimal impairment was not significant and yet very necessary to the Act's being constitutional.

Section 9 of the Act, requiring the placing of unattributed health warnings, infringed s. 2(*b*) and was unjustifiable under s. 1 for the reasons of McLachlin J. Sections 4, 5, 6 and 8 should also be struck. Proof might exist for this total and absolute ban on advertising, but without it, there is no justifiable basis for this ban.

Per La Forest, L'Heureux-Dubé, Gonthier and Cory JJ.: The infringement was justifiable under s. 1. Protecting Canadians from the health risks associated with tobacco use, and informing them about these risks, is a pressing and substantial objective. It meets the two broad criteria set forth in *Oakes*. First, its objective is of sufficient importance to override a guaranteed right. Second, it meets the proportionality requirements established in *Oakes*. These requirements are not synonymous with nor have they been superseded by those set forth in s. 1 of the *Charter*. The appropriate "test" is that found in s. 1 itself. The courts are to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society" and must strike a delicate balance between individual rights and community needs. This balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The section 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement. An important "synergetic relation" exists between *Charter* rights and the context in which they are claimed. The *Oakes* requirements therefore must be applied flexibly, having regard to the specific factual and social context of each case. A rigid or formalistic approach should be

constitutionnelle, le gouvernement ne devrait pas s'en tenir à un débat contradictoire et devrait faire une pleine divulgation. L'interdiction totale de publicité (l'option pleinement attentatoire aux droits) n'est acceptable du point de vue constitutionnel que s'il existe des renseignements établissant qu'une telle interdiction est nécessaire pour qu'un objectif urgent et réel de la loi soit atteint. Si la preuve ne permet pas d'établir clairement si une interdiction partielle est aussi efficace qu'une interdiction totale, la *Charte* exige que le législateur opte pour la mesure qui constitue une atteinte partielle au droit qui y est garanti. Les adaptations qui s'imposent pour satisfaire au critère de l'atteinte minimale ne sont pas importantes, mais elles sont tout à fait nécessaires pour rendre la loi constitutionnelle.

L'article 9 de la Loi, qui exige l'apposition de messages non attribués, viole l'al. 2*b*) et n'est pas justifiable en vertu de l'article premier pour les motifs formulés par le juge McLachlin. Les articles 4, 5, 6 et 8 devraient aussi être annulés. Il existe peut-être une preuve appuyant cette interdiction totale et absolue de la publicité, mais sans cette preuve, l'interdiction n'est pas justifiable.

Les juges La Forest, L'Heureux-Dubé, Gonthier et Cory: La violation était justifiable en vertu de l'article premier. Protéger les Canadiens contre les conséquences néfastes du tabac sur la santé et les sensibiliser à ces conséquences constitue un objectif urgent et réel. Cette mesure satisfait aux deux critères généraux énoncés dans *Oakes*. Premièrement, son objectif est suffisamment important pour l'emporter sur un droit garanti. Deuxièmement, cet objectif répond aux exigences de la proportionnalité formulées dans *Oakes*. Ces exigences ne sont pas comparables à celles applicables à l'article premier de la *Charte* ni ne les ont remplacées. Le «critère» approprié se trouve dans l'article premier même. Les tribunaux doivent déterminer si la limite est raisonnable et si elle peut se démontrer dans le cadre d'une «société libre et démocratique», et ils doivent établir un équilibre délicat entre les droits individuels et les besoins de la collectivité. Un tel équilibre ne peut être établi dans l'abstrait, à partir seulement d'un «critère» formaliste qui s'appliquerait de façon uniforme dans toutes les circonstances. L'examen fondé sur l'article premier est un examen inévitablement normatif qui exige des tribunaux qu'ils tiennent compte de la nature du droit violé ainsi que des valeurs et des principes spécifiques à partir desquels l'État tente de justifier la violation. Il existe un important «rapport synergique» entre les droits garantis par la *Charte* et le contexte de l'instance particulière. Les exigences formulées dans *Oakes* doivent donc être appliquées avec souplesse en tenant

avoided in order to overcome the risk of losing sight of this relation.

The evidentiary requirements under s. 1 vary substantially depending upon both the nature of the legislation and the nature of the right infringed. Here, both these contextual elements were highly relevant to a proper application of the s. 1 analysis. The application of a "rigorous" civil standard of proof below resulted in a failure to take into account the specific context in which the s. 1 balancing must take place.

The nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence. Despite the lack of definitive scientific explanations of the causes of tobacco addiction, clear evidence does exist of the detrimental social effects of tobacco consumption. Overwhelming evidence was introduced at trial that tobacco consumption is a principal cause of deadly cancers, heart disease and lung disease, and that tobacco is highly addictive. The most distressing aspect of the evidence is that tobacco consumption is most widespread among the most vulnerable, the young and the less educated, at whom much of the advertising is specifically directed.

The significant gap between an understanding of the health effects of tobacco consumption and of the root causes of tobacco consumption raises a fundamental institutional problem that must be taken into account in undertaking the s. 1 balancing. Strictly applying the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern whenever Parliament wished to address its effects. This would have the effect of virtually paralyzing the operation of government in the socio-economic sphere. To require Parliament to await definitive social science conclusions whenever it wishes to make social policy would impose an unjustifiable and unrealistic limit on legislative power.

compte du contexte factuel et social particulier de chaque cas. Il faut éviter d'utiliser une méthode rigide ou formaliste si l'on veut écarter le risque qu'il ne soit pas tenu compte de ce rapport.

Les exigences en matière de preuve sous le régime de l'article premier varient beaucoup en fonction de la nature de la loi et du caractère du droit atteint. En l'espèce, ces deux éléments contextuels sont fort pertinents pour une bonne application de l'analyse fondée sur l'article premier. L'application «rigoureuse» du fardeau de la preuve en matière civile par les instances inférieures a fait en sorte que l'on n'a pas tenu compte du contexte spécifique dans lequel doit se dérouler la pondération en vertu de l'article premier.

La nature et l'étendue des problèmes de santé reliés à l'usage du tabac sont tout à fait pertinents pour l'analyse fondée sur l'article premier, tant aux fins de la détermination du critère approprié de justification que dans l'appréciation de la preuve pertinente. Malgré l'absence d'explications scientifiques concluantes des causes de la dépendance au tabac, il existe des éléments de preuve clairs sur les effets sociaux préjudiciables de l'usage du tabac. On a présenté en première instance une preuve abondante établissant que l'usage du tabac est une cause principale de cancers, de maladies cardiaques et de maladies pulmonaires entraînant la mort, et que le tabac crée une forte dépendance. L'aspect le plus troublant de la preuve est que l'usage du tabac est plus répandu chez les personnes les plus vulnérables, soit les jeunes et les personnes moins instruites, vers qui une grande partie de la publicité est expressément dirigée.

L'écart important entre ce que nous comprenons des effets de l'usage du tabac sur la santé et des principales causes de cet usage soulève un problème institutionnel fondamental dont il faut tenir compte dans la pondération effectuée en application de l'article premier. Une application stricte de l'analyse de la proportionnalité dans les affaires de cette nature imposerait un fardeau impossible au Parlement puisqu'il serait alors tenu de produire des éléments de preuve socio-scientifiques concluants relativement aux causes fondamentales d'un problème urgent d'intérêt social chaque fois qu'il désire s'attaquer à ses effets. Cela aurait pour effet de pratiquement paralyser le fonctionnement de l'appareil gouvernemental dans la sphère socio-économique. Si l'on exigeait du Parlement qu'il attende les données concluantes des études dans le domaine des sciences humaines chaque fois qu'il désire adopter une politique sociale, on restreindrait la compétence législative de façon injustifiable et irréaliste.

The Court has recognized that the *Oakes* standard of justification should be attenuated when institutional constraints analogous to those in the present cases arise. Although courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny — that is not so in the sphere of policy-making. Policy-making is a role properly assigned to elected parliamentarians who have the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to ordinary criminal justice legislation, the courts recognize these important institutional differences. The Act in issue is the type of legislation generally accorded a high degree of deference and the considerations addressed in *Irwin Toy* and *McKinney* are applicable.

Expression, depending on its nature, is entitled to varying levels of constitutional protection and requires a contextual, as opposed to an abstract, approach. Although freedom of expression is a fundamental value, other fundamental values are also deserving of protection and consideration by the courts. When these values come into conflict, the courts must make choices based not upon abstract analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. Freedom of expression claims must be weighed in light of their relative connection to a set of even more fundamental or core values which include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. State action placing such values in jeopardy is subject to a searching degree of scrutiny. Where the expression in question is farther from the "core" of freedom of expression values, a lower standard of justification may be applied.

The harm engendered by tobacco and the profit motive underlying its promotion place this form of expression as far from the "core" of freedom of expression values as prostitution, hate-mongering and pornography. Its sole purpose is to promote the use of a product that is harmful and often fatal to the consumer by sophisticated advertising campaigns often specifically

La Cour a reconnu qu'il y aurait lieu d'assouplir le critère de justification formulé dans *Oakes* en présence de contraintes institutionnelles semblables à celles qui existent en l'espèce. Bien que les tribunaux soient des spécialistes de la protection de la liberté et de l'interprétation des lois et que, par conséquent, ils soient bien placés pour faire un examen approfondi des lois en matière de justice criminelle, ce n'est pas le cas dans le domaine de l'élaboration des politiques. Ce dernier rôle incombe aux parlementaires élus, qui disposent des ressources institutionnelles nécessaires pour recueillir et examiner la documentation en matière de sciences humaines, arbitrer entre des intérêts sociaux opposés et assurer la protection des groupes vulnérables. Lorsqu'ils font preuve d'une plus grande retenue à l'égard des lois à caractère social qu'à l'égard des lois ordinaires en matière de justice criminelle, les tribunaux reconnaissent ces différences institutionnelles importantes. La Loi est le type de loi envers laquelle on fait généralement preuve d'une grande retenue, et les considérations examinées dans les arrêts *Irwin Toy* et *McKinney* sont applicables.

L'expression, selon sa nature, pourra bénéficier de divers degrés de protection constitutionnelle et l'on doit recourir à une méthode contextuelle, et non abstraite. Bien que la liberté d'expression soit une valeur fondamentale, il en existe d'autres qui méritent aussi d'être protégées et examinées par les tribunaux. En cas de conflit entre ces valeurs, les tribunaux sont appelés à faire des choix fondés non pas sur une analyse abstraite, mais sur une appréciation concrète de l'importance relative de chacune des valeurs pertinentes dans notre collectivité dans le contexte en question. Les demandes touchant la liberté d'expression doivent être examinées en fonction du lien relatif qu'elles ont avec des valeurs encore plus fondamentales, dont la découverte de la vérité dans les affaires politiques et dans les entreprises scientifiques et artistiques, la protection de l'autonomie et de l'enrichissement personnels et la promotion de la participation du public au processus démocratique. Lorsque les mesures gouvernementales menacent ces valeurs, elles doivent être examinées rigoureusement. Lorsque l'expression en cause s'écarte beaucoup de l'«essence» des valeurs de la liberté d'expression, le critère de justification appliqué peut être moins rigide.

Les maux engendrés par le tabac et la volonté de faire des profits qui en sous-tend la promotion placent cette forme d'expression aussi loin du «cœur» des valeurs de la liberté d'expression que la prostitution, la fomentation de la haine ou la pornographie. Son seul but est de promouvoir, par des campagnes de publicité subtiles visant souvent expressément les jeunes et les plus vulnérables,

aimed at the young and most vulnerable. This form of expression must then be accorded a very low degree of protection under s. 1 and an attenuated level of justification is appropriate. The Attorney General need only demonstrate that Parliament had a rational basis for introducing the measures contained in this Act.

The reliance on the trial judge's finding need not be adopted. An appellate court generally may only interfere with the factual findings of a trial judge where the trial judge made a manifest error and where that error influenced the trial judge's final conclusion or overall appreciation of the evidence. The trial judge's factual findings in these cases, however, were not of the type that fall within the general rule of appellate "non-interference". The privileged position of the trial judge to appreciate and weigh adjudicative facts does not extend to the assessment of "social" or "legislative" facts that arise in the law-making process. The trial judge's factual findings concerning the connection between tobacco advertising and consumption were therefore entitled to minimal deference.

The legislative means chosen under the Act must be rationally connected to the objective of protecting public health by reducing tobacco consumption, not according to a civil standard of proof, but only to the extent that there was a reasonable basis for believing such connection. A rational connection obviously exists between a prohibition on the distribution of free samples of tobacco products under s. 7 and the protection of public health. One also exists between the prohibition on advertising and promotion of tobacco products under ss. 4, 5, 6, and 8 and the objective of reducing tobacco consumption. Notwithstanding the want of a definitive study connecting tobacco advertising and tobacco consumption, sufficient evidence was adduced at trial to conclude that the objective of reducing tobacco consumption is logically furthered by the prohibition on tobacco advertising and promotion under the Act. The large advertising budgets of the tobacco companies of themselves suggest that advertising not only helps to maintain brand loyalty but also to increase consumption and to induce smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend to both potential smokers and current smokers who would prefer to quit but cannot. Three categories of evidence capable of substantiating this rational connection were disregarded at trial: internal tobacco marketing documents, expert reports, and international materials. The internal marketing documents

l'usage d'un produit qui est nocif, voire souvent fatal, pour le consommateur. Cette forme d'expression n'a alors droit qu'à une faible protection en vertu de l'article premier et l'on doit faire preuve de souplesse dans la justification au regard de l'article premier. Le procureur général n'a qu'à établir que le Parlement avait un motif rationnel de déposer les mesures contenues dans la Loi.

Il n'y a pas lieu d'adopter les conclusions du juge de première instance. En règle générale, une cour d'appel ne peut modifier les conclusions de fait d'un juge de première instance, sauf si celui-ci a commis une erreur manifeste qui a influencé sa conclusion définitive ou encore son appréciation globale de la preuve. Toutefois, en l'espèce, les conclusions de fait du juge de première instance n'étaient pas du type de celles qui seraient visées par la règle générale de «non-intervention» en appel. La situation privilégiée du juge de première instance lorsqu'il apprécie et pondère les faits en litige ne s'étend pas à l'évaluation des faits «sociaux» ou «législatifs» qui se rattachent au processus législatif. Les conclusions de fait du juge de première instance relativement au lien entre la publicité en faveur des produits du tabac et l'usage du tabac devaient donc faire l'objet d'une retenue minimale.

Les moyens législatifs choisis doivent avoir un lien rationnel avec l'objectif de protéger la santé publique par la réduction de l'usage du tabac, qui n'a pas à être établi selon les règles de preuve en matière civile, mais seulement dans la mesure où il y a des motifs raisonnables de croire à l'existence d'un tel lien. Il existe manifestement un lien rationnel entre l'interdiction, en vertu de l'art. 7, de distribuer des échantillons gratuits de produits du tabac et la protection de la santé publique. Il en existe un également entre l'interdiction de publicité et de promotion en faveur des produits du tabac, en vertu des art. 4, 5, 6 et 8, et l'objectif de réduire la consommation du tabac. Malgré l'absence d'une étude concluante sur le lien entre la publicité des produits du tabac et leur usage, une preuve suffisante a été présentée au procès pour conclure que la Loi sert logiquement l'objectif de réduire l'usage des produits du tabac par la prohibition de la publicité et de la promotion. Les budgets de publicité considérables des compagnies de tabac démontrent en soi que la publicité aide non seulement à préserver la fidélité aux marques, mais aussi à accroître la consommation et à inciter les fumeurs à ne pas cesser de fumer. La préoccupation du gouvernement quant aux effets des produits du tabac sur la santé peut très raisonnablement s'étendre non seulement aux fumeurs potentiels, mais aussi aux fumeurs actuels qui voudraient cesser de fumer, mais qui ne le peuvent pas. Trois catégories d'éléments de preuve qui

introduced at trial strongly suggest that the tobacco companies perceive advertising to be a cornerstone of their strategy to reassure current smokers and expand the market by attracting new smokers, primarily among the young. The expert reports introduced at trial attest, at the very least, to the existence of a "body of opinion" supporting the existence of a causal connection between advertising and consumption. It is also significant that by 1990, over 40 countries had adopted measures to restrict or prohibit tobacco advertising.

For the reasons discussed throughout the s. 1 analysis, the legislative means chosen impair the right in question as little as possible, notwithstanding the fact that it imposes a complete prohibition on tobacco advertising and promotion rather than a partial one. The relevance of context is important in s. 1 balancing, particularly at the minimal impairment stage, because it does not require that the least intrusive measures be used but only that the measures employed were the least intrusive in light of both the legislative objective and the infringed right. The measures taken here to control tobacco products, given the legislative context and the fact that this profit-generated type of expression is far from the "core" of the freedom of expression, satisfied the *Oakes* minimal impairment requirement. While a complete prohibition on a type of expression is more difficult to justify than a partial prohibition, ample evidence was adduced at trial to demonstrate the government's decision that a full prohibition on advertising was justified and necessary. The measures were the product of an intensive 20-year period of experimenting with less intrusive measures with the cooperation of the provinces and expensive consultation with an array of national and international health groups. Over the course of this period the government adopted a variety of less intrusive measures before determining a full prohibition on advertising was necessary. Parallel developments in the international community have taken place. There has been overwhelming legislative and judicial acceptance of this type of prohibition by other democratic countries. Where governments have instituted partial prohibitions, tobacco companies have devised ingenious tactics to

auraient pu étayer l'existence de ce lien rationnel ont été écartées en première instance, savoir: les documents internes de commercialisation des produits du tabac, les rapports d'experts et les documents internationaux. Les documents de commercialisation internes déposés lors du procès donnent fortement à entendre que les compagnies de tabac perçoivent la publicité comme la pierre angulaire de leur stratégie visant à rassurer les fumeurs actuels et à étendre le marché en attirant de nouveaux fumeurs, principalement chez les jeunes. Les rapports d'experts attestent, à tout le moins, la présence d'un «corps d'opinions» appuyant l'existence d'un lien causal entre publicité et consommation. Il est également intéressant de constater qu'en 1990, plus de 40 pays avaient adopté des mesures visant à restreindre ou à interdire la publicité en faveur du tabac.

Pour les motifs exprimés tout au long de l'analyse fondée sur l'article premier, les moyens choisis par le législateur portent le moins possible atteinte au droit en question, malgré le fait qu'ils imposent une interdiction complète de la publicité et de la promotion des produits du tabac plutôt qu'une interdiction partielle. La pertinence du contexte dans une pondération en vertu de l'article premier est importante, particulièrement à l'étape du critère de l'atteinte minimale, car cette exigence n'oblige pas à prendre les mesures les moins attentatoires, mais seulement à ce que les mesures utilisées soient les moins attentatoires compte tenu tant de l'objectif législatif que du droit violé. Étant donné le contexte législatif et le fait que ce genre d'expression axé sur la réalisation de profits soit loin du «cœur» de la liberté d'expression, les mesures prises pour réglementer les produits du tabac satisfont à l'exigence de l'atteinte minimale énoncée dans *Oakes*. Bien qu'une interdiction totale d'un type d'expression soit plus difficile à justifier qu'une interdiction partielle, une preuve volumineuse a été déposée en première instance établissant que la décision du gouvernement d'établir une interdiction complète de la publicité était justifiable et nécessaire. Les mesures sont le résultat d'une période intensive de recherche sur des mesures moins attentatoires, qui s'est poursuivie pendant 20 ans, et a demandé la collaboration des provinces et de longues consultations auprès d'une multitude de groupes du domaine de la santé sur les plans tant national qu'international. Au cours de cette période, le gouvernement a adopté toute une gamme de mesures moins attentatoires avant de déterminer qu'il était nécessaire d'interdire complètement la publicité. Des développements parallèles sont survenus dans la communauté internationale. D'autres pays démocratiques ont donné une acceptation générale à ce type d'interdiction sur les plans tant législatifs que

circumvent them. International health organizations support this kind of prohibition.

A proportionality must exist between the deleterious and the salutary effects of the measures. The legislative objective of reducing the number of direct inducements for Canadians to consume these products outweighs the limitation on tobacco companies to advertise inherently dangerous products for profit.

While a legitimate concern was raised with respect to the effect of governmental claims to confidentiality in constitutional cases, the action of the government in these cases was not fatal. The evidence was overwhelming that the prohibition was a reasonable one.

Compelling the tobacco companies to place unattributed health messages on tobacco packages does not infringe their freedom of expression. These messages cannot be taken as being an opinion endorsed by the tobacco companies. They are rather a requirement imposed by government as a condition of participating in a legislated activity. Even if they may infringe a form of expression protected by s. 2(*b*), they were fully justifiable under s. 1. The warnings do nothing more than bring the dangerous nature of these products to the attention of the consumer. They have no political, social or religious content. Any concern arising from the tobacco companies' being prevented from printing on their packaging the opinion that tobacco products are not harmful, even if it is a technical infringement of their rights, was easily outweighed by the pressing health concerns raised by tobacco consumption, especially to children. The *Charter* does not require the elimination of "minuscule" constitutional burdens, and legislative action that increases the costs of exercising a right should not be invalidated if the burden is "trivial". Here, the only cost associated with the unattributed health warning requirement was a potential reduction in profits; manufacturers of dangerous products can reasonably be expected to bear this cost.

Disposition

Per Lamer C.J. and Sopinka, McLachlin, Iacobucci and Major JJ.: Sections 4, 8 and 9, and ss. 5 and 6

judiciaires. Dans les pays où les gouvernements ont imposé des interdictions partielles, les compagnies de tabac ont trouvé d'ingénieuses tactiques pour les contourner. Les organismes internationaux de la santé appuient ce genre d'interdiction.

Il doit y avoir proportionnalité entre les effets préjudiciables et les effets bénéfiques des mesures. L'objet législatif de réduire le nombre d'incitations directes faites aux Canadiens de consommer ces produits l'emporte sur la restriction imposée aux compagnies de tabac de faire de la publicité, à des fins de profit, en faveur de produits intrinsèquement dangereux.

Bien qu'une préoccupation légitime ait été soulevée relativement à l'effet des demandes gouvernementales en matière de confidentialité dans les affaires constitutionnelles, l'activité gouvernementale en l'espèce n'était pas fatale. Il y a une preuve abondante que l'interdiction était raisonnable.

Forcer les compagnies de tabac à placer sur les emballages de produits du tabac des mises en garde non attribuées ne constitue pas une violation de leur liberté d'expression. Ces messages ne peuvent être considérés comme une opinion à laquelle souscrivent les compagnies de tabac. Il s'agit plutôt d'une exigence imposée par le gouvernement comme condition de la participation à une activité réglementée. Même s'ils peuvent porter atteinte à une forme d'expression protégée par l'al. 2*b*), ils étaient tout à fait justifiables au regard de l'article premier. Les mises en garde ne font rien de plus que d'attirer l'attention des consommateurs sur la nature dangereuse de ces produits. Elles n'ont aucun contenu politique, social ou religieux. Toute inquiétude engendrée par l'interdiction imposée aux compagnies de tabac d'imprimer sur leurs emballages leur opinion selon laquelle les produits du tabac ne sont pas dangereux, même s'il s'agit d'une violation de pure forme de leurs droits, ne fait pas le poids devant les préoccupations pour la santé, surtout des enfants, que fait surgir la consommation du tabac. La *Charte* n'exige pas l'élimination des «infimes» inconvénients affectant des droits constitutionnels, et une loi qui accroît le coût de l'exercice d'un droit ne doit pas être invalidée si l'inconvénient est «négligeable». En l'espèce, le seul coût lié à l'exigence d'une mise en garde non attribuée est une possible réduction des bénéfices; on peut raisonnablement s'attendre à ce que ce coût soit supporté par les fabricants de produits dangereux.

Dispositif

Le juge en chef Lamer et les juges Sopinka, McLachlin, Iacobucci et Major: Les articles 4, 8 et 9, et

which are not severable from them, are of no force or effect under s. 52 of the Constitution Act, 1982. Iacobucci J., while declaring the impugned legislation inoperable, would have made a suspensive declaration of invalidity of one year and Cory J., had he found the impugned legislation inoperable, would have agreed with Iacobucci J. in this respect.

Per Lamer C.J. and Sopinka, McLachlin and Major JJ.: Sections 4, 8 and 9 of the *Tobacco Products Control Act* constitute unjustified infringements on free expression and cannot be severed cleanly from other provisions dealing with promotion and trade mark usage, ss. 5 or 6. Sections 4, 5, 6, 8, and 9 are inconsistent with the *Charter* and hence are of no force or effect by reason of s. 52 of the *Constitution Act, 1982*.

Per Iacobucci J.: A suspensive declaration of invalidity of one year should be made. Immediately striking down the legislation would permit the tobacco companies the untrammelled ability to advertise until minimally impairing legislation is drafted; the suspensive veto would permit the government to design such legislation while the *status quo* remains in force.

Per Cory J.: If the impugned legislation were inoperable, agreement was expressed for the reasons of Iacobucci J. that a suspensive declaration of invalidity of one year be made.

Cases Cited

By McLachlin J.

Referred to: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Snell v. Farrell*, [1990] 2 S.C.R. 311; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Butler*, [1992] 1 S.C.R. 452; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

les art. 5 et 6 qui ne peuvent en être dissociés, sont inopérants en vertu de l'art. 52 de la Loi constitutionnelle de 1982. Bien qu'il déclare les dispositions contestées inopérantes, le juge Iacobucci, aurait rendu un jugement déclaratoire suspendant l'invalidité pour un an, et le juge Cory, s'il avait conclu que les dispositions contestées étaient inopérantes, aurait été d'accord avec le juge Iacobucci sur ce point.

Le juge en chef Lamer et les juges Sopinka, McLachlin et Major: Les articles 4, 8 et 9 de la *Loi réglementant les produits du tabac* constituent des atteintes injustifiées à la liberté d'expression et ne peuvent être nettement dissociés des autres dispositions qui traitent de promotion et d'usage des marques, les art. 5 ou 6. Les articles 4, 5, 6, 8 et 9 sont incompatibles avec la *Charte* et sont, de ce fait, inopérants en application de l'art. 52 de la *Loi constitutionnelle de 1982*.

Le juge Iacobucci: Il y aurait lieu d'ordonner une suspension de l'effet de la déclaration d'invalidité pour une période d'un an. L'annulation immédiate de la loi aurait pour effet de permettre aux compagnies de tabac de mener librement des campagnes publicitaires jusqu'à l'établissement d'une loi satisfaisant au critère de l'atteinte minimale; le veto suspensif permettrait au gouvernement de procéder à l'élaboration d'une telle loi et au statu quo de demeurer en vigueur.

Le juge Cory: Si les dispositions contestées étaient inopérantes, les motifs du juge Iacobucci concernant une suspension de l'effet de l'invalidité pour une période d'un an sont acceptés.

Jurisprudence

Citée par le juge McLachlin

Arrêts mentionnés: *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Stoffman c. Vancouver General Hospital*, [1990] 3 R.C.S. 483; *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139; *Snell c. Farrell*, [1990] 2 R.C.S. 311; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *R. c. Butler*, [1992] 1 R.C.S. 452; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *R. c. Chaulk*, [1990] 3 R.C.S. 1303; *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084.

By Iacobucci J.

Referred to: *Egan v. Canada*, [1995] 2 S.C.R. 513; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

By Major J.

Referred to: *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *R. v. Hauser*, [1979] 1 S.C.R. 984; *Boggs v. The Queen*, [1981] 1 S.C.R. 49; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Furtney*, [1991] 3 S.C.R. 89.

By La Forest J. (dissenting)

R. v. Crown Zellerbach Canada Ltd., [1988]1 S.C.R. 401; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348; *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Scowby v. Glendinning*, [1986] 2 S.C.R. 226; *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524; *Goodyear Tire and Rubber Co. v. The Queen*, [1956] S.C.R. 303; *R. v. Zelensky*, [1978] 2 S.C.R. 940; *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Switzman v. Elbling*, [1957] S.C.R. 285; *R. v. Wetmore*, [1983] 2 S.C.R. 284; *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501, supplemented by addendum at [1934] 1 D.L.R. 706; *R. v. Swain*, [1991] 1 S.C.R. 933; *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914; *R. v. Cosman's Furniture*

Citée par le juge Iacobucci

Arrêts mentionnés: *Egan c. Canada*, [1995] 2 R.C.S. 513; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927.

Citée par le juge Major

Arrêts mentionnés: *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 914; *Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1; *R. c. Hauser*, [1979] 1 R.C.S. 984; *Boggs c. La Reine*, [1981] 1 R.C.S. 49; *Reference re Alberta Statutes*, [1938] R.C.S. 100; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. c. Furtney*, [1991] 3 R.C.S. 89.

Citée par le juge La Forest (dissident)

R. c. Crown Zellerbach Canada Ltd., [1988]1 R.C.S. 401; *Attorney-General for Ontario c. Attorney-General for the Dominion*, [1896] A.C. 348; *Attorney-General for Ontario c. Canada Temperance Federation*, [1946] A.C. 193; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Scowby c. Glendinning*, [1986] 2 R.C.S. 226; *Attorney-General for Ontario c. Hamilton Street Railway Co.*, [1903] A.C. 524; *Goodyear Tire and Rubber Co. c. The Queen*, [1956] R.C.S. 303; *R. c. Zelensky*, [1978] 2 R.C.S. 940; *Proprietary Articles Trade Association c. Attorney-General for Canada*, [1931] A.C. 310; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297; *Schneider c. La Reine*, [1982] 2 R.C.S. 112; *Switzman c. Elbling*, [1957] R.C.S. 285; *R. c. Wetmore*, [1983] 2 R.C.S. 284; *Standard Sausage Co. c. Lee*, [1933] 4 D.L.R. 501, complété par des motifs additionnels publiés à [1934] 1 D.L.R. 706; *R. c. Swain*, [1991] 1 R.C.S. 933; *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1

(1972) Ltd. (1976), 32 C.C.C. (2d) 345; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368; *Campbell v. The Queen*, [1965] S.C.R. vii; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Furtney*, [1991] 3 S.C.R. 89; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469; *R. v. Jones*, [1986] 2 S.C.R. 284; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *R. v. Butler*, [1992] 1 S.C.R. 452; *Dorval v. Bouvier*, [1968] S.C.R. 288; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351; *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), cert. denied, 467 U.S. 1259 (1984); *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1992] 2 F.C. 130; *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641; *R. v. Schwartz*, [1988] 2 S.C.R. 443; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425.

R.C.S. 914; *R. c. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Attorney-General for British Columbia c. Attorney-General for Canada*, [1937] A.C. 368; *Campbell c. The Queen*, [1965] R.C.S. vii; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. c. Furtney*, [1991] 3 R.C.S. 89; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *R. c. Edwards Books and Art Ltd.*, [1986] 2 R.C.S. 713; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469; *R. c. Jones*, [1986] 2 R.C.S. 284; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *Black c. Law Society of Alberta*, [1989] 1 R.C.S. 591; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229; *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103; *R. c. Butler*, [1992] 1 R.C.S. 452; *Dorval c. Bouvier*, [1968] R.C.S. 288; *Lapointe c. Hôpital Le Gardeur*, [1992] 1 R.C.S. 351; *Dunagin c. City of Oxford, Mississippi*, 718 F.2d 738 (5th Cir. 1983) (*en banc*), cert. refusé, 467 U.S. 1259 (1984); *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211; *Central Hudson Gas & Electric Corp. c. Public Service Commission of New York*, 447 U.S. 557 (1980); *Oklahoma Telecasters Ass'n c. Crisp*, 699 F.2d 490 (1983), inf. pour d'autres motifs *sub nom. Capital Cities Cable, Inc. c. Crisp*, 467 U.S. 691 (1984); *Metromedia, Inc. c. City of San Diego*, 453 U.S. 490 (1981); *Posadas de Puerto Rico Associates c. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *Canadian Assn. of Regulated Importers c. Canada (Procureur général)*, [1992] 2 C.F. 130; *Canada (Procureur général) c. Central Cartage Co.*, [1990] 2 C.F. 641; *R. c. Schwartz*, [1988] 2 R.C.S. 443; *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139; *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425.

Statutes and Regulations Cited

Act Respecting the Protection of Non-Smokers in Certain Public Places, R.S.Q., c. P-38.01.
Act to amend the Excise Act, the Customs Act and the Tobacco Sales to Young Persons Act, S.C. 1994, c. 37.
Act to Protect the Health of Non-smokers, S.M. 1990, c. S125.
Canada Evidence Act, R.S.C. 1985, c. C-5, s. 39.
Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).
Constitution Act, 1867, Preamble, ss. 91(27), 92(13), (16).
Hazardous Products Act, R.S.C., 1985, c. H-3, ss. 2 [rep. & sub., c. 24 (3rd. Supp.), s. 1], 4 [*idem*], 5 [*idem*], 15 [*idem*].
Medical Services Act, R.S.N.S. 1989, c. 281.
Minors Tobacco Act, R.S.S. 1965, c. 381.
Non-smokers' Health Act, S.C. 1988, c. 21.
Tobacco Access Act, S.N.S. 1993, c. 14.
Tobacco Control Act, S.N. 1993, c. T-4.1.
Tobacco Control Act, 1994, S.O. 1994, c. 10.
Tobacco Product Act, R.S.B.C. 1979, c. 403 [am. S.B.C. 1992, c. 81].
Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 19.
Tobacco Products Control Regulations, amendment, SOR/93-389, s. 11.
Tobacco Sales Act, S.N.B. 1993, c. T-6.1.
Tobacco Sales to Minors Act, S.P.E.I. 1991, c. 44.
Tobacco Sales to Young Persons Act, S.C. 1993, c. 5.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*).
Loi constitutionnelle de 1867, préambule, art. 91(27), 92(13), (16).
Loi de 1994 sur la réglementation de l'usage du tabac, L.O. 1994, ch. 10.
Loi modifiant la Loi sur l'accise, la Loi sur les douanes et la Loi sur la vente du tabac aux jeunes, L.C. 1994, ch. 37.
Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 19.
Loi sur la preuve au Canada, L.R.C. (1985), ch. C-5, art. 39.
Loi sur la protection de la santé des non-fumeurs, L.M. 1990, ch. S125.
Loi sur la protection des non-fumeurs dans certains lieux publics, L.R.Q., ch. P-38.01.
Loi sur la santé des non-fumeurs, L.C. 1988, ch. 21.
Loi sur la vente du tabac aux jeunes, L.C. 1993, ch. 5.
Loi sur les produits dangereux, L.R.C. (1985), ch. H-3, art. 2 [abr. & rempl., ch. 24 (3e suppl.), art. 1], 4 [*idem*], 5 [*idem*], 15 [*idem*].
Loi sur les ventes de tabac, L.N.-B. 1993, ch. T-6.1.
Medical Services Act, R.S.N.S. 1989, ch. 281.
Minors Tobacco Act, R.S.S. 1965, ch. 381.
Règlement sur les produits du tabac — Modification, DORS/93-389, art. 11.
Tobacco Access Act, S.N.S. 1993, ch. 14.
Tobacco Control Act, S.N. 1993, ch. T-4.1.
Tobacco Product Act, R.S.B.C. 1979, ch. 403 [mod. S.B.C. 1992, ch. 81].
Tobacco Sales to Minors Act, S.P.E.I. 1991, ch. 44.

Authors Cited

Canada. Health and Welfare Canada. *Canadian Initiatives in Smoking and Health*. Ottawa: 1983.
Canada. Health and Welfare Canada. Health Protection Branch. Bureau of Chronic Disease Epidemiology. Surveillance & Risk Assessment Division. Report by Donald T. Wigle. *Illness and Death in Canada by Smoking: An Epidemiological Perspective*. Ottawa: 1989.
Canada. Health and Welfare Canada. National Program to Reduce Tobacco Use. "Directional paper of the national program to reduce tobacco use in Canada".

Doctrine citée

Assemblée mondiale de la santé. Résolution de l'Assemblée Mondiale de la Santé WHA39.14. Mai 1986. WHA39/1986/REC/1, 14.
Assemblée mondiale de la santé. Résolution de l'Assemblée Mondiale de la Santé WHA43.16. Mai 1990. WHA43/1990, 16.
Canada. Chambre des communes. Comité permanent de la santé, du bien-être social et des affaires sociales. *Rapport du Comité permanent de la santé, du bien-être social et des affaires sociales sur l'usage du tabac et de la cigarette*. Présenté par M. Gaston Isa-

Appendix in *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective.* Ottawa: 1987.

Canada. Health and Welfare Canada. National Program to Reduce Tobacco Use. *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective.* Ottawa: 1987.

Canada. Health and Welfare Canada. Tobacco Products Unit. Report by Roberta G. Ferrence. *Trends in Tobacco Consumption in Canada, 1900-1987.* Ottawa: 1989.

Canada. *House of Commons Debates*, vol. IX, 2nd Sess., 33rd Parl., November 23rd, 1987, p. 11042.

Canada. House of Commons. Standing Committee on Health, Welfare and Social Affairs. *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking*. Presented by M. Gaston Isabelle, Chairman, Session 1969-70. Ottawa: Queen's Printer, 1969.

Chapman, Simon and Bill Fitzgerald. "Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications for Health Promotion" (1982), 72 *Am. J. Pub. Health* 491.

Collinshaw, Neil E., Walter Tostowaryk and Donald T. Wigle. "Mortality Attributable to Tobacco Use in Canada" (1988), 79 *Can. J. Pub. Health* 166.

European Commission. *Official Journal of the European Communities*. Preparatory Acts. Amended proposal for a Council Directive on the authorized advertising of tobacco products in the press and by means of bills and posters. (90/C 116/05).

European Commission. *Official Journal of the European Communities*. Preparatory Acts. Amended proposal for a Council Directive on advertising of tobacco products. (91/C 167/03).

European Commission. *Official Journal of the European Communities*. Preparatory Acts. Amended proposal for a Council Directive on the approximation of Member States' laws, regulations and administrative provisions on advertising for tobacco products. (92/C 129/04).

European Council. *Official Journal of the European Communities*. Council Directive of 3 October 1989. (89/552/EEC).

European Council. *Official Journal of the European Communities*. Council Directive of 13 November 1989. (89/622/EEC). Amended by Council Directive of 15 May 1992. (92/41/EEC).

Gorn, Gerald J. and Renée Florsheim. "The Effects of Commercials for Adult Products on Children" (1985), 11 *J. Consumer Res.* 962.

Hagan, John. "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence

belle, président, Session 1969-70. Ottawa: Imprimeur de la Reine, 1969.

Canada. *Débats de la Chambre des communes*, vol. IX, 2e sess., 33e Lég., le 23 novembre 1987, p. 11042.

Canada. Santé et Bien-être social Canada. Document d'orientation du programme national de lutte contre le tabagisme au Canada. Programme national de lutte contre le tabagisme. Annexe du *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective.* Ottawa: 1987.

Canada. Santé et Bien-être social Canada. Direction générale de la protection de la santé. Bureau de l'épidémiologie des maladies chroniques. Division de la surveillance et de l'évaluation des risques. Rapport par Donald T. Wigle. *Illness and Death in Canada by Smoking: An Epidemiological Perspective.* Ottawa: 1989.

Canada. Santé et Bien-être social Canada. *Initiatives canadiennes en matière de santé et de lutte contre l'usage du tabac.* Ottawa: 1983.

Canada. Santé et Bien-être social Canada. National Program to Reduce Tobacco. *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective.* Ottawa: 1987.

Canada. Santé et Bien-être social Canada. Tobacco Products Unit. Rapport par Roberta G. Ferrence. *Trends in Tobacco Consumption in Canada 1900-1987.* Ottawa: 1989.

Chapman, Simon and Bill Fitzgerald. «Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications for Health Promotion» (1982), 72 *Am. J. Pub. Health* 491.

Collinshaw, Neil E., Walter Tostowaryk and Donald T. Wigle. «Mortality Attributable to Tobacco Use in Canada» (1988), 79 *Can. J. Pub. Health* 166.

Commission européenne. *Journal officiel des Communautés européennes*. Actes préparatoires. Proposition modifiée de directive du Conseil en matière de publicité autorisée par voie de presse et d'affiches en faveur des produits du tabac. (90/C 116/05).

Commission européenne. *Journal officiel des Communautés européennes*. Actes préparatoires. Amended proposal for a Council Directive on advertising of tobacco products. (91/C 167/03).

Commission européenne. *Journal officiel des Communautés européennes*. Actes préparatoires. Amended proposal for a Council Directive on the approximation of Member States' laws, regulations and administrative provision on advertising for tobacco products. (92/C 129/04).

Conseil européen. *Journal officiel des Communautés européennes*. Directive du Conseil le 3 octobre 1989. (89/552/CEE).

in Constitutional Litigation". In Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987, 213.

Hogg, Peter. *Constitutional Law of Canada*, vol. 1, 3rd ed. (Supplemented). Scarborough, Ont.: Carswell, 1992 (loose-leaf).

Imasco Ltd. *Annual Report 1992*. Montreal: Imasco Ltd., 1992.

Imperial Tobacco Ltd. *Project Viking*, vol. I: *A Behavioural Model of Smoking*. Montreal: Imperial Tobacco Ltd., 1986.

Imperial Tobacco Ltd. *Project Viking*, vol. II: *An Attitudinal Model of Smoking*. Montreal: Imperial Tobacco Ltd., 1986.

Imperial Tobacco Ltd. *Project Viking*, vol. III: *Product Issues*. Montreal: Imperial Tobacco Ltd., 1986.

Joossens, Luc. "Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in some Western European Countries". In *Proceedings of the 5th World Conference on Smoking and Health*. Winnipeg: Canadian Council on Smoking and Health, 1983, 549.

Morgan, Brian G. "Proof of Facts in Charter Litigation". In Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987, 159.

New Zealand. Toxic Substances Board. *Health or Tobacco: An End to Tobacco Advertising and Promotion*. Wellington: Publications Division, Government Printing Office, 1989.

Rothschild, Michael L. *Advertising: From Fundamentals to Strategies*. Toronto: D. C. Heath, 1987.

United Nations. Economic and Social Council. Resolution 1993/79. "Multisectoral collaboration on tobacco or health". Geneva, September 7, 1993. *Official Records of the Economic and Social Council, 1993, Supplement No. 1*. (E/1993/93).

United States of America. Department of Health and Human Services. *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. DHHS Publication No. (CDC) 89-8411, Prepublication version, January 11, 1989.

United States of America. Department of Health and Human Services. *The Health Consequences of Smoking — Nicotine Addiction — A report of the Surgeon General*. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health. Washington, D.C.: U.S. Government Printing Office, 1988.

Woolhandler, Ann. "Rethinking the Judicial Reception of Legislative Facts" (1988), 41 *Vand. L. Rev.* 111.

Conseil européen. *Journal officiel des Communautés européennes*. Directive du Conseil le 13 Novembre 1989. (89/622/CEE). Modifiée par la directive du Conseil le 15 mai 1992 (92/41/CEE).

Gorn, Gerald J. and Renée Florsheim. «The Effects of Commercials for Adult Products on Children», (1985), 11 *J. Consumer Res.*, 962.

Hagan, John. «Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation». In Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987, 213.

Hogg, Peter. *Constitutional Law of Canada*, vol. 1, 3rd ed (Supplemented). Scarborough, Ont.: Carswell, 1992 (loose-leaf).

Imasco Ltd. *Rapport annuel 1992*. Montréal: Imasco, 1992.

Imperial Tobacco Ltd. *Project Viking*, vol. I. *A Behavioural Model of Smoking*. Montreal: Imperial Tobacco Ltd., 1986.

Imperial Tobacco Ltd. *Project Viking*, vol. II. *An Attitudinal Model of Smoking*. Montreal: Imperial Tobacco Ltd., 1986.

Imperial Tobacco Ltd. *Project Viking*, vol. III. *Product Issues*. Montreal: Imperial Tobacco Ltd., 1986.

Joossens. Luc. «Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in some Western European Countries». In *Proceedings of the 5th World Conference on Smoking and Health*. Winnipeg: Canadian Council on Smoking and Health, 1983, 549.

Morgan, Brian G. «Proof of Facts in Charter Litigation». In Robert J. Sharpe, ed., *Charter Litigation*. Toronto: Butterworths, 1987, 159.

Nations Unies. Conseil économique et social. Résolution 1993/79. «Multisectoral collaboration on tabacco or health». Geneva, September 7, 1993. *Official Records of the Economic and Social Council, 1993, Supplement No. 1*. (E/1993/93).

New Zealand. Toxic Substances Board. *Health or Tobacco: An End to Tobacco Advertising and Promotion*. Wellington: Publications Division, Government Printing Office, 1989.

Rothschild, Michael L. *Advertising: From Fundamentals to Strategies*. Toronto: D. C. Heath, 1987.

United States of America. Department of Health and Human Services. *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*. U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health. DHHS Pubication No. (CDC) 89-8411, Prepublication version, January 11, 1989.

World Health Assembly. World Health Assembly Resolution WHA39.14. May 1986. WHA39/1986/REC/1, 14.

World Health Assembly. World Health Assembly Resolution WHA43.16. May 1990. WHA43/1990, 16.

United States of America. Department of Health and Human Services. *The Health Consequences of Smoking — Nicotine Addiction — A report of the Surgeon General.* U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for Health Promotion and Education, Office on Smoking and Health. Washington, D.C.: U.S. Government Printing Office, 1988.

Woolhandler, Ann. «Rethinking the Judicial Reception of Legislative Facts» (1988), 41 *Vand. L. Rev.* 111.

APPEALS from a judgment of the Quebec Court of Appeal (1993), 102 D.L.R. (4th) 289, [1993] R.J.Q. 375, 53 Q.A.C. 79, 48 C.P.R. (3d) 417, allowing appeals from judgments of Chabot J. (1991), 82 D.L.R. (4th) 449, [1991] R.J.Q. 2260, 37 C.P.R. (3d) 193, granting motions for declaratory judgment. Appeals allowed, La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. dissenting. The first constitutional question dealing with the legislative competence of Parliament to enact the legislation under the criminal law power or for the peace, order and good government of Canada should be answered in the positive. With respect to the second constitutional question, ss. 4 (re advertising), 8 (re trade mark use) and 9 (re unattributed health warnings) of the Act are inconsistent with the right of freedom of expression as set out is 2(*b*) of the *Charter* and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would find that they constitute a reasonable limit. Given that ss. 5 (re retail displays) and 6 (re sponsorships) could not be cleanly severed from ss. 4, 8 and 9, all are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*.

POURVOIS contre un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, (1993), 102 D.L.R. (4th) 289, 53 Q.A.C. 79, 48 C.P.R. (3d) 417, qui a accueilli des appels contre des décisions du juge Chabot, [1991] R.J.Q. 2260, (1991), 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait accordé des requêtes en jugement déclaratoire. Pourvois accueillis, les juges La Forest, L'Heureux-Dubé, Gonthier et Cory sont dissidents. La première question constitutionnelle sur la compétence du Parlement de légiférer en matière de droit criminel ou pour la paix, l'ordre et le bon gouvernement du Canada reçoit une réponse positive. Pour ce qui est de la seconde question constitutionnelle, les art. 4 (la publicité), 8 (les marques) et 9 (les messages non attribués relatifs à la santé) de la Loi sont incompatibles avec le droit à la liberté d'expression garanti à l'al. 2*b*) de la *Charte* et n'apportent pas une limite raisonnable à l'exercice de ce droit, dont la justification puisse se démontrer au sens de l'article premier. Les juges La Forest, L'Heureux-Dubé, Gonthier et Cory sont d'avis qu'ils apportent une limite raisonnable. Vu que les art. 5 (commerce au détail) et 6 (parrainage) ne peuvent pas nettement être distingués des art. 4, 8 et 9, ils sont tous inopérants aux termes de l'art. 52 de la *Loi constitutionnelle de 1982*.

Colin K. Irving, *Georges R. Thibaudeau* and *Douglas Mitchell*, for the appellant RJR-MacDonald Inc.

Colin K. Irving, *Georges R. Thibaudeau* et *Douglas Mitchell*, pour l'appelante RJR-MacDonald Inc.

L. Yves Fortier, Q.C., *Simon V. Potter*, *Lyndon A. J. Barnes* and *Gregory Bordan*, for the appellant Imperial Tobacco Ltd.

L. Yves Fortier, c.r., *Simon V. Potter*, *Lyndon A. J. Barnes* et *Gregory Bordan*, pour l'appelante Imperial Tobacco Ltd.

Alain Gingras, for the mis-en-cause the Attorney General of Quebec.

Alain Gingras, pour le mis en cause le procureur général du Québec.

Claude Joyal, James Mabbutt, Q.C., Paul Évraire, Q.C., Yves Lebœuf and *Johanne Poirier*, for the respondent.

Tanya Lee, for the intervener the Attorney General for Ontario.

Robert W. Cosman, Karl Delwaide and *Richard B. Swan*, for the interveners the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, and the Canadian Lung Association.

The following are the reasons delivered by

1 LAMER C.J. — I have had the benefit of reading the reasons of my colleagues. I am in agreement with the reasons of my colleague, Justice Iacobucci, but agree with my colleague, Justice McLachlin, as to the disposition.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by

2 LA FOREST J. (dissenting) — The issues in these appeals are whether the *Tobacco Products Control Act*, S.C. 1988, c. 20 (the "Act"), falls within the legislative competence of the Parliament of Canada under s. 91 of the *Constitution Act, 1867*, either as criminal law or under the peace, order and good government clause, and if so whether it constitutes an infringement of freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* which is not justified under s. 1 of the *Charter*. In broad terms, the Act prohibits, subject to specified exceptions, all advertising and promotion of tobacco products, and prohibits the sale of a tobacco product unless the package containing it sets forth prescribed health warnings and a list of the toxic constituents of the product and of the smoke produced from its combustion.

3 These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The appellant RJR - MacDonald Inc. ("RJR") seeks a declaration that the Act is wholly *ultra vires* the Parliament of Canada and

Claude Joyal, James Mabbutt, c.r., Paul Évraire, c.r., Yves Lebœuf et *Johanne Poirier*, pour l'intimé.

Tanya Lee, pour l'intervenant le procureur général de l'Ontario.

Robert W. Cosman, Karl Delwaide et *Richard B. Swan*, pour les intervenants la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, l'Association médicale canadienne et l'Association pulmonaire du Canada.

Version française des motifs rendus par

LE JUGE EN CHEF LAMER — J'ai eu l'avantage de lire les motifs de mes collègues. Je suis d'accord avec les motifs de mon collègue, le juge Iacobucci, mais je souscris au dispositif de ma collègue, le juge McLachlin.

Version française des motifs des juges La Forest, L'Heureux-Dubé et Gonthier rendus par

LE JUGE LA FOREST (dissident) — Les présents pourvois visent à déterminer si la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20 (la «Loi»), relève de la compétence du Parlement du Canada, conférée par l'art. 91 de la *Loi constitutionnelle de 1867*, de légiférer en matière de droit criminel ou pour la paix, l'ordre et le bon gouvernement et, dans l'affirmative, si cette loi constitue une violation de la liberté d'expression garantie par l'al. 2*b*) de la *Charte canadienne des droits et libertés*, qui n'est pas justifiée en vertu de l'article premier de la *Charte*. En termes généraux, la Loi interdit, sous réserve de certaines exceptions, toute publicité et promotion en faveur des produits du tabac ainsi que la vente de ces produits, sauf si leur emballage porte les mises en garde réglementaires ainsi qu'une liste des substances toxiques que le produit contient et qui sont dégagées par sa combustion.

La présente instance a commencé par deux requêtes distinctes en jugement déclaratoire devant la Cour supérieure du Québec. L'appelante RJR-MacDonald Inc. («RJR») demande que la Loi soit déclarée complètement *ultra vires* du Parlement du

invalid as an unjustified infringement of freedom of expression guaranteed by s. 2(*b*) of the *Charter*. The appellant Imperial Tobacco Ltd. ("Imperial") seeks the same order, but only in respect of ss. 4, 5, 6 and 8 of the Act. The two motions were heard together before Chabot J. of the Quebec Superior Court who rejected the Attorney General of Canada's contention that the Act was valid either as criminal law or under the peace, order and good government clause, and declared the whole of the Act *ultra vires* the Parliament of Canada. He further held the Act was of no force or effect as an unjustified infringement of s. 2(*b*) of the *Charter*. The Quebec Court of Appeal reversed this judgment. While upholding the judge's conclusion regarding the criminal law power, it unanimously held that the Act was *intra vires* Parliament as falling within the peace, order and good government clause and, by majority, that the infringement of s. 2(*b*) of the *Charter* was justified by s. 1 of that instrument. The minority judge would have held ss. 4, 5, 6 and 8 invalid under s. 2(*b*) of the *Charter*.

Canada et non valide du fait qu'elle constitue une violation injustifiée de la liberté d'expression garantie par l'al. 2*b*) de la *Charte*. L'appelante Imperial Tobacco Ltd. («Imperial») demande la même ordonnance, mais seulement relativement aux art. 4, 5, 6 et 8 de la Loi. Les deux requêtes ont été entendues en même temps par le juge Chabot de la Cour supérieure du Québec, qui a rejeté la prétention du procureur général du Canada quant à la validité de la Loi, que ce soit sous le chef du droit criminel ou en vertu de la clause pour la paix, l'ordre et le bon gouvernement, et a déclaré toute la Loi *ultra vires* du Parlement du Canada. Il a par ailleurs affirmé que la Loi était inopérante du fait qu'elle constituait une violation injustifiée de l'al. 2*b*) de la *Charte*. La Cour d'appel du Québec a infirmé cette décision. Elle a confirmé la conclusion du juge de première instance quant à la compétence en matière de droit criminel, mais elle a conclu à l'unanimité que la Loi était *intra vires* du Parlement en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement et statué à la majorité que la violation de l'al. 2*b*) de la *Charte* pouvait se justifier en vertu de l'article premier. Le juge minoritaire aurait déclaré non valides les art. 4, 5, 6 et 8 au regard de l'al. 2*b*) de la *Charte*.

The appellants sought and were granted leave to appeal to this Court.

Les appelantes ont demandé et obtenu l'autorisation de se pourvoir devant notre Cour. 4

The Legislative Scheme

Le régime législatif

The Act, the long title of which is *An Act to prohibit the advertising and promotion and respecting the labelling and monitoring of tobacco products*, received Royal Assent on June 28, 1988 and came into force on January 1, 1989. The purpose of the Act is set out in s. 3, which reads:

La Loi, dont le titre intégral est *Loi interdisant la publicité en faveur des produits du tabac, réglementant leur étiquetage et prévoyant certaines mesures de contrôle*, a reçu la sanction royale le 28 juin 1988 et est entrée en vigueur le 1er janvier 1989. Son objet est formulé à l'art. 3: 5

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,

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des

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.

Section 3 thus states that Parliament's purpose in enacting the legislation is to address the "national public health problem of substantial and pressing concern" arising from the use of tobacco, by protecting young persons and others from inducements to use tobacco products, and by enhancing public awareness concerning the hazards of tobacco use. However, it is of significance to these appeals that, with the exception of a prohibition on the distribution of free samples of tobacco products under s. 7, the Act does not purport to proscribe the sale, distribution or use of tobacco products. Rather, as its long title indicates, the Act seeks to attain its purpose through the institution of a prohibition on the advertising and promotion of tobacco products offered for sale in Canada and through the institution of a requirement that manufacturers of tobacco products display health warnings on tobacco product packages.

6 In furtherance of the purpose set out in s. 3, Parliament has created a legislative scheme that targets three distinct categories of commercial activity: advertising, promotion and labelling. Sections 4 and 5 of the Act, which fall under the title "ADVERTISING", deal with the advertisement and display of tobacco products. Section 4 prohibits the advertisement, by publication, broadcast or otherwise, of tobacco products offered for sale in Canada. An exception to this prohibition is created by s. 4(3) and (4), which stipulate that the prohibition does not extend to foreign advertising in foreign publications imported into Canada or foreign broadcasts retransmitted in Canada, as long as those advertisements are not intended primarily for the purpose of promoting the sale of a tobacco product in Canada. Section 5 is directed to the retail display of tobacco products in retail establishments and vending machines. Section 5(1) stipulates that a retailer may expose tobacco products for sale and may post signs that indicate, other than by their brand names or trade marks, the

incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Ainsi, l'art. 3 affirme que le législateur vise par cette loi à s'attaquer «à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale» et qui découle de la consommation du tabac, en préservant notamment les jeunes des incitations à la consommation du tabac et en sensibilisant davantage les Canadiennes et les Canadiens aux méfaits du tabac. Cependant, pour les fins des présents pourvois, il importe de signaler que la Loi, à l'exception de l'interdiction de distribuer des échantillons de produits du tabac prévue à l'art. 7, n'a pas pour but d'interdire la vente, la distribution ou la consommation des produits du tabac. Elle vise plutôt, comme son titre intégral l'indique, à atteindre son objectif en interdisant la publicité et la promotion en faveur des produits du tabac mis en vente au Canada et en exigeant que les fabricants de produits du tabac apposent des mises en garde sur leurs emballages.

Pour atteindre l'objectif visé à l'art. 3, le législateur a créé un régime législatif qui vise trois catégories distinctes d'activité commerciale: la publicité, la promotion et l'étiquetage. Les articles 4 et 5 de la Loi, sous la rubrique «PUBLICITÉ», portent sur la publicité et la présentation des produits du tabac. En vertu de l'art. 4, il est interdit de diffuser, notamment par la presse ou la radio-télévision, de la publicité en faveur d'un produit du tabac mis en vente au Canada. Les paragraphes 4(3) et (4) créent une exception à cette interdiction et prévoient que l'interdiction ne s'applique pas à la publicité dans des publications étrangères importées au Canada ou à la retransmission d'émissions de l'étranger dans la mesure où cette publicité n'est pas faite dans le but, principalement, de promouvoir la vente d'un produit du tabac au Canada. L'article 5 porte sur la présentation des produits du tabac dans l'établissement du détaillant et dans les distributeurs automatiques. Le paragraphe 5(1) prévoit qu'un détaillant peut exposer des produits du tabac pour la vente et signaler

tobacco products offered for sale on the premises. Section 5(2) permits the operation of tobacco vending machines, and the identification of products and prices on the exterior of the machines.

par des affiches les produits du tabac qui y sont vendus, sans toutefois mentionner leur nom ou leur marque. Le paragraphe 5(2) permet à une personne d'exploiter un distributeur automatique de produits du tabac, et de les nommer et d'en indiquer les prix sur celui-ci.

Sections 6 to 8 of the Act fall under the title "PROMOTION", and deal with various direct and indirect promotional activities involving tobacco products. Section 6(1) stipulates that the full name of a tobacco manufacturer may be used in a representation to the public that promotes a cultural or sporting event, but prohibits the use of brand names in such representations unless the use of a brand name is required by a contract made before January 25, 1988. Section 6(2) stipulates that, where a contract requiring the use of a brand name was in place before January 25, 1988, the value of contributions under that contract are frozen at 1987 levels. Section 7 prohibits the free distribution of tobacco products in any form. Section 8 prohibits the use of a tobacco trade mark on any article other than a tobacco product, and also prohibits the use and distribution of tobacco trade marks in advertising for products other than tobacco products; however, a special exemption from the s. 8 prohibition is created under s. 8(3) for the "Dunhill" trade mark.

Les articles 6 à 8 de la Loi figurent sous la rubrique «PROMOTION» et portent sur diverses activités promotionnelles directes et indirectes en faveur des produits du tabac. Le paragraphe 6(1) prévoit qu'il est possible d'utiliser le nom intégral du fabricant d'un produit du tabac dans toute mention au public qui vise à promouvoir une activité ou une manifestation culturelles ou sportives, mais interdit l'utilisation du nom du produit dans ces mentions, sauf si cette utilisation est exigée par un contrat conclu avant le 25 janvier 1988. Le paragraphe 6(2) prévoit que, dans le cas où un contrat conclu avant le 25 janvier 1988 exige l'utilisation du nom du produit, la valeur des concours financiers dans le cadre de ce contrat ne peut dépasser la valeur des concours apportés en 1987. L'article 7 interdit la distribution des produits du tabac à titre gratuit. L'article 8 interdit de faire usage des marques apposées sur les produits du tabac sur des articles autres que ces produits, de distribuer ces marques et d'en faire usage dans toute publicité en faveur d'autres articles que les produits du tabac; cependant, le par. 8(3) crée pour la marque «Dunhill» une exception à l'interdiction prévue à l'art. 8. 7

Section 9 falls under the title "LABELLING", and prohibits tobacco manufacturers from selling their products unless they display on the package containing the product unattributed messages describing the health effects of the product as well as a list of the product's toxic constituents and the quantities of those constituents present in it. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing the content, position, configuration, size and prominence of the health messages. Under the *Tobacco Products Control Regulations, amendment*, SOR/93-389, s. 11 (July 21, 1993), every tobacco package must display one of the following messages:

L'article 9, que l'on trouve sous la rubrique «ÉTIQUETAGE», interdit aux fabricants de vendre un produit du tabac qui ne comporte pas sur l'emballage les mises en garde non attribuées décrivant les effets du produit sur la santé ainsi que la liste et la quantité des substances toxiques que celui-ci contient. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements pour fixer la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence des messages relatifs à la santé. En vertu du *Règlement sur les produits du tabac — Modification*, DORS/93-389, art. 11 (21 juillet 1993), tout emballage contenant des produits du tabac doit porter l'un des messages suivants: 8

11. (1) . . .

(*a*) . . .

(i) "Cigarettes are addictive" . . .

(ii) "Tobacco smoke can harm your children" . . .

(iii) "Cigarettes cause fatal lung disease" . . .

(iv) "Cigarettes cause cancer" . . .

(v) "Cigarettes cause strokes and heart disease" . . .

(vi) "Smoking during pregnancy can harm your baby" . . .

(vii) "Smoking can kill you" . . .

(viii) "Tobacco smoke causes fatal lung disease in non-smokers" . . .

Section 17(*g*) also authorizes the Governor in Council to require leaflets providing health information to be placed inside packages of a tobacco product and to prescribe their content, form and manner of placement in those packages. Under s. 9(2), tobacco manufacturers are prohibited from displaying on their packages any writing other than the name, brand name, trade mark, and other information required by legislation.

9 One further provision of the Act is of relevance to these appeals. Section 17(*a*) gives the Governor in Council power to make regulations exempting a tobacco product from the application of ss. 4 and 7 where, in the opinion of the Governor in Council, that product is likely to be used as a substitute for other tobacco products and poses less risk to the health of users than those other products.

10 The enforcement provisions of the Act are found in ss. 11 to 16. These provisions confer upon the Minister the power to designate a "tobacco product inspector" with powers of inspection, search and seizure, analysis, detention of things seized, and forfeiture. The "offences and punishments" for contravention of the Act are set out in ss. 18 and 19. Section 18 stipulates that every person who contravenes ss. 4, 6(2), 7, 8, 9 or 10 is guilty of an offence punishable on summary conviction or an indictable offence. The penalties range in seriousness from a fine not exceeding two thousand dol-

11. (1) . . .

a) . . .

(i) «La cigarette crée une dépendance» . . .

(ii) «La fumée du tabac peut nuire à vos enfants» . . .

(iii) «La cigarette cause des maladies pulmonaires mortelles» . . .

(iv) «La cigarette cause le cancer» . . .

(v) «La cigarette cause des maladies du cœur» . . .

(vi) «Fumer durant la grossesse peut nuire à votre bébé» . . .

(vii) «Fumer peut vous tuer» . . .

(viii) «La fumée du tabac cause chez les non-fumeurs des maladies pulmonaires mortelles» . . .

De plus, l'al. 17*g*) autorise le gouverneur en conseil à exiger que des prospectus relatifs aux effets des produits du tabac soient placés à l'intérieur de l'emballage d'un produit du tabac et à en préciser la forme, la teneur et l'emplacement. En vertu du par. 9(2), il est interdit aux fabricants de produits du tabac d'apposer sur leurs emballages des mentions autres que la désignation, le nom et toute marque de celui-ci ainsi que les renseignements prévus par la loi.

Une autre disposition de la Loi est également pertinente en l'espèce. En vertu de l'al. 17*a*), le gouverneur en conseil peut, par règlement, exempter de l'application des art. 4 et 7 tout produit du tabac qui, à son avis, sera probablement utilisé comme substitut aux autres produits du tabac et fait courir moins de risque à la santé des consommateurs que ces autres produits.

Les dispositions relatives au contrôle d'application se trouvent aux art. 11 à 16. Ces dispositions confèrent au ministre le pouvoir de désigner un «inspecteur des produits du tabac» qui possède des pouvoirs de visite, de perquisition, de saisie, d'analyse, de détention d'objets et de confiscation. Les «infractions et peines» sont prévues aux art. 18 et 19. L'article 18 porte que quiconque contrevient aux art. 4, 6(2), 7, 8, 9 ou 10 commet une infraction punissable sur déclaration de culpabilité par procédure sommaire ou commet un acte criminel. La gravité des peines varie d'une amende maxi-

lars or six months' imprisonment, or both, for a first offence on summary conviction, to a fine not exceeding three hundred thousand dollars or two years' imprisonment, or both, for a second or subsequent offence pursued by way of indictment.

The Relevant Statutory Provisions

For ease of reference, I set out the relevant provisions of the Act as follows:

4. (1) No person shall advertise any tobacco product offered for sale in Canada.

(2) No person shall, for consideration, publish, broadcast or otherwise disseminate, on behalf of another person, an advertisement for any tobacco product offered for sale in Canada.

(3) For greater certainty, subsection (2) does not apply in respect of the distribution for sale of publications imported into Canada or the retransmission of radio or television broadcasts originating outside Canada.

(4) No person in Canada shall advertise a tobacco product by means of a publication published outside Canada or a radio or television broadcast originating outside Canada primarily for the purpose of promoting the sale in Canada of a tobacco product.

(5) Notwithstanding subsections (1) and (2), the manufacturer or importer of a tobacco product may advertise the product by means of signs at any time before January 1, 1991, if

(*a*) the amount, determined in accordance with the regulations, expended by the manufacturer or importer on the preparation in 1989 of materials for use in signs and on the presentation of signs in that year does not exceed two thirds of the expenses of the manufacturer or importer, determined in accordance with the regulations, incurred during its last financial year ending before January 1, 1988 for such preparation and presentation;

(*b*) the amount, determined in accordance with the regulations, expended by the manufacturer or importer on such preparation and presentation in 1990 does not exceed one third of the expenses of the manufacturer or importer, so determined, incurred there-

male de deux mille dollars et d'un emprisonnement maximal de six mois, ou l'une de ces peines, pour une première infraction punissable par voie de procédure sommaire, jusqu'à une amende maximale de trois cent mille dollars et un emprisonnement maximal de deux ans, ou l'une de ces peines, s'il s'agit d'un récidiviste poursuivi par acte d'accusation.

Les dispositions législatives pertinentes

Par souci de commodité, je reproduis les dispositions pertinentes de la Loi:

4. (1) La publicité en faveur des produits du tabac mis en vente au Canada est interdite.

(2) Il est interdit, à titre onéreux et pour le compte d'une autre personne, de diffuser, notamment par la presse ou la radio-télévision, la publicité en faveur d'un produit du tabac mis en vente au Canada.

(3) Il est entendu que le paragraphe (2) ne s'applique pas à la distribution en vue de la vente de publications importées au Canada ou à la retransmission d'émissions de radio ou de télévision de l'étranger.

(4) Il est interdit à toute personne se trouvant au Canada de faire de la publicité en faveur d'un produit du tabac dans une publication étrangère ou une émission radiodiffusée de l'étranger dans le but, principalement, de promouvoir la vente d'un produit du tabac au Canada.

(5) Malgré les paragraphes (1) et (2) le fabricant ou l'importateur d'un produit du tabac peut, jusqu'au 1er janvier 1991, exclusivement, faire de la publicité en faveur du produit par des affiches à condition que:

a) le montant qu'il dépense pour la préparation, en 1989, de la publicité relative à ces affiches et pour la présentation de ces affiches au public au cours de la même année ne dépasse pas les deux tiers des dépenses engagées pour la préparation et la présentation d'affiches au cours de son dernier exercice clos avant le 1er janvier 1988;

b) le montant qu'il dépense pour la préparation et la présentation d'affiches en 1990 ne dépasse pas le tiers

for during the financial year referred to in paragraph (*a*); and

(*c*) a health warning is provided in accordance with the regulations on any sign put in place after the coming into force of this Act.

(6) In subsection (5), "sign" does not include

(*a*) a sign displayed at the place of business of a retailer; or

(*b*) a representation described in paragraph 6(1)(*a*) or (*b*).

5. (1) Notwithstanding section 4, a retailer may

(*a*) expose tobacco products for sale at the retailer's place of business;

(*b*) post in that place, in the prescribed form, manner and quantity, signs that indicate, otherwise than by their brand names or trade marks, the tobacco products offered for sale and their prices;

(*c*) where the retailer's name or trade name contains any word or expression signifying that tobacco products are sold by the retailer, employ that name or trade name, otherwise than in association with a tobacco product, for the purpose of advertising the retailer's business, except by means of a radio or television transmission; and

(*d*) display at the retailer's place of business, at any time before January 1, 1993, an advertisement or portion thereof

(i) that was displayed in that place before January 25, 1988, or

(ii) that the retailer is obliged to display under the terms of a contract entered into before January 25, 1988, other than a term allowing for the extension or renewal of the contract after that day.

(2) Notwithstanding section 4, a person who operates a vending machine that dispenses tobacco products may identify or depict those products and their prices on the exterior of the vending machine in the prescribed form and manner.

6. (1) Notwithstanding section 4 and subsection 8(1) but subject to subsection (2) of this section, the full name of a manufacturer or importer of tobacco products

des dépenses engagées au cours de l'exercice visé à l'alinéa *a*);

c) les affiches installées après l'entrée en vigueur de la présente loi comportent une mise en garde réglementaire.

Les montants et dépenses visés au présent paragraphe se calculent conformément aux règlements.

(6) Pour l'application du paragraphe (5), «affiche» ne vise pas:

a) les supports publicitaires se trouvant à l'intérieur ou aux abords de l'établissement d'un détaillant;

b) les mentions visées aux alinéas 6(1)*a*) ou *b*).

5. (1) Malgré l'article 4, le détaillant peut:

a) exposer des produits du tabac pour la vente dans son établissement;

b) signaler dans ce lieu, par des affiches réglementaires quant à leur forme, leur teneur et leur quantité, les produits du tabac qui y sont vendus ainsi que leur prix, sans toutefois mentionner leur nom ou leur marque;

c) faire usage, ailleurs qu'à la radio-télévision, de sa dénomination ou de sa raison sociale à des fins publicitaires — même quand l'un de ses éléments indique qu'il vend des produits du tabac — sans toutefois y associer un produit du tabac;

d) jusqu'au 1er janvier 1993, exclusivement, conserver, à l'intérieur ou aux abords de son établissement, les supports publicitaires — ou parties de ceux-ci:

(i) soit dont il avait déjà fait usage avant le 25 janvier 1988,

(ii) soit dont il est tenu de faire usage conformément aux stipulations d'un contrat conclu avant le 25 janvier 1988, à l'exclusion de toute stipulation autorisant le renouvellement ou la prorogation du contrat après cette date.

(2) Malgré l'article 4, l'exploitant d'un distributeur automatique de produits du tabac peut les représenter ou les nommer et en indiquer les prix sur celui-ci selon les modalités réglementaires.

6. (1) Sous réserve du paragraphe (2), il est possible, malgré l'article 4 et le paragraphe 8(1), d'utiliser le nom intégral du fabricant ou de l'importateur d'un produit du

and, where required by the terms of a contract entered into before January 25, 1988, the brand name of a tobacco product, may be used, otherwise than in association with a tobacco product, in a representation to the public

(*a*) that promotes a cultural or sporting activity or event; or

(*b*) that acknowledges financial or other contributions made by the manufacturer or importer of the tobacco product toward such an activity or event.

(2) Where, in any calendar year, a manufacturer or importer of tobacco products makes financial or other contributions toward cultural or sporting activities or events in respect of which brand names of those products are used, the value of such contributions, determined in accordance with the regulations, shall not exceed the value, so determined, of the contributions made by the manufacturer or importer toward cultural or sporting activities and events in 1987.

7. (1) No distributor shall distribute tobacco products in the absence of consideration therefor, or furnish tobacco products to any person for the purpose of their subsequent distribution without consideration.

(2) No person shall offer any gift or cash rebate or the right to participate in any contest, lottery or game to the purchaser of a tobacco product in consideration of the purchase thereof, or to any person in consideration of the furnishing of evidence of such a purchase.

8. (1) No manufacturer or importer of tobacco products who is entitled to use any trade mark in association with those products, and no person acting with the concurrence or acquiescence of such a manufacturer or importer, shall

(*a*) apply the trade mark, in any form in which it appears on packages of the product that are sold in Canada, to any article other than a tobacco product or a package or container in which a tobacco product is sold or shipped, or

(*b*) use the trade mark in any such form for the purpose of advertising any article other than a tobacco product or any service, activity or event,

notwithstanding that the manufacturer or importer is,

tabac et, dans les cas où l'exige un contrat conclu avant le 25 janvier 1988, le nom du produit, sans toutefois y associer un produit du tabac, dans toute mention au public:

a) qui vise à promouvoir une activité ou une manifestation culturelles ou sportives;

b) qui fait état des concours financiers ou autres apportés par le fabricant ou l'importateur à la réalisation de cette activité ou manifestation.

(2) La valeur, calculée conformément aux règlements, des concours financiers ou autres apportés par le fabricant ou l'importateur de produits du tabac à la réalisation d'activités ou manifestations culturelles ou sportives dans le cadre desquelles est mentionné le nom des produits ne peut dépasser, pour une année civile donnée, la valeur, ainsi calculée, des concours qu'il a apportés en 1987 à la réalisation de telles activités ou manifestations.

7. (1) Il est interdit aux négociants de distribuer des produits du tabac à titre gratuit ou d'en fournir à cette fin.

(2) Il est interdit d'offrir un cadeau ou une remise, ou la possibilité de participer à un concours, une loterie ou un jeu, en contrepartie de l'achat d'un produit du tabac ou de la production d'une preuve d'achat de celui-ci.

8. (1) Il est interdit aux fabricants et aux importateurs de produits du tabac:

a) d'apposer des marques qu'ils sont habilités à utiliser à l'égard de ces produits sur des articles, autres que les produits du tabac et les emballages servant à vendre ou expédier ceux-ci, sous une forme reprenant celle qui figure sur les emballages de ces produits alors vendus au Canada;

b) de faire usage de ces marques et sous cette forme dans toute publicité en faveur d'autres articles que les produits du tabac ou de services, manifestations ou activités.

La présente interdiction s'applique même si les fabricants ou les importateurs sont par ailleurs habilités à utiliser ces marques à l'égard de ces autres articles ou de ces services, manifestations ou activités et vise égale-

but for this Act, entitled to use the trade mark in association with that article, service, activity or event.

(2) No person shall distribute, sell, offer for sale or expose for sale any article, other than a tobacco product or a package or container in which a tobacco product is sold or shipped, that bears a trade mark of a tobacco product in any form in which it appears on packages of the tobacco product that are sold in Canada.

(3) Subsections (1) and (2) do not apply in respect of a trade mark if in 1986 tobacco products and other articles bearing that trade mark were sold at retail in Canada and the retail value of those other articles estimated in accordance with the regulations was greater than one-quarter of the retail value of those tobacco products so estimated.

(4) Subsection (2) does not apply in respect of the distribution or sale before January 1, 1993 of an article manufactured before April 30, 1987, or ordered before that date from the manufacturer or supplier of the article otherwise than by the placing of a standing order that requires confirmation or is subject to cancellation after that date.

9. (1) No distributor shall sell or offer for sale a tobacco product unless

(*a*) the package containing the product displays, in accordance with the regulations, messages pertaining to the health effects of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein; and

(*b*) if and as required by the regulations, a leaflet furnishing information relative to the health effects of the product has been placed inside the package containing the product.

(2) No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages and list referred to in subsection (1), the label required by the *Consumer Packaging and Labelling Act* and the stamp and information required by sections 203 and 204 of the *Excise Act*.

(3) This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature, to warn purchasers

ment quiconque agit avec le consentement, exprès ou tacite, de ces fabricants ou ces importateurs.

(2) Il est interdit de distribuer, de vendre, de mettre en vente ou d'exposer en vue de la vente des articles, autres que les produits du tabac et les emballages servant à vendre ou expédier ceux-ci, s'ils portent la marque d'un produit du tabac sous une forme reprenant celle qui figure sur les emballages de ce produit vendus au Canada.

(3) Les paragraphes (1) et (2) ne s'appliquent pas si, en 1986 et au Canada, la valeur estimative, calculée conformément aux règlements, des ventes au détail d'articles autres que les produits du tabac portant la marque en question était supérieure au quart de celle, ainsi calculée, des produits du tabac portant également cette marque.

(4) Le paragraphe (2) ne s'applique pas à la vente ou à la distribution, avant le 1er janvier 1993, d'articles fabriqués avant le 30 avril 1987 ou commandés à leur fabricant ou fournisseur avant cette date, sauf s'il s'agit d'une commande permanente qui doit être confirmée ou peut prendre fin après cette date.

9. (1) Il est interdit aux négociants de vendre ou mettre en vente un produit du tabac qui ne comporte pas, sur ou dans l'emballage respectivement, les éléments suivants:

a) les messages soulignant, conformément aux règlements, les effets du produit sur la santé, ainsi que la liste et la quantité des substances toxiques, que celui-ci contient et, le cas échéant, qui sont dégagées par sa combustion;

b) s'il y a lieu, le prospectus réglementaire contenant l'information sur les effets du produit sur la santé.

(2) Les seules autres mentions que peut comporter l'emballage d'un produit du tabac sont la désignation, le nom et toute marque de celui-ci, ainsi que les indications exigées par la *Loi sur l'emballage et l'étiquetage des produits de consommation* et le timbre et les renseignements prévus aux articles 203 et 204 de la *Loi sur l'accise*.

(3) Le présent article n'a pas pour effet de libérer le négociant de toute obligation qu'il aurait, aux termes d'une loi fédérale ou provinciale ou en *common law*,

of tobacco products of the health effects of those products.

17. The Governor in Council may make regulations

(*a*) exempting a tobacco product from the application of sections 4 and 7 where, in the opinion of the Governor in Council, that product is likely to be used as a substitute for other tobacco products and poses less risk to the health of users than those other products;

. . .

(*f*) prescribing, in respect of any tobacco product, the content, position, configuration, size and prominence of the messages and list of toxic constituents referred to in paragraph 9(1)(*a*);

(*g*) requiring leaflets furnishing information referred to in paragraph 9(1)(*b*) to be placed inside packages of a tobacco product and prescribing their content, form and manner of placement in those packages;

. . .

18. (1) Every person who contravenes section 4, 7, 8, 9 or 10

(*a*) is guilty of an offence punishable on summary conviction and is liable

(i) for a first offence under any of those sections, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) where the person has previously been convicted of an offence under any of those sections, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(*b*) is guilty of an indictable offence and liable

(i) for a first offence under any of those sections, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both, and

(ii) where the person has previously been convicted of an offence under any of those sections, to a fine not exceeding three hundred thousand dollars or to imprisonment for two years, or to both.

(2) Every person who contravenes subsection 6(2) is guilty of an offence punishable on summary conviction and is liable

d'avertir les acheteurs de produits du tabac des effets de ceux-ci sur la santé.

17. Le gouverneur en conseil peut, par règlement:

a) exempter de l'application des articles 4 et 7 tout produit du tabac qui, à son avis, sera probablement utilisé comme substitut aux autres produits du tabac et fait courir moins de risque à la santé des consommateurs que ces autres produits;

. . .

f) fixer, pour tout produit du tabac, la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence des mentions — messages et liste des substances toxiques — visées à l'alinéa 9(1)*a*);

g) exiger la présence, à l'intérieur de l'emballage d'un produit du tabac, du prospectus visé à l'alinéa 9(1)*b*) et préciser la forme de celui-ci, sa teneur ainsi que son emplacement;

. . .

18. (1) Quiconque contrevient aux articles 4, 7, 8, 9 ou 10:

a) soit commet une infraction punissable sur déclaration de culpabilité par procédure sommaire et encourt:

(i) pour une première infraction, une amende maximale de deux mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines,

(ii) s'il a déjà été déclaré coupable de n'importe laquelle des infractions prévues à ces articles, une amende maximale de cinq mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

b) soit commet un acte criminel et encourt:

(i) pour une première infraction, une amende maximale de cent mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines,

(ii) s'il a déjà été déclaré coupable de n'importe laquelle des infractions prévues à ces articles, une amende maximale de trois cent mille dollars et un emprisonnement maximal de deux ans, ou l'une de ces peines.

(2) Quiconque contrevient au paragraphe 6(2) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire:

(*a*) for a first offence, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(*b*) for a second or subsequent offence, to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(3) Every person who contravenes section 14 or any regulations made under paragraph 17(*i*) is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding ten thousand dollars.

19. (1) A prosecution in respect of an offence under this Act, other than a prosecution under paragraph 18(1)(*b*), may not be instituted later than twelve months after the time when the subject-matter of the prosecution arose.

(2) A prosecution for an offence under this Act may be instituted, heard, tried and determined by a court in any territorial jurisdiction in which the accused carries on business regardless of where the subject-matter of the prosecution arose.

(3) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information or indictment for an offence under this Act or under section 421, 422 or 423 [now section 463, 464 or 465] of the *Criminal Code* in respect of an offence under this Act.

(4) In any prosecution for an offence referred to in subsection (3), the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

Judgments of the Courts Below

Quebec Superior Court (1991), 82 D.L.R. (4th) 449 (Chabot J.) (translation)

12 Chabot J. found the Act invalid in its entirety, both as being *ultra vires* the Parliament of Canada under the *Constitution Act, 1867* and as constitut-

a) s'il s'agit d'une première infraction, une amende maximale de dix mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines;

b) en cas de récidive, une amende maximale de cinquante mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines.

(3) Quiconque contrevient à l'article 14 et aux règlements d'application de l'alinéa 17*i*) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de dix mille dollars.

19. (1) Les poursuites, autres que celles prévues à l'alinéa 18(1)*b*), visant les infractions à la présente loi se prescrivent par un an à compter de la perpétration de celles-ci.

(2) Le tribunal dans le ressort duquel l'accusé exerce ses activités est compétent pour connaître de toute poursuite en matière d'infraction à la présente loi, indépendamment du lieu de perpétration.

(3) Dans les poursuites visant toute infraction à la présente loi, ou engagées sous le régime des articles 421, 422 ou 423 [maintenant les articles 463, 464 ou 465] du *Code criminel* et relatives à une telle infraction, il n'est pas nécessaire que soit énoncée ou niée, selon le cas, une exception, exemption, excuse ou réserve, prévue par le droit, dans la dénonciation ou l'acte d'accusation.

(4) Dans les poursuites visées au paragraphe (3), il incombe à l'accusé de prouver qu'une exception, exemption, excuse ou réserve, prévue par le droit, joue en sa faveur; quant au poursuivant, il n'est pas tenu, si ce n'est à titre de réfutation, de prouver que l'exception, l'exemption, l'excuse ou la réserve ne joue pas en faveur de l'accusé, qu'elle soit ou non énoncée dans la dénonciation ou l'acte d'accusation.

Les décisions des instances inférieures

La Cour supérieure du Québec, [1991] R.J.Q. 2260 (le juge Chabot)

Comme nous l'avons vu, le juge Chabot a déclaré la Loi non valide dans son intégralité, à la fois parce qu'elle était *ultra vires* du Parlement du

ing an unjustifiable infringement of s. 2(*b*) of the *Charter*.

In his analysis of the Act under the *Constitution Act, 1867*, Chabot J., at pp. 467-68, characterized it as legislation that is, in pith and substance, in relation to the regulation of advertising and promotion carried on by a particular industry. Having thus characterized the Act, Chabot J. then determined that it was not a valid exercise of the federal Parliament's criminal law power under s. 91(27) of the *Constitution Act, 1867* or Parliament's power to legislate for the peace, order and good government of Canada under s. 91 of the *Constitution Act, 1867*.

With respect to the criminal law power, Chabot J. reasoned that the Act was not valid criminal law because it was not addressed directly to the "evil" against which it was purportedly aimed, i.e., tobacco consumption. He observed, at p. 470, that "advertising in itself does not cause harm, any more than the advertising of tobacco products is by itself harmful to health" and, at p. 468, that "[t]he objective of protecting public health, if it exists, can only be an indirect and remote objective [of the Act]".

Turning to the peace, order and good government clause, Chabot J. concluded that the Act did not satisfy the criteria for the "national dimensions" branch of that clause set forth in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401. The present cases were, in his view, distinguishable from the Privy Council's decisions in the "temperance cases" (*Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 (the *Local Prohibition Case*), and *Attorney-General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193) because, in contrast with those cases, there was "no evidence that the advertisement of tobacco products has attained a stage of pestilence in Canada which would give it the required character and degree of singleness, distinctiveness and indivisibility which would distinguish it clearly from matters of provincial interest"

Canada en vertu de la *Loi constitutionnelle de 1867* et qu'elle constituait une violation injustifiable de l'al. 2*b*) de la *Charte*.

Dans son analyse de la Loi en vertu de la *Loi constitutionnelle de 1867*, le juge Chabot a dit, aux pp. 2275 et 2276, qu'il s'agissait d'une loi qui, de par son caractère véritable, cherche à réglementer la publicité et la promotion effectuées par une industrie donnée. Après avoir ainsi qualifié la Loi, il a affirmé qu'il ne s'agissait pas d'un exercice valide de la compétence du Parlement fédéral en matière de droit criminel en vertu du par. 91(27) de la *Loi constitutionnelle de 1867* ou de sa compétence de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*. 13

En ce qui concerne la compétence en matière de droit criminel, le juge Chabot a conclu que la Loi n'est pas une règle de droit criminel valide parce qu'elle ne traite pas directement du «mal» qu'elle prétend régler, soit la consommation des produits du tabac. Il a fait remarquer, à la p. 2278, que «la publicité ne cause pas de dommages comme tels, pas plus que la publicité des produits du tabac comme telle ne cause pas d'atteinte à la santé» et, à la p. 2276, que «[l]'objectif de protection de la santé publique, s'il existe, ne peut être qu'un objectif indirect et lointain [de la Loi]». 14

Examinant ensuite la compétence relative à la paix, l'ordre et le bon gouvernement, le juge Chabot a conclu que la Loi ne satisfaisait pas aux critères du volet «dimension nationale» de cette compétence, formulés dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401. À son avis, les présents pourvois se distinguent des arrêts du Conseil privé sur la «tempérance» (*Attorney-General for Ontario c. Attorney-General for the Dominion*, [1896] A.C. 348 (l'*arrêt sur la prohibition locale*), et *Attorney-General for Ontario c. Canada Temperance Federation*, [1946] A.C. 193) parce que, contrairement à ce qui existait dans ces arrêts, «il n'y a aucune preuve que la publicité des produits du tabac aurait atteint ce stade de pestilence au Canada qui lui donnerait ce caractère et ce degré requis d'unicité, de particularité et d'indivisibilité qui la distinguerait claire- 15

(p. 475). Chabot J. also decided that there was no evidence of a "provincial inability" to control tobacco advertising. He observed, at p. 478, that "the evidence clearly shows the will and the capacity of the provinces to cooperate with each other and with the federal government with respect to the advertising and promotion of tobacco products".

16 Proceeding to an analysis of the Act's validity under the *Charter*, Chabot J. found the Act to be in violation of the appellants' right to freedom of expression under s. 2(*b*). He concluded, first (at pp. 484-85), that tobacco advertising has a sufficient expressive content to constitute a protected activity under s. 2(*b*) and, second (at p. 486), that the unattributed health message requirement under s. 9 of the Act infringed the appellants' s. 2(*b*) rights on the ground that "freedom of expression includes the freedom to remain silent".

17 Chabot J. then found, applying the test established by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, that the s. 2(*b*) infringement was not justified under s. 1 of the *Charter*. After considering the uncontradicted evidence adduced by the Attorney General concerning the dire health consequences of tobacco use, Chabot J., at p. 492, concluded that the Attorney General had satisfied the first branch of the *Oakes* test by demonstrating a "substantial and pressing concern". However, he concluded that the Act did not survive the "proportionality" branch of that test. He began his proportionality analysis by holding, at p. 515, that the Attorney General had failed to establish, on the balance of probabilities, that a rational connection exists between a full prohibition on advertising and the objective of reducing tobacco consumption. He also observed, at p. 513, that "[t]he virtual totality of the scientific documents in the state's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption". He then decided that the complete prohibition on advertising under the Act did not meet the test of minimal impairment of the appel-

ment des matières d'intérêt provincial» (p. 2281). Le juge Chabot a décidé qu'il n'y avait aucune preuve de «l'incapacité provinciale» de contrôler la publicité des produits du tabac. Il a fait remarquer, à la p. 2283, que «la preuve a révélé abondamment la volonté et la capacité des provinces de coopérer entre elles et avec le fédéral en regard de la publicité et de la promotion des produits du tabac».

Passant ensuite à une analyse de la validité de la Loi au regard de la *Charte*, le juge Chabot a déterminé que la Loi viole le droit à la liberté d'expression garanti aux appelantes par l'al. 2*b*). Il a conclu dans un premier temps que la publicité des produits du tabac a un contenu expressif suffisant pour constituer une activité protégée au sens de l'al. 2*b*) (aux pp. 2288 et 2289), et dans un deuxième temps, que l'exigence des messages de santé non attribués prévue à l'art. 9 de la Loi contrevient aux droits garantis aux appelantes par l'al. 2*b*) pour le motif que «la liberté d'expression inclut la liberté de ne pas s'exprimer» (p. 2289).

Lorsqu'il a appliqué le critère formulé par notre Cour dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, le juge Chabot a ensuite affirmé que la violation de l'al. 2*b*) ne se justifiait pas en vertu de l'article premier de la *Charte*. Après avoir examiné la preuve non contredite déposée par le procureur général relativement aux conséquences graves du tabagisme, le juge Chabot a conclu, à la p. 2294, que le ministère public avait satisfait au premier critère de l'arrêt *Oakes* en établissant une «préoccupation réelle et urgente». Cependant, il a conclu que la Loi ne satisfait pas au volet «proportionnalité» de ce critère. Il a commencé son analyse de la proportionnalité en affirmant, à la p. 2310, que le procureur général n'avait pas fait, suivant la prépondérance des probabilités, la preuve d'un lien rationnel entre une interdiction totale de publicité et l'objectif de diminution de la consommation des produits du tabac. Il a aussi fait remarquer, à la p. 2309, que «[l]a presque totalité de la documentation scientifique en possession de l'État lors de l'adoption de la loi ne démontrait pas que le bannissement de la publicité aurait un effet sur la consommation». Il a alors décidé que le bannissement total de la publi-

lants' s. 2(*b*) rights. He observed, at pp. 515-16, that no evidence had been adduced at trial demonstrating that a complete prohibition on tobacco advertisements would reduce tobacco consumption more effectively than a partial ban, or that unattributed health warnings would be more effective than attributed health warnings. Finally, with respect to the proportionality between effects and objectives, Chabot J. concluded, at p. 517, that the Act constitutes "social engineering" and "an extremely serious impairment of the principles inherent in a free and democratic society which is disproportionate to the objective of the [Act]".

cité en vertu de la Loi ne satisfaisait pas au critère de l'atteinte minimale aux droits garantis aux appelantes par l'al. 2*b*). Il a ajouté, à la p. 2311, que l'on n'avait pas présenté de preuve en première instance établissant qu'un bannissement total de la publicité relative aux produits du tabac réduirait la consommation de façon plus efficace qu'un bannissement partiel, ou que des messages non attribués seraient plus efficaces que des messages attribués. Enfin, en ce qui concerne la proportionnalité entre les effets et les objectifs, le juge Chabot a conclu, à la p. 2312, que la Loi constitue un genre d'«ingénierie sociale» et «une atteinte extrêmement grave aux principes inhérents d'une société libre et démocratique, incommensurable avec l'objectif de la [Loi]».

Quebec Court of Appeal (1993), 102 D.L.R. (4th) 289 (LeBel and Rothman JJ.A., Brossard J.A. dissenting in part) (translation)

La Cour d'appel du Québec, [1993] R.J.Q. 375 (les juges LeBel et Rothman; le juge Brossard étant dissident en partie)

The Court of Appeal allowed the appeals from the decision of Chabot J. and upheld the constitutional validity of the Act in its entirety. It was unanimous in deciding that the Act was not beyond the legislative competence of the Parliament of Canada under s. 91 of the *Constitution Act, 1867* and, although the Attorney General had conceded that the Act constituted an infringement of the appellants' rights under s. 2(*b*), a majority (Brossard J.A. dissenting) decided that the infringement was justifiable under s. 1 of the *Charter*.

18 La Cour d'appel a accueilli les appels contre la décision du juge Chabot et confirmé la constitutionnalité de l'ensemble de la Loi. La cour, à l'unanimité, a statué que la Loi n'outrepassait pas la compétence législative du Parlement du Canada prévue à l'art. 91 de la *Loi constitutionnelle de 1867*; en outre, même si le procureur général avait admis que la Loi constituait une violation des droits garantis aux appelantes par l'al. 2*b*), la cour à la majorité (le juge Brossard étant dissident) a décidé que cette violation était justifiable en vertu de l'article premier de la *Charte*.

Writing for a unanimous Court of Appeal with respect to the constitutionality of the Act under the *Constitution Act, 1867*, Brossard J.A. began his analysis by characterizing the Act as legislation, in pith and substance, in relation to the protection of public health (at p. 339). Brossard J.A. criticized, at pp. 338-39, the trial judge's pith and substance analysis on two grounds. First, he decided that the trial judge had confined himself to an excessively literal interpretation of the Act by failing to explore a possible connection between the Act's statement of purpose in s. 3 and its legal effect on tobacco advertising and promotion. Second, he held that the trial judge had confused the evidentiary requirements for the application of s. 1 of the

19 S'exprimant au nom de la Cour d'appel à l'unanimité relativement à la constitutionnalité de la Loi en vertu de la *Loi constitutionnelle de 1867*, le juge Brossard a commencé son analyse en affirmant, à la p. 408, que la Loi visait, de par son caractère véritable, la protection de la santé publique. Le juge Brossard, aux pp. 407 et 408, a trouvé deux lacunes dans l'analyse du caractère véritable de la loi faite par le juge de première instance. Premièrement, il a décidé que le juge de première instance s'était restreint à une interprétation trop littérale de la Loi, en omettant de rechercher un lien possible entre l'objet de la Loi mentionné à l'art. 3 et son effet juridique sur la publicité et la promotion des produits du tabac. Deuxièmement, il a statué que le

Charter, under which the effectiveness of the legislation is a relevant criterion, with the requirements for ascertaining pith and substance in a division of powers analysis, where it is not.

20 Brossard J.A. then proceeded to consider whether the Act was a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867* or the peace, order and good government clause under s. 91 of the *Constitution Act, 1867*. He began by deciding that the Act did not fall under the criminal law power. He found it significant, at pp. 341-42, that neither tobacco consumption nor tobacco advertising are activities that have an "affinity with some traditional criminal law concern" (p. 342) and observed that, although the Act makes the advertising and promotion of tobacco products illegal, the "real evil" the Act is designed to combat, tobacco consumption, continues to be legal in Canada. Parliament, he reasoned, at pp. 340-41, cannot criminalize the ancillary activities relating to a principal activity when it has not criminalized the principal activity itself. Brossard J.A. decided, however, that the Act fell within the federal Parliament's power to legislate for the peace, order and good government of Canada because it satisfied the test for the "national dimensions" branch of that power developed in *Crown Zellerbach*, *supra*. He observed, at p. 348, that the problem of tobacco consumption has developed into a matter of national concern comparable in scope to that of alcohol consumption addressed in the temperance cases. He also noted, at p. 350, that the health problems resulting from tobacco consumption have a "singleness, distinctiveness and indivisibility that distinguish them clearly from matters that are of strictly provincial interest". Finally, he concluded that the Act met the "provincial inability test" because "[t]he fact is that communications, whether radio or television broadcasting, or even newspaper publishing, do not

juge de première instance avait confondu les exigences de la preuve relative à l'application de l'article premier de la *Charte*, en vertu duquel l'efficacité de la loi est un critère pertinent, et ce qui est requis pour la détermination du caractère véritable de la loi, dans le cadre d'une analyse sur le partage des pouvoirs, dans laquelle cette efficacité n'est pas un critère pertinent.

Le juge Brossard a ensuite examiné si la Loi constituait un exercice valide de la compétence fédérale en matière de droit criminel en vertu du par. 91(27) de la *Loi constitutionnelle de 1867* ou de la compétence de faire des lois pour la paix, l'ordre et le bon gouvernement en vertu de l'art. 91 de la *Loi constitutionnelle de 1867*. Il a commencé par affirmer qu'il ne s'agissait pas d'une loi relevant de la compétence en matière de droit criminel. À son avis (aux pp. 409 et 410), il importe de préciser que ni la consommation des produits du tabac ni la publicité de ces produits ne constituent des activités qui ont [TRADUCTION] «une affinité avec une préoccupation traditionnelle en matière de droit criminel» (p. 410); il a aussi fait remarquer que, bien que la Loi rende illégale la publicité et la promotion des produits du tabac, le «véritable mal» que vise à combattre la Loi — la consommation des produits du tabac — demeure légitime au Canada. Le Parlement, raisonne-t-il, aux pp. 408 et 409, ne peut rendre criminels les aspects secondaires de l'activité principale s'il n'a pas criminalisé cette activité. Cependant, le juge Brossard a décidé que la Loi relève de la compétence du fédéral de légiférer pour la paix, l'ordre et le bon gouvernement du Canada parce qu'elle satisfait aux critères du volet «dimension nationale» de cette compétence formulés dans l'arrêt *Crown Zellerbach*, précité. Il a fait observer, à la p. 414, que le tabagisme est devenu un problème d'intérêt national d'une envergure comparable à celui de la consommation de l'alcool dont il était question dans les arrêts sur la tempérance. Il a aussi fait remarquer, à la p. 415, que les problèmes de santé reliés au tabagisme comportent ce «degré d'unicité, de particularité et d'indivisibilité qui les distingue clairement des matières d'intérêt strictement provincial». Enfin, il a conclu que la Loi satisfaisait au «critère de l'incapacité provinciale» parce que

recognize frontiers, still less provincial borders" (pp. 350-51).

«le domaine des communications, qu'il s'agisse de radio, de télévision, de publication même de journaux, ne connaît plus de frontières et encore moins de frontières provinciales» (p. 415).

The Court of Appeal was divided on the validity of the Act under the *Charter*. LeBel J.A., writing for the majority, accepted that the Act infringed the appellants s. 2(*b*) rights, but held that the infringement was justified under s. 1 of the *Charter*. LeBel J.A., at pp. 311-12, first noted that the trial judge had erred in applying a civil standard of justification in his application of the *Oakes* analysis. He observed, at p. 313, that, in cases involving socio-economic legislation such as the Act, this Court has "recognized the need for an attitude of deference with regard to legislative choices", and has required the state to meet an attenuated standard of justification under the *Oakes* analysis.

21 La Cour d'appel était partagée sur la question de la validité de la Loi en vertu de la *Charte*. Le juge LeBel, s'exprimant au nom de la majorité, a reconnu que la Loi violait les droits garantis aux appelantes par l'al. 2*b*), mais a conclu que cette violation pouvait se justifier en vertu de l'article premier de la *Charte*. Il a tout d'abord fait remarquer, à la p. 391, que le juge de première instance avait commis une erreur en appliquant un critère de justification assimilable à celui appliqué dans un procès civil lorsqu'il a procédé à l'analyse élaborée dans l'arrêt *Oakes*. Il a fait observer, à la p. 392, que, dans les cas de lois socio-économiques comme en l'espèce, notre Cour «reconnaît la nécessité d'une attitude de déférence à l'égard des choix législatifs en ce domaine» et exige du ministère public qu'il satisfasse à un critère assoupli de justification en vertu de l'analyse élaborée dans l'arrêt *Oakes*.

Applying the attenuated *Oakes* standard, LeBel J.A. held that the Act was a justifiable infringement under s. 1 of the *Charter*. He first observed that "there does not appear to be a serious debate" that the objective of reducing the number of smokers in Canada is pressing and substantial (p. 321), and then proceeded to an application of the proportionality test. There was, he held, at p. 323, sufficient evidence adduced at trial to establish a rational connection between a prohibition of tobacco advertising and the goal of reducing tobacco consumption. He conceded that there was no evidence on the record demonstrating, on the criterion of the civil balance of proof, that the prohibition of these forms of advertising would attain that objective. However, he noted that there was sufficient expert testimony and documentation adduced at trial to "attest, at the very least, to the existence of a body of opinion favourable to the adoption of a legislative measure such as the restriction of tobacco advertising in order to diminish consumption over time" (p. 323). LeBel J.A. also observed, at p. 324, that, in Imperial's

22 Le juge LeBel a appliqué une forme assouplie du critère formulé dans l'arrêt *Oakes* et conclu que la Loi constituait une violation justifiable en vertu de l'article premier de la *Charte*. Il a tout d'abord précisé qu'«il ne semble pas y avoir de débat sérieux» que l'objectif de réduire le nombre de fumeurs au Canada est important et urgent (p. 397), et il a ensuite appliqué le critère de la proportionnalité. À son avis, suffisamment d'éléments de preuve ont été présentés au procès pour établir un lien rationnel entre une interdiction de la publicité des produits du tabac et l'objectif de diminuer le tabagisme (p. 398). Il a reconnu qu'il n'existe pas, dans le dossier, de preuve démontrant que, suivant le critère civil de la prépondérance de la preuve, l'interdiction de ces formes de publicité réussirait à atteindre cet objectif. Toutefois, il a affirmé que l'on avait présenté au procès suffisamment de témoignages d'expert et d'études qui «attestent, à tout le moins, de l'existence d'un corps d'opinions favorables à l'adoption d'une mesure législative comme la limitation de la publicité du tabac, pour diminuer éventuellement la consommation de

internal documentation, "there are commentaries suggesting that the objective of tobacco advertising is either promotion, recruitment of new smokers, or consolidation of market share by reassuring current smokers".

23 Second, LeBel J.A. held, at pp. 326-27, that the Act satisfied the minimal impairment test because the measures adopted under the Act did not prohibit consumption of tobacco, did not allow for the control of foreign advertising, and permitted the continued availability of tobacco product information at retail establishments. Finally, he found it significant that the legislative objective, addressing a serious health problem, outweighed the adverse effects of the legislation on the appellants' right to commercial expression which, he noted, at p. 326, "seeks exclusively to advance the respondents' interests in marketing, distributing and selling a product recognized as harmful".

24 Brossard J.A., in dissent, agreed with LeBel J.A. that the Act's objective was pressing and substantial, and that ss. 7 and 9 met the requirements of the *Oakes* test but, in his view, ss. 4, 5, 6 and 8 did not satisfy either the rational connection or the minimal impairment branches of the *Oakes* proportionality test.

25 With respect to the rational connection test, Brossard J.A. distinguished between three different types of advertising (at pp. 383-84): informative advertising (which disseminates information concerning product content), brand loyalty advertising (which is aimed solely at promoting one brand over another based on the colour, design and appearance of the packaging), and lifestyle advertising (which creates an image by associating the product's consumption with a particular lifestyle). Brossard J.A. found, at p. 384, that the prohibition on informative advertising and brand preference advertising was not rationally connected to the goal of reducing consumption of tobacco because "there is not a single piece of evidence in the record with any probative value to the effect that it

celui-ci» (p. 398). Le juge LeBel a aussi fait observer, à la p. 399, que, dans la documentation interne obtenue d'Imperial, «l'on retrouve aussi des commentaires suggérant que la publicité du tabac aurait un objectif soit de promotion, soit de recrutement de nouveaux fumeurs, soit de consolidation de la clientèle, en rassurant les fumeurs actuels».

Deuxièmement, le juge LeBel a conclu, aux pp. 400 et 401, que la Loi satisfait au critère de l'atteinte minimale parce que les mesures adoptées en vertu de la Loi n'interdisent pas la consommation des produits du tabac, ne permettent pas de contrôler la publicité étrangère et permettent de continuer de fournir de l'information sur les produits du tabac aux points de vente. Enfin, il a jugé important que l'objectif législatif, qui vise un problème grave de santé, l'emporte sur les effets négatifs qu'a la loi sur la garantie de l'expression commerciale des appelantes, lequel, estime-t-il, à la p. 400, «recherche uniquement la promotion de l'intérêt des intimés à commercialiser, distribuer et vendre un produit reconnu comme nocif».

Le juge Brossard, dissident, était d'accord avec le juge LeBel pour dire que l'objectif de la Loi était urgent et réel, et que les art. 7 et 9 répondaient aux exigences du critère formulé dans l'arrêt *Oakes*; cependant, à son avis, les art. 4, 5, 6 et 8 ne satisfont ni au volet du lien rationnel ni à celui de l'atteinte minimale du critère de la proportionnalité formulé dans *Oakes*.

En ce qui concerne le critère du lien rationnel, le juge Brossard a établi une distinction entre trois différents types de publicité (aux pp. 437 et 438): la publicité informative (celle qui contient de l'information quant au contenu du produit), la publicité de fidélité à une marque (qui vise uniquement à promouvoir une marque plutôt qu'une autre par l'effet de la couleur, du design de l'emballage et de sa présentation) et la publicité de style de vie (qui crée une image en associant un style de vie à la consommation du produit). Le juge Brossard a conclu, aux pp. 437 et 438, que l'interdiction de la publicité informative et de la publicité de fidélité à une marque n'a pas de lien rationnel avec l'objectif de diminuer l'usage du tabac parce qu'il «n'existe au dossier aucun élément de preuve ayant quelque

encourages non-smokers to become smokers . . . or smokers to increase their consumption, or that it prevents smokers from reducing their consumption or quitting if they want to". However, he found, at p. 385, that the prohibitions respecting lifestyle advertising met the rational connection test owing to the testimony adduced at trial concerning the stimulative effect of such advertising upon the consumer behaviour of young persons.

Proceeding to the minimal impairment requirement, Brossard J.A. held, at p. 387, that, with the exception of the prohibition upon lifestyle advertising, ss. 4, 5, 6 and 8 of the Act did not minimally impair the appellants' rights because "it would easily have been possible to exclude from the general ban any advertising which is purely informative, there being no proof even on the level of possibility that such advertising has any impact on consumption". Thus, Brossard J.A. concluded, at p. 392, that ss. 4, 5, 6 and 8 of the Act could not be justified under s. 1 of the *Charter*, but that ss. 7 and 9 could be justified under s. 1 of the *Charter*. Brossard J.A. did not uphold the prohibition on lifestyle advertising, even though he decided it was theoretically justifiable under s. 1, because Parliament made no distinction between types of advertising in the legislation.

Issues Before This Court

The argument before this Court was conducted on the basis of two constitutional questions, stated by Chief Justice Lamer on November 4, 1993:

1. Is the *Tobacco Products Control Act*, S.C. 1988, c. 20, wholly or in part 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?

2. Is the *Tobacco Products Control Act* wholly or in part inconsistent with the right of freedom of expression as set out in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and, if so, does it constitute a

valeur probante à l'effet qu'elle inciterait un non-consommateur à le devenir [. . .] ou un consommateur à augmenter sa consommation ou à l'empêcher de diminuer ou d'arrêter cette consommation s'il le désire». Cependant, il a conclu, à la p. 438, que l'interdiction de publicité de style de vie satisfaisait au critère du lien rationnel compte tenu des témoignages présentés au procès relativement à l'effet incitatif de cette publicité sur le comportement des jeunes consommateurs.

Pour ce qui est de l'exigence de l'atteinte minimale, le juge Brossard a conclu, à la p. 439, que, sous réserve de l'exception de l'interdiction de publicité de style de vie, les art. 4, 5, 6 et 8 de la Loi ne constituent pas une atteinte minimale aux droits des appelantes parce qu'il «eût été facilement possible de soustraire toute publicité de nature strictement informative, n'ayant aucune incidence prouvée, même au niveau des possibilités, sur la consommation, de la suppression générale». En conséquence, le juge Brossard a conclu, à la p. 442, que les art. 4, 5, 6 et 8 de la Loi ne pouvaient se justifier en vertu de l'article premier de la *Charte*, mais que les art. 7 et 9 le pouvaient. Il n'a pas confirmé l'interdiction de publicité de style de vie, même s'il a décidé que ce type de publicité était théoriquement justifiable en vertu de l'article premier, parce que le législateur n'avait pas fait dans la loi de distinction entre les types de publicité.

Les questions devant notre Cour

Les arguments présentés devant notre Cour ont porté sur deux questions constitutionnelles formulées par le juge en chef Lamer le 4 novembre 1993:

1. La *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20, relève-t-elle, en tout ou en partie, de la compétence du Parlement du Canada de légiférer pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91, ou en matière de droit criminel suivant le par. 91(27), de la *Loi constitutionnelle de 1867*, ou autrement?

2. La *Loi réglementant les produits du tabac* est-elle, en tout ou en partie, incompatible avec la liberté d'expression garantie à l'al. 2*b*) de la *Charte canadienne des droits et libertés* et, dans l'affirmative, apporte-

reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof?

Analysis

1. *Jurisdiction under the Constitution Act, 1867*

The Criminal Law Power

28 The first question arising on these appeals is whether the Act constitutes a valid exercise of the federal criminal law power and is therefore *intra vires* the federal Parliament. Section 91(27) of the *Constitution Act, 1867* confers on the federal Parliament the exclusive power to legislate in relation to the criminal law. The criminal law power is plenary in nature and this Court has always defined its scope broadly. As Estey J. observed in *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 238, "[t]he terms of s. 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term"; see also *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524 (P.C.), at pp. 528-29. In developing a definition of the criminal law, this Court has been careful not to freeze the definition in time or confine it to a fixed domain of activity; see *Goodyear Tire and Rubber Co. v. The Queen*, [1956] S.C.R. 303, at p. 311 (*per* Rand J.); *R. v. Zelensky*, [1978] 2 S.C.R. 940, at pp. 950-51 (*per* Laskin C.J.). In *Proprietary Articles Trade Association v. Attorney-General for Canada*, [1931] A.C. 310 (*PATA*), at p. 324, the Privy Council defined the federal criminal law power in the widest possible terms to include any prohibited act with penal consequences. Subsequent to that decision, this Court recognized that the Privy Council's definition was too broad in that it would allow Parliament to invade areas of provincial legislative competence colourably simply by legislating in the proper form; see *Scowby*, *supra*, at p. 237. So, as Estey J. put it in *Scowby*, at p. 237, "it was accepted that some legitimate public purpose must underlie the prohibition". This necessary adjustment was introduced in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*). Rand J. drew

t-elle une limite raisonnable à l'exercice de ce droit, dont la justification puisse se démontrer au sens de l'article premier de la *Charte*?

Analyse

1. *Compétence en vertu de la Loi constitutionnelle de 1867*

La compétence en matière de droit criminel

La première question soulevée dans les présents pourvois vise à déterminer si la Loi constitue un exercice valide de la compétence fédérale en matière de droit criminel et est en conséquence *intra vires* du Parlement. Le paragraphe 91(27) de la *Loi constitutionnelle de 1867* confère au Parlement la compétence exclusive de légiférer relativement au droit criminel. Cette compétence est de nature plénière et notre Cour en a toujours défini largement la portée. Comme le juge Estey l'a fait remarquer dans l'arrêt *Scowby c. Glendinning*, [1986] 2 R.C.S. 226, à la p. 238, «[l]es termes du par. 91(27) de la Constitution doivent être interprétés comme attribuant au Parlement la compétence exclusive en matière de droit criminel dans le sens plus large du terme»; voir aussi *Attorney-General for Ontario c. Hamilton Street Railway Co.*, [1903] A.C. 524 (C.P.), aux pp. 528 et 529. Dans l'élaboration d'une définition du droit criminel, notre Cour a pris soin de ne pas geler la définition à une époque déterminée ni de la restreindre à un domaine d'activité fixe; voir *Goodyear Tire and Rubber Co. c. The Queen*, [1956] R.C.S. 303, à la p. 311 (le juge Rand); *R. c. Zelensky*, [1978] 2 R.C.S. 940, aux pp. 950 et 951 (le juge en chef Laskin). Dans l'arrêt *Proprietary Articles Trade Association c. Attorney-General for Canada*, [1931] A.C. 310 (*PATA*), à la p. 324, le Conseil privé a défini la compétence fédérale en matière de droit criminel dans le sens le plus large possible de façon à inclure tout acte interdit assorti de sanctions pénales. À la suite de cette décision, notre Cour a reconnu que la définition du Conseil privé était trop large car elle permettrait au Parlement, simplement en légiférant de la manière appropriée, d'empiéter spécieusement sur des domaines de compétence législative provinciale; voir *Scowby*, précité, à la p. 237. Comme l'affirme le juge Estey

attention, at pp. 49-50, to the need to identify the evil or injurious effect at which a penal prohibition was directed. He stated:

> 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.
>
> . . .
>
> Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . . [Emphasis added.]

See also *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 489.

Taking into account the broad definition of the criminal law developed by this Court, I am satisfied that the Act is, in pith and substance, criminal law. A law's pith and substance, or "matter", is best described as its dominant purpose or true character; see *Morgentaler*, *supra*, at pp. 481-82. From a plain reading of the Act, it seems clear that Parliament's purpose in enacting this legislation was to prohibit three categories of acts: advertisement of tobacco products (ss. 4 and 5), promotion of tobacco products (ss. 6 to 8) and sale of tobacco products without printed health warnings (s. 9). These prohibitions are accompanied by penal sanctions under s. 18 of the Act, which, as Lord Atkin noted in *PATA*, *supra*, at p. 324, creates at least a *prima facie* indication that the Act is criminal law. However, the crucial further question is whether the Act also has an underlying criminal public purpose in the sense described by Rand J. in the *Margarine Reference*, *supra*. The question, as Rand J.

dans *Scowby*, à la p. 237, «on a accepté que l'interdiction doit se fonder sur un objectif public légitime». Cet ajustement nécessaire a été introduit dans *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (le *Renvoi sur la margarine*). Aux pages 49 et 50, le juge Rand a attiré l'attention sur la nécessité d'identifier le mal ou l'effet nuisible ou indésirable contre lequel la loi est dirigée. Il affirme:

> [TRADUCTION] Un crime est un acte que la loi interdit, avec des sanctions pénales appropriées; mais comme les prohibitions ne sont pas édictées dans le vide, nous sommes justifiés de chercher contre quel mal ou effet nuisible ou indésirable pour le public la loi est dirigée. Cet effet peut être relié à des intérêts sociaux, économiques ou politiques; et la législature avait à l'esprit de supprimer le mal ou de protéger l'intérêt menacé.
>
> . . .
>
> La prohibition est-elle [. . .] adoptée en vue d'un objectif public qui peut la faire considérer comme relative au droit criminel? La paix publique, l'ordre, la sécurité, la santé, la moralité: ce sont là des buts habituels, bien que non exclusifs, que poursuit ce droit . . . [Je souligne.]

Voir aussi *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 489.

29 Si l'on tient compte de la définition large du droit criminel établie par notre Cour, je suis convaincu que la Loi est, de par son caractère véritable, une loi en matière de droit criminel. La meilleure façon de décrire le caractère véritable d'une loi, ou la «matière» qu'elle vise, consiste à partir de son objet principal ou de son idée maîtresse; voir *Morgentaler*, précité, aux pp. 481 et 482. Si l'on interprète la Loi dans son sens ordinaire, il semble évident qu'elle avait pour objet d'interdire trois catégories d'actes: la publicité en faveur des produits du tabac (art. 4 et 5), la promotion des produits du tabac (art. 6 à 8) et la vente des produits du tabac dont l'emballage ne comporterait pas les messages relatifs à la santé (art. 9). Ces interdictions sont assorties de sanctions pénales en vertu de l'art. 18 de la Loi, lesquelles, comme le précise lord Atkin dans l'arrêt *PATA*, précité, à la p. 324, créent une indication du moins à première vue que la loi est de droit criminel. Cependant, l'autre

framed it, is whether the prohibition with penal consequences is directed at an "evil" or injurious effect upon the public.

30 In these cases, the evil targeted by Parliament is the detrimental health effects caused by tobacco consumption. This is apparent from s. 3, the Act's "purpose" clause, which bears repeating here:

> **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.

Quite clearly, the common thread running throughout the three enumerated purposes in paras. 3(*a*) to (*c*) is a concern for public health and, more specifically, a concern with protecting Canadians from the hazards of tobacco consumption. This is a valid concern. A copious body of evidence was introduced at trial demonstrating convincingly, and this was not disputed by the appellants, that tobacco consumption is widespread in Canadian society and that it poses serious risks to the health of a great number of Canadians. I note in passing the well-established principle that a court is entitled, in a pith and substance analysis, to refer to extrinsic materials, such as related legislation, Parliamentary debates and evidence of the "mischief" at which the legislation is directed; see *Morgentaler*, *supra*, at pp. 483-84; *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 437; *Re Upper Churchill Water Rights Reversion Act*, [1984] 1

question importante est de savoir si la Loi a également un objectif public sous-jacent du droit criminel au sens où le décrit le juge Rand dans le *Renvoi sur la margarine*, précité. Comme le précise le juge Rand, la question est de savoir si l'interdiction assortie de sanctions pénales est dirigée contre un «mal» ou un effet nuisible pour le public.

Dans les présents pourvois, le mal visé par le Parlement est l'effet nocif de l'usage du tabac sur la santé. Ceci ressort clairement de l'art. 3, la clause «objet» de la Loi, qu'il vaut la peine de reproduire ici:

> **3.** La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:
>
> *a*) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;
>
> *b*) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;
>
> *c*) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Il est tout à fait évident que les trois objets énumérés aux al. 3*a*) à *c*) ont en commun un souci pour la santé publique, et plus particulièrement, un souci de protéger les Canadiens contre les méfaits du tabac. C'est un souci valide. On a présenté en première instance une preuve abondante établissant de façon convaincante (ce qui n'a pas été contesté par les appelantes) que l'usage du tabac est répandu dans la société canadienne et qu'il présente de graves dangers pour la santé d'un grand nombre de Canadiens. En passant, je tiens à mentionner le principe bien établi selon lequel un tribunal a le droit, dans le cadre d'une analyse du caractère véritable, de se reporter à une preuve extrinsèque, comme les textes législatifs connexes, les débats parlementaires et la preuve du «mal» que le texte vise à corriger; voir *Morgentaler*, précité, aux pp. 483 et 484; *Renvoi relatif à la Loi anti-inflation*, [1976] 2 R.C.S. 373, à la p. 437;

S.C.R. 297, at pp. 317-19. An appropriate starting point in an examination of these extrinsic materials is the speech given by Jake Epp, the Minister of National Health and Welfare, on November 23, 1987 before second reading of Bill C-51, which was later given Royal Assent to the Act. He stated (*House of Commons Debates*, vol. IX, at p. 11042):

The federal Government has taken an active role in addressing the issue of cigarette smoking. It is important for people to understand why smoking, which was thought of as merely a personal habit, has become a legitimate public concern. There is overwhelming evidence that tobacco smoke is the largest preventable cause of illness, disability and premature death in Canada. Moreover, it has also become evident that Canadians who are consistently exposed to smoke in the environment may suffer from adverse health effects. Not surprisingly, the public is increasingly asking for an environment that protects non-smokers from tobacco smoke.

As Minister of National Health and Welfare, my primary concern is the health of Canadians. Therefore, I must do all that I can to protect their health by discouraging the advertising and promotion of tobacco, and by increasing public health knowledge of the health hazards of smoking.

This is not a moral crusade. It is not a case of some overzealous individuals attempting to force their lifestyle on others. It is responsible government action in reaction to overwhelming evidence that tobacco, despite its widespread use by a third of the adult population, is actually responsible for 100 deaths a day in Canada.

Apart from shedding light upon the government's intent in introducing this legislation, this speech also gives some indication of the nature and scope of the societal problem posed by tobacco consumption. Statistics show that approximately 6.7 million Canadians, or 28 percent of Canadians over the age of 15, consume tobacco products; see expert report prepared for Health and Welfare Canada by Dr. Roberta G. Ferrence, *Trends in Tobacco Consumption in Canada, 1900-1987* (1989). The harm tobacco consumption causes

Renvoi relatif à la Upper Churchill Water Rights Reversion Act, [1984] 1 R.C.S. 297, aux pp. 317 à 319. Comme point de départ de l'examen de ces documents extrinsèques, il convient d'examiner le discours prononcé par Jake Epp, ministre de la Santé nationale et du Bien-être social, le 23 novembre 1987, avant la deuxième lecture du projet de loi C-51, qui a plus tard reçu la sanction royale. Il affirme (*Débats de la Chambre des communes*, vol. IX, à la p. 11042):

Le gouvernement fédéral s'attaque activement à la question de l'usage du tabac. Il est important que les gens comprennent pourquoi cet usage que l'on considérait simplement comme une habitude personnelle est devenu avec raison un sujet d'inquiétude publique. En effet, des preuves irréfutables démontrent que la fumée du tabac est la plus importante cause évitable de maladies, d'incapacités et de décès prématurés au Canada. De plus, il est devenu évident que les Canadiens qui sont exposés régulièrement à un environnement enfumé peuvent souffrir de conséquences nuisibles à leur santé. Il n'est donc pas étonnant que le public exige de plus en plus un environnement où les non-fumeurs sont protégés de la fumée du tabac.

En tant que ministre de la Santé nationale et du Bien-être social, je me préoccupe avant tout de la santé des Canadiens. Je dois donc faire tout ce que je peux pour protéger leur santé en décourageant la publicité en faveur du tabac et en informant davantage le public sur les dangers que l'usage du tabac fait courir à la santé.

Il ne s'agit pas d'une croisade morale. Il ne s'agit pas de quelques personnes zélées qui tentent d'imposer leur style de vie aux autres. Il s'agit d'une mesure responsable que le gouvernement prend en réponse à des preuves irréfutables qui démontrent que le tabac cause effectivement près de 100 décès par jour au Canada même si le tiers de la population adulte fume.

En plus de clarifier l'intention du gouvernement au moment du dépôt de ce projet de loi, ce discours donne également une indication de la nature et de l'étendue du problème social posé par l'usage du tabac. Les statistiques révèlent qu'approximativement 6,7 millions de Canadiens, ou 28 pour 100 de la population canadienne de plus de 15 ans, consomment des produits du tabac; voir le rapport d'expert de Roberta G. Ferrence, rédigé pour Santé et Bien-être social Canada, *Trends in Tobacco Consumption in Canada, 1900-1987* (1989). Le

each year to individual Canadians, and to the community as a whole, is tragic. Indeed, it has been estimated that smoking causes the premature death of over 30,000 Canadians annually; see Neil E. Collinshaw, Walter Tostowaryk, Donald T. Wigle, "Mortality Attributable to Tobacco Use in Canada" (1988), 79 *Can. J. Pub. Health* 166; expert report prepared for Health and Welfare Canada by Dr. Donald T. Wigle, *Illness and Death in Canada by Smoking: An Epidemiological Perspective* (1989). Overwhelming evidence was introduced at trial that tobacco use is a principal cause of deadly cancers, heart disease and lung disease. In our day and age this conclusion has become almost a truism. Nonetheless, it is instructive to review a small sampling of some of the vast body of medical evidence adduced at trial attesting to the devastating health consequences that arise from tobacco consumption. The expert report of Dr. Anthony B. Miller, for example, contains the following statement, at p. 24 ("Tobacco Use and Cancer" (1989)):

> The scientific evidence summarised in this statement shows that tobacco smoking causes lung, oral, larynx, esophagus, bladder, kidney and pancreas cancer, while oral use of tobacco causes oral cancer. Tobacco use causes 29% of the deaths that occur in Canada from cancer each year, i.e. an estimated excess of 15,300 deaths in 1989. Evidence is accumulating that passive smoking (exposure to environmental tobacco smoke) increases the risk of lung cancer in non-smokers.

Similarly, in the report of Dr. Donald T. Wigle, *supra*, one finds the following conclusion:

> Tobacco smoke contains over 4,000 known chemicals many of which are toxic. Over 50 chemicals present in tobacco smoke and tobacco smoke *per se*, are known to cause cancer in animals, humans or both.

. . .

> Smoking causes about 30% of all cancer deaths, 30% of all coronary heart disease deaths and about 85% of all chronic bronchitis/emphysema deaths in Canada and United States. In addition, smoking is a major cause of

mal que l'usage du tabac cause chaque année aux Canadiens, de façon individuelle ou globale, est tragique. En fait, on a estimé que la cigarette cause le décès prématuré de plus de 30 000 Canadiens chaque année; voir Neil E. Collinshaw, Walter Tostowaryk et Donald T. Wigle, «Mortality Attributable to Tobacco Use in Canada» (1988), 79 *Can. J. Pub. Health* 166; rapport d'expert de Donald T. Wigle, rédigé pour Santé et Bien-être social Canada, *Illness and Death in Canada by Smoking: An Epidemiological Perspective* (1989). On a déposé en première instance une preuve abondante établissant que l'usage du tabac est une cause principale de cancer, ainsi que de maladies cardiaques et pulmonaires causant la mort. De nos jours, cette conclusion est devenue presque un truisme. Néanmoins, il est instructif d'examiner quelques extraits de la vaste preuve médicale présentée en première instance relativement aux conséquences dévastatrices de l'usage du tabac sur la santé. Par exemple, le rapport d'expert d'Anthony B. Miller, renferme l'affirmation suivante, à la p. 24. («Tobacco Use and Cancer» (1989)):

> [TRADUCTION] La preuve scientifique résumée dans le présent énoncé révèle que l'habitude de fumer cause le cancer des poumons, de la bouche, du larynx, de l'œsophage, de la vessie, des reins et du pancréas, et que l'usage oral du tabac cause le cancer de la bouche. L'usage du tabac est la cause de 29 pour 100 des décès attribuables au cancer chaque année, soit environ plus de 15 300 décès en 1989. Il y a de plus en plus de données qui établissent que le tabagisme passif (inhalation involontaire de fumée de tabac) accroît le risque de cancer des poumons chez les non-fumeurs.

De même, dans le rapport de Donald T. Wigle, *op. cit.*, on trouve la conclusion suivante:

> [TRADUCTION] La fumée de tabac contient plus de 4 000 substances chimiques connues, dont beaucoup sont toxiques. Plus de 50 substances chimiques présentes dans la fumée de tabac, et la fumée de tabac elle-même, sont une cause connue du cancer chez les animaux et les humains.

. . .

> L'usage du tabac cause environ 30 pour 100 de tous les décès attribuables au cancer, 30 pour 100 de tous les décès attribuables à l'insuffisance coronarienne et environ 85 pour 100 de tous les décès attribuables à la

deaths due to aortic aneurysms, peripheral artery disease and fires. There is growing evidence that smoking is also an important cause of deaths due to stroke.

In terms of the scientific evidence available, the causal role of smoking in the major diseases described above is firmly established beyond all reasonable doubt. This conclusion is accepted by all leading health professional organizations and by many governments and international agencies including:

- Canadian Medical Association
- Canadian Public Health Association
- Health and Welfare Canada
- Canadian Cancer Society
- Canadian Lung Association
- Canadian Heart Foundation
- Canadian Council on Smoking and Health
- U.S. Surgeon General/U.S. Department of Health and Human Services
- World Health Organization
- International Agency for Research on Cancer.

It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills. Given this fact, can Parliament validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use? In my view, there is no question that it can. "Health", of course, is not an enumerated head under the *Constitution Act, 1867*. As Estey J. observed in *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142:

> . . . "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.

bronchite/emphysème chronique au Canada et aux États-Unis. De plus, l'habitude de fumer est une cause importante des décès attribuables aux anévrismes aortiques, aux maladies artérielles périphériques et aux incendies. Il existe de plus en plus de données que l'usage du tabac est également une importante cause des décès résultant d'accidents cérébrovasculaires.

La documentation scientifique établit bien hors de tout doute raisonnable le rôle de l'usage du tabac comme cause des principales maladies qui viennent d'être décrites. Cette conclusion est acceptée par toutes les grandes organisations professionnelles de la santé ainsi que par de nombreux gouvernements et organismes internationaux, dont:

- Association médicale canadienne
- Association canadienne de santé publique
- Santé et Bien-être social Canada
- Société canadienne du cancer
- Association pulmonaire du Canada
- Fondation canadienne des maladies du cœur
- Conseil canadien sur le tabagisme et la santé
- Surgeon General et Department of Health and Human Services des États-Unis
- Organisation mondiale de la santé
- Centre international de recherche sur le cancer.

Il appert donc que les effets nocifs de l'usage du tabac sur la santé sont à la fois saisissants et importants. En deux mots, le tabac tue. Compte tenu de ce fait, le Parlement peut-il validement se servir du droit criminel pour interdire aux fabricants des produits du tabac d'inciter la population canadienne à consommer ces produits et pour mieux la sensibiliser aux méfaits du tabac? À mon avis, il ne fait aucun doute qu'il peut le faire. De toute évidence, la «santé» n'est pas un chef de compétence énuméré dans la *Loi constitutionnelle de 1867*. Comme le fait observer le juge Estey dans l'arrêt *Schneider c. La Reine*, [1982] 2 R.C.S. 112, à la p. 142:

> . . . la «santé» n'est pas l'objet d'une attribution constitutionnelle spécifique, mais constitue plutôt un sujet indéterminé que les lois fédérales ou provinciales valides peuvent aborder selon la nature ou la portée du problème de santé en cause dans chaque cas.

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.

33 As I have indicated, it is clear that this legislation is directed at a public health evil and that it contains prohibitions accompanied by penal sanctions. Is it colourable? In my view, it is not. Indeed, it is difficult to conceive what Parliament's purpose could have been in enacting this legislation apart from the reduction of tobacco consumption and the protection of public health. If Parliament's underlying purpose or intent had been to encroach specifically upon the provincial power to regulate advertising, it would surely have enacted legislation applying to advertising in more than one industry. Similarly, if Parliament's intent had been to regulate the tobacco industry as an industry, and not merely to combat the ancillary health effects resulting from tobacco consumption, then it would surely have enacted provisions that relate to such matters as product quality, pricing and labour relations. In this respect, the present cases must be distinguished from cases such as *Morgentaler*, *supra*, where there was evidence that Nova Scotia's major purpose in enacting the *Medical Ser-*

Vu que la santé comme matière constitutionnelle présente un caractère «informe» et qu'il s'ensuit que tant le Parlement que les législatures provinciales peuvent validement légiférer dans ce domaine, il importe de faire ressortir de nouveau la nature plénière de la compétence en matière de droit criminel. Dans le *Renvoi sur la margarine*, précité, aux pp. 49 et 50, le juge Rand établit clairement que la protection de la «santé» constitue un des «buts habituels» du droit criminel, et que la compétence en matière de droit criminel peut validement être exercée pour protéger le public contre un «effet nuisible ou indésirable». Le fédéral possède une vaste compétence pour ce qui est de l'adoption de lois en matière criminelle relativement à des questions de santé, et cette compétence n'est circonscrite que par les exigences voulant qu'elles comportent une interdiction accompagnée d'une sanction pénale, et qu'elles visent un mal légitime pour la santé publique. Si une loi fédérale donnée possède ces caractéristiques et ne constitue pas par ailleurs un empiétement «spécieux» sur la compétence provinciale, c'est alors une loi valide en matière criminelle; voir *Scowby*, précité, aux pp. 237 et 238.

Comme je l'ai indiqué, il est clair que la loi est dirigée contre un mal touchant la santé publique et qu'elle renferme des interdictions assorties de sanctions pénales. Est-elle spécieuse? À mon avis, elle ne l'est pas. En fait, outre la diminution de l'usage du tabac et la protection de la santé publique, il est difficile de concevoir quel aurait pu être l'objectif du Parlement lorsqu'il a adopté cette loi. Si l'objet ou l'intention sous-jacents du Parlement avaient été d'empiéter spécifiquement sur la compétence provinciale en matière de réglementation de la publicité, il aurait certainement adopté une loi applicable à la publicité dans plus d'une industrie. De même, si l'intention du Parlement avait été de réglementer l'industrie du tabac en tant qu'industrie, et non simplement de lutter contre les effets indirects de l'usage du tabac sur la santé, il aurait sûrement adopté des dispositions se rapportant à des questions comme la qualité du produit, la fixation des prix et les relations du travail. À cet égard, les présents pourvois se distinguent notamment de l'arrêt *Morgentaler*, précité, dans lequel il

vices Act, R.S.N.S. 1989, c. 281, which purported to be for the control of private health care facilities, was in fact the elimination of free-standing abortion clinics, or *Switzman v. Elbling*, [1957] S.C.R. 285, where it was clear that Quebec's intention in enacting the *Act Respecting Communistic Propaganda*, R.S.Q. 1941, c. 52, was not to control the use of property but to suppress freedom of speech, a federal matter. In both these cases, it was clear that the provincial legislature was attempting to intrude indirectly upon federal powers when it could not do so directly; see also *Re Upper Churchill Water Rights Reversion Act*, *supra*. By contrast, there is no evidence in the present cases that Parliament had an ulterior motive in enacting this legislation, or that it was attempting to intrude unjustifiably upon provincial powers under ss. 92(13) and (16). They thus differ from the *Margarine Reference*, *supra*, where the prohibition was not really directed at curtailing a public evil, but was in reality, in pith and substance, aimed at regulating the dairy industry.

existait une preuve que la Nouvelle-Écosse visait avant tout l'élimination des cliniques d'avortement autonomes, lorsqu'elle a adopté la *Medical Services Act*, R.S.N.S. 1989, ch. 281, dont l'objet était supposément de contrôler les établissements de santé privés, et de l'arrêt *Switzman c. Elbling*, [1957] R.C.S. 285, dans lequel il était évident que le Québec, en adoptant la *Loi concernant la propagande communiste*, S.R.Q. 1941, ch. 52, ne visait pas à contrôler l'utilisation des biens mais plutôt à supprimer la liberté d'expression, matière de compétence fédérale. Dans ces deux affaires, il est clair que la législature provinciale tentait d'empiéter indirectement sur les compétences fédérales parce qu'elle ne pouvait le faire directement; voir aussi le *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, précité. Par contre, il n'existe dans les présents pourvois aucune preuve que le Parlement avait une arrière-pensée lorsqu'il a adopté cette loi, ou encore qu'il tentait d'empiéter de façon injustifiable sur les compétences attribuées aux provinces en vertu des par. 92(13) et (16). Les présents pourvois diffèrent donc du *Renvoi sur la margarine*, précité, dans lequel l'interdiction ne visait pas vraiment à s'attaquer à un mal public, mais en fait, compte tenu du caractère véritable de la loi en cause, à réglementer l'industrie laitière.

Why, then, has Parliament chosen to prohibit tobacco advertising, and not tobacco consumption itself? In my view, there is a compelling explanation for this choice. It is not that Parliament was attempting to intrude colourably upon provincial jurisdiction but that a prohibition upon the sale or consumption of tobacco is not a practical policy option at this time. It must be kept in mind that the very nature of tobacco consumption makes government action problematic. Many scientists agree that the nicotine found in tobacco is a powerfully addictive drug. For example, the United States Surgeon General has concluded that "[c]igarettes and other forms of tobacco are addicting" and that "the processes that determine tobacco addiction are similar to those that determine addiction to other drugs, including illegal drugs"; see *The Health Consequences of Smoking — Nicotine Addiction — A report of the Surgeon General* (1988). Given the addictive nature of tobacco

34

Pourquoi, alors, le Parlement a-t-il choisi d'interdire la publicité en faveur des produits du tabac et non leur usage? À mon avis, ce choix repose sur une justification impérative. En fait, ce n'est pas que le Parlement tentait d'empiéter de façon déguisée sur une compétence provinciale, mais bien qu'une interdiction de vente ou d'usage du tabac ne constitue pas pour lui une option politique pratique pour le moment. Il faut se rappeler que la nature même de l'usage du tabac rend l'action gouvernementale problématique. De nombreux scientifiques conviennent que la nicotine que l'on trouve dans le tabac constitue une drogue qui crée une forte dépendance. Par exemple, le Surgeon General des États-Unis a conclu que [TRADUCTION] «[l]es cigarettes et les autres types de produits du tabac créent une dépendance» et que «les méthodes de détermination de la dépendance au tabac sont semblables à celles utilisées pour d'autres drogues, y compris les drogues illicites»;

products, and the fact that over one-third of Canadians smoke, it is clear that a legislative prohibition on the sale and use of tobacco products would be highly impractical. Indeed a prohibition on the manufacture and sale of tobacco products would likely lead many smokers to resort to alternative, and illegal, sources of supply. As legislators in this country discovered earlier in the century, the prohibition of a social drug such as tobacco or alcohol leads almost inevitably to an increase in smuggling and crime.

35 However, the mere fact that it is not practical or realistic to implement a prohibition on the use or manufacture of tobacco products does not mean that Parliament cannot, or should not, resort to other intermediate policy options. As Sheila Copps, then an opposition MP, commented during the debate concerning Bill C-51, *House of Commons Debates*, *supra*, at p. 11047:

> We realize that tobacco has been a part of our culture for many hundreds of years. We realize that the negative health effects of tobacco have become evident only in the last number of years. Yet frankly, from a strict political point of view, I do not think any political party would want to go into the next election trumpeting itself as the party which will introduce prohibition on tobacco. That is a fact.
>
> If we are stopping short of actually banning the sale of this hazardous product, what steps are we prepared to take to cut down on its use over the next number of years? Certainly, a ban on tobacco advertising is one strategy which is supportable in the move to cut down on the consumption of tobacco.

Jake Epp, the Minister of National Health and Welfare, made a similar observation during the debate, at p. 11045:

> Prohibiting the sale of a social drug like tobacco is not feasible, but prohibiting the advertising and promotion of this toxic substance is both feasible and desirable . . . .

voir *The Health Consequences of Smoking — Nicotine Addiction — A report of the Surgeon General* (1988). Vu que les produits du tabac créent une dépendance et que plus d'un tiers de la population canadienne fume, il est clair qu'une interdiction législative de vente et d'usage des produits du tabac est tout à fait inconcevable en pratique. En effet, interdire la fabrication et la vente des produits du tabac inciterait vraisemblablement de nombreux fumeurs à s'approvisionner autrement et illégalement. Comme les législateurs de notre pays l'ont découvert au début du siècle, l'interdiction d'une drogue sociale comme le tabac ou l'alcool mène presque inévitablement à un accroissement de la contrebande et du crime.

Cependant, le simple fait qu'il n'est ni pratique ni réaliste de mettre en œuvre une interdiction d'usage ou de fabrication des produits du tabac ne signifie pas que le Parlement ne peut ni ne devrait avoir recours à d'autres options intermédiaires. Comme l'a affirmé M^me^ Sheila Copps, alors députée de l'opposition, au cours du débat sur le projet de loi C-51, *Débats de la Chambre des communes*, *op. cit.*, à la p. 11047:

> Nous savons que le tabac fait partie de notre culture depuis des siècles, et que ses effets nocifs ne sont connus que depuis quelques années. Pourtant, il faut bien admettre qu'aucun parti politique, à mon avis, mènerait une campagne électorale tambour battant sur l'interdiction du tabac. Voilà la réalité.
>
> Or, si nous sommes encore bien loin d'interdire la vente de ce produit dangereux, jusqu'où accepterions-nous d'aller pour en réduire progressivement la consommation? Certes, interdire la publicité sur le tabac est une politique acceptable comme mesure progressive.

Jake Epp, ministre de la Santé nationale et du Bien-être social, a fait une observation similaire au cours du débat, à la p. 11045:

> Il n'est pas possible d'interdire la vente d'une drogue aussi répandue dans notre société que le tabac peut l'être, mais il est à la fois possible et souhaitable d'en interdire la publicité et la promotion . . .

The advertising ban is but only a part, although a key part, of a long term comprehensive health oriented policy on tobacco and smoking. The long term objective is to bring about a significant decline in smoking and tobacco consumption. An essential tool for meeting this objective is the national program to reduce tobacco use, a joint effort of provincial, territorial, and the federal Governments plus major health organizations. In the short term, the Government's objectives are to strengthen the existing trend against the social acceptability of smoking and to enhance the credibility of the health message.

It is apparent from these comments that the social problems created by tobacco consumption are complex and that innovative legislative solutions are required to address them effectively. Faced with the insurmountable difficulties a complete prohibition upon tobacco consumption would create, the federal Parliament has undertaken the task of devising such solutions. Indeed, the Act forms only one part of a comprehensive and multifaceted federal and provincial program to control and reduce the consumption of tobacco. This program has been in development for over 25 years. As early as 1969, the Standing Committee on Health, Welfare and Social Affairs produced a report entitled *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking* (1969). In that report, the Committee advocated the progressive elimination of tobacco consumption through the introduction of intermediate measures. The Committee stated, at p. 30:

While it is clear that cigarette sales cannot be banned at this time, it is equally clear that the production, distribution and sale of cigarettes should no longer be considered in the same light as the production, distribution and sale of other products. It seems reasonable to introduce whatever steps are feasible to progressively eliminate the promotion of cigarette sales and preparations should be made to assist growers and others affected by reductions in cigarette sales. It is also desirable to increase educational efforts to discourage cigarette smoking and to expand activities to make cigarette smoking less hazardous for those who continue to smoke.

L'interdiction de la publicité n'est qu'un aspect, même s'il est important, d'une vaste politique à long terme, en matière de santé, concernant le tabac et son usage. L'objectif à long terme est d'abaisser notablement la consommation de tabac. L'outil essentiel pour y parvenir est le programme national de réduction de l'usage du tabac, effort conjoint des gouvernements provinciaux, territoriaux et fédéral et des principales organisations du domaine de la santé. À court terme, les objectifs du gouvernement sont de renforcer la tendance actuelle contre l'acceptabilité sociale de l'usage du tabac et d'améliorer la crédibilité du message dénonçant le coût pour la santé.

Ces commentaires indiquent clairement que les problèmes sociaux créés par l'usage du tabac sont complexes et qu'il faut de nouvelles solutions législatives pour les résoudre efficacement. Aux prises avec les difficultés insurmontables que créerait l'interdiction complète de l'usage du tabac, le Parlement a entrepris de concevoir ces solutions. En fait, la Loi ne constitue qu'une facette d'un programme fédéral et provincial exhaustif destiné à contrôler et à réduire l'usage du tabac. Ce programme évolue depuis plus de 25 ans. En effet, dès 1969, le Comité permanent de la santé, du bien-être social et des affaires sociales a produit un rapport intitulé: *Rapport du Comité permanent de la santé, du bien-être social et des affaires sociales sur l'usage du tabac et de la cigarette* (1969). Dans ce rapport, le Comité préconise l'élimination progressive de l'usage du tabac par l'établissement de mesures intermédiaires. Il affirme à la p. 30:

Bien qu'il soit évident que la vente des cigarettes ne peut pas être interdite en ce moment, il est également manifeste que la production, la distribution et la vente de ces produits ne peuvent plus être envisagées dans la même perspective que la production, la distribution et la vente d'autres produits. Il semble raisonnable, au présent stade, de recourir à toute mesure pratique en vue d'éliminer progressivement la promotion des ventes de cigarettes et il faut en même temps établir des projets destinés à aider les producteurs et les autres personnes qui seront lésées par la mévente des cigarettes. Il serait en outre souhaitable d'intensifier les mesures d'éducation populaire en vue de décourager les fumeurs et de déployer des efforts en vue de rendre la cigarette moins dangereuse pour les fumeurs invétérés.

In this regard, the Committee recommended, at p. 32, that "cigarette advertising and all other promotion of cigarette sales be progressively eliminated" and suggested, at pp. 52-53, a complete elimination of all cigarette promotional activities within four years from enactment of any legislation. Since 1969, the Department of National Health and Welfare has introduced a variety of educational programmes and has supported research and health promotion organizations in the battle against tobacco consumption. In 1983, for example, Health and Welfare Canada published *Canadian Initiatives in Smoking and Health* in which it stated, at pp. 79 and 81:

A major initiative toward concerted action with the ten provinces and the two territories began in 1980, when smoking and health was identified as a high priority area for joint action. In November 1980, a federal-provincial working group was established.

When this task force reported back a year later, both federal and provincial governments were involved in a variety of smoking prevention, cessation, and research projects. The scale of these activities had grown apace and presented many opportunities for mutual assistance and cooperation.

For its part, the federal government was engaged in support, research, and program development and implementation in several critical areas.

. . .

The Health Promotion Directorate, responsible for the overall smoking and health program, was engaged in research and data base development projects; a major national prevention project, "Toward a Generation of Non-Smoking Canadians"; a cessation project with community pharmacists; and a mass media, community-linked cessation campaign, "Time to Quit", aimed at the general public.

À cet égard, le Comité a recommandé à la p. 32 que «la publicité sur la cigarette et toute autre forme de promotion des ventes de cigarettes soient progressivement éliminées», et il a proposé aux pp. 52 et 53 une élimination complète de toute publicité sur la cigarette dans les quatre années suivant l'adoption d'une loi. Depuis 1969, le ministère de la Santé nationale et du Bien-être social a présenté toute une gamme de programmes éducatifs et a appuyé les organismes de recherche et de promotion de la santé dans la lutte contre l'usage du tabac. Par exemple, en 1983, Santé et Bien-être social Canada a publié un document intitulé *Initiatives canadiennes en matière de santé et de lutte contre l'usage du tabac* dans lequel il affirme aux pp. 80 et 82:

Une initiative d'envergure visant à favoriser la prise de mesures concertée par les provinces et les deux territoires du Canada débuta en 1980, lorsque la santé et la lutte contre le tabagisme furent définis comme étant des secteurs prioritaires à l'égard desquels il convenait de prendre des mesures conjointes. En novembre 1980, un groupe de travail fédéral-provincial fut créé.

Lorsque ce groupe de travail présenta son rapport un an plus tard, les autorités tant fédérales que provinciales étaient engagées dans toute une gamme de projets axés sur la prévention du tabagisme, sur la cessation et sur la recherche. L'envergure de ces activités avait connu une expansion rapide et offrait de nombreuses possibilités d'aide et de collaboration.

Pour sa part, le gouvernement fédéral s'occupait de financement, de recherche ainsi que d'élaboration et de mise sur pied de programmes dans plusieurs secteurs critiques.

. . .

La Direction de la promotion de la santé, chargée de l'administration de l'ensemble du Programme canadien sur le tabac et la santé, exécutait les projets de recherche et de création de banques de données, un projet national d'envergure en matière de prévention, «Vers une génération de non-fumeurs», un projet de lutte contre le tabagisme conjointement avec les pharmaciens communautaires, ainsi qu'une campagne de lutte contre le tabagisme administrée dans les collectivités et diffusée dans les médias à l'intention du grand public qui s'intitulait «Moi aussi, j'écrase».

In 1985, "federal, provincial and territorial ministers of health agreed to work jointly with non-governmental organizations in the development and implementation of a National Program to Reduce Tobacco Use" ("Break free — For a new generation of non-smokers"); see Health and Welfare Canada, *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective* (1987). In June 1987, Health and Welfare Canada released a "Directional paper of the national program to reduce tobacco use in Canada", where, at p. 4, seven "strategic directions" were recommended to "achieve a non-smoking program that will assist in producing a generation of non-smokers by the year 2000":

1. Legislation
2. Access to Information
3. Availability of Services/Programs
4. Message Promotion
5. Support for Citizen Action
6. Intersectoral Policy Coordination
7. Research/Knowledge Development

Among the legislative measures recommended in that Paper were the identification of tobacco products as hazardous products and the "prohibition of direct or indirect advertising, promotion and sponsorship of tobacco products or requirement of large health warnings to make promotion less attractive" (p. 20). In 1988, the legislative committee responsible for studying Bill C-51, which was subsequently adopted by Parliament as the Act, held hearings and heard from 104 organizations representing a variety of interests, including medicine, transport, advertising, smokers' rights, non-smokers' rights, and tobacco production.

Subsequent to the passage of the Act, Parliament has also introduced an array of legislative measures as part of its larger initiative to curb tobacco consumption. These include a law prohibiting the sale of tobacco to minors (*Tobacco Sales to Young Persons Act*, S.C. 1993, c. 5.), a law eliminating

En 1985, [TRADUCTION] «les ministres fédéral, provinciaux et territoriaux de la santé ont accepté de travailler conjointement avec les organismes non gouvernementaux à l'élaboration et à la mise en œuvre d'un programme national de lutte contre le tabagisme» («Pour une nouvelle génération de non-fumeurs»); voir Santé et Bien-être social Canada, *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective* (1987). En juin 1987, Santé et Bien-être social Canada a publié un «Document d'orientation du programme national de lutte contre le tabagisme au Canada», dans lequel, à la p. 4, on recommandait sept «orientations stratégiques» pour «favoriser le non-usage du tabac en vue de créer une génération de non-fumeurs d'ici l'an 2000»: 37

1. Législation
2. Accès à l'information
3. Accessibilité des services et des programmes
4. Diffusion de messages anti-tabac
5. Appui des initiatives communautaires
6. Coordination intersectorielle
7. Expansion des connaissances et des recherches

Parmi les mesures législatives recommandées dans ce document, on note entre autres qu'il faut indiquer que les produits du tabac sont des substances toxiques et qu'il faut «interdire la publicité, la promotion et le parrainage directs ou indirects des produits du tabac; rendre la promotion de ces produits moins attrayante ou exiger que l'emballage de tous les produits du tabac porte des mises en garde bien en évidence» (p. 20). En 1988, le comité législatif responsable de l'étude du projet de loi C-51, qui est par la suite devenu la Loi, a tenu des auditions au cours desquelles il a obtenu le point de vue de 104 organisations représentatives de tout un éventail d'intérêts: médecine, transports, publicité, groupes de fumeurs, groupes de non-fumeurs et producteurs de tabac.

À la suite de l'adoption de la Loi, le Parlement a aussi déposé toute une gamme de mesures législatives dans le cadre de son vaste programme de lutte contre l'usage du tabac. Mentionnons notamment une loi interdisant la vente de produits du tabac à des mineurs (*Loi sur la vente du tabac aux* 38

smoking in federal government work environments (*Non-smokers' Health Act*, S.C. 1988, c. 21), and the prohibition of the sale of cigarettes in the small package formats often purchased by children (so-called "kiddie packs" of less than 20 cigarettes); see *An Act to amend the Excise Act, the Customs Act and the Tobacco Sales to Young Persons Act*, S.C. 1994, c. 37. Parliament has also sought to reduce smoking through major tax increases in 1985, 1989 and 1991, although taxes were partially rolled back in 1994 due to a large contraband problem. Also relevant is that nine provinces have introduced legislation respecting the sale of tobacco to young persons and smoking in public places (*Tobacco Control Act, 1994*, S.O. 1994, c. 10; *Tobacco Control Act*, S.N. 1993, c. T-4.1; *Tobacco Access Act*, S.N.S. 1993, c. 14; *Tobacco Sales Act*, S.N.B. 1993, c. T-6.1; *Tobacco Sales to Minors Act*, S.P.E.I. 1991, c. 44; *The Minors Tobacco Act*, R.S.S. 1965, c. 381; *An Act to Protect the Health of Non-smokers*, S.M. 1990, c. S125; *Tobacco Product Act*, R.S.B.C. 1979, c. 403, as amended, S.B.C. 1992, c. 81; *An Act Respecting the Protection of Non-smokers in Certain Public Places*, R.S.Q., c. P-38.01).

39 Quite clearly, then, Parliament has been innovative in seeking to find alternatives to a prohibition on the sale or use of tobacco. In light of the practical difficulties entailed in prohibiting the sale or consumption of tobacco, and the resulting need for innovative legislative solutions, Parliament's decision to criminalize tobacco advertisement and promotion is, in my view, a valid exercise of the criminal law power. This Court has long recognized that Parliament may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health, and that Parliament may also validly impose labelling and packaging requirements on dangerous products with a view to protecting public health. This was recognized as early as the *Margarine Reference*, *supra*. There, it is true, this Court decided that s. 5(*a*) of the *Dairy Industry Act*, R.S.C. 1927, c. 45, which prohibited

jeunes, L.C. 1993, ch. 5), une loi éliminant l'usage du tabac dans les lieux de travail fédéraux (*Loi sur la santé des non-fumeurs*, L.C. 1988, ch. 21) et une loi interdisant la vente de cigarettes dans des petits paquets souvent achetés par des enfants (contenant moins de 20 cigarettes); voir la *Loi modifiant la Loi sur l'accise, la Loi sur les douanes et la Loi sur la vente du tabac aux jeunes*, L.C. 1994, ch. 37. Le Parlement a également cherché à réduire l'usage du tabac par d'importantes majorations de taxes en 1985, 1989 et 1991; cependant, ces taxes ont été partiellement éliminées en 1994 à cause d'un grave problème de contrebande. Il est également pertinent de mentionner que neuf provinces ont adopté des lois relatives à la vente de tabac aux jeunes et à l'usage du tabac dans les endroits publics (*Loi de 1994 sur la réglementation de l'usage du tabac*, L.O. 1994, ch. 10; *Tobacco Control Act*, S.N. 1993, ch. T-4.1; *Tobacco Access Act*, S.N.S. 1993, ch. 14; *Loi sur les ventes de tabac*, L.N.-B. 1993, ch. T-6.1; *Tobacco Sales to Minors Act*, S.P.E.I. 1991, ch. 44; *The Minors Tobacco Act*, R.S.S. 1965, ch. 381; *Loi sur la protection de la santé des non-fumeurs*, L.M. 1990, ch. S125; *Tobacco Product Act*, R.S.B.C. 1979, ch. 403, modifiée, S.B.C. 1992, ch. 81; *Loi sur la protection des non-fumeurs dans certains lieux publics*, L.R.Q., ch. P-38.01).

Il est très clair que le Parlement a été innovateur en cherchant à trouver des solutions de rechange à une interdiction de vente ou d'usage du tabac. Compte tenu des difficultés pratiques liées à une telle interdiction et de la nécessité qui s'ensuit de trouver des solutions législatives innovatrices, la décision du Parlement de rendre criminelles la publicité et la promotion du tabac constitue, à mon avis, un exercice valide de sa compétence en matière de droit criminel. Notre Cour a depuis longtemps reconnu que le Parlement peut validement utiliser cette compétence pour interdire ou contrôler la fabrication, la vente et la distribution de produits qui présentent un danger pour la santé publique, et qu'il peut aussi validement imposer des exigences en matière d'étiquetage et d'emballage de produits dangereux dans le but de protéger la santé publique. Cela a été reconnu dès le *Renvoi sur la margarine*, précité. Certes, dans ce renvoi,

the importation of margarine into Canada, was *ultra vires* the federal Parliament, but this decision was based on the holding that margarine was not a threat to the health of Canadians and, accordingly, that s. 5(*a*) was an invalid intrusion upon the provincial power to regulate local trade. However, in so deciding, the Court also made clear that the federal Parliament could validly legislate under the criminal law power with respect to health and product safety. In his concurring reasons, *supra*, at pp. 82-83, Locke J. stated:

> It cannot, in my opinion, be successfully contended that if the real purpose of the prohibition of the importation, manufacture or sale of these products was the protection of the general health of the public the Dominion might not properly legislate.

Later, in *R. v. Wetmore*, [1983] 2 S.C.R. 284, this Court addressed the question whether ss. 8 and 9 of the *Food and Drugs Act*, R.S.C. 1970, c. F-27, which prohibited the sale of drugs prepared under unsanitary conditions and false or misleading advertisement of drugs, were a valid exercise of the federal criminal law power. Those provisions read as follows:

> **8.** No person shall sell any drug that
>
> (*a*) was manufactured, prepared, preserved, packed or stored under unsanitary conditions; . . .
>
> **9.** (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

In upholding the constitutionality of these provisions under s. 91(27), Laskin C.J., writing for the majority, stated, at pp. 288-89:

> An examination of the various provisions of the *Food and Drugs Act* shows that it goes beyond mere prohibi-

notre Cour a décidé que l'al. 5*a*) de la *Loi de l'industrie laitière*, S.R.C. 1927, ch. 45, qui interdisait l'importation de margarine au Canada, était *ultra vires* du Parlement; cependant, en prenant cette décision, notre Cour est partie de la prémisse que la margarine ne constituait pas un danger pour la santé des Canadiens et elle a en conséquence statué que l'al. 5*a*) constituait un empiétement non valide sur la compétence provinciale de réglementer le commerce local. Toutefois, dans sa décision, notre Cour a clairement établi que le Parlement pouvait validement légiférer en vertu de sa compétence en matière de droit criminel relativement à la santé et à la sécurité des produits. Dans des motifs concordants, aux pp. 82 et 83, le juge Locke affirme:

> [TRADUCTION] À mon avis, on ne peut avoir gain de cause en soutenant que le Dominion ne peut légiférer si l'objet réel de l'interdiction d'importation, de fabrication ou de vente de ces produits est la protection de la santé du public.

Plus tard, dans l'arrêt *R. c. Wetmore*, [1983] 2 R.C.S. 284, notre Cour a examiné la question de savoir si les art. 8 et 9 de la *Loi des aliments et drogues*, S.R.C. 1970, ch. F-27, qui interdisaient la vente de drogues préparées dans des conditions non hygiéniques et l'annonce de manière fausse et trompeuse de drogues, constituaient un exercice valide de la compétence fédérale en matière de droit criminel. Voici le libellé des dispositions en question:

> **8.** Nul ne doit vendre quelque drogue
>
> *a*) qui a été fabriquée, préparée, conservée, empaquetée ou emmagasinée dans des conditions non hygiéniques; . . .
>
> **9.** (1) Nul ne doit étiqueter, empaqueter, traiter, préparer, vendre ou annoncer quelque drogue de manière fausse, trompeuse ou mensongère, ou qui peut créer une fausse impression quant à la nature, valeur, quantité, composition, ou quant aux avantages ou à la sûreté de la drogue.

Lorsqu'il a confirmé la constitutionnalité de ces dispositions en vertu du par. 91(27), le juge en chef Laskin, s'exprimant au nom de la majorité, affirme aux pp. 288 et 289:

> Il ressort d'un examen des différentes dispositions de la *Loi des aliments et drogues* que cette loi va au delà de

tion to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture. The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seem to me to subjoin a trade and commerce aspect beyond mere criminal law alone. There appear to be three categories of provisions in the *Food and Drugs Act*. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Part III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.

However, it is unnecessary to pursue this issue and it has been well understood over many years that protection of food and other products against adulteration and to enforce standards of purity are properly assigned to the criminal law. [Emphasis added.]

It is clear from Laskin C.J.'s analysis that legislation with respect to food and drugs that is aimed at protecting the "physical health and safety of the public" is a valid exercise of the federal criminal law power. This was also the view of the British Columbia Court of Appeal in *Standard Sausage Co. v. Lee*, [1933] 4 D.L.R. 501, supplemented by addendum at [1934] 1 D.L.R. 706, affirmed in *Wetmore*, *supra*, at pp. 292-93, where it upheld the constitutionality under the criminal law power of a prohibition against the adulteration of foods under ss. 3, 4 and 23 of the *Food and Drugs Act*, R.S.C. 1927, c. 76. In reaching this decision, Macdonald J.A. stated, at pp. 506-7:

. . . if the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under s. 91 (27) of the B.N.A. Act. This is not in essence an interference with property and civil rights. That may follow as an incident but the real purpose (not colourable and not merely to aid what in

la simple prohibition et qu'elle fixe des normes notamment en ce qui concerne l'étiquetage, l'empaquetage et la fabrication, de sorte qu'elle ne relève pas exclusivement du par. 91(27). Les ramifications de la Loi, qui porte sur les aliments, les drogues, les cosmétiques et les instruments, et l'accent qu'elle met sur les normes de commercialisation me semblent lui prêter un aspect commercial qui transcende le simple droit criminel. La *Loi des aliments et drogues* semble comprendre trois catégories de dispositions. Celles de l'art. 8 visent à protéger la santé et la sécurité physiques du public. Les dispositions de l'art. 9 portent sur la commercialisation et celles relatives aux drogues contrôlées, qui figurent dans la partie III de la Loi, ont pour objet la protection de la santé morale du public. Les première et troisième catégories peuvent à juste titre être considérées comme relevant de la compétence en matière de droit criminel, mais la seconde emporte certainement l'application de la compétence en matière d'échanges et de commerce.

Toutefois, il n'est pas nécessaire d'examiner davantage cette question, car il est bien établi depuis fort longtemps que la protection des aliments et d'autres produits contre la falsification et l'application des normes de pureté ressortissent légitimement au droit criminel. [Je souligne.]

L'analyse du juge en chef Laskin indique clairement qu'une loi portant sur les aliments et les drogues qui vise à protéger «la santé et la sécurité physiques du public» constitue un exercice valide de la compétence fédérale en matière de droit criminel. Tel était également le point de vue de la Cour d'appel de la Colombie-Britannique dans l'arrêt *Standard Sausage Co. c. Lee*, [1933] 4 D.L.R. 501, complété par des motifs additionnels publiés à [1934] 1 D.L.R. 706, confirmé dans *Wetmore*, précité, aux pp. 292 et 293, et dans lequel on a déclaré constitutionnelle, comme relevant du droit criminel, une interdiction de falsification d'aliments prévue aux art. 3, 4 et 23 de la *Loi des aliments et drogues*, S.R.C. 1927, ch. 76. Lorsqu'il a rendu cette décision, le juge Macdonald a affirmé aux pp. 506 et 507:

[TRADUCTION] . . . si le Parlement fédéral, pour protéger la santé publique contre un danger réel ou appréhendé, apporte des restrictions aux agents de conservation qui peuvent être utilisés et en limite le nombre, il peut le faire en vertu du par. 91(27) de l'A.A.N.B. Ce n'est pas par essence une intrusion dans la propriété et les droits civils. Cela peut en découler accessoirement mais le vrai

substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all inhabitants of the Dominion.

. . .

The primary object of this legislation is the public safety — protecting it from threatened injury. If that is its main purpose — and not a mere pretence for the invasion of civil rights — it is none the less valid . . . .

Moreover, in my view, the necessary implication of the reasoning in *Wetmore* and the *Margarine Reference* is that the federal criminal law power to legislate with respect to dangerous goods also encompasses the power to legislate with respect to health warnings on dangerous goods. Since health warnings serve to alert Canadians to the potentially harmful consequences of the use of dangerous products, the power to prohibit sales without these warnings is simply a logical extension of the federal power to protect public health by prohibiting the sale of the products themselves. As noted by Lamer C.J. in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 999, "it has long been recognized that there also exists a preventative branch of the criminal law power". This is also the implication of this Court's decision in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, where Estey J., although finding a detailed regulatory scheme with respect to production and content standards for malt liquor under the *Food and Drugs Act*, R.S.C. 1970, c. F-27, to be *ultra vires* Parliament, observed, at pp. 933-34:

That there is an area of legitimate regulations in respect of trade practices contrary to the interest of the community such as misleading, false or deceptive advertising and misbranding, is not under debate.

In this respect, it is significant that Parliament has already enacted numerous prohibitions against

but (qui n'est pas déguisé, ni seulement un appui à ce qui est en substance un empiétement) est de prévenir un dommage réel ou appréhendé ou la probabilité d'un dommage de la plus grande gravité pour tous les habitants du Dominion.

. . .

L'objet premier de cette loi est la sécurité du public, en protégeant celui-ci contre un dommage appréhendé. Si c'est là son but principal — et non un simple prétexte pour s'ingérer dans le domaine des droits civils — sa validité n'est pas amoindrie . . .

En outre, à mon avis, il découle nécessairement du raisonnement dans l'arrêt *Wetmore* et dans le *Renvoi sur la margarine* que, dans le domaine du droit criminel, la compétence fédérale de légiférer relativement aux produits dangereux englobe également celle de légiférer quant aux mises en garde à apposer sur les produits dangereux. Puisque ces mises en garde servent à sensibiliser les Canadiens aux conséquences potentiellement nocives de l'utilisation de produits dangereux, le pouvoir d'interdire la vente de produits sur lesquels n'a pas été apposée cette mise en garde ne constitue qu'une extension logique de la compétence fédérale de protéger la santé publique par l'interdiction même de la vente de ces produits. Comme l'a fait remarquer le juge en chef Lamer dans l'arrêt *R. c. Swain*, [1991] 1 R.C.S. 933, à la p. 999, «[i]l est [. . .] reconnu depuis longtemps que le pouvoir en matière de droit criminel comporte aussi un aspect préventif». C'est également ce que sous-entend l'arrêt de notre Cour *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 914, dans lequel le juge Estey, après avoir conclu qu'un règlement détaillé concernant les normes de production et de contenu d'une liqueur de malt pris en vertu de la *Loi des aliments et drogues*, S.R.C. 1970, ch. F-27, était *ultra vires* du Parlement, a cependant fait remarquer aux pp. 933 et 934:

L'existence d'un secteur de réglementation légitime des pratiques commerciales contraires aux intérêts de la collectivité, tels que l'annonce et l'étiquetage trompeurs, faux ou mensongers, n'est pas en cause.

À cet égard, il importe de signaler que le Parlement a déjà adopté de nombreuses interdictions de

the manufacture, sale, advertisement and use of a great variety of products that Parliament deems, from time to time, to be dangerous or harmful. For example, the *Hazardous Products Act*, R.S.C., 1985, c. H-3, amended R.S.C., 1985, c. 24 (3rd. Supp.), s. 1, which has been found to be a valid exercise of the criminal law power by the Manitoba Court of Appeal in *R. v. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345, contains the following provisions:

2. In this Act,

"advertise", in relation to a prohibited product or restricted product, includes any representation by any means whatever for the purpose of promoting directly or indirectly the sale or other disposition of the product;

. . .

"controlled product" means any product, material or substance specified by the regulations made pursuant to paragraph 15(1)(*a*) to be included in any of the classes listed in Schedule II;

"hazardous product" means any prohibited product, restricted product or controlled product;

. . .

"prohibited product" means any product, material or substance included in Part I of Schedule I;

"restricted product" means any product, material or substance included in Part II of Schedule I;

. . .

4. (1) No person shall advertise, sell or import a prohibited product.

(2) No person shall advertise, sell or import a restricted product except as authorized by the regulations made under section 5.

5. The Governor in Council may make regulations

(*a*) authorizing the advertising, sale or importation of any restricted product and prescribing the circumstances and conditions under which and the persons by whom the restricted product may be advertised, sold or imported;

. . .

fabrication, de vente, de publicité et d'utilisation d'un grand nombre de produits qu'il considère à l'occasion comme dangereux ou nocifs. Par exemple, la *Loi sur les produits dangereux*, L.R.C. (1985), ch. H-3, modifiée, L.R.C. (1985), ch. 24 (3e suppl.), art. 1, que la Cour d'appel du Manitoba a jugé un exercice valide de la compétence en matière de droit criminel, dans l'arrêt *R. c. Cosman's Furniture (1972) Ltd.* (1976), 32 C.C.C. (2d) 345, renferme les dispositions suivantes:

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

«produit contrôlé» Produit, matière ou substance classés conformément aux règlements d'application de l'alinéa 15(1)*a*) dans une des catégories inscrites à l'annexe II.

«produit dangereux» Produit interdit, limité ou contrôlé.

«produit interdit» Produit, matière ou substance inscrits à la partie I de l'annexe I.

«produit limité» Produit, matière ou substance inscrits à la partie II de l'annexe I.

«publicité» S'entend notamment de la présentation, par tout moyen d'un produit interdit ou d'un produit limité en vue d'en promouvoir directement ou indirectement l'aliénation, notamment par vente.

. . .

4. (1) La vente, l'importation et la publicité des produits interdits sont interdites.

(2) Sauf autorisation contraire des règlements d'application de l'article 5, la vente, l'importation et la publicité des produits limités sont interdites.

5. Le gouverneur en conseil peut, par règlement:

a) autoriser la vente, l'importation ou la publicité de tout produit limité et prévoir les cas et conditions dans lesquels l'autorisation peut être donnée et à qui elle peut l'être;

. . .

15. (1) Subject to section 19, the Governor in Council may make regulations

. . .

(*d*) prescribing the form and manner in which information shall be disclosed on a label and the manner in which a label shall be applied to a controlled product or container in which a controlled product is packaged;

(*e*) prescribing hazard symbols and the manner in which hazard symbols shall be displayed on a controlled product or container in which a controlled product is packaged;

From the foregoing, it is clear that Parliament could, if it chose, validly prohibit the manufacture and sale of tobacco products under the criminal law power on the ground that these products constitute a danger to public health. Such a prohibition would be directly analogous to the prohibitions on dangerous drugs and unsanitary foods or poisons mentioned earlier, which quite clearly fall within the federal criminal law power. In my view, once it is accepted that Parliament may validly legislate under the criminal law power with respect to the manufacture and sale of tobacco products, it logically follows that Parliament may also validly legislate under that power to prohibit the advertisement of tobacco products and sales of products without health warnings. In either case, Parliament is legislating to effect the same underlying criminal public purpose: protecting Canadians from harmful and dangerous products.

Seen in this light, the only true distinction that can be drawn between the measures adopted under the Act and an outright prohibition on the sale or consumption of tobacco is with respect to the form employed by Parliament to combat the "evil" of tobacco consumption. However, such a distinction, unaccompanied by any evidence of colourability, is not constitutionally significant. Once it is conceded, as I believe it must be, that tobacco consumption has detrimental health effects and that Parliament's intent in enacting this legislation was

15. (1) Sous réserve de l'article 19, le gouverneur en conseil peut, par règlement:

. . .

d) fixer les modalités de la divulgation de renseignements sur une étiquette et de l'apposition de celle-ci sur un produit contrôlé ou sur le contenant dans lequel celui-ci est emballé;

e) fixer les signaux de danger et les modalités de leur affichage sur un produit contrôlé ou sur le contenant dans lequel celui-ci est emballé;

Il découle clairement de ce qui précède que le Parlement pourrait, s'il le désire, interdire validement la fabrication et la vente des produits du tabac en vertu de sa compétence en matière de droit criminel pour le motif que ces produits constituent un danger pour la santé publique. Une telle interdiction serait tout à fait analogue aux interdictions relatives aux drogues dangereuses et produits préparés dans des conditions non hygiéniques ou aux poisons, dont j'ai déjà parlé, lesquelles relèvent manifestement de la compétence fédérale en matière de droit criminel. À mon avis, lorsque l'on accepte que, en vertu de sa compétence en matière de droit criminel, le Parlement peut validement légiférer relativement à la fabrication et à la vente des produits du tabac, il s'ensuit logiquement qu'il peut aussi validement légiférer en vertu de cette compétence pour interdire la publicité des produits du tabac et la vente des produits ne comportant pas de mise en garde. Dans les deux cas, le Parlement se trouve à légiférer pour le même objectif public du droit criminel: protéger la population canadienne contre les produits nocifs et dangereux.

Vu sous cet angle, la seule véritable distinction susceptible d'être établie entre les mesures adoptées en vertu de la Loi et une interdiction absolue de vente ou d'usage des produits du tabac a trait au moyen employé par le Parlement pour lutter contre le «mal» que présente l'usage du tabac. Cependant, si elle n'est pas accompagnée d'une preuve de son caractère déguisé, une telle distinction n'est pas importante du point de vue constitutionnel. Lorsqu'il est admis, comme cela doit l'être à mon avis, que l'usage du tabac a des effets nocifs sur la santé

to combat these effects, then the wisdom of Parliament's choice of method cannot be determinative with respect to Parliament's power to legislate. The goal in a pith and substance analysis is to determine Parliament's underlying purpose in enacting a particular piece of legislation; it is not to determine whether Parliament has chosen that purpose wisely or whether Parliament would have achieved that purpose more effectively by legislating in other ways; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 358 (*per* Wilson J.) and *Morgentaler*, *supra*, at p. 487:

> Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.

There is no evidence that the practical effect of the Act, or the lack thereof, reflects any "alternative or ulterior purpose".

et que, lors de l'adoption de la loi en question, le Parlement souhaitait lutter contre ces effets, alors la sagesse de la méthode qu'il a choisie ne peut être déterminante relativement à sa compétence de légiférer. L'analyse du caractère véritable d'une loi a pour but de déterminer l'objet sous-jacent que visait le Parlement au moment de l'adoption de cette loi; il ne s'agit pas de déterminer s'il a choisi cet objet judicieusement ou s'il l'aurait atteint plus efficacement en légiférant autrement; voir *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, à la p. 358 (le juge Wilson), et *Morgentaler*, précité, à la p. 487:

> Ce n'est que lorsqu'une loi a des effets qui empiètent si directement sur un autre domaine qu'elle doit avoir un objet dissimulé que lesdits effets prennent eux-mêmes de l'importance aux fins de l'analyse . . .

Il n'existe aucune preuve que l'effet pratique de la Loi, ou l'absence d'effet, est l'indice d'un quelconque «objet dissimulé».

The Appellants' Principal Arguments

45 The foregoing considerations, it seems to me, are sufficient to establish that the pith and substance of the Act is criminal law for the purpose of protecting public health and that Parliament accordingly has the legislative authority under s. 91(27) of the *Constitution Act, 1867* to enact this legislation. However, I think it right to address directly the three principal arguments raised by the appellants in support of their submission that the Act is not valid as criminal law: first, that the conduct prohibited by the Act does not have an "affinity with a traditional criminal law concern"; second, that Parliament cannot criminalize an activity ancillary to an "evil" if it does not criminalize the "evil" itself; and, third, that the Act is more properly characterized as regulatory, not criminal, legislation. I will now address each of these arguments in turn.

Les principaux arguments des appelantes

Il me semble que les considérations qui précèdent suffisent à établir que la Loi, de par son caractère véritable, est une loi en matière de droit criminel visant à protéger la santé publique et que, par conséquent, le Parlement a la compétence législative, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*, de l'adopter. Cependant, j'estime opportun d'examiner directement les trois principaux arguments soulevés par les appelantes pour soutenir que la Loi n'est pas une loi valide en matière de droit criminel: premièrement, que la conduite interdite par la Loi n'a pas d'[TRADUCTION] «affinité avec une préoccupation traditionnelle en matière de droit criminel»; deuxièmement, que le Parlement ne peut rendre criminelle une activité accessoire à un «mal» s'il n'a pas donné un caractère criminel au «mal» lui-même, et troisièmement, qu'il convient davantage de qualifier la Loi de texte de nature réglementaire plutôt que de texte relevant du droit criminel. J'examinerai séparément chacun de ces arguments.

i. *Affinity of the Act with a Traditional Criminal Law Concern*

The appellants' first argument is that the Act is not a valid exercise of the criminal law power because it does not involve conduct having an affinity with a traditional criminal law concern. The appellants observe that both tobacco consumption and tobacco advertising have always been legal in this country and, on this basis, argue that this legislation does not serve a "public purpose commonly recognized as being criminal in nature"; see *Swain*, *supra*, at p. 998.

In my view, this argument fails because it neglects the well-established principle that the definition of the criminal law is not "frozen as of some particular time"; see *Zelensky*, *supra*, at p. 951 (*per* Laskin C.J.). It has long been recognized that Parliament's power to legislate with respect to the criminal law must, of necessity, include the power to create new crimes. This was made clear as early as 1931, when the Privy Council upheld the validity of the *Combines Investigation Act*, R.S.C. 1927, c. 26, in *PATA*, *supra*. That legislation criminalized a wide array of commercial activities not hitherto perceived to have an affinity with criminal law concerns. However, Lord Atkin explained that this fact alone was not sufficient to preclude the application of the criminal law power. He stated, at pp. 323-24:

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities

i. *Affinité de la Loi avec une préoccupation traditionnelle en matière de droit criminel*

Le premier argument des appelantes est que la Loi ne constitue pas un exercice valide de la compétence en matière de droit criminel parce qu'elle ne touche pas une conduite ayant une affinité avec une préoccupation traditionnelle en matière de droit criminel. Les appelantes font remarquer que l'usage du tabac et la publicité en sa faveur ont toujours été légales au Canada et, pour ce motif, elles soutiennent que la loi ne sert pas «une fin publique communément reconnue comme étant de nature criminelle»; voir *Swain*, précité, à la p. 998.

À mon avis, cet argument échoue parce qu'il ne tient pas compte du principe bien établi selon lequel la définition du droit criminel n'est pas «gelé[e] à une époque déterminée»; voir *Zelensky*, précité, à la p. 951 (le juge en chef Laskin). On a depuis longtemps reconnu que la compétence fédérale de légiférer en matière de droit criminel comprend nécessairement celle de définir de nouveaux crimes. Cela a été établi clairement dès 1931 lorsque le Conseil privé a confirmé la validité de la *Loi des enquêtes sur les coalitions*, S.R.C. 1927, ch. 26, dans l'arrêt *PATA*, précité. Cette loi rendait criminelles une vaste gamme d'activités commerciales que l'on ne considérait pas jusque là comme ayant une affinité avec les préoccupations en matière de droit criminel. Cependant, lord Atkin a expliqué que ce seul fait ne suffit pas à empêcher l'application de la compétence en matière de droit criminel. Il a affirmé, aux pp. 323 et 324:

[TRADUCTION] De l'avis de leurs Seigneuries, l'art. 498 du Code criminel et la plus grande partie des dispositions de la Loi des enquêtes sur les coalitions entrent dans le pouvoir qu'a le Parlement du Dominion de faire des lois en ce qui concerne les matières entrant dans la catégorie de sujets «le droit criminel, y compris la procédure en matière criminelle» (art. 91, par. 27). En substance, le but de la Loi est, dans son art. 2, de définir et, dans son art. 32, de rendre criminelles les coalitions que le législateur entend prohiber dans l'intérêt public. Cette définition est large et peut couvrir des activités que l'on ne considérait pas jusque-là comme criminelles. Mais seules sont touchées les coalitions «qui ont opéré ou sont de nature à opérer au détriment de l'intérêt du public, soit des consommateurs, des producteurs ou

which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.*, [1903] A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes . . . . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for 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 . . . . [Emphasis added.]

Soon after that decision, in *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368, the Privy Council adopted similar reasoning to uphold a prohibition on price discrimination under the criminal law power. Later, this Court, following in large part the reasoning employed by the Privy Council in *PATA*, *supra*, sustained a prohibition of resale price maintenance under the criminal law power (*Campbell v. The Queen*, [1965] S.C.R. vii) and a federal law authorizing the courts to make orders prohibiting the continuation of illegal practices or to dissolve illegal mergers; see *Goodyear Tire*, *supra*. In the *Goodyear Tire* case, at p. 311, Rand J. reaffirmed the reasoning in the *PATA* case and made the following observation:

It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable.

48 In my view, the reasoning in *PATA* and *Goodyear Tire* is directly applicable here. The simple

autres»; et si le Parlement décide à bon droit que lesdites activités commerciales doivent être réprimées dans l'intérêt public, leurs Seigneuries ne voient pas pourquoi le Parlement ne pourrait pas en faire des crimes. Le «droit criminel» signifie «le droit criminel dans son sens le plus large» (*Attorney-General for Ontario* c. *Hamilton Street Ry. Co.*, [1903] A.C. 524). Il ne se confine certainement pas à ce que le droit anglais ou celui d'une province quelconque considéraient comme des actes criminels en 1867. Ce pouvoir doit permettre de légiférer pour définir de nouveaux crimes. [. . .] Il apparaît assez vain à leurs Seigneuries de chercher à confiner les crimes à une catégorie d'actes qui, de par leur nature véritable, appartiennent au domaine du «droit criminel», car on ne peut fixer le domaine du droit criminel qu'en examinant quels actes l'État qualifie de crimes à chaque période en cause . . . [Je souligne.]

Peu de temps après cette décision, dans l'arrêt *Attorney-General for British Columbia c. Attorney-General for Canada*, [1937] A.C. 368, le Conseil privé a adopté un raisonnement similaire pour maintenir, en vertu de la compétence en matière de droit criminel, une prohibition de discrimination relative aux prix. Plus tard, notre Cour, se fondant en grande partie sur le raisonnement du Conseil privé dans l'arrêt *PATA*, précité, a confirmé une interdiction de maintien du prix de revente en vertu de la compétence en matière de droit criminel (*Campbell c. The Queen*, [1965] R.C.S. vii), ainsi qu'une loi fédérale autorisant les tribunaux à interdire par ordonnance la continuation de pratiques illégales ou à dissoudre des fusions illégales; voir *Goodyear Tire*, précité. Dans cet arrêt, à la p. 311, le juge Rand a de nouveau confirmé le raisonnement de l'arrêt *PATA* et fait l'observation suivante:

[TRADUCTION] Il est reconnu que le par. 91(27) de la loi sur la Confédération doit être interprété dans son sens le plus large, mais il ne s'agit pas pour autant d'établir un éventail fixe d'infractions ni de sanctions. L'évolution des types et des modèles d'activités sociales et économiques fait constamment appel à de nouveaux contrôles et restrictions de nature pénale, et, selon moi, on ne peut sérieusement soutenir que les nouveaux modes d'exécution et de sanction, adaptés à l'évolution des conditions, ne doivent pas être considérés comme faisant également partie de la compétence du Parlement.

À mon avis, les arrêts *PATA* et *Goodyear Tire* sont directement applicables en l'espèce. Le sim-

fact that neither tobacco consumption nor tobacco advertising have been illegal in the past in no way precludes Parliament from criminalizing either of those activities today. Indeed, given the fact that the first medical reports linking cigarette smoking to disease did not emerge until the 1950s, and that governments have only recently been made aware of the truly devastating health consequences of tobacco consumption, it is clear that Parliament had no reason, before that time, to criminalize this activity. The evolution in medical knowledge since the 1950s has radically altered the social and political landscape, producing a growing consensus, both nationally and internationally, that tobacco consumption is a *sui generis* problem that can only be properly addressed with an array of innovative and multifaceted legislative responses. In Canada, the decision to criminalize tobacco advertising was made incrementally, as part of a 25-year public policy process, and only after Parliament had determined that there was compelling evidence concerning the health effects of tobacco consumption and that the variety of non-criminal measures then in place were not sufficiently effective in reducing consumption. It would be artificial, if not absurd, to limit Parliament's power to legislate in this emerging area of public health concern simply because it did not, and logically could not, legislate at an earlier time.

ple fait que l'usage et la publicité du tabac n'étaient pas illégaux dans le passé n'empêche aucunement le Parlement de criminaliser l'une ou l'autre de ces activités aujourd'hui. En fait, puisque ce n'est que dans les années 50 qu'ont paru les premiers rapports médicaux reliant l'habitude de fumer à la maladie et que ce n'est que récemment que les gouvernements ont été mis au courant des conséquences véritablement nocives de l'usage du tabac pour la santé, il est clair que le Parlement n'avait auparavant aucune raison de criminaliser cette activité. L'évolution de la médecine depuis les années 50 a radicalement modifié le cadre social et politique, donnant lieu, sur les plans tant national qu'international, à un consensus de plus en plus grand selon lequel l'usage du tabac est un problème en soi auquel on ne peut s'attaquer efficacement que par une série de mesures législatives innovatrices et diversifiées. Au Canada, la décision de criminaliser la publicité du tabac a été prise progressivement dans le cadre d'un processus de politique gouvernementale échelonné sur une période de 25 ans et seulement après que le Parlement eut déterminé qu'il existait des données impératives sur les effets de l'usage du tabac sur la santé et que la gamme de mesures non criminelles alors en place n'étaient pas suffisamment efficaces pour réduire la consommation. Il serait artificiel, voire absurde, de restreindre la compétence du Parlement de légiférer dans ce nouveau domaine d'intérêt pour la santé publique simplement parce qu'il ne l'a pas fait, et ne pouvait logiquement pas le faire, auparavant.

ii. *The Ancillary Nature of the Prohibited Act*

The appellants' second argument is that the Act lacks the requisite "criminal public purpose" because Parliament cannot criminalize an activity ancillary to an "evil" (the advertisement and promotion of tobacco), when the underlying activity the legislation is designed to combat (the manufacture, sale and consumption of tobacco) is itself legal.

In my view, this argument fails because it cannot be reconciled with the recent jurisprudence of this Court. In both *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1

ii. *L'aspect secondaire de l'acte interdit*

Le deuxième argument des appelantes est que la Loi ne vise pas un «objectif public du droit criminel» parce que le Parlement ne peut criminaliser une activité portant sur un aspect secondaire d'un «mal» (la publicité et la promotion des produits du tabac) si l'activité sous-jacente à laquelle s'attaque la loi (la fabrication, la vente et l'usage du tabac) est elle-même légale. 49

À mon avis, cet argument échoue parce qu'il n'est pas compatible avec la jurisprudence récente de notre Cour. Tant dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, 50

S.C.R. 1123 (the *Prostitution Reference*), and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, this Court upheld the constitutionality of legislation that criminalized an ancillary activity without also criminalizing the underlying activity or "evil". In the *Prostitution Reference*, for example, this Court upheld the constitutionality of ss. 193 and 195.1(1)(*c*) of the *Criminal Code*, R.S.C. 1970, c. C-34, which prohibited the solicitation of clients for prostitution and the operation of bawdy houses, but did not, at the same time, prohibit prostitution itself. In reaching the conclusion that these provisions were constitutionally valid, Dickson C.J. reasoned as follows, at p. 1142:

> While I recognize that Parliament has chosen a circuitous path, I find it difficult to say that Parliament cannot take this route. The issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system. The fact that the sale of sex for money is not a criminal act under Canadian law does not mean that Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation. Unless or until this Court is faced with the direct question of Parliament's competence to criminalize prostitution, it is difficult to say that Parliament cannot criminalize and thereby indirectly control some element of prostitution — that is, street solicitation. [Emphasis in original.]

In that case, Lamer J. (as he then was) also made the following observation, at p. 1191:

> As I have noted above, prostitution itself is not a crime in Canada. Our legislators have instead, chosen to attack prostitution indirectly. The *Criminal Code* contains many prohibitions relating to the act of taking money in return for sexual services. Among the offences that relate to prostitution are the bawdy-house provisions, the procuring and pimping provisions, as well as other more general offences that indirectly have an impact on prostitution related activities; for example provisions such as disturbing the peace. In my view, these laws indicate that while on the face of the legislation the act

[1990] 1 R.C.S. 1123 (le *Renvoi sur la prostitution)* que dans l'arrêt *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, notre Cour a maintenu la constitutionnalité de lois qui criminalisaient une activité secondaire sans rendre criminelle l'activité ou le «mal» sous-jacents. Par exemple, dans le *Renvoi sur la prostitution*, notre Cour a confirmé la constitutionnalité de l'art. 193 et de l'al. 195.1(1)*c*) du *Code criminel*, S.R.C. 1970, ch. C-34, qui interdisaient la sollicitation de clients à des fins de prostitution et la tenue de maisons de débauche, sans toutefois interdire la prostitution même. Pour conclure à la validité constitutionnelle de ces dispositions, le juge en chef Dickson a fait le raisonnement suivant, à la p. 1142:

> Bien que j'admette que le Parlement a choisi un moyen détourné, il m'est difficile d'affirmer que le Parlement ne peut emprunter cette voie. La question n'est pas de savoir si le régime législatif est insatisfaisant ou peu judicieux mais si le régime porte atteinte aux préceptes fondamentaux de notre système juridique. Le fait que la vente de services sexuels en échange d'argent ne soit pas un acte criminel en droit canadien ne signifie pas que le Parlement ne peut utiliser le droit criminel pour manifester la désapprobation de la société à l'égard de la sollicitation de rue. Tant qu'on ne demandera pas directement à notre Cour de se prononcer sur la compétence du Parlement pour criminaliser la prostitution, il est difficile d'affirmer que le Parlement ne peut pas criminaliser et ainsi contrôler indirectement certains éléments de la prostitution, c'est-à-dire la sollicitation de rue. [Souligné dans l'original.]

Dans cet arrêt, le juge Lamer (maintenant Juge en chef) a également fait l'observation suivante, à la p. 1191:

> Comme je l'ai déjà dit, la prostitution en soi n'est pas un crime au Canada. Notre législateur a préféré s'attaquer indirectement à la prostitution. Le *Code criminel* contient plusieurs interdictions relatives à l'action d'accepter de l'argent en contrepartie de services sexuels. On retrouve parmi les infractions qui se rapportent à la prostitution les dispositions sur les maisons de débauche, les dispositions sur les souteneurs ainsi que d'autres infractions plus générales qui ont des répercussions indirectes sur les activités accessoires de la prostitution; par exemple, des dispositions sur le fait de troubler la paix. À mon avis, ces dispositions législatives indiquent que, bien que selon la lettre de la loi la prostitution elle-

of prostitution is not illegal, our legislators are indeed aiming at eradicating the practice.

A similar line of reasoning was employed by this Court in *Rodriguez*, *supra*, where the constitutionality of a prohibition against assisted suicide under s. 214(*b*) of the *Criminal Code*, R.S.C., 1985, c. C-46, was upheld despite the fact that suicide itself was, and is at present, not illegal in this country.

In my view, the reasoning in the *Prostitution Reference* and *Rodriguez* is directly applicable to the present cases. Although the manufacture, sale and consumption of tobacco has not been criminalized under the Act, it is clear that Parliament's underlying purpose in criminalizing tobacco advertising and promotion is to eradicate the practice. The fact that Parliament has chosen a "circuitous path" to accomplish this goal does not in any way lessen the constitutional validity of the goal. I emphasize once again that it is the pith and substance of the legislation, not Parliament's wisdom in choosing the legislative method, that is the touchstone in a division of powers analysis.

iii. *The Creation of Exemptions Under the Criminal Law Power*

The appellants' third argument is that the Act is fundamentally regulatory, not criminal, in nature. In support of this argument, they observe that the Act contains exemptions for publications and broadcasts originating outside Canada (s. 4(3)), for the Dunhill trademark (s. 8(3)), and for tobacco product substitutes exempted by the Governor in Council on the ground that they pose less risk to the health of users (s. 17(*a*)). The practical effect of these exemptions, the appellants argue, is that the very same act can be legal when committed by one party in Canada but illegal when committed by another.

In my view, this argument fails because it disregards the long-established principle that the criminal law may validly contain exemptions for certain

même ne soit pas illégale, notre législateur vise effectivement à supprimer la pratique.

Notre Cour a appliqué un raisonnement similaire dans l'arrêt *Rodriguez*, précité, dans lequel elle a confirmé la constitutionnalité d'une interdiction d'aide au suicide en vertu de l'al. 214*b*) du *Code criminel*, L.R.C. (1985), ch. C-46, même si le suicide n'était, et n'est toujours pas, illégal au Canada.

À mon avis, le raisonnement appliqué dans le *Renvoi sur la prostitution* et dans l'arrêt *Rodriguez* est directement applicable en l'espèce. Bien que la fabrication, la vente et l'usage du tabac n'aient pas été criminalisés en vertu de la Loi, de toute évidence, en rendant criminelles la publicité et la promotion en faveur du tabac, le législateur fédéral avait comme objectif sous-jacent de supprimer cette pratique. Le fait qu'il a choisi «un moyen détourné» pour atteindre cet objectif n'en change aucunement la validité constitutionnelle. Je voudrais souligner de nouveau que c'est le caractère véritable de la loi, non la sagesse du choix de la mesure législative, qui est la pierre angulaire dans une analyse du partage des pouvoirs.

iii. *La création d'exemptions dans le cadre de la compétence en matière de droit criminel*

Le troisième argument des appelantes est que la Loi est fondamentalement un texte réglementaire et non un texte relevant du droit criminel. À l'appui de cet argument, elles soutiennent que la Loi renferme des exemptions concernant les publications et les émissions en provenance de l'étranger (par. 4(3)), la marque Dunhill (par. 8(3)), et les substituts aux produits du tabac exemptés par le gouverneur en conseil pour le motif qu'ils font courir moins de risques pour la santé des consommateurs (al. 17*a*)). En pratique, ces exemptions ont pour effet, selon les appelantes, qu'un acte peut être légal s'il est commis par une partie au Canada, mais illégal lorsqu'il est commis par une autre partie.

À mon avis, cet argument échoue parce qu'il ne tient pas compte du principe depuis longtemps reconnu que le droit criminel peut validement

conduct without losing its status as criminal law. As early as 1959, in *Lord's Day Alliance of Canada v. Attorney General of British Columbia*, [1959] S.C.R. 497, this Court held that the *Lord's Day Act*, R.S.C. 1952, c. 171, which prohibited gambling on Sunday, was a valid exercise of the criminal law power despite the fact that s. 6 of that Act created an exemption for provinces which had passed legislation to the contrary. In upholding the validity of the Act, Rand J. explained, at pp. 509-10, that this exemption did not detract from the criminal nature of the legislation:

> The legislative efficacy in prohibiting the activity named is that solely of Parliament; the effect of the exception is to declare that in the presence of a provincial enactment of the appropriate character the scope of s. 6 automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided a limitation for its own legislative act. That Parliament can so limit the operation of its own legislation and that it may do so upon any such event or condition is not open to serious debate.

54 This principle was reiterated in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, where this Court addressed the constitutionality of s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34. Under s. 251(1) of the *Code*, the intentional procurement of a miscarriage was declared to be unlawful. However, under s. 251(4) and (5), Parliament had also created an exemption for miscarriages carried out by qualified medical practitioners where the life of the woman was in danger. Laskin C.J., dissenting in the result but not on this issue, made it clear that the creation of such an exemption did not detract from the validity of the provision as criminal law, at p. 627:

> I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation. It has done this in respect of gaming and betting by prescribing for lawful operation of pari-mutuel systems . . ., by exempting agricultural fairs or exhibitions from certain of the

comporter des exemptions relativement à certaines conduites sans pour autant perdre son caractère. Dès 1959, dans l'arrêt *Lord's Day Alliance of Canada c. Attorney General of British Columbia*, [1959] R.C.S. 497, notre Cour a statué que la *Loi sur le dimanche*, S.R.C. 1952, ch. 171, qui interdisait les jeux de hasard le dimanche, était un exercice valide de compétence en matière de droit criminel, même si l'art. 6 de cette loi créait une exemption pour les provinces qui avaient adopté une loi à l'effet contraire. En confirmant la validité de la loi, le juge Rand a expliqué, aux pp. 509 et 510, que cette exemption n'enlève pas à la loi son caractère de droit criminel:

> [TRADUCTION] L'action législative, en interdisant l'activité indiquée, correspond uniquement à celle du Parlement: l'exception a pour effet de déclarer qu'en présence d'une disposition provinciale de nature appropriée, l'art. 6 cesse immédiatement de s'appliquer au territoire provincial visé par cette disposition. Il s'agit d'une condition de fait au sujet de laquelle le Parlement lui-même a prévu des limites à sa propre action législative. Le fait que le Parlement peut ainsi limiter l'application de ses propres lois et le faire dans n'importe quelles circonstances ou sous n'importe quelles conditions ne prête pas vraiment à discussion.

Ce principe a été repris dans *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, où notre Cour a examiné la constitutionnalité de l'art. 251 du *Code criminel*, S.R.C. 1970, ch. C-34. En vertu du par. 251(1) du *Code*, le fait de procurer intentionnellement un avortement a été déclaré illégal. Cependant, en vertu des par. 251(4) et (5), le législateur a créé une exemption dans le cas des avortements effectués par des médecins qualifiés si la santé de la femme est en danger. Le juge en chef Laskin, dissident quant au résultat mais pas relativement à cette question, a clairement établi que la formulation d'une telle exemption ne porte pas atteinte à la validité de la disposition en tant que règle de droit criminel, à la p. 627:

> Je n'ai pas besoin de citer de précédents pour affirmer que le Parlement peut déterminer ce qui n'est pas criminel aussi bien que ce qui l'est, et qu'il peut par conséquent introduire dans ses lois pénales des dispenses ou des immunités. Il l'a fait dans le domaine des jeux et paris en permettant l'exploitation légale du pari mutuel [. . .], en exemptant les foires ou expositions agricoles

prohibitions against lotteries and games of chance . . . and by expressly permitting lotteries under stated conditions. . . .

Most recently, in *R. v. Furtney*, [1991] 3 S.C.R. 89, this Court reaffirmed Laskin C.J.'s conclusion. In *Furtney*, the Court addressed a challenge to s. 207 of the *Criminal Code*, R.S.C., 1985, c. C-46, which prohibited lotteries but created an exemption for provincial lotteries conducted in accordance with terms and conditions of licences issued by the Lieutenant Governor. The Court held that the *Code* provision was valid criminal law, even though it delegated regulatory power to the provincial Lieutenant Governors in Council to create exemptions. In reaching the conclusion that s. 207 was a valid exercise of the criminal law power, Stevenson J. stated, at p. 105:

I note that these very provisions were referred to as valid by Laskin C.J. in his dissenting judgment (the majority not addressing the matter) in *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616. The Chief Justice (at p. 627) referred to Parliament's authority to introduce dispensations or exemptions from criminal law in determining what is and what is not criminal.

Stevenson J. expressed his agreement with Laskin C.J.'s view and gave the following rationale for his conclusion, at pp. 106-7:

The appellants question whether the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority. In so doing they ask the question "referred to by Professor Hogg" in his *Constitutional Law of Canada* . . . at p. 415. Hogg suggests that the question is really one of colourability. . . . In my view the decriminalization of lotteries licensed under prescribed conditions is not colourable. It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist. I cannot characterize it as an invasion of provincial powers

de certaines interdictions qui frappent les loteries et jeux de hasard [. . .] et en permettant expressément des loteries sous certaines conditions. . .

Plus récemment, dans *R. c. Furtney*, [1991] 3 R.C.S. 89, notre Cour a de nouveau confirmé la conclusion du juge en chef Laskin. Dans cet arrêt, notre Cour s'est prononcée sur une contestation de l'art. 207 du *Code criminel*, L.R.C. (1985), ch. C-46, qui interdisait les loteries, sauf celles d'une province tenues conformément aux modalités d'une licence délivrée par le lieutenant-gouverneur. Notre Cour a statué que la disposition du *Code* énonçait une règle de droit criminel valide, même si elle déléguait un pouvoir de réglementation aux lieutenants-gouverneurs en conseil des provinces leur permettant de créer certaines exceptions. En arrivant à la conclusion que l'art. 207 constituait un exercice valide de compétence en matière de droit criminel, le juge Stevenson affirme à la p. 105:

Je constate que ces dispositions mêmes ont été considérées comme valides par le juge en chef Laskin dans l'opinion dissidente (les juges formant la majorité n'ayant pas abordé la question) qu'il a rédigée dans l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616. Le Juge en chef a mentionné, à la p. 627, le pouvoir du Parlement d'introduire, dans ses lois criminelles, des dispenses ou des immunités en déterminant ce qui est et ce qui n'est pas criminel.

Le juge Stevenson a exprimé son assentiment avec le juge en chef Laskin et a justifié ainsi sa conclusion, aux pp. 106 et 107:

Les appelants mettent en doute que le pouvoir en matière de droit criminel puisse étayer l'instauration d'un régime de réglementation dans lequel un organisme ou un agent administratif exerce un pouvoir discrétionnaire. Ce faisant, ils posent la question [TRADUCTION] «mentionnée par le professeur Hogg» dans *Constitutional Law of Canada*, [. . .] à la p. 415. Hogg dit qu'il s'agit vraiment d'une question de législation déguisée. [. . .] À mon avis, la décriminalisation des loteries exploitées en vertu de licences assorties de certaines conditions précises n'est pas une tentative déguisée de légiférer. Elle constitue une définition de l'acte criminel, qui fixe la portée de l'infraction, un exercice constitutionnellement acceptable du pouvoir en matière de droit criminel, qui réduit le champ de l'interdiction du droit criminel lorsqu'il existe certaines conditions. Je

any more than the appellants were themselves able to do. [Emphasis added.]

56 The clear implication of this Court's decisions in *Lord's Day Alliance*, *Morgentaler* and *Furtney*, is that the creation of a broad status-based exemption to criminal legislation does not detract from the criminal nature of the legislation. On the contrary, the exemption helps to define the crime by clarifying its contours. In my view, this is precisely what Parliament has done in creating exemptions under the Act. The crime created by Parliament is the advertisement and promotion of tobacco products offered for sale in Canada. Rather than diluting the criminality of these acts, the exemptions to which the appellants refer serve merely to delineate the logical and practical limits to Parliament's exercise of the criminal law power in this context. For example, it is clear that the exemption for foreign media under s. 4(3) was created to avoid both the extraterritorial application of Canadian legislation and the page-by-page censorship of foreign publications at the border. It must also be kept in mind that the exemption thereby created extends only to foreign publications imported into Canada or the retransmission of broadcasts originating outside Canada. Section 4(4) limits this exemption by prohibiting persons in Canada from advertising products for sale in Canada by way of foreign publications of broadcasts. Given the fact that foreign tobacco products comprise less than 1 percent of the Canadian market, it is apparent that the exemption has an extremely limited scope. There is an equally logical and practical explanation for the exemptions created under ss. 17(*a*) and 8(3). With respect to the exemption under s. 17(*a*), which permits the Governor in Council to make regulations exempting substitute tobacco products from the application of ss. 4 and 7 where they pose less risk to the health of users, it is clear that Parliament was seeking to encourage the development of alternatives to tobacco. Such an exemption is, of course, completely consistent with the Act's underlying purpose of protecting public health. With respect to the exemption for Dunhill products under s. 8(3), it is clear that Parliament was addressing the legitimate concern that this trademark is unique because

ne puis qualifier cela d'empiétement sur les pouvoirs des provinces, pas plus que les appelants n'ont eux-mêmes été en mesure de le faire. [Je souligne.]

Il résulte de toute évidence des arrêts de notre Cour *Lord's Day Alliance*, *Morgentaler* et *Furtney* que la création d'une exemption générale, fondée sur le statut, à l'application d'une loi en matière criminelle n'a pas pour effet d'enlever à la loi son caractère de droit criminel. Au contraire, l'exemption contribue à définir l'infraction en en clarifiant les particularités. À mon avis, c'est précisément ce que le Parlement a fait par la constitution d'exemptions dans la Loi. L'infraction créée par le Parlement est la publicité et la promotion des produits du tabac mis en vente au Canada. Plutôt que d'atténuer la nature criminelle de ces actes, les exemptions que mentionnent les appelantes servent tout simplement à cerner les restrictions logiques et pratiques de l'exercice de la compétence fédérale en matière de droit criminel dans ce contexte. Par exemple, il est clair que le législateur a créé l'exemption applicable aux médias étrangers visée au par. 4(3) pour éviter à la fois l'application extraterritoriale de la loi canadienne et l'examen page par page des publications étrangères à la frontière. On doit également se rappeler que l'exemption en question ne s'applique qu'aux publications étrangères importées au Canada ou qu'à la retransmission d'émissions de radio ou de télévision de l'étranger. Le paragraphe 4(4) restreint cette exemption en interdisant à toute personne se trouvant au Canada de faire de la publicité dans une publication étrangère ou une émission radiodiffusée de l'étranger en faveur d'un produit du tabac vendu au Canada. Puisque les produits du tabac étrangers représentent moins d'un pour cent du marché canadien, il est évident que l'exemption a une portée extrêmement limitée. Il y a également une explication tout aussi logique et pratique pour les exemptions créées en vertu de l'al. 17*a*) et du par. 8(3). Pour ce qui est de l'exemption prévue à l'al. 17*a*), qui permet au gouverneur en conseil de prendre des règlements pour exempter de l'application des art. 4 et 7 les produits du tabac utilisés comme substituts s'ils font courir moins de risque pour la santé des consommateurs que ces autres produits, il est évident que le Parlement cherchait à encourager la mise au point de nouveaux produits

it has a marketing existence quite independent from tobacco. Thus, none of these exemptions serves in any way to confuse, or detract from, the category of acts Parliament has validly criminalized under the Act.

comme substituts du tabac. Une telle exemption est, bien entendu, tout à fait compatible avec l'objet sous-jacent de la Loi, qui est de protéger la santé publique. En ce qui concerne l'exemption pour les produits Dunhill établie au par. 8(3), il est évident que le Parlement tenait compte de la préoccupation légitime selon laquelle cette marque est unique parce qu'elle a une existence commerciale tout à fait indépendante du tabac. En conséquence, aucune de ces exemptions ne sert à embrouiller la catégorie des actes que le Parlement a validement criminalisés en vertu de la Loi ni à y porter atteinte.

For all the foregoing reasons, I am of the view that the Act is a valid exercise of the federal criminal law power. Having reached this conclusion, I do not find it necessary to address the Attorney General's further submission that the Act falls under the federal power to legislate for the peace, order and good government of Canada. Accordingly, I now proceed directly to a consideration of the Act's validity under the *Charter*.

Pour tous les motifs qui précèdent, je suis d'avis que la Loi constitue un exercice valide de la compétence fédérale en matière de droit criminel. C'est pourquoi j'estime inutile d'examiner l'autre argument du procureur général selon lequel la Loi relève de la compétence fédérale de légiférer pour la paix, l'ordre et le bon gouvernement du Canada. Par conséquent, je passerai immédiatement à un examen de la validité de la Loi sous le régime de la *Charte*.

2. *The Canadian Charter of Rights and Freedoms*

2. *La Charte canadienne des droits et libertés*

Introductory

Introduction

The Attorney General conceded that the prohibition on advertising and promotion under the Act constitutes an infringement of the appellants' right to freedom of expression under s. 2(*b*) of the *Charter*, and directed his submissions solely to justifying the infringement under s. 1 of the *Charter*. In my view, the Attorney General was correct in making this concession. This Court has, on a number of occasions, held that prohibitions against engaging in commercial expression by advertising infringe upon the freedom of expression in s. 2(*b*) of the *Charter*; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 976-78; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 241-45. On this general issue, then, there only remains the question whether this

Le procureur général a admis que l'interdiction de publicité et de promotion prévue dans la Loi constitue une violation du droit à la liberté d'expression garanti aux appelantes par l'al. 2*b*) de la *Charte*, et il a orienté ses arguments seulement vers la justification de cette violation en vertu de l'article premier de la *Charte*. À mon avis, le procureur général a eu raison d'admettre ce fait. À plusieurs reprises, notre Cour a statué que les interdictions relatives à l'expression commerciale par la publicité portent atteinte à la liberté d'expression prévue à l'al. 2*b*) de la *Charte*; voir *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712, aux pp. 766 et 767; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, aux pp. 976 à 978; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232, aux pp. 241 à 245. Relativement à cette question générale, il ne

infringement is justified under s. 1, a matter to which I shall turn in a moment.

59 Before doing so, however, it is appropriate to draw attention to the fact that the Attorney General did not concede that s. 9 of the Act, which requires tobacco manufacturers to place an unattributed health warning on packages of these products, constitutes an infringement of the appellants' right to freedom of expression. In my view, the Attorney General was correct in not making this concession. However, since there is considerable overlap between my discussion of this issue and my discussion of s. 1, I shall for convenience address this distinct issue separately at the conclusion of my general s. 1 analysis.

Section 1 of the *Charter*

The Legislative Objective and Context

60 Section 1 of the *Charter* guarantees the rights and freedoms set out therein "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It is well established that the onus of justifying the limitation of a *Charter* right rests on the party seeking to have that limitation upheld, in this case the Attorney General. In *Oakes*, *supra*, this Court set out two broad criteria as a framework to guide courts in determining whether a limitation is demonstrably justified in a free and democratic society. The first is that the objective the limit is designed to achieve must be of sufficient importance to warrant overriding the constitutionally protected right or freedom. The second is that the measures chosen to achieve the objective must be proportional to the objective. The proportionality requirement has three aspects: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects.

reste alors qu'à déterminer si cette atteinte peut se justifier en vertu de l'article premier, question que j'examinerai dans un instant.

Cependant, j'aimerais auparavant faire ressortir que le procureur général n'a pas admis que l'art. 9 de la Loi, qui exige des fabricants du tabac qu'ils apposent une mise en garde non attribuée sur les emballages de ces produits, constitue une violation du droit à la liberté d'expression des appelantes. À mon avis, le procureur général a eu raison de ne pas admettre ce fait. Cependant, puisqu'il existe un chevauchement considérable entre mon analyse de cette question et celle fondée sur l'article premier, par souci de commodité, j'examinerai cette question distincte séparément à la fin de mon analyse générale fondée sur l'article premier.

L'article premier de la *Charte*

L'objectif et le contexte de la loi

L'article premier de la *Charte* garantit les droits et libertés qui y sont énoncés. «Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.» Il est bien établi qu'il incombe à la partie qui recherche la justification de la restriction, en l'espèce le procureur général, d'en faire la justification. Dans *Oakes*, précité, notre Cour a établi deux critères généraux pour guider les tribunaux lorsqu'ils doivent déterminer si la justification d'une restriction peut se démontrer dans le cadre d'une société libre et démocratique. En premier lieu, l'objectif que la restriction vise à promouvoir doit être suffisamment important pour justifier la suppression d'un droit ou d'une liberté garantis par la Constitution. En second lieu, les moyens choisis pour atteindre l'objectif doivent être proportionnels à cet objectif. L'exigence de la proportionnalité comporte trois aspects: les mesures choisies doivent avoir un lien rationnel avec l'objectif; elles doivent porter le moins possible atteinte au droit ou à la liberté en question, et il doit exister une proportionnalité entre les effets préjudiciables des mesures et leurs effets salutaires.

The appellants have conceded that the objective of protecting Canadians from the health risks associated with tobacco use, and informing them about these risks, is pressing and substantial. Rather than focusing upon the objective, the appellants submit that the measures employed under the Act are not proportional to the objective. In adopting this strategy, they rely heavily upon Chabot J.'s rigorous application of the proportionality requirement at trial. There, Chabot J. equated the burden of proof under the s. 1 analysis to the burden in a civil trial, stating, at p. 515:

> . . . the burden of proof of justification under s. 1 of the Charter rests on the party who seeks to uphold the limitation of a guaranteed right. This burden is the civil burden of proof, the balance of probabilities. However, this balance of probabilities must be applied rigorously and the evidence must be cogent and persuasive. . . .

Applying this standard, Chabot J. decided that the Attorney General had not demonstrated that the prohibition of tobacco advertising and promotion under ss. 4 to 8 of the Act, and the s. 9 requirement that tobacco manufacturers print unattributed health warnings on tobacco products, are proportional to the objective of reducing tobacco consumption. The appellants submit that Chabot J.'s approach was correct and argue that this Court should defer to his factual findings.

It is my view that Chabot J.'s approach was not the correct one in the circumstances of these cases, and that he erred in deciding that the civil burden of proof must be "applied rigorously". As I will show, it is also my view that the Attorney General adduced sufficient evidence at trial to justify the limitation on freedom of expression entailed by this legislation, and that the appellants' argument accordingly fails. However, before I proceed to reexamine the evidence, I find it necessary to clarify in more detail the nature of Chabot J.'s error. Throughout his judgment, Chabot J. referred to the requirements set forth in *Oakes* as a "test". In so doing, he adopted the view, unfortunately still held

Les appelantes ont reconnu le caractère urgent et réel de l'objectif visant à protéger les Canadiens contre les conséquences néfastes du tabac sur la santé et à les sensibiliser à ces conséquences. Plutôt que de s'attarder à cet objectif, les appelantes soutiennent que les mesures employées en vertu de la Loi ne sont pas proportionnelles à l'objectif. En adoptant cette stratégie, les appelantes s'appuient fortement sur l'application rigoureuse de l'exigence de la proportionnalité qu'a faite le juge de première instance. En effet, le juge Chabot a assimilé le fardeau de la preuve applicable lors d'une analyse fondée sur l'article premier au fardeau de la preuve applicable en matière civile; il affirme à la p. 2310:

> . . . le fardeau de la preuve en matière de justification en vertu de l'article premier de la charte repose sur celui qui soutient la restriction à un droit garanti. C'est le fardeau de preuve civile, la balance des probabilités. Toutefois, cette balance des probabilités doit être appliquée rigoureusement et la preuve doit être forte et persuasive.

À partir de ce critère, le juge Chabot a décidé que le procureur général n'avait pas démontré la proportionnalité entre d'une part, l'interdiction de publicité et de promotion du tabac en vertu des art. 4 à 8 de la Loi et la nécessité pour les fabricants des produits du tabac d'apposer, en vertu de l'art. 9, des mises en garde non attribuées sur les emballages, et d'autre part, l'objectif de réduire l'usage du tabac. Les appelantes soutiennent que l'analyse du juge Chabot était correcte et que notre Cour doit faire preuve de retenue à l'égard des conclusions de fait auxquelles il est arrivé.

Je suis d'avis que l'analyse du juge Chabot n'était pas correcte dans les circonstances et qu'il a commis une erreur en décidant que le fardeau de preuve civile doit être «appliqué rigoureusement». Comme je vais l'illustrer, je suis également d'avis que le procureur général a déposé une preuve suffisante en première instance pour justifier la restriction à la liberté d'expression qu'entraîne cette loi, et que l'argument des appelantes doit donc échouer. Cependant, avant de procéder au réexamen de la preuve, j'estime nécessaire de clarifier la nature de l'erreur du juge Chabot. Tout au long de sa décision, il parle des exigences formulées dans l'arrêt *Oakes* comme d'un «critère». Ce faisant, il a

by some commentators, that the proportionality requirements established in *Oakes* are synonymous with, or have even superseded, the requirements set forth in s. 1. This view is based upon a misperception of this Court's jurisprudence. The appropriate "test" to be applied in a s. 1 analysis is that found in s. 1 itself, which makes it clear that the court's role in applying that provision is to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society". In *Oakes*, this Court established a set of principles, or guidelines, intended to serve as a framework for making this determination. However, these guidelines should not be interpreted as a substitute for s. 1 itself. It is implicit in the wording of s. 1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The s. 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement.

63 This Court has on many occasions affirmed that the *Oakes* requirements must be applied flexibly, having regard to the specific factual and social context of each case. The word "reasonable" in s. 1 necessarily imports flexibility. In a significant, but often neglected, passage from *Oakes* itself, Dickson C.J. warned against an overly formalistic approach to s. 1 justification, stating, at p. 139, that "[a]lthough the nature of the proportionality test will vary depending on the circumstances, in each case the courts will be required to balance the interests of society with those of individuals and groups". Shortly thereafter, he reaffirmed this warning in *R. v. Edwards Books and Art Ltd.*,

adopté le point de vue, que partagent malheureusement certains auteurs, que les exigences en matière de proportionnalité formulées dans l'arrêt *Oakes* sont comparables à celles applicables à l'article premier ou les ont même remplacées. Ce point de vue se fonde sur une interprétation erronée de la jurisprudence de notre Cour. Le «critère» approprié applicable à une analyse fondée sur l'article premier se trouve dans la disposition même, laquelle établit clairement que le rôle du tribunal lorsqu'il l'applique est de déterminer si la limite est raisonnable et peut se démontrer dans le cadre d'une «société libre et démocratique». Dans l'arrêt *Oakes*, notre Cour a établi une série de principes ou directives destinés à servir de cadre analytique à cette fin. Toutefois, ces directives ne devraient pas être interprétées comme si elles remplaçaient l'article premier. Le libellé de l'article premier indique implicitement que les tribunaux doivent, chaque fois qu'ils l'appliquent, établir un équilibre délicat entre les droits individuels et les besoins de la collectivité. Un tel équilibre ne peut être établi dans l'abstrait, à partir seulement d'un «critère» formaliste qui s'appliquerait de façon uniforme dans toutes les circonstances. L'examen fondé sur l'article premier est un examen inévitablement normatif qui exige des tribunaux qu'ils tiennent compte de la nature du droit violé ainsi que des valeurs et des principes spécifiques à partir desquels le ministère public tente de justifier la violation.

Notre Cour a confirmé à maintes reprises que les exigences formulées dans l'arrêt *Oakes* doivent être appliquées avec souplesse en tenant compte du contexte factuel et social particulier de chaque cas. Le terme «raisonnables» employé à l'article premier est nécessairement une indication qu'il y a lieu de faire preuve de souplesse. Dans un passage important, mais souvent oublié, de l'arrêt *Oakes*, le juge en chef Dickson fait une mise en garde contre un examen trop formaliste de la justification en vertu de l'article premier, affirmant à la p. 139, que «[m]ême si la nature du critère de proportionnalité pourra varier selon les circonstances, les tribunaux devront, dans chaque cas, soupeser les intérêts de la société et ceux de particuliers et de groupes». Peu après, il a répété cette mise en garde dans l'arrêt *R. c. Edwards Books and Art Ltd.*, [1986] 2

[1986] 2 S.C.R. 713, at pp. 768-69, where, referring to the Court's decision in *Oakes*, he stated:

The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

Later, in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 735, Dickson C.J. had occasion to elaborate more fully upon the nature of the *Oakes* inquiry, stating that it was "dangerously misleading to conceive of s. 1 as a rigid and technical provision". He noted at p. 735 that,

[f]rom a crudely practical standpoint, *Charter* litigants sometimes may perceive s. 1 in this manner, but in the body of our nation's constitutional law it plays an immeasurably richer role, one of great magnitude and sophistication.

The role played by s. 1, he observed, at pp. 735-36, is to bring "together the fundamental values and aspirations of Canadian society" through the "dual function" of activating *Charter* rights and permitting such reasonable limits as a free and democratic society may have occasion to place upon them. In applying a "rigid or formalistic approach to the application of s. 1", he cautioned, at p. 737, the courts risk losing sight of the "synergetic relation" that exists between *Charter* rights and the context in which they are claimed. In *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at pp. 1489-90, I also stressed the importance of this "synergetic relation", and the resulting need to avoid what I called a "mechanistic approach" in the application of the s. 1 analysis:

In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context

R.C.S. 713, aux pp. 768 et 769, où il dit relativement à l'arrêt *Oakes*:

La Cour a affirmé que la nature du critère de proportionnalité pourrait varier en fonction des circonstances. Tant dans son élaboration de la norme de preuve que dans sa description des critères qui comprennent l'exigence de proportionnalité, la Cour a pris soin d'éviter de fixer des normes strictes et rigides.

Plus tard, dans l'arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, à la p. 735, le juge en chef Dickson a eu l'occasion de clarifier davantage la nature de l'examen dont il est question dans l'arrêt *Oakes*, affirmant que l'«on s'induit dangereusement en erreur si l'on voit dans l'article premier une disposition rigide et empreinte de formalisme». Il souligne, à la p. 735:

D'un point de vue purement pratique, les plaideurs qui invoquent la *Charte* peuvent parfois percevoir ainsi l'article premier mais, dans le droit constitutionnel de notre nation, cet article joue un rôle infiniment plus riche, un rôle de grande envergure et d'extrême raffinement.

Le juge en chef Dickson précise aux pp. 735 et 736 que le rôle de l'article premier est de réunir «les valeurs et les aspirations fondamentales de la société canadienne», ayant comme «double fonction» de rendre effectifs les droits et libertés garantis par la *Charte* et de permettre toute limite raisonnable qu'une société libre et démocratique peut avoir à y imposer. S'ils font preuve de «rigidité et [de] formalisme [. . .] dans l'application de l'article premier», précise-t-il, à la p. 737, les tribunaux risquent de ne pas tenir compte du «rapport synergique» qui existe entre les droits garantis par la *Charte* et le contexte de l'instance particulière. Dans *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469, aux pp. 1489 et 1490, j'ai également fait ressortir l'importance du «rapport synergique» et de la nécessité d'éviter ce que j'ai appelé une «méthode mécaniste» dans l'application de l'analyse fondée sur l'article premier:

Il me semble qu'en effectuant cette évaluation en vertu de l'article premier il faut éviter de recourir à une méthode mécaniste. Bien qu'il faille accorder priorité dans l'équation aux droits garantis par la *Charte*, les valeurs sous-jacentes doivent être, dans un contexte par-

against other values of a free and democratic society sought to be promoted by the legislature.

For a similar contextual approach to the s. 1 analysis, see *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 300; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 184-85; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, at pp. 627-28; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56, 1380; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 280-81; and *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, at p. 1122.

64 It appears, then, that Chabot J.'s principal error in applying a "rigorous" civil standard of proof was his failure to take into account the specific context in which the s. 1 balancing must take place. This Court has on many occasions stated that the evidentiary requirements under s. 1 will vary substantially depending upon both the nature of the legislation and the nature of the right infringed. In the present cases, both these contextual elements are highly relevant to a proper application of the s. 1 analysis. Accordingly, before proceeding to an analysis of the evidence submitted at trial, I find it necessary to explore in more detail both the nature of the legislation and the nature of the right it infringes.

65 I turn first to the nature of the legislation. In my discussion of the criminal law power, I concluded that the Act is, in pith and substance, criminal law aimed at the protection of public health. In enacting this legislation, Parliament clearly intended to protect public health by reducing the number of inducements for Canadians to consume tobacco, and by educating Canadians about the health risks entailed in its consumption. The appellants concede, and in my view there is no doubt, that this goal is pressing and substantial. At trial and before this Court the Attorney General adduced copious evidence, some of which is set forth in the criminal law power discussion, demonstrating that tobacco consumption is one of the leading causes of illness

ticulier, évaluées délicatement en fonction d'autres valeurs propres à une société libre et démocratique que le législateur cherche à promouvoir.

Pour une démarche contextuelle similaire relativement à l'analyse fondée sur l'article premier, voir *R. c. Jones*, [1986] 2 R.C.S. 284, à la 300; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, aux pp. 184 et 185; *Black c. Law Society of Alberta*, [1989] 1 R.C.S. 591, aux pp. 627 et 628; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, aux pp. 1355, 1356 et 1380; *McKinney c. Université de Guelph*, [1990] 3 R.C.S. 229, aux pp. 280 et 281, et *Dickason c. Université de l'Alberta*, [1992] 2 R.C.S. 1103, à la p. 1122.

Il appert alors que la principale erreur du juge Chabot lorsqu'il a appliqué «rigoureusement» le fardeau de preuve civile est qu'il a omis de tenir compte du contexte spécifique dans lequel doit se dérouler la pondération en vertu de l'article premier. Notre Cour a à maintes reprises affirmé que les exigences en matière de preuve sous le régime de l'article premier varieront beaucoup en fonction de la nature de la loi et du caractère du droit atteint. Ces éléments contextuels sont fort pertinents en l'espèce pour une bonne application de l'analyse fondée sur l'article premier. En conséquence, avant de procéder à une analyse de la preuve déposée au procès, j'estime nécessaire d'examiner plus en détail la nature de la loi et celle du droit auquel elle porte atteinte.

J'examinerai tout d'abord la nature de la loi. Dans mon examen de la compétence en matière de droit criminel, j'ai conclu que la Loi constitue, de par son caractère véritable, du droit criminel visant la protection de la santé publique. Lorsqu'il a adopté cette loi, le Parlement visait de toute évidence à protéger la santé publique en diminuant le nombre des incitations à la consommation du tabac et à sensibiliser les Canadiens aux méfaits du tabac. Les appelantes admettent que cet objectif est urgent et réel, ce qui ne fait aucun doute à mon avis. En première instance et devant notre Cour, le procureur général a déposé de nombreux éléments de preuve, dont certains ont été exposés au cours de l'analyse de la compétence en matière de droit

and death in our society. It is noteworthy that the detrimental effects of tobacco consumption impact not only upon the estimated 30,000 Canadians who die from related diseases each year, but also upon every member of our community. Apart from the apparent danger posed to nonsmoking members of the community by secondary smoke, all Canadians, and not merely tobacco consumers, must shoulder the heightened tax burden arising from the high cost of medical care for tobacco users who become ill.

Having conceded that the objective of protecting public health from the detrimental effects of tobacco consumption is pressing and substantial, the appellants submit, and Chabot J. agreed, that the facts respecting the harmful effect of tobacco are irrelevant to the application of the proportionality analysis. Chabot J. stated, at p. 491:

> . . . much of the expert scientific evidence relating to the effects of tobacco on health, however voluminous and instructive, was nevertheless, with respect, irrelevant to the case and, in the humble view of the court, served merely to colour the debate unnecessarily.

With respect, I disagree. In my view, the nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence. In this respect, it is essential to keep in mind that tobacco addiction is a unique, and somewhat perplexing, phenomenon. Despite the growing recognition of the detrimental health effects of tobacco use, close to a third of the population continues to use tobacco products on a regular basis. At this point, there is no definitive scientific explanation for tobacco addiction, nor is there a clearly understood causal connection between advertising, or any other environmental factor, and tobacco consumption. This is not surprising. One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of human psychology. Many of the workings of

criminel, établissant que l'usage du tabac est l'une des principales causes de maladie et de décès dans notre société. Il importe de signaler que les effets préjudiciables de l'usage du tabac ont une incidence non seulement sur les quelque 30 000 Canadiens qui décèdent chaque année de maladies connexes, mais aussi sur l'ensemble de la collectivité. En effet, outre le risque apparent que le tabagisme passif cause aux non-fumeurs dans la société, tous les Canadiens, et non seulement les fumeurs, doivent assumer le fardeau fiscal accru qu'entraînent les frais médicaux élevés des fumeurs qui contractent des maladies.

Comme ils ont admis que l'objectif de protection de la santé publique contre les effets préjudiciables du tabac est urgent et réel, les appelantes soutiennent, ce avec quoi était d'accord le juge Chabot, que les faits relatifs à l'effet nocif du tabac ne sont pas pertinents relativement à l'application de la proportionnalité. Le juge Chabot affirme, à la p. 2293:

> . . . une grande partie de cette preuve d'expertise scientifique relativement aux effets du tabac sur la santé, toute colossale et instructive fut-elle, n'en était pas moins, avec respect, non pertinente en l'espèce et ne servait, de l'humble opinion du Tribunal, qu'à colorer inutilement le débat.

En toute déférence, je ne suis pas d'accord. À mon avis, la nature et l'étendue des problèmes de santé reliés à l'usage du tabac sont tout à fait pertinents relativement à l'analyse fondée sur l'article premier, tant aux fins de la détermination du critère approprié de justification que dans l'appréciation de la preuve pertinente. À cet égard, il est essentiel de se rappeler que la dépendance au tabac est un phénomène unique et assez compliqué. Même si les effets nocifs du tabac sont de plus en plus connus, près du tiers de la population continue de fumer de façon régulière. On ne peut actuellement pas donner d'explication scientifique concluante de la dépendance au tabac, ni établir un lien causal bien compris entre la publicité, ou tout autre facteur environnemental, et l'usage du tabac. Cela n'est pas étonnant. En effet, on ne saurait comprendre le lien causal entre la publicité et la consommation ou entre le tabac et la dépendance sans procéder à une analyse approfondie des mystères

the human mind, and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time. In this respect, it is instructive to consider the view of the Surgeon General of the United States, who observed in his 1989 report entitled *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*, at pp. 512-13:

> There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption. Given the complexity of the issue, none is likely to be forthcoming in the foreseeable future.

However, despite the lack of definitive scientific explanations of the causes of tobacco addiction, clear evidence does exist of the detrimental social effects of tobacco consumption. As I discussed earlier, overwhelming evidence was introduced at trial that tobacco use is a principal cause of deadly cancers, heart disease and lung disease, and that tobacco is highly addictive. Perhaps the most distressing aspect of the evidence introduced at trial is that tobacco consumption is most widespread among the young and the less educated — those segments of the population who are least able to inform themselves about, and to protect themselves against, its hazards. The majority of Canadian tobacco smokers start smoking regularly in their teens, and approximately one in five begin smoking regularly as early as 13; see expert report of Dr. Roberta G. Ferrence, *supra*; "Project Plus/Minus", prepared for Imperial Tobacco Ltd. (1982). Indeed, it has been estimated that, among young Canadians who continue to use tobacco, six times more will die prematurely of disease caused by smoking than from car accidents, suicide, murder and AIDS combined; see expert report of Dr. Donald T. Wigle, *supra*. Moreover there are more smokers among people with less formal education. While, in 1986, 60 percent of those with no high school education smoked on a daily basis, only 8 percent of those with a university degree did so;

de la psychologie humaine. Un grand nombre des rouages du cerveau humain et des causes du comportement humain demeurent un mystère pour nous, et le demeureront sans doute pendant encore longtemps. Sur ce point, il est intéressant d'examiner le point de vue du Surgeon General des États-Unis qui a fait remarquer dans son rapport de 1989 intitulé: *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*, aux pp. 512 et 513:

> [TRADUCTION] Il n'existe pas d'étude publique scientifiquement rigoureuse qui donne une réponse concluante à la question fondamentale de savoir si la publicité et la promotion accroissent la consommation du tabac. Compte tenu de la complexité de la question, il y a peu de chance qu'une telle étude soit menée à brève échéance.

Cependant, malgré l'absence d'explications scientifiques concluantes des causes de la dépendance au tabac, il existe des éléments de preuve clairs sur les effets sociaux préjudiciables de l'usage du tabac. Comme je l'ai mentionné, on a présenté en première instance une preuve abondante établissant d'une part, que l'usage du tabac est une cause principale de cancers, de maladies cardiaques et de maladies pulmonaires entraînant la mort, et d'autre part, que le tabac crée une forte dépendance. L'aspect le plus troublant de la preuve déposée au procès est peut-être que l'usage du tabac est plus répandu chez les jeunes et les personnes moins instruites — les groupes qui sont le moins en mesure de se renseigner sur les méfaits du tabac et de s'en protéger. La majorité des fumeurs au Canada commencent à fumer régulièrement à l'adolescence, et environ un fumeur sur cinq commence à fumer régulièrement dès l'âge de 13 ans; voir le rapport d'expert de Roberta G. Ferrence, *op. cit.*; «Project Plus/Minus», préparé pour Imperial Tobacco Ltd. (1982). En fait, on a estimé que les maladies causées par le tabac entraîneront six fois plus de décès prématurés chez les jeunes fumeurs canadiens que les accidents de voiture, le suicide, le meurtre et le SIDA confondus; voir le rapport d'expert de Donald T. Wigle, *op. cit.* Par ailleurs, il y a davantage de fumeurs chez les gens qui ont moins d'instruction. En 1986, 60 pour 100 des personnes n'ayant fait aucune étude secondaire fumaient à tous les jours, contre seulement 8 pour 100 dans le

see expert report of Dr. Roberta G. Ferrence, *supra*, at p. 32.

It appears, then, that there is a significant gap between our understanding of the health effects of tobacco consumption and of the root causes of tobacco consumption. In my view, this gap raises a fundamental institutional problem that must be taken into account in undertaking the s. 1 balancing. Simply put, a strict application of the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern every time it wishes to address its effects. This could have the effect of virtually paralyzing the operation of government in the socio-economic sphere. As I noted in *McKinney*, *supra*, at pp. 304-5, predictions respecting the ramifications of legal rules upon the social and economic order are not matters capable of precise measurement, and are often "the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components". To require Parliament to wait for definitive social science conclusions every time it wishes to make social policy would impose an unjustifiable limit on legislative power by attributing a degree of scientific accuracy to the art of government which, in my view, is simply not consonant with reality. As LeBel J.A. observed in the Court of Appeal (at pp. 311-12):

Interpreted literally, mechanically, without nuance, the *Oakes* test and the burden of proof which it imposes on the state would most often negate its ability to legislate.

Moreover, such an approach misconceives the nature of a constitutional case such as this. It cannot be dealt with as if it were an ordinary civil trial. We are not dealing with a matter in which, for example, a particular litigant seeks to demonstrate that his tobacco consumption and the advertising of a manufacturer whose cigarettes

cas des diplômés d'université; voir le rapport d'expert de Roberta G. Ferrence, *op. cit.*, à la p. 32.

67

Il paraît alors y avoir un important écart entre ce que nous comprenons des effets de l'usage du tabac sur la santé et des principales causes de cet usage. À mon avis, cet écart soulève un problème institutionnel fondamental dont il faut tenir compte dans la pondération effectuée en application de l'article premier. Bref, une application stricte de l'analyse de la proportionnalité dans les affaires de cette nature imposerait un fardeau impossible au Parlement puisqu'il serait alors tenu de produire des éléments de preuve socio-scientifiques concluants relativement aux causes fondamentales d'un problème urgent d'intérêt social chaque fois qu'il désire s'attaquer à ses effets. Cela aurait pour effet de pratiquement paralyser le fonctionnement de l'appareil gouvernemental dans la sphère socio-économique. Comme je l'ai fait remarquer dans l'arrêt *McKinney*, précité, aux pp. 304 et 305, les prévisions relatives aux incidences des règles juridiques sur l'ordre socio-économique ne sont pas des questions susceptibles d'être évaluées précisément, et découlent souvent «de la combinaison d'hypothèses, de connaissances fragmentaires, de l'expérience générale et de la connaissance des besoins, des aspirations et des ressources de la société ainsi que d'autres éléments». Si l'on exigeait du Parlement qu'il attende les données concluantes des études dans le domaine des sciences humaines chaque fois qu'il désire adopter une politique sociale, on restreindrait de façon injustifiable la compétence législative en attribuant un degré de précision scientifique à l'art de gouverner, ce qui, à mon avis, n'est tout simplement pas conforme à la réalité. Comme le juge LeBel de la Cour d'appel l'a fait remarquer (à la p. 391):

Interprétés littéralement, mécaniquement, sans nuances, le test d'*Oakes* et le fardeau de preuve imposé ainsi à l'État nieraient, le plus souvent, à celui-ci la faculté de légiférer.

Par ailleurs, une telle approche se méprend sur la nature d'une affaire constitutionnelle comme celle-ci. Elle ne s'assimile pas à un simple procès civil. Nous ne sommes pas placés devant un dossier où un plaideur particulier tenterait, par hypothèse, de démontrer que, dans son cas, sa consommation de tabac et la publicité

he consumed caused his lung cancer or his emphysema. It is rather a question of determining the basis on which a legislator may choose to act, where the outcome is uncertain.

It is necessary to understand the limits and the nature of policy choices. It is often difficult to forecast the future and to anticipate the beneficial or negative consequences of government policy. A well-conceived policy may be poorly applied. The necessary institutional resources may fail; unforeseen obstacles may intervene. If one is to apply rigorously the criterion of civil proof on the balance of probabilities it will be impossible to govern. On this basis, it would not be possible to make difficult but sometimes necessary legislative choices. There would be conferred on the courts a supervisory role over a state itself essentially inactive.

68 In several recent cases, this Court has recognized the need to attenuate the *Oakes* standard of justification when institutional constraints analogous to those in the present cases arise. In *Irwin Toy*, *supra*, at pp. 993-94, this Court stated:

> . . . in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.
>
> . . .
>
> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. . . .

In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justify-

faite par tel manufacturier dont il consommait les cigarettes ont causé son cancer du poumon ou son emphysème. Il s'agit plutôt de déterminer sur quelle base un législateur peut choisir d'agir, dans des perspectives incertaines.

Il faut comprendre les limites et la nature des choix politiques. Il est souvent difficile de prévoir l'avenir et d'anticiper les conséquences bénéfiques ou néfastes d'une politique gouvernementale. Bien conçue, une politique peut être mal appliquée. Les ressources institutionnelles nécessaires peuvent faire défaut, des obstacles imprévus survenir. Si l'on applique rigoureusement le critère de la preuve civile, selon la balance des probabilités, on ne gouvernera pas. L'on ne saura faire les choix législatifs difficiles, mais parfois nécessaires. L'on confiera à la magistrature la surveillance d'un état essentiellement passif.

Dans plusieurs arrêts récents, notre Cour a reconnu la nécessité d'assouplir le critère de justification formulé dans *Oakes* en présence de contraintes institutionnelles semblables à celles qui existent en l'espèce. Dans *Irwin Toy*, précité, aux pp. 993 et 994, notre Cour affirme:

> . . . en faisant correspondre les moyens et les fins, et en se demandant s'il a été porté le moins possible atteinte aux droits ou aux libertés, le législateur en arbitrant entre les revendications de groupes concurrents, sera encore obligé de trouver le point d'équilibre sans pouvoir être absolument certain d'où il se trouve. Les groupes vulnérables vont revendiquer la protection du gouvernement alors que les autres groupes et individus affirmeront que le gouvernement ne doit pas intervenir.
>
> . . .
>
> Pour trouver le point d'équilibre entre des groupes concurrents, le choix des moyens, comme celui des fins, exige souvent l'évaluation de preuves scientifiques contradictoires et de demandes légitimes mais contraires quant à la répartition de ressources limitées. Les institutions démocratiques visent à ce que nous partagions tous la responsabilité de ces choix difficiles. Ainsi, lorsque les tribunaux sont appelés à contrôler les résultats des délibérations du législateur, surtout en matière de protection de groupes vulnérables, ils doivent garder à l'esprit la fonction représentative du pouvoir législatif. . .

Il arrive parfois qu'au lieu d'arbitrer entre des groupes différents, le gouvernement devienne plutôt ce qu'on pourrait appeler l'adversaire singulier de l'individu dont le droit a été violé. Par exemple, pour justifier

ing an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions. . . .

In drawing a distinction between legislation aimed at "mediating between different groups", where a lower standard of s. 1 justification may be appropriate, and legislation where the state acts as the "singular antagonist of the individual", where a higher standard of justification is necessary, the Court in *Irwin Toy* was drawing upon the more fundamental institutional distinction between the legislative and judicial functions that lies at the very heart of our political and constitutional system. Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.

In my view, the considerations addressed by this Court in *Irwin Toy* and *McKinney*, *supra*, are applicable to the present cases. In enacting this legisla-

une atteinte à des droits consacrés par les art. 7 à 14 de la *Charte*, l'État fera valoir, au nom de toute la société, sa responsabilité de poursuivre les criminels alors que la personne fera valoir le caractère prépondérant des principes de justice fondamentale. Il est possible qu'il n'y ait pas de demandes contradictoires venant de différents groupes. Dans de tels cas, et d'ailleurs chaque fois que l'objet du gouvernement se rapporte au maintien de l'autorité et de l'impartialité du système judiciaire, les tribunaux peuvent décider avec un certain degré de certitude si les [TRADUCTION] «moyens les moins radicaux» ont été choisis pour parvenir à l'objectif compte tenu de la somme d'expérience acquise dans le règlement de ces questions . . .

En établissant une distinction entre une loi visant à «arbitrer entre des groupes différents», auquel cas un critère moins sévère pourrait être approprié relativement à la justification en vertu de l'article premier, et une loi dans laquelle l'État agit à titre d'«adversaire singulier de l'individu», auquel cas il faut appliquer un critère plus sévère, notre Cour, dans l'arrêt *Irwin Toy*, faisait appel à la distinction institutionnelle plus fondamentale entre les fonctions législatives et judiciaires, qui est à la base même de notre régime politique et constitutionnel. Les tribunaux sont des spécialistes de la protection de la liberté et de l'interprétation des lois et sont, en conséquence, bien placés pour faire un examen approfondi des lois en matière de justice criminelle. Cependant, ils ne sont pas des spécialistes de l'élaboration des politiques et ils ne devraient pas l'être. Ce rôle est celui des représentants élus de la population, qui disposent des ressources institutionnelles nécessaires pour recueillir et examiner la documentation en matière de sciences humaines, arbitrer entre des intérêts sociaux opposés et assurer la protection des groupes vulnérables. Lorsqu'elle fait preuve d'une plus grande retenue à l'égard des lois à caractère social qu'à l'égard des lois en matière de justice criminelle, notre Cour reconnaît ces différences institutionnelles importantes entre le pouvoir législatif et le pouvoir judiciaire.

À mon avis, les considérations que notre Cour a examinées dans les arrêts *Irwin Toy* et *McKinney*, précités, sont applicables en l'espèce. Lorsqu'il a

69

tion, Parliament was facing a difficult policy dilemma. On the one hand, Parliament is aware of the detrimental health effects of tobacco use, and has a legitimate interest in protecting Canadians from, and in informing them about, the dangers of tobacco use. Health underlies many of our most cherished rights and values, and the protection of public health is one of the fundamental responsibilities of Parliament. On the other hand, however, it is clear that a prohibition on the manufacture, sale or use of tobacco products is unrealistic. Nearly seven million Canadians use tobacco products, which are highly addictive. Undoubtedly, a prohibition of this nature would lead to an increase in illegal activity, smuggling and, quite possibly, civil disobedience. Well aware of these difficulties, Parliament chose a less drastic, and more incremental, response to the tobacco health problem. In prohibiting the advertising and promotion of tobacco products, as opposed to their manufacture or sale, Parliament has sought to achieve a compromise among the competing interests of smokers, non-smokers and manufacturers, with an eye to protecting vulnerable groups in society. Given the fact that advertising, by its very nature, is intended to influence consumers and create demand, this was a reasonable policy decision. Moreover, as I discussed above, the Act is the product of a legislative process dating back to 1969, when the first report recommending a full prohibition on tobacco advertising was published; see *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking*, *supra*. In drafting this legislation, Parliament took into account the views of Canadians from many different sectors of society, representing many different interests. Indeed, the legislative committee responsible for drafting Bill C-51, which was subsequently adopted by Parliament as the Act, heard from 104 organizations during hearings in 1988 representing a variety of interests, including medicine, transport, advertising, smokers' rights, non-smokers' rights, and tobacco production.

adopté cette loi, le Parlement était aux prises avec un dilemme difficile. D'une part, il est bien au courant des effets nocifs de l'usage du tabac sur la santé et est légitimement fondé à protéger les Canadiens contre ses méfaits et à les y sensibiliser. La santé est à la base des droits et valeurs qui nous tiennent le plus à cœur, et la protection de la santé publique est l'une des responsabilités fondamentales du Parlement. D'autre part, cependant, il est clair qu'il n'est pas réaliste d'interdire la fabrication, la vente ou l'usage des produits du tabac. Presque sept millions de Canadiens font usage des produits du tabac, lesquels créent une forte dépendance. De toute évidence, une telle interdiction donnerait lieu à un accroissement des activités illégales, de la contrebande, voire même de la désobéissance civile. Fort conscient de ces difficultés, le Parlement a choisi des mesures moins radicales et plus graduelles pour répondre au problème du tabagisme. En interdisant la publicité et la promotion des produits du tabac, par opposition à leur fabrication ou à leur vente, il a tenté de parvenir à un compromis entre les intérêts opposés des fumeurs, des non-fumeurs et des fabricants, dans le but de protéger les groupes vulnérables de la société. Puisque la publicité vise intrinsèquement à influencer les consommateurs et à susciter la demande, la mesure prise constituait une décision de principe raisonnable. Par ailleurs, comme je l'ai déjà mentionné, la Loi est l'aboutissement du processus législatif commencé en 1969 au moment où était rendu public le premier rapport recommandant un bannissement total de la publicité des produits du tabac; voir le *Rapport du Comité permanent de la santé, du bien-être social et des affaires sociales sur l'usage du tabac et de la cigarette*, *op. cit.* Dans la rédaction de la Loi, le législateur a tenu compte du point de vue des Canadiens provenant de divers secteurs de la société, représentant tout un éventail d'intérêts. En effet, lors des audiences tenues en 1988, le comité responsable de la rédaction du projet de loi C-51, aujourd'hui devenu la Loi, a entendu les commentaires de 104 organisations représentant divers intérêts, notamment, médecine, transport, publicité, groupes de fumeurs, groupes de non-fumeurs et producteurs de tabac.

Seen in this way, it is clear that the Act is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate. As I observed in *McKinney*, *supra*, at p. 305:

They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch, as *Irwin Toy*, *supra*, at pp. 993-94, has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.

Turning now to the nature of the right infringed under the Act, it is once again necessary to place the appellants' claim in context. This Court has recognized, in a line of freedom of expression cases dating back to *Edmonton Journal*, *supra*, that, depending on its nature, expression will be entitled to varying levels of constitutional protection. In *Edmonton Journal*, Wilson J. outlined the need for a contextual, as opposed to an abstract, approach to freedom of expression cases. She stated, at pp. 1355-56:

. . . a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. 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

Vue sous cet angle, il est clair que la Loi est précisément le type de loi envers laquelle notre Cour a généralement fait preuve d'une grande retenue. Dans la cadre de la rédaction de cette loi, qui vise à atteindre un objectif social louable et à protéger les groupes vulnérables, le Parlement a dû recueillir et examiner des données sociales complexes et trancher entre des intérêts sociaux opposés. Le soin de prendre de telles décisions est confié comme il se doit à nos représentants élus, qui disposent des ressources nécessaires à cette fin et qui sont en dernier ressort responsables envers l'électorat. Comme je l'ai fait remarquer dans l'arrêt *McKinney*, précité, à la p. 305: 70

Ce sont des décisions où ceux qui participent aux activités politiques et législatives de la démocratie canadienne possèdent des avantages manifestes sur les membres du pouvoir judiciaire, comme nous l'a rappelé l'arrêt *Irwin Toy*, précité, aux pp. 993 et 994. Cela ne libère pas le pouvoir judiciaire de son obligation constitutionnelle d'examiner minutieusement les mesures législatives pour veiller à ce qu'elles se conforment raisonnablement aux normes constitutionnelles, mais cela entraîne une plus grande circonspection que dans des domaines comme le système de justice criminelle où le savoir et le discernement de la cour lui permettent de se prononcer de façon beaucoup plus sûre.

Je passe maintenant à l'examen de la nature du droit auquel il a été porté atteinte; de nouveau, il est nécessaire de placer dans son contexte la demande des appelantes. Dans une série d'arrêts sur la liberté d'expression rendus depuis *Edmonton Journal*, précité, notre Cour a reconnu que, selon sa nature, l'expression pourra bénéficier de divers degrés de protection constitutionnelle. Dans l'arrêt *Edmonton Journal*, le juge Wilson a exposé la nécessité du recours à une méthode contextuelle, et non abstraite, dans l'examen des questions de liberté d'expression. Elle affirme aux pp. 1355 et 1356: 71

. . . une liberté ou un droit particuliers peuvent avoir une valeur différente selon le contexte. Par exemple, il se peut que la liberté d'expression ait une importance plus grande dans un contexte politique que dans le contexte de la divulgation des détails d'une affaire matrimoniale. La méthode contextuelle tente de mettre clairement en évidence l'aspect du droit ou de la liberté qui est véritablement en cause dans l'instance ainsi que les aspects

with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

In *Rocket*, *supra*, at pp. 246-47, McLachlin J. affirmed Wilson J.'s contextual approach:

> While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

72 The source of the "sensitive, case-oriented approach" referred to by McLachlin J. in *Rocket* is this Court's more fundamental recognition that the right to freedom of expression is not absolute and cannot, in all cases, override other rights and values. Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. This the Court has done by weighing freedom of expression claims in light of their relative connection to a set of even more fundamental values. In *Keegstra*, *supra*, at pp. 762-63, Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. When state action places such values in jeopardy,

pertinents des valeurs qui entrent en conflit avec ce droit ou cette liberté. Elle semble mieux saisir la réalité du litige soulevé par les faits particuliers et être donc plus propice à la recherche d'un compromis juste et équitable entre les deux valeurs en conflit en vertu de l'article premier.

Dans l'arrêt *Rocket*, précité, aux pp. 246 et 247, le juge McLachlin a confirmé la méthode contextuelle formulée par le juge Wilson:

> Bien que la méthode canadienne ne consiste pas à appliquer des critères spéciaux aux restrictions imposées à l'expression commerciale, notre méthode d'analyse permet d'aborder la détermination de leur constitutionnalité avec sensibilité et en fonction de chaque cas particulier. En situant les valeurs contradictoires dans leur contexte factuel et social au moment de procéder à l'analyse fondée sur l'article premier, les tribunaux ont la possibilité de tenir compte des caractéristiques spéciales de l'expression en question. Comme le juge Wilson le fait remarquer dans *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, ce ne sont pas toutes les expressions qui méritent la même protection. Toutes les violations de la liberté d'expression ne sont pas également graves.

La source de l'examen à faire «avec sensibilité et en fonction de chaque cas particulier», dont parle le juge McLachlin dans l'arrêt *Rocket*, est la reconnaissance plus fondamentale par notre Cour que le droit à la liberté d'expression n'est pas absolu et ne peut, dans tous les cas, l'emporter sur les autres droits et libertés. Bien que la liberté d'expression constitue indubitablement une valeur fondamentale, il existe d'autres valeurs fondamentales qui méritent aussi d'être protégées et examinées par les tribunaux. En cas de conflit entre ces valeurs, comme cela se produit souvent, les tribunaux sont appelés à faire des choix fondés non pas sur une analyse abstraite, platonicienne, mais sur une appréciation concrète de l'importance relative de chacune des valeurs pertinentes dans notre collectivité dans le contexte en question. C'est ce que notre Cour a fait en examinant les demandes touchant le droit à la liberté d'expression en fonction du lien relatif qu'elles ont avec des valeurs encore plus fondamentales. Dans l'arrêt *Keegstra*, précité, aux pp. 762 et 763, le juge en chef Dickson a identifié ces valeurs fondamentales ou se trouvant au «cœur» d'une garantie comme incluant la décou-

this Court has been careful to subject it to a searching degree of scrutiny. However, when the form of expression placed in jeopardy falls farther from the "centre core of the spirit", this Court has ruled restrictions on such expression less difficult to justify. As Dickson C.J. observed in *Keegstra*, *supra*, at p. 760:

In my opinion, however, the s. 1 analysis of a limit upon s. 2(*b*) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*).

In cases where the expression in question is farther from the "core" of freedom of expression values, this Court has applied a lower standard of justification. For example, in *Keegstra*, where a majority of this Court ruled that a prohibition on hate speech under s. 319(2) of the *Criminal Code*, R.S.C., 1985, c. C-46, was a justifiable limitation on freedom of expression, Dickson C.J. found that this limited infringement was justified because hate propaganda was a form of expression that was only remotely related to "core" free expression values. He noted, at p. 766:

. . . I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a

verte de la vérité dans les affaires politiques et dans les entreprises scientifiques et artistiques, la protection de l'autonomie et de l'enrichissement personnels et la promotion de la participation du public au processus démocratique. Lorsque les mesures gouvernementales menacent ces valeurs, notre Cour a pris soin d'en faire un examen rigoureux. Toutefois, lorsque la forme d'expression menacée s'écarte beaucoup de l'«esprit même» de la garantie, notre Cour a statué que les restrictions à cette expression sont moins difficiles à justifier. Comme le juge en chef Dickson l'a fait remarquer dans *Keegstra*, précité, à la p. 760:

À mon avis, toutefois, l'analyse en vertu de l'article premier d'une restriction imposée à l'al. 2*b*) doit tenir compte de la nature de l'activité expressive que l'État cherche à restreindre. Si nous devons veiller à ne pas juger l'expression en fonction de sa popularité, il est tout aussi néfaste pour les valeurs inhérentes à la liberté d'expression, et pour les autres valeurs sous-jacentes à une société libre et démocratique, de considérer que toutes les sortes d'expressions revêtent la même importance au regard des principes qui sont au cœur de l'al. 2*b*).

Dans les cas où l'expression en question s'écarte beaucoup des valeurs au «cœur» de la liberté d'expression, notre Cour a appliqué une norme de justification moins sévère. Par exemple, dans l'arrêt *Keegstra*, dans lequel notre Cour à la majorité a statué qu'une interdiction de fomentation de la haine fondée sur le par. 319(2) du *Code criminel*, L.R.C. (1985), ch. C-46, constituait une restriction justifiable de la liberté d'expression, le juge en chef Dickson a statué que cette atteinte limitée était justifiée parce que la propagande haineuse constituait une forme d'expression qui ne se rattachait que vaguement au «cœur» des valeurs de la liberté d'expression. Il a fait remarquer, à la p. 766:

. . . je suis d'avis que la propagande haineuse apporte peu aux aspirations des Canadiens ou du Canada, que ce soit dans la recherche de la vérité, dans la promotion de l'épanouissement personnel ou dans la protection et le développement d'une démocratie dynamique qui accepte et encourage la participation de tous. Si je ne puis conclure que la propagande haineuse ne mérite qu'une protection minimale dans le cadre de l'analyse fondée sur l'article premier, je peux néanmoins recon-

special category of expression which strays some distance from the spirit of s. 2(*b*), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*)". . . .

74 This Court adopted a similar approach in *R. v. Butler*, [1992] 1 S.C.R. 452, where it found a prohibition upon publications whose dominant characteristic was the "undue exploitation of sex" under s. 163(8) of the *Criminal Code*, R.S.C., 1985, c. C-46, to be a justifiable infringement upon freedom of expression. In so ruling, this Court found it significant, at p. 500, that "the kind of expression which is sought to be advanced does not stand on an equal footing with other kinds of expression which directly engage the 'core' of the freedom of expression values". The expression targeted by s. 163(8) was pornography, which is designed to promote sex for profit, and thus fell far from the "core" of freedom of expression values discussed by Dickson C.J. in *Keegstra*. The Court has adopted a similar approach with respect to prostitution, which was also accorded a lower level of protection in the *Prostitution Reference*, *supra*. In that case, Dickson C.J. stated, at p. 1136:

> When a *Charter* freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed *Charter* right, should also be analyzed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

75 In my view, the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitu-

naître le fait que les restrictions imposées à la propagande haineuse visent une catégorie particulière d'expression qui s'écarte beaucoup de l'esprit même de l'al. 2*b*). Je conclus donc qu'«il se pourrait que des restrictions imposées à des expressions de ce genre soient plus faciles à justifier que d'autres atteintes à l'al. 2*b*)». . .

Notre Cour a adopté une analyse similaire dans l'arrêt *R. c. Butler*, [1992] 1 R.C.S. 452, dans lequel elle a statué qu'une interdiction touchant des publications dont une caractéristique dominante était «l'exploitation indue des choses sexuelles» en contravention du par. 163(8) du *Code criminel*, L.R.C. (1985), ch. C-46, constituait une atteinte justifiable à la liberté d'expression. Ce faisant, notre Cour a considéré comme important, à la p. 500, que «le genre d'expression que l'on cherche à promouvoir n'est pas du même calibre que les autres genres d'expression qui touchent directement à l'«essence» des valeurs relatives à la liberté d'expression». L'expression visée par le par. 163(8) était la pornographie, laquelle vise à promouvoir le sexe contre un profit, ce qui s'écarte des valeurs au «cœur» de la liberté d'expression analysées par le juge en chef Dickson dans l'arrêt *Keegstra*. Notre Cour a adopté une analyse similaire relativement à la prostitution, à laquelle elle a également accordé une protection moindre dans le *Renvoi sur la prostitution*, précité. Dans cette affaire, le juge en chef Dickson affirme aux pp. 1135 et 1136:

> Lorsqu'une liberté garantie par la *Charte* a été violée par une mesure prise par l'État, en l'occurrence la criminalisation, le ministère public doit s'acquitter du lourd fardeau de justifier cette violation. Néanmoins, comme dans le cas de toute violation d'un droit reconnu par la *Charte*, l'activité d'expression devrait également être analysée dans le contexte particulier de l'affaire. En l'espèce, l'activité visée par la disposition législative contestée est une expression ayant un but économique. On peut difficilement affirmer que les communications relatives à l'opération économique d'échange de services sexuels pour de l'argent relèvent, ou même se rapprochent, de l'essence de la garantie de la liberté d'expression.

À mon avis, le préjudice engendré par le tabac, et la volonté de faire des profits qui en sous-tend la promotion, placent cette forme d'expression aussi loin du «cœur» des valeurs de la liberté d'expres-

tion, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s. 1. It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it. The main, if not sole, motivation for this advertising is, of course, profit. The sale of tobacco products in Canada generates enormous profits for the three companies who dominate the market (RJR, Imperial and Rothmans, Benson & Hedges Inc.). In 1992, for example, earnings from Imperial's operations alone reached $432,000,000 (Earnings from operations (Tobacco) in Note 31 (Segmented financial information) in "Notes to the Consolidated Financial Statements", at p. 48 of Imasco *Annual Report 1992* and "Six Year Review" in Imasco *Annual Report 1992*, at pp. 52-53).

The appellants, both of whom are large multinational corporations, spend millions of dollars every year to promote their products (in 1987 alone, RJR and Imperial spent over $75 million dollars on advertising and promotion); see RJR-MacDonald Inc., "Advertising and Promotion Spending (CND$)" (1976-1987); Imperial Tobacco Ltd., "Domestic Advertising Expense Summary" (1982-1987). The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products. The sophistication of the advertising campaigns employed by these corporations, in my view, undermines their claim to freedom of expression protection because it creates an enormous power differential between these companies and tobacco consumers in the "marketplace of ideas". As noted by M. L. Rothschild in *Advertising: From Fundamentals to Strategies* (1987), at p. 8, and cited in Dr. Richard W. Pollay, "The

sion que la prostitution, la fomentation de la haine ou la pornographie, ce qui fait qu'elle n'a droit qu'à une faible protection en vertu de l'article premier. Il faut se rappeler que la publicité du tabac ne sert aucune fin politique, scientifique ou artistique et qu'elle ne favorise pas la participation au processus politique. Son seul but est plutôt de renseigner les consommateurs sur un produit qui est nocif, voire souvent fatal, pour ceux qui en font usage, et d'en faire la promotion. Le principal, sinon le seul motif de la publicité est, bien entendu, le profit. La vente des produits du tabac au Canada génère d'énormes profits pour les trois compagnies qui dominent le marché (RJR, Imperial et Rothmans, Benson & Hedges Inc.). Par exemple, en 1992, les revenus d'exploitation d'Imperial seulement se sont élevés à 432 000 000 $ (Bénéfice des activités d'exploitation (Tabac), dans Note 31 (Information financière sectorielle) dans «Notes complémentaires des exercices», à la p. 48, Imasco, *Rapport annuel 1992*, et «Revue des six dernières années» dans Imasco, *Rapport annuel 1992*, aux pp. 52 et 53).

Les appelantes, toutes deux d'importantes multinationales, dépensent des millions de dollars chaque année pour faire la promotion de leurs produits (en 1987 seulement, RJR et Imperial ont dépensé plus de 75 millions de dollars au titre de la publicité et de la promotion); voir RJR-MacDonald Inc., «Advertising and Promotion Spending CND$» (1976-1987); Imperial Tobacco Ltd., «Domestic Advertising Expense Summary» (1982-1987). Vu les sommes importantes que ces compagnies consacrent à la publicité, elles sont en mesure de recourir aux techniques les plus avancées dans le domaine de la publicité et des sciences psychosociales pour convaincre d'éventuels acheteurs. À mon avis, la complexité même des campagnes publicitaires menées par ces compagnies ne les aide pas lorsqu'elles demandent que soit protégée leur liberté d'expression, du fait que ces campagnes créent un important déséquilibre des forces entre ces sociétés et les consommateurs des produits du tabac dans le «marché des idées». Comme l'a fait remarquer M. L. Rothschild dans *Advertising: From Fundamentals to Strategies* (1987), à la p. 8, et cité dans l'ouvrage de Richard W. Pollay,

76

Functions and Management of Cigarette Advertising", Report, prepared July 27, 1989, at p. 2:

Advertising is salesmanship, and is paid for by a firm, a person or a group with a particular point of view. The message advocates that point of view, and its goal is to create awareness, attitude, or behaviour that is favorable to that advocacy position. The message attempts to inform and to persuade; it is intentionally biased, and there is no intent to present a balanced point of view.

The power differential between advertiser and consumer is even more pronounced with respect to children who, as this Court observed in *Irwin Toy*, at p. 987, are "particularly vulnerable to the techniques of seduction and manipulation abundant in advertising"; see, e.g., expert report of Dr. Michael J. Chandler, "A Report on the Special Vulnerabilities of Children and Adolescents" (1989), at p. 19; expert report of Simon Chapman and Bill Fitzgerald, "Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications for Health Promotion" (1982), 72 *Am. J. Pub. Health* 491; Gerald J. Gorn and Renée Florsheim, "The Effects of Commercials for Adult Products on Children" (1985), 11 *J. Consumer Res.* 962. In this respect, it is critical to keep in mind Dickson C.J.'s reminder in *Edwards Books*, *supra*, at p. 779:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

77 I conclude, therefore, that an attenuated level of s. 1 justification is appropriate in these cases. Taking into account both the nature of the right and the nature of the legislation in issue, I am satisfied that LeBel J.A. was correct in deciding that the Attorney General need only demonstrate that Parliament had a rational basis for introducing the measures contained in this Act. With these observations firmly in mind, I now proceed to an application of the proportionality test.

«The Functions and Management of Cigarette Advertising», Rapport, 27 juillet 1989, à la p. 2:

[TRADUCTION] La publicité est l'art de vendre; elle est financée par une firme, une personne ou un groupe ayant un point de vue particulier. Le message prône ce point de vue et son objectif est de sensibiliser, de créer un intérêt ou d'établir un comportement qui est favorable à la position avancée. Le message tente d'informer et de persuader, il est intentionnellement partial; il ne s'agit aucunement de présenter un point de vue équilibré.

Le déséquilibre des forces entre le publicitaire et le consommateur est encore plus marqué dans le cas des enfants qui, comme l'a affirmé notre Cour dans l'arrêt *Irwin Toy*, à la p. 987, sont «particulièrement vulnérable[s] aux nombreuses techniques de séduction et de manipulation de la publicité»; voir le rapport d'expert de Michael J. Chandler, «A Report on the Special Vulnerabilities of Children and Adolescents» (1989), à la p. 19; le rapport d'expert de Simon Chapman et Bill Fitzgerald, «Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications for Health Promotion» (1982), 72 *Am. J. Pub. Health* 491, et Gerald J. Gorn et Renée Florsheim, «The Effects of Commercials for Adult Products on Children» (1985), 11 *J. Consumer Res.* 962. À cet égard, il est essentiel de se rappeler la mise en garde du juge en chef Dickson dans *Edwards Books*, précité, à la p. 779:

Je crois que lorsqu'ils interprètent et appliquent la *Charte*, les tribunaux doivent veiller à ce qu'elle ne devienne pas simplement l'instrument dont se serviront les plus favorisés pour écarter des lois dont l'objet est d'améliorer le sort des moins favorisés.

Par conséquent, je conclus qu'il convient en l'espèce de faire preuve de souplesse dans la justification au regard de l'article premier. Compte tenu de la nature du droit et de celle de la loi en cause, je suis convaincu que le juge LeBel de la Cour d'appel a eu raison de décider que le procureur général n'avait qu'à établir que le Parlement avait un motif rationnel de déposer les mesures contenues dans la Loi. En gardant fermement ces observations à l'esprit, je procède maintenant à une application du critère de la proportionnalité.

Proportionality

As I mentioned at the outset of my *Charter* discussion, the appellants rely heavily on Chabot J.'s factual findings in support of their argument that the measures employed under the Act are not proportional to the objective of reducing tobacco consumption. Briefly, Chabot J.'s principal factual findings at trial were as follows. With respect to a rational connection between the measures adopted under the Act and the objective of reducing tobacco consumption, he found, at p. 512, that "the connection which the state seeks to establish between health protection and tobacco advertising is tenuous and speculative" and, at p. 513, that "[t]he virtual totality of the scientific documents in the state's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption". With respect to whether the measures impair rights as little as possible, Chabot J. concluded, at pp. 515-16, as follows:

> To the extent that the purpose of the law is to eliminate any message constituting an inducement addressed to any Canadian citizen, the only means to achieve this is necessarily a total ban on such messages. To the extent that the purpose is to protect young people from inducements to smoke, a total ban on all advertising of any kind, directed at any audience, goes far beyond that purpose. Likewise, if the objective is to enhance Canadians' awareness of the harmful effects of cigarettes, the total ban on advertising is out of all proportion to the objective, while the imposition of unattributed messages goes beyond what was necessary to achieve the objective, all the more so as there is no impact study on the effectiveness of these unattributed messages as compared to messages attributed to the Department of National Health and Welfare.

Finally, with respect to the proportionality between effects and objectives, Chabot J. found, at p. 517, that the Act constituted "social engineering" which was an "extremely serious impairment of the principles inherent in a free and democratic society which is disproportionate to the objective of the [Act]".

In my view, Chabot J. erred in finding that there was insufficient evidence to satisfy the proportionality requirement, and the majority of the Court of

Proportionnalité

78 Comme je l'ai mentionné au début de mon analyse fondée sur la *Charte*, les appelantes s'appuient fortement sur les conclusions de fait du juge Chabot pour soutenir que les mesures employées en vertu de la Loi ne sont pas proportionnelles à l'objectif de réduire l'usage du tabac. Voici un bref résumé des principales conclusions de fait du juge Chabot. En ce qui concerne l'existence d'un lien rationnel entre les mesures adoptées en vertu de la Loi et l'objectif de réduire l'usage du tabac, il a conclu, à la p. 2308, que «le lien que l'État cherche à établir entre la protection de la santé et la publicité des produits du tabac est ténu et aléatoire» et que «[l]a presque totalité de la documentation scientifique en possession de l'État lors de l'adoption de la loi ne démontrait pas que le bannissement de la publicité aurait un effet sur la consommation» (p. 2309). Quant à savoir si les mesures constituent une atteinte minimale aux droits, le juge Chabot a ajouté, à la p. 2311:

> Dans la mesure où l'objectif de la loi est d'éliminer tout message incitatif auprès de tout citoyen canadien, la seule manière d'y arriver, c'est nécessairement d'interdire en totalité ces messages. Dans la mesure où l'objectif est de protéger les jeunes contre les incitatifs à fumer, l'interdiction totale de toute forme et de toute publicité dirigée à tout auditoire dépasse largement l'objectif. Pareillement, si l'objectif est de sensibiliser les Canadiens aux méfaits de la cigarette, l'interdiction totale de la publicité est sans commune mesure avec l'objectif, alors que l'imposition de messages non attribués dépasse ce qui était nécessaire pour atteindre l'objectif, d'autant plus qu'il n'y a aucune étude d'impact sur la valeur de ces messages non attribués par rapport aux messages attribués au ministère de la Santé.

Enfin, relativement au critère de la proportionnalité entre les effets et les objectifs, le juge Chabot a estimé à la p. 2312 que la Loi était un genre «d'ingénierie sociale» qui constitue «une atteinte extrêmement grave aux principes inhérents d'une société libre et démocratique, incommensurable avec l'objectif de la [Loi]».

79 À mon avis, le juge Chabot a commis une erreur lorsqu'il a décidé que la preuve n'était pas suffisante pour satisfaire au critère de la proportionna-

Appeal was correct to interfere with his findings and reevaluate the evidence. It is, of course, well-established that an appellate court may only interfere with the factual findings of a trial judge where the trial judge made a manifest error and where that error influenced the trial judge's final conclusion or overall appreciation of the evidence; see *Dorval v. Bouvier*, [1968] S.C.R. 288; *Lapointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351, at p. 358. However, it is important to emphasize that the trial findings on which the appellants rely are not the type of factual findings that fall within the general rule of appellate "non-interference" discussed in these cases. The appellate "non-interference" rule reflects the traditional recognition that a trial judge is better placed than an appellate court to assess and weigh so-called "adjudicative" facts or, in John Hagan's terms, "who did what, where, when, how and with what motive or intent"; see John Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Robert J. Sharpe, ed., *Charter Litigation* (1987), at p. 215. Fauteux J. explained the rationale for the non-interference rule in *Dorval*, *supra*, at p. 293, as follows:

[TRANSLATION] Because of the privileged position of the judge who presides at the trial, who sees and hears the parties and witnesses and who assesses their evidence, it is an established principle that his opinion is to be treated with the utmost deference by the appellate court, whose duty it is not to retry the case nor to interfere by substituting its own assessment of the evidence for that of the trial judge, except in the case of a clear error on the face of the reasons of the judgment appealed from.

However, the privileged position of the trial judge does not extend to the assessment of "social" or "legislative" facts that arise in the law-making process and require the legislature or a court to assess complex social science evidence and to draw general conclusions concerning the effect of legal rules on human behaviour. As Ann Woolhandler observes in "Rethinking the Judicial Reception of

lité, et la Cour d'appel à la majorité a eu raison de modifier les déterminations du juge Chabot et de procéder à une nouvelle appréciation de la preuve. Il est, évidemment, bien établi qu'une cour d'appel ne peut modifier les conclusions de fait d'un juge de première instance, sauf si celui-ci a commis une erreur manifeste qui a influencé sa conclusion définitive ou encore son appréciation globale de la preuve; voir *Dorval c. Bouvier*, [1968] R.C.S. 288; *Lapointe c. Hôpital Le Gardeur*, [1992] 1 R.C.S. 351, à la p. 358. Cependant, il est important de souligner que les conclusions de fait du juge de première instance, que font valoir les appelantes, ne sont pas du type de celles qui seraient visées par la règle générale de «non-intervention» en appel examinée dans les arrêts que je viens de mentionner. La règle de «non-intervention» en appel reflète la règle traditionnelle selon laquelle un juge de première instance est en meilleure position qu'une cour d'appel pour évaluer et pondérer des faits dits «en litige» ou pour déterminer, selon les termes employés par John Hagan, [TRADUCTION] «qui a fait quoi, où, quand, comment et pour quel motif ou dans quelle intention»; voir John Hagan, «Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation» dans Robert J. Sharpe, dir., *Charter Litigation* (1987), à la p. 215. Le juge Fauteux a expliqué la raison d'être de la règle de non-intervention dans l'arrêt *Dorval*, précité à la p. 293:

En raison de la position privilégiée du juge qui préside au procès, voit, entend les parties et les témoins et en apprécie la tenue, il est de principe que l'opinion de celui-ci doit être traitée avec le plus grand respect par la Cour d'appel et que le devoir de celle-ci n'est pas de refaire le procès, ni d'intervenir pour substituer son appréciation de la preuve à celle du juge de première instance à moins qu'une erreur manifeste n'apparaisse aux raisons ou conclusions du jugement frappé d'appel.

Cependant, la situation privilégiée du juge de première instance ne va pas jusqu'à faire l'appréciation des faits «sociaux» ou «législatifs» qui se rattachent au processus législatif et obligent une législature ou un tribunal à procéder à l'appréciation de données complexes en sciences humaines et à tirer des conclusions générales sur l'effet des règles de droit sur le comportement humain.

Legislative Facts" (1988), 41 *Vand. L. Rev.* 111, at pp. 114 and 123, conclusions of this nature are most accurately characterized as social or legislative facts because they involve predictions about the social effects of legal rules, which are invariably subject to dispute:

In contrast to adjudicative facts, legislative facts do not presume a pre-existing legal norm because by definition such facts are used to create law. A paradigmatic legislative fact is one that shows the general effect a legal rule will have, and is presented to encourage the decisionmaker to make a particular legal rule. There is less a sense that legislative facts are true or knowable because such facts are predictions, and, moreover, typically predictions about the relative importance of one factor in causing a complex phenomenon.

. . .

Legislative facts are predictions about the effects of legal rules and are by their nature disputable. The creation and reception of legislative facts will be governed by pre-existing presumptions about desirable effects and their causes. Legislative facts, moreover, cannot neutrally provide answers to legal questions because by definition legislative facts are used to make the rules that pose the questions. Although legislative facts provide information for the pragmatic balancing of desirable effects, these "facts" cannot tell us what effects are desirable, or how to weigh them.

In my view, the causal connection between tobacco advertising and consumption, or the lack thereof, is a paradigm example of a legislative or social fact. While a trial judge is in a privileged position with respect to adjudicative fact-finding, this is not the case with legislative or social fact-finding, where appellate courts and legislatures are as well placed as trial judges to make findings. Certainly, one does not have to be a trial judge to come to general conclusions about the effect of legal rules on human behaviour. Moreover, given the intimate relation that exists between legislative facts and the creation of legal rules, there is also a strong policy reason for suspending the non-interference rule with respect to legislative or social

Comme Ann Woolhandler le fait remarquer dans «Rethinking the Judicial Reception of Legislative Facts» (1988), 41 *Vand. L. Rev.* 111, aux pp. 114 et 123, de telles conclusions peuvent être plus précisément qualifiées de faits sociaux ou législatifs parce qu'elles portent sur des prédictions quant aux effets sociaux des règles de droit, lesquelles font immanquablement l'objet de débats:

[TRADUCTION] Contrairement aux faits en litige, les faits législatifs ne supposent pas une norme juridique préexistante parce que, par définition, ces faits servent à l'établissement de lois. Un fait législatif de nature paradigmatique est un fait qui établit l'effet général d'une règle de droit, et qui vise à inciter le décideur à adopter une règle de droit particulière. On a moins l'impression que les faits législatifs sont exacts ou connaissables parce que ces faits sont des prédictions et, plus précisément, des prédictions qui portent généralement sur l'importance relative d'un facteur à l'intérieur d'un phénomène complexe.

. . .

Les faits législatifs sont des prédictions sur les effets des règles de droit et sont, de par leur nature, contestables. La constitution et l'admission des faits législatifs seront régies par les présomptions existantes sur les effets souhaitables et leurs causes. Par ailleurs, les faits législatifs ne peuvent fournir de réponses objectives aux questions de droit parce que, par définition, ces faits sont utilisés aux fins de l'adoption des règles qui suscitent les questions. Bien que les faits législatifs renseignent sur la pondération pragmatique des effets souhaitables, ces «faits» ne peuvent nous dire quels sont les effets souhaitables ou comment il faut en faire l'appréciation.

80 À mon avis, l'existence ou l'inexistence d'un lien causal entre la publicité et l'usage du tabac est un exemple paradigmatique d'un fait législatif ou social. Bien qu'un juge de première instance soit dans une situation privilégiée relativement à l'appréciation des faits en litige, il ne l'est pas dans le cas de faits législatifs ou sociaux, dont l'appréciation peut être aussi bien faite par une cour d'appel ou une législature que par un juge de première instance. De toute évidence, il n'est pas nécessaire d'être juge de première instance pour tirer des conclusions générales sur l'incidence des règles de droit sur le comportement humain. Par ailleurs, compte tenu de la relation étroite entre les faits législatifs et la création des règles de droit, il existe

facts. As Brian G. Morgan notes in "Proof of Facts in Charter Litigation" in *Charter Litigation*, *supra*, at p. 186, the rigid application of that rule would deny appellate courts their proper role in developing legal principles of general application:

> . . . where legislative and constitutional facts are considered and determined at the trial court level, it is important that reference to the traditional division between fact and law in fixing the scope of appellate review not lead the appellate court to treat as conclusive the findings of the trial judge. First, the traditional and accepted expertise of the trial court in determining adjudicative facts does not extend to the less familiar and inherently less certain task of determining legislative or constitutional facts. Secondly, unless the appellate courts retain sufficient discretion to review findings of the trial court on matters of legislative or constitutional facts, the appellate courts will be denied their proper role of developing principles in this area of the law to be applied in the multitude of individual cases which come before trial judges.

The United States Court of Appeals for the Fifth Circuit, in *Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738 (1983) (*en banc*), cert. denied, 467 U.S. 1259 (1984), a case involving the constitutionality of a ban on liquor advertising, made the same point, at pp. 748-49, n. 8, in slightly more colourful terms:

> There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction

également un solide motif de principe de suspendre l'application de la règle de non-intervention relativement aux faits législatifs ou sociaux. Comme Brian G. Morgan le fait remarquer dans «Proof of Facts in Charter Litigation» dans *Charter Litigation*, *op. cit.*, à la p. 186, l'application rigide de cette règle empêcherait les cours d'appel de s'acquitter du rôle qui leur incombe d'élaborer des principes de droit d'application générale:

> [TRADUCTION] . . . lorsque des faits législatifs et des faits de nature constitutionnelle sont examinés et tranchés en première instance, il est important que la mention de la distinction traditionnelle entre un fait et une règle de droit, aux fins de la détermination de l'étendue de l'examen en appel, ne mène pas la cour d'appel à considérer comme définitives les conclusions du juge de première instance. Premièrement, l'expertise traditionnelle et reconnue du tribunal de première instance dans l'appréciation des faits en litige n'englobe pas la tâche moins connue et moins certaine en soi de l'appréciation des faits législatifs ou de nature constitutionnelle. Deuxièmement, à moins qu'une cour d'appel conserve un pouvoir discrétionnaire suffisant pour réviser les conclusions prononcées en première instance sur des questions relatives à des faits législatifs ou de nature constitutionnelle, elle ne pourra s'acquitter du rôle qu'elle a d'élaborer dans ce domaine du droit des principes qui devront être appliqués dans les nombreux dossiers dont sont saisis les juges de première instance.

Dans l'arrêt *Dunagin c. City of Oxford, Mississippi*, 718 F.2d 738 (1983) (*en banc*), cert. refusé, 467 U.S. 1259 (1984), affaire portant sur la constitutionnalité d'une interdiction de publicité de boissons alcoolisées, la Court of Appeals for the Fifth Circuit des États-Unis a formulé la même observation, aux pp. 748 et 749, note 8, mais en des termes légèrement plus colorés:

> [TRADUCTION] Il y a une limite au règlement de questions constitutionnelles importantes en fonction des idées des spécialistes en sciences humaines qui témoignent comme expert en première instance. Supposons qu'un juge de première instance dans un État donne foi au témoignage d'un sociologue qui n'a pas établi de lien entre l'abus d'alcool et la publicité, alors qu'un autre juge dans un autre État donne foi au témoignage d'un psychiatre qui est arrivé à la conclusion contraire. Une

and illegal in another? Should the fundamental principles of equal protection delivered in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 96 L.Ed. 873 (1954), be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitutionality of the property tax as a means of financing public education, resolved in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

situation similaire s'est produite en l'espèce. Une conduite identique devrait-elle bénéficier d'une protection constitutionnelle dans un ressort et être illégale dans un autre? Les principes fondamentaux en matière d'égalité de protection formulés dans *Brown c. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 96 L.Ed. 873 (1954) devraient-ils être remis en question si les études sociologiques sur la ségrégation raciale, mentionnées au renvoi 11 de la décision, se révèlent incorrectes du point de vue méthodologique? La constitutionnalité de la taxe foncière comme moyen de financement de l'enseignement public, prononcée dans l'affaire *San Antonio Independent School District c. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), devrait-elle dépendre des opinions courantes des éducateurs et des sociologues quant à l'existence d'un rapport coût-qualité dans l'enseignement? La peine capitale devient-elle un châtiment cruel et inusité dans le cas où les derniers modèles de régression établissent qu'elle n'a pas d'effet de dissuasion? Les sciences humaines jouent un rôle important dans de nombreux domaines, y compris le droit, mais d'autres valeurs, intérêts et croyances non scientifiques ont un rôle transcendant.

Perhaps for these reasons, the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court.

C'est peut-être pour ces motifs que la Cour suprême, dans ses récents arrêts sur l'expression commerciale et dans ses décisions pertinentes sur la liberté d'expression, indique que les tribunaux d'appel jouissent d'une grande latitude lorsqu'ils décident si les restrictions à l'expression sont justifiées. La Cour suprême n'accorde d'ailleurs dans ces arrêts aucune grande importance aux conclusions de fait du juge de première instance.

For the foregoing reasons, I conclude that an appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter. As applied to these cases, I find that, apart from his specific findings with respect to the credibility of witnesses and the probative value of reports, Chabot J.'s factual findings concerning the connection between tobacco advertising and consumption are entitled to minimal deference by this Court. With this in mind, I proceed to the proportionality analysis.

Pour les motifs qui précèdent, je conclus qu'une cour d'appel peut modifier une conclusion d'un juge de première instance concernant un fait législatif ou social en cause dans une détermination de la constitutionnalité lorsqu'elle décide que le juge de première instance a commis une erreur dans son examen ou son évaluation de la question. Si l'on applique cette conclusion aux présents pourvois, je suis d'avis que les conclusions de fait du juge Chabot relativement au lien entre la publicité en faveur des produits du tabac et l'usage du tabac, à l'exception toutefois de ses conclusions spécifiques sur la crédibilité des témoins et la valeur probante des rapports, donnent lieu à une retenue minimale de la part de notre Cour. Gardant ces considérations à l'esprit, je passe maintenant à l'analyse de la question de la proportionnalité. 81

Rational Connection

82 The first step in the proportionality analysis requires the government to demonstrate that the legislative means chosen under the Act are rationally connected to the objective of protecting public health by reducing tobacco consumption. As I explained in discussing the contextual nature of the s. 1 analysis, it is unnecessary in these cases for the government to demonstrate a rational connection according to a civil standard of proof. Rather, it is sufficient for the government to demonstrate that it had a reasonable basis for believing such a rational connection exists; see *McKinney*, *supra*, at pp. 282-85; *Irwin Toy*, *supra*, at p. 994; *Butler*, *supra*, at p. 502. Wilson J. summarized the standard of justification under the rational connection analysis in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 291, as follows:

> The *Oakes* inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.

83 I note at the outset that there is, without question, a rational connection between a prohibition on the distribution of free samples of tobacco products under s. 7 and the protection of public health. Given the close correlation between price and demand in a free market economy, and the addictive nature of tobacco, it is self-evident that the availability of free tobacco will tend to increase consumption of that product. The appellants, however, base their argument principally upon the claim that there is no rational connection between the prohibition on advertising and promotion of tobacco products under ss. 4, 5, 6, and 8 and the objective of reducing tobacco consumption. In my view, the appellants' argument fails. Although the appellants observe, quite correctly, that there has not to date been a definitive study conducted with respect to the connection between tobacco advertising and tobacco consumption, I believe there was sufficient evidence adduced at trial to con-

Le lien rationnel

La première étape dans l'analyse de la proportionnalité exige que le gouvernement fasse la preuve que les moyens législatifs choisis ont un lien rationnel avec l'objectif de protéger la santé publique par la réduction de l'usage du tabac. Comme je l'ai expliqué dans mes motifs sur la nature contextuelle de l'analyse fondée sur l'article premier, il n'est pas nécessaire en l'espèce que le gouvernement fasse la preuve d'un lien rationnel selon les règles de preuve en matière civile. Il lui suffit plutôt de démontrer qu'il avait des motifs raisonnables de croire à l'existence d'un tel lien; voir *McKinney*, précité, aux pp. 282 à 285; *Irwin Toy*, précité, à la p. 994, et *Butler*, précité, à la p. 502. Dans *Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211, le juge Wilson a résumé, à la p. 291, ce en quoi la justification doit consister dans l'analyse du lien rationnel:

> L'examen, proposé dans *Oakes*, du «lien rationnel» entre les objectifs et les moyens choisis pour les atteindre n'exige rien de plus que la démonstration que les moyens retenus par le gouvernement favorisent logiquement la réalisation des objectifs légitimes et importants du législateur.

Je constate, dès le départ, qu'il existe assurément un lien rationnel entre l'interdiction, en vertu de l'art. 7, de distribuer des échantillons gratuits de produits du tabac et la protection de la santé publique. Étant donné le rapport étroit entre le prix et la demande dans une économie de libre marché, de même que la nature toxicomanogène du tabac, il est tout à fait évident que la disponibilité de produits du tabac gratuits induira à une augmentation de leur consommation. Pour leur part, les appelantes, appuient leur argumentation principalement sur l'allégation qu'il n'y a aucun lien rationnel entre l'interdiction de la publicité et de la promotion des produits du tabac, en vertu des art. 4, 5, 6 et 8, et l'objectif de réduire la consommation du tabac. À mon avis, l'argumentation des appelantes ne peut être retenue. Bien que jusqu'à maintenant, comme le font remarquer avec raison les appelantes, il n'y ait jamais eu d'étude concluante sur le lien entre la publicité des produits du tabac et leur

clude that the objective of reducing tobacco consumption is logically furthered by the prohibition under the Act on both tobacco advertising and promotion.

I begin with what I consider to be a powerful common sense observation. Simply put, it is difficult to believe that Canadian tobacco companies would spend over 75 million dollars every year on advertising if they did not know that advertising increases the consumption of their product. In response to this observation, the appellants insist that their advertising is directed solely toward preserving and expanding brand loyalty among smokers, and not toward expanding the tobacco market by inducing non-smokers to start. In my view, the appellants' claim is untenable for two principal reasons. First, brand loyalty alone will not, and logically cannot, maintain the profit levels of these companies if the overall number of smokers declines. A proportionate piece of a smaller pie is still a smaller piece. As the United States Court of Appeals for the Fifth Circuit, observed in *Dunagin*, *supra*, at p. 749:

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales.

Second, even if this Court were to accept the appellants' brand loyalty argument, the appellants have not adequately addressed the further problem that even commercials targeted solely at brand loyalty may also serve as inducements for smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend not only to potential smokers who are con-

usage, je crois qu'on a présenté suffisamment d'éléments de preuve au procès pour conclure que la Loi sert logiquement l'objectif de réduire l'usage des produits du tabac par la prohibition tant de la publicité que de la promotion.

Je commence par ce que je considère être une observation relevant du plus gros bon sens. Il est tout simplement difficile de croire que les compagnies de tabac canadiennes dépenseraient plus de 75 000 000 $ chaque année pour la publicité si elles ne savaient pas qu'il en résultera une augmentation de l'usage de leurs produits. En réponse à cette observation, les appelantes insistent pour dire que leur publicité ne vise qu'à préserver et renforcer la fidélité des fumeurs à des marques, et qu'elle ne vise pas à étendre le marché des produits du tabac en incitant les non-fumeurs à commencer à fumer. À mon avis, l'allégation des appelantes ne peut être retenue, pour deux raisons principales. Premièrement, la seule fidélité aux marques ne maintiendra pas les bénéfices de ces compagnies, car, logiquement elle ne le peut pas, si le nombre total de fumeurs diminue. La même part d'une plus petite tarte n'en demeure pas moins une plus petite part. Comme l'a fait remarquer la Court of Appeals for the Fifth Circuit des États-Unis dans *Dunagin*, précité, à la p. 749:

> [TRADUCTION] Il est au-delà de notre capacité de comprendre pourquoi de fortes sommes d'argent seraient affectées à la promotion de la vente de spiritueux sans attente de résultats, ou continueraient de l'être si aucun résultat n'en découle. Il ne fait aucun doute que les compétiteurs souhaitent maintenir et augmenter leur part du marché, mais quel commerçant s'interdit toute comparaison avec ses compétiteurs? C'est l'ensemble des ventes, les bénéfices, qui payent la publicité; et des dollars ne sont consacrés à la publicité que s'ils rapportent des ventes.

Deuxièmement, même si notre Cour acceptait l'argument des appelantes quant à la fidélité à une marque, les appelantes n'auraient pas apporté de solution au problème soulevé par le fait que même la publicité orientée seulement vers la fidélité à une marque peut aussi servir à inciter les fumeurs à ne pas cesser de fumer. La préoccupation du gouvernement quant aux effets des produits du tabac

sidering starting, but also to current smokers who would prefer to quit but cannot.

85 I observe in passing, based upon the recent jurisprudence of this Court, that the foregoing common sense observation is sufficient in itself to establish a rational connection in these cases. In this respect, there is a direct analogy between the present case and *Butler*, *supra*. In *Butler*, where this Court addressed the constitutionality of a prohibition on "obscene" material under the *Criminal Code*, R.S.C., 1985, c. C-46, the critical question raised at the rational connection stage was whether a rational connection existed between "obscene" material and violence against women. There was little or no evidence adduced to establish such a causal connection in a definitive manner. Indeed, in reviewing the evidence in that case, which consisted largely of two conflicting government reports, Sopinka J. observed, at p. 501, that "the literature of the social sciences remains subject to controversy" and that the social science evidence was "inconclusive". Nonetheless, Sopinka J. decided, at p. 502, that a common sense analysis was sufficient to satisfy the rational connection requirement:

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

In reaching this conclusion, Sopinka J., at p. 502, relied heavily on the following statement by the Meese Commission in its report (Attorney General's Commission on Pornography, *Final Report* (1986), vol. 1, at p. 326), regarding the effects of pornography:

> Although we rely for this conclusion on significant scientific empirical evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bear a causal relationship to their behavior. This is hardly surprising. What would be surprising

sur la santé peut très raisonnablement s'étendre non seulement aux fumeurs potentiels qui envisagent la possibilité de commencer à fumer, mais aussi aux fumeurs actuels qui voudraient cesser de fumer, mais qui ne le peuvent pas.

Je note en passant que, selon la jurisprudence récente de notre Cour, l'observation de gros bon sens qui précède est suffisante en soi pour établir un lien rationnel en l'espèce. À cet égard, il y a une analogie directe entre la présente affaire et l'arrêt *Butler*, précité. Dans cet arrêt, où notre Cour s'est penchée sur la constitutionnalité d'une interdiction édictée par le *Code criminel*, L.R.C. (1985), ch. C-46, contre le matériel «obscène», la question en litige qui se posait à l'étape du lien rationnel était de savoir si un lien rationnel existait entre le matériel «obscène» et la violence contre les femmes. Il n'y avait que peu ou pas de preuve établissant de façon certaine un lien causal. En fait, en examinant la preuve déposée dans ce pourvoi, qui consistait principalement en deux rapports gouvernementaux contradictoires, le juge Sopinka a fait observer, à la p. 501, que: «les ouvrages dans le domaine des sciences humaines peuvent toujours faire l'objet d'une controverse» et que la preuve en matière de sciences humaines était «non concluante». Néanmoins, le juge Sopinka a décidé, à la p. 502, qu'une analyse fondée sur le bon sens suffisait pour satisfaire au critère du lien rationnel:

> Bien qu'il puisse être difficile, voire impossible, d'établir l'existence d'un lien direct entre l'obscénité et le préjudice causé à la société, il est raisonnable de supposer qu'il existe un lien causal entre le fait d'être exposé à des images et les changements d'attitude et de croyance.

Pour arriver à cette conclusion, le juge Sopinka, à la p. 502, s'est appuyé en grande partie sur une affirmation tirée du rapport de la commission Meese (Attorney General's Commission on Pornography, *Final Report* (1986), vol. 1, à la p. 326) portant sur les effets de la pornographie:

> [TRADUCTION] Bien que nous nous soyons fondés sur d'importantes données scientifiques empiriques pour en arriver à cette conclusion, nous croyons qu'il vaut la peine d'en faire ressortir la logique sous-jacente. Les données démontrent simplement qu'il existe un lien causal entre les images auxquelles les gens sont exposés et

would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behaviour, especially in a form that almost exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior.

In my view, a similar type of analysis is applicable here. In his 1989 report, *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*, *supra*, at p. 512, the Surgeon General of the United States conceded that there have been no "scientifically rigorous" studies that prove a causal link between advertising and promotion of tobacco products and consumption, and observed that "[g]iven the complexity of the issue, none is likely to be forthcoming in the foreseeable future" (pp. 512-13). However, he went on to make the following observation, at p. 513:

> The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and logical evidence makes it more likely than not that advertising and promotional activities do stimulate cigarette consumption. However, that analysis also concluded that the extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable (Warner 1986b). This influence relative to other influences on tobacco use, such as peer pressure and role models, is uncertain. Although its effects are not wholly predictable, regulation of advertising and promotion is likely to be a prominent arena for tobacco policy debate in the 1990s. In part this reflects the high visibility of advertising and promotion; in part it reflects the perception that these activities constitute an influence on tobacco consumption that is amenable to government action. [Emphasis added.]

leur comportement. Cela n'est guère étonnant. Le contraire le serait, mais ce n'est pas là notre conclusion. Nous ne sommes pas, de toute évidence, arrivés à la conclusion que les images auxquelles sont exposés les gens contribuent davantage à la violence sexuelle que toutes les nombreuses autres causes possibles, dont l'examen dépassait le cadre de notre mandat. Néanmoins, il serait vraiment étrange que les représentations détaillées d'une forme de comportement, qui est presque toujours représenté comme désirable, n'aient pas au moins une certaine incidence sur les types de comportement.

À mon avis, un type similaire d'analyse est applicable en l'espèce. Dans son rapport de 1989, intitulé *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*, *op. cit.*, à la p. 512, le Surgeon General des États-Unis a admis, qu'il n'y avait pas d'étude [TRADUCTION] «scientifiquement rigoureuse» qui établissait un lien causal entre d'une part, la publicité et la promotion des produits du tabac et d'autre part, la consommation, et il a fait observer que [TRADUCTION] «[c]ompte tenu de la complexité de la question, il y a peu de chance qu'une telle étude soit menée à brève échéance» (pp. 512 et 513). Il a toutefois fait l'observation suivante, à la p. 513:

> [TRADUCTION] L'étude la plus complète quant aux mécanismes tant directs qu'indirects a conclu que l'ensemble de la preuve, empirique, expérimentale et logique, indique qu'il est plus vraisemblable, plutôt que le contraire, que la publicité et les activités de promotion stimulent la consommation de cigarettes. Toutefois, l'analyse a aussi conclu que la portée de l'influence de la publicité et de la promotion sur l'ampleur de la consommation est inconnue et peut-être inconnaissable (Warner 1986b). On ne peut mesurer avec certitude cette influence par rapport à d'autres influences sur la consommation des produits du tabac telles que la pression des pairs et les modèles de comportement. Bien que ses effets ne soient pas entièrement prévisibles, la réglementation de la publicité et de la promotion sera vraisemblablement un point chaud des discussions portant sur les politiques en matière de produits du tabac dans les années 1990. Cela reflète en partie la présence importante de la publicité et de la promotion, mais aussi, en partie, la perception que ces activités constituent une influence sur la consommation des produits du tabac, qui est du ressort du gouvernement. [Je souligne.]

Thus, following the reasoning adopted by this Court in *Butler*, the power of the common-sense connection between advertising and consumption is sufficient to satisfy the rational connection requirement.

87 However, it is not necessary to rely solely upon common sense to reach this conclusion because there was, in any event, sufficient evidence adduced at trial to bear out the rational connection between advertising and consumption. In this respect, I find it significant that Chabot J. made specific reference in his reasons to only two pieces of evidence. First, he considered at length a 1989 report of the New Zealand Toxic Substances Board entitled *Health or Tobacco: An End to Tobacco Advertising and Promotion* (1989), where the Board had reviewed the effect of advertising restrictions in 33 countries, and had concluded that there was a correlation between the degree of restrictions imposed in each of these countries and the relative decline in tobacco consumption. Chabot J. found the Report to be of no probative value on the following grounds, at p. 513:

> With respect to the T.S.B. report, the court can only note that it contains serious methodological errors and a lack of scientific rigour which renders it for all intents and purposes devoid of any probative value. It is a report with an obvious point of view and its conclusions reflect that point of view. In this regard, the court agrees entirely with the analysis of the report made by RJR's counsel in his argument . . . and concludes that the T.S.B. report, as an extrinsic document, is of no probative value.

Chabot J. also rejected the evidence of Dr. Jeffrey Harris, a Crown witness, who had affirmed the accuracy of the Report's conclusions in his own report and in testimony at trial. In Chabot J.'s view, at p. 514, "the input data used by Dr. Harris were unreliable and . . . his methodology led necessarily to the desired result". As a result, Chabot J. held, at p. 514, that Dr. Harris's testimony and his report (also adduced as evidence) had "no probative value". However, apart from these two findings, Chabot J. made no other findings respecting the credibility of expert witnesses who testified at

Par conséquent, conformément au raisonnement adopté par notre Cour dans l'arrêt *Butler*, le pouvoir du lien établi par le bon sens entre publicité et consommation est suffisant pour satisfaire à l'exigence d'un lien rationnel.

Il n'est cependant pas nécessaire de s'en remettre exclusivement au bon sens pour en arriver à cette conclusion, parce que, de toute façon, une preuve suffisante a été déposée en première instance pour confirmer l'existence du lien rationnel entre la publicité et la consommation. À cet égard, je trouve pertinent de noter que le juge Chabot n'a fait référence dans ses motifs qu'à deux documents. Il a d'abord examiné à fond un rapport présenté en 1989 par le Toxic Substances Board de la Nouvelle-Zélande, intitulé *Health or Tobacco: An End to Tobacco Advertising and Promotion* (1989), dans lequel, après avoir examiné les effets de restrictions imposées à la publicité dans 33 pays, cet organisme est arrivé à la conclusion qu'il y avait corrélation entre le degré des restrictions imposées dans chaque pays et le déclin relatif de l'usage des produits du tabac. Le juge Chabot a conclu, à la p. 2309, que ce rapport n'avait pas de valeur probante pour les motifs suivants:

> En ce qui a trait au *T.S.B. Report*, le Tribunal ne peut que noter que celui-ci comporte des erreurs graves de méthodologie et un manque de rigueur scientifique qui le rendent à toutes fins utiles sans valeur probante. C'est un rapport avec un point de vue manifeste et le résultat du rapport est conforme à ce point de vue. À cet égard, le Tribunal partage entièrement l'analyse de ce rapport effectuée par le procureur de R.J.R. dans son argumentation et conclut que le *T.S.B. Report*, à titre de document extrinsèque, n'a aucune valeur probante.

Le juge Chabot a aussi rejeté le témoignage de Jeffrey Harris, un témoin du procureur général, qui a déclaré dans son propre rapport et dans son témoignage au procès que les conclusions du rapport étaient exactes. Selon le juge Chabot, à la p. 2309, «les données de base utilisées par le Dr Harris sont aléatoires et [. . .] sa méthodologie conduit nécessairement au résultat recherché». Par conséquent, le juge Chabot a jugé, à la p. 2310, que le témoignage et le rapport de Harris (aussi déposé en preuve) n'avaient «aucune valeur probante». Cependant, à part ces deux conclusions, le juge

trial or the accuracy of the many reports adduced by the Attorney General. As such, it is apparent that Chabot J. disregarded a substantial amount of evidence that might otherwise have substantiated the government's belief in a rational connection. This evidence can be conveniently subdivided into three categories: internal tobacco marketing documents, expert reports, and international materials. I will review each of these in turn.

Perhaps the most compelling evidence concerning the connection between advertising and consumption can be found in the internal marketing documents prepared by the tobacco manufacturers themselves. Although the appellants steadfastly argue that their marketing efforts are directed solely at maintaining and expanding brand loyalty among adult smokers, these documents show otherwise. In particular, the following general conclusions can be drawn from these documents: the tobacco companies are concerned about a shrinking tobacco market and recognize that an "advocacy thrust" is necessary to maintain the size of the overall market; the companies understand that, in order to maintain the overall numbers of smokers, they must reassure current smokers and make their product attractive to the young and to non-smokers; they also recognize that advertising is critical to maintaining the size of the market because it serves to reinforce the social acceptability of smoking by identifying it with glamour, affluence, youthfulness and vitality.

Many of these conclusions are borne out by a simple reading of an extensive marketing research study commissioned by Imperial Tobacco Ltd. in 1986, entitled *Project Viking*. In the introduction to the study, the authors refer to the fact that increasing numbers of smokers are quitting as a "problem". They also observe that, in light of these declining numbers, the tobacco companies must direct their marketing efforts towards "expanding the market, or at very least forestalling its

Chabot n'a tiré aucune autre conclusion sur la crédibilité des témoins experts au procès, ou sur l'exactitude des nombreux rapports déposés en preuve par le procureur général. Il apparaît donc que le juge Chabot a écarté une grande partie de la preuve qui aurait pu autrement appuyer l'opinion du gouvernement quant à l'existence d'un lien rationnel. Cette preuve peut commodément se diviser en trois catégories: les documents internes de commercialisation des produits du tabac, les rapports d'experts et les documents internationaux. J'examinerai à tour de rôle chaque catégorie.

L'élément de preuve peut-être le plus convaincant au sujet du lien entre la publicité et la consommation se trouve dans les documents internes de commercialisation préparés par les fabricants de produits de tabac eux-mêmes. Bien que les appelantes affirment résolument que leurs efforts de commercialisation sont orientés seulement vers la préservation et le renforcement de la fidélité des fumeurs adultes à des marques, ces documents témoignent du contraire. En particulier, on peut tirer de ces documents les conclusions générales suivantes: les compagnies de tabac s'inquiètent du rétrécissement du marché et reconnaissent qu'une [TRADUCTION] «initiative de promotion» est nécessaire pour maintenir la taille de l'ensemble du marché; les compagnies comprennent que, pour maintenir le nombre total des fumeurs, elles doivent rassurer les fumeurs actuels et rendre leurs produits attirants pour les jeunes et les non-fumeurs; elles reconnaissent aussi que la publicité est essentielle au maintien de la taille du marché parce qu'elle sert à renforcer l'acceptabilité sociale de l'usage du tabac en l'identifiant au prestige, à la richesse, à la jeunesse et à la vitalité.

Nombre de ces conclusions découlent de la seule lecture d'une importante étude de commercialisation commandée par Imperial Tobacco Ltd. en 1986 et intitulée *Project Viking*. En introduction, les auteurs de l'étude décrivent comme étant un «problème» le fait qu'un nombre croissant de fumeurs cessent de fumer. Ils font aussi observer que, compte tenu de la décroissance du nombre des fumeurs, les compagnies de tabac doivent consacrer leurs activités de commercialisation à [TRA-

decline". They then indicate the objectives of *Project Viking*, vol. I: *A Behavioural Model of Smoking*, which they describe as follows:

Background and Objectives

It is no exaggeration to suggest that the tobacco industry is under siege. The smoker base is declining, primarily as a function of successful quitting. And the characteristics of new smokers are changing such that the future starting level may be in question. There is a constant stream of anti-smoking publicity in the media. Not all of this is soundly supported, but it gains legitimacy in the fact that there have been no responses from the tobacco industry in counterpoint.

Within this somewhat alarming view of the mid-term future, Imperial Tobacco is embarking on a proactive program. Perhaps for the first time, the mandate under consideration is not limited simply to maximizing the ITL franchises; it is now to include as well serious attempts to combat those forces aligned in an attempt to significantly diminish the size of the tobacco market in Canada.

This is the underpinning of Project Viking. There are, in fact, two components to the program, each having its own purposes, but also overlapping with the other in informational areas:

- Project Pearl is directed at expanding the market, or at very least forestalling its decline. It examines attitudes and issues with the potential to be addressed via advocacy. It also looks at the needs of smokers specifically.
- Project Day represents the tactical end by which ITL may achieve competitive gains within the market of today and in the future. Unmet needs of smokers that could be satisfied by new or modified products, products which could delay the quitting process, are pursued. [Emphasis added.]

As LeBel J.A. noted in the Court of Appeal, at p. 324, this document "indicates the objectives of the program: if not to expand the market, then at least to retain it, and also to preserve the company's market share". In *Project Viking*, vol. III: *Product Issues*, the need for an "advocacy thrust" is emphasized:

DUCTION] «faire croître la taille du marché ou, tout au moins, à prévenir son déclin». Ils indiquent ensuite quels sont les objectifs du *Project Viking*, vol. I: *A Behavioural Model of Smoking*, dans les termes suivants:

[TRADUCTION] Historique et objectifs

Ce n'est pas exagérer que d'affirmer que l'industrie du tabac est assiégée. Le nombre des fumeurs diminue, principalement en raison de ceux qui réussissent à cesser de fumer. Et les caractéristiques des nouveaux fumeurs changent de telle façon que le futur seuil de ceux qui commencent pourrait être remis en question. Il existe un courant continu de publicité anti-tabac dans les médias. Cette publicité n'est pas en tout point bien étayée, mais elle gagne en légitimité du fait que l'industrie du tabac n'y a donné aucune réponse en contrepartie.

Compte tenu de cette perspective plutôt alarmante à moyen terme, Imperial Tobacco lance un programme proactif. Peut-être pour la première fois, le mandat pris en considération n'est pas limité simplement à la maximisation des franchises d'ITL; il doit maintenant inclure aussi des tentatives sérieuses de contrer les forces mises en place dans le but de faire sensiblement diminuer la taille du marché des produits du tabac au Canada.

C'est là le principe du projet Viking. Le programme comporte en fait deux volets, chacun ayant ses propres objectifs, mais se combinant toutefois dans le domaine de l'information:

- Le projet Pearl vise à faire croître la taille du marché ou, tout au moins, à prévenir son déclin. Il examine les attitudes et les questions qui ont le potentiel de faire l'objet d'activités de promotion. Il examine aussi les besoins spécifiques des fumeurs.
- Le projet Day constitue le moyen tactique par lequel ITL pourrait augmenter sa part du marché actuel et futur. On envisage des produits nouveaux ou modifiés qui pourraient satisfaire les besoins des fumeurs auxquels on n'a pas encore répondu, et des produits qui pourraient retarder le moment où un fumeur cesse de fumer. [Je souligne.]

Comme le juge LeBel de la Cour d'appel l'a fait remarquer, à la p. 399, ce document «indique les objectifs du programme: sinon étendre le marché, du moins le conserver, et préserver aussi la part de celui-ci que détient la compagnie». Dans *Project Viking*, vol. III: *Product Issues*, on insiste sur la nécessité d'entreprendre une «initiative de promotion»:

Unsuccessful Quitters are moved disproportionately by physical reactions and social forces to stop smoking (but health remains the most often specified reason). Short-term Quitters very often point to expense, which often will be a transient reason itself, not compelling enough to keep them out of the tobacco market. Health is also of major concern to them.

Strategically, it would seem that reducing quitting is the most viable approach. But it would also seem that a product solution may not be sufficient on its own. An advocacy thrust may be necessary; disaffected smokers do need some reassurance that they are not social pariahs. [Emphasis added.]

The report then goes on to refer to persons contemplating quitting, and states that "[t]he extent to which they can be reassured and satisfied has a major impact on the extension of a viable tobacco industry". Smokers are segmented into five groups (*Project Viking*, vol. II: *An Attitudinal Model of Smoking*, at pp. 31-35): "Smokers With a Disease Concern", "Leave Me Alone", "Pressured", "Seriously Like to Quit", "Not Enjoying Smoking/Smoking Less Now". With respect to the "Pressured" group, the report states, at p. 33, that they "deserve particular attention" as they are "most vulnerable to quitting and . . . in urgent need of reassurance and stroking".

It is, therefore, clear from this report that a central aspect of the "advocacy thrust" suggested in *Project Viking* is advertising. It is difficult to see how companies could "reassure" smokers that they are not "social pariahs" or "stroke" them merely by reducing the price or content of their products. To reassure smokers effectively, it is also necessary to convince them that smoking is socially acceptable or even admirable. Advertising is a proven and effective method for achieving this result.

Apart from the emphasis on "reassuring" smokers, it is also possible to discern from these marketing documents a recognition that tobacco compa-

[TRADUCTION] Les fumeurs qui ont tenté sans succès d'arrêter de fumer sont motivés de façon disproportionnée par des réactions physiques et des influences sociales qui les incitent à cesser de fumer (mais la santé demeure la raison la plus souvent invoquée). Ceux qui ont cessé de fumer depuis peu invoquent souvent le coût, ce qui est souvent une raison transitoire qui n'a pas assez de poids pour les exclure définitivement du marché du tabac. La santé les préoccupe aussi beaucoup.

Sur le plan stratégique, il semble que réduire le nombre des fumeurs qui cessent de fumer est la méthode la plus prometteuse. Mais il semble aussi qu'une solution portant sur les produits ne serait pas suffisante en soi. Une initiative de promotion peut être nécessaire; les fumeurs rebelles ont besoin de se faire rappeler qu'ils ne sont pas des parias. [Je souligne.]

Le rapport traite ensuite des personnes qui envisagent de cesser de fumer, et il y est affirmé que [TRADUCTION] «[l]e plus ils seront rassurés et satisfaits, meilleur sera l'incidence sur la viabilité de l'industrie du tabac». Les fumeurs sont répartis en cinq groupes (*Project Viking*, vol. II: *An Attitudinal Model of Smoking*, aux pp. 31 à 35): [TRADUCTION] «Fumeurs inquiets pour leur santé», «Laissez-moi tranquille», «Sujets à des pressions», «Aimeraient sérieusement cesser de fumer», «Aucun plaisir à fumer/Consommation réduite». En ce qui concerne le groupe «Sujets à des pressions», il est affirmé, à la p. 33, qu'ils [TRADUCTION] «méritent une attention particulière» parce qu'ils sont «les plus susceptibles de cesser de fumer et ont un urgent besoin d'être rassurés et encouragés».

90 Il ressort par conséquent clairement de ce rapport que la publicité est un aspect central de l'«initiative de promotion» proposée dans *Project Viking*. Il est difficile de voir comment les compagnies pourraient «rassurer» les fumeurs qu'ils ne sont pas des «parias», ou les «encourager», simplement par la réduction du prix ou du contenu de leurs produits. Pour rassurer les fumeurs de façon efficace, il est aussi nécessaire de les convaincre que fumer est acceptable sur le plan social, ou même admirable. La publicité a fait la preuve de son efficacité en ce domaine.

91 À part l'insistance quant à la nécessité de «rassurer» les fumeurs, il est possible également de dégager de ces documents de commercialisation la

nies must target the young in order to ensure the continued maintenance of the tobacco market at its current size. I find it significant that, in these documents, strategies to attract the young are usually accompanied by extensive discussions concerning the "image" of the product. For example, the 1978 "Business Plans of RJR-MacDonald Inc. and International Plans" identified as "Prime Prospects" new smokers entering the cigarette market who want the positive, masculine image of this product. Later, in a 1987 RJR-MacDonald Inc. document entitled "Export "A" Brand Long-Term Strategy", reference is made under the title "Whose Behaviour Are We Trying to Affect?" to "18-34; Emphasis 18-24 (new users)" and to "High school — some post secondary education". It continues:

reconnaissance que les compagnies de tabac doivent cibler les jeunes si elles souhaitent garder le marché des produits du tabac à sa taille actuelle. Je trouve révélateur que, dans ces documents, les stratégies visant à attirer les jeunes sont habituellement accompagnées par de longues discussions sur l'«image» du produit. Par exemple, le document «Business Plans of RJR-MacDonald Inc. and International Plans», publié en 1978, a qualifié d'[TRADUCTION] «espoirs de premier plan» les nouveaux fumeurs abordant le marché de la cigarette qui sont à la recherche de l'image positive et masculine que reflète ce produit. Puis, en 1987, dans un document de RJR-MacDonald Inc. intitulé «Export «A» Brand Long-Term Strategy», il est question, sous le titre [TRADUCTION] «Quel comportement cherchons-nous à modifier?», des [TRADUCTION] «18 à 34 ans: particulièrement 18 à 24 ans (nouveaux consommateurs)» et d'[TRADUCTION] «études secondaires — certaines études postsecondaires». Le rapport se poursuit de la façon suivante:

Psychographics:

Young adults who are currently in the process of establishing their independence and their position in society. They look for peer group acceptance in their brand selection, and may often be moderate or conservative in their choices. As young adults they look for symbols that will help to reinforce their independence and individuality.

[TRADUCTION] Psychographie:

Les jeunes adultes qui sont actuellement en voie d'établir leur indépendance et leur place dans la société. Ils recherchent l'acceptation de leurs pairs lorsqu'ils choisissent leur marque, et ils peuvent souvent se montrer modérés ou conservateurs dans leur choix. Comme jeunes adultes, ils sont à la recherche de symboles qui les aideront à affirmer leur indépendance et leur individualité.

Mr. P. Hoult, ex-CEO of Imperial, testified at trial that lifestyle advertising is designed to create certain associations in the minds of consumers, and in the case of EXPORT cigarettes, an association with enjoyment, outdoors and youth. Similarly, in "Overview 1988", an internal document prepared by Imperial, it was stated that one of the philosophies governing its marketing activities was to

Monsieur P. Hoult, ancien directeur général d'Imperial, a affirmé au procès que la publicité dite de style de vie cherche à faire établir des associations dans l'esprit des consommateurs et, dans le cas des cigarettes EXPORT, une association avec plaisir, activités extérieures et jeunesse. Il a aussi été affirmé dans «Overview 1988», un document interne préparé par Imperial, que l'un des principes régissant les activités de publicité était le suivant:

[s]upport the continued social acceptability of smoking through industry and/or corporate action (e.g. product quality, positive lifestyle advertising, selective field activities and marketing public relations programs).

[TRADUCTION] Affirmer qu'il est toujours acceptable socialement de fumer, par des mesures de l'industrie ou des compagnies (p. ex. qualité des produits, publicité positive dite de style de vie, certaines activités de terrain et programmes de relations publiques axés sur la commercialisation).

One of the other stated objectives, "Overall Marketing Objectives" in "Overall Market Conditions 1988", was as follows:

> RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers. Shift resources substantially in favour of avenues that allow for the expression and reinforcement of these image characteristics. [Emphasis in original.]

That these companies are aware of the need to attract the young is also reinforced by the fact that, in 1977, Imperial commissioned a marketing research study entitled "Project 16" which focused on the smoking patterns of adolescents under the age of 17, and traced the manner in which adolescents are influenced by peer pressure and other societal factors to start smoking. A similar focus can be discerned from Imperial's "Fiscal '80 Media Plans" which outlines the target groups in 1980 for each of the company's brands. A weight was assigned to each target group to determine, by means of a computer, which magazines would be selected to place advertisements. This method maximized the advertising exposure for the desired target groups. Importantly, for some brands, not only do target groups include adolescents as young as 12, but youth aged 12-17 are weighted far more heavily than older age groups.

The internal marketing documents introduced at trial strongly suggest that the tobacco companies perceive advertising to be a cornerstone of their strategy to reassure current smokers and expand the market by attracting new smokers, primarily among the young. This conclusion is given added force by a number of reports introduced at trial, to which Chabot J. made no reference, which attest to the causal connection between tobacco advertising and consumption. In a report entitled "The Functions and Management of Cigarette Advertising", Dr. Richard W. Pollay, an historian and marketing professor at the University of British Columbia, concluded that advertising and promotional activi-

Un des autres objectifs mentionnés «Overall Marketing Objectives» dans «Overall Market Conditions 1988» était le suivant:

> [TRADUCTION] RÉTABLIR des images claires et distinctes des marques d'ITL et montrer tout particulièrement leur à-propos pour les jeunes. Réaffecter les ressources en bonne partie vers les avenues qui favorisent l'expression et le renforcement des caractéristiques de ces images. [Souligné dans l'original.]

Il est encore plus évident que ces compagnies sont conscientes de la nécessité d'attirer les jeunes si l'on considère le fait que, en 1977, Imperial a commandé une étude de commercialisation intitulée «Project 16», qui était centrée sur les habitudes d'utilisation du tabac des adolescents âgés de moins de 17 ans, et qui montrait de quelle façon les adolescents sont incités par la pression des pairs et d'autres facteurs sociaux à commencer à fumer. Les mêmes constatations peuvent être faites à partir du document d'Imperial intitulé «Fiscal '80 Media Plans», qui décrit les groupes cibles de chaque marque de la compagnie pour 1980. Une pondération a été effectuée tenant compte de chaque groupe cible afin de déterminer, au moyen d'un ordinateur, dans quels magazines les messages publicitaires seraient placés. Cette méthode maximisait la présence du message en fonction du groupe cible désiré. Fait important, pour certaines marques, non seulement les groupes cibles comprennent les adolescents qui n'ont que 12 ans, mais, dans la pondération, les jeunes de 12 à 17 ans ont une importance beaucoup plus grande que les groupes de personnes plus âgées.

Les documents de commercialisation internes déposés lors du procès donnent fortement à entendre que les compagnies de tabac perçoivent la publicité comme la pierre angulaire de leur stratégie visant à rassurer les fumeurs actuels et à étendre le marché en attirant de nouveaux fumeurs, principalement chez les jeunes. Cette conclusion a encore plus de poids si l'on considère les nombreux rapports déposés lors du procès, auxquels le juge Chabot n'a fait aucune référence et qui attestent un lien causal entre la publicité des produits du tabac et leur consommation. Dans un rapport intitulé «The Functions and Management of Cigarette Advertising», Richard W. Pollay, historien et

ties serve to change people's perceptions, creating more positive attitudes and serve as a reinforcement for smokers and a temptation and teacher of tolerance for non-smokers. He stated:

The research and strategic thinking identifies the psychological needs, wants and interests of target, and leads to the creation of a strategic "positioning" of the products to offer them in ways that promise satisfactions relevant to the targets' personalities and preferences. For starter brands, images are created to communicate independence, freedom and peer acceptance to young targets. The advertising images portray smokers as attractive and autonomous, accepted and admired, athletic and at home in nature. For 'lighter' brands directed at smokers with health concerns, ads image a sense of well being, harmony with nature, and a consumer's self image as intelligent.

. . .

Advertising and promotional activities and communication serve to induce many changes in the public's perceptions, creating: more positive attitudes toward smoking and smokers; less consciousness and fear of any unhealthy consequences of smoking; a stronger self-image among smokers; more confidence of some social support for smoking; and perceptions that smoking is a cultural commonplace to be taken for granted. To smokers it is a reminder and reinforcer, while to non-smokers it is a temptation and a teacher of tolerance. [Emphasis added.]

Similarly, in a report entitled "Effects of Cigarette Advertising on Consumer Behavior", Dr. Joel B. Cohen, a professor of marketing at the University of Florida, observed, at p. 44, that tobacco advertising targets both non-smokers and the young, who are particularly vulnerable to advertising techniques:

There is ample documentation as to the effectiveness of cigarette advertising. Cigarette advertising achieves essential communications goals that are almost univer-

professeur de commercialisation à l'Université de la Colombie-Britannique, a conclu que la publicité et les activités de promotion servent à changer les perceptions des gens, à créer des attitudes plus positives, et qu'elles servent de renforcement chez les fumeurs, et de tentation et de leçon de tolérance pour les non-fumeurs. Il a affirmé:

[TRADUCTION] La recherche et la pensée stratégique identifient les besoins psychologiques, les désirs et les intérêts de la cible, et mènent à la création d'un «positionnement» stratégique des produits pour qu'ils soient offerts de façon à promettre les satisfactions auxquelles les cibles s'attendent en raison de leurs personnalités et de leurs préférences. Pour les marques de débutants, des images sont créées pour induire chez les jeunes cibles l'idée d'indépendance, de liberté et d'acceptation des pairs. La publicité représente les fumeurs comme étant à la fois attirants et autonomes, acceptés et admirés, athlétiques et sûrs d'eux-mêmes dans la nature. Pour les marques plus «légères» destinées aux fumeurs qui sont préoccupés par leur santé, la publicité donne l'image d'une sensation de bien-être, d'une harmonie avec la nature et d'un consommateur avisé.

. . .

La publicité, les activités de promotion et les communications servent à provoquer de nombreux changements dans les perceptions du public, à savoir: créer des attitudes plus positives envers l'usage du tabac et les fumeurs; diminuer les interrogations et les craintes quant aux conséquences de l'usage du tabac pour la santé; renforcer l'image de soi parmi les fumeurs; augmenter le sentiment de l'acceptabilité sociale de l'usage du tabac; créer l'impression que fumer est un lieu commun culturel qui doit être tenu pour acquis. Pour les fumeurs, c'est un rappel et un renforcement, alors que pour les non-fumeurs, c'est une tentation et une leçon de tolérance. [Je souligne.]

De façon similaire, dans un rapport intitulé «Effects of Cigarette Advertising on Consumer Behavior», Joel B. Cohen, professeur de commercialisation à l'Université de la Floride, fait observer, à la p. 44, que la publicité des produits du tabac cible à la fois les non-fumeurs et les jeunes, qui sont particulièrement vulnérables face aux techniques de la publicité:

[TRADUCTION] Il existe une vaste documentation sur l'efficacité de la publicité de la cigarette. Cette publicité atteint des buts de communications essentiels sur les-

sally agreed to increase the likelihood of purchase, and it does so for deliberately targeted groups including adolescent males and females and health concerned smokers. Both of these groups are particularly vulnerable to the types of appeals used.

Cigarette advertising cannot be created so that it is only effective for brand switching. The ads are developed (and researched) to insure that they are maximally effective against targeted segments. Nonsmokers in those segments (e.g., young males) have similar motivations and concerns, and there is no way to lower a "magic curtain" around them in order to shield them from the enticement of such advertising. ["Only" emphasized in original; other emphasis added.]

In yet another report, entitled "A Report on the Special Vulnerabilities of Children and Adolescents", *supra*, at pp. 17-18, Dr. Michael J. Chandler, a psychologist, concluded that the cognitive and socio-emotional immaturities of both children and adolescents makes them vulnerable to the influence of cigarette advertising because they lack the ability to evaluate the messages being presented:

. . . it is an essential truism that tobacco companies cannot maintain their current levels of profit unless they can successfully entice new generations to smoke cigarettes. Whether by accident or design, existing cigarette advertising practices appear strategically tailored to accomplish this questionable initiation process.

It is too early, of course, to calculate the real effects of eliminating the public advertising and promotion of tobacco products. Such a ban can be expected, however, to reduce the numbers of young persons who eventually do choose to smoke.

The views expressed in these reports are not, of course, definitive or conclusive. Indeed, there is currently a lively debate in the social sciences respecting the connection between advertising and consumption, a debate that has been carried on for years and will no doubt persist well into the near future. However, these reports attest, at the very least, to the existence of what LeBel J.A. called a "body of opinion" supporting the existence of a

quels on s'entend presque universellement pour dire qu'ils accroissent la probabilité d'achat; et elle le fait à l'endroit de groupes délibérément ciblés, entre autres celui des adolescents, garçons et filles, et celui des fumeurs préoccupés par leur santé. Ces deux groupes sont particulièrement sensibles aux types d'attraits utilisés.

La publicité de la cigarette ne peut pas être créée de manière à avoir une efficacité seulement sur les changements de marques. Les messages publicitaires sont créés — à la suite de recherches — dans le but d'avoir un effet maximal sur une couche de population ciblée. Les non-fumeurs de ces couches (p. ex. les jeunes hommes) ont des goûts et des préoccupations similaires, et il n'y a pas de façon de tirer autour d'eux un «écran magique» de manière à les protéger de la tentation provoquée par cette publicité. [«Seulement» souligné dans l'original; je souligne le reste.]

Dans encore un autre rapport, intitulé «A Report on the Special Vulnerabilities of Children and Adolescents», *op. cit.*, aux pp. 17 et 18, Michael J. Chandler, psychologue, a conclu que l'immaturité des enfants et des adolescents sur les plans cognitif et socio-affectif les rend vulnérables à l'influence de la publicité de la cigarette parce qu'ils ne sont pas capables d'évaluer les messages qui leur sont présentés:

[TRADUCTION] . . . il relève d'un truisme essentiel que les compagnies de tabac ne peuvent pas maintenir les bénéfices actuels à moins qu'elles puissent réussir à attirer les jeunes à fumer la cigarette. Que ce soit par accident ou à dessein, les pratiques actuelles de la publicité de la cigarette paraissent opportunément conçues pour accomplir ce discutable processus d'initiation.

Il est trop tôt, évidemment, pour faire le bilan des effets réels de l'élimination de la publicité et de la promotion des produits du tabac auprès du public. Cette interdiction devrait cependant réduire le nombre de jeunes qui, tôt ou tard, choisissent de fumer.

Les opinions exprimées dans ces rapports ne sont évidemment pas définitives ni concluantes. En fait, il y a actuellement un débat animé en sciences humaines quant au lien entre publicité et consommation, un débat qui se poursuit depuis des années et qui, sans doute, se poursuivra encore un certain temps. Toutefois, ces rapports attestent à tout le moins la présence de ce que le juge LeBel, de la Cour d'appel, a appelé un «corps d'opinions»

causal connection between advertising and consumption. Included in this "body of opinion" are a significant number of international health organizations, which support prohibitions on advertising as a viable strategy in the battle against tobacco consumption. In May 1986, for example, the Thirty-ninth World Health Assembly adopted Resolution WHA39.14, urging member states to fight tobacco consumption through a variety of measures including "the progressive elimination of those socio-economic, behavioural, and other incentives which maintain and promote the use of tobacco" and "prominent health warnings which might include the statement that tobacco is addictive, on cigarette packets and containers of all types of tobacco products". In May 1990, the Forty-third World Health Assembly adopted Resolution WHA43.16 urging "progressive restrictions and concerted action to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco" and stating that it was "encouraged" by "recent information demonstrating the effectiveness of tobacco control strategies, and in particular . . . comprehensive bans and other legislative restrictive measures to control effectively direct and indirect advertising, promotion and sponsorship concerning tobacco". In July 1993, the Economic and Social Council of the United Nations adopted Resolution 1993/79 expressly urging governments to maximize their efforts to reduce tobacco consumption through the adoption of multifaceted approaches. In 1989, the European Council adopted Directive 89/552/EEC banning broadcast advertising of tobacco products. One month later, the Council adopted Directive 89/622/EEC (amended 92/41/EEC) requiring health warnings on tobacco products packaging. From 1990 to 1992, the European Commission submitted proposals for Council Directives which would ban all direct and indirect advertising of tobacco products (90\C 116\05; 91/C 167/03; 92/C 129/04). It is also significant that by 1990, over 40 countries had adopted measures to restrict or prohibit tobacco advertising. Tobacco advertising is fully prohibited by law in Australia, New Zealand, France, Portugal, Norway, Finland, Iceland, Singapore and Thailand, among other countries. Among those countries that have instituted substantial

appuyant l'existence d'un lien causal entre publicité et consommation. Ce «corps d'opinions» comprend celles de nombreux organismes internationaux de la santé qui appuient l'interdiction de la publicité comme stratégie viable dans la lutte engagée contre l'usage du tabac. En mai 1986, par exemple, la Trente-neuvième Assemblée mondiale de la santé a adopté la résolution WHA39.14, par laquelle elle demandait instamment aux États membres de lutter contre l'usage des produits du tabac en utilisant diverses mesures, dont l'«élimination progressive des incitations socio-économiques, comportementales et autres qui entretiennent et favorisent l'usage du tabac» et «l'apposition, bien en évidence, de mises en garde pouvant préciser que le tabac engendre la dépendance, sur les paquets de cigarettes et les emballages de tous les types de produits du tabac». En mai 1990, la Quarante-troisième Assemblée mondiale de la santé a adopté la résolution WHA43.16, par laquelle elle demandait instamment d'imposer «des restrictions progressives et des actions concertées visant à éliminer à terme toute publicité directe et indirecte et toutes les activités de promotion et de parrainage concernant le tabac» et affirmait qu'elle était «encouragée» par «les informations récentes montrant l'efficacité des stratégies de lutte antitabac, et en particulier [. . .] des interdictions générales et d'autres mesures législatives restrictives visant à lutter efficacement contre la publicité directe et indirecte, ainsi que contre les activités de promotion et de parrainage concernant le tabac». En juillet 1993, le Conseil économique et social des Nations Unies a adopté la résolution 1993/79, par laquelle il demandait instamment aux gouvernements de maximiser leurs efforts afin de réduire la consommation du tabac par l'adoption de mesures à plusieurs facettes. En 1989, le Conseil européen a adopté la directive 89/552/CEE, par laquelle il interdisait la diffusion de messages publicitaires sur les produits du tabac. Un mois plus tard, le Conseil a adopté la directive 89/622/CEE (modifiée par 92/41/CEE), par laquelle il exigeait l'inscription de mises en garde sur l'emballage des produits du tabac. De 1990 à 1992, la Commission européenne a présenté au Conseil des projets de directives qui avaient pour but d'interdire toute publicité directe et indirecte

restrictions on tobacco advertising are Austria, Belgium, West Germany, Ireland, the Netherlands, Spain and Sweden.

On the basis of the foregoing evidence, I conclude that there is a rational connection between the prohibition on advertising and consumption under ss. 4, 5, 6 and 8 of the Act and the reduction of tobacco consumption. I am comforted in this conclusion by the fact that a number of American courts have also recognized the existence of a rational connection between advertising and consumption. I note that in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), at p. 569, the Supreme Court of the United States found an "immediate connection between advertising and demand for electricity" and therefore a direct link between the ban on advertising and the state interest in conservation. The court continued:

> Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

Similarly, in *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (1983), at p. 501, (rev'd on other grounds *sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)), the Court of Appeals for the Tenth Circuit observed that "the record does not demonstrate that Oklahoma's laws have any direct effect on the consumption of alcohol" but concluded:

des produits du tabac (90/C 116/05; 91/C 167/03; 92/C 129/04). Il est également intéressant de constater qu'en 1990, plus de 40 pays avaient adopté des mesures visant à restreindre ou à interdire la publicité du tabac. Les lois de l'Australie, de la Nouvelle-Zélande, de la France, du Portugal, de la Norvège, de la Finlande, de l'Islande, de Singapour et de la Thaïlande, entre autres, interdisent toute publicité des produits du tabac. L'Autriche, la Belgique, l'Allemagne de l'Ouest, l'Irlande, les Pays-Bas, l'Espagne et la Suède, entre autres, ont imposé d'importantes restrictions à la publicité du tabac.

Compte tenu de la preuve mentionnée précédemment, je conclus qu'il existe un lien rationnel entre l'interdiction de la publicité en vertu des art. 4, 5, 6 et 8 de la Loi et la réduction de la consommation du tabac. Je suis d'autant plus convaincu de la justesse de cette conclusion que de nombreuses décisions judiciaires américaines ont aussi constaté l'existence d'un lien rationnel entre la publicité et la consommation. Je remarque que dans l'arrêt *Central Hudson Gas & Electric Corp. c. Public Service Commission of New York*, 447 U.S. 557 (1980), à la p. 569, la Cour suprême des États-Unis a conclu à l'existence d'un [TRADUCTION] «lien direct entre la publicité et la demande d'électricité» et, par conséquent, d'un lien direct entre l'interdiction de la publicité et l'intérêt de l'État pour la conservation. La cour a affirmé:

> [TRADUCTION] Central Hudson ne contesterait pas l'interdiction de la publicité si elle ne croyait pas que la promotion fait augmenter ses ventes. Par conséquent, nous trouvons qu'il y a un lien direct entre l'intérêt de l'État pour la conservation et l'ordonnance de la Commission.

De même, dans l'arrêt *Oklahoma Telecasters Ass'n c. Crisp*, 699 F.2d 490 (1983), à la p. 501 (infirmé pour d'autres motifs *sub nom. Capital Cities Cable, Inc. c. Crisp*, 467 U.S. 691 (1984)), la Court of Appeals for the Tenth Circuit a fait observer que [TRADUCTION] «le dossier ne démontre pas que les lois de l'Oklahoma ont un effet direct sur la consommation de boissons alcoolisées», mais a conclu:

. . . prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales. We therefore do not believe that it is constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally. The choice of the Oklahoma legislature, and its people with respect to the constitutional provision, is not unreasonable, and does directly advance Oklahoma's interest in reducing the sale, consumption, and abuse of alcoholic beverages.

This "common-sense" approach to causation was also applied in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (finding that a ban on highway billboards was reasonably related to highway safety despite a lack of evidence in the record demonstrating this connection); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (finding that a ban on casino advertising was rationally connected to the government objective to reduce demand for gambling despite a lack of evidence on the record); and *Dunagin, supra*, (finding that a ban on alcohol advertising directly advanced the legislative goal of reducing alcohol consumption despite a lack of evidence).

Minimal Impairment

95 The next step in the proportionality analysis is to determine whether the legislative means chosen impair the right or freedom in question as little as possible. The appellants submit that Parliament has unjustifiably imposed a complete prohibition on tobacco advertising and promotion when it could have imposed a partial prohibition with equal effectiveness. They suggest that Parliament could have instituted a partial prohibition by forbidding "lifestyle" advertising (which seeks to promote an

[TRADUCTION] . . . les interdictions imposées contre la publicité des boissons alcoolisées sont raisonnablement liées à la réduction des ventes et de la consommation de ces boissons, et des problèmes qu'elles entraînent. Toute l'économie des industries qui contestent ces interdictions est fondée sur l'idée que la publicité accroît les ventes. Nous ne croyons donc pas qu'il soit déraisonnable sur le plan constitutionnel pour l'État de l'Oklahoma de penser que la publicité permettra de faire augmenter non seulement les ventes de certaines marques de boissons alcoolisées, mais aussi celles des boissons alcoolisées en général. Le choix de la législature de l'Oklahoma et des citoyens de cet État en ce qui concerne la disposition constitutionnelle n'est pas déraisonnable, et favorise directement l'intérêt de l'Oklahoma dans la réduction des ventes, de la consommation et des abus de boissons alcoolisées.

Cette façon d'aborder la question de la causalité en se fondant sur «le bon sens» a aussi été adoptée dans *Metromedia, Inc. c. City of San Diego*, 453 U.S. 490 (1981) (où on a conclu qu'une interdiction de placer des panneaux d'affichage près des autoroutes était raisonnablement liée à la sécurité routière même si le dossier ne contenait pas de preuve démontrant ce lien); dans *Posadas de Puerto Rico Associates c. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (où on a conclu qu'une interdiction de faire la publicité de casinos avait un lien rationnel avec l'objectif du gouvernement de réduire la demande pour les jeux de hasard, malgré le manque de preuve au dossier), et dans *Dunagin*, précité (où on a conclu qu'une interdiction de la publicité des boissons alcoolisées appuyait directement l'objectif de la législature de réduire la consommation des boissons alcoolisées et ce, malgré un manque de preuve).

L'atteinte minimale

La prochaine étape de l'analyse de la proportionnalité consiste à déterminer si les moyens choisis par le législateur portent le moins possible atteinte au droit ou à la liberté en question. Les appelantes soutiennent que le Parlement a imposé de façon injustifiée une interdiction complète de la publicité et de la promotion des produits du tabac, alors qu'une interdiction partielle se serait avérée tout aussi efficace. Elles disent que le Parlement aurait pu imposer une interdiction partielle en pro-

image by associating the consumption of the product with a particular lifestyle) or advertising directed at children, without at the same time prohibiting "brand preference" advertising (which seeks to promote one brand over another based on the colour and design of the package) or "informational" advertising (which seeks to inform the consumer about product content, taste and strength and the availability of different or new brands). According to the appellants, there is no need to prohibit brand preference or informational advertising because both are targeted solely at smokers, and serve a beneficial function by promoting consumer choice.

hibant la publicité dite de «style de vie» (qui cherche à faire la promotion d'une image par l'association de la consommation du produit avec un style de vie particulier), ou la publicité destinée aux enfants, sans pour autant interdire la publicité de «marque» (qui cherche à faire préférer une marque à une autre à partir de la couleur et de la conception de l'emballage) ou la publicité «informative» (qui cherche à informer le consommateur au sujet du contenu, du goût et de la force du produit, de même que de la disponibilité de différentes ou de nouvelles marques). Selon les appelantes, il n'y a aucune raison d'interdire la publicité de marque ou la publicité informative, parce qu'elles s'adressent toutes deux aux seuls fumeurs et qu'elles ont une fonction bénéfique, celle de promouvoir le choix du consommateur.

In my view, the appellants' argument fails for the same reasons that I have discussed throughout my s. 1 analysis. The relevance of context cannot be understated in s. 1 balancing, particularly at the minimal impairment stage. This Court has on many occasions stated that the degree of required fit between means and ends will vary depending upon both the nature of the right and the nature of the legislation. As Dickson C.J. stated in the *Prostitution Reference*, *supra*, at p. 1136:

96

À mon avis, l'argument des appelantes ne peut être retenu et ce, pour les mêmes motifs que j'ai exprimés tout au long de mon analyse fondée sur l'article premier. On ne saurait sous-estimer la pertinence du contexte dans une pondération en vertu de l'article premier, particulièrement à l'étape du critère de l'atteinte minimale. Notre Cour a maintes fois déclaré que le degré de proportionnalité entre les moyens et les fins varie en fonction tant de la nature du droit en question que de la nature de la loi. Comme le juge en chef Dickson l'a affirmé dans le *Renvoi sur la prostitution*, précité, aux pp. 1135 et 1136:

> When a *Charter* freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed *Charter* right, should also be analyzed in the particular context of the case.

> Lorsqu'une liberté garantie par la *Charte* a été violée par une mesure prise par l'État, en l'occurrence la criminalisation, le ministère public doit s'acquitter du lourd fardeau de justifier cette violation. Néanmoins, comme dans le cas de toute violation d'un droit reconnu par la *Charte*, l'activité d'expression devrait également être analysée dans le contexte particulier de l'affaire.

Thus, the minimal impairment requirement does not impose an obligation on the government to employ the least intrusive measures available. Rather, it only requires it to demonstrate that the measures employed were the least intrusive, in light of both the legislative objective and the infringed right. As Sopinka J. noted in *Butler*, *supra*, at pp. 504-5:

Par conséquent, l'exigence de l'atteinte minimale n'impose pas l'obligation au gouvernement d'avoir recours aux mesures disponibles les moins attentatoires. Cette exigence l'oblige seulement à démontrer que les mesures prises sont les moins attentatoires compte tenu tant de l'objectif législatif que du droit violé. Comme le juge Sopinka l'a constaté dans *Butler*, précité, aux pp. 504 et 505:

In determining whether less intrusive legislation may be imagined, this Court stressed in the *Prostitution Reference*, *supra*, that it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored in the context of the infringed right. . . . [Emphasis in original.]

97 Taking into account the legislative context, it is my view that the measures adopted under the Act satisfy the *Oakes* minimal impairment requirement. It must be kept in mind that the infringed right at issue in these cases is the right of tobacco corporations to advertise the only legal product sold in Canada which, when used precisely as directed, harms and often kills those who use it. As I discussed above, I have no doubt that Parliament could validly have employed the criminal law power to prohibit the manufacture and sale of tobacco products, and that such a prohibition would have been fully justifiable under the *Charter*. There is no right to sell harmful products in Canada, nor should there be. Thus, in choosing to prohibit solely the advertisement of tobacco products, it is clear that Parliament in fact adopted a relatively unintrusive legislative approach to the control of tobacco products. Indeed, the scope of conduct prohibited under the Act is narrow. Under the Act, tobacco companies continue to enjoy the right to manufacture and sell their products, to engage in public or private debate concerning the health effects of their products, and to publish consumer information on their product packages pertaining to the content of the products. The prohibition under this Act serves only to prevent these companies from employing sophisticated marketing and social psychology techniques to induce consumers to purchase their products. This type of expression, which is directed solely toward the pursuit of profit, is neither political nor artistic in nature, and therefore falls very far from the "core" of freedom of expression values discussed by this Court in *Keegstra*, *supra*.

98 Furthermore, there was ample evidence introduced by the Attorney General at trial demonstrating that a full prohibition of tobacco advertising is justified and necessary. In enacting this legislation,

En déterminant s'il est possible d'imaginer une loi moins attentatoire, notre Cour a fait ressortir, dans le *Renvoi sur la prostitution*, précité, que le régime législatif n'a pas à être «parfait», mais qu'il doit être bien adapté au contexte du droit qui est violé . . . [Souligné dans l'original.]

Compte tenu du contexte législatif, je suis d'avis que les mesures adoptées en vertu de la Loi satisfont à l'exigence de l'atteinte minimale énoncée dans l'arrêt *Oakes*. Il faut se rappeler que le droit violé en l'espèce est le droit des compagnies de tabac de faire la publicité du seul produit vendu légalement au Canada qui, s'il est utilisé précisément de la façon recommandée, fait du tort à ceux qui l'utilisent ou souvent les tue. Comme il ressort de l'analyse qui précède, je n'ai aucun doute que le Parlement pouvait validement se servir de sa compétence en matière de droit criminel pour interdire la fabrication et la vente des produits du tabac, et qu'une telle interdiction aurait été pleinement justifiable en vertu de la *Charte*. On n'a pas et ne devrait pas avoir le droit de vendre des produits nocifs au Canada. Par conséquent, en choisissant d'interdire seulement la publicité des produits du tabac, le Parlement a de toute évidence adopté une démarche législative relativement non attentatoire pour exercer un contrôle sur les produits du tabac. En fait, l'étendue de l'interdiction est restreinte. Sous le régime de la Loi, les compagnies de tabac continuent de bénéficier du droit de fabriquer et de vendre leurs produits, de prendre part à des débats publics ou privés sur les effets de leurs produits sur la santé et d'apposer sur les emballages des messages quant au contenu de ces produits. L'interdiction visée par la Loi ne sert qu'à empêcher ces compagnies de recourir à des techniques complexes de commercialisation et de psychologie sociale pour inciter les consommateurs à acheter leur produits. Cette forme d'expression, qui vise seulement la réalisation de profits, n'est ni politique ni artistique et est donc très loin du «cœur» des valeurs de la liberté d'expression dont notre Cour a fait l'étude dans l'arrêt *Keegstra*, précité.

Par ailleurs, le procureur général a déposé une preuve volumineuse en première instance afin d'établir qu'une interdiction totale de publicité du tabac est à la fois justifiée et nécessaire. Lorsqu'il

Parliament came to the conclusion that all advertising stimulates consumption and that a full prohibition upon advertising is therefore necessary to reduce consumption effectively. Parliament reached this conclusion only after many years of careful study and reflection. As I mentioned in my discussion of the criminal law power, the measures adopted under the Act were the product of an intensive 20-year public policy process, which involved extensive consultation with an array of national and international health groups and numerous studies, and educational and legislative programs. Over the course of this 20-year period, the government adopted an incremental legislative approach by experimenting with a variety of less intrusive measures before determining that a full prohibition on advertising was necessary. As early as 1969, the Standing Committee of Health and Welfare and Social Affairs recommended a full prohibition in its *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking*, *supra*, at pp. 52-53, suggesting the following legislative solution:

One year from enactment of legislation

- Complete elimination of free distribution of cigarettes and of all coupon and premium schemes.
- No cigarette advertising on television or radio before 10 p.m.
- Warning on all cigarette packages and cartons, in all cigarette advertising and promotional materials and on all cigarette vending machines.
- Government-authorized statements of tar and nicotine levels on all cigarette packages and cartons, in all cigarette advertising and promotional materials and on all cigarette vending machines.

Two years from enactment of legislation

- Prohibition of cigarette advertising on television and radio.

a adopté cette loi, le Parlement est arrivé à la conclusion que toute publicité incite à la consommation et qu'une interdiction totale de la publicité est en conséquence nécessaire pour réduire efficacement cette consommation. Le Parlement n'est arrivé à cette conclusion qu'après de nombreuses années d'études et de réflexions attentives. Comme je l'ai mentionné dans mon analyse de la compétence en matière de droit criminel, les mesures adoptées en vertu de la Loi sont le résultat d'un processus de politique d'intérêt public qui s'est poursuivi pendant 20 ans et qui a nécessité de longues consultations auprès d'une multitude de groupes du domaine de la santé, sur les plans tant national qu'international, ainsi que de nombreuses études et maints programmes éducatifs et législatifs. Au cours de cette période de 20 ans, le gouvernement a adopté une démarche législative graduelle en essayant toute une gamme de mesures moins attentatoires avant de déterminer qu'il était nécessaire d'interdire complètement la publicité. Dès 1969, le Comité permanent de la santé, du bien-être social et des affaires sociales a recommandé une interdiction complète dans le *Rapport du Comité permanent de la santé, du bien-être social et des affaires sociales sur l'usage du tabac et de la cigarette*, *op. cit.*, aux pp. 52 et 53, où il proposait la solution législative suivante:

Un an après la mise en vigueur de la loi

- Abolition totale de toute distribution gratuite de cigarettes ainsi que des systèmes de coupons ou de primes.
- Plus d'annonces de cigarettes à la télévision ou à la radio avant 10 h le soir.
- Avertissement sur tous les paquets et cartons de cigarettes, sur tout le matériel publicitaire et sur les machines distributrices.
- Mention contrôlée par le gouvernement du degré de goudron et de nicotine sur tous les paquets et cartons de cigarettes, sur tout le matériel publicitaire et sur les machines distributrices.

Deux ans après la mise en vigueur de la loi

- Abolition de toutes les annonces de cigarettes à la télévision et à la radio.

– Prohibition of other than simple brand name advertisements in remaining media.

Four years from enactment of legislation

– Complete elimination of all cigarette promotional activities.

Although the Standing Committee recommended a full prohibition upon tobacco advertising within four years, Parliament refrained from instituting a full prohibition and chose instead to implement a variety of lesser legislative measures. Since 1969, for example, the Department of National Health and Welfare has introduced and supported many educational programmes and many research and health promotion organizations; see, e.g., Health and Welfare Canada, *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective*, *supra*; Health and Welfare Canada, "Directional paper of the national program to reduce tobacco use in Canada", *supra*. Parliament has also sought to combat tobacco use by preventing the sale of tobacco to young persons (*Tobacco Sales to Young Persons Act*), restricting smoking in workplaces and public places (*Non-smokers' Health Act*) and by increases in tobacco taxes. However, despite all these efforts, it was apparent by 1989 that close to one-third of Canadians continued to smoke and that the decline in the numbers of smokers in Canada since 1969 had been neither rapid nor substantial. Faced with this distressing statistic, and with the seeming ineffectiveness of the measures adopted up to that time, Parliament had more than reasonable grounds for concluding that the more robust measures adopted under the Act were both necessary and a logical next step in the policy process.

99 The reasonableness of Parliament's decision to prohibit tobacco advertising has been amply borne out by parallel developments in the international community before and after the passage of the Act. It is of great significance, in my view, that over 20 democratic nations have, in recent years, adopted complete prohibitions on tobacco advertising simi-

– Pour les autres moyens de diffusion, abolition de toute publicité à l'exception des simples annonces de marques de commerce.

Quatre ans après la mise en vigueur de la loi

– Abolition totale de toute publicité sur les cigarettes.

Même si le Comité permanent avait recommandé une abolition totale de toute publicité du tabac sur une période de quatre ans, le Parlement s'est abstenu d'imposer une interdiction totale et a plutôt choisi de mettre en œuvre toute une gamme de mesures législatives moins sévères. Par exemple, depuis 1969, le ministère de la Santé nationale et du Bien-être social a mis en place et appuyé de nombreux programmes éducatifs et de nombreux organismes de recherche et de promotion de la santé; voir, p. ex., Santé et Bien-être social Canada, *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective*, *op. cit.*; Santé et Bien-être social Canada, «Document d'orientation du programme national de lutte contre le tabagisme au Canada», *op. cit.* Le Parlement a aussi cherché à combattre l'usage du tabac en interdisant la vente de produits du tabac aux jeunes (*Loi sur la vente du tabac aux jeunes*), en restreignant l'usage du tabac sur les lieux de travail et les lieux publics (*Loi sur la santé des non-fumeurs*) et en augmentant les taxes sur le tabac. Cependant, malgré tous ces efforts, on s'est rendu compte en 1989 que près d'un tiers des Canadiens continuaient de fumer et que la réduction du nombre de fumeurs au Canada depuis 1969 n'avait été ni rapide ni importante. Face à ces statistiques troublantes et à l'inefficacité apparente des mesures adoptées jusque-là, le Parlement avait des motifs plus que raisonnables de conclure que la prise de mesures plus énergiques en vertu de la Loi était nécessaire et constituait une prochaine étape logique du processus de politique d'intérêt public.

Le caractère raisonnable de la décision du Parlement d'interdire la publicité du tabac est amplement démontré par les développements parallèles dans la communauté internationale avant et après l'adoption de la Loi. À mon avis, il est très important de faire remarquer que, au cours des dernières années, plus de 20 pays démocratiques, dont

lar to those adopted under the Act, including Australia, New Zealand, Norway, Finland and France. It is also of significance that the constitutionality of full advertising prohibitions have been upheld by the French Conseil constitutionnel (Décision No. 90-283 DC (Jan. 8, 1991) declaring the *Loi nº 91-32 relative à la lutte contre le tabagisme et l'alcoolisme*, which prohibits all direct and indirect tobacco advertising), to be constitutionally valid and by American courts (upholding full prohibitions on alcohol advertising and gambling advertising as a reasonable limitation on freedom of expression under the United States Constitution in *Central Hudson*, *supra*; *Oklahoma Telecasters*, *supra*; *Metromedia*, *supra*; *Posadas*, *supra*; *Dunagin*, *supra*). The decisions of the American courts, which have traditionally been jealous guardians of the right to freedom of expression, are particularly instructive in this context because they demonstrate that the adoption of a full prohibition upon tobacco advertising is perceived as neither novel nor radical in other democratic nations. Given the background of the legislation and the overwhelming acceptance by other democratic countries of this type of prohibition as a reasonable means for combatting the serious evils flowing from the sale and distribution of tobacco products, it seems difficult to argue that the impugned legislation is not a reasonable limit on the appellants' rights demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

Thus, in my view, there was more than enough evidence adduced at trial to justify the government's decision to institute a full prohibition on advertising and promotion. In their argument before this Court, the appellants made much of the fact that, during the course of the trial, a certificate was issued by the Clerk of the Privy Council pursuant to s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, stating that certain documents requested by the appellants, many of which were departmental memoranda sent to the Minister of Health and Welfare, constituted "confidence[s] of

l'Australie, la Nouvelle-Zélande, la Norvège, la Finlande et la France, ont adopté une interdiction complète de publicité du tabac analogue à celle adoptée en vertu de la Loi. Il est également important de préciser que la constitutionnalité d'interdictions totales de la publicité a été reconnue par le Conseil constitutionnel en France (Décision nº 90-283 DC (8 janv. 1991), qui a déclaré valide la *Loi nº 91-32 relative à la lutte contre le tabagisme et l'alcoolisme*, qui interdit toute publicité directe ou indirecte du tabac) et par les tribunaux américains (qui ont maintenu, dans les arrêts *Central Hudson*, *Oklahoma Telecasters*, *Metromedia*, *Posadas*, et *Dunagin*, précités, des interdictions totales de la publicité des boissons alcoolisées et des jeux de hasard parce qu'elles sont des restrictions raisonnables de la liberté d'expression garantie par la Constitution des États-Unis). Les décisions des tribunaux américains, qui ont toujours jalousement protégé le droit à la liberté d'expression, sont particulièrement intéressantes dans ce contexte parce qu'elles établissent que l'adoption d'une interdiction complète de publicité du tabac n'est considérée ni comme nouvelle ni comme radicale dans d'autres pays démocratiques. Vu l'historique de la loi et l'acceptation générale que les autres pays démocratiques donnent à ce type d'interdiction comme moyen raisonnable de lutter contre les graves problèmes découlant de la vente et de la distribution des produits du tabac, il semble difficile de soutenir que la loi attaquée ne constitue pas une limite raisonnable aux droits des appelantes, dont la justification puisse se démontrer dans une société libre et démocratique, en application de l'article premier de la *Charte*.

100 À mon avis, on a donc présenté en première instance plus d'éléments de preuve qu'il ne le fallait pour justifier la décision du gouvernement d'établir une interdiction complète de la publicité et de la promotion. Dans leur argumentation devant notre Cour, les appelantes ont accordé beaucoup d'importance au fait que, pendant le procès, le greffier du Conseil privé avait attesté, conformément à l'art. 39 de la *Loi sur la preuve au Canada*, L.R.C. (1985), ch. C-5, que certains documents demandés par les appelantes, dont bon nombre étaient des mémoires ministériels envoyés au

the Queen's Privy Council for Canada". As a result of the objection taken by the Privy Council, all references in the requested documents to an unidentified and alternative policy option were blacked out. The appellants speculate that this mysterious policy option was less intrusive than the measures adopted under the Act and argue on this basis that a full prohibition on advertising was not the only option available to the government.

ministre de la Santé et du Bien-être social, constituaient des «renseignement[s] confidentiel[s] du Conseil privé de la Reine pour le Canada». À la suite de l'objection formulée par le Conseil privé, toute mention d'une autre option de principe non identifiée a été biffée des documents. Les appelantes estiment que cette mystérieuse option de principe était moins attentatoire que les mesures adoptées en vertu de la Loi, et soutiennent sur ce fondement qu'une interdiction complète de publicité n'était pas la seule option offerte au gouvernement.

101 Although I believe the appellants have raised a legitimate concern with respect to the effect of governmental claims to confidentiality in constitutional cases, I cannot accept that the resort by the government to Cabinet confidentiality in this context is fatal to this legislation. The appellants are right to argue that claims to confidentiality have the effect of withholding from the factual record evidence relating to available governmental options and thus compromise the ability of courts in some cases to evaluate the constitutionality of governmental actions properly. For the same reasons, the appellants are also right to argue that the exercise of this power will at times undermine attempts by the government to justify legislation under the *Charter*. The onus is on the government to establish minimal impairment and in this context it is difficult to understand why it could not make the information available. It is right to say, however, that during the course of the litigation the appellants studiously refrained from taking the steps that could have been taken to obtain the information available. It is significant that the appellants failed to challenge the Certificate issued by the Clerk of the Privy Council, as they were clearly entitled to do under s. 39 of the *Canada Evidence Act*; see, e.g., *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1992] 2 F.C. 130 (C.A.); *Canada (Attorney General) v. Central Cartage Co.*, [1990] 2 F.C. 641 (C.A.). That said, the responsibility was ultimately that of the government, and in acting as it did, it

Bien que, selon moi, les appelantes aient soulevé une préoccupation légitime relativement à l'effet des demandes gouvernementales en matière de confidentialité dans les affaires constitutionnelles, je ne puis accepter que le recours à la confidentialité des documents du Cabinet, revendiquée par le gouvernement dans le présent contexte, soit fatal pour la validité de la loi. Les appelantes ont raison de soutenir que les demandes de confidentialité ont pour effet de retirer du dossier des faits des éléments de preuve relatifs aux options offertes au gouvernement et, en conséquence, de nuire dans certains cas à la capacité des tribunaux de bien évaluer la constitutionnalité des mesures gouvernementales. Pour les mêmes motifs, les appelantes ont également raison de soutenir que l'exercice de ce pouvoir portera parfois atteinte aux tentatives du gouvernement de justifier une loi en vertu de la *Charte*. Il appartient au gouvernement de prouver l'atteinte minimale et dans ce contexte il est difficile de comprendre pourquoi il ne pourrait pas permettre l'accès à ces renseignements. Cependant, on a raison d'affirmer que les appelantes se sont délibérément abstenues, tout au long du litige, de prendre les mesures qui leur auraient permis d'obtenir les renseignements visés. Il importe de préciser que les appelantes ont omis de contester l'attestation donnée par le greffier du Conseil privé, comme elles avaient clairement le droit de le faire en vertu de l'art. 39 de la *Loi sur la preuve au Canada*; voir par exemple, *Canadian Assn. of Regulated Importers c. Canada (Procureur général)*, [1992] 2 C.F. 130 (C.A.), et *Canada (Procureur général) c. Central Cartage Co.*, [1990] 2 C.F. 641 (C.A.). Cela dit, la responsabilité incom-

put this Court in the difficult position of having to speculate about the contents of documents.

The real answer to the appellants' contention, however, is that such speculation cannot, in my view, displace the overwhelming evidence that the prohibition was a reasonable one. Even if it were true that the government was considering a less intrusive option prior to adopting the Act, I do not accept that this in any way undermines the Attorney General's argument that the Act minimally impairs the appellants' rights in light of the legislative objective. A partial prohibition on advertising would only have been required under the *Charter* if it had been clear to Parliament that some forms of advertising do not stimulate consumption, and that a full prohibition would accordingly be overbroad. However, the Attorney General demonstrated convincingly at trial that Parliament had a reasonable basis for believing, after 20 years of research and legislative experimentation, that all tobacco advertising stimulates tobacco consumption. As I explained in my rational connection discussion above, it is reasonable to conclude that all advertising stimulates consumption because all advertising serves to place tobacco products in the public eye and to give these products legitimacy, particularly among the young. Indeed, the appellants' emphasis in their own marketing documents on the colour and "look" of tobacco packages demonstrates that the companies themselves recognize that even purely "informational" advertising has an important effect on consumption.

Moreover, in considering the comparative advantages of partial and full advertising prohibitions, it is also significant that, in countries where governments have instituted partial prohibitions upon tobacco advertising such as those suggested by the appellants, the tobacco companies have developed ingenious tactics to circumvent the restrictions. For example, when France attempted to institute a partial prohibition on tobacco adver-

bait finalement au gouvernement, et en agissant comme il l'a fait, ce dernier place notre Cour dans une position difficile qui la force à conjecturer sur le contenu de ces documents.

Cependant, la véritable réponse à l'argument des appelantes est que cette conjecture ne peut, à mon avis, modifier la preuve accablante que l'interdiction était raisonnable. Même s'il était exact que, avant l'adoption de la Loi, le gouvernement examinait une option moins attentatoire, je n'accepte pas que ce facteur affaiblisse d'une façon quelconque l'argument du procureur général que la Loi constitue une atteinte minimale aux droits des appelantes compte tenu de l'objectif législatif. Une interdiction partielle de la publicité n'aurait été exigée en vertu de la *Charte* que s'il avait été clair dans l'esprit du législateur que certaines formes de publicité n'incitent pas à la consommation, et qu'une interdiction complète aurait donc une portée trop vaste. Cependant, le procureur général a établi de façon convaincante en première instance que le Parlement avait des motifs raisonnables de croire, après 20 ans de recherche et d'expérimentation législative, que toute publicité du tabac incite à l'usage du tabac. Comme je l'ai expliqué dans mon analyse du lien rationnel, il est raisonnable de conclure que toute publicité encourage la consommation parce que la publicité présente les produits du tabac au public et leur donne un caractère légitime, particulièrement chez les jeunes. En fait, l'importance que les appelantes accordent dans leurs propres documents de commercialisation à l'incidence sur les ventes de la couleur et de l'«aspect» des emballages des produits du tabac montre que les compagnies reconnaissent que même la publicité qui est purement «informative» a un effet important sur la consommation.

En outre, dans l'examen des avantages comparatifs des interdictions partielles ou complètes de la publicité, il est également révélateur que, dans les pays où les gouvernements ont imposé des interdictions partielles de la publicité du tabac comme celles proposées par les appelantes, les compagnies de tabac ont trouvé d'ingénieuses tactiques pour contourner ces restrictions. Par exemple, lorsque la France a tenté d'imposer une interdiction partielle

tising in the 1980s (by prohibiting "lifestyle" tobacco advertising but not informational or brand preference advertising), the tobacco companies devised techniques for associating their product with "lifestyle" images which included placing pictures on the brand name and reproducing those pictures when an advertisement showed the package, and taking out a full-page magazine advertisement and subcontracting three-quarters of the advertisement to Club Med, whose lifestyle advertisements contributed to a lifestyle association for the brand; see Luc Joossens, "Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in some Western European Countries" in *Proceedings of the 5th World Conference on Smoking and Health* (1983).

104 Thus, it appears that Parliament had compelling reasons for rejecting a partial prohibition on advertising and instituting a full prohibition. In this light, it would be highly artificial for this Court to decide, on a purely abstract basis, that a partial prohibition on advertising would be as effective as a full prohibition. In my view, this is precisely the type of "line drawing" that this Court has identified as being within the institutional competence of legislatures and not courts. The Court made this clear in *Irwin Toy*, *supra*, where it stated, at p. 990, that the government should be given "a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence". In *Irwin Toy*, this Court found ss. 248 and 249 of the *Consumer Protection Act*, R.S.Q., c. P-40.1, which prohibited the use of commercial advertising directed at persons under 13 years of age, to be an infringement of s. 2(*b*) of the *Charter*, but upheld the legislation under s. 1. The Court there observed that there was conflicting social science evidence on whether the appropriate legislative line was to be drawn at 13 years of age or a younger age and, at p. 990, observed:

If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that

de la publicité du tabac dans les années 80 (en interdisant la publicité du tabac de type «style de vie», mais non la publicité informative ou de marque), les compagnies de tabac ont trouvé des techniques pour associer leurs produits à des «styles de vie», par exemple, en plaçant des vignettes sur le nom de la marque et en reproduisant ces vignettes lorsqu'une annonce montrait le paquet, ou en achetant pour la publicité une pleine page d'un magazine, puis en revendant les trois-quarts de la page au Club Med, dont la publicité de style de vie contribuait à associer un style de vie à la marque; voir Luc Joossens, «Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in some Western European Countries» dans *Proceedings of the 5th World Conference on Smoking and Health* (1983).

Il semble donc que le Parlement avait des motifs impératifs de rejeter une interdiction partielle de la publicité et d'imposer plutôt une interdiction totale. C'est pourquoi notre Cour ferait un geste tout à fait artificiel si elle décidait, purement dans l'abstrait, qu'une interdiction partielle de la publicité serait aussi efficace qu'une interdiction totale. À mon avis, c'est précisément le type de «ligne de démarcation » que notre Cour a déclaré être du ressort des législatures et non des tribunaux. Notre Cour a été claire sur ce point dans l'arrêt *Irwin Toy*, précité, où elle a déclaré, à la p. 990, que le gouvernement devait disposer «d'une certaine latitude pour formuler des objectifs légitimes fondés sur des preuves en matière de sciences humaines qui n'étaient pas totalement concluantes». Dans cet arrêt, notre Cour a conclu que les art. 248 et 249 de la *Loi sur la protection du consommateur*, L.R.Q., ch. P-40.1, qui interdisaient la publicité commerciale destinée aux personnes de moins de 13 ans, violaient l'al. 2*b*) de la *Charte*, mais elle a maintenu la loi en vertu de l'article premier. La Cour a alors fait observer que les éléments de preuve en matière de sciences humaines étaient contradictoires quant à savoir si la ligne de démarcation que devait tracer la loi devait se situer à 13 ans ou à un âge encore plus jeune, et, à la p. 990, elle a fait observer:

Si le législateur a fait une évaluation raisonnable quant à la place appropriée de la ligne de démarcation, surtout

assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

The Court decided that the government's choice of 13 years as the cutoff line was reasonable in light of the available evidence, and thus concluded, at p. 999:

> While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.

This Court adopted a similar deferential approach in *Edwards Books and Art Ltd., supra*, in deciding that ss. 2(1) and 3(4) of the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, which prohibited retail stores with more than seven employees or more than 5,000 square feet of retail space from carrying on business on Sundays, was a justifiable infringement of freedom of religion under s. 1 of the *Charter* because it provided a mandatory day of rest for workers who would otherwise be vulnerable to pressure from employers. In that case, the appellants, a group of large retail store owners, argued that the legislature had failed to adduce sufficient evidence demonstrating that the legislation minimally impaired their rights under the *Charter*. In particular, they argued that the legislature had not adduced evidence justifying the exemption for owners of retail stores with less than eight employees. In addressing their claim, Dickson C.J. first observed, at p. 769, that the state had adduced only one Ontario Law Reform Commission report (the 1970 *Report on Sunday Observance Legislation*) in support of the distinctions drawn in the legislation, and that the Report was over 15 years old. Despite the lack of evidence on the record, however, Dickson C.J. concluded that the legislature was entitled to a degree of deference in fashioning the legislative means to accomplish that goal. While observing that other legislative

quand cette évaluation exige l'appréciation de preuves scientifiques contradictoires et la répartition de ressources limitées, il n'appartient pas aux tribunaux de se prononcer après coup. Ce serait seulement substituer une évaluation à une autre.

La Cour a décidé que le choix du gouvernement de tracer la ligne de démarcation à 13 ans était raisonnable compte tenu de la preuve disponible, et elle a conclu, à la p. 999:

> Bien que, selon la preuve, le gouvernement dispose d'autres options comportant une intrusion moindre qui répondent à des objectifs plus modestes, la preuve démontre aussi la nécessité d'interdire la publicité pour parvenir aux objectifs que le gouvernement s'est raisonnablement fixés. Cette Cour n'adoptera pas une interprétation restrictive de la preuve en matière de sciences humaines, au nom du principe de l'atteinte minimale, et n'obligera pas les législatures à choisir les moyens les moins ambitieux pour protéger des groupes vulnérables.

Notre Cour a adopté de façon similaire une attitude de retenue dans l'arrêt *Edwards Books*, précité, statuant que les par. 2(1) et 3(4) de la *Loi sur les jours fériés dans le commerce de détail*, L.R.O. 1980, ch. 453, qui interdisaient aux magasins de détail employant plus de sept personnes ou consacraient plus de 5 000 pieds carrés au commerce de détail de faire des affaires le dimanche, étaient une atteinte justifiable à la liberté de religion en vertu de l'article premier de la *Charte*, parce qu'ils prévoyaient un jour de repos obligatoire pour les employés, qui, autrement, auraient été dans une position vulnérable face aux demandes pressantes des employeurs. Dans cette affaire, les appelants, un groupe de propriétaires de grands magasins de détail, ont allégué que la législature avait fait défaut de déposer une preuve suffisante pour démontrer que sa loi portait atteinte de façon minimale à leurs droits garantis par la *Charte*. Plus particulièrement, ils ont fait valoir que la législature n'avait pas déposé de preuve justifiant l'exemption accordée aux propriétaires de magasins de détail employant moins de huit employés. Examinant leur demande, le juge en chef Dickson a d'abord fait observer, à la p. 769, que l'État n'avait déposé qu'un rapport de la Commission de réforme du droit de l'Ontario (*Report on Sunday Observance Legislation* de 1970) à l'appui de la distinction faite par la loi, et que le rapport datait de plus de

105

options were conceivable, including a Sabbatarian exemption, which would have impaired the rights of retail owners to a lesser degree, Dickson C.J. stated, at p. 782, that "[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". He concluded, at p. 783:

> I should emphasize that it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable.

I concurred with Dickson C.J. in that case, and stressed, at p. 795, that it was necessary, in that context, to give the legislature "room to manoeuvre" in fashioning legislation designed to mediate between different social interests and to protect vulnerable groups. My approach was later accepted by this Court in *R. v. Schwartz*, [1988] 2 S.C.R. 443, at pp. 488-89; *Andrews*, *supra*, at pp. 184-86, 197-98; and *Cotroni*, *supra*, at p. 1495.

106 In my view, the Court's approach in *Edwards Books* and *Irwin Toy* is directly applicable to the present cases. Tobacco consumption is a multifaceted problem which requires intervention from a variety of public authorities on a number of different fronts. Parliament has adopted an incremental solution by prohibiting advertising without, at the same time, prohibiting the consumption, manufacture or sale of tobacco. In so doing, it has chosen a policy approach that strives to balance the rights of tobacco smokers and manufacturers against the legitimate public health concerns arising from tobacco addiction including, most importantly, the special vulnerabilities of young Canadians. In my view, it is not the role of this Court to substitute its opinion for that of Parliament con-

15 ans. En dépit du manque de preuve au dossier, le juge en chef Dickson a toutefois conclu que la législature avait droit à une certaine retenue quant à son choix des moyens législatifs propres à atteindre l'objectif visé. Tout en faisant observer que d'autres options législatives étaient concevables, dont une exemption pour le sabbat, qui aurait porté atteinte dans une moindre mesure aux droits des propriétaires de magasins de détail, le juge en chef Dickson a affirmé, à la p. 782, que «[l]es tribunaux ne sont pas appelés à substituer des opinions judiciaires à celles du législateur quant à l'endroit où tracer une ligne de démarcation». Il a conclu, à la p. 783:

> Je tiens à souligner qu'il n'appartient pas à cette Cour de concevoir une loi qui soit constitutionnellement valide, de se prononcer sur la validité de régimes dont elle n'est pas saisie directement, ni d'examiner quelles mesures législatives pourraient être les plus souhaitables.

J'ai souscrit à l'avis du juge en chef Dickson dans cette affaire, et j'ai fait ressortir, à la p. 795, qu'il était nécessaire, dans un tel contexte, de donner à la législature une «marge de manœuvre» dans la façon d'élaborer une loi visant à faire la médiation entre des intérêts sociaux opposés et à protéger les groupes vulnérables. Mon point de vue a par la suite été accepté par notre Cour dans *R. c. Schwartz*, [1988] 2 R.C.S. 443, aux pp. 488 et 489; dans *Andrews*, précité, aux pp. 184 à 186, 197 et 198; et dans *Cotroni*, précité, à la p. 1495.

À mon avis, la démarche adoptée par la Cour dans *Edwards Books* et *Irwin Toy* est directement applicable aux présents pourvois. La consommation du tabac est un problème comportant de multiples aspects qui requiert l'intervention de nombreuses autorités publiques s'y attaquant sur différents fronts. Le Parlement a adopté une solution graduelle en interdisant la publicité sans interdire aussi l'usage, la fabrication ou la vente des produits du tabac. Ce faisant, il a choisi une démarche qui cherche à établir un équilibre entre les droits des fumeurs et des fabricants et les préoccupations légitimes en matière de santé publique que constitue la dépendance au tabac, tout particulièrement en ce qui concerne les jeunes. À mon avis, notre Cour n'a pas à substituer son

cerning the ideal legislative solution to this complex and wide-ranging social problem. As McLachlin J. observed in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 248:

> . . . some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive.

In reaching the conclusion that the Act satisfies the *Oakes* minimal impairment criterion, I am well aware of the statements of this Court in *Ford*, *supra*, and *Rocket*, *supra*, to the effect that a complete prohibition on a type of expression will be more difficult to justify than a partial prohibition. In my view, however, these decisions are fully distinguishable from the present cases. Once again, I emphasize the importance of context in the minimal impairment analysis. In *Rocket*, this Court found that a prohibition on advertising by dentists under s. 37(39) and (40) of *Regulation 447 of the Health Disciplines Act*, R.R.O. 1980, was an infringement of s. 2(*b*) and could not be justified under s. 1. McLachlin J. began her s. 1 analysis by observing, at p. 247, that restrictions on freedom of expression may be easier to justify in some contexts than others:

> The expression limited by this regulation is that of dentists who wish to impart information to patients or potential patients. Their motive for doing so is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, is merely loss of profit, and not loss of opportunity to participate in the political process or the 'marketplace of ideas', or to realize one's spiritual or artistic self-fulfilment: see *Irwin Toy*, *supra*, at p. 976. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*).

Despite her recognition of the importance of context, however, McLachlin J. struck down the legis-

opinion à celle du Parlement quant à ce que serait la solution législative idéale à ce problème social complexe et répandu. Comme le juge McLachlin l'a fait observer dans *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, à la p. 248:

> . . . il convient d'avoir de l'égard pour les législateurs et les difficultés inhérentes au processus de rédaction des règles d'application générale. Il ne faudrait pas annuler une limite prescrite par une règle de droit tout simplement parce que le tribunal peut concevoir une autre solution qui lui semble moins restrictive.

Arrivant à la conclusion que la Loi satisfait au critère de l'atteinte minimale formulé dans *Oakes*, je suis bien conscient des affirmations de notre Cour dans *Ford* et *Rocket*, précités, selon lesquelles une interdiction totale d'un type d'expression est plus difficile à justifier qu'une interdiction partielle. À mon avis, toutefois, la présente espèce se distingue tout à fait de ces arrêts. À nouveau, j'insiste sur l'importance du contexte dans l'analyse de l'atteinte minimale. Dans *Rocket*, notre Cour a conclu que l'interdiction de la publicité pour le compte des dentistes décrétée par le par. 37(39) et (40) du *Regulation 447 of the Health Disciplines Act*, R.R.O. 1980, violait l'art. 2*b*) et ne pouvait se justifier par l'article premier. Le juge McLachlin a commencé son analyse fondée sur l'article premier en faisant observer, à la p. 247, que les restrictions à la liberté d'expression peuvent être plus faciles à justifier dans certains contextes que dans d'autres:

> L'expression qui est restreinte par ce règlement est celle de dentistes qui désirent communiquer des renseignements à des patients réels ou éventuels. Dans la plupart des cas, leur raison d'agir ainsi est principalement d'ordre économique. À l'inverse, s'ils sont empêchés d'agir ainsi, la perte qu'ils subissent est simplement une perte de bénéfice et non une perte d'occasion de participer au processus politique ou au «marché des idées», ou de réaliser un épanouissement personnel sur le plan spirituel ou artistique: voir *Irwin Toy*, précité, à la p. 976. Cela laisse entendre qu'il se pourrait que des restrictions imposées à des expressions de ce genre soient plus faciles à justifier que d'autres atteintes à l'al. 2*b*).

En dépit du fait qu'elle ait reconnu l'importance du contexte, le juge McLachlin a cependant déclaré la

lative provision on the ground that it did not minimally impair the right to freedom of expression. She noted that the expression in question, the advertisement of dentistry services, had social value in the measure that it gave consumers access to information that would enable them to make informed health care choices. To the extent that the impugned legislative provision denied consumers such information, she observed, such an infringement could not lightly be dismissed. She stated, at p. 250:

> It is easy to think of examples of expression not falling within the exceptions which should clearly be permitted. For example, it is conceded that dentists should be able to advertise their hours of operation and the languages they speak, information which would be useful to the public and present no serious danger of misleading the public or undercutting professionalism.

She then stated, at p. 251:

> . . . the value served by free expression in the case of professional advertising is not purely the enhancement of the advertiser's opportunity to profit, as was the case in *Irwin Toy*. The public has an interest in obtaining information as to dentists' office hours, the languages they speak, and other objective facts relevant to their practice — information which s. 37(39) prohibits dentists from conveying by advertising.

108 It appears, then, that the contextual basis for McLachlin J.'s decision was that s. 37(39) of the *Regulation 447 of the Health Disciplines Act* operated to prohibit many aspects of advertising by dentists that serve to promote public health (i.e., advertising of hours of operation, language spoken and other aspects relating to their practice). No such argument can be made with respect to tobacco advertising. This type of expression serves to promote an activity which, in contrast to dentistry, is inherently dangerous and has no redeeming public health value. Indeed, the contrast with *Rocket* could not be more striking. Making an informed choice about dentists serves to promote

disposition invalide pour le motif qu'elle ne portait pas atteinte à la liberté d'expression d'une façon minimale. Elle a fait remarquer que l'expression en question, soit la publicité de services de soins dentaires, avait une valeur sociale dans la mesure où elle donnait aux consommateurs accès à de l'information qui leur permettrait de faire des choix éclairés en matière de soins de santé. Dans la mesure où la disposition contestée nierait cette information aux consommateurs, fait-elle observer, une telle violation ne peut être écartée à la légère. Elle affirme, à la p. 250:

> Il est facile d'imaginer des exemples d'expressions qui ne s'inscrivent pas dans les exceptions et qui seraient clairement autorisées. Par exemple, on reconnaît que les dentistes devraient être en mesure d'annoncer leurs heures de bureau et les langues qu'ils parlent; ce sont des renseignements qui seraient utiles pour le public et qui ne présentent aucun danger grave d'induire le public en erreur ou de diminuer le professionnalisme.

Puis, elle ajoute à la p. 251:

> . . . la valeur appuyée par la liberté d'expression dans le cas de la publicité professionnelle n'est pas purement une augmentation de la possibilité de l'annonceur de réaliser des bénéfices comme c'était le cas dans l'arrêt *Irwin Toy*. Le public a intérêt à obtenir des renseignements sur les heures de bureau du dentiste, sur la langue qu'il parle et sur d'autres faits objectifs pertinents à son travail — des renseignements que le par. 37(39) interdit au dentiste de transmettre par la publicité.

Il semble donc que le contexte sur lequel le juge McLachlin a appuyé sa décision ait été que le par. 37(39) du *Regulation 447 of the Health Disciplines Act* avait pour effet d'interdire de nombreux aspects de la publicité pour le compte des dentistes qui servent à promouvoir la santé publique (c.-à-d. la publicité portant sur les heures de bureau, la langue parlée et d'autres aspects de l'exercice de leur profession). Aucun argument de ce genre ne peut être présenté en ce qui concerne la publicité des produits du tabac. Ce type d'expression sert à promouvoir une activité qui, par contraste avec la dentisterie, est de façon inhérente dangereuse et n'a aucun effet bénéfique sur la santé publique. En

health by allowing patients to seek out the best care; making an informed choice about tobacco simply permits consumers to choose between equally dangerous products. Although the appellants argue that informational advertising allows smokers to make informed health choices by giving them information about tobacco product content, and thereby permitting them to choose tobacco products with lower tar levels, they submit no evidence that such products are actually healthier, nor logically could they, since the evidence appears to point the other direction: such products are no safer than high tar products and serve mainly to induce smokers who might otherwise quit to keep smoking "lighter" brands; see e.g. the Report of the Surgeon General of the United States, *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*, *supra*, at pp. 315-16, 664-65; Dr. Richard W. Pollay, "The Functions and Management of Cigarette Advertising", *supra*, at pp. 28-29; Report of Dr. Joel B. Cohen, "Effects of Cigarette Advertising on Consumer Behavior", *supra*, at pp. 41-42. Moreover, the appellants' argument, weak on an evidentiary level, is further undermined by the fact that consumers can still, under the Act, obtain product and health information at the point of sale and on the tobacco package (ss. 5 and 9).

A similar contrast can be drawn between the present cases and *Ford*, *supra*. In *Ford*, *supra*, this Court found that ss. 58, 69 and 205 to 208 of the Quebec *Charter of the French Language*, R.S.Q., c. C-11, which required public signs, posters and commercial advertising to be in the French language only, infringed s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and could not be justified under s. 1. The Court based this decision

fait, le contraste avec l'arrêt *Rocket* ne pourrait pas être plus frappant. La possibilité de choisir son dentiste de façon éclairée contribue à la promotion de la santé en ce qu'elle permet aux patients de chercher à obtenir les meilleurs soins; la possibilité de faire un choix éclairé quant au tabac ne permet aux consommateurs de choisir qu'entre des produits également dangereux. Bien que les appelantes prétendent que la publicité informative permet aux fumeurs de faire des choix éclairés en ce qui concerne leur santé, parce qu'elle leur donne des renseignements sur le contenu des produits du tabac et qu'elle leur permet ainsi de choisir les produits du tabac qui ont les quantités de goudron les plus faibles, elles n'ont présenté aucune preuve établissant que ces produits sont de fait meilleurs pour la santé; elles en étaient de toute façon logiquement incapables, puisque la preuve paraît indiquer le contraire: ces produits ne sont pas plus sûrs que ceux qui contiennent de fortes quantités de goudron et ils servent principalement à inciter les fumeurs qui pourraient autrement cesser de fumer à continuer de fumer des marques plus «légères»; voir p. ex. le rapport du Surgeon General des États-Unis, *Reducing the Health Consequences of Smoking — 25 Years of Progress — A report of the Surgeon General*, *op. cit.*, aux pp. 315, 316, 664 et 665; Richard W. Pollay, «The Functions and Management of Cigarette Advertising», *op. cit.*, aux pp. 28 et 29, et le rapport de Joel B. Cohen, «Effects of Cigarette Advertising on Consumer Behavior», *op. cit.*, aux pp. 41 et 42. De plus, l'argument des appelantes, déjà faible sur le plan de la preuve, est encore davantage miné par le fait que, en vertu de la Loi, les consommateurs peuvent toujours obtenir des renseignements sur les produits et la santé au point de vente et sur l'emballage des produits du tabac (art. 5 et 9).

109 On peut constater le même contraste entre les présents pourvois et *Ford*, précité. Dans cet arrêt, notre Cour a conclu que les art. 58, 69 et 205 à 208 de *Charte de la langue française* du Québec, L.R.Q., ch. C-11, qui exigeaient que les affiches, les enseignes publiques et la publicité commerciale soient en français seulement, enfreignaient l'al. 2*b*) de la *Charte canadienne des droits et libertés* et ne pouvaient se justifier en vertu de l'article premier.

principally on the observation, at p. 780, that the prohibition was overbroad and thus did not satisfy the minimal impairment requirement:

> . . . whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under the Quebec *Charter* and the Canadian *Charter*, requiring the exclusive use of French has not been so justified.

110 However, there are two crucial distinctions between *Ford* and the present cases. First, although the infringed expression in *Ford* fell, as in the present cases, within the category of commercial expression, the nature and scope of the expression in these cases are quite different. While, in these cases, the Act prohibits only tobacco advertising, in *Ford*, the law prohibited all non-French commercial expression in Quebec. It was therefore much broader in scope than the prohibition under the Act. Moreover, while the Act prohibits expression that has little or no connection with "core" freedom of expression values, the commercial expression in *Ford* was intimately connected with such core values. The impugned law in that case represented an attempt by the government of Quebec to eradicate the commercial use in public of any language other than French. Given the close historical relationship between language, culture and politics in Canada, it cannot seriously be denied that the implications of this prohibition extended well beyond the commercial sphere and impacted upon the dignity of all minority language groups in Quebec. Indeed, the Court in *Ford*, *supra*, at p. 748, recognized this fact when it quoted with approval from *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 744, where the Court stated:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. . . . Language bridges the gap

La Cour a fondé sa décision principalement sur l'observation qu'elle fait, à la p. 780, que l'interdiction est trop large et, par conséquent, ne respecte pas le principe de l'atteinte minimale:

> Alors qu'exiger que la langue française prédomine, même nettement, sur les affiches et les enseignes serait proportionnel à l'objectif de promotion et de préservation d'un «visage linguistique» français au Québec et serait en conséquence justifié en vertu des *Chartes* québécoise et canadienne, l'obligation d'employer exclusivement le français n'a pas été justifiée.

Il y a encore deux distinctions importantes à faire entre l'arrêt *Ford* et les présents pourvois. Premièrement, bien que la liberté d'expression violée dont il était question dans *Ford* tombe, comme en l'espèce, dans la catégorie de l'expression commerciale, la nature et la portée de l'expression dans chaque cas sont très différentes. Alors que, dans les cas qui nous occupent, la Loi interdit seulement la publicité du tabac, dans *Ford*, la loi interdisait, au Québec, toute expression commerciale qui n'était pas en français. L'interdiction avait donc une portée beaucoup plus grande que celle édictée en vertu de la Loi. En outre, alors que la Loi interdit une expression qui n'a que peu ou pas de lien avec le «cœur» des valeurs de la liberté d'expression, l'expression commerciale dont il était question dans *Ford* était intimement liée à ces valeurs fondamentales. La loi contestée représentait une tentative du gouvernement du Québec d'éliminer l'utilisation commerciale en public de toute langue autre que le français. Étant donné les liens étroits dans l'histoire du Canada entre langue, culture et politique, on ne peut sérieusement nier que l'interdiction avait une incidence qui s'étendait bien au-delà du domaine commercial et qu'elle avait des répercussions sur la dignité de tous les groupes linguistiques minoritaires au Québec. En fait, la Cour, dans *Ford*, précité, à la p. 748, a souligné ce fait lorsqu'elle a repris l'extrait suivant des motifs qu'elle avait exprimés dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, à la p. 744:

> L'importance des droits en matière linguistique est fondée sur le rôle essentiel que joue la langue dans l'existence, le développement et la dignité de l'être humain.

between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

In my view, it cannot seriously be argued that the "dignity" of the three large corporations whose rights are infringed in these cases is in any way comparable to that of minority group members dealt with in *Ford*.

A second important distinction between *Ford* and the present cases relates to the quantity of evidence adduced to satisfy the minimal impairment requirement. In *Ford*, no evidence was adduced to show why the exclusion of all languages other than French was necessary to achieve the objective of protecting the French language and reflecting the reality of Quebec society. Indeed, the Court in that case stated, at p. 779:

> The section 1 and s. 9.1 [of the Quebec *Charter*] materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials. Indeed, in his factum and oral argument the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French. He concentrated on the reasons for the adoption of the *Charter of the French Language* and the earlier language legislation, which, as was noted above, were conceded by the respondents.

By contrast, as I discussed above, the Attorney General in the present cases submitted a substantial body of documentation, drawn from national and international sources, to demonstrate that a full prohibition is rational and can be justified in a free and democratic society. I conclude that sufficient evidence was adduced to justify the Attorney General's submission.

Proportionality Between the Effects of the Legislation and the Objective

The third part of the proportionality analysis requires a proportionality between the deleterious and the salutary effects of the measures; see

[. . .] Le langage constitue le pont entre l'isolement et la collectivité, qui permet aux êtres humains de délimiter les droits et obligations qu'ils ont les uns envers les autres, et ainsi, de vivre en société.

À mon avis, on ne peut sérieusement avancer que la «dignité» des trois grandes sociétés dont les droits sont violés en l'espèce est de quelque façon comparable à celle de groupes minoritaires comme dans l'arrêt *Ford*.

L'autre distinction importante entre *Ford* et les présents pourvois se rapporte à la quantité des éléments de preuve déposés à l'appui de l'exigence de l'atteinte minimale. Dans *Ford*, aucune preuve n'a été déposée pour établir que l'exclusion de toutes les langues autres que le français était nécessaire pour atteindre l'objectif de protéger la langue française et de refléter la réalité de la société québécoise. En fait, la Cour a alors dit, à la p. 779:

> Toutefois, les documents se rapportant à l'article premier et à l'art. 9.1 [de la *Charte* québécoise] n'établissent pas que l'exigence de l'emploi exclusif du français est nécessaire pour atteindre l'objectif législatif ni qu'elle est proportionnée à cet objectif. Cette question précise n'est même pas abordée dans les documents. En fait, dans son mémoire et dans les arguments oraux, le procureur général du Québec n'a pas tenté de justifier l'exigence de l'emploi exclusif du français. Il a plutôt insisté sur les motifs de l'adoption de la *Charte de la langue française* et de la législation antérieure en matière linguistique, motifs qui, il faut le répéter, ne sont pas contestés par les intimées.

Par contre, comme je l'ai mentionné précédemment, le procureur général a déposé en l'espèce une preuve documentaire volumineuse, tirée de sources nationales et internationales, afin d'établir qu'une interdiction totale est rationnelle et qu'elle peut se justifier dans une société libre et démocratique. Je conclus que le procureur général a déposé une preuve suffisante pour appuyer ses observations.

Proportionnalité entre les effets de la loi et l'objectif

La troisième partie de l'analyse de la proportionnalité nécessite qu'il y ait proportionnalité entre les effets préjudiciables et les effets béné-

Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, at pp. 890-91. For the reasons I have given with respect to both the nature of the legislation and the nature of the right infringed in these cases, it is my view that the deleterious effects of this limitation, a restriction on the rights of tobacco companies to advertise products for profit that are inherently dangerous and harmful, do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to consume these products.

The Unattributed Health Message Requirement

113 I now turn to the appellants' final argument, namely, that s. 9 of the Act constitutes an unjustifiable infringement of their freedom of expression by compelling them to place on tobacco packages an unattributed health message. I agree, to use Wilson J.'s phrase, that if the effect of this provision is "to put a particular message into the mouth of the plaintiff, as is metaphorically alleged to be the case here", the section runs afoul of s. 2(*b*) of the *Charter*; see *Lavigne*, *supra*, at p. 267. This view had earlier been adopted by the whole Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. There a labour arbitrator had, *inter alia*, required an employer, by way of remedy for unjustly dismissing an employee, to provide a letter of recommendation consisting only of uncontested facts found by the arbitrator. Speaking for the Court on this point, Lamer J. (as he then was) stated, at p. 1080: "freedom of expression necessarily entails the right to say nothing or the right not to say certain things".

114 I add that I do not accept the distinction sought to be drawn by the Attorney General that here the statement is one of fact, not of opinion. Whatever merit this distinction may have in other contexts, the line here is too fine to warrant the distinction. I thus have no difficulty holding that the health mes-

fiques des mesures; voir *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, aux pp. 890 et 891. Pour les motifs que j'ai exprimés en ce qui concerne tant la nature de la loi que celle du droit violé en l'espèce, je suis d'avis que les effets préjudiciables de la limitation, soit la restriction des droits des compagnies de tabac de faire de la publicité, dans un but commercial, sur des produits qui sont en soi dangereux et dommageables, ne l'emportent pas sur l'objectif de la loi de réduire le nombre des sources directes d'incitation à consommer ces produits faite aux Canadiens.

La nécessité de mises en garde non attribuées

Je me penche maintenant sur le dernier argument des appelantes, soit que l'art. 9 de la Loi constitue une violation injustifiable de leur liberté d'expression, les forçant à placer sur les emballages de produits du tabac un message relatif à la santé non attribué. Je conviens, pour utiliser les termes du juge Wilson, que si l'effet de cette disposition est «de faire dire des choses particulières au demandeur, pour formuler métaphoriquement l'allégation faite en l'espèce», l'article est contraire à l'al. 2*b*) de la *Charte*; voir *Lavigne*, précité, à la p. 267. Ce point de vue avait déjà été adopté par l'ensemble de notre Cour dans *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, où un arbitre avait, entre autres, exigé d'un employeur, en réparation d'un congédiement injuste, qu'il remette une lettre de recommandation ne comprenant que les faits qui, selon l'arbitre, n'avaient pas été contestés. S'exprimant au nom de la Cour sur ce point, le juge Lamer (maintenant Juge en chef) a affirmé à la p. 1080: «la liberté d'expression comporte nécessairement le droit de ne rien dire ou encore le droit de ne pas dire certaines choses».

J'ajoute que je n'accepte pas de faire la distinction que tente de faire le procureur général selon qui, en l'espèce, il s'agit d'un énoncé de fait, non d'opinion. Quel que soit le mérite que cette distinction puisse avoir dans d'autres contextes, la ligne de démarcation est en l'espèce trop ténue pour permettre cette distinction. Je n'ai par conséquent aucune difficulté à statuer que la mise en

sage is expression as that term is understood in s. 2(*b*).

I have, however, more fundamental problems accepting the appellants' contention that their s. 2(*b*) right was infringed by the requirement that a prescribed health warning must be placed on tobacco packages. It must be remembered that this statement is unattributed and I have some difficulty in seeing, in the context in which it was made, that it can in any real sense be considered to be attributed to the appellants. Simply because tobacco manufacturers are required to place unattributed warnings on their products does not mean that they must endorse these messages, or that they are perceived by consumers to endorse them. In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course. It is common knowledge amongst the public at large that such statements emanate from the government, not the tobacco manufacturers. In this respect, there is an important distinction between messages directly attributed to tobacco manufacturers, which would create the impression that the message emanates from the appellants and would violate their right to silence, and the unattributed messages at issue in these cases, which emanate from the government and create no such impression. Seen in this way, the mandatory health warnings under s. 9 are no different from unattributed labelling requirements under the *Hazardous Products Act*, under which manufacturers of hazardous products are required to place unattributed warnings, such as "DANGER" or "POISON", and hazard symbols, such as skull and crossbones on their products; see *Consumer Chemicals and Containers Regulations*, SOR/88-556. I should add that the issue has ramifications for many other spheres of activity where individuals may in certain prescribed circumstances be required to place danger signs on facilities used by the public or on construction sites, and so on. This is not really an expression of opinion by the person in control of the facility or the construction site. It is rather a requirement

garde concernant la santé est une expression dans le sens où ce terme est entendu à l'al. 2*b*).

J'ai cependant beaucoup plus de difficulté à 115
accepter la prétention des appelantes selon laquelle le droit que leur garantit l'al. 2*b*) a été violé par l'obligation d'inscrire une mise en garde particulière sur les emballages de produits du tabac. Il faut se rappeler que cet énoncé est non attribué, et je peux difficilement voir comment, dans le contexte où il a été fait, il pourrait, en réalité, être attribué aux appelantes. Le simple fait que les fabricants de produits du tabac sont tenus d'inscrire des mises en garde non attribuées sur leurs produits ne signifie pas qu'ils doivent souscrire à ces messages, ou qu'ils sont perçus par les consommateurs comme y souscrivant. Dans un État moderne, il est du cours normal des choses que l'étiquetage des produits, et particulièrement des produits destinés à la consommation humaine, soit soumis à la réglementation de l'État. Le public sait bien que ces messages émanent du gouvernement, et non des fabricants des produits du tabac. Ainsi, il y a une importante distinction à faire entre les messages directement attribués aux fabricants de produits du tabac, qui créeraient l'impression qu'ils émanent des appelantes et violeraient leur droit de garder le silence, et les messages non attribués en litige dans les présents pourvois, qui émanent du gouvernement et qui ne créent pas pareille impression. Vues de cette façon, les mises en garde exigées par l'art. 9 ne sont pas différentes des exigences en matière d'inscription de messages non attribués imposées par la *Loi sur les produits dangereux*, en vertu de laquelle les fabricants de produits dangereux sont tenus d'apposer sur leurs produits des mises en garde non attribuées, telles que «DANGER» ou «POISON», et des signaux de danger, tels qu'une tête de mort et tibias croisés; voir le *Règlement sur les produits chimiques et contenants destinés aux consommateurs*, DORS/88-556. Je crois devoir dire que la question s'étend à de nombreux autres domaines d'activités où des personnes peuvent, dans certaines circonstances particulières, avoir à placer des mises en garde dans des lieux fréquentés par le public, ou sur un chantier de construction et ainsi de suite. Il ne s'agit pas réellement d'une expression d'opinion de la part de la personne res-

imposed by the government as a condition of participating in a regulated activity.

116 Even if I were of the view that there was an infringement, I am firmly convinced that it is fully justifiable under s. 1. Once again, I stress the importance of context in the s. 1 analysis. The appellants are large corporations selling a product for profit which, on the basis of overwhelming evidence, is dangerous, yet maintain the right to engage in "counterspeech" against warnings which do nothing more than bring the dangerous nature of these products to the attention of consumers. Given that the objective of the unattributed health message requirement is simply to increase the likelihood that every literate consumer of tobacco products will be made aware of the risks entailed by the use of that product, and that these warnings have no political, social or religious content, it is clear that we are a long way in this context from cases where the state seeks to coerce a lone individual to make political, social or religious statements without a right to respond. I believe a lower level of constitutional scrutiny is justified in this context. These cases seem to me to be a far more compelling situation than *Slaight*, *supra*, where a majority of the Court held the infringement there was justified under s. 1. The *Charter* was essentially enacted to protect individuals, not corporations. It may, at times it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case, and I again draw inspiration from the statement of Dickson C.J. in *Edwards Books*, *supra*, at p. 779, that the courts must ensure that the *Charter* not become simply an instrument "of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons".

ponsable du lieu public ou du chantier de construction. Il s'agit plutôt d'une exigence imposée par le gouvernement comme condition de la participation à une activité réglementée.

Même si j'étais d'avis qu'il y a violation, je suis tout à fait convaincu qu'elle serait justifiable au regard de l'article premier. Une fois encore, j'insiste sur l'importance du contexte dans l'analyse fondée sur l'article premier. Les appelantes sont de grandes sociétés qui vendent un produit qui leur rapporte un bénéfice et qui est, sur la foi d'une preuve écrasante, dangereux. Elle n'en revendiquent pas moins le droit de tenir un «contre-discours» contre des mises en garde, qui ne font rien de plus que d'attirer l'attention des consommateurs sur la nature dangereuse de ces produits. Étant donné que, d'une part, l'objectif visé par l'exigence d'apposer une mise en garde non attribuée est simplement d'accroître la probabilité que tout consommateur de produits du tabac qui sait lire sera mis au courant des risques rattachés à l'usage de ces produits, et que, d'autre part, ces mises en garde n'ont aucun contenu politique, social ou religieux, il est clair que nous sommes loin, dans ce contexte, de la situation où l'État tente de forcer un particulier isolé à faire des déclarations politiques, sociales ou religieuses, sans droit de réplique. Je crois qu'en l'occurrence l'analyse constitutionnelle n'a pas à être aussi approfondie. En effet, il me semble qu'elle présente une situation bien plus convaincante que celle de l'arrêt *Slaight*, précité, où, notre Cour à la majorité a conclu que la violation en question était justifiée au regard de l'article premier. Essentiellement, la *Charte* a été adoptée pour protéger les particuliers, non les personnes morales. Il se peut qu'il faille parfois protéger les droits des personnes morales afin de protéger les droits des particuliers. Mais je ne crois pas que ce soit le cas ici et, une fois de plus, je m'inspire d'une affirmation du juge en chef Dickson dans *Edwards Books*, précité, à la p. 779, selon laquelle les tribunaux doivent s'assurer que la *Charte* ne devienne pas simplement un instrument dont se serviront «les plus favorisés pour écarter des lois dont l'objet est d'améliorer le sort des moins favorisés».

In my view, the requirement that health warnings must be unattributed is also proportional to the objective of informing consumers about the risks of tobacco use. Unattributed warnings are rationally connected to this objective because they increase the visual impact of the warning. It is not difficult to see that bold unattributed messages on a tobacco package (such as, for example, "SMOKING CAN KILL YOU") are more striking to the eye than messages cluttered by subtitles and attributions. Moreover, the attribution of the warnings also tends to dilute the factual impact of the messages. As Brossard J.A. observed, at p. 383:

> . . . it seems to me to leap to the eye that an "attributed" message can quickly become meaningless, or even ridiculous.
>
> As an example, the message that is supposed to come from the "Surgeon-General" remains a message imputed to an abstract entity or a political body which obviously cannot by simple decree make something hazardous that otherwise would not be. This, it seems to me, rationally weakens and attenuates the message.

These considerations are particularly relevant with respect to Parliament's goal of protecting children, who constitute the largest single group of new smokers every year in this country. In a report submitted at trial ("A Report on the Special Vulnerabilities of Children and Adolescents", *supra*) Dr. Michael J. Chandler observed that adolescents are apt to disregard or disobey messages from perceived authority figures. On this basis, he concluded that attributed warnings would be less effective in deterring adolescents from smoking. He stated, at p. 19:

> Adolescents are predisposed, as a function of their persistent cognitive immaturity, to view public disagreements between "experts" as evidence that everything is simply a matter of subjective opinion, and a licence to "do their own thing". A warning by Health and Welfare Canada on a publicly advertised product would provide them with just the sort of evidence they feel is required to justify doing whatever impulsive thing occurs to them at the moment.

117

À mon avis, l'exigence de non-attribution des mises en garde est également proportionnelle à l'objectif d'informer les consommateurs sur les risques de l'usage du tabac. Les mises en garde non attribuées ont un lien rationnel avec cet objectif en ce qu'elles accroissent l'effet visuel de la mise en garde. Il n'est pas difficile de voir que les messages directs non attribués (tels que «FUMER PEUT VOUS TUER») sont plus frappants visuellement que les messages encombrés de sous-titres et d'attributions. De plus, l'attribution des mises en garde a aussi tendance à diluer l'incidence factuelle du message. Comme l'a fait observer le juge Brossard, à la p. 437:

> Il me paraît [. . .] «sauter aux yeux» qu'un message «imputé» peut rapidement devenir sans signification, sinon même être tourné au ridicule.
>
> À titre d'exemple, le message que l'on veut imputer au Surgeon General demeure un message imputé à une abstraction ou à un corps politique qui ne saurait évidemment rendre dangereux, par simple décret, ce qui ne le serait pas autrement. Le message me semble alors rationnellement affaibli et atténué.

Ces considérations sont particulièrement pertinentes en ce qui concerne le but du Parlement de protéger les enfants, qui constituent à eux seuls le plus grand groupe de nouveaux fumeurs chaque année au pays. Dans un rapport déposé au procès («A Report on the Special Vulnerabilities of Children and Adolescents», *op. cit.*), Michael J. Chandler, fait observer que les adolescents ont tendance à ne pas porter attention ou à désobéir aux messages émanant de ce qu'ils perçoivent comme des représentants de l'autorité. Il en conclut donc que les mises en garde attribuées seraient moins efficaces pour ce qui est de décourager les adolescents de fumer. Il affirme, à la p. 19:

> [TRADUCTION] Les adolescents sont prédisposés, en raison de leur immaturité sur le plan cognitif, à voir les divergences publiques entre «experts» comme la preuve que tout n'est qu'une question d'opinion subjective et qu'ils peuvent par conséquent «faire comme ils veulent». Une mise en garde de Santé et Bien-être social Canada apposée sur un produit faisant l'objet de publicité leur fournirait tout juste l'excuse qu'ils attendent pour se justifier de faire tout ce qui leur passe par la tête.

118 Thus, although the unattributed health warning requirement precludes large corporations from disseminating on their product packages the view that tobacco products are not harmful, I believe that any concern arising from this technical infringement of their rights is easily outweighed by the pressing health concerns raised by tobacco consumption. As noted by Dickson C.J. in *Edwards Books*, *supra*, at p. 759, the *Charter* does not require the elimination of "minuscule" constitutional burdens, and legislative action that increases the costs of exercising a right need not be prohibited if the burden is "trivial" or "insubstantial". In these cases, the only cost associated with the unattributed warning requirement is a potential reduction in profits. In my view, this is a cost that manufacturers of dangerous products can reasonably be expected to bear, given the health benefits of effective health warnings. As I stated in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 506-7:

> In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations.

Disposition

119 I would dismiss the appeals with costs. I would answer the constitutional questions as follows:

1. Is the *Tobacco Products Control Act*, S.C. 1988, c. 20, wholly or in part 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?

Par conséquent, bien que l'exigence des mises en garde non attribuées empêche les grandes sociétés de répandre l'idée par leurs emballages que les produits du tabac ne sont pas dangereux, je crois que toute inquiétude engendrée par cette violation de pure forme de leurs droits ne fait pas le poids devant les préoccupations pour la santé que fait surgir la consommation du tabac. Comme l'a fait remarquer le juge en chef Dickson dans *Edwards Books*, précité, à la p. 759, la *Charte* ne nécessite pas l'élimination des «infime[s]» inconvénients affectant des droits constitutionnels, et une loi qui accroît le coût de l'exercice d'un droit ne doit pas être déclarée inopérante si l'inconvénient est «négligeable» ou «insignifiant». Dans les présents pourvois, le seul coût lié à l'exigence d'une mise en garde non attribuée est une possible réduction des bénéfices. À mon avis, on peut raisonnablement s'attendre à ce que ce coût soit supporté par les fabricants de produits dangereux, compte tenu des avantages pour la santé de mises en garde efficaces. Comme je l'ai affirmé dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, aux pp. 506 et 507:

> Dans une société industrielle moderne, on reconnaît généralement que de nombreuses activités auxquelles peuvent se livrer des particuliers doivent malgré tout être plus ou moins réglementées par l'État pour veiller à ce que la poursuite des intérêts des particuliers soit compatible avec les intérêts de la collectivité dans la réalisation des buts et des aspirations collectifs.

Dispositif

Je suis d'avis de rejeter les pourvois avec dépens et de donner les réponses suivantes aux questions constitutionnelles:

1. La *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20, relève-t-elle, en tout ou en partie, de la compétence du Parlement du Canada de légiférer pour la paix, l'ordre et le bon gouvernement du Canada en vertu de l'art. 91, ou en matière de droit criminel suivant le par. 91(27), de la *Loi constitutionnelle de 1867*, ou autrement?

Answer: The *Tobacco Products Control Act* is wholly within the legislative competence of Parliament and is validly enacted pursuant to the criminal law power in s. 91(27) of the *Constitution Act, 1867*. It is not necessary to consider whether Parliament may validly enact the Act under its power to make laws for the peace, order and good government of Canada.

2. Is the *Tobacco Products Control Act* wholly or in part inconsistent with the right of freedom of expression as set out in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and, if so, does it constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof?

Answer: The Act is inconsistent with s. 2(*b*) of the *Charter*, but constitutes a reasonable limit to that right under s. 1 thereof.

The following are the reasons delivered by

SOPINKA J. — I agree with Justice Major that the impugned legislation is not validly enacted under the criminal law power. In other respects, I concur in the reasons of Justice McLachlin.

The following are the reasons delivered by

CORY J. — Although I am in accordance with the reasons and conclusions of Justice La Forest, I am also in agreement with the reasons of Justice Iacobucci in so far as they declare a suspension of invalidity for one year.

The following is the judgment delivered by

MCLACHLIN J. — At issue in these cases is the validity of the *Tobacco Products Control Act*, S.C. 1988, c. 20 (the "Act"), a law which imposes a ban on all advertising of tobacco products in the Canadian media and requires tobacco manufacturers to

Réponse: La *Loi réglementant les produits du tabac* est entièrement du ressort législatif du Parlement et elle a été validement adoptée en vertu du pouvoir de légiférer en matière de droit criminel conféré par le par. 91(27) de la *Loi constitutionnelle de 1867*. Il n'y a pas lieu de déterminer si le Parlement peut validement adopter la Loi en vertu de son pouvoir de faire des lois pour la paix, l'ordre et le bon gouvernement au Canada.

2. La *Loi réglementant les produits du tabac* est-elle, en tout ou en partie, incompatible avec la liberté d'expression garantie à l'al. 2*b*) de la *Charte canadienne des droits et libertés* et, dans l'affirmative, apporte-t-elle une limite raisonnable à l'exercice de ce droit, dont la justification puisse se démontrer au sens de l'article premier de la *Charte*?

Réponse: La Loi est incompatible avec l'al. 2*b*) de la *Charte*, mais elle apporte une limite raisonnable à l'exercice de ce droit au sens de l'article premier de la *Charte*.

Version française des motifs rendus par

LE JUGE SOPINKA — Tout comme le juge Major, j'estime que la loi contestée n'a pas été validement adoptée dans le cadre de la compétence en matière de droit criminel. À tous autres égards, je souscris aux motifs du juge McLachlin. 120

Version française des motifs rendus par

LE JUGE CORY — Bien que je sois d'accord avec les motifs et les conclusions du juge La Forest, je suis également d'accord avec les motifs du juge Iacobucci dans la mesure où ils préconisent une suspension de l'effet de l'invalidité pour une période d'un an. 121

Version française du jugement rendu par

LE JUGE MCLACHLIN — Les présents pourvois portent sur la validité de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20 (la «Loi»), qui interdit toute publicité en faveur des produits du tabac dans les médias canadiens et exige que les 122

print unattributed health warnings on the packages of all tobacco products.

123 The first issue is whether Parliament had the power to enact the ban and warning requirements, given that advertising and promotion of particular industries generally are matters of provincial competence. I agree with my colleague, Justice La Forest, that Parliament may impose advertising bans and require health warnings on tobacco products under its criminal law power.

124 The second issue is whether the ban and warning requirements violate the *Canadian Charter of Rights and Freedoms*. The *Charter* guarantees free expression, a guarantee which has been held to extend to commercial speech such as advertising: see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; and *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. I agree with La Forest J. that the prohibition on advertising and promotion of tobacco products constitutes a violation of the right to free expression as the Attorney General conceded. Unlike La Forest J., I take the view that s. 9 of the Act, which requires tobacco manufacturers to place an unattributed health warning on tobacco packages, also infringes the right of free expression. As La Forest J. notes in para. 113, this Court has previously held that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things": *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1080, *per* Lamer J. (as he then was). Under s. 9(2), tobacco manufacturers are prohibited from displaying on their packages any writing other than the name, brand name, trade mark, and other information required by legislation. The combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constitutes an infringe-

fabricants de ces produits apposent des mises en garde non attribuées sur les emballages de tous les produits du tabac.

La première question est de savoir si le Parlement avait la compétence pour adopter cette interdiction et les exigences relatives aux mises en garde, puisque la publicité et la promotion d'industries particulières sont généralement des questions de compétence provinciale. À l'instar de mon collègue le juge La Forest, je suis d'avis que, en vertu de sa compétence en matière de droit criminel, le Parlement peut imposer des interdictions sur la publicité et exiger l'apposition de mises en garde sur les produits du tabac.

La deuxième question est de savoir si l'interdiction et les exigences relatives aux mises en garde vont à l'encontre de la *Charte canadienne des droits et libertés*. La *Charte* garantit la liberté d'expression, et cette garantie a été interprétée comme incluant le discours commercial, comme la publicité; voir *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, et *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232. Je conviens avec le juge La Forest que l'interdiction imposée sur la publicité et la promotion des produits du tabac constitue une violation du droit à la liberté d'expression, comme l'a admis le procureur général. Contrairement au juge La Forest, je suis d'avis que l'art. 9 de la Loi, qui exige que les fabricants apposent sur les produits du tabac des messages non attribués relatifs à la santé, porte également atteinte au droit à la liberté d'expression. Comme le juge La Forest le souligne, au par. 113, notre Cour a déjà statué que «la liberté d'expression comporte nécessairement le droit de ne rien dire ou encore le droit de ne pas dire certaines choses»: *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, à la p. 1080, le juge Lamer (maintenant Juge en chef). En vertu du par. 9(2), il est interdit aux fabricants de tabac d'apposer sur l'emballage d'un produit du tabac des mentions autres que la désignation, le nom et toute marque de celui-ci ainsi que les renseignements prévus par

ment of the right to free expression guaranteed by s. 2(*b*) of the *Charter*.

The only remaining question is whether these infringements of the right of free expression are saved under s. 1 of the *Charter*, as being reasonable and "demonstrably justified in a free and democratic society". Acknowledging that the evidence of justification is problematic, La Forest J. concludes that it nevertheless suffices to justify the infringement of the right of free expression, given the importance of the legislative goal, the context of the law and the need to defer to Parliament on such an important and difficult issue. With respect, I cannot agree. I share the trial judge's view that the Attorney General of Canada has failed to establish justification under s. 1 for ss. 4, 8 and 9 of the Act, those provisions which impose a total advertising ban, prohibit trade mark usage on articles other than tobacco products and mandate the use of unattributed health warnings on tobacco packaging. Because I do not believe that these provisions are severable from ss. 5 and 6 of the Act, which pertain to restrictions on promotion and trade mark usage, I find ss. 4, 5, 6, 8, and 9 to be invalid, leaving the remainder of the Act intact except in so far as it relates to the invalid provisions.

1. The Test for Justification under Section 1 of the *Charter*

(a) *The Wording of Section 1*

I agree with La Forest J. that "[t]he appropriate 'test' . . . in a s. 1 analysis is that found in s. 1 itself" (para. 62). The ultimate issue is whether the infringement is reasonable and "demonstrably justified in a free and democratic society". The jurisprudence laying down the dual considerations of importance of objective and proportionality between the good which may be achieved by the

une loi. Les mises en garde non attribuées, conjuguées à l'interdiction d'apposer tout autre renseignement qui permettrait aux fabricants de tabac d'exprimer leurs points de vue, constituent une violation de la liberté d'expression garantie par l'al. 2*b*) de la *Charte*.

125 La dernière question est de savoir si ces violations du droit à la liberté d'expression sont sauvegardées en vertu de l'article premier de la *Charte*, comme étant des limites raisonnables «dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique». Reconnaissant que la preuve de la justification présente des problèmes, le juge La Forest conclut qu'elle suffit néanmoins à justifier la violation du droit à la liberté d'expression compte tenu de l'importance de l'objectif législatif, du contexte de la loi et de la nécessité d'avoir de l'égard pour le Parlement relativement à une question si importante et difficile. En toute déférence, je ne suis pas de cet avis. Tout comme le juge de première instance, j'estime que le procureur général du Canada n'a pas réussi à établir une justification en vertu de l'article premier pour les art. 4, 8 et 9 de la Loi, dispositions qui interdisent totalement la publicité, proscrivent l'utilisation de marques sur des articles autres que les produits du tabac et exigent l'apposition sur les emballages de mises en garde non attribuées. Puisque ces dispositions ne sont pas, à mon avis, dissociables des art. 5 et 6 de la Loi, qui portent sur les restrictions en matière de promotion et d'usage de marques, je conclus que les art. 4, 5, 6, 8 et 9 ne sont pas valides et que le reste de la Loi demeure inchangé, sauf dans la mesure où il se rapporte aux dispositions invalidées.

1. Le critère de la justification en vertu de l'article premier de la *Charte*

a) *Le libellé de l'article premier*

126 Je suis d'accord avec le juge La Forest pour dire que: «[l]e «critère» approprié applicable à une analyse fondée sur l'article premier se trouve dans la disposition même» (par. 62). Il s'agit en fin de compte de savoir si la violation se situe à l'intérieur de limites raisonnables «dont la justification [peut] se démontrer dans le cadre d'une société libre et démocratique». Dans la jurisprudence por-

law and the infringement of rights it works, may be seen as articulating the factors which must be considered in determining whether a law that violates constitutional rights is nevertheless "reasonable" and "demonstrably justified". If the objective of a law which limits constitutional rights lacks sufficient importance, the infringement cannot be reasonable or justified. Similarly, if the good which may be achieved by the law pales beside the seriousness of the infringement of rights which it works, that law cannot be considered reasonable or justified. While sharing La Forest J.'s view that an overtechnical approach to s. 1 is to be eschewed, I find no conflict between the words of s. 1 and the jurisprudence founded upon *R. v. Oakes*, [1986] 1 S.C.R. 103. The latter complements the former.

tant sur la double considération que sont l'importance de l'objectif et le critère de la proportionnalité entre le bien que vise la loi et la violation des droits à laquelle elle donne lieu, les tribunaux formulent les facteurs dont il faut tenir compte pour déterminer si l'atteinte qu'une loi porte aux droits garantis par la Constitution se situe néanmoins à l'intérieur de limites «raisonnables» «dont la justification [peut] se démontrer». Si l'objectif d'une loi qui restreint les droits garantis par la Constitution n'est pas suffisamment important, l'atteinte ne peut être ni raisonnable ni justifiée. De même, si le bien visé par la loi perd de son importance par rapport à la gravité de l'atteinte aux droits qui s'ensuit, on ne peut considérer que cette loi soit raisonnable ou justifiée. Je conviens avec le juge La Forest qu'il faut s'abstenir de faire une analyse trop technique fondée sur l'article premier; cependant, il n'existe pas, à mon avis, d'incompatibilité entre le libellé de l'article premier et la jurisprudence fondée sur l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, celle-ci venant compléter l'article premier.

127 This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed upon s. 1 of the *Charter*. First, to be saved under s. 1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the *Charter* is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.

Cela dit, il importe de se remémorer les termes mêmes choisis par ceux qui ont rédigé et approuvé l'article premier de la *Charte*. Premièrement, pour qu'une disposition puisse être sauvegardée en vertu de l'article premier, la partie qui défend la loi (en l'espèce le procureur général du Canada) doit établir que la loi qui porte atteinte au droit ou à la liberté garantis par la *Charte* est «raisonnable». En d'autres termes, la mesure attentatoire doit être justifiable par application de la raison et de la rationalité. La question n'est pas de savoir si la mesure est populaire ou compatible avec les sondages d'opinion publique. Elle est plutôt de savoir si cette mesure peut être justifiée par l'application du processus de la raison. Dans le contexte juridique, la raison comporte la notion d'inférence à partir de la preuve ou des faits établis. Il ne s'agit pas d'éliminer le rôle de l'intuition, ni d'exiger chaque fois une preuve répondant aux normes scientifiques, mais bien d'insister sur une défense rationnelle et raisonnée.

128 Second, to meet its burden under s. 1 of the *Charter*, the state must show that the violative law

Deuxièmement, pour s'acquitter du fardeau que lui impose l'article premier de la *Charte*, l'État

is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

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.

(b) *The Factors to be Considered under Section 1*

The factors generally relevant to determining whether a violative law is reasonable and demonstrably justified in a free and democratic society remain those set out in *Oakes*. The first requirement is that the objective of the law limiting the *Charter* right or freedom must be of sufficient importance to warrant overriding it. The second is that the means chosen to achieve the objective must be proportional to the objective and the effect of the law — proportionate, in short, to the good which it may produce. Three matters are considered in determining proportionality: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or free-

doit établir que la violation comprise dans une loi se situe à l'intérieur de limites «dont la justification puisse se démontrer». Le choix de l'expression «puisse se démontrer» est important. Il ne s'agit pas de procéder par simple intuition, ou d'affirmer qu'il faut avoir de l'égard pour le choix du Parlement. Il s'agit d'un processus de démonstration. Cela renforce la notion propre au terme «raisonnable» selon laquelle il faut tirer une inférence rationnelle de la preuve ou des faits établis.

La démarche fondamentale est la suivante. Bien qu'ils doivent demeurer conscients du contexte socio-politique de la loi attaquée et reconnaître les difficultés qui y sont propres en matière de preuve, les tribunaux doivent néanmoins insister pour que, avant qu'il ne supprime un droit protégé par la Constitution, l'État fasse une démonstration raisonnée du bien visé par la loi par rapport à la gravité de la violation. Les tribunaux doivent respecter cette démarche fondamentale pour que les droits garantis par notre constitution soient opérants. Ce n'est pas une tâche facile, et les tribunaux devront peut-être affronter le courant d'opinion publique. Cependant, c'est depuis toujours le prix du maintien des droits constitutionnels. Si important que puisse sembler l'objectif du Parlement, si l'État n'a pas démontré que les moyens qu'il utilise pour atteindre son objectif sont raisonnables et proportionnels à la violation des droits, la loi doit alors par nécessité être déclarée non valide.

b) *Les facteurs à examiner sous le régime de l'article premier*

Les facteurs énoncés dans l'arrêt *Oakes* demeurent les facteurs généralement pertinents pour déterminer si une limite prévue dans une loi est une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Premièrement, l'objectif de la loi qui restreint un droit ou une liberté garantis par la *Charte* doit être suffisamment important pour justifier sa suppression. Deuxièmement, les moyens choisis pour atteindre cet objectif doivent être proportionnels à l'objectif et à l'effet de la loi — en bref, proportionnels au bien qu'elle vise. Dans la détermination de la proportionnalité, il faut tenir compte de trois points: les mesures choisies doi-

dom as little as reasonably possible (minimal impairment); and there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.

(c) *Applying the Oakes Factors — Context, Deference to Parliament, Standard of Proof and the Trial Judge's Findings*

131 Having set out the criteria determinative of whether a law that infringes a guaranteed right or freedom is justified under s. 1, La Forest J. offers observations on the approach the courts should use in applying them.

132 His first point is that the *Oakes* test must be applied flexibly, having regard to the factual and social context of each case. I agree. The need to consider the context of the case has been accepted since Wilson J. propounded it in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. This "sensitive, case-oriented approach" was affirmed in *Rocket, supra*, which also concerned a law limiting advertising. There I wrote at pp. 246-47:

> While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

133 That the s. 1 analysis takes into account the context in which the particular law is situate should

vent avoir un lien rationnel avec l'objectif; elles doivent restreindre aussi peu que cela est raisonnablement possible le droit ou la liberté garantis (atteinte minimale), et il doit exister une proportionnalité globale entre les effets préjudiciables des mesures et les effets salutaires de la loi.

c) *Application des facteurs de l'arrêt Oakes — Contexte, égard envers le Parlement, norme de preuve et conclusions du juge de première instance*

Après avoir formulé les critères qui servent à déterminer si une loi qui porte atteinte à un droit ou à une liberté garantis se justifie en vertu de l'article premier, le juge La Forest fait des observations sur la méthode que les tribunaux devraient utiliser lorsqu'ils les appliquent.

Il fait tout d'abord remarquer que le critère formulé dans l'arrêt *Oakes* doit être appliqué avec souplesse, compte tenu du contexte factuel et social de chaque cas particulier. Je suis d'accord. La nécessité de tenir compte du contexte de chaque cas particulier est acceptée depuis que le juge Wilson l'a proposée dans l'arrêt *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326. Cette «méthode d'analyse [. . .] avec sensibilité et en fonction de chaque cas particulier» a été confirmée dans l'arrêt *Rocket*, précité, qui portait également sur une loi restreignant la publicité. Dans cet arrêt, j'affirme, aux pp. 246 et 247:

> Bien que la méthode canadienne ne consiste pas à appliquer des critères spéciaux aux restrictions imposées à l'expression commerciale, notre méthode d'analyse permet d'aborder la détermination de leur constitutionnalité avec sensibilité et en fonction de chaque cas particulier. En situant les valeurs contradictoires dans leur contexte factuel et social au moment de procéder à l'analyse fondée sur l'article premier, les tribunaux ont la possibilité de tenir compte des caractéristiques spéciales de l'expression en question. Comme le juge Wilson le fait remarquer dans *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, ce ne sont pas toutes les expressions qui méritent la même protection. Toutes les violations de la liberté d'expression ne sont pas également graves.

Il n'est pas vraiment étonnant que l'analyse fondée sur l'article premier tienne compte du contexte

hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

However, while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on *Charter* rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the *Charter*.

Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state: *Irwin Toy*, *supra*, at pp. 993-94; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at p. 521. However, such distinctions

dans lequel se situe la loi en question. L'examen fondé sur l'article premier est, de par sa nature même, un examen spécifique des faits. Pour déterminer si l'objectif de la loi est suffisamment important pour justifier la suppression d'un droit garanti, le tribunal doit examiner le véritable objectif de la loi. Dans l'examen de la proportionnalité, le tribunal doit déterminer quel est le lien qui existe entre l'objectif de la loi et ce que cette loi réussira effectivement à accomplir, dans quelle mesure la loi restreint le droit en question et, enfin, si l'avantage que la loi vise l'emporte sur la gravité de la restriction du droit. Bref, l'évaluation en vertu de l'article premier est un exercice fondé sur les faits de la loi en cause et sur la preuve de sa justification, et non sur des abstractions.

Cependant, bien que la loi contestée doive être 134
examinée dans son contexte social et économique, la jurisprudence n'indique aucunement que l'analyse contextuelle diminue l'obligation qu'a l'État de démontrer que la restriction des droits est raisonnable et justifiée. Le contexte est essentiel dans la détermination de l'objectif législatif et de la proportionnalité, mais on ne peut pousser son importance à l'extrême et considérer ainsi la loi contestée comme un phénomène socio-économique unique, dont le Parlement est réputé le meilleur juge. On se trouverait ainsi à atténuer l'obligation imposée au Parlement de justifier les restrictions qu'il apporte aux droits garantis par la *Charte*, et à remplacer la démonstration raisonnée envisagée par la *Charte* par l'exercice du pouvoir discrétionnaire ad hoc d'un tribunal.

Relié au contexte, il y a le degré de respect dont 135
les tribunaux doivent faire preuve envers le Parlement. Il est bien établi que le respect accordé au Parlement ou aux législatures peut varier en fonction du contexte social dans lequel est imposée la restriction aux droits. Par exemple, on a affirmé qu'il y aurait lieu de faire preuve d'un plus grand respect pour le législateur fédéral ou provincial dans le cas où une loi vise les droits contradictoires de divers secteurs de la société, que dans le cas où il s'agit d'une contestation entre le particulier et l'État: *Irwin Toy*, précité, aux pp. 993 et 994; *Stoffman c. Vancouver General Hospital*, [1990] 3

may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential. The cases at bar provide a cogent example. We are concerned with a criminal law, which pits the state against the offender. But the social values reflected in this criminal law lead La Forest J. to conclude that "the Act is the very type of legislation to which this Court has generally accorded a high degree of deference" (para. 70). This said, I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature. As I wrote in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 248, "some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive".

136 As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's

R.C.S. 483, à la p. 521. Cependant, ces distinctions pourraient ne pas être toujours faciles d'application. Par exemple, on considère généralement que le droit criminel opposera l'État et l'accusé; cependant, il nécessitera aussi une répartition des priorités entre l'accusé et la victime, véritable ou éventuelle. Les présents pourvois offrent un exemple convaincant. Nous sommes en présence d'une loi de nature pénale, qui oppose l'État et le contrevenant. Cependant, les valeurs sociales présentes dans cette loi amènent le juge La Forest à conclure que «la Loi est précisément le type de loi envers laquelle notre Cour a généralement fait preuve d'une grande retenue» (par. 70). Cela dit, je reconnais que le problème auquel la loi tente de remédier risque d'avoir une incidence sur le degré de respect dont le tribunal devrait faire preuve à l'égard du choix du Parlement. De même, la difficulté de concevoir des solutions législatives à des problèmes sociaux qui pourraient bien n'être que partiellement compris peut aussi avoir une incidence sur le degré de respect dont les tribunaux feront preuve envers le législateur fédéral ou provincial. Comme je l'ai affirmé dans l'arrêt *Comité pour la République du Canada c. Canada*, [1991] 1 R.C.S. 139, à la p. 248: «il convient d'avoir de l'égard pour les législateurs et les difficultés inhérentes au processus de rédaction des règles d'application générale. Il ne faudrait pas annuler une limite prescrite par une règle de droit tout simplement parce que le tribunal peut concevoir une autre solution qui lui semble moins restrictive».

Cependant, comme pour le contexte, il faut prendre soin de ne pas pousser trop loin la notion du respect. Le respect porté ne doit pas aller jusqu'au point de libérer le gouvernement de l'obligation que la *Charte* lui impose de démontrer que les restrictions qu'il apporte aux droits garantis sont raisonnables et justifiables. Le Parlement a son rôle: choisir la réponse qui convient aux problèmes sociaux dans les limites prévues par la Constitution. Cependant, les tribunaux ont aussi un rôle: déterminer de façon objective et impartiale si le choix du Parlement s'inscrit dans les limites prévues par la Constitution. Les tribunaux n'ont pas plus le droit que le Parlement d'abdiquer leur responsabilité. Les tribunaux se trouveraient à dimi-

view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

Context and deference are related to a third concept in the s. 1 analysis: standard of proof. I agree with La Forest J. that proof to the standard required by science is not required. Nor is proof beyond a reasonable doubt on the criminal standard required. As the s. 1 jurisprudence has established, the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate: *Oakes*, *supra*, at p. 137; *Irwin Toy*, *supra*, at p. 992. I thus disagree with La Forest J.'s conclusion (in para. 82) that in these cases "it is unnecessary . . . for the government to demonstrate a rational connection according to a civil standard of proof". Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: see *Snell v. Farrell*, [1990] 2 S.C.R. 311.

In summary, while I agree with La Forest J. that context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis, these concepts should be used as they have been used by this Court in previous cases. They must not be attenuated to the point that they relieve the state of the burden the *Charter* imposes of demonstrating that the limits imposed on our constitutional rights and freedoms are reasonable and justifiable in a free and democratic society.

I come finally to a fourth general matter discussed by La Forest J. — the degree of deference

nuer leur rôle à l'intérieur du processus constitutionnel et à affaiblir la structure des droits sur lesquels notre constitution et notre nation sont fondées, s'ils portaient le respect jusqu'au point d'accepter le point de vue du Parlement simplement pour le motif que le problème est sérieux et la solution difficile.

137 Dans le cadre de l'analyse fondée sur l'article premier, les concepts de contexte et de respect sont rattachés à un troisième: celui de la norme de preuve. À l'instar du juge La Forest, j'estime que la preuve n'a pas à satisfaire à la norme requise en matière scientifique. Il ne s'agit pas non plus d'une preuve hors de tout doute raisonnable comme en matière criminelle. Comme l'établit la jurisprudence relative à l'article premier, la norme de preuve qui convient, à toutes les étapes de l'analyse de la proportionnalité, est celle qui s'applique en matière civile, c'est-à-dire la preuve selon la prépondérance des probabilités: *Oakes*, précité, à la p. 137; *Irwin Toy*, précité, à la p. 992. Je ne suis donc pas d'accord avec la conclusion du juge La Forest (au par. 82) qu'«il n'est pas nécessaire [. . .] que le gouvernement fasse la preuve d'un lien rationnel selon les règles de preuve en matière civile». Pour satisfaire à la norme de preuve en matière civile, on n'a pas à faire une démonstration scientifique; la prépondérance des probabilités s'établit par application du bon sens à ce qui est connu, même si ce qui est connu peut comporter des lacunes du point de vue scientifique: voir l'arrêt *Snell c. Farrell*, [1990] 2 R.C.S. 311.

138 Bref, bien que je convienne avec le juge La Forest que les concepts de contexte, de respect et d'application d'une norme de preuve souple et réaliste sont des aspects essentiels de l'analyse fondée sur l'article premier, j'estime qu'ils devraient être appliqués conformément à la jurisprudence de notre Cour. On ne doit pas en atténuer l'importance au point de libérer l'État de l'obligation que la *Charte* lui impose de démontrer que les restrictions apportées à nos droits et libertés constitutionnels sont raisonnables et justifiables dans le cadre d'une société libre et démocratique.

139 J'arrive finalement à la quatrième question générale examinée par le juge La Forest: le degré

which appellate courts should accord to the findings of the trial judge under s. 1 of the *Charter* analysis. The trial judge in these cases concluded that the proportionality test was not met. He based this conclusion on findings that the evidence failed to establish any of the three requirements for proportionality under s. 1.

de retenue dont une cour d'appel doit faire preuve envers les conclusions du juge de première instance dans le cadre d'une analyse fondée sur l'article premier de la *Charte*. Le juge de première instance a conclu en l'espèce que l'on n'avait pas satisfait au critère de la proportionnalité. À cette fin, il s'est fondé sur sa conclusion que la preuve n'établissait aucune des trois exigences du critère de la proportionnalité en vertu de l'article premier.

140 As a general rule, courts of appeal decline to interfere with findings of fact by a trial judge unless they are unsupported by the evidence or based on clear error. This rule is based in large part on the advantage afforded to the trial judge and denied to the appellate court of seeing and hearing the witnesses. La Forest J. concludes that this rule does not apply to the findings of the trial judge in these cases, because those findings were not "adjudicative facts" but rather were "legislative facts".

En règle générale, une cour d'appel refuse de modifier les conclusions de fait du juge de première instance, sauf si ces conclusions ne s'appuient pas sur la preuve ou sont fondées sur une erreur manifeste. Cette règle repose en grande partie sur l'avantage dont bénéficie le juge de première instance, mais non une cour d'appel, de voir et d'entendre les témoins. Le juge La Forest conclut que cette règle ne s'applique pas aux conclusions du juge de première instance, en l'espèce, parce que ces conclusions portaient non pas sur des «faits en litige», mais plutôt sur des «faits législatifs».

141 While this approach sheds some light on the matter, the distinction between legislative and adjudicative facts may be harder to maintain in practice than in theory. Suffice it to say that in the context of the s. 1 analysis, more deference may be required to findings based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy oriented evidence. As a general matter, appellate courts are not as constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation, since the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts. At the same time, while appellate courts are not bound by the trial judge's findings in respect of social science evidence, they should remain sensitive to the fact that the trial judge has had the advantage of hearing competing expert testimony firsthand. The trial judge's findings with respect to the credibility of certain witnesses may

Bien que cette démarche clarifie quelque peu la question, la distinction entre les faits législatifs et les faits en litige pourrait bien être plus difficile à maintenir en pratique qu'en théorie. Qu'il me suffise de dire que, dans le contexte de l'analyse fondée sur l'article premier, il pourrait bien être nécessaire de faire preuve d'une plus grande retenue à l'égard de conclusions fondées sur une preuve de nature purement factuelle, qu'à l'égard de conclusions que le juge de première instance aurait tirées après l'examen de la preuve en matière de sciences humaines et d'autres questions de principe. En règle générale, dans le contexte d'une analyse fondée sur l'article premier, une cour d'appel n'est pas liée par les conclusions du juge de première instance au même degré qu'elle l'est dans le cadre d'un litige de nature non constitutionnelle, puisque l'incidence de la violation sur les droits constitutionnels doit souvent être évaluée dans le cadre d'un vaste examen de facteurs sociaux, économiques et politiques, qui vient s'ajouter à celui de faits scientifiques. Par ailleurs, bien qu'une cour d'appel ne soit pas liée par les

be useful when the appeal court reviews the record.

Against this background, I return to the cases at bar and the factors for s. 1 justification discussed in *Oakes*.

(d) *The Objective of the Limit on Free Expression*

The question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution. Given the importance of the *Charter* guarantees, this is not easily done. To meet the test, the objective must be one of pressing and substantial importance.

Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. As my colleague has noted, the *Tobacco Products Control Act* is but one facet of a complex legislative and policy scheme to protect Canadians from the health risks of tobacco use. However, the objective of the impugned measures themselves is somewhat narrower than this. The objective of the advertising ban and trade mark usage restrictions must be to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products. The objective of the mandatory package warning must be to discourage people who see the package from tobacco use. Both constitute important objectives, although the significance of the targeted decrease in consumption is reduced by the government's estimate that despite the ban, 65 percent of the

conclusions du juge de première instance relativement à la preuve en matière de sciences humaines, elle devrait continuer d'être consciente du fait que le juge de première instance a eu l'avantage d'entendre de première main des témoignages d'experts contradictoires. Les conclusions du juge de première instance sur la crédibilité de certains témoins peuvent être utiles lorsque la cour d'appel fait l'examen du dossier.

142 Sur cette toile de fond, je reviens à l'examen des présents pourvois et des facteurs de justification en vertu de l'article premier, formulés dans l'arrêt *Oakes*.

d) *L'objectif de la restriction de la liberté d'expression*

143 À cette étape, la question est de savoir si l'objectif de la mesure attentatoire est suffisamment important pour justifier en principe une restriction des droits et libertés garantis par la Constitution. Vu l'importance des garanties de la *Charte*, ce n'est pas un exercice facile à faire. Pour satisfaire à ce critère, l'objectif doit revêtir une importance urgente et réelle.

144 Il faut veiller à ne pas surestimer l'objectif. Aux fins d'une analyse fondée sur l'article premier, l'objectif pertinent est l'objectif de la mesure attentatoire puisque c'est cette dernière et rien d'autre que l'on cherche à justifier. Si l'on formule l'objectif d'une façon trop large, on risque d'en exagérer l'importance et d'en compromettre l'analyse. Comme mon collègue l'a fait remarquer, la *Loi réglementant les produits du tabac* ne constitue que l'une des facettes d'un régime complexe sur le plan de la loi et des principes destiné à protéger les Canadiens contre les méfaits de l'usage du tabac sur la santé. Cependant, l'objectif des mesures contestées est un peu plus restreint que cela. L'interdiction de publicité et les restrictions à l'usage des marques doivent viser à empêcher la population canadienne de se laisser convaincre par la publicité et la promotion de faire usage du tabac. L'objectif de la mise en garde obligatoire doit être de dissuader les gens qui voient l'emballage de faire usage du tabac. Ces deux objectifs sont importants, mais l'ampleur de la diminution de

Canadian magazine market will contain tobacco advertisements, given that the ban applies only to Canadian media and not to imported publications.

145 I digress at this point to note that I do not share La Forest J.'s view (para. 66) that the trial judge erred in observing (at p. 491) that "much of the expert scientific evidence relating to the effects of tobacco on health . . . was . . . irrelevant to the case and . . . served . . . to colour the debate unnecessarily". The trial judge was simply pointing out that much of the evidence focused on a larger problem than that targeted by the legislation at issue. The critical question is not the evil tobacco works generally in our society, but the evil which the legislation addresses.

146 While the limited objective of reducing tobacco-associated health risks by reducing advertising-related consumption and providing warnings of dangers is less significant than the broad objective of protecting Canadians generally from the risks associated with tobacco use, it nevertheless constitutes an objective of sufficient importance to justify overriding the right of free expression guaranteed by the *Charter*. Even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression.

(e) *Proportionality*

(i) Findings of the Trial Judge (1991), 82 D.L.R. (4th) 449

147 The trial judge held that the impairment of rights effected by the law had not been shown to be proportionate to the objective of reducing tobacco use by eliminating advertising in Canadian media and requiring unattributed health warn-

consommation visée perd de l'importance si l'on tient compte du fait que, selon une estimation gouvernementale, 65 pour 100 des magazines vendus au Canada contiendront des annonces sur les produits du tabac, puisque l'interdiction ne vise que les médias canadiens et non les publications importées.

Je m'écarte ici du sujet pour préciser que je ne suis pas d'accord avec l'opinion du juge La Forest (par. 66) selon laquelle le juge de première instance a commis une erreur lorsqu'il a fait observer (à la p. 2293) qu'«une grande partie de cette preuve d'expertise scientifique relativement aux effets du tabac sur la santé [. . .] était [. . .] non pertinente en l'espèce et ne servait [. . .] qu'à colorer inutilement le débat». Le juge de première instance faisait simplement ressortir que la majeure partie de la preuve portait sur un problème plus vaste que celui visé par la loi en cause. La question cruciale n'est pas le mal que le tabac cause dans l'ensemble de notre société, mais bien le mal auquel s'attaque la loi.

Bien que l'objectif restreint de diminuer les méfaits du tabac sur la santé, au moyen d'une diminution de l'usage du tabac causé par la publicité et de l'inscription de mises en garde, soit moins important que l'objectif général de protéger l'ensemble de la population canadienne contre les dangers liés à l'usage du tabac, cet objectif restreint est néanmoins suffisamment important pour justifier la suppression de la liberté d'expression garantie par la *Charte*. Même une infime diminution de l'usage du tabac peut entraîner un avantage important pour la santé des Canadiens et justifier une restriction de la liberté d'expression qui respecte le critère de la proportionnalité.

e) *La proportionnalité*

(i) Les conclusions du juge de première instance, [1991] R.J.Q. 2260

Le juge de première instance a conclu que l'on n'avait pas établi que l'atteinte aux droits était proportionnelle à l'objectif de réduire l'usage du tabac par l'interdiction de la publicité dans les médias canadiens et l'inscription obligatoire de mises en

ings on tobacco packaging. In his view, none of the three requirements for proportionality under s. 1 had been established.

The first requirement is that there be a rational connection between the objective of reducing tobacco consumption and the advertising ban. Chabot J. found that the Attorney General for Canada had failed to establish on a balance of probabilities that a rational connection exists between the full prohibition on advertising and the objective of reducing tobacco consumption, describing "the connection which the state seeks to establish between health protection and tobacco advertising" as "tenuous and speculative" (p. 512). He stated (at p. 513): "[t]he virtual totality of the scientific documents in the state's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption".

The second requirement of proportionality is that the law impair the protected right as little as reasonably possible. In other words, the infringement on the right of free expression must go no further than reasonably required to achieve the legislative goal, in these cases the reduction of tobacco use caused by advertising and the absence of package warnings. The trial judge observed, at pp. 515-17, that the Attorney General had adduced no evidence that a complete ban would reduce tobacco consumption more than a partial ban, or that unattributed health warnings would be more effective than attributed health warnings. As a result, he found that the Attorney General had failed to meet the burden upon it of showing that the infringements of rights were carefully tailored to the legislative objective.

The third requirement is proportionality between the objective of the law and the limits it imposes on constitutionally guaranteed rights. Here too, Chabot J. ruled that the state had not discharged the onus upon it. In his view, the law constituted "social engineering" and "an extremely serious

garde non attribuées sur les emballages des produits du tabac. À son avis, on n'avait satisfait à aucune des trois exigences du critère de la proportionnalité dans le cadre de l'article premier.

148 La première exigence est qu'il y ait un lien rationnel entre l'objectif de réduire l'usage du tabac et l'interdiction de publicité. Le juge Chabot a conclu que le procureur général du Canada n'avait pas réussi à établir, suivant la prépondérance des probabilités, l'existence d'un lien rationnel entre l'interdiction totale de publicité et l'objectif de réduire l'usage du tabac, affirmant que «le lien que l'État cherche à établir entre la protection de la santé et la publicité des produits du tabac est ténu et aléatoire» (p. 2308). Il précise, à la p. 2309, que «[l]a presque totalité de la documentation scientifique en possession de l'État lors de l'adoption de la loi ne démontrait pas que le bannissement de la publicité aurait un effet sur la consommation».

149 La deuxième exigence du critère de la proportionnalité est que la loi restreigne le droit protégé aussi peu que cela est raisonnablement possible. En d'autres termes, la violation du droit à la liberté d'expression ne doit pas s'étendre au-delà de ce qui est raisonnablement nécessaire pour atteindre l'objectif législatif, en l'occurrence, la diminution de l'usage du tabac imputable à la publicité et à l'absence de mises en garde sur les emballages. Le juge de première instance a fait remarquer, aux pp. 2310 à 2312, que le procureur général n'avait pas présenté de preuve pour établir qu'une interdiction totale réduirait l'usage du tabac davantage qu'une interdiction partielle, ou que des messages non attribués relatifs à la santé seraient plus efficaces que des messages attribués. En définitive, il a conclu que le procureur général ne s'était pas acquitté du fardeau qu'il avait d'établir que la violation des droits était soigneusement adaptée à l'objectif législatif.

150 La troisième exigence est qu'il doit y avoir proportionnalité entre l'objectif de la loi et les restrictions qu'elle impose aux droits garantis par la Constitution. Le juge Chabot a également conclu que l'État ne s'était pas acquitté de la charge qu'il avait. À son avis, la loi constitue un genre «d'ingé-

impairment of the principles inherent in a free and democratic society". This effect he found (at p. 517) to be "disproportionate to the objective of the [Act]".

151 To what extent should this Court defer to the trial judge's findings? As discussed earlier, this depends on whether the findings relate to purely factual matters or whether they relate to complex social science evidence from which it is difficult to draw firm factual and scientific conclusions. In the cases at bar, the trial lasted more than one year and a massive amount of evidence was adduced through experts and through documentary evidence on which the experts were examined. I agree with La Forest J. that it would be wrong to discard completely the trial judge's findings in these cases with respect to the credibility of witnesses and with respect to the defective methodology used in compiling the data for certain reports. In my view, Chabot J. was in a stronger position than are appellate courts to make such determinations, having listened to extensive testimony from experts on both sides of the debate. On the other hand, it may be that less deference should be accorded to the trial judge's finding that the complete ban on advertising was not rationally connected to the aim of reducing advertising-induced consumption. Much of the evidence adduced on this point was social science evidence predictive of human behaviour from which it was difficult to draw firm factual conclusions. In assessing this evidence Chabot J. erred in failing to consider factors which could suggest as a matter of logic or reason that there was, on a balance of probabilities, a rational connection between the objective and the means chosen.

152 With respect to the minimal impairment element of the proportionality analysis, I accept Chabot J.'s finding that the impugned provisions mandating a complete ban and unattributed package warnings

nierie sociale» et «une atteinte extrêmement grave aux principes inhérents d'une société libre et démocratique». Il affirme, à la p. 2312, que cet effet est «incommensurable avec l'objectif de la [Loi]».

Dans quelle mesure notre Cour devrait-elle faire preuve de retenue à l'égard des conclusions du juge de première instance? Comme je l'ai déjà dit, il faut déterminer si les conclusions se rapportent à des questions purement factuelles ou à des éléments de preuve complexes en matière de sciences humaines à partir desquels il est difficile de tirer de solides conclusions factuelles et scientifiques. En l'espèce, le procès a duré plus d'un an et une preuve volumineuse a été présentée, que ce soit par témoignages d'expert ou par dépôt de documents sur lesquels les experts ont été interrogés. Tout comme le juge La Forest, j'estime qu'il serait erroné d'écarter complètement les conclusions du juge de première instance dans les présents pourvois relativement à la crédibilité des témoins et à la mauvaise méthodologie employée pour recueillir les données de certains rapports. À mon avis, le juge Chabot était mieux placé qu'une cour d'appel pour tirer ces conclusions puisqu'il avait entendu les longs témoignages des experts des deux parties. Par contre, il y a peut-être lieu de faire preuve d'une moins grande retenue à l'égard de la conclusion du juge de première instance selon laquelle l'interdiction totale de publicité n'avait pas de lien rationnel avec l'objectif de diminution de la consommation provoquée par la publicité. La majeure partie de la preuve présentée sur ce point consistait en des données en matière de sciences humaines concernant le comportement humain prévisible, à partir desquelles il était difficile de tirer de solides conclusions factuelles. Dans l'appréciation de ces données, le juge Chabot a commis une erreur en omettant d'examiner des facteurs qui, logiquement ou rationnellement, aurait pu établir, suivant la prépondérance des probabilités, l'existence d'un lien rationnel entre l'objectif et les moyens choisis.

En ce qui concerne le volet atteinte minimale de l'analyse de la proportionnalité, j'accepte la conclusion du juge Chabot voulant que les dispositions attaquées qui interdisent toute publicité et

do not minimally impair the right to free expression. Under the minimal impairment analysis, Chabot J. did not rely on problematic social science data, but on the fact that the government had adduced no evidence to show that less intrusive regulation would not achieve its goals as effectively as an outright ban. Nor had the government adduced evidence to show that attributed health warnings would not be as effective as unattributed warnings on tobacco packaging.

exigent l'apposition de mises en garde non attribuées sur les emballages ne constituent pas une atteinte minimale au droit à la liberté d'expression. Dans le cadre de l'analyse de l'atteinte minimale, le juge Chabot ne s'est pas fié à des données problématiques en matière de sciences humaines mais plutôt au fait que le gouvernement n'avait pas présenté d'éléments de preuve établissant qu'un règlement moins attentatoire n'atteindrait pas ses objectifs aussi efficacement qu'une interdiction totale. Le gouvernement n'avait pas non plus présenté d'éléments de preuve pour établir que des mises en garde attribuées sur les emballages des produits du tabac ne seraient pas aussi efficaces que des mises en garde non attribuées.

(ii) Rational Connection

(ii) Le lien rationnel

As a first step in the proportionality analysis, the government must demonstrate that the infringements of the right of free expression worked by the law are rationally connected to the legislative goal of reducing tobacco consumption. It must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities.

153 À la première étape de l'analyse de la proportionnalité, le gouvernement doit démontrer que l'atteinte à la liberté d'expression entraînée par la loi a un lien rationnel avec l'objectif législatif de réduire l'usage du tabac. Il doit établir un lien causal, fondé sur la raison ou la logique, entre la violation et l'avantage recherché. En d'autres termes, le gouvernement doit établir que la restriction des droits sert la fin visée. Cette preuve doit être faite suivant la prépondérance des probabilités.

The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective: *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 777; *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503. As Sopinka J. wrote of the causal link

154 Le lien causal entre l'atteinte aux droits et l'avantage recherché peut parfois être établi par une preuve scientifique démontrant à la suite d'une observation répétée que l'un influe sur l'autre. Par contre, dans les cas où une loi vise une modification du comportement humain, comme dans le cas de la *Loi réglementant les produits du tabac*, le lien causal pourrait bien ne pas être mesurable du point de vue scientifique. Dans ces cas, notre Cour s'est montrée disposée à reconnaître l'existence d'un lien causal entre la violation et l'avantage recherché sur le fondement de la raison ou de la logique, sans insister sur la nécessité d'une preuve directe de lien entre la mesure attentatoire et l'objectif législatif: *R. c. Keegstra*, [1990] 3 R.C.S. 697, aux pp. 768 et 777; *R. c. Butler*, [1992] 1 R.C.S. 452, à la p. 503. Voici comment le juge Sopinka envisage le lien causal entre l'obscénité et

between obscenity and harm to society in *Butler*, at p. 502:

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

155 The trial judge in the cases at bar found that the government had not established a rational connection between the advertising ban and unattributed warnings and a reduction in tobacco use in the first, scientific sense. The only direct or scientific evidence offered of the link between advertising bans and smoking reduction consisted of a report of the New Zealand Toxic Substances Board entitled *Health or Tobacco: An End to Tobacco Advertising and Promotion* (1989), which reviewed the effect of advertising restrictions in 33 countries and concluded that there was a correlation between the degree of restrictions imposed in each country and decline in tobacco use and of the evidence of Dr. Jeffrey Harris, affirming the accuracy of the New Zealand Report. The trial judge, after lengthy consideration, rejected this evidence. The report was found, at p. 513, to contain serious methodological errors which rendered it "for all intents and purposes devoid of any probative value". As for Dr. Harris, the trial judge found, at p. 514, that he used unreliable input data and a methodology which "led necessarily to the desired result". As noted above, these findings relating to the credibility of witnesses and the soundness of various methodological approaches fall within the scope of the trial judge's traditional and accepted expertise of weighing and evaluating competing expert testimony. They have not been seriously challenged. No reason has been cited for interfering with them. We may therefore take it that there was no direct evidence of a scientific nature showing a causal

le préjudice causé à la société, dans l'arrêt *Butler*, à la p. 502:

> Bien qu'il puisse être difficile, voire impossible, d'établir l'existence d'un lien direct entre l'obscénité et le préjudice causé à la société, il est raisonnable de supposer qu'il existe un lien causal entre le fait d'être exposé à des images et les changements d'attitude et de croyance.

Le juge du procès a conclu que le gouvernement n'avait pas établi de lien rationnel entre l'interdiction de publicité et les mises en garde non attribuées, d'une part, et une diminution de l'usage du tabac au sens scientifique premier, d'autre part. La seule preuve directe ou scientifique présentée quant à l'existence du lien entre l'interdiction de publicité et la diminution de l'usage du tabac était composée d'un rapport du Toxic Substances Board de la Nouvelle-Zélande, intitulé *Health or Tobacco: An End to Tobacco Advertising and Promotion* (1989), dans lequel l'organisme, après avoir examiné les effets de restrictions imposées à la publicité dans 33 pays, est arrivé à la conclusion qu'il y avait corrélation entre le degré des restrictions imposées dans chaque pays et la diminution de l'usage du tabac, ainsi que du témoignage de Jeffrey Harris, qui a confirmé l'exactitude du rapport néo-zélandais. Après un long examen, le juge de première instance a rejeté cette preuve. Il s'est dit d'avis, à la p. 2309, que ce rapport contenait des erreurs graves de méthodologie «qui le rendent à toutes fins utiles sans valeur probante». En ce qui concerne le témoignage de Harris, le juge de première instance a affirmé, à la p. 2309, qu'il s'était servi de données non fiables et que sa méthodologie «conduit nécessairement au résultat recherché». Comme je l'ai déjà fait remarquer, ces conclusions relatives à la crédibilité des témoins et à la justesse des divers processus méthodologiques relèvent de la compétence traditionnelle que l'on reconnaît au juge de première instance de faire l'appréciation de témoignages d'experts contradictoires. Ces conclusions n'ont pas été sérieusement contestées. On ne nous a donné aucune raison de les modifier. Nous pouvons en conséquence affirmer qu'il n'existait aucune preuve directe de nature scientifique de l'existence d'un lien causal

link between advertising bans and decrease in tobacco consumption.

This leaves the question of whether there is less direct evidence that suggests as a matter of "reason" or "logic" that advertising bans and package warnings lead to a reduction in tobacco use. The evidence relied upon by La Forest J. in support of rational connection falls into this category. Without duplicating his thorough review, it may be seen as consisting largely of evidence of advertising practices as well as the assumptions and conclusions of bodies concerned with reducing the health risk associated with tobacco use.

The question is whether this evidence establishes that it is reasonable or logical to conclude that there is a causal link between tobacco advertising and unattributed health warnings and tobacco use. To use the words of the Meese Commission on Pornography relied on in *Butler*, at p. 502, "would [it] be surprising . . . to find otherwise"? The government argues that it would be "surprising . . . to find otherwise". Why would tobacco companies spend great sums on advertising if not to increase the consumption of tobacco, it asks?

To this the tobacco companies reply that their advertising is directed not at increasing the size of the total market but at obtaining a larger share of the existing market. The evidence indicates that one of the thrusts of the advertising programs of tobacco companies is securing a larger market share, but there is also evidence suggesting that advertising is used to increase the total market. For example, the Court was referred to an Imperial Tobacco Ltd. ("Imperial") document, *Project Viking*, vol. I: *A Behavioural Model of Smoking*, a market research study carried out to determine an advertising strategy for the company. The report suggests that advertising should be directed to "expanding the market, or at the very least, forestalling its decline" by proactively recruiting new smokers and reassuring present smokers who

entre une interdiction de publicité et la diminution de l'usage du tabac.

156 Il reste à déterminer s'il existe une preuve moins directe qui, «rationnellement» ou «logiquement», permet d'affirmer qu'une interdiction de publicité et des mises en garde sur les emballages amènent une diminution de l'usage du tabac. Les éléments de preuve sur lesquels se fonde le juge La Forest pour conclure à l'existence d'un lien rationnel font partie de cette catégorie. Sans reprendre son examen approfondi, je constate que cette preuve se compose en grande partie de données sur les pratiques publicitaires et des hypothèses et conclusions des organismes qui se préoccupent de la diminution des méfaits de l'usage du tabac sur la santé.

157 La question est de savoir si cette preuve établit qu'il est raisonnable ou logique de conclure qu'il existe un lien causal entre la publicité en faveur du tabac et les mises en garde non attribuées, d'une part, et l'usage du tabac, d'autre part. Pour citer le rapport de la Commission Meese sur la pornographie, sur lequel notre Cour s'est appuyée dans l'arrêt *Butler*, à la p. 502, «[c]ela n'est guère étonnant. Le contraire le serait». Le gouvernement soutient que «[l]e contraire serait étonnant». Pourquoi, demande-t-il, les compagnies de tabac consacreraient-elles tant d'argent à la publicité si ce n'est pour accroître l'usage du tabac?

158 À cela, les compagnies de tabac répondent que leur publicité ne vise pas à accroître la taille du marché global, mais bien à obtenir une plus grande part du marché existant. La preuve révèle que les campagnes publicitaires des compagnies de tabac visent à leur permettre d'acquérir une plus grande part du marché, mais d'autres éléments de preuve montrent qu'elles servent aussi à accroître l'ensemble du marché. Par exemple, on a soumis à notre Cour un document de la compagnie Imperial Tobacco Ltd. («Imperial»), intitulé *Project Viking*, vol. I. *A Behavioural Model of Smoking*, une étude de marché réalisée aux fins de l'établissement d'une stratégie publicitaire pour la compagnie. Ce rapport dit que la publicité devrait viser à [TRADUCTION] «faire croître la taille du marché ou, tout au moins, à prévenir son déclin» en cherchant proacti-

might otherwise quit in response to vigorous anti-smoking publicity. Moreover, while purely informational advertising may not increase the total market, lifestyle advertising may, as a matter of common sense, be seen as having a tendency to discourage those who might otherwise cease tobacco use from doing so. Conversely, package warnings, attributed or not, may be seen as encouraging people to reduce or cease using tobacco. All this taken together with the admittedly inconclusive scientific evidence is sufficient to establish on a balance of probabilities a link based on reason between certain forms of advertising, warnings and tobacco consumption.

159 On the other hand, there does not appear to be any causal connection between the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products which is mandated by s. 8 of the Act. There is no causal connection based on direct evidence, nor is there, in my view, a causal connection based in logic or reason. It is hard to imagine how the presence of a tobacco logo on a cigarette lighter, for example, would increase consumption; yet, such use is banned. I find that s. 8 of the Act fails the rational connection test.

(iii) Minimal Impairment

160 As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: see *Reference re ss. 193 and 195.1(1)(c) of*

vement à intéresser de nouveaux fumeurs et en rassurant les fumeurs actuels qui seraient susceptibles d'abandonner en raison de la vigoureuse publicité contre le tabac. En outre, bien que la publicité purement informative puisse ne pas donner lieu à un accroissement du marché global, la publicité de style de vie peut logiquement être considérée comme ayant une tendance à dissuader de cesser de fumer ceux qui autrement cesseraient. En revanche, les mises en garde sur les emballages, attribuées ou non, peuvent être considérées comme une façon d'inciter les gens à diminuer ou abandonner leur usage du tabac. Ces facteurs, conjugués à la preuve scientifique considérée comme non concluante, suffisent à établir, suivant la prépondérance des probabilités, l'existence d'un lien fondé sur la raison entre certaines formes de publicité, les mises en garde et l'usage du tabac.

Par contre, il ne paraît pas y avoir de lien causal entre l'objectif de diminution de l'usage du tabac et l'interdiction absolue quant à l'usage des marques sur des articles autres que les produits du tabac, imposée par l'art. 8 de la Loi. Il n'existe ni lien causal fondé sur une preuve directe, ni d'ailleurs à mon avis, de lien causal fondé sur la logique ou la raison. Il est difficile de s'imaginer comment la présence d'un logo sur un briquet, par exemple, permettrait d'accroître l'usage du tabac mais pourtant, cette pratique est interdite. À mon avis, l'art. 8 de la Loi ne satisfait pas au critère du lien rationnel.

(iii) L'atteinte minimale

À la deuxième étape de l'analyse de la proportionnalité, le gouvernement doit établir que les mesures en cause restreignent le droit à la liberté d'expression aussi peu que cela est raisonnablement possible aux fins de la réalisation de l'objectif législatif. La restriction doit être «minimale», c'est-à-dire que la loi doit être soigneusement adaptée de façon à ce que l'atteinte aux droits ne dépasse pas ce qui est nécessaire. Le processus d'adaptation est rarement parfait et les tribunaux doivent accorder une certaine latitude au législateur. Si la loi se situe à l'intérieur d'une gamme de mesures raisonnables, les tribunaux ne concluront pas qu'elle a une portée trop générale simplement

the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at pp. 1196-97; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1340-41; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, at pp. 1105-06. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

parce qu'ils peuvent envisager une solution de rechange qui pourrait être mieux adaptée à l'objectif et à la violation; voir *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, aux pp. 1196 et 1197; *R. c. Chaulk*, [1990] 3 R.C.S. 1303, aux pp. 1340 et 1341, et *Ramsden c. Peterborough (Ville)*, [1993] 2 R.C.S. 1084, aux pp. 1105 et 1106. Par contre, si le gouvernement omet d'expliquer pourquoi il n'a pas choisi une mesure beaucoup moins attentatoire et tout aussi efficace, la loi peut être déclarée non valide.

The trial judge, as we have seen, was troubled by the fact that the government had presented no evidence showing that a less comprehensive ban on advertising would not have been equally effective, or that an attributed warning would not have been equally effective as an unattributed one.

Comme nous l'avons vu, le juge de première instance était troublé par le fait que le gouvernement n'avait pas présenté d'éléments de preuve pour établir qu'une interdiction de publicité moins globale n'aurait pas été aussi efficace qu'une interdiction totale ou qu'une mise en garde attribuée n'aurait pas été tout aussi efficace qu'une mise en garde non attribuée. 161

I turn first to the prohibition on advertising contained in s. 4 of the Act. It is, as has been observed, complete. It bans all forms of advertising of Canadian tobacco products while explicitly exempting all foreign advertising of non-Canadian products which are sold in Canada. It extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands — all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health.

J'examine tout d'abord l'interdiction de publicité prévue à l'art. 4 de la Loi. Comme on l'a fait remarquer, il s'agit d'une interdiction totale. Cette disposition interdit toutes les formes de publicité en faveur des produits du tabac canadiens et exclut explicitement toute publicité étrangère en faveur de produits non canadiens vendus au Canada. Elle vise toute publicité qui, pourrait-on soutenir, présente des avantages pour le consommateur, tout en n'ayant pratiquement aucune incidence sur l'usage. L'interdiction vise toute publicité purement informative, les simples notes quant à l'apparence de l'emballage, la publicité en faveur de nouvelles marques et la publicité indiquant le contenu relatif de goudron des différentes marques de tabac. Fumer est une activité légale; cependant, le consommateur est privé d'un important moyen de se renseigner sur l'offre de produits susceptibles de satisfaire à ses préférences et de comparer le contenu des produits de diverses marques dans le but de diminuer les méfaits du tabac pour sa santé. 162

As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban: *Ramsden v. Peterborough (City)*, *supra*, at pp. 1105-06; *Ford v. Quebec (Attorney General)*, *supra*, at pp. 772-73.

Comme notre Cour l'a déjà fait remarquer, il sera plus difficile de justifier l'interdiction totale d'une forme d'expression que l'interdiction partielle: *Ramsden c. Peterborough (Ville)*, précité, aux pp. 1105 et 1106, et *Ford c. Québec (Procu-* 163

The distinction between a total ban on expression, as in *Ford* where the legislation at issue required commercial signs to be exclusively in French, and a partial ban such as that at issue in *Irwin Toy*, *supra*, is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis. In *Rocket*, *supra*, the law imposed a complete advertising ban on professionals seeking to advertise their services. I concluded that while the government had a pressing and substantial objective, and while that objective was rationally connected to the means chosen, the minimal impairment requirement was not met since the government had exceeded a reasonable margin of appreciation given the need for consumers to obtain useful information about the services provided. A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

164 As noted in my analysis of rational connection, while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect. The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only; measures such as those in Quebec's *Consumer Protection Act*, R.S.Q., c. P-40.1, to prohibit advertising aimed at children and adolescents; and labelling requirements only (which Health and Welfare believed would be preferable to an advertising ban: A. J. Liston's testi-

reur général), précité, aux pp. 772 et 773. La distinction entre une interdiction totale d'une forme d'expression, comme dans l'arrêt *Ford* dans lequel la loi en cause exigeait que l'affichage commercial se fasse uniquement en français, et une interdiction partielle, comme celle dont il était question dans l'arrêt *Irwin Toy*, précité, est pertinente pour ce qui est du degré de latitude dont peut bénéficier le gouvernement en vertu du critère de l'atteinte minimale de l'analyse. Dans *Rocket*, précité, la loi imposait une interdiction totale de publicité aux professionnels cherchant à annoncer leurs services. J'y ai conclu que, même si le gouvernement avait un objectif urgent et réel et si cet objectif avait un lien rationnel avec les moyens choisis, l'exigence de l'atteinte minimale n'avait pas été remplie puisque le gouvernement avait excédé la latitude raisonnable dont il disposait, vu qu'il était nécessaire que les consommateurs obtiennent des renseignements utiles sur les services offerts. Une interdiction totale ne sera acceptable, sur le plan constitutionnel, en vertu du volet atteinte minimale de l'analyse que dans le cas où le gouvernement peut établir que seule une interdiction totale lui permettra d'atteindre son objectif. Si, comme en l'espèce, aucune preuve n'a été présentée pour démontrer qu'une interdiction partielle serait moins efficace qu'une interdiction totale, on n'a pas établi la justification requise en vertu de l'article premier visant à sauvegarder la violation de la liberté d'expression.

Comme je l'ai fait remarquer dans mon analyse du lien rationnel, bien que l'on puisse conclure, de façon rationnelle et logique, que la publicité de style de vie vise à accroître la consommation, rien n'indique que la publicité purement informative ou de fidélité aux marques aurait cet effet. Au moment où il a adopté l'interdiction totale de la publicité, le gouvernement disposait de toute une gamme de mesures moins attentatoires: une interdiction partielle qui aurait permis la publicité informative et de fidélité aux marques, une interdiction de publicité de style de vie seulement, des mesures comme celles prévues dans la *Loi sur la protection du consommateur* du Québec, L.R.Q., ch. P-40.1, dans le but d'interdire la publicité destinée aux enfants et aux adolescents, et des exi-

mony). In my view, any of these alternatives would be a reasonable impairment of the right to free expression, given the important objective and the legislative context.

These considerations suggest that the advertising ban imposed by s. 4 of the Act may be more intrusive of freedom of expression than is necessary to accomplish its goals. Indeed, Health and Welfare proposed less-intrusive regulation instead of a complete prohibition on advertising. Why then, did the government adopt such a broad ban? The record provides no answer to this question. The government presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans.

This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

Not only did the government present no evidence justifying its choice of a total ban, it also

gences en matière d'étiquetage seulement (qui selon Santé et Bien-être social seraient préférables à une interdiction de publicité: voir le témoignage de A. J. Liston). À mon avis, chacune de ces mesures constituerait une atteinte raisonnable au droit à la liberté d'expression, étant donné l'importance de l'objectif et du contexte législatif.

Il appert de ces réflexions que l'interdiction de publicité imposée par l'art. 4 de la Loi pourrait bien porter davantage atteinte à la liberté d'expression qu'elle n'a à le faire pour que ses objectifs soient atteints. En fait, le ministère de la Santé et du Bien-être social a proposé un règlement moins attentatoire en remplacement d'une interdiction totale de la publicité. Alors, pourquoi le gouvernement a-t-il adopté une interdiction si générale? Le dossier ne renferme rien sur cette question. Le gouvernement n'a pas présenté d'éléments de preuve pour défendre l'interdiction totale ni de données établissant une comparaison entre les effets d'une interdiction totale et des interdictions moins attentatoires. 165

Cette omission est d'autant plus flagrante que le gouvernement avait effectué au moins une étude des solutions de rechange avant d'opter pour l'interdiction totale. Le gouvernement a privé les tribunaux des résultats de cette étude. Le procureur général du Canada a refusé de divulguer ce document, de même qu'environ 500 autres dont la production avait été demandée en première instance; il a, à cette fin, invoqué l'art. 39 de la *Loi sur la preuve au Canada*, L.R.C. (1985), ch. C-5, faisant ainsi échec à une demande de divulgation présentée par les compagnies de tabac puisque les tribunaux n'ont pas compétence pour examiner les documents selon lesquels un privilège est réclamé en vertu de cette disposition. Les mentions de cette étude ont été biffées des documents produits: motifs de la première instance, à la p. 2311. Face à cette attitude, il est difficile de ne pas inférer que les résultats de ces études font échec à la prétention du gouvernement qu'une interdiction moins attentatoire n'aurait pas donné lieu à un résultat tout aussi valable. 166

Non seulement le gouvernement n'a pas produit d'éléments de preuve pour justifier l'interdiction 167

presented no argument before us on the point. The appellants argued that there were undisclosed alternatives to a complete ban. The Attorney General's factum offered no response. Instead, the Attorney General contented himself with the bland statement that a complete ban is justified because Parliament "had to balance competing interests" somehow. Its response to the minimal impairment argument is not evidence, but a simple assertion that Parliament has the right to set such limits as it chooses:

> . . . Parliament was certainly entitled to conclude that nothing short of the means it designed would meet the public health objectives set out in s. 3 of the [Act]. The Act is a justified preventative health measure. Parliament has the ability to set the exact limits of this measure. [Emphasis added.]

totale qu'il a choisi d'imposer, il ne nous a non plus présenté aucun argument sur ce point. Selon les appelantes, d'autres mesures non divulguées auraient pu remplacer une interdiction totale. Le mémoire du procureur général n'a pas apporté de réponse. En fait, le procureur général s'est contenté d'affirmer d'une manière imperturbable qu'une interdiction totale est justifiée parce que le Parlement [TRADUCTION] «devait soupeser des intérêts contradictoires». La façon dont il répond à l'argument concernant l'atteinte minimale ne constitue pas une preuve, mais bien une simple affirmation que le Parlement a le droit de fixer les limites qu'il choisit:

> [TRADUCTION] . . . le Parlement avait certainement le droit de conclure que seuls les moyens qu'il avait conçus permettraient d'atteindre les objectifs en matière de santé publique, énoncés à l'art. 3 [de la Loi]. La Loi est une mesure préventive justifiée en matière de santé. Le Parlement peut en fixer les limites exactes. [Je souligne.]

168 My colleague La Forest J., while recognizing that the government's refusal to release the documents puts this Court in a difficult position given that the onus is on the government to make out minimal impairment, nonetheless concludes that the legislation is minimally impairing based on the importance of the legislative objective and the legislative context. With respect, I cannot agree. Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the *Charter*. The Constitution, as interpreted by the courts, determines those limits. Section 1 specifically stipulates that the infringement may not exceed what is reasonable and "demonstrably justified in a free and democratic society", a test which embraces the requirement of minimal impairment, and places on the government the burden of demonstrating that Parliament has respected that limit. This the government has failed to do, notwithstanding that it had at least one study on the comparative effectiveness of a partial and complete ban. In the face of this omission, the fact that full bans have been imposed in certain other countries and the fact that opinions

Néanmoins, mon collègue le juge La Forest conclut, tout en reconnaissant que le refus du gouvernement de divulguer les documents place notre Cour dans une situation difficile puisqu'il appartient au gouvernement d'établir l'atteinte minimale, que la loi crée une atteinte minimale compte tenu de l'importance de l'objectif et du contexte de la loi. En toute déférence, je ne suis pas d'accord. Même dans le cas de problèmes sociaux difficiles qui présentent des enjeux élevés, le Parlement n'a pas le droit de déterminer unilatéralement les limites qu'il peut imposer aux droits et libertés garantis par la *Charte*. C'est la Constitution, selon l'interprétation que lui donnent les tribunaux, qui détermine ces limites. L'article premier édicte expressément que la violation ne peut aller au-delà de limites qui soient «raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique», critère qui englobe l'exigence de l'atteinte minimale et impose au gouvernement le fardeau d'établir que le Parlement a respecté cette limite. C'est ce que le gouvernement a omis de faire, même s'il disposait d'au moins une étude sur l'efficacité comparative d'une interdiction partielle et d'une interdiction totale.

favouring total bans can be found, fall short of establishing minimal impairment.

Compte tenu de cette omission, le fait que des interdictions totales ont été imposées dans certains autres pays et qu'il existe des opinions favorables à une interdiction totale ne réussit pas à établir une atteinte minimale.

La Forest J. supports his conclusion that Parliament should be permitted to choose such measures as it sees fit by contrasting the importance of Parliament's objective with the low value of the expression at issue. This way of answering the minimal impairment requirement raises a number of concerns. First, to argue that the importance of the legislative objective justifies more deference to the government at the stage of evaluating minimal impairment, is to engage in the balancing between objective and deleterious effect contemplated by the third stage of the proportionality analysis in *Oakes*. While it may not be of great significance where this balancing takes place, care must be taken not to devalue the need for demonstration of minimum impairment by arguing the legislation is important and the infringement of no great moment.

169 Le juge La Forest base sa conclusion selon laquelle le Parlement devrait avoir le droit de choisir les mesures qu'il juge appropriées sur la comparaison entre l'importance de l'objectif du Parlement et la faible valeur de l'expression en cause. Cette façon de satisfaire à l'exigence de l'atteinte minimale soulève certaines préoccupations. Premièrement, soutenir que l'importance de l'objectif législatif justifie un plus grand respect envers le gouvernement à l'étape de l'évaluation de l'atteinte minimale, c'est procéder à la pondération des effets objectifs et des effets préjudiciables, prévue à la troisième étape de l'analyse de la proportionnalité dans l'arrêt *Oakes*. Le moment de cette pondération n'a peut-être pas beaucoup d'importance en soi; cependant, on doit veiller à ne pas minimiser la nécessité de démontrer l'existence d'une atteinte minimale en faisant valoir que la loi est importante mais que la violation ne l'est pas vraiment.

Second, just as care must be taken not to overvalue the legislative objective beyond its actual parameters, so care must be taken not to undervalue the expression at issue. Commercial speech, while arguably less important than some forms of speech, nevertheless should not be lightly dismissed. For example, in *Rocket*, *supra*, this Court struck down restrictions on dental advertising on the ground that the minimal impairment requirement had not been met. The *Health Disciplines Act*, R.S.O. 1980, c. 196, prohibited forms of advertising which far from being unprofessional, might have benefited consumers and contributed to their health. The same may be said here. Tobacco consumption has not been banned in Canada. Yet the advertising ban deprives those who lawfully choose to smoke of information relating to price, quality and even health risks associated with different brands. It is no answer to suggest, as does my colleague, (para. 108) that the tobacco companies have failed to establish the true benefits of

170 Deuxièmement, tout comme il faut prendre soin de ne pas surestimer l'objectif législatif par rapport à ses véritables paramètres, il faut veiller à ne pas sous-estimer l'importance de l'expression en cause. Quoique l'on puisse soutenir que le discours commercial est moins important que certaines formes d'expression, on ne devrait néanmoins pas l'écarter à la légère. Par exemple, dans l'arrêt *Rocket*, précité, notre Cour a annulé des restrictions imposées à la publicité des dentistes pour le motif que l'on n'avait pas satisfait à l'exigence de l'atteinte minimale. La *Loi sur les sciences de la santé*, L.R.O. 1980, ch. 196, interdisait certains types de publicité qui, loin d'être non professionnels, auraient pu présenter des avantages pour les consommateurs et contribuer à leur santé. On peut reprendre le même argument ici. L'usage du tabac n'a pas été interdit au Canada. Cependant, l'interdiction de publicité prive les fumeurs légitimes de renseignements sur le prix, la qualité, voire même les méfaits des différentes marques de tabac sur la

such information. Under s. 1 of the *Charter*, the onus rests on the government to show why restrictions on these forms of advertising are required.

171 Third, in finding that the commercial speech here at issue is entitled "to a very low degree of protection under s. 1" (para. 75) and that "an attenuated level of s. 1 justification is appropriate in these cases" (para. 77), La Forest J. places a great deal of reliance on the fact that the appellants are motivated by profit. I note that the same may be said for many business persons or corporations that challenge a law as contrary to freedom of expression. While this Court has stated that restrictions on commercial speech may be easier to justify than other infringements, no link between the claimant's motivation and the degree of protection has been recognized. Book sellers, newspaper owners, toy sellers — all are linked by their shareholders' desire to profit from the corporation's business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not. In my view, motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.

172 It remains to consider whether the requirement that the warning be unattributed pursuant to s. 9 of the Act fails to meet the minimum impairment requirement of proportionality. The appellant corporations contend that a warning similar to that used in the United States, which identifies the author as the Surgeon General, would be equally effective while avoiding the inference some may draw that it is the corporations themselves who are warning of the danger. They object not only to being forced to say what they do not wish to say, but also to being required to do so in a way that associates them with the opinion in question. This

santé. Il ne suffit pas d'affirmer, comme le fait mon collègue (par. 108), que les compagnies de tabac n'ont pas établi les véritables avantages de ces renseignements. En vertu de l'article premier de la *Charte*, il appartient au gouvernement d'établir pourquoi il faut imposer des restrictions relativement à ces types de publicité.

Troisièmement, en affirmant que le discours commercial en cause n'a droit «qu'à une faible protection en vertu de l'article premier» (par. 75) et qu'«il convient en l'espèce de faire preuve de souplesse dans la justification au regard de l'article premier» (par. 77), le juge La Forest accorde beaucoup d'importance au fait que les appelantes sont motivées par le profit. Il en est de même de nombreux entrepreneurs ou sociétés qui contestent une loi pour le motif qu'elle contrevient à la liberté d'expression. Bien qu'elle ait affirmé que des restrictions au discours commercial puissent être plus faciles à justifier que d'autres violations, notre Cour n'a pas reconnu de lien entre la motivation d'une demanderesse et le degré de protection accordée. Les libraires, les propriétaires de journaux, les vendeurs de jouets ont tous en commun le désir des actionnaires de tirer profit de l'activité commerciale de la compagnie, que l'expression que l'on veut protéger soit ou non étroitement liée aux valeurs fondamentales de la liberté d'expression. À mon avis, la volonté de faire un profit ne constitue pas une considération pertinente lorsqu'il s'agit de déterminer si le gouvernement a établi que la loi est raisonnable ou justifiée en tant qu'atteinte à la liberté d'expression.

Il reste à établir si l'exigence de la non-attribution des mises en garde, prévue à l'art. 9 de la Loi, ne satisfait pas à l'exigence de l'atteinte minimale du critère de la proportionnalité. Selon les appelantes, une mise en garde semblable à celle utilisée aux États-Unis, émanant du Surgeon General, serait tout aussi efficace, et empêcherait certains d'inférer que ce sont les compagnies qui font la mise en garde. Les compagnies s'opposent non seulement à ce qu'on leur attribue des propos qu'elles n'ont pas l'intention de tenir, mais aussi à se voir obligées de le faire d'une façon qui les associe au message en question. À leur avis, cela

impairs their freedom of expression, they contend, more than required to achieve the legislative goal.

The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. The question is whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulations.

As with the advertising ban, it was for the government to show that the unattributed warning, as opposed to an attributed warning, was required to achieve its objective of reducing tobacco consumption among those who might read the warning. Similarly, it was for the government to show why permitting tobacco companies to place additional information on tobacco packaging, such as a statement announcing lower tar levels, would defeat the government's objective. This it has failed to do. Again, my colleague La Forest J. responds (para. 116) with the belief that "a lower level of constitutional scrutiny is justified in this context". For the reasons given with respect to the advertising ban, I respectfully disagree.

(iv) Proportionality Between the Effects of the Legislation and the Objective

Having found the requirement of minimum impairment is not satisfied for ss. 4 and 9 of the Act, it is unnecessary to proceed to the final stage of the proportionality analysis under s. 1 — balancing the negative effects of the infringement of rights against the positive benefits associated with the legislative goal. A finding that the law impairs the right more than required contradicts the assertion that the infringement is proportionate. Neither the fact that commercial expression may be entitled to a lesser degree of protection than certain other forms of expression, nor the importance of reducing tobacco consumption, even to a small extent, negate this proposition. Freedom of expression, even commercial expression, is an important

porte atteinte à leur liberté d'expression plus qu'il n'est nécessaire de le faire pour atteindre l'objectif de la loi.

173 Le gouvernement est clairement justifié d'exiger des appelantes qu'elles apposent des mises en garde sur les emballages des produits du tabac. La question est de savoir s'il était nécessaire d'interdire aux appelantes d'attribuer le message au gouvernement et s'il était nécessaire de les empêcher d'apposer sur leur emballage des renseignements autres que ceux autorisés par règlement.

174 Comme pour l'interdiction de publicité, il appartenait au gouvernement d'établir que la mise en garde non attribuée, par opposition à une mise en garde attribuée, était nécessaire pour atteindre l'objectif visé de réduire la consommation du tabac chez les personnes susceptibles de la lire. De même, le gouvernement devait établir pourquoi l'inscription de renseignements additionnels sur les emballages par les compagnies de tabac, comme un message sur la faible teneur en goudron, irait à l'encontre de son objectif. Il n'a pas réussi à le faire. De nouveau, mon collègue le juge La Forest affirme (par. 116) que, selon lui, «en l'occurrence l'analyse constitutionnelle n'a pas à être aussi approfondie». Avec égards, pour les motifs exposés relativement à l'interdiction de publicité, je ne suis pas d'accord.

(iv) La proportionnalité entre les effets de la loi et son objectif

175 Puisque j'ai conclu que l'on n'a pas satisfait à l'exigence de l'atteinte minimale relativement aux art. 4 et 9 de la Loi, j'estime inutile de procéder à l'examen de la dernière étape du critère de la proportionnalité dans la cadre de l'article premier: soupeser les effets négatifs de la violation des droits par rapport aux avantages positifs liés à l'objectif législatif. Conclure que la loi porte atteinte au droit en question plus qu'il n'est nécessaire contredit l'affirmation que la violation satisfait au critère de la proportionnalité. Ni le fait que l'expression commerciale peut bénéficier d'une protection moindre que certaines autres formes d'expression, ni l'importance de réduire la consommation du tabac, même légèrement, ne viennent repousser

and fundamental tenet of a free and democratic society. If Parliament wishes to infringe this freedom, it must be prepared to offer good and sufficient justification for the infringement and its ambit. This it has not done.

2. Remedy

176 I have found ss. 4, 8 and 9 of the *Tobacco Products Control Act* constitute unjustified infringements on free expression. These provisions spearhead the scheme under the Act and cannot be severed cleanly from other provisions dealing with promotion and trade mark usage, ss. 5 and 6. I would consequently hold that ss. 4, 5, 6, 8, and 9 are inconsistent with the *Charter* and hence are of no force or effect by reason of s. 52 of the *Constitution Act, 1982*.

177 Section 7 of the Act prohibits the free distribution of any tobacco product in any form, a provision which is closely connected to the law's objective. In my view, this provision should stand, together with the remaining provisions of the Act which deal with reporting, enforcement, regulations and offences and punishment, in so far as these sections operate in relation to provisions other than those declared invalid.

178 This leaves the question of costs. The appellant Imperial has been successful in these appeals. The appellant RJR-MacDonald has been substantially successful. Having requested that the whole of the *Tobacco Products Control Act* be struck down, it has succeeded in having a significant portion of it struck down. I would allow the appeals with costs to both appellants.

The following are the reasons delivered by

179 IACOBUCCI J. — These appeals concern the constitutional legitimacy of the *Tobacco Products Control Act*, S.C. 1988, c. 20 (the "Act"), a federal statute which effectively establishes a total ban on cigarette advertising in Canada.

cette affirmation. La liberté d'expression, même l'expression commerciale, constitue un précepte important et fondamental d'une société libre et démocratique. Si le Parlement a l'intention de porter atteinte à cette liberté, il doit être disposé à justifier l'étendue de cette atteinte de façon adéquate et suffisante. Il ne l'a pas fait.

2. La réparation

J'ai conclu que les art. 4, 8 et 9 de la *Loi réglementant les produits du tabac* constituent des atteintes injustifiées à la liberté d'expression. Ces dispositions sont le fer de lance de l'économie de la Loi et ne peuvent être nettement dissociées des autres qui traitent de promotion et d'usage des marques, les art. 5 et 6. Je conclus donc que les art. 4, 5, 6, 8 et 9 sont incompatibles avec la *Charte* et sont de ce fait inopérants en application de l'art. 52 de la *Loi constitutionnelle de 1982*.

L'article 7 de la Loi interdit la distribution à titre gratuit des produits du tabac, sous quelque forme que ce soit, disposition qui se rattache étroitement à l'objectif de la Loi. À mon avis, cette disposition devrait être déclarée valide, de même que les autres dispositions de la Loi relatives aux rapports, à la mise en œuvre, aux règlements, aux infractions et aux peines, dans la mesure où elles s'appliquent aux dispositions autres que celles qui ont été déclarées non valides.

Il reste à trancher la question des dépens. L'appelante Imperial a eu gain de cause en l'espèce. L'appelante RJR-MacDonald a elle aussi eu essentiellement gain de cause. Elle avait demandé l'annulation intégrale de la *Loi réglementant les produits du tabac* et a réussi à en faire annuler une bonne partie. Je suis d'avis d'accueillir les pourvois avec dépens aux deux appelantes.

Version française des motifs rendus par

LE JUGE IACOBUCCI — Les présents pourvois portent sur la constitutionnalité de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20 (la «Loi»), loi fédérale qui établit en fait une interdiction totale de la publicité en faveur de la cigarette au Canada.

The appellants submit that there are two alternative grounds that support the constitutional invalidity of the Act: (1) that it is *ultra vires* the powers accorded to Parliament by s. 91 of the *Constitution Act, 1867*; and (2) that it infringes the appellants' right to freedom of expression in a manner that does not constitute a reasonable limit under s. 1 of the *Canadian Charter of Rights and Freedoms*.

My colleague Justice La Forest details at length the reasons why the Act is properly enacted pursuant to the federal power over criminal law (s. 91(27)). I find myself in full agreement with him in this regard. I also agree with his approach to appellate court intervention on legislative or social facts as found by a trial judge.

I diverge, however, with La Forest J. on the *Charter* issue; specifically, I do not believe that the Act minimally impairs the appellants' s. 2(*b*) *Charter* rights. More broadly, I also have reservations about the somewhat attenuated minimal impairment analysis propounded by La Forest J. As I noted in my reasons in *Egan v. Canada*, [1995] 2 S.C.R. 513, unduly diluting the s. 1 principles from their original form cast in *R. v. Oakes*, [1986] 1 S.C.R. 103, and related cases causes me concern in so far as it creates a risk that *Charter* violations will be too readily justified and, as a result, *Charter* values too easily undercut. In this respect, I find myself generally attracted to Justice McLachlin's reasons and disposition in this appeal. Nevertheless, although I concur with many of her general conclusions, I differ somewhat with her s. 1 analysis and proposed remedy and therefore prefer to express my own reasons.

The two principal issues underlying the *Charter* analysis in these appeals are: (1) whether the Act is rationally connected to its goal of protecting Canadians from the health risks associated with

Les appelantes soutiennent que deux motifs subsidiaires viennent étayer l'inconstitutionnalité de la Loi: (1) elle excède les pouvoirs conférés au Parlement par l'art. 91 de la *Loi constitutionnelle de 1867*, et (2) elle porte atteinte à la liberté d'expression des appelantes d'une façon qui ne constitue pas une limite raisonnable en vertu de l'article premier de la *Charte canadienne des droits et libertés*. 180

Mon collègue le juge La Forest expose en détail les motifs pour lesquels il s'agit d'une loi validement adoptée conformément à la compétence fédérale en matière de droit criminel (par. 91(27)). Je suis tout à fait d'accord avec lui sur ce point. Je suis également d'accord avec la démarche qu'il adopte relativement à l'intervention des tribunaux d'appel quant aux faits législatifs ou sociaux constatés par le juge de première instance. 181

Cependant, je ne partage pas l'opinion du juge La Forest sur la question de la *Charte* et, plus précisément, je ne crois pas que la Loi constitue une atteinte minimale aux droits garantis aux appelantes par l'al. 2*b*) de la *Charte*. D'une façon plus générale, j'ai aussi des réserves sur l'analyse quelque peu assouplie de l'atteinte minimale que propose le juge La Forest. Comme je l'ai fait remarquer dans mes motifs de l'arrêt *Egan c. Canada*, [1995] 2 R.C.S. 513, je crains un trop grand assouplissement des principes d'application de l'article premier par rapport à leur formulation initiale dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, et les arrêts connexes, car cela crée un risque que les violations de la *Charte* ne soient trop facilement justifiées et, de ce fait, que les valeurs protégées par la *Charte* ne soient trop facilement contrecarrées. À cet égard, je trouve généralement intéressants les motifs et le dispositif du juge McLachlin en l'espèce. Néanmoins, bien que je souscrive à nombre de ses conclusions générales, j'ai une opinion quelque peu différente quant à son analyse de l'article premier et à la réparation proposée et je préfère donc formuler mes propres motifs. 182

Les deux principales questions en litige qui sous-tendent l'analyse fondée sur la *Charte* dans les présents pourvois sont de savoir (1) si la Loi a un lien rationnel avec son objectif de protéger les 183

tobacco use and, if so, (2) whether the legislation attains this rationally connected goal in a manner that minimally impairs the appellants' infringed *Charter* rights.

184 Rational connection is to be established, upon a civil standard, through reason, logic or simply common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or common sense. It is by no means dispositive or determinative.

185 Clarifying the standard upon which rational connection analysis ought to proceed is of great importance in appeals such as these, in which there is extremely lengthy yet generally inconclusive scientific evidence. In short, Chabot J. found much of the scientific evidence to be suspect and was of the mind that the Act was "social engineering". With respect, this latter proposition is one which I cannot accept. Consequently, I am reluctant to associate the reasons of this Court with those of Chabot J. and agree with La Forest J. in this respect in concluding that the trial judge's determination that the Act is not rationally connected to its legislative goal ought to be overturned. I should now like to turn to minimal impairment aspects.

186 Minimal impairment analysis requires this Court to consider whether the legislature turned its mind to alternative and less rights-impairing means to promote the legislative goal in question. In these appeals, I am concerned by the fact that the Attorney General of Canada chose to withhold from the factual record evidence related to the options it had considered as alternatives to the total ban it chose to put in place. It is no answer to this conduct to suggest, as my colleague La Forest J. does, that part of the responsibility for this incomplete factual record lies with the appellants, purportedly owing to the fact that their counsel did not pursue every conceivable legal avenue in order to attempt to secure the publication of the undisclosed documents. I am reluctant to permit the justification of a conceded constitutional violation because of the inability of a party to the litigation to have pursued all possible avenues to obtain the non-disclosed

Canadiens contre les méfaits de l'usage du tabac sur la santé et, dans l'affirmative, (2) si la Loi atteint cet objectif d'une façon qui porte le moins possible atteinte aux droits que la *Charte* garantit aux appelantes.

Le lien rationnel doit être établi, selon la norme de preuve en matière civile, par la raison, la logique ou le simple bon sens. L'existence d'une preuve scientifique n'a une valeur probante que lorsqu'il s'agit d'établir la raison, la logique ou le bon sens. Elle n'est en aucune façon déterminante.

Dans des pourvois comme en l'espèce, dans lesquels il existe une preuve scientifique extrêmement volumineuse, mais généralement non concluante, il est fort important de clarifier la norme sur laquelle doit se fonder l'analyse du lien rationnel. En résumé, le juge Chabot a conclu qu'une grande partie de la preuve scientifique était douteuse et que la Loi était une forme «d'ingénierie sociale». En toute déférence, je ne puis accepter cette dernière conclusion. C'est pourquoi j'hésite à associer les motifs de notre Cour à ceux du juge Chabot et je suis d'accord avec le juge La Forest pour conclure que la décision du juge de première instance portant que la Loi n'a pas de lien rationnel avec son objectif législatif devrait être infirmée. Je traiterai maintenant des aspects de l'atteinte minimale.

Lorsqu'elle analyse l'atteinte minimale, notre Cour doit déterminer si le législateur a examiné d'autres mesures moins attentatoires pour atteindre l'objectif législatif en question. Dans les présents pourvois, je suis préoccupé par le fait que le procureur général du Canada a choisi de ne pas dévoiler la preuve factuelle au dossier concernant les options envisagées comme solutions de rechange à l'interdiction totale que le législateur a choisi de mettre en place. On ne saurait expliquer cette conduite, comme le fait mon collègue le juge La Forest, en affirmant que les appelantes sont en partie responsables de l'existence de ce dossier factuel incomplet, présumément parce que leurs avocats n'ont pas épuisé tous les moyens juridiques possibles pour tenter d'obtenir la publication des documents non divulgués. J'hésite à permettre la justification d'une violation admise de la Constitution parce qu'une partie au litige n'a pas

information. These cases are of wide public interest constitutional litigation in which the government should remain non-adversarial and make full disclosure. Without this requirement, courts will be constrained to decide the constitutionality of legislation without full information. In any event, the burden of proof at the s. 1 stage lies solely with the government.

épuisé tous les moyens possibles pour obtenir les renseignements non divulgués. Il s'agit en l'espèce d'un litige d'un grand intérêt public en matière constitutionnelle, dans lequel le gouvernement ne devrait pas s'en tenir à un débat contradictoire et devrait faire une pleine divulgation. Sinon, les tribunaux seront forcés de trancher la constitutionnalité d'une loi sans avoir tous les renseignements. Quoi qu'il en soit, à l'étape de l'article premier, c'est au gouvernement seul qu'incombe la charge de la preuve.

I underscore that the rights violation in these cases does not involve the prohibition of the sale or consumption of tobacco. It involves the total ban on the advertising of tobacco products. I do not believe that the jurisprudence supports La Forest J.'s conclusion that the impugned *Charter* right, in these cases s. 2(*b*), is minimally impaired because the government chose not to pursue a course of conduct (i.e., prohibiting tobacco products) which bears no relevance to s. 2(*b*), especially when it is clear that this alternative was never, by the government's own admission, feasible or viable.

Je tiens à faire ressortir que la violation des droits en l'espèce ne découle pas d'une interdiction de la vente ou de l'usage du tabac, mais plutôt d'une interdiction totale de la publicité en faveur des produits du tabac. Je ne crois pas que la jurisprudence appuie la conclusion du juge La Forest qu'il y a atteinte minimale au droit garanti par la *Charte*, en l'espèce à l'al. 2*b*), parce que le gouvernement a choisi de ne pas opter pour une ligne de conduite (l'interdiction des produits du tabac) qui n'a aucun rapport avec l'al. 2*b*), particulièrement lorsqu'il est évident que cette solution de rechange n'a jamais été, de l'aveu même du gouvernement, possible ou viable.

In my opinion, the question in these appeals is not whether a partial prohibition (the lesser rights-impairing approach) would be acceptable only if there were information establishing that some forms of advertising do not stimulate consumption. On the contrary, it is the total prohibition (the full rights-impairing option) that is only constitutionally acceptable if information is provided that such a total prohibition is necessary in order for the legislation to achieve a pressing and substantial goal. When, as in the case at bar, the evidence is unclear whether a partial prohibition is as effective as a full prohibition, the *Charter* requires that the legislature enact the partial denial of the implicated *Charter* right. In the absence of the discharge of this evidentiary burden (which is to be wholly borne by the government), the least rights-impairing option is to be preferred. Although tobacco advertising as a whole certainly affects consumption, the evidence is unclear whether all types of tobacco ads affect consumption. I believe that some attention

À mon avis, la question en l'espèce n'est pas de savoir si une interdiction partielle (la mesure moins attentatoire aux droits) ne serait acceptable que s'il existait des données établissant que certaines formes de publicité n'encouragent pas la consommation. Au contraire, c'est l'interdiction totale (l'option pleinement attentatoire aux droits) qui n'est acceptable du point de vue constitutionnel que s'il existe des renseignements établissant qu'une telle interdiction est nécessaire pour qu'un objectif urgent et réel de la loi soit atteint. Si, comme en l'espèce, la preuve ne permet pas d'établir clairement si une interdiction partielle est aussi efficace qu'une interdiction totale, la *Charte* exige que le législateur opte pour la mesure qui constitue une atteinte partielle au droit garanti par la *Charte*. Lorsque cette preuve n'a pas été établie (dont le fardeau de présentation incombe en totalité au gouvernement), il faut préférer l'option la moins attentatoire. Bien que la publicité du tabac dans son ensemble influe certainement sur la consomma-

must be paid to whether the legislature endeavoured to differentiate the harmful advertising from the benign advertising before it decided to ban all advertising or sought to identify whether, as claimed by the appellants, informational and brand-name advertising do not have the effects that the Act seeks to curb.

189 I agree with La Forest J. that a contextual approach must be taken to s. 1 analysis, and, when reduced to its essence, the impugned right in this case amounts to the ability of tobacco companies to advertise — solely for the purposes of financial profit — a product with known deleterious effects to public health. To this end, the amount of legislative tailoring required to sustain minimal impairment analysis would not be very significant. However, context does not eliminate the need for any tailoring at all. In this appeal, the government chose not to do any tailoring and, ultimately, this constitutes the lynch-pin of the Act's unconstitutionality. I note that the partialness of bans on commercial expression has often been key to their constitutional validity: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

190 Section 9 of the Act (obliging the placing of unattributed health messages on cigarette packages) raises similar concerns. I find that this provision trenches upon s. 2(*b*) and is unjustifiable under s. 1 and I agree with McLachlin J. in this respect. The question here is whether the reduction of tobacco consumption can be equally advanced by adopting the less intrusive remedy of governmentally attributed warnings or whether such a method would only yield results more modest than the full rights-impairing approach presently adopted by s. 9. Given the evidence before this

tion, la preuve n'établit pas clairement si tous les types de publicité influent sur la consommation. À mon avis, il faut examiner si le législateur s'est efforcé de distinguer la publicité néfaste de la publicité bénigne avant de décider d'imposer une interdiction totale de la publicité ou s'il a cherché à déterminer si, comme le soutiennent les appelantes, la publicité informative et la publicité de marques n'entraînent pas les effets contre lesquels la Loi cherche à lutter.

Je suis d'accord avec le juge La Forest pour dire qu'il faut adopter une analyse contextuelle relativement à l'article premier et que, ramené à sa plus simple expression, le droit attaqué en l'espèce est celui des compagnies de tabac de faire la publicité — strictement à des fins de profits — d'un produit ayant des effets néfastes connus sur la santé publique. À cette fin, le législateur n'aurait pas à faire de très importantes adaptations pour satisfaire à l'analyse de l'atteinte minimale. Cependant, le contexte n'élimine pas la nécessité de toute adaptation. Dans le cadre des présents pourvois, le gouvernement a choisi de ne pas faire d'adaptations et, en fin de compte, c'est là le motif clé pour lequel la Loi est inconstitutionnelle. Je constate que le caractère partiel des interdictions imposées à l'expression commerciale a souvent été la clé de leur constitutionnalité: *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927.

L'article 9 de la Loi (qui exige l'apposition de messages non attribués sur les emballages de cigarettes) soulève des préoccupations similaires. À mon avis, cette disposition empiète sur l'al. 2*b*) et ne peut se justifier en vertu de l'article premier, et je suis d'accord avec le juge McLachlin sur ce point. En l'espèce, la question est de savoir si la diminution de l'usage du tabac peut également être encouragée par la mesure moins attentatoire que constituent des messages attribués au gouvernement ou si cette mesure ne donnerait lieu qu'à des résultats plus modestes que la disposition pleinement attentatoire aux droits que constitue l'art. 9. Vu la preuve présentée à notre Cour, j'ai tendance

Court, I am inclined to opt for the lesser rights-impairing approach.

At this juncture, I should like to offer some indication of what sorts of measures would, in my mind, have survived *Charter* scrutiny. As I have already mentioned, it is clear that health warnings can and should be placed on the packages, but the strictures of the *Charter* necessitate that they be attributed to their author, in all likelihood Health and Welfare Canada. Regarding the advertising ban, it is clear to me that an effort could have been made to regulate tobacco advertising along the lines of alcohol advertising. Given that the tobacco companies had agreed as early as 1972 (through the *Voluntary Code*) to refrain from advertising on television and radio, these regulations would only involve advertising in the print media anyway. Alternatively, as evidenced in some of the testimony at trial, partial bans in the order of prohibitions on lifestyle advertising only and limitations on advertising aimed at adolescents could have been given more constructive attention. The main point I wish to make is that in this case we are faced with a total and absolute ban on advertising without a justifiable basis for it. Perhaps proof exists for such a ban, but in my view the record does not establish it.

In the end, I would allow these appeals, with costs throughout to the appellants. For the reasons set out above, ss. 4, 5, 6, 8, and 9 of the Act should be struck. However, I am of the mind, for the reasons I advanced in *Egan*, *supra*, that this, too, is the appropriate case for a suspensive declaration of invalidity of one year. I thus disagree with McLachlin J. in terms of the remedy. Immediately striking down the legislation would permit the tobacco companies the untrammelled ability to advertise until minimally impairing legislation is drafted; the suspensive veto would permit the government to design such legislation while the *status quo* remains in force. In my view, that is warranted in light of the deleterious effects of tobacco prod-

à opter pour la démarche moins attentatoire aux droits.

191 À cette étape, j'aimerais donner des précisions sur les mesures qui, à mon avis, auraient résisté à un examen fondé sur la *Charte*. Comme je l'ai déjà mentionné, il est évident que des messages relatifs à la santé peuvent et doivent être apposés sur les emballages, mais les contraintes de la *Charte* exigent qu'ils soient attribuées à un auteur, en toute vraisemblance Santé et Bien-être social Canada. En ce qui concerne l'interdiction de publicité, il est, à mon avis, clair que l'on aurait pu s'efforcer de réglementer la publicité du tabac de la même façon que celle de l'alcool. Puisque les compagnies de tabac avaient convenu dès 1972 (le *Voluntary Code*) de s'abstenir de faire de la publicité à la télévision et à la radio, ce règlement ne porterait de toute façon que sur la publicité dans la presse écrite. Par ailleurs, comme l'indiquent certains témoignages au procès, on aurait pu s'intéresser de manière plus constructive à une interdiction partielle, sous forme d'interdiction de la publicité de style de vie seulement et de restrictions sur la publicité relative aux adolescents. Je tiens à souligner principalement qu'il s'agit, en l'espèce, d'une interdiction de la publicité totale et absolue, qui n'est pas justifiée. Il existe peut-être une preuve appuyant une telle interdiction mais, à mon avis, elle ne ressort pas du dossier.

192 En définitive, je suis d'avis d'accueillir les pourvois, avec dépens dans toutes les cours en faveur des appelantes. Pour les motifs qui précèdent, les art. 4, 5, 6, 8 et 9 de la Loi devraient être annulés. Cependant, pour les motifs formulés dans l'arrêt *Egan*, précité, je suis d'avis qu'il est également approprié en l'espèce d'ordonner une suspension de l'effet de la déclaration d'invalidité pour une période d'un an. Je ne partage donc pas l'opinion du juge McLachlin quant à la réparation. L'annulation immédiate de la loi aurait pour effet de permettre aux compagnies de tabac de mener librement des campagnes publicitaires jusqu'à l'établissement d'une loi satisfaisant au critère de l'atteinte minimale; par contre, le veto suspensif permettrait au gouvernement de procéder à l'élaboration d'une telle loi et au statu quo de demeurer

ucts on those who use them and on society generally.

The following are the reasons delivered by

193 MAJOR J. — I agree with Justice McLachlin's disposition of these appeals but disagree that Parliament may impose an advertising ban on tobacco products, trade marks, and brand names under its criminal law power.

194 I agree with Justice La Forest that Parliament could prohibit the sale of tobacco products without printed health warnings under its criminal law power but that is not the issue in these appeals.

195 It is undisputed that Parliament may legislate with respect to hazardous, unsanitary, adulterated and otherwise dangerous foods and drugs pursuant to its power to legislate in the field of criminal law.

196 It follows that Parliament can require manufacturers to place warnings on tobacco products which are known to have harmful effects on health. Manufacturers of tobacco products are under a duty to disclose and warn of the dangers inherent in the consumption of tobacco products. Failure to place warnings on tobacco products can validly constitute a crime, a "public wrong" which merits proscription and punishment and ought to be suppressed as "socially undesirable conduct" (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 488). Section 9 of the *Tobacco Products Control Act*, S.C. 1988, c. 20 ("the Act"), falls within Parliament's power under s. 91(27) of the *Constitution Act, 1867*.

197 However, I do not agree that Parliament under its criminal law power is entitled to prohibit all advertising and promotion of tobacco products and restrict the use of tobacco trademarks as provided for in ss. 4, 5, 6, 8 and 9 of the Act. In *Labatt Breweries of Canada Ltd. v. Attorney General of*

en vigueur. À mon avis, cette mesure se justifie par les effets néfastes des produits du tabac sur ceux qui les utilisent et sur la société en général.

Version française des motifs rendus par

LE JUGE MAJOR — Je souscris au dispositif proposé par le juge McLachlin en l'espèce, mais je ne puis convenir que le Parlement peut, en vertu de sa compétence en matière de droit criminel, imposer une interdiction sur la publicité en faveur des produits du tabac, de leurs marques et de leurs noms.

À l'instar du juge La Forest, je suis d'avis que le Parlement peut, en vertu de sa compétence en matière de droit criminel, interdire la vente des produits du tabac sur lesquels aucune mise en garde n'a été apposée, mais là n'est pas la question en litige en l'espèce.

Il est incontesté que, conformément à sa compétence en matière de droit criminel, le Parlement peut légiférer relativement aux aliments et drogues dangereux, insalubres ou altérés, ou présentant autrement un danger.

Le Parlement peut par conséquent obliger les fabricants à apposer des mises en garde sur les produits du tabac qui sont reconnus comme nocifs pour la santé. Les fabricants de produits du tabac ont l'obligation de mettre la population en garde contre les dangers inhérents à la consommation des produits du tabac. L'omission d'apposer des mises en garde sur ces produits peut validement constituer un crime, un «méfait public» qui justifie interdiction et sanctions et qui doit être enrayé puisqu'il constitue un «acte socialement indésirable» (*R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 488). L'article 9 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20 (la «Loi»), relève de la compétence du Parlement en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*.

Par contre, je ne crois pas qu'en vertu de sa compétence en matière de droit criminel, le Parlement puisse interdire toute publicité et promotion en faveur des produits du tabac et restreindre l'utilisation des marques de tabac comme le prévoient les art. 4, 5, 6, 8 et 9 de la Loi. Dans l'arrêt *Brasse-*

Canada, [1980] 1 S.C.R. 914, the test should be one of substance, not form, and excludes from the criminal jurisdiction legislative activity not having the prescribed characteristics of criminal law. It is not always easy to determine whether legislation comes within the purview of Parliament's criminal law power. Cory J. described this difficulty in *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 347:

> As a point of commencement, it may be helpful to consider what constitutes criminal law. While, like a work of art, it is something that may be easier to recognize than define, some guidelines have been established.

Cory J., at p. 348, then referred to the reasons of Rand J. in *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the *Margarine Reference*), which he found to be a "very helpful definition of criminal law" and referred with approval to the dissenting reasons in *R. v. Hauser*, [1979] 1 S.C.R. 984, *per* Dickson J. (as he then was) at p. 1026:

> Head 27 of s. 91 of the *British North America Act* empowers Parliament to make substantive laws prohibiting, with penal consequences, acts or omissions considered to be harmful to the State, or to persons or property within the State.

The approach taken by this Court in *Knox Contracting*, *supra*, provides a solid foundation for defining the scope of Parliament's criminal law power.

In discussing the *Margarine Reference*, Professor Hogg notes that legislation which merely contains a prohibition and a consequent penalty cannot be upheld as a valid exercise of Parliament's criminal law power unless the legislation also addresses a "typically criminal public purpose" (*Constitutional Law of Canada* (3rd ed. 1992), at p. 18-5). The "typically criminal public purpose" can be determined in part by considering whether the act or omission is sufficiently harmful to the state, or

ries Labatt du Canada Ltée c. Procureur général du Canada, [1980] 1 R.C.S. 914, le critère applicable devrait s'intéresser au fond et non à la forme, et il exclut de la compétence en matière de droit criminel toute activité législative qui ne revêt pas les caractéristiques requises du droit criminel. Il n'est pas toujours aisé de déterminer si un texte de loi s'inscrit dans le cadre de la compétence du Parlement en matière de droit criminel. Le juge Cory a exposé ainsi la difficulté dans l'arrêt *Knox Contracting Ltd. c. Canada*, [1990] 2 R.C.S. 338, à la p. 347:

> Tout d'abord, il peut être utile d'examiner en quoi consiste le droit criminel. Bien que, comme une œuvre d'art, il s'agisse de quelque chose qui peut être plus facile à reconnaître qu'à définir, certaines lignes directrices ont été établies.

Le juge Cory cite ensuite, à la p. 348, un passage des motifs prononcés par le juge Rand dans *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (le *Renvoi sur la margarine*), où l'on trouve à son avis une «définition très utile du droit criminel», puis il renvoie en les approuvant aux motifs du juge Dickson (plus tard Juge en chef), dissident dans l'arrêt *R. c. Hauser*, [1979] 1 R.C.S. 984, à la p. 1026:

> Le paragraphe 27 de l'art. 91 de l'*Acte de l'Amérique du Nord britannique* habilite le Parlement à édicter des lois qui interdisent, sous peine de sanctions pénales, des actes ou omissions jugés préjudiciables à l'État, à des personnes ou à des biens y situés.

La position adoptée par notre Cour dans l'arrêt *Knox Contracting*, précité, fournit une assise solide aux fins de cerner l'étendue de la compétence du Parlement en matière de droit criminel.

198 Dans son analyse du *Renvoi sur la margarine*, le professeur Hogg remarque que la loi qui ne contient qu'une simple interdiction à laquelle est assortie une sanction pénale ne peut être considérée comme un exercice valide de la compétence du Parlement en matière de droit criminel que si cette loi vise également un [TRADUCTION] «objectif public habituellement reconnu du droit criminel» (*Constitutional Law of Canada* (3e éd. 1992), à la p. 18-5). On pourra établir en partie ce qu'est un

to persons or property within the state to warrant the exercise of Parliament's criminal law power.

199 In *Boggs v. The Queen*, [1981] 1 S.C.R. 49, it was held to be beyond Parliament's criminal power to impose criminal sanctions for infractions of a variety of provincial regulations such as failure to pay insurance premiums, civil judgments, taxes and licence fees. Licence suspensions are not related to the owner's ability to drive or to public safety on the highways, and hence criminal penalties flowing from their breach are *ultra vires* Parliament. Although Parliament's power to legislate in the field of criminal law is broad, it is subject to constitutional limits.

200 A definitive and all-encompassing test to determine what constitutes a "criminal offence" remains elusive but the activity which Parliament wishes to suppress through criminal sanction must pose a significant, grave and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the criminal law power. While there is a range of conduct between the most and less serious, not every harm or risk to society is sufficiently grave or serious to warrant the application of the criminal law.

201 The heart of criminal law is the prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole. *Reference re Alberta Statutes*, [1938] S.C.R. 100, held that a crime is a public wrong involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. Matters which pose a significant and serious risk of harm or which cause significant and serious

«objectif public habituellement reconnu du droit criminel» en déterminant si l'acte ou l'omission est suffisamment préjudiciable à l'État, à des personnes ou à des biens y situés, pour justifier l'exercice par le Parlement de sa compétence en matière de droit criminel.

Dans l'arrêt *Boggs c. La Reine*, [1981] 1 R.C.S. 49, on a conclu que la compétence du Parlement en matière criminelle ne lui permettait pas d'imposer des sanctions pénales relativement à des infractions commises contre divers règlements provinciaux, comme l'omission de payer des primes d'assurance, un montant alloué par un jugement civil, une taxe ou un droit de délivrance d'un permis. Les suspensions de permis n'ont pas de rapport avec la capacité de conduire ou la sécurité du public sur les routes, de sorte que les sanctions pénales assorties à leur non-respect excèdent les pouvoirs du Parlement. Bien que le pouvoir de ce dernier de légiférer en matière criminelle soit vaste, il est assujetti à certaines limites constitutionnelles.

Il demeure impossible d'établir un critère définitif et exhaustif qui permette de déterminer ce qui constitue une «infraction criminelle» mais, pour qu'elle puisse tomber sous le coup de la compétence en matière de droit criminel, l'activité que le Parlement souhaite réprimer à l'aide d'une sanction pénale doit présenter un risque de préjudice grave et important pour la santé du public, sa moralité ou sa sécurité. S'il existe une gamme de comportements entre celui qui est le plus grave et celui qui l'est le moins, ce ne sont pas tous les préjudices ou dangers pour la société qui sont suffisamment graves et importants pour justifier l'application du droit criminel.

Au cœur du droit criminel se situe l'interdiction du comportement qui entrave le bon fonctionnement de la société ou qui compromet la sécurité de la société considérée dans son ensemble. Dans *Reference re Alberta Statutes*, [1938] R.C.S. 100, la Cour a conclu qu'un crime est un méfait public qui implique la violation des droits et des devoirs publics envers la collectivité tout entière, considérée comme telle, dans sa capacité d'agir en tant que collectivité. Tout ce qui pose un risque de pré-

harm to public health, safety or security can be proscribed by Parliament as criminal.

Consequently, lesser threats to society and its functioning do not fall within the criminal law, but are addressed through non-criminal regulation, either by Parliament or provincial legislatures, depending on the subject matter of the regulation.

The regulation of manipulative children's advertising was upheld as *intra vires* the province in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, even though the impugned legislation contained sanctions that included fines and possible imprisonment. While manipulative children's advertising exposes society to some harms, those harms are not sufficient to attract the sanction of the criminal law. In the same way, we must consider whether the ban on tobacco advertising is essentially a regulatory matter within provincial competence, or whether tobacco advertising truly constitutes criminal conduct, a public wrong which Parliament is entitled to punish as harmful, socially undesirable conduct violative of public rights and duties.

Sopinka J. in *Morgentaler, supra*, stated that to find a valid exercise of Parliament's criminal law power, the presence of a criminal public purpose or object is pivotal. I agree that criminal law is not frozen in time. Parliament can decriminalize what once was thought criminal, and can also criminalize conduct which was not part of the criminal law at the time of Confederation. I disagree that affinity with a traditional criminal law concern has no part to play in the analysis, whether the conduct proscribed by Parliament has an affinity with a traditional criminal law concern is a starting point in determining whether a particular matter comes within federal criminal competence. Cases such as *Morgentaler, supra*, and *Knox Construction, supra*, demonstrate that courts will often look for

judice grave et important ou qui entraîne pour la sécurité et la santé du public un préjudice grave ou important peut être interdit par le Parlement comme relevant du droit criminel.

202 Par conséquent, les menaces moins graves pour la société et son fonctionnement ne relèvent pas du droit criminel; elles sont toutefois ciblées dans les régimes de réglementation qui ne relèvent pas du droit criminel, soit par le Parlement, soit par les législatures provinciales, selon le sujet que vise le règlement.

203 Dans l'arrêt *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, la Cour a jugé que le règlement relatif à la publicité manipulatrice destinée aux enfants relevait de la compétence de la province même s'il prévoit des sanctions telles des amendes et le risque d'emprisonnement. Si la publicité manipulatrice destinée aux enfants expose la société à certains préjudices, ceux-ci ne sont pas suffisamment graves pour que l'on fasse appel au droit criminel. De la même façon, il nous faut considérer si l'interdiction de la publicité en faveur des produits du tabac est dans son essence un sujet de réglementation qui relève de la compétence provinciale ou si la publicité en faveur des produits du tabac est véritablement un acte criminel, un méfait public que le Parlement a le droit de punir parce qu'il constitue un comportement préjudiciable, socialement indésirable et contraire aux droits et aux devoirs publics.

204 Dans l'arrêt *Morgentaler*, précité, le juge Sopinka a indiqué que, pour qu'un exercice par le Parlement de sa compétence en matière de droit criminel soit valide, l'existence d'un objectif public touchant le droit criminel est primordiale. Je conviens que le droit criminel n'est pas immuable. Le Parlement peut décriminaliser ce qui autrefois était jugé criminel et peut d'autre part criminaliser un comportement qui ne ressortissait pas au droit criminel à l'époque de la Confédération. Je ne peux convenir que l'existence d'une affinité avec une préoccupation traditionnelle du droit criminel ne joue aucun rôle dans l'analyse, puisque la question de savoir si le comportement interdit par le Parlement a une affinité avec une préoccupation traditionnelle du droit criminel est le point de

an affinity with a traditional criminal law concern, or affinity with activities historically recognized as criminal, to determine whether a certain exercise of legislative power falls within the field of criminal law.

départ de l'analyse visant à déterminer si un sujet donné relève de la compétence du Parlement en matière criminelle. Des arrêts comme *Morgentaler* et *Knox Construction*, précités, démontrent que, pour déterminer si un exercice donné du pouvoir de légiférer s'inscrit dans le domaine du droit criminel, les tribunaux chercheront souvent une affinité avec une préoccupation traditionnelle du droit criminel ou une affinité avec des activités qui, dans le passé, ont été reconnues comme étant criminelles.

205 In *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 811, the Court noted that the prohibition on the use of language in and of itself did not have an affinity with some traditional criminal law concern such as morality or public order.

Dans l'arrêt *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790, à la p. 811, la Cour a signalé que l'interdiction relative à l'utilisation en soi d'une langue n'a aucune affinité en soi avec un sujet traditionnel du droit criminel comme la moralité ou l'ordre public.

206 Parliament has the power to make certain kinds of speech criminal, such as sedition and obscenity. These types of speech have an affinity with traditional criminal law concerns. These two examples are not determinative, but demonstrate the presence of a typically criminal public purpose where the speech in question causes serious harm or a serious risk of harm to society. In contrast, it is difficult to see how tobacco advertising causes the same type of harm.

Le Parlement a le pouvoir de qualifier de criminelles certaines formes d'expression, comme la sédition et l'obscénité. Ces formes d'expression ont des affinités avec des préoccupations traditionnelles du droit criminel. Si ces deux exemples ne sont pas déterminants, ils démontrent toutefois l'existence d'un objectif public habituellement reconnu du droit criminel, où l'expression en cause entraîne un préjudice grave ou un risque grave de préjudice à la société. Par contre, il est difficile de voir comment la publicité en faveur des produits du tabac peut causer pareil préjudice.

207 In his reasons, La Forest J. states that the "evil targeted by Parliament is the detrimental health effects caused by tobacco consumption" (para. 30). McLachlin J. writes that "[c]are must be taken not to overstate the objective" (para. 144). I endorse her conclusion that, if the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.

Dans ses motifs, le juge La Forest indique que «le mal visé par le Parlement est l'effet nocif de l'usage du tabac sur la santé» (par. 30). Le juge McLachlin écrit pour sa part qu'«[i]l faut veiller à ne pas surestimer l'objectif» (par. 144). Je partage son avis lorsqu'elle conclut que, si l'on formule l'objectif d'une façon trop large, on risque d'en exagérer l'importance et d'en compromettre l'analyse.

208 The objective of the advertising ban and trade mark usage restrictions, as stated by McLachlin J., is to prevent Canadians from being persuaded by advertising and promotion to use tobacco products.

L'objectif de l'interdiction de publicité et des restrictions à l'usage des marques, ainsi que l'écrit le juge McLachlin, est d'empêcher la population canadienne de se laisser convaincre par la publicité et la promotion de faire usage du tabac. En toute déférence, je ne puis convenir avec le juge

I respectfully disagree with La Forest J. that this type of persuasion constitutes criminal conduct.

Tobacco advertising and promotion may encourage some people to start or to continue to smoke. For that reason, it is viewed by many as an undesirable form of commercial expression. I do not disagree that it may be an undesirable form of expression, but is this undesirability sufficient to make such expression criminal? Does tobacco advertising pose a significant, grave and serious danger to public health? Or does it simply encourage people to consume a legal but harmful product? I cannot agree that the commercial speech at issue poses such a significant, grave and serious danger to public health to fall within the purview of the federal criminal law power. In my opinion, the Act is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of Parliament's criminal law power. Legislation prohibiting all advertising of a product which is both legal and licensed for sale throughout Canada lacks a typically criminal public purpose and is *ultra vires* Parliament under s. 91(27) of the *Constitution Act, 1867*. Such advertising can hardly be considered to be a public wrong involving a violation of public rights and duties to the whole community, the type of conduct that Parliament is entitled to proscribe and punish as harmful and socially undesirable under its criminal law power.

Parliament could have criminalized tobacco use, but has chosen not do so for a variety of reasons. The Act does not directly address the injurious or undesirable effects of tobacco use. La Forest J., in response to this concern, notes that in some circumstances Parliament has criminalized ancillary activities without criminalizing the core activity itself, and that this Court has upheld such measures as a valid exercise of the criminal law power. With respect, the cases cited by La Forest J. — *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (solicitation

La Forest que ce genre de persuasion constitue un comportement criminel.

209 Il se peut que la publicité et la promotion en faveur du tabac incitent certaines personnes à commencer ou à continuer à fumer. Pour cette raison, plusieurs considèrent qu'il s'agit là d'une forme indésirable d'expression commerciale. J'admets qu'il puisse s'agir d'une forme indésirable d'expression, mais est-ce suffisant pour la rendre criminelle? La publicité en faveur du tabac présente-t-elle un risque grave et important pour la santé publique? Ou encourage-t-elle simplement les gens à consommer un produit légal, mais nocif? Je ne peux convenir que le discours commercial en question présente un risque grave et important pour la santé publique au point qu'il est assujetti à la compétence fédérale en matière de droit criminel. À mon avis, la Loi est trop éloignée des effets nocifs ou indésirables de l'utilisation du tabac pour constituer un exercice valide de la compétence du Parlement en matière de droit criminel. Une loi qui interdit toute publicité en faveur d'un produit légal dont la vente est réglementée partout au Canada est dénuée d'un objectif public habituellement reconnu du droit criminel et excède les pouvoirs du Parlement sous le régime du par. 91(27) de la *Loi constitutionnelle de 1867*. On peut difficilement considérer cette publicité comme un méfait public impliquant la violation des droits et des devoirs publics envers la collectivité tout entière, le genre de comportement que le Parlement peut interdire et punir, conformément à sa compétence en matière de droit criminel, parce qu'il est socialement préjudiciable et indésirable.

210 Le Parlement aurait pu criminaliser l'usage du tabac, mais il a choisi de ne pas le faire pour de multiples raisons. La Loi ne vise pas directement les effets nocifs ou indésirables de l'usage du tabac. En réponse à cet argument, le juge La Forest fait remarquer que, dans certaines circonstances, le Parlement a criminalisé des activités secondaires sans criminaliser l'activité principale même, et que notre Cour a confirmé que l'adoption de telles mesures était un exercice valide de la compétence en matière de droit criminel. Avec égards, les arrêts cités par le juge La Forest — *Renvoi relatif à*

for the purposes of prostitution and the operation of bawdy houses) and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (prohibition on assisted suicide) — concern matters which have traditionally been subject to criminal sanctions. Moreover, the "ancillary" activities proscribed in the above two examples pose significant and serious dangers in and of themselves.

211 It is well known that crime often follows in the wake of prostitution and its related activities. It is also well known that assisted suicide can engender all manner of evils, not the least of which is involuntary euthanasia. Hence the criminalization of solicitation of prostitution where prostitution itself is legal, or the criminalization of assisted suicide where suicide itself is legal does not provide a useful analogy to the criminalization of tobacco advertising where tobacco consumption is legal. The fact that the "ancillary" activities in the *Prostitution Reference* and in *Rodriguez* of themselves pose serious risks of harm to society makes the analogy less than compelling.

212 Since Parliament has chosen not to criminalize tobacco use, it is difficult to understand how tobacco advertising can somehow take on the character of criminal activity. The Act does not deal in any way with the regulation or prohibition of dangerous products or drugs. The underlying "evil" of tobacco use which the Act is designed to combat remains perfectly legal. Tobacco advertising is in itself not sufficiently dangerous or harmful to justify criminal sanctions. In my view, it is beyond Parliament's competence to criminalize this type of speech where Parliament has declined to criminalize the underlying activity of tobacco use.

213 On a final note, La Forest J. addressed the exemptions contained within the Act, most notably the exemption for foreign periodicals. He concluded that notwithstanding the exemptions,

l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.), [1990] 1 R.C.S. 1123 (sollicitation à des fins de prostitution et tenue d'une maison de débauche), et *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519 (prohibition de l'aide au suicide) — portent tous deux sur des sujets qui ont toujours fait l'objet de sanctions pénales. En outre, les activités «secondaires» interdites dans les deux exemples qui précèdent comportent en elles-mêmes des dangers graves et importants.

Il est bien connu que la prostitution et les activités qui y sont liées entraînent souvent dans leur sillage une certaine criminalité. Il est également bien connu que l'aide au suicide peut engendrer toutes sortes de maux, dont l'euthanasie involontaire n'est pas le moindre. La criminalisation de la sollicitation à des fins de prostitution lorsque la prostitution même est légale, ou la criminalisation de l'aide au suicide lorsque le suicide même est légal, n'offre donc aucune analogie utile quant à la criminalisation de la publicité en faveur du tabac alors que la consommation du tabac est légale. Le fait que les activités «secondaires» dans le *Renvoi sur la prostitution* et dans l'arrêt *Rodriguez* posent en elles-mêmes des risques graves de préjudice à la société rend l'analogie moins que convaincante.

Puisque le Parlement a choisi de ne pas criminaliser l'usage du tabac, il est difficile de comprendre comment la publicité en faveur du tabac peut d'une quelconque façon revêtir le caractère d'une activité criminelle. La Loi ne porte pas du tout sur la réglementation ou l'interdiction de produits dangereux ou de drogues. Le «mal» sous-jacent à l'usage du tabac que la Loi vise à combattre demeure parfaitement légal. La publicité en faveur du tabac en elle-même n'est pas suffisamment dangereuse ou préjudiciable pour justifier l'existence de sanctions pénales. À mon avis, il ne relève pas de la compétence du Parlement de criminaliser cette forme de discours lorsqu'il a refusé de criminaliser l'activité principale, soit l'usage du tabac.

Enfin, le juge La Forest s'est penché sur les exemptions prévues dans la Loi, plus particulièrement l'exemption concernant les publications étrangères. Il conclut que, nonobstant ces exemp-

tobacco advertising still constitutes criminal law. I disagree. La Forest J. cites a number of cases, such as *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, and *R. v. Furtney*, [1991] 3 S.C.R. 89, for the proposition that exemptions in criminal legislation do not take away from the legislation's criminal character. While exemptions do not necessarily take a statute out of criminal law, broadly based exemptions are a factor which may lead a court to conclude that the proscribed conduct is not truly criminal. Both *Morgentaler* (dealing with abortion) and *Furtney* (dealing with gambling) involved conduct which has traditionally been viewed as criminal. The exemptions could not be described as "broadly based". For example, the *Criminal Code* only allowed abortions to be performed in limited circumstances and under strict conditions and guidelines. While the legislation may not have been applied uniformly at hospitals throughout the country, Parliament could still validly decide that abortion in general was criminal and could only be performed in hospitals in accordance with statutory requirements.

tions, la publicité en faveur du tabac demeure une matière qui relève du droit criminel. Je ne suis pas d'accord. Le juge La Forest cite certains arrêts, dont *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, et *R. c. Furtney*, [1991] 3 R.C.S. 89, pour soutenir que les exemptions prévues dans une loi en matière criminelle ne retirent pas à la loi son caractère criminel. Si les exemptions ne retirent pas nécessairement une loi du cadre criminel, l'existence d'exemptions générales est un facteur qui peut mener un tribunal à conclure que le comportement interdit n'est pas véritablement criminel. Aussi bien l'arrêt *Morgentaler* (concernant l'avortement) que l'arrêt *Furtney* (concernant le jeu) portaient sur un comportement qui a toujours été considéré comme criminel. Les exemptions ne pouvaient être qualifiées de «générales». Ainsi, le *Code criminel* n'autorisait les avortements que s'ils étaient pratiqués dans certaines circonstances et suivant des conditions et des directives strictes. Bien que la loi puisse ne pas avoir été appliquée de façon uniforme dans les hôpitaux du pays, le Parlement pouvait quand même validement décider que l'avortement en général était criminel et ne pouvait être pratiqué que dans les hôpitaux conformément aux exigences prescrites dans la loi.

In *Furtney*, unrestricted and unregulated gambling could be seen as engaging a typically criminal public purpose because of the harm to society that often flows from gambling and its related activities. The fact that properly licensed and regulated gambling, such as bingo, could be exempted from the criminal law did not take away from the criminal public purpose engaged by the general prohibition on gambling. The exemptions discussed in the above two cases are limited in nature and the scope of activities that remained criminalized still engaged a typically criminal public purpose.

214 Dans *Furtney*, on a considéré qu'on pouvait envisager que le jeu non restreint et non réglementé engage un objectif public reconnu du droit criminel en raison du préjudice que le jeu et les activités qui s'y rattachent causent fréquemment à la société. Le fait qu'un jeu valablement réglementé et assujetti à l'obtention d'un permis, par exemple le bingo, puisse être exempté de l'application du droit criminel, ne diminue en rien l'objectif public de droit criminel qui sous-tend l'interdiction générale visant le jeu. Les exemptions analysées dans les deux affaires précitées sont limitées en nature et la portée des activités qui demeurent criminalisées engage toujours un objectif public reconnu du droit criminel.

In these appeals, McLachlin J. notes that despite the advertising ban, 65 percent of the Canadian magazine market will contain tobacco advertisements, given that the ban applies only to Canadian media and not to imported publications. The

215 Dans les présents pourvois, le juge McLachlin signale qu'en dépit de l'interdiction de publicité, 65 pour 100 du marché des revues au Canada contiendra de la publicité en faveur du tabac puisque l'interdiction ne s'applique qu'aux médias cana-

exemptions for advertising cannot be seen as being limited in nature because most Canadians will be exposed to advertising for tobacco products in newspapers, magazines and so forth. It is hard to understand how the respondent on the one hand claims that nothing short of a total ban will accomplish the goal of reducing tobacco consumption while at the same time the Act allows a very significant amount of advertising to enter the country. It is difficult to imagine how tobacco advertising produced by the United States or other countries and distributed in Canada through publications somehow becomes criminal when produced and distributed by Canadians. The broadly based exemptions contained in the Act, combined with the fact that the Act does not engage a typically criminal public purpose, leads to the conclusion that the prohibitions on advertising cannot be upheld as a valid exercise of Parliament's criminal law power.

diens et non aux publications importées au Canada. Les exemptions quant à la publicité ne peuvent être considérées comme étant limitées puisque la plupart des Canadiens seront exposés à la publicité en faveur des produits du tabac dans des journaux, des revues et le reste. Il est difficile de comprendre comment l'intimé peut soutenir d'une part, qu'il faut une interdiction générale, rien de moins, pour réaliser l'objectif qui consiste à réduire la consommation du tabac alors que, d'autre part, la Loi permet qu'une quantité considérable de publicité soit introduite au pays. On peut difficilement imaginer comment la publicité en faveur du tabac produite par les États-Unis ou d'autres pays et distribuée au Canada par voie de publications devient en quelque sorte criminelle lorsqu'elle est produite et distribuée par des Canadiens. L'existence d'exemptions générales prévues dans la Loi, combinée au fait qu'elle ne relève pas d'un objectif public habituellement reconnu du droit criminel, porte à conclure que les interdictions sur la publicité ne peuvent être maintenues à titre d'exercice valide de la compétence du Parlement en matière de droit criminel.

216 The Act, except for s. 9 and its associated provisions relating to mandatory health warnings on tobacco packaging, cannot be upheld as valid criminal legislation. The Act is a regulatory measure aimed at decreasing tobacco consumption. While Parliament's desire to limit tobacco advertising may be desirable, its power to do so cannot be found in s. 91(27) of the *Constitution Act, 1867*.

La Loi, à l'exception de l'art. 9 et de ses dispositions accessoires relatives aux mises en garde obligatoires sur les emballages, ne peut être maintenue comme étant une loi valide en matière criminelle. La Loi est une mesure de réglementation qui vise à diminuer la consommation du tabac. Bien que la volonté du Parlement de restreindre la publicité en faveur du tabac puisse être souhaitable, le par. 91(27) de la *Loi constitutionnelle de 1867* ne lui confère pas le pouvoir de le faire.

217 In the Court of Appeal ((1993), 102 D.L.R. (4th) 289), Brossard J.A. held at p. 352 that the Act fell within the federal parliament's power to legislate for the "peace, order and good government" of Canada as the Act met national dimensions. I agree. Inasmuch as the legislations fails in any event for the reasons of McLachlin J., it is unnecessary to come to any conclusion on this point.

Le juge Brossard de la Cour d'appel ([1993] R.J.Q. 375) a conclu, à la p. 416, que la Loi relevait de la compétence du Parlement de légiférer pour la «paix, l'ordre et le bon gouvernement» du Canada puisqu'elle revêt des dimensions nationales. Toutefois, je suis d'accord que, puisque les dispositions législatives sont de toute façon invalides pour les motifs formulés par le juge McLachlin, il est inutile de tirer quelque conclusion à cet égard.

Appeals allowed, LA FOREST, L'HEUREUX-DUBÉ, GONTHIER *and* CORY JJ. *dissenting. The first*

Pourvois accueillis, les juges LA FOREST, L'HEUREUX-DUBÉ, GONTHIER *et* CORY *sont dissi-*

constitutional question dealing with the legislative competence of Parliament to enact the legislation under the criminal law power or for the peace, order and good government of Canada should be answered in the positive. With respect to the second constitutional question, ss. 4 (re advertising), 8 (re trade mark use) and 9 (re unattributed health warnings) of the Act are inconsistent with the right of freedom of expression as set out in s. 2(b) of the Charter and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would find that they constitute a reasonable limit. Given that ss. 5 (re retail displays) and 6 (re sponsorships) could not be cleanly severed from ss. 4, 8 and 9, all are of no force or effect pursuant to s. 52 of the Constitution Act, 1982.

Solicitors for the appellant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the appellant Imperial Tobacco Ltd.: Ogilvy, Renault, Montreal.

Solicitors for the respondent the Attorney General of Canada: Côté & Ouellet, Montreal.

Solicitor for the mis-en-cause the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitors for the intervener the Heart and Stroke Foundation of Canada: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the intervener the Canadian Cancer Society: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the intervener the Canadian Council on Smoking and Health: Fasken, Campbell, Godfrey, Toronto.

dents. La première question constitutionnelle sur la compétence du Parlement de légiférer en matière de droit criminel ou pour la paix, l'ordre et le bon gouvernement du Canada reçoit une réponse positive. Pour ce qui est de la seconde question constitutionnelle, les art. 4 (la publicité), 8 (les marques) et 9 (les messages non attribués relatifs à la santé) de la Loi sont incompatibles avec le droit à la liberté d'expression garanti à l'al. 2b) de la Charte et n'apportent pas une limite raisonnable à l'exercice de ce droit, dont la justification puisse se démontrer au sens de l'article premier. Les juges La Forest, L'Heureux-Dubé, Gonthier et Cory sont d'avis qu'ils apportent une limite raisonnable. Vu que les art. 5 (commerce au détail) et 6 (parrainage) ne peuvent pas nettement être distingués des art. 4, 8 et 9, ils sont tous inopérants aux termes de l'art. 52 de la Loi constitutionnelle de 1982.

Procureurs de l'appelante RJR-MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de l'appelante Imperial Tobacco Ltd.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé le procureur général du Canada: Côté & Ouellet, Montréal.

Procureur du mis en cause le procureur général du Québec: Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de l'Ontario: Le procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante la Fondation des maladies du cœur du Canada: Fasken, Campbell, Godfrey, Toronto.

Procureurs de l'intervenante la Société canadienne du cancer: Fasken, Campbell, Godfrey, Toronto.

Procureurs de l'intervenant le Conseil canadien sur le tabagisme et la santé: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the intervener the Canadian Medical Association: Fasken, Campbell, Godfrey, Toronto.

Solicitors for the intervener the Canadian Lung Association: Fasken, Campbell, Godfrey, Toronto.

Procureurs de l'intervenante l'Association médicale canadienne: Fasken, Campbell, Godfrey, Toronto.

Procureur de l'intervenante l'Association pulmonaire du Canada: Fasken, Campbell, Godfrey, Toronto.

1953 CarswellNat 237, [1953] Ex. C.R. 287, [1953] C.T.C. 438

1953 CarswellNat 237
Exchequer Court of Canada

Royal Trust Co. v. Minister of National Revenue

1953 CarswellNat 237, [1953] Ex. C.R. 287, [1953] C.T.C. 438

THE ROYAL TRUST COMPANY OF THE CITY OF VANCOUVER, IN THE PROVINCE OF BRITISH COLUMBIA, EXECUTOR OF THE WILL OF ANDREW JACOBSON, and MINISTER OF NATIONAL REVENUE, Respondent

Cameron, J.

Judgment: October 21, 1953

Counsel: *R. D. Plommer*, for the Appellant.
R. V. Prenter, for the Respondent.

Subject: Estates and Trusts; Public; Tax — Miscellaneous

Headnote

Estates --- Estate tax and succession duties — Valuation — Ascertainment of aggregate value — Deductions

Statutes --- Interpretation — Role of court — Language clear

Succession duties — Dominion — Dominion Succession Duty Act, Statutes of Canada 1940-41, c. 14 — Section 11A — Credit in respect of provincial succession duties — Rules of construction.

In this appeal the sole issue was as to the proper interpretation of Section 11A of the *Dominion Succession Duty Act* which granted a right to deduct from the duties otherwise computed under the Act the lesser of:

"(a) The duty or duties payable by him under the laws of any province or provinces in respect of such succession, or

(b) Fifty per centum of the duty otherwise payable by him under this Act in respect of such succession."

The appellant claimed that the amount under (b) is one-half of the total duties payable by each successor under the Act and not limited to assets in his succession which have been taxed by a province as was contended by the respondent.

HELD:

(i) That the phrase "duties otherwise payable under this Act" in paragraph (b) means nothing more than the amount which, but for the provisions of Section 11A, would be payable under the Act;

(ii) That the computation under paragraph (b) is not restricted to that part of the succession on which duty has been paid to a province;

(iii) That the appeal is allowed.

***Cameron, J.*:**

1 This appeal is taken under the provisions of Part VI of the *Dominion Succession Duty Act*, Statutes of Canada, 1940-41, c. 14 as amended.

2 The appellant is the duly appointed executor of the estate of Andrew Jacobson, late of New Denver, British Columbia, who died on November 24, 1950.

3 The gross estate of the deceased amounted to $131,844.77, of which assets situated in the Province of British Columbia totalled $51,952.42. The balance of $79,892.36 was composed of assets situate without the Province of British Columbia and consisted of shares in corporations having their head offices in the Province of Ontario.

4 The liabilities of the deceased amounted to $1,228.92, leaving a net estate of $130,615.86. It is agreed that the total amount of Dominion Succession duties *before taking into consideration the provisions of Section 11A* is $21,390.56.

5 The sole difference between the parties is the construction to be placed on Section 11A, which is as follows:

"Each successor may deduct from the duties otherwise payable by him under this Act in respect of a succession derived from a predecessor dying after the 31st day of December 1946, the lesser of

(a) the duty or duties payable by him under the laws of any province or provinces in respect of such succession, or

(b) fifty per centum of the duty otherwise payable by him under this Act in respect of such succession."

6 No succession duties were payable to the Province of British Columbia on any of the assets in the estate. To the Province of Ontario succession duties aggregating $14,592.90 were paid on the various successions as shown on Ex. 1. In computing the deductions to be allowed the appellant under Section 11A, the respondeat took the position that subsection (b) thereof — namely, 50 per cent of the duty otherwise payable under the Act in respect of such succession — meant only that portion of the Dominion succession duty which was referable to successions which had also been subject to succession duties in a province — in this case, the Province of Ontario. His computation in respect of such successions is shown on Ex. 1. From that statement it will be seen that the Dominion succession duties on the shares of the assets which were taxed also by the Province of Ontario aggregated $13,016.60, 50 per centum of that amount, or $6,508.30, being less than the duties of $14,592.50 paid to the Province of Ontario, the respondent allowed a deduction on that amount, namely, $6,508.30. At the trial, counsel for the Minister took the position that the computation so made was properly made under the provisions of Section 11A.

7 Counsel for the appellant, however, contends that under the clear wording of that section there is no power to make any such computation. He submits that the section requires the Minister to make two computations. First he must ascertain the duty or duties payable by each successor on his succession, to one or more provinces. Then he must ascertain the amount of one-half of the duty otherwise payable by each successor under the *Dominion Succession Duty Act*, and by that he means not the duty payable to the respondent in respect only of assets in his succession which have been taxed by a province, but the total duty payable by him to the respondent in respect of his whole succession, whether or not it has been subjected to tax by a province. Each successor, he says, is then entitled to deduct the lesser of these two amounts from the duties otherwise payable by him under the Act.

8 Ex. 2 is the schedule prepared by counsel for the appellant, and sets out the computation which he says is to be made under Section 11A. It shows that in the case of one beneficiary, no amount of duty was payable to the Province of Ontario, but $255.00 was payable to the respondent. No deduction is claimed in respect of that beneficiary. However, in respect of all other beneficiaries who were liable to any succession duties, the computation under part (b) of Section 11A was less than that under part (a). The total deduction so claimed amounted to $10,440.28. There is no dispute as to the figures contained in Ex. 2, it being admitted that if the appellant's contention is well founded, it is entitled to a deduction of $10,440.28 from the total Dominion duties otherwise payable, of $21,390.56.

9 Section 11A was not a part of the original Act, but was added thereto by Statutes of Canada, 1946, c. 46, Section 2. So far as I am aware, it has not been judicially considered heretofore. In my view, it permits of only one possible interpretation, and that is the one contended for by the appellant. Prior to coming into effect of Section 11A, the duty payable under the Act on a succession was computed with reference to the whole of the property in, or deemed to be included in, a succession; and it was not affected in any way by the fact that the assets in the succession were in one or in several provinces, or that some of such assets had been subjected to provincial succession duties and others had not. The question of provincial succession duties did not enter into the matter at all. The amount so computed under the provisions of the Act in respect of each succession was the duty payable by him under the Act. Now, no change was made in that computation by adding Section 11A to the Act. The duty payable under the other provisions of the Act — or, as it is worded in Section 11A, "the duty otherwise payable by him under the Act" — remained exactly the same. The correct computation of that amount for each succession in this case is shown in Column 2 of Ex. 2, and, as I have said, total $21,390.56. That figure is accepted as correct in paragraph 4 of the Statement of Defence, and while it is there called "Dominion Succession Duty Assessment", there is no doubt in my mind that it is the total of the Dominion duties computed prior to the application of the provisions of Section 11A. All that that section did was

to permit the deduction therefrom of the lesser of (a), the provincial succession duties, or, (b) one-half of the duty otherwise payable by the individual successor under the Act.

10 The phrase "duties otherwise payable under this Act" means nothing more than the amount which, but for the provisions of this section, would be payable under the Act.

11 Were I to give effect to the interpretation placed by counsel for the respondent upon the concluding part of Section 11A, it would be tantamount to striking out of the last line thereof, the words "of such succession" and substituting therefor, "of that part of such succession only as had been subjected to the payment of a provincial succession duty", so that part (b) would then read, "50 per centum of the duty otherwise payable by him under this act in respect of that part of such succession only as had been subjected to the payment of a provincial succession duty".

12 To do so would be to do violence to the very words of the section, which, in my view, are clear and unambiguous.

13 The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention of Parliament which passed them. If the words of the section are themselves clear and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. (*Craies on Statute Law*, 5th Ed., at page 64.)

14 In my opinion the language used in Section 11A is so clear and explicit that it permits of one interpretation only. I can find nothing in part (b) which authorizes the respondent in making the computation therein provided for, to limit that allowance to that part of the succession on which duty has been paid to a province. It relates to the whole of the duty otherwise payable under the Dominion Act.

15 But it is submitted that if part (b) be interpreted in the manner I have indicated, inequities and inequalities may result. But when the words of an Act are plain, the Court will not make any alteration in them because injustice may otherwise be done. In *Warburton v. LoveLand* (1831), 2 D. & C., H. of L. 480 at page 489, it was stated:

> "Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature."

16 Again, in a more recent case, *King Emperor v. Benoari Lal Sarma*, [1945] Law Reports 72, Ind. App. 57 at page 71, Viscount Simon said in the Privy Council:

> "Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used."

17 It may well be that Parliament, in enacting Section 11A, considered that all successions under the Dominion Act would also be subject to duty under a Provincial Succession Duty Act, and therefore made no provision for cases, such as the instant one, in which a substantial part of a number of successions paid no provincial duty. But a statute may not be extended to meet a case for which provision has clearly and undoubtedly not been made.

18 In *London and India Docks v. Thames Steam Tug*, [1909] A.C. 15, Lord Atkinson said at page 23:

> "The intention of the Legislature, however obvious it may be, must, no doubt, in the construction of statutes, be defeated where the language it has chosen to use compels to that result, but only where the language compels to it."

19 Again, in *Attorney-General v. Earl of Selborne*, [1902] 1 K.B. 388, the Master of the Rolls said at page 396:

> "Therefore the Crown fails if the case is not brought within the words of the statute, interpreted according to their natural meaning; and if there is a case which is not covered by the statute so interpreted that can only be cured by legislation, and not by any attempt to construe the statute benevolently in favour of the Crown."

20 I may note here that Section 11A in the form in which I have set it out above was replaced by a new Section 11A by Statutes of Canada, 1952, c. 24, Section 6. It may well be that, as now framed, it would authorize the Minister to treat cases arising after it came into effect in the manner now contended for by his counsel. It is not retroactive, however, and can have no bearing on this case.

21 It appears from the record that the appellant has paid the full amount of the assessment made upon it.

22 For these reasons the appellant must succeed.

23 There will therefore be judgment allowing the appeal and declaring: (a) that the appellant is entitled to deduct from the Dominion duties otherwise payable by it under the Act — namely, the sum of $21,390.56 — the deductions authorized by part (b) of Section 11A as it was in 1950, namely, a total of $10,440.28, the net duty payable by the appellant being therefore $10,950.28; and (b) that the appellant is entitled to be repaid by the respondent the sum of $9,049.72, being the difference between the sum of $20,000.00 paid by it to the respondent and the sum of $10,950.28, being the amount of duty for which it is liable, less, of course, any portion thereof, if any, that may have been refunded to the appellant in the meantime; (c) that the appellant is entitled to the costs of the appeal, after taxation.

Judgment accordingly.

Saskatchewan Court of Appeal

Citation: Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)
Date: 1992-01-02
Docket: File No. 667

Between:
Saskatchewan Action Foundation for the Environment Inc. (appellant/applicant)
and
Grant Milton Hodgins, Minister of the Environment and Public Safety, Saskatchewan (respondent/respondent) and Saskatchewan Power Corp., Souris Basin Development Authority and Saferco Products Inc. (intervenors/intervenors)

Cameron, Wakeling and Sherstobitoff, JJ.A.

Counsel:
H.R. Kloppenburg, Q.C., John Hardy and Ann Hardy, for the appellant
Barry Hornsberger, for the respondent Minister of Environment and Public Safety
L. Leblanc and L. Andrychuk, for the respondent Saferco Products Inc.
R.G. Kennedy, for the respondent Souris Basin Development Authority

[1] Sherstobitoff, J.A.: The main issue in this appeal is whether and to what extent members of the public have a right of access to documents in the possession of the Minister of the Environment and Public Safety, Saskatchewan, documents related to projects or developments which have undergone, or are undergoing, or are liable to undergo, assessment under the provisions of the *Environmental Assessment Act*, S.S. 1979-80, c. E-10.1.

[2] The appeal, taken by the Saskatchewan Action Foundation for the Environment Inc. ("SAFE") is from a decision in the Court of Queen's Bench dismissing an application by SAFE for an order in the nature of mandamus compelling the Minister of the Environment and Public Safety for Saskatchewan (the "Minister") to produce for public inspection all documents in his possession relating to each of four major projects which are at various stages of advancement: the Rafferty-Alameda Dam Project ("Rafferty-Alameda"), the Island Falls Dam Construction Project ("Island Falls"), the Meadow Lake Pulp Mill Project ("Meadpulp") and the Saferco Fertilizer Plant Project ("Saferco").

[3] In addition to the main issue, the appeal raises issues of standing, remedy, timeliness, and mootness.

The Facts

[4] SAFE is a nonprofit corporation established under the *Non-Profit Corporations Act*, S.S. 1979, c. N-4.1. It was established to promote the protection of the environment

through the taking of whatever lawful action it might see fit. One of SAFE'S major objectives is to promote proper environmental assessment including full disclosure by government and business in such a way that the public will be included in the decisionmaking process. Included in its membership are a number of provincial and national environmental organizations as well as individual members who are concerned about the environment.

[5] On March 29, 1990, Mr. R. MacDonald, a director of SAFE, wrote to the Minister demanding the production of all documents in the possession of the Minister relating to the Rafferty-Alameda, Island Falls, Meadpulp and Saferco projects. On receiving no reply, a second letter reiterating the demand, dated April 30, 1990, was sent. There was no response to these demands.

[6] By Notice of Motion dated May 28, 1990, SAFE applied for an order compelling the Minister to produce the documents it had demanded. On June 19, 1990, the Minister issued an order ("the Minister's first order"), purportedly pursuant to section 7 of the *Environmental Assessment Act.* In effect, the order barred disclosure to SAFE, or any other party, of the documents and information sought by the motion. The motion came before the chambers judge on June 28, 1990, who adjourned it to August 8, 1990.

[7] On August 1, 1990, a second order was issued by the Minister ("the Minister's second Order") pursuant to the *Act.* It provided that, with certain exceptions, the documents with respect to Island Falls and Saferco would be released for public inspection. Copies of both orders by the Minister had been filed in court and were served earlier on counsel for SAFE.

[8] The motion was later argued and the decision dismissing the application was made on August 23, 1990.

The Issues As Defined By The Parties

[9] The appellant says that it is entitled to an order compelling the Minister to make full disclosure of all documents and information relating to the four projects which have been subject, to varying extents, to the environmental assessment process prescribed by the *Act.* The appellant supports its claim on two footings.

[10] First, SAFE argues that since the Minister neither claimed nor demonstrated that the documents at issue enjoy public interest immunity, they are subject to disclosure and production just as they would be in a civil action against the Crown. The argument relies on case law which has severely limited Crown privilege, now termed public interest immunity, on the basis of protecting the public's interest in litigation. The appellant claims, by way of analogy, that the courts should take the same approach in cases such as this one where, as yet, no action has been commenced.

[11] Second, the appellant argues that its right to production and disclosure is

contemplated in the *Environmental Assessment Act* itself. SAFE claims that under the broad definition of "person" stated in the *Act*, any resident of the province, including any corporate resident, is entitled to be granted access to all documents and information related to the environmental review process under the *Act.*

[12] The positions of the respondents are various. They can be summarized in this way. First, the appellant has no right, either at common law or under the statute, to disclosure of documents or information except as specifically provided for by s. 11(2) of the *Act.* Second, the *Act* does not create private rights, only public rights, and accordingly the appellant has no locus standi to bring any action, let alone this application which was brought without any action having been commenced. Third, that mandamus does not lie. And fourth, that the matter is moot and the application untimely.

[13] Since the *Environmental Assessment Act* lies at the centre of the dispute, it will be appropriate to begin with a review of the statute, its origin, purpose and scheme, and those of its enacting parts as are in issue.

Historical And Present Day Context Of The Act

[14] To determine the purpose of the *Act*, it is useful to consider its history and present day standing. These may be gleaned from a recent review of the legislation done at the request of the Minister.

[15] By ministerial order made on August 9, 1990, the Minister appointed a Commission, the Saskatchewan Environmental Assessment Review Commission, to review the *Environmental Assessment Act* and the current Saskatchewan Environmental Assessment and Review process. He requested recommendations for changes to the legislation and the process, asked for the background and rationale for each suggestion, and suggested that a report be submitted as early as possible in the new year. The Commission submitted its report to the Minister under cover of letter dated February 27, 1991.

[16] The report of the Commission, entitled "Environmental Challenges, the Report of the Saskatchewan Environmental Assessment Review Commission" sets out the historical context of environmental legislation in Saskatchewan as follows at (pp. 7-8):

> "Environmental law in Canada, and more particularly, Saskatchewan, has passed through a series of stages (Estrin, 1972) since it emerged as a unique area of the law in the late 1950's. Canadians first recognized the seriousness of problems of environmental degradation in the late '50s and early '60s. Their immediate response to solve such problems as air and water pollution was to stop the offending activity by law, restore the damaged resource and then prevent further degradation by licensing 'acceptable levels' of discharge. On an issue by issue, often crisis by crisis basis, society responded to growing environmental problems. Between 1956 and 1970, every province in Canada adopted two or more

environmental statutes.

"The second stage in Canadian environmental law was to address the increasing body of environmental legislation in a more comprehensive manner. Some provinces simply compiled the statutes which had been passed to date, while others, including Saskatchewan, established a department within Government to protect and promote environmental concerns.

"Despite these efforts, environmental law failed to meet the growing challenge of environmental protection. Problems continued to emerge and issues outpaced laws. A new approach to environmental protection was essential: a pro-active rather than reactive approach, to prevent environmental problems, rather than just trying to clean them up.

"In seeking a solution, Canada turned to the United States and the *National Environmental Policy Act* of 1969. This *Act* introduced environmental assessment to North America. It was not long before Canada tested EA for itself. In 1973 the Federal Government, pursuant to an earlier Cabinet Directive, introduced the Environmental Assessment Review Process (EARP). Saskatchewan kept pace with national activities, and, in 1976, the provincial government introduced its own environmental assessment policy and created the Environmental Assessment Branch.

"Environmental assessment was originally intended as a planning tool. It was designed to describe and evaluate all possible environmental impacts of a proposed action before irreversible decisions regarding the future of the proposal were made.

"It seemed, if not a panacea, at least a reasonable response to many of the shortcomings in environmental protection to date. With EA, the government could predict, mitigate and prevent environmental degradation -- a new approach which could lessen the impact before-the-fact.

"Environmental assessment offered many other advantages over the previous approach to environmental protection. Consulting and involving the public was considered fundamental to its efficiency. The definition of 'environment' was expanded to include social and economic considerations. Each proposal would be assessed, and state-of-the-art technology could be demanded to ensure the environment was protected.

"Initial attempts at using the EA process were encouraging. The results seemed to ensure Saskatchewan's future well-being. Some 50 full environmental impact assessments (EIAs) were undertaken between 1976 and 1980, including the Key Lake Mine and the Nipawin Hydro Project assessments. Four were not approved; a number were deferred by the proponent. The success of these assessments prompted the *Environmental Assessment Act* to be passed in 1980 -- an *Act* which

remains virtually unchanged today. Environmental Assessment now has the full force of law.

"Since the passage of that legislation, approximately 636 projects have been screened through the process and 80 have required full EIAs. (See Appendix II for more information). Of those projects, all but two have been given Ministerial approval to proceed, or to proceed subject to conditions. As well, only on one EIA (Rafferty-Alameda dams project) did the Minister deem it necessary to establish a Board of Inquiry."

[17] As to the present-day situation, the Commission said at pp. 2-3:

"Environmental assessment (EA) has been law in Saskatchewan for almost 11 years. When the *Act* was first proclaimed, lawmakers were justifiably proud of this statute which set the standard for EA legislation across the country. But since then, the promise of the *Environmental Assessment Act* has failed to meet, or keep up with, the environmental expectations of the public.

"The reasons for this are many and address the shortcomings of both the procedure and content of the present legislation and practice. Concerns range from assessing policy to stakeholder funding; from scope of the process to confidentiality of information. All are legitimate issues and warrant our specific attention.

"These individual issues aside, the real justification for the Commission was simply that it was time to review the EA statute and practice. …

"The other driving force behind EA reform was the will of the public. The level of concern and commitment to the environment has dramatically increased over the past 11 years. The people of Saskatchewan appreciate their natural environment and have consistently supported initiatives to protect and preserve the province's natural resources. When environmental concerns are overlooked or not given the priority they deserve, the majority now demand to know why. The public has come to expect that their own commitment will be reflected in the executive decision-making of their elected representatives.

"As people are becoming more environmentally aware, they are scrutinizing planning processes like environmental assessment more rigourously. The public recognizes that, without such safeguards, their vested interest in a sustainable future may well be jeopardized."

[18] The report made recommendations for sweeping changes in the environmental review process, and the legislation authorizing it. While these recommendations are, strictly speaking, not relevant to these proceedings, it is worth noting that the recommendations do address the very issues raised by this case.

[19] In very general terms, the Commission recommended that administration of the

legislation be put into the hands of a body independent of the government, to be named the Environmental Assessment Commission. The formal recommendation as to public participation is as follows:

> "7.1 The public must have standing at a number of points in the EA process. Public participation must not only be encouraged, but must be guaranteed by the *EA Act."*

As to disclosure of information, the recommendations were as follows:

> "7.13 All information pertaining to a proponent's request for confidentiality must be forwarded to the EAC at the earliest possible opportunity in the EA process. The EAC will determine if it is confidential and should be withheld from the public.
>
> "7.14 In the event a full EIA is necessary, proponents shall completely disclose all information related to the environmental impacts of their proposed activity to the ARC. [Activity Review Committee established by the EAC]"

The only concern of the report was to protect confidentiality when demanded by a proponent for commercial or technical reasons such as when necessary to protect secret processes which permit a continued advantage over competitors in their industry, etc. Otherwise, the report assumed that all information should be made public.

The Purposes Of The Act

[20] The purpose of the *Act* is three-fold.

[21] Its first purpose is to ensure that there are adequate and acceptable safeguards and protections for the environment in respect of all new developments within the Province. A "development" is defined, in s. 2(d) of the *Act*, as:

> "… any project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to:
>
> (i) have an affect [sic] on any unique, rare or endangered feature of the environment;
>
> (ii) substantially utilize any provincial resource and in so doing pre-empt the use, or potential use, of that resource for any other purpose;
>
> (iii) cause the emission of any pollutants or create byproducts, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
>
> (iv) cause widespread public concern because of potential environmental

changes;

(v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or

(vi) have significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment."

"Environment", for the purposes of the environmental assessment process, is defined in s. 2(e) as:

"(i) air, land and water;

"(ii) plant and animal life, including man; and

"(iii) the social, economic and cultural conditions that influence the life of man or a community insofar as they are related to the matters described in subclauses (i) and (ii)."

[22] The *Act*, therefore, is broadly based. Its breadth can be noted further by the fact that the *Act* "binds the Crown" (s. 3), making the Crown as equally subject to its reach as are members of the general public. As well, developments may be exempted from the *Act's* application only the Lieutenant Governor-in-Council, and then only in the case of an emergency (s. 4).

[23] Its second purpose is to ensure that there will be someone, with adequate powers, to oversee the protection of the environment. The watchdog role is assigned to the Minister. His office is given specific powers with regard to conducting research and studies, gathering, publishing and disseminating information, appointing committees, and making any tests and examinations "for the purpose of administering and enforcing this Act" (s. 5). Before a "proponent", the person intending to undertake a development, can proceed, approval from the Minister must be obtained. Subsection 8(1) reads as follows:

"8(1) Notwithstanding the requirements of any other Act, regulation or bylaw relating to any licence, permit, approval, permission or consent, a proponent shall obtain ministerial approval to proceed with a development, and no person shall proceed with a development until he has received ministerial approval."

The Minister can impose terms and conditions on any approval given or may refuse approval altogether:

"15(1) Where the minister is satisfied that a proponent has met all the requirements of this Act, he shall, within a reasonable time after making his decision:

(a) give ministerial approval to proceed with the development and may impose

any terms and conditions that he considers necessary or advisable; or

(b) refuse to approve the development."

If approval is made subject to terms and conditions, those must be strictly adhered to:

"17. No person shall proceed with a development for which he has received ministerial approval, except in accordance with the terms and conditions of the ministerial approval."

[24] Where a proponent of a development which is lawfully proceeding intends to make a change which is not in conformity with the terms and conditions contained in the Minister's initial approval, further approval must be obtained with respect to the change. Section 16(2) and (3) state:

"16(2) Where the minister has received notice of a proposed change, he shall:

(a) give ministerial approval of the proposed change and may impose any terms and conditions that he considers advisable;

(b) refuse to approve the change in the development; or

(c) direct the proponent to seek approval for the proposed change in the manner prescribed in sections 9 to 15.

"(3) No person shall proceed with a change in a development until he has been given ministerial approval to proceed."

[25] If a development is proceeding in violation of the *Act*, either without ministerial approval or in disregard of any terms and conditions imposed, the Minister may seek redress in the Court of Queen's Bench in the form of injunctive relief (s. 18). The Minister may also conduct his own investigation in order to determine, should a suspicion be raised, whether the terms and conditions of ministerial approval are being complied with (s. 19). Persons acting in contravention of the requirements of the *Act* are subject to prosecution and are liable on summary conviction to a fine of up to $5,000 or more, if the offence continues (s. 21).

[26] The third purpose of the *Act* is to engage the public in ensuring environmental protection. The *Act* provides a mechanism whereby the members of the public can actively participate in the process of identifying and evaluating the environmental issues surrounding proposed developments within the Province. Theoretically, any person can work jointly with proponents and authorities in order to reduce any potential risks. A "person" under the *Act* includes:

"2(j) … a body corporate or other legal entity, an unincorporated association, partnership or other organization, a municipality and the Crown, a Crown corporation or an agency of the Crown."

The *Act* requires that environmental impact statements submitted by proponents of developments to the Minister, and the subsequent departmental reviews, be available for "public inspection" (s. 11). It further provides that "any person" may, following that inspection, submit written comments within a 30-day period (s. 12). The concept of meaningful public involvement is fundamental to the entire process.

The Scheme Of The Act

[27] Section 9(1) of the *Environmental Assessment Act* provides that:

> "9(1) The proponent of a development shall, in accordance with the regulations:
>
> (a) conduct an environmental impact assessment of the developments; and
>
> (b) prepare and submit to the minister an environmental impact statement relating to the development."

[28] To date, no regulations have been enacted, although, by s. 27, the lieutenant Governor-in-Council is empowered to enact regulations respecting any requirement relating to an assessment or a statement (subsection (a)) and specifying the grounds on which the Minister may withhold or limit disclosure of any information, matter or document relating to a development (subsection (e)). As a matter of policy, the department screens project proposals to determine whether or not ministerial approval under the *Act* will be required for a particular project. If the screening indicates that approval will be required, in other words, that the project proposal is a "development" as defined by the *Act*, then s. 9(1) applies.

[29] Section 10 requires the Minister, on becoming aware that an environmental impact assessment is about to be conducted, to give public notice of it.

[30] Once the Minister receives an environmental impact statement, he and the department must conduct a review, and when finished, must make the review, as well as the statement, available to the public. Section 11(1) and (2) of the Act read as follows:

> "11(1) The minister shall cause a review to be prepared of each statement that he receives.
>
> "(2) When the review mentioned in subsection (1) is completed, the minister shall:
>
> (a) make the statement and review available for public inspection: and
>
> (b) give notice, in the manner prescribed in the regulations, of the locations at which the statement and the review may be inspected, and may prescribe any conditions relating to the inspection that he considers appropriate." (emphasis added)

This section imposes two duties on the Minister, duties which are owed to the public in general within the province. Since the Minister is bound to carry out those duties, it follows that any person, as a member of the public, may, as of right, have access to the environmental impact statement and the documents making up the review of it for inspection.

[31] A third and related duty imposed on the Minister becomes apparent when s. 11(2) is read in conjunction with s. 7 of the *Act.* Section 7 states:

> "7. Where, in the opinion of the minister, it is in the public interest or in the interest of any person, the minister may, subject to the regulations, withhold or limit production, public inspection or discovery of any information or document that relates to a development, other than any information or document that relates to pollutants, public health or human safety."

Since "review" under s. 11 is unqualified in any way, it must be taken in its broadest sense to mean that anything that underlies it, any information or documents relating to a development in the possession of the Minister, must be made available for public inspection. Section 7 confirms that view in that it allows for only one exemption from public inspection or discovery of information or documents relating to a development, that being nondisclosure in specific instances when it is in the public interest. The section goes on, however, to limit the exemption. Information or documents relating to pollutants, public health, or human safety cannot, under any circumstances, be withheld. Therefore, when making an EIS and the subsequent, required review available for public inspection, the Minister must not, by law, withhold or limit production of <u>any</u> documents unless it is done in the general public interest.

[32] Under s. 12, any "person" may:

> "(a) inspect a statement and review that is available for public inspection pursuant to subsection 11(2);
>
> "(b) make a written submission to the minister within 30 days from the date when the minister first gives notice pursuant to subsection 11(2), or, if the minister considers it appropriate, within an additional period of 30 days."

[33] To clarify, it is well to stop and examine this stage in the assessment and review process, whereby the Minister will now have received all the relevant and required documentation and information from the proponent. At this point the Minister will have heard the proponent's side of the issue as to whether ministerial approval to proceed with the development under s. 15 should be granted or not: the project and the existing environmental conditions will have been described, the potential effects on the environment will have been evaluated, and the steps that the proponent will need to mitigate any adverse effects will have been outlined.

[34] Given that one of the purposes of the *Act* is to put the Minister in the position of

a regulator, manager or watchdog for environmental concerns within the Province, it is therefore incumbent upon him to hear both sides of the issue, not only the side of a proponent, but also that of any opponent. Section 12(b) of the *Act* empowers "any person", any member of the public, to oppose a potential development. Therefore, by implication, under the provisions of the legislation, the Minister must hear and take into account all views, including those opposed to the grant of ministerial approval.

[35] Sections 13 and 14 of the *Act* further reinforce the view that there must be meaningful public input into the process. These sections allow the Minister, prior to making his final decision, to hold an information meeting (s. 13(a)) and to require the proponent to make experts available at that public meeting (s. 13(b)). The Minister also has the option of appointing a Board of Inquiry, the terms of reference to be set by the Minister. An inquiry provides the means by which to further assess the probable implications of proceeding with a proposed development by, at least in part, soliciting additional public comment (s. 14). When a ministerial decision is finally made at the completion of the assessment process, notice of the decision and written reasons must go to "both sides", the proponent and the identified opponents of a proposed development (s. 15(2)).

[36] The provisions of the *Act* are unequivocal in their meaning: only after receiving public input on any proposed development can the Minister make the decision that he is required by law to make. The scheme of the *Environmental Assessment Act* is unmistakably adversarial; it allows for a proponent, and for an opponent or opponents; and the Minister, as decision maker, is placed squarely in between.

[37] Public consultation and informed debate have been made an integral part of the environmental assessment process with a view not only to decision-making which is more environmentally sound, but also that which is more publicly acceptable. Such informed public participation is possible only if all participants are given full access to all available information except that specifically exempted by statutory authority.

[38] Public participation in the process is all the more important because the Government of Saskatchewan may have an interest, direct or indirect, in the advancement of a development, or developments, as it does in this case. Accordingly, the Minister, being the person charged under the *Act* with granting approval, and at the same time being a member of the Government, is placed in a position of potential conflict. Public participation in the process is important to avoid the appearance of partiality.

The Right To Disclosure And The Duty To Disclose

[39] In light of the foregoing the appellant's position on the main issue, so far as its position is founded in statute, is well taken: there exists generally a statutory right in persons to obtain disclosure, and a corresponding duty in the Minister to make disclosure, of all documents and information in his possession relating to a development. Only when it is not "in the public interest or in the interest of any

person" within the meaning of s. 7 of the *Act*, does the right and the corresponding duty not exist.

[40] On this view of the statute it is unnecessary to consider the appellant's contention that the common law is to the same effect.

Locus Standi

[41] When ss. 11, 12, 2(j) and 7 are read together, the issue of the appellant's "standing" in these proceedings, or its "status" under the *Act* -- really one and the same question -- is resolved. The appellant has status since the very nature and purpose of the legislation is to allow for public consultation following a required EIA and review.

[42] The many authorities referred to by the respondents for the proposition that the appellant has no locus standi as a private person seeking to enforce a public right are simply irrelevant in this case. First, although the judge below did not specifically deal with the issue of standing, it is evident that he granted standing to the appellant since he dealt with the application on its merits. There was no appeal by the respondents against that decision. Secondly, this is not a case of a private citizen seeking to enforce a public right. It is a case of a statute which confers upon the Minister a duty to make disclosure of certain documents and information to any member of the public who seeks access to that information and which confers upon members of the public the right to those documents and information. The holder of the right, in this case, the appellant SAFE, has status to enforce the corresponding duty.

Remedy Of Mandamus

[43] Mandamus is a discretionary remedy which compels the performance of a statutory duty owed to an applicant. The appellant claims that mandamus should be available to it in this case in order that SAFE, a member of the public and a "person" as defined by the *Act*, may have access, a right given to it under the *Act*, to certain documents and information relating to developments affecting the environment in this Province.

[44] In light of the duties which the *Act* imposes on the Minister -- the duty to do a review of an EIS, to make the review available for public inspection, and further, to make all the documents forming the review available, subject to limited exception in specific cases -- viewed within the context of the purpose and scheme of the *Act*, mandamus is a remedy which is available to the appellant in this case.

Mootness

[45] The four projects for which SAFE is demanding access to documents are at varying stages of completion.

[46] Rafferty-Alameda is a southeastern Saskatchewan dam project. The Souris Basin Development Authority ("SBDA"), an intervenor in the matter before the Court, is the Crown Corporation which has been responsible for the project's development. As of this date, the Rafferty Dam is completed and the Alameda Dam is under construction. The SBDA carried out the required procedures under the *Environmental Assessment Act* in 1987. As a result, Rafferty-Alameda was found to be a "development" and the EIS and the subsequent review by the Minister were made available to the public at that time. In addition, the Minister, acting pursuant to s. 14 of the *Act*, appointed the Rafferty-Alameda Board of Inquiry which provided for further public involvement. The SBDA received ministerial authorization to proceed with construction on February 15, 1988. This project has been, and continues to be, the subject of other litigation in both provincial and federal courts. The documents filed with the Minister during the assessment process are on record in the other litigation. In the Minister's view, Rafferty-Alameda is a completed transaction and all relevant documents have been disclosed.

[47] Island Falls, a second project involving construction of a dam, was announced by the Saskatchewan Power Corporation, the project's proponent, in September 1989. The dam was to be located at the Island Falls hydro station, replacing the existing dam near Sandy Bay in northeastern Saskatchewan. However, in February 1990, SaskPower decided not to proceed with the project, but instead to make certain repairs which will serve to maintain the present structure. The department originally had determined that the project did not require ministerial approval as it was not a new development according to the *Act's* definition. There seems to be little happening with regard to this project and counsel for the appellant is satisfied with the disclosure made of documents relating to Island Falls. SaskPower did not appear or make representations in this Court.

[48] According to the affidavit evidence of Mr. MacDonald, a director of the appellant, the Meadpulp project is a development within the meaning of the *Act* and is therefore subject to the *Act.* While this project is still in issue, no information as to its current status has been given to the Court. The appellant's counsel indicated that his understanding was that some components of the construction of the project had been commenced. Meadpulp originally applied for intervenor status in these proceedings. However, the application was later withdrawn.

[49] Saferco Products Inc. is an intervenor in these proceedings and is the proponent for Saferco, the fourth project at issue. Incorporated in 1988, the principal shareholders of the corporation are Cargill Limited/Cargill Limitée, CIC Industrial Interests Ltd. (Crown Investments Corporation of Saskatchewan) and CMB Fertilizers Ltd. Saferco is a nitrogen fertilizer manufacturing plant currently under construction near Belle Plaine. In October 1988 Saferco submitted a draft of a project proposal to the Minister in compliance with the department's environmental assessment process. In May of 1989 the Government of Saskatchewan and Cargill announced their intention to build the plant. Later that year, in August, Saferco submitted a final project proposal to the Minister which was subsequently reviewed by an Environmental Assessment Review Panel. Saferco was notified by the

Minister in September 1989 that it could proceed with the project without further compliance with the *Act* since it had been determined that Saferco was not a "development" and, therefore, was not required to obtain the approval of the Minister under s. 15 of the *Act.*

[50] Following the commencement of these proceedings the Minister and Saferco made an agreement whereby Saferco agreed to carry out a full EIS for the project while being allowed to continue on with construction. The Minister, on June 1, 1990, made available to the public some of the documents relating to the review of the proposals which had been conducted earlier. Saferco submitted an "Updated Project Proposal" for the Belle Plaine plant to the Minister in July 1990, pursuant to their May 1990 agreement.

[51] Saferco has now been given ministerial approval to proceed under s. 15(1)(a) of the *Act.* The full EIS submitted by Saferco and the review which followed were made available to the public in compliance with the *Act.* The Minister now contends that pursuant to the Minister's second order of August 1, 1990, every relevant document with respect to Saferco has been disclosed and is available for inspection with the exception of 11 identified documents containing confidential proprietary information. In respect of those materials, it is claimed that they contain information concerning processes developed by third parties who have a right to protection because the processes are not as yet within the public domain.

[52] The Minister's position as to what documents should be disclosed with respect to each project may be derived from four ministerial orders issued by him since June 19, 1990.

[53] The Minister's first order held that all documents with respect to Rafferty-Alameda and Meadpulp, except those relating to pollution, public health or human safety as per s. 7 of the *Act*, would be withheld from SAFE or any other party. It also stated that neither Island Falls nor Saferco were developments, thereby avoiding any need for an EIA and review and the subsequent disclosure of those documents under the *Act.* The order further stated that should Island Falls and Saferco be held to be "developments", all documents, with the above exceptions, would, nonetheless, be withheld.

[54] The Minister's second order essentially reversed the first in respect of disclosure of Island Falls and Saferco documentation. All information and documentation in the case of Island Falls would be made available except for three categories which are of no consequence to this appeal. Regarding Saferco, all documents were to be made public with 11 named exceptions, each containing confidential proprietary information.

[55] Two additional ministerial orders followed. The third acknowledged the May 28, 1990, agreement made between the Minister and Saferco and the disclosure that ensued, discussed above, and stated that ministerial approval had been given for Saferco to proceed. By his fourth order, the Minister amended the second order to

the effect that the production of documents ordered for Island Falls and Saferco included all the information or documents which were within the Minister's possession. In light of the Minister's orders, as well as the production of information and documents made by him as required during the assessment process, the respondents submit that the appellant's application is moot in that there is no longer "a live controversy or concrete dispute".

[56] The appellant, however, does not accept the Minister's position that full disclosure has taken place. Nor does it accept the conclusion reached by the chambers judge that SAFE did not put in issue the Minister's right to withhold disclosure of proprietary information with regard to Saferco. SAFE claims that its view and understanding of "proprietary information" may be very different from that of the Minister. SAFE further claims that the Minister's "certified" full disclosure on the Saferco project is, in reality, something less, since on analysis, a number of "gaps" have been revealed, likely denoting the existence of other, as yet, undisclosed files and documents. The appellant opines that this demonstrated inadequacy of the disclosure with regard to Saferco puts the Minister's purported disclosure in respect of the other three projects in serious doubt.

[57] It is apparent that there is a serious lack of trust between the parties. Although the appellant did not claim lack of partiality on the part of the Minister, it obviously mistrusts the Minister and the Department because the Government, of which it is a part, has an interest in each of the projects which are the subject of this application. On the other hand, the Minister and Saferco accuse SAFE of improper motives in bringing these proceedings because it has received financial contributions from a lobby group of other nitrogen fertilizer manufacturers opposed to construction of the Saferco plant. These are but two examples of the almost overt hostility that prevails amongst the parties. In light of the foregoing, the matter may or may not be moot, depending on whether the Minister has in fact made full disclosure. In the atmosphere of mistrust that prevails, it is appropriate to require the Minister to file an affidavit verifying his complete and full disclosure of the information and documents contemplated by the *Act* with regard to the four identified projects.

The Application Of The Act To The Island Falls & Saferco Projects

[58] The Minister has taken the position that the *Environmental Assessment Act* does not apply with respect to these two projects. As discussed in detail earlier, both the projects were initially determined not to be developments within the definition in s. 2(j) of the *Act.*

[59] SAFE has acknowledged its satisfaction with the production of documents regarding Island Falls, and the issue of the determination of that project as not falling within the *Act* has not been placed before this Court.

[60] As for Saferco, although the project has now undergone the assessment and review process, has been held to have met the statutory requirements of the *Act*, and has been given ministerial approval to proceed, its proponent argues that the

development/no development determination is the responsibility of the Minister and his department alone. It further claims that if the decision is reviewable at all in a court of law, it is reviewable only on jurisdictional grounds.

[61] Their arguments are as follows: while the appellant's application is, on its face, seemingly directed to the production of documents pursuant to s. 7 et seq. of the *Act*, it is really an attempt to procure a judicial determination that Saferco is a development as defined by the *Act.* It claims that the remedy of mandamus is inappropriate and should not be made available where an appellant, as in this case, is attempting to conduct a collateral attack on a decision of the Minister made by him under authority of the *Act.*

[62] Although the Minister and Saferco say that s. 7 of the *Act* does not impose a positive duty of disclosure on the Minister, they reason that if the section did impose or confirm the existence of such a duty, thus making the Minister subject to mandamus, the duty would only arise in relation to a "development". Since the Saferco plant was originally determined not to be a development, and the Minister has not conceded that an error was made in holding that view, then, under these circumstances, mandamus is not appropriate and does not lie.

[63] Offered in support of the claim against the availability of mandamus is the administrative law principle that in supervising the exercise of a power by the Minister under the authority of the *Act*, the court cannot exercise an appellate jurisdiction or substitute its own opinion on the merits of the issue for that of the tribunal.

[64] In support of that proposition they cite *Shiell v. Amok Ltd. et al.* (1988), 58 Sask.R. 141; 27 Admin. L.R. 1 (Sask. Q.B.) and *Association of Stop Construction of Rafferty Alameda Project Inc. v. Saskatchewan* (1988), 68 Sask.R. 52 (Sask. Q.B.). Those cases involved attacks on decisions made by the Minister under the *Act*, in the first case, giving ministerial approval to proposed changes in a project under s. 16(2) of the *Act* and, in the other case, giving ministerial approval to proceed with the development under s. 15(1)(a) of the Act. The Court in each case held that the Minister had made a decision authorized by the *Act* and that his decision was subject to judicial review only on very limited grounds. The decisions under attack were decisions which the *Act* specifically authorized the Minister to make.

[65] These judgments did not address the issue presently before us, that is, whether or not the Minister has power under the *Act* to decide, so as to bind the parties concerned, whether a project is a development within the meaning of the *Act.*

[66] The respondents say that the power to do so on the part of the Minister is found by necessary inference from the provisions of s. 8(1) of the *Act* which requires that a proponent obtain Ministerial approval to proceed with the development before doing so. They say that before the Minister can make a decision as to whether to grant approval or not, he must make a decision as to whether or not the project is a development. Unfortunately, the *Act* is silent on the issue. While the *Act* explicitly

authorizes the Minister to make a decision, in the case of a development, as to whether to grant authorization to proceed or not, it does not explicitly grant the power to determine whether or not a project is a development. And that decision is of great importance. If the Minister has the power suggested by the respondents, he has the power to exempt any project from the application of the *Act.*

[67] An examination of the rest of the *Act* does not support the position taken by the respondents. Section 5, which outlines the powers of the Minister for the purpose of administering and enforcing the *Act* and the regulations, is silent as to decision-making powers with respect to the question of what constitutes a development under the *Act.* Under s. 27 of the *Act*, the Lieutenant Governor-in-Council may make regulations with respect to certain matters, but the enumerated matters do not deal with the question of what constitutes a development under the *Act.* Furthermore, no regulations have been enacted.

[68] Section 4 of the *Act* which permits the Lieutenant Governor-in-Council, in the case of an emergency, to exempt any development, any class of developments, or any proponent from the application of all or any part of the *Act* or the regulations, does not support the position of the respondents. The section would be superfluous if the Minister had power under s. 8(1) to determine that any project was not a development within the meaning of the *Act.*

[69] Nor do the enforcement provisions of the *Act* support the position of the respondents. Section 18 permits the Minister to apply to the Court of Queen's Bench for an order enjoining any person from proceeding with a development contrary to the Act. Section 21 makes any person who contravenes s. 8(1) guilty of an offence and liable on summary conviction to a fine of not more than $5,000 and in the case of a continuing offence to a further fine of not more than $1,000 for each day during which the offence continues. Section 23 renders any person who proceeds with a development for which ministerial approval is required without being given ministerial approval or being exempted under s. 4 liable to any person who suffers loss, damage or injury as a result of the development without proof of negligence or intention to inflict loss, damage or injury. Under each of these enforcement provisions a court would have to determine whether or not there was a development within the meaning of the *Act.* There is no provision that a determination of the question by the Minister under the provisions of s. 8(1) would be binding on the Court or conclusive of the question. In the absence of such a provision, the legislators must be deemed to have left the question, in the case of a dispute, to be determined by the courts.

[70] All of the foregoing indicates that the issue of development or no development, in the case of a dispute between interested parties, should be resolved, as in all other cases of statutory interpretation, by the courts, unless the authority to make that decision has been expressly conferred upon some other body. Since the necessary authority has not been explicitly confided to the Minister under the terms of the *Act*, the decision must rest with the courts.

[71] Accordingly, the decisions by the Minister that Saferco and Island Falls were not developments within the meaning of the *Act* are not binding upon the appellant for the purposes of this application and, accordingly, the appellant may rely upon the provisions of the *Act* to demand access to the documents in question. It should be carefully noted that the scope of this finding is limited to this application and the question of production of documents. The Court has not considered or pronounced upon, and does not intend to consider or pronounce upon, the merits of the decisions made by the Minister as to whether each project was a development or not.

Timeliness

[72] In the case of Rafferty-Alameda and Meadpulp, the environmental assessment procedure had been carried out, and ministerial approval granted, prior to the commencement of these proceedings. The respondents concerned with these projects took the position that, assuming that the appellant was entitled to production of documents, the purpose of that production was to make the written submissions contemplated by s. 12(b) of the *Act* or to permit representations to be made to an inquiry contemplated by s. 14 of the *Act.* Since the time for such public input into the environmental review process had passed, the respondents took the position that the right of access to documents was exhausted. To put it another way, they took the position that this application was out of time because the *Act* did not contemplate any public participation in the process after the grant of ministerial approval.

[73] The appellant, on the other hand, took the position that the public had a continuing interest in the matter of whether a proponent proceeded with a development in accordance with the ministerial approval, and in the matter of any proposed changes for which ministerial approval might be sought under s. 16 of the *Act.* It further maintained that the public has an interest in possible proceedings under sections 17 to 22 of the *Act.*

[74] The *Act* is silent as to any time limitation on the right of access to documents and information. Having found that the public has a right of access to documents and information under the terms of the *Act*, it is logical to conclude that, in the absence of any specific time limitation on that right in the *Act*, the right is a continuing one so long as the development remains subject to the terms of the *Act.*

Conclusion

[75] If the environmental assessment process in Saskatchewan is to fulfil the potential originally envisioned for it, all the intended participants must work to satisfy the purpose and scheme of the *Act.* Through mechanisms which are defined by law, participation by the public is required in order that the planning and management of environmental development and protection can be both objective and effective. In order to make that requirement meaningful, the public must be empowered with a right of access to information, all information which forms part of any environmental

assessment within the province.

[76] For the reasons outlined above, the appellant, SAFE, or its duly authorized representative, has a statutory right of access to all information or documents it seeks and it is the duty of the Minister to make what has been requested available.

[77] Accordingly, the appeal is allowed and the matter remitted to the Court of Queen's Bench, subject to the following direction. Regarding Rafferty-Alameda, Saferco, and Island Falls, in respect of which the Minister takes the position that he has disclosed all relevant documents, the Minister shall file an affidavit verifying that all such documents have been disclosed and produced. In respect of Meadpulp, the Minister shall, within 30 days of the date of this order, make available for inspection to the appellant all documents and information in his possession and shall simultaneously file an affidavit verifying that all documents and information in his possession have been so disclosed and produced. In the case of all of the projects, if the Minister wishes to claim an exemption by reason of solicitor-client privilege, or under the provisions of s. 7 of the *Act*, he shall, within the 30 day period, notify the appellant and supply it with a list of the documents in respect of which the exemption is claimed. In the event the interested parties cannot agree as to the entitlement of any documents to exemption, the matter shall be determined by a judge of the Court of Queen's Bench upon application by any of the interested parties. Upon the filing of such a notice, all documents in respect of which the exemption is claimed shall be filed with the Court for review by the judge. The documents shall be held under seal and shall not be made available to anyone but the judge unless and until he or she otherwise orders.

[78] The appellant shall have its costs under double Column V.

[79] *Wakeling, J.A.* [dissenting]: This is an appeal taken by the Saskatchewan Action Foundation for the Environment Inc. (SAFE) from the decision of Dielschneider, J., which rejected SAFE'S application for a writ of mandamus to compel the Minister of the Environment to disclose all documents in his possession relative to the following Saskatchewan projects:

Saferco Products Inc. (Saferco);

Meadow Lake Pulp Mill (Meadpulp);

Rafferty-Alameda Dams (Rafferty-Alameda); and

Island Falls Dam (Island Falls).

These are major projects in the province which are at various stages of completion. For instance, the Alameda Dam is completed, the Rafferty Dam is under construction, the Island Falls Dam is virtually abandoned, Meadpulp is perhaps in the early stages of construction, and Saferco is currently under construction.

[80] SAFE had earlier made demand upon the Minister for the production of these documents and the response of the Minister had been varied, not necessarily as an indication of an inconsistent ministerial policy but more likely because the projects are obviously quite different with different backgrounds and at varied stages of development.

[81] These projects have been the subject of four ministerial orders made by the Minister under the purported authority of s. 7 of the *Environmental Assessment Act* (The *Act*), S.S. 1978-80, c. E-10.1. These orders are lengthy and it is sufficient for these purposes to summarize their purpose and effect.

"First Order

"It was ordered that:

(1) Neither Island Falls nor Saferco were developments within the meaning of the *Act.* As a consequence, there was no requirement for the filing of a statement or preparation of a review.

(2) All documents relating to Meadpulp and Rafferty-Alameda be withheld, except those relating to pollution, public health or human safety.

(3) All documents relating to Island Falls and Saferco are similarly withheld if it should be ordered that s. 7 applies to these projects.

(4) The order will be reviewed and rescinded or replaced as circumstances dictate.

"Second Order

"It was ordered that:

(1) With respect to Island Falls, all information and documentation would be available except three named categories which are not of consequence to this appeal.

(2) With respect to Saferco, all documents shall be made public except 11 identified documents which contain confidential proprietary information.

(3) Nothing in this order shall be construed as an acknowledgment that Island Falls or Saferco are developments.

(4) If s. 7 of the *Act* is ever determined to be applicable to Island Falls or Saferco, none of the documents being withheld relate to pollutants, public health or human safety.

"Third Order

"It was recognized that Saferco had filed a statement and pursuant to an agreement the Minister made this statement and the review available to the public under s. 11 of the *Act.* Further, as Saferco has met all the requirements of the *Act*, approval was given under s. 15(1)(a) of the *Act* to proceed with the project subject to certain conditions which have no application to these proceedings.

"Fourth Order

"It was stated that the second order be amended to indicate that the production ordered for Island Falls and Saferco covered all the information or documents that are within the Minister's power or possession."

[82] The Rafferty-Alameda Dam project was given ministerial authorization almost three years ago and counsel for the Souris Basin Development Authority pointed out that there are many volumes of information and material which have been and are currently available. In fact, the Minister considers the project a completed transaction and indicates he has disclosed every relevant document and none remains which would be subject to an order for disclosure if it was to be made by this Court.

[83] A similar position has been adopted by the Minister in respect of Saferco. It is his contention that every relevant document has been disclosed and is available for inspection, with the exception of the 11 documents referred to in the second order. These excepted documents are described as proprietary in nature because their contents contain information about processes or procedures developed by third parties which are not yet in the public domain and should therefore be protected.

[84] Nothing seems to have proceeded on the Island Falls project and counsel for SAFE accepted the documents relating to this project were no longer an issue.

[85] The Meadpulp Project is still an issue but no information was available as to its current status. Counsel for SAFE indicated that he understood some elements of construction had commenced but that was the extent of his information. It seems no other orders have been made by the Minister and no documents have so far been produced to the applicant.

[86] The trial judge disposed of this application by concluding that full disclosure had been made by the Minister in respect of Saferco and that issue was therefore moot. That if disclosure relative to Alameda and Meadpulp was not complete, then the Crown privilege which gave the Minister a discretion as to what documents should be disclosed had not been extended by the *Act* and as there was neither a common law nor a statutory right of disclosure to support the mandamus application, it must be dismissed.

[87] On the appeal to this Court, several preliminary issues were raised by the respondents. It was first alleged the appellant had no standing to bring the

application; second, the issue was moot insofar as Saferco was concerned; and third, mandamus was not the appropriate remedy. Only the issue of mootness was dealt with by the chambers judge, so it is assumed he decided the other issues favourably to the appellant. I propose to deal with these issues in a rather abbreviated fashion as a detailed analysis is not required to support the conclusions I have reached.

[88] As for the allegation of lack of standing, the respondent referred to cases such as Shiell v. Amok Ltd. and S.M.D.C. et al. (1988), 58 Sask.R. 141 (Q.B.); and Association of Stop Construction of Rafferty-Alameda Project Inc. v. Minister of Environment and Public Safety et al. (1988), 68 Sask.R. 52, which are decisions of the Queen's Bench where status had not been accepted. I do not need to consider whether they were correctly decided, but I do agree it is impractical and illogical to expose projects such as these to what amounts to continued harassment through the need to respond to the demand of each individual who seeks to enforce a right to be informed. This right of an individual to be informed is not to be set aside simply because it creates a nuisance to the Crown, but it must also be balanced against the public's right to have a project proceed without endless interruption by continued individual applications where the project enjoys a large degree of public support and the Crown after due deliberation has found it be in the public interest to proceed. The question of who enjoys status to bring a motion of this nature serves to at least assist in providing a reasonable balance between these conflicting interests.

[89] Fortunately, an understanding of what constitutes status in cases of this nature has been greatly advanced by a detailed review contained in *Finlay v. Canada*, [1986] 2 S.C.R. 607; 71 N.R. 338. Le Dain, J., on behalf of the Court, analyzed the law on this subject and concluded a direct personal interest is required to support a claim of standing as of right. He went on, however, to indicate that the courts do have the opportunity to grant standing where the right has not been clearly established but there is sufficient reason to warrant the exercise of a judicial discretion in favour of granting status. The existence of this judicial discretion was recognized and applied by this Court in *Bury v. S.G.I.*, 91 Sask.R., 39; 75 D.L.R.(4th) 449 at 453, where the trial judge decided it was an appropriate case to grant standing and this Court found no reason to interfere with the exercise of that discretion.

[90] Although the basis for the exercise of the chamber judge's discretion to grant standing in this case is not apparent from his judgment, the adoption of the same approach as taken by this Court in *Bury* seems warranted. This is an instance where individuals and groups have joined together to advance a common interest based legitimate concerns, such as protection of the environment. There is an understandable reluctance to say to such a group, particularly at this stage of the proceedings when so much time and money has already been expended, that they do not even have the right to raise the issue quite aside from the right to have the answers. It is therefore reasonable that this Court accept that there is a basis to support the exercise of the chamber judge's discretion when he concluded that the appellant should have standing to advance its case.

[91] I should like to add however that special circumstances prevail in respect of the Rafferty-Alameda project. A rather convincing argument was presented that there could be no reasonable basis for opening this matter up to further scrutiny given the nature of that project, the previous delivery of massive amounts of documents, the litigation that has gone on and the time that has elapsed since approval was granted by the Minister after apparent compliance with the *Act.* For these reasons, had Rafferty-Alameda been dealt with alone, exercise of a judicial discretion to grant status would have been much more difficult to accept. In light of the result I have come to on the principal issue of disclosure, I do not find it necessary to consider status with respect to the Rafferty-Alameda project in isolation from the others.

[92] As for the issue of mootness, it seems clear that the appellant is not satisfied with the answer it has received from the Minister. It still takes the position that the order is required to obtain the result it seeks. The evidence indicates that since the application was launched much of the information which the appellant sought has been obtained, but I cannot conclude that no issue remains. That conclusion requires a finding of fact which cannot be appropriately addressed within the framework of an application such as this. The issue cannot therefore be set aside on this basis.

[93] The suitability of the writ of mandamus as an adequate remedy was questioned for the reason that it does not apply where the action they want to enforce has already been taken. To utilize mandamus in such circumstances is not to enforce compliance with a public duty but to seek an indirect right of appeal by way of a review of an administrative decision already made. Reliance was placed on the following portion of the judgment of Culliton, C.J.S., in *Oil, Chemical & Atomic Workers International Union, Local 9-649 et al. v. Nichol et al.* (1965), 52 W.W.R. 434 (Sask. C.A.), at p. 439:

> "Moreover, mandamus is not the remedy to remove something which has been done, or to review what has been done … No authority is needed for the statement that the court cannot exercise an appellate jurisdiction under the guise of mandamus."

This position was affirmed by the later decision of this Court in *McNutt v. International Woodworkers of America and Moose Jaw Sash and Door Co.* (1963) Ltd. (1980), 5 Sask.R. 48.

[94] I accept the validity of this argument but its application is predicated on the assumption that full disclosure has been granted so that there is no remaining unfulfilled duty of the Minister. This fact is not accepted by the appellants. They contend that they have shown a public duty to disclose, a failure to completely fulfil that duty, and a right to have the problem as it relates to the remaining undisclosed documents addressed by an order of mandamus. I am prepared in this case to accept the position of the appellants as I am not able to conclude positively that all relevant material has been disclosed so as to conclude that the Minister's duty has been completely fulfilled. In any event, it seems somewhat of a reversal of logic to

consider whether the process is appropriate rather than to accept the process and determine whether the essential elements, such as a ministerial duty to disclose, have been made out. This is not then a judicial review of an administrative decision; it is a question of determining what legal duty of disclosure has been placed upon the Minister under either the common law or the *Act*, and if there is a duty SAFE has a right to an order assuring ministerial compliance with that order. The extent to which compliance has already occurred is a question of fact for subsequent determination.

[95] This then advances the matter to the primary issue, namely, the appellant's right to have an order compelling the Minister to make full disclosure.

[96] It is perhaps useful at this point to indicate that all parties to this appeal recognize that if litigation was involved the Crown would be required to disclose all relevant material, excepting where it could be shown that disclosure was contrary to the public interest. In those circumstances, the description of the documents not disclosed and the nature of the public interest would have to be identified, and if no agreement prevailed, the issue of what need be disclosed would be judicially resolved. This is a system which seems to function well and to provide litigants with adequate protection of their right to obtain all relevant information. What is at issue here is a right of a different nature. It is the right of the public to have access to documents generally without any of the guideposts of relevancy which litigation provides. The applicant cannot say what it is looking for; it does not know what is there and consequently wants to look through it all.

[97] The right to obtain disclosure in this fashion has not been recognized to date by the common law. The Crown has traditionally enjoyed an immunity which has been only marginally reduced over recent years. Lorden's recent text entitled *Crown Law* describes this immunity in the following way at p. 529:

> "Historically, access to government information was very limited, the view being that the information belonged to the government and that the government had the discretion to disclose information as it wished 'apart from limited obligations to, for example, maintain public registers of various kinds and any rights of discovery applicable to the Government in the context of litigation.'"

[98] The applicant relied extensively upon a review of those cases which have severely limited what constitutes Crown immunity based on the protection of the public interest in the litigation process. This was done with a view to suggesting that by analogy the same restrictive approach should be taken by the courts in reviewing the general concept of Crown immunity in cases such as this where no litigation is involved.

[99] What SAFE seeks to accomplish is a major transformation of the current common law. It really advocates a common law doctrine which would supplant the need for freedom of information legislation now in existence in Canada and some provinces. To support his position it points to such cases as *Norwich Pharmacal v.*

Customs and Excise, [1973] 2 All E.R. 943 (H.L.), where the House of Lords found that the government (customs officials) had to disclose the names of certain importers in order that the intended plaintiff could determine which parties had damaged it by importing goods in breach of its patent rights. This decision has supported a line of cases relating to obtainment of information of a very singular and specific nature from third parties in order to support intended litigation (i.e., *Pochuk v. Gov't of Manitoba* (1984), 28 Man.R.(2d) 34).

[100] I can accept that *Norwich Pharmacal* represents a crack in or perhaps a chip off the basic principle that the Crown enjoys an absolute immunity from disclosure, but it is nothing more than that. It does not represent a basis upon which this Court could determine the common law right of immunity has been set aside or even that the House of Lords intended its decision as the forerunner of such a result.

[101] The law is still as stated by John Swaigen in his text *Environmental Rights*:

> "In the absence of any statutory right of access, there is, by definition, no duty upon a Minister or Board to produce the document requested. Therefore, the remedy of mandamus is not available to compel disclosure."

This statement is supported by decisions such as *McAuliffe v. Metropolitan Toronto Board of Commissioners of Police* (1976), 9 O.R.(2d) 583 (Ont. Div. Ct.) at pp. 589-590, 592 and 596; *Rossi v. The Queen* (1974), 1 F.C.R. 531 (Fed. Ct., Trial Div.) at pp. 535-536.

[102] This immunity from disclosure is not a new or startling proposition. It is one of the traditional Crown prerogatives, and while a number of the others are gradually being eroded, this prerogative has remained almost completely intact, except to the extent it is being legislatively reduced or eliminated in some jurisdictions. There is no doubt in my mind that legislation constitutes the more suitable process for any revision of this long-standing Crown immunity. In any event, it is not timely for the courts to seek to change this common law concept when legislation dealing with this immunity now exists or is being currently considered in many jurisdictions, including our own.

[103] The net result is that this application cannot be founded upon a common law right of disclosure of Crown documents.

[104] The applicant's alternative position is that the right of disclosure is to be found in the *Act.* Counsel for SAFE admitted that if there was a single direct section which could provide a foundation for the application he would have so indicated in his notice of motion. Rather, it is the general tenor and effect of the *Act* which he relies upon. Those sections which were alleged to be the most supportive of this position are the following:

> "7. Where, in the opinion of the minister, it is in the public interest or in the interest of any person, the minister may, subject to the regulations, withhold or limit

production, public inspection or discovery of any information or document that relates to a development, other than any information or document that relates to pollutants, public health or human safety.

. . . . .

"11(1) The minister shall cause a review to be prepared of each statement that he receives.

"(2) When the review mentioned in subsection (1) is completed, the minister shall:

(a) make the statement and review available for public inspection; and

(b) give notice, in the manner prescribed in the regulations, of the locations at which the statement and the review may be inspected, and may prescribe any conditions relating to the inspection that he considers appropriate.

"12. Any person may:

(a) inspect a statement and review that is available for public inspection pursuant to subsection 11(2);

(b) make a written submission to the minister within 30 days from the date when the minister first gives notice pursuant to subsection 11(2), or, if the minister considers it appropriate, within an additional period of 30 days."

[105] Opposing counsel find support for diametrically opposite positions as a result of a review and consideration of these sections. One position relies on the fact that s. 11(2)(a) is the only one which indicates what is to be disclosed and that is specifically identified as the impact statement (statement) and the review. The only other reference to disclosure is in s. 7 and it gives authority to the Minister to restrict production and inspection of documents. There is nothing in these sections to suggest the traditional Crown immunity is no longer applicable, either generally or insofar as it relates to this *Act.* The other opposite position is that there is no need to give the Minister, the power to prevent the disclosure of documents, as is done by s. 7, unless the other sections of the *Act* have by implication given a right of disclosure. After all, what is the purpose in giving the Minister the right to make regulations restricting production of documents unless there is a corresponding right of access which has been provided for, if not explicitly then by implication, in the remaining provisions of the *Act.*

[106] Perhaps the only point upon which some degree of uniformity can be recognized when assessing the merits of these two positions is the need for review and revision of this legislation. It has some rather obvious shortcomings. For instance, if the statement and review must be disclosed, what is the position in respect of documents which the Department has in its possession which have reference to the conclusions or recommendations contained in the statement or

review? If one takes a purposive approach to the interpretation of the legislation, it must be assumed that the object is to permit the public a full and fair examination of the statement provided by the applicant and the review which has been done by the Department. If that is so, a restrictive interpretation of ss. 11 and 12 so as to limit what the public can see or know to the statement and review would appear inappropriate. But does this purposive approach go so far as to support the conclusion the legislation has provided a full and complete right of disclosure, despite apparent wording to the contrary? If it does support that conclusion, is that the reason why the power given to the Minister in s. 7 was thought to be necessary?

[107] I confess that I have difficulty in understanding why the power given the Minister in s. 7 was thought to be necessary. Perhaps it was intended to authorize a restricted right of access to some portion of the statement or review which was not in the public interest to disclose. Whatever the purpose, it is obvious the intent was to restrict rather than liberalize the public's right of access to documents in the possession of the Crown. That being so, it is hard to conclude that its existence can be seen as supportive of an argument in favour of the public's unrestricted right to production of Crown documents.

[108] For my part, considerations such as this do little more than provide support for the conclusion that the legislation is not without its problems. They do not, however, go so far as to make the case for the applicant. I cannot see in this *Act* a legislative intent to provide a sweeping right of disclosure which overrides the Crown immunity which otherwise prevails. Indeed, the legislation is better described as being restrictive, given the fact the reference to what will be disclosed relates to only two documents which are readily identifiable. That specific description of what is to be disclosed, plus the right of a further restriction contained in s. 7, does not lead me to conclude the Legislature was intent on providing a legislated end to the Crown immunity pertaining to the disclosure of its documents.

[109] I do not find it reasonable to conclude that legislation which was intended to make such a sweeping change by eliminating the Crown's traditional immunity would be drafted in such a way that the change would only be apparent to those who could see through and behind the words and draw a meaning based upon inference and indirection which the language would not otherwise support. Such a traditional Crown right should only be ignored by the courts when clear language has been employed to indicate that is the intended result. It will be apparent that I find much to agree with in the comment of Tallis, J.A., in *Farley v. Badley* (1991), 97 Sask.R. 21; 12 W.A.C. 21.

> "This common law principle is well established. It can only be abrogated by legislation, and will only be taken to have been abrogated where the statutory purpose and object to that effect is clear. Courts do not have free rein to impose rules of repayment priority, as a matter of policy. The question is not whether the Crown's impugned prerogative is wise, but whether having regard for the statutes and controlling authorities bearing on it, it continues to exist."

[110] I do not see any reason to conclude that the legislators intended to provide the public with the right of access to any documents other than the statement and the review as indicated in s. 11. It may be that they did not see the Minister as being in a position of conflict required to adjudicate on the competing interests of the developer and the public. Rather, they may have seen the Minister as an elected officer of the Crown with a mandate from the public to carry out or promote projects perceived by the Government to be in the public interest, subject to a limited right of public participation which was satisfied by the opportunity to have access to the statement and the review. Whatever the reason they may have had for casting the legislation in the form they did, it was their exclusive mandate to select the form and it was this Court's mandate to interpret the words they employed but that mandate does not go so far as to permit the Courts to direct a more significant degree of public participation then the legislation has provided.

[111] In the result, I have concluded that there is neither a common law nor statutory right of disclosure sufficient to support this application.

[112] A further reference to the interpretation to be given the enactment as it relates to a development is required. At the hearing, some considerable time was devoted to the powers of the Minister to arbitrarily decide what is a development within the meaning of the *Act.* The purpose of this concern was to determine whether the Minister had the right to make the *Act* inapplicable simply by declaring that any project was not a development. I have concluded these considerations need not be dealt with as they do not assist in the determination of this issue. If the Minister has no power to make the orders under s. 7, then the orders are invalid and do not exist for purposes of this application, but the right of SAFE is not by reason thereof advanced in any measure. It must rely exclusively on the provisions of the *Act* which I have already indicated provide for disclosure of specific documents but makes no reference to the production of documents generally. On the other hand, if the power to make the orders does exist, then they are valid but again they do not serve to advance SAFE'S position. Granting these orders their most liberal interpretation, they do not support a general right of access to Crown documents.

[113] For the above reasons, the appellant's claim to mandamus must fail as it has not established the breach of a lawful duty of disclosure. The appeal is dismissed with costs on double Column V.

Appeal allowed.

1909 CarswellOnt 704
Ontario Divisional Court

Smith v. London (City)

1909 CarswellOnt 704, 14 O.W.R. 1248, 1 O.W.N. 280, 20 O.L.R. 133

Smith v. City of London

Boyd, C.

Judgment: December 16, 1909

Counsel: *E. F. B. Johnston, K.C.*, and *J. M. McEvoy* (London), for plaintiff, appellants.
E. E. A. DuVernet, K.C., for defendants, contra.
J. R. Cartwright, K.C., for Attorney-General for Ontario.

Subject: Public
Related Abridgment Classifications
Constitutional law
VII Distribution of legislative powers
VII.2 Nature of general federal powers
VII.2.a Principle of supremacy of Parliament
Constitutional law
VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.a Principle of supremacy of legislature
Constitutional law
VII Distribution of legislative powers
VII.3 Nature of general provincial powers
VII.3.d Property and civil rights within province
VII.3.d.i General principles
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.h Municipal corporations
VII.4.h.ii Powers which province may confer on municipality
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.i Public utilities
Municipal law
III Powers of municipal corporation
III.1 Source of powers
Statutes
II Interpretation
II.1 General principles
II.1.a Role of court
Statutes
II Interpretation

II.1 General principles
II.1.b Ambiguity
Statutes
II Interpretation
II.4 Construction
II.4.e Presumptions
II.4.e.iv Mistake

Headnote

Municipal Corporations — By-law Contract for Supply of Electrical Power — Action to Set aside Contract — Contract Validated by Legislature — Action Stayed Thereby.

Plaintiff brought action against the city corporation, on behalf of himself and all other ratepayers, to have declared void, a contract entered into between the corporation and the Hydro-Electric Power Commission of Ontario, for the supply of electrical power to the inhabitants of the city.

The action in substance attacked the validity of several provincial statutes, 6 Edw. VII. ch. 15, 7 Edw. VII. c. 19, superseding the former except as to contracts already entered into, 8 Edw. VII. c. 22 and 9 Edw. VII. c. 19, both providing for the validation of by-laws and contracts made under the former Acts.

At the trial judgment was given staying the action pursuant to 9 Edw. VII. c. 19, s. S, and not making any other order. Plaintiff appealed to the Divisional Court and asked that judgment be entered for plaintiff as prayed. Held, that the whole ground of attack had been taken away by the legalization of the by-law contract. The result was that no ground of interference appeared, and the legislation being within provincial competence there could be a declaration to that effect, but no further order. No costs allowed.

See S. C. (1908) 11 O. W. R. 1148, (1909) 13 O. W. R. 1148, 19 O. L. R. 139, 14 O. W. R. 148.

The appeal to the Divisional Court was heard by Boyd, C., Magee and Latchford, JJ.

***Boyd, C.*:**

1 This action in substance attacks the validity of several provincial statutes: 6 Edw. VII., ch. 15, an Act as to electrical power; 7 Edw. VII., ch. 19, superseding the former, except as to contracts already entered into; 8 Edw. VII., ch. 22, and 9 Edw. VII., ch. 19, both providing for the validation of by-laws and contracts made under the former Acts.

2 In statement the action seeks to annul the contract entered into by the City of London with the Hydro-Electric Commission as authorized, amended, and validated by this legislation. The commission is not a party because the Attorney-General refused his consent to its being added under sec. 23 of the Act of 1907. But the action is carried on against the corporation of London to test the constitutional question raised under the British North America Act, 1867. The scheme of the first and main act, so far as pertains to the municipalization of electrical power, may be thus briefly expressed: A corporate body is created under the name of the "Hydro-Electric Commission," empowered to acquire all lands, water privileges, and plant needful for the generation, development and transmission of electrical power in the Province. To this body or commission municipal corporations may apply for the transmission of electricity for the uses of the corporation and its inhabitants in regard to lighting, heating, and motive-power. Thereupon the commission furnishes estimates of the cost, plans and specifications of the works necessary for the distribution of electricity by the corporation; a statement of the terms and conditions upon which the energy may be transmitted and supplied, together with a form of contract to be entered into, 6 Edw. VII., ch. 15. The council of the corporation may then submit to the electors a by-law authorizing the municipality to enter into such contract, and if the majority of electors assent thereto the contract may be executed by the commission and the corporation.

3 In the City of London application was made to the commission and certain steps were taken, which resulted in a large electoral vote of nearly 2 to 1 in favour of the by-law (January 4th, 1907). It is said and not gainsaid that the general plan of the work then contemplated and voted on was that the commission should undertake the financial responsibility of transmitting the power to London and supplying it at a given price in the municipality. In taking the vote the form of contract and the estimates were not submitted to the electors. So that legislative confirmation was invoked and it was granted with, it is said, certain changes in the groundwork. It was said, and not gainsaid, that one change reversed the original plan by providing for

the delivery at Niagara Falls — the point of devolpment as contrasted with the point of supply — and so altering materially the whole financial responsibility. The contract, and in effect the by-law, were made valid in this form without being further voted upon. It would appear that both by-law and contract would be open to successful attack in the courts, but for their legislative validation by 7 Edw. VII., ch. 73, sec. 2; 8 Edw. VII., ch. 22, sec. 4, and 9 Edw. VII., ch. 19, sec. 4. In the schedule to this legislation appears for the first time the contract which was executed by the defendants and the commission. The legislative change was made in April, 1908; the contract signed on 9th June, and this action begun on 16th June of that year. The final piece of legislation recited that doubts had been raised as to the validity and binding character of the contract, and that the councils who had executed the contracts were desirous that the enjoyment of the benefits of the undertaking should not be postponed by unnecessary and vexatious litigation. It then enacts that the contract as varied shall be valid and binding according to the terms thereof, and shall not be called in question on any ground whatever in any Court, but shall be held and adjudged to be valid and binding on the corporation — which shall be conclusively deemed to have entered into a contract with the commission within the meaning of the statutes. And by sec. 8 every action theretofore brought and then pending wherein the validity of the contract or by-law is attacked, by whomsoever brought, shall be forever stayed. The Act was passed on 29th March, 1909, and is levelled at this particular action and any other then pending.

4 The legislation contained in this series of Acts is questioned in this appeal on the special ground that it is ultra vires of the Provincial law-making power. And in this aspect I take it that it is open to the Court, notwithstanding the wide language used as to staying the proceedings, to take cognizance of the legislative competence to deal with the whole subject-matter. If the provisions of the statutes in question were found to be beyond the powers of the Provincial Legislature it is the duty of the Court, under the scheme of the British North America Act, 1867, so to adjudicate and determine. The controversy was presented under many aspects, but the solid residuum of objection left at the close of the argument is within a narrow compass. It may be thus put: Electric current is a commodity and as such the subject of "trade and commerce"; this is an attempt to engage in municipal trade, and the law rightly construed does not permit a municipal body to interfere with the rights of individual inhabitants as to private lighting. Something also was suggested as to the undertaking savouring of monopoly and claiming exclusive rights, unfavourable to free trade and self-government. It was urged also that the electors even by unanimous vote could not warrant such legislation. It is admitted (perhaps reluctantly) that so far as supplying light to public buildings and streets and the like, the legislation was permissible. No doubt the statute contemplates that light, heat, and power may be supplied (at a proper charge) to individual inhabitants and families. And the evidence is that the defendant corporation intends to go into this line of business. A clause in the contract provides that the corporation will take power exclusively from the Commission during the continuance of the agreement; and the extreme limit assigned is 40 years unless determined as provided in the contract. In regard to exclusive rights and private supply, there appears to be nothing further that is relevant in the statutes, by-law, and contract.

5 In considering all legislation in Canada and the Provinces touching its constitutional aspect, the question is not of policy or expediency or reasonableness, but simply competence, i.e., whether the particular statute can be brought into or under the class of subjects assigned by the Imperial Act of Confederation to the enacting assembly, whether it be legislature or parliament.

6 These Acts upon their face, by their very titles, claim to be classified under the heading of "Municipal Institutions in the Province:" B. N. A. Act, 1867, sec. 92 (8). The main Act is intituled "to provide for the transmission of electrical power to municipalities," 6 Edw. VII., ch. 15, and the next one to validate by-laws and contracts made under the former. They are all in pari materia. They deal with the transmission of electricity from Niagara Falls through and to various municipalities, making it available for all municipal corporations who apply. The installation of electric plant in the City of London would be per se "a local work or undertaking," "a matter merely of local or private nature in the province:" ib., sec. 92, Nos. 10 and 16. Such legislation in England always falls under the heading of "Local Acts."

7 The "establishment of municipal institutions for the whole country" was recommended by Lord Durham's report of 1839, and the term "Municipal Institutions," passed into statutory language and significance in 1858: 22 Vict., 1st sess., ch. 99, "An Act respecting the Municipal Institutions of Upper Canada," and thence it is carried into the C. S. U. C. 1859, ch. 54, which practically codified the municipal law of the province as it then was and as it continued to be till the date of confederation in 1867. The term "Municipal Institutions" appears intended to give compendious expression to the state of affairs which exists in a defined populated area the inhabitants of which are incorporated and intrusted with privileges of local self-government or administration

responsive to the needs, the health, the safety, the comfort, and the orderly government of an organized community. As put by Lord Herschell in "The Liquor Prohibition Appeal of 1895," when speaking of its use in the B. N.A. Act, "'Municipal Institutions' deals with two things: the constitution of municipalities or municipal bodies and their functions" (argument at p. 35). Having created the municipality, the province is able to confer upon that body any or every power which the province itself possesses under the Confederation Act. In the same case Lord Watson expresses the opinion: "The province might give the local body new powers and functions so long as these were powers and functions which the legislature could exercise and legislate upon, and could therefore delegate to a municipal body:" ib., p. 44. These powers, he says again (p. 45), are to be administered for the benefit of the public and the inhabitants of the municipality. In the same case at p. 51 this is to be found; Lord Davey: "I suppose you would say that 'Municipal Institutions' would include, for instance, the creation of a market and municipal police." . . . Lord Watson: "Or a separate body of commissioners for the purpose of supplying the locality with water; I should say all these were municipal institutions . . . or institutions created for the benefit of the particular municipality." Lord Davey: "And I should suppose it might include the establishing a gas works." Lord Herschell: "I should think it included every local body and every power that you can confer upon that local body:" ib., pp. 51, 52.

8 Lord Morris suggests, at p. 55, that the enacting part of sec. 92 (8) should be read in this way: "In each province the legislature may exclusively make laws in relation to matters coming within Municipal Institutions in the province." And Lord Herschell considers that "Municipal Institutions" refers not so much to the powers or functions as to the corporate body upon which the power or function is bestowed: p.54.

9 Be that as it may, it is pertinent to look at the Municipal Institutions Act existing at Confederation to see what subjects and powers were embraced in it or conferred by it. In particular we find that before Confederation municipal bodies were empowered to supply gas and water for public and also for private use and consumption: 29 & 30 Vict. ch. 51 (1866), secs. 2, 3, and 4 of which give to the municipality the same powers as are possessed by private joint stock companies incorporated under C. S. C. (1859), ch. 65, for supplying cities, towns, and villages with gas and water. Section 65 shews that the gas and water is to be supplied to private persons. When it is remembered that gas is available for heat and motive power as well as for light, it is an easy step to say that it is equally right and proper to supply the new commodity, electricity, for purposes of light, heat, and power to the municipality and its inhabitants. The statute in hand then purports to confer a new power upon municipalities, and that power relates to the management and administration of a local undertaking, i.e., the transmission of electrical energy for the common good of the inhabitants, in its public and private use.

10 The provincial legislation in its course and development has been akin to that on the subject of lighting in England. The supply of gas by private companies preceded the manufacture and supply of gas for general use by municipal bodies. We are told by Mr. Clifford that parliament has repeatedly refused to allow even municipal bodies to supply gas in competition with existing gas companies, and has stipulated that if corporations want such a power they must buy the gas works: History of Private Bill Legislation, vol. 1, p. 232 n. (1885). And when electricity began to come to the front, the course of procedure was the same in regard to electric lighting companies: first the private company and then the option to purchase given to the municipal body. The English Electric Lighting Act of 1882 gives power to local authorities to supply light by license under a special Act (this for private as well as public purposes), and the expenses are to be defrayed out of local rates (secs. 7, 8, and 27). I may quote a summary of the situation in the mother country from Lord Courtney's book on the Working Constitution of the United Kingdom (1890). He says: "Among the other duties of borough councils is that of seeing that the communities are adequately supplied with lighting and water. Gas and water works are however in most cases originally undertaken by private companies under local Acts of Parliament, and are indeed in many cases still so promoted. Newer systems of electric lighting have often, perhaps generally, been started under licenses from local authorities for a term of years. Most of the larger boroughs have however taken over and extended the gas and water works supplying their areas, and some have started electric lighting. There is a clear tendency on the part of municipalities to undertake these functions for themselves, applying at least some of the pro fits that may be realized in diminution of rates:" ib., p. 342. He then speaks of tramways, and concludes: "These are examples of a process known as the extension of municipal trading, the policy of which is still in dispute:" p. 243.

11 He says further: "There are signs that the provision of electric power may in appropriate places come within the range of municipal enterprise. One ground of objection to the movement is found in the apprehension that popularly elected bodies

may work these undertakings in the interest of working men voters rather than on commercial principles; but so far it cannot be said that experience has proved this danger to be substantial:" ib., 243.

12 Though thus referred to as municipal trading, the supply of light, whether by gas or other illuminant, is a proper function of municipal administration. So to hold does not at all infringe upon the meaning of "trade and commerce" as used in the B. N. A. Act, where exclusive power is conferred upon the Dominion to legislate as to the regulation of trade and commerce (sec. 91 (2)). These words would point to political arrangements in regard to trade, requiring the sanction of parliament, regulation of trade in matters of inter-provincial concern, and the like, as indicated in Citizens Insurance Co. v. Parsons, 7 App. Cas. 110; but the comment of Lord Herschell on that case in Liquor Prohibition Appeal of 1895, was that "it allowed to the provincial legislature a very considerable power of dealing with trade within its own limits — within its own borders:" ib., p. 115. And he says again at p. 104: "You may give a very broad construction to 'trade and commerce,' and yet it may be that it would still leave open a very large power of dealing in such a way as to incidentally affect trade without its being a part of the regulations made within such meaning." It appears to me that the Privy Council has passed upon this very point in reference to the provincial regulation of electric light and power in Hull Electric Co. v. Ottawa Electric Co., [1902] A. C. 237. A Quebec statute legalized a contract made by a municipal council for procuring a supply of electricity for light, heat, and motive power, for 35 years, for the use of the municipality and its inhabitants. The validity of that legislation was attacked on much the same grounds as are advanced here, viz., that electric light was a commercial commodity and as such fell within the exclusive competence of the Dominion Parliament to regulate trade, and that a monoply has been created beyond the municipal power. These points were in controversy in the Court below, in the first or primary Court, then in review in the Superior Court, and lastly in the Court of Queen's Bench, with varied successes and reverses. But when it came before the Judicial Committee the attack upon the by-law and the statute was abandoned. Upon this abandonment Lord Macnaghten, giving the judgment of the Privy Council, said: "It is obviously untenable. The scheme in favour of which the by-law was passed was a purely local undertaking. As such it came within the exclusive jurisdiction of the provincial legislature, and not the less so because in such case it is usual, and probably essential for the success of the undertaking, to exclude for a limited time the competition of rival dealers;" p. 247. That decision, though on a Quebec statute, is of equal force as to Ontario — the municipal system in both provinces being organized and developed on the same lines.

13 Whether or not the distribution of electricity to private persons at a fixed price can fairly be called "trading," it is not needful to consider. Neither is it in place to consider what forms of municipal trading or industrial undertakings should be encouraged by the legislature or what forbidden. Nor on what terms the permission should be granted. All such matters of discretion or expedience or advantage rest with the law-making body and are subject to the exercise of its plenary power.

14 But it is perhaps well to deal with the proposition advanced that the supply of house-light is a purely private matter, and that no public body can interfere with the right of a man to use any kind of light he pleases, and that there is no right to tax him for the supply of special light to other people. No doubt this scheme for electrical light contemplates local taxation to defray the expenses of instalment and operation — though it is hoped that after a while the undertaking will carry itself, will defray the initial cost, and it may be yield a surplus for the general benefit of the inhabitants. The term of 40 years for the subsistence of the contract is fixed between the commission and the corporation, so that full opportunity may be given to work out beneficial and profitable results to both parties. I note in the English Electric Lighting Act of 1888, a period of 40 years is given for the operation of a private undertaking before compulsory purchase can be enforced by the local authority.

15 Taxation of a given locality to meet the expense of a business undertaking in that place should only be imposed if it is for the general benefit of the community. To instal or support a private trade or business has not been considered as of municipal cognizance to be undertaken by the municipality. It is to be left to private enterprise. In the present development of economic utilities, it may become a question of kind and degree and availableness whether or not the promotion of the interests of the large aggregation of the inhabitant's constitutes a public service or not. In regard to electric light from Niagara Falls, these considerations enter into the question; the individual cannot procure his own supply of electricity; it has to come to him by means of material conveyance over private and public property — streets and highways — which cannot be used without a right of franchise or expropriation. The transmission and storing and distribution of electrical energy necessitate a system of control and regulation for the interests of public and private safety. If economic and convenient use of electricity is to be obtained,

these desiderata exclude the undertaking from the area of private enterprise and an ordinary business. It is removed within the range of municipal institutions. The proper user and enjoyment of such a service affects the citizens as a community and not merely as individuals. The self-interest of the few must give way to the common interests of the whole body of incorporated inhabitants represented by the vote of the majority. The general proposition as in effect expressed by the Massachusetts Bench may be adopted as a good working rule on this head, viz., that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with apart from the aid of powers and privileges derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them or may need them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them. See opinion of Judges, 150 Mass. at p. 597 (1890).

16 The supply of light by means of gas or electricity, with the incidental advantages of heat and motive power connected therewith, appear to be a proper municipal function. The primary need, no doubt, is as to public places (streets and buildings, etc.): yet the vending of the commodity to private consumers is a convenient and comparatively inexpensive accompaniment. Both go far to promote the convenience, comfort and safety of all members of the municipality.

17 I have no difficulty in deciding that as to the main and central question here agitated, as to the power of the city of London to engage in the business of acquiring and distributing electric energy, that it is one of the incidents of municipal government, whether or not in competition with private concerns is of no material significance in the constitutional aspect of this legislation.

18 The provincial legislature has power to establish electrical works as a local work or undertaking under another clause of the Confederation Act, sec. 92 (10). Consequently it has power to delegate this undertaking to a competent municipal body.

19 The next questions may be considered together, and may be thus stated: Has the plaintiff, a ratepayer of the city, a right to be heard in seeking relief after the validation of the contract and by-law? He starts with a good cause of action. The terms of the contract being changed after the vote, prima facie the vote has been cast away, and there is no valid contract which binds the ratepayers, and the levy of rates based on contract and by-law is illegal. But comes the special Act as the Deus ex machina with double aspect not only to validate everything but to close the Court against the aggrieved ratepayer.

20 Now the legislature might have passed an Act to provide directly for the instalment of this electric plant and for the levy of rates upon the inhabitants for the outlay and the maintenance. There is no constitutional reason why the legislature might not resume part of the matter or proceeding delegated and take it out of the hands of the municipality if it thought proper; assuming that a majority vote was passed in favour of the project, and that the changes made in the contract were not of fundamental character or such as affected the proper realization of the scheme, and that the expense and delay of a further vote would not be likely materially to change the opinion of the ratepayers; such considerations as these might, well or ill-founded, induce the body of legislators, containing representatives of the city, to apply the drastic remedy now resented by the minority. It must also be noted that the mayor and council of the city authorized and approved of the execution of the contract so validated on that further popular vote. And the mayor and council are the legally constituted representatives of the inhabitants and are responsible to them at the polls.

21 However, the legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary, and (that being so) no Court can change the situation. This legislative action is, no doubt, a violation pro tanto of the principle of local self-control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But, whatever be its character or effect, the investigation is not for the Courts, but for the politician or the elector. The propriety of any interference with these rights of local self-government is a matter of legislative policy and ethics — not of constitutional law. Where the legislature has transcended its power the Courts may sit in judgment on the statute; where legislative power within its proper ambit is regarded as unreasonable or abused it is open for the Dominion to exercise the right of disallowance. The principle which is now fairly rooted in English law as to Acts of Parliament applies with equal force to Acts of provincial legislatures acting within the constitutional powers conferred upon them by the Imperial Statutes of 1867 — the British North America Act. When the provincial legislature exercises exclusive plenary power within the constitutional limits of the Imperial Federation Act, any statute so enacted is not to be revised or supervised by the judicial body. Blackstone deals with the large proposition that Acts of Parliament contrary to reason are void. But (he says) if the Parliament will positively enact a thing

to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it, and the examples usually alleged in support of this sense of the rule do none of them prove that when the main object of the statute is unreasonable the Judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government: Com. p. 91. And in Mr. Christian's note (it is added): "If an Act of Parliament is clearly and unequivocally expressed, it is neither void in its direct nor collateral consequences, however absurd and unreasonable they may appear. . . . When the signification of a statute is manifest, no authority less than that of Parliament can restrain its operation." Beyond the commentators the same thing was judicially expressed by Lord Campbell in Logan v. Bruslem, 4 Moore P. C. 296: "As to an Act of Parliament not binding if it is contrary to reason, that can receive no countenance from any Court of Justice whatever. A Court of Justice cannot set itself above the legislature; the whole is a question of construction (as to the meaning of the Act), and there is no power of dispensation from the words used." This case decided in a Vice-Admiralty appeal from Sierra Leone in 1842, was probably not seen by Robinson, C.J., when he used the language in 1848 which is found in Toronto and Lake Huron R. W. Co. v. Crookshank, 4 U. C. R. 309, 317. He adverts "to the law that even in a case where the legislature of the province have powers which are not controlled expressly by a higher authority than their own, it may yet be confined by some clear and undisputed constitutional principle." And at p. 318 he refers to the few instances in which Acts might be supposed to be passed so utterly at variance with natural justice and the inherent rights of individuals that Courts of Justice could refuse to treat them as binding.

22 The mistiness of view as to possible grounds on which an Act of Parliament might be avoided by the Courts has been cleared away by the modern doctrine as to the sovereign power resident in the legislature, and I do not know of any example even in early days when a concrete case arose of an Act of Parliament being overruled or displaced by the Judges.

23 I may revert to the modern view as laid down by Judges, and in judgments of the highest authority. Lord Halsbury says: "It is not competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think the Court of Law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes:" Commissioners for Special Purposes of Income Tax v. Pemsel, [1891] A. C. p. 549. And again it is said: "When the sense of the language is unambiguous, the sense must prevail; we must take the law as we find it, and if it be unjust or inconvenient, we must leave it to the constitutional authority to amend it:" Per Coleridge, J., advising the Lords in Garland v. Carlisle, 4 Cl. & Fin. 705, 706. And finally in a Canadian appeal, Labrador Co. v. The Queen, [1893] A. C. 123, Lord Hannen summed up the situation tersely thus: "The Courts of Law cannot sit in judgment on the legislature, but must obey and give effect to its determination."

24 The power to stay actions by direct intervention of the legislature is but rarely exercised. The usual precedents are drawn from the region of martial law. It is a far call from high political offenders to the ratepayer who objects to a civic burden as irregularly imposed.

25 There is no analogy to be drawn from legislation as to limitation of actions. These usually give a certain period of time in which to assert rights in the Courts under penalty of being shut out from relief. Such a statute is one of repose — this, however, is one of repression. If litigation is to be barred because it is regarded as frivolous or vexatious, the well recognized plan is to leave it in the hands of the Judges, as, e.g., is provided in the English Vexatious Actions Act of 1896, by which the Attorney-General can apply for an order that no legal proceedings shall be instituted by one who has habitually and persistently instituted vexatious legal proceedings without any reasonable ground. In the United States a vested right of action is treated as a piece of property which is to be protected by the Courts against all arbitrary interference, even on the part of the legislature.

26 As to the peremptory stay of a pending or a vested cause of action, there is a salient distinction between American and English methods and law. Kent, C., said, in Dash v. Van Kleeck, 7 Johns 505 (1811): "There is no distinction in principle between a law punishing a person criminally for a past innocent act or punishing him civilly by divesting him of a lawfully acquired right." American jurists distinguish between judicial and legislative Acts thus, that a judicial Act determines what existing law is in respect to some existing thing already done or happened; while a legislative Act is a pre-determination of what the law shall be for regulation of all future cases falling under its provision. A retroactive law to stay a plenary action is not regarded as a legislative Act. In Ervine's Appeal, 16 Pa. St. 266, it is said: "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced."

27 But with this limitation of the law-making power English opinion does not agree, though the ordinary use of such power is deprecated. The present stay of proceedings does not so much matter, as the whole ground of attack has been taken away by the legalization of the by-law-contract foundation of the whole undertaking. Approach to the judgment seat being barred, it is of slight importance whether the outer door of the Courts is open or closed.

28 Respecting the section of the statute which stays the actions pending, it is plainly enough expressed to that effect, and the only comment that the Court can make is to quote these words from Lord Watson's judgment in Young v. Adams, [1898] A. C. 457, 476: "A retrospective operation ought not to be given to the statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment. The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act and to deprive the person injured of the remedy which the law then gave him." The short result is that no ground of interference appears, and that the legislation is within provincial competence. There may be a declaration to this effect, but no further order. It is not a case for costs.

***Magee* and *Latchford, JJ.*, concurred.:**

Most Negative Treatment: Check subsequent history and related treatments.

2006 BCSC 329
British Columbia Supreme Court [In Chambers]

Tele- Mobile Co., A Partnership v. Bell Mobility Inc.

2006 CarswellBC 2482, 2006 BCSC 329, [2007] B.C.W.L.D. 3735, [2007] B.C.W.L.D. 3760, [2007] B.C.W.L.D. 3830, 152 A.C.W.S. (3d) 1117

Tele-Mobile Company, A Partnership (Plaintiff) and Bell Mobility Inc. (Defendant)

J. Groves J.

Heard: February 10, 2006
Judgment: February 10, 2006
Docket: Vancouver S056268

Proceedings: additional reasons to *Tele-Mobile Co., a Partnership v. Bell Mobility Inc.* (2006), 2006 BCSC 185, 2006 CarswellBC 2462 (B.C. S.C. [In Chambers]); additional reasons to *Tele-Mobile Co., a Partnership v. Bell Mobility Inc.* (2006), 46 C.P.R. (4th) 146, 2006 BCSC 161, 2006 CarswellBC 430 (B.C. S.C. [In Chambers])

Counsel: D.K. Wotherspoon, A.I. Nathanson for Plaintiff
R.J.C. Deane, S.T.C. Warnett for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Criminal

Related Abridgment Classifications

Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.vii Miscellaneous
Remedies
II Injunctions
II.2 Prohibitive injunctions
II.2.c Interim and interlocutory injunctions
II.2.c.i Threshold test
II.2.c.i.D Miscellaneous

Headnote

Remedies --- Injunctions — Availability of injunctions — Prohibitive injunctions — Interim and interlocutory injunctions — Threshold test — Miscellaneous

Misleading advertising — T Co. and B Inc. were competitors in providing mobile wireless telecommunications service — Parties shared same data transfer network — T Co. began large advertising campaign, which included ads stating that it had "the fastest wireless high speed network" ("offending ads") — B Inc. applied for injunction on basis that offending ads were misleading under s. 52(1) of Competition Act ("Act"), and application was adjourned — Applications judge directed T Co. to provide affidavit sworn by appropriate officer stating that it would not run offending ads without adding disclaimer — Application judge held there was prima facie case that offending ads were misleading and that this constituted irreparable harm — Hearing was held three days later and application was adjourned again — Four-day adjournment was granted to allow T Co. to remove offending ads — Applications judge held that affidavit of T Co. official gave requisite undertaking not to run offending ads — However, applications judge held that giving T Co. twelve days to remove offending ads was too much time — Applications judge directed that at next hearing, T Co. have sufficient evidence of efforts to deal with offending ads —

Hearing was held four days later — Application adjourned — Firm three-day deadline imposed for compliance by T Co. — Any offending ads in place after deadline would be actionable by B Inc. — Injunctive remedy against T Co. at this point was not necessary — Efforts made by T Co. thus far were satisfactory, and it could be expected to act honourably based on court's direction — T Co. swore affidavit indicating intention to comply — T Co. made significant though perhaps not complete efforts to deconstruct large advertising campaign — T Co. cooperated with B Inc. in bringing application on relatively short notice.
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Miscellaneous offences
Misleading advertising — T Co. and B Inc. were competitors in providing **mobile** wireless telecommunications service — Parties shared same data transfer network — T Co. began large advertising campaign, which included ads stating that it had "the fastest wireless high speed network" ("offending ads") — B Inc. applied for injunction on basis that offending ads were misleading under s. 52(1) of Competition Act ("Act"), and application was adjourned — Applications judge directed T Co. to provide affidavit sworn by appropriate officer stating that it would not run offending ads without adding disclaimer — Application judge held there was prima facie case that offending ads were misleading and that this constituted irreparable harm — Hearing was held three days later and application was adjourned again — Four-day adjournment was granted to allow T Co. to remove offending ads — Applications judge held that affidavit of T Co. official gave requisite undertaking not to run offending ads — However, applications judge held that giving T Co. twelve days to remove offending ads was too much time — Applications judge directed that at next hearing, T Co. have sufficient evidence of efforts to deal with offending ads — Hearing was held four days later — Application adjourned — Firm three-day deadline imposed for compliance by T Co. — Any offending ads in place after deadline would be actionable by B Inc. — Injunctive remedy against T Co. at this point was not necessary — Efforts made by T Co. thus far were satisfactory, and it could be expected to act honourably based on court's direction — T Co. swore affidavit indicating intention to comply — T Co. made significant though perhaps not complete efforts to deconstruct large advertising campaign — T Co. cooperated with B Inc. in bringing application on relatively short notice.
Table of Authorities
Statutes considered:
Competition Act, R.S.C. 1985, c. C-34
Generally — referred to

ADDITIONAL REASONS to judgment reported at ***Tele-Mobile*** *Co., a Partnership v.* ***Bell Mobility*** *Inc.* (2006), 2006 BCSC 185, 2006 CarswellBC 2462 (B.C. S.C. [In Chambers]), with respect to application by telecommunications company for injunction against misleading advertising by competitor.

***J. Groves J.*:**

1 I wish to again thank counsel for their able submissions on behalf of their clients, and apologize in advance for the lack of articulation in these relatively quickly composed oral reasons.

2 I don't intend to repeat at length the significant history of the matters that are again before the court today other than to set the decision today in a brief context.

3 On the 3rd of February, 2006, by way of oral reasons, I concluded that a certain advertisement, which I will refer to as "banner advertisement" of the Telus **Mobility** advertising campaign called "Broadband on the fly" was misleading and a prima facie breach of the *Competition Act*. Rather than issue an injunction, I gave Telus **Mobility** the opportunity to remedy that circumstance by providing the court, as had **Bell**, the defendant in the action with an affidavit that they did not intend to advertise in the offensive manner which the court had determined. By "offensive," I mean offensive vis-à-vis the *Competition Act's* directions as to misleading and false advertising.

4 On the 3rd of February I directed that Telus **Mobility** be given the opportunity to provide this affidavit, and they were given the opportunity to do so by the 6th of February 2006. On the 6th of February, having read the affidavit of Lise Doucette on behalf of Telus **Mobility** I was satisfied as to the undertaking, but I was not satisfied that Telus **Mobility's** plan to remove the determined offensive advertising was necessarily time sufficient. I advised Telus **Mobility** that they had to have before me significant evidence if they desired, essentially, an extension of the court's hesitancy to use its injunctive power; significant

evidence of its compliance; and/or significant evidence of its inability to comply in a timely fashion, essentially by today, with the directions that the advertising be removed.

5 Today I have before me the Affidavit No. 3 of Lise Doucet who is a vice-president marketing communications for Telus **Mobility**. Ms. Doucet has deposed in her affidavit that banner ads in newspapers and print material were removed by the 8th of February, 2006; that radio ads were removed as of the 8th of February, 2006; that television ads would be removed by the 10th of February, 2006; that elevator ads were removed as of the 7th of February, 2006; and that outdoor billboards, which would no doubt require significant effort to be expended to change, would be removed by the close of business on Monday, February 13th, 2006.

6 A number of affidavits have been filed on behalf of the defendant **Bell** which casts doubt on the compliance suggested by Ms. Doucet in her affidavit. Of significance is the affidavit of a Ms. Lisa de Georgio, who indicated that despite what Ms. Doucet said in her affidavit she observed the elevator ads still running on the 8th of February, 2006.

7 Additionally, there is the affidavit of Peter Borszcz, who is an articling student with the firm representing **Bell** who indicated that he heard radio ads which did not contain the two elements of modification necessary to comply with the court's directions. He said he heard those ads on the 9th of February, 2006, which is again inconsistent with the Lise Doucet affidavit.

8 Finally, there is an Affidavit No. 2 of Peter Borszcz, an articling student at the firm retained by the defendant **Bell**, indicating that this morning at 7:48 a.m. and 7:51 a.m., he noticed the ads continuing to run in the elevator in what is called the Captivate network in the elevator. That is also inconsistent with the assurances provided in the Lise Doucet Affidavit No. 3.

9 Additionally, **Bell** has provided an affidavit of Johanna Jutila, a legal secretary at their firm, to which she shows a copy of a Telus **Mobility** advertisement on a bill board in Toronto with a new slogan, "Broadband on the fly, the fastest way to work." I will deal with that issue separately.

10 The history of this matter is that it initially began with a concern by Telus **Mobility** about an advertisement by the defendant **Bell**. **Bell** conceded, when pressed on the matter by Telus **Mobility** prior to court action, essentially that its ads did not comply with the *Competition Act*. **Bell** provided affidavit materials in opposing the injunction sought by Telus **Mobility** which contained an undertaking not to continue with the impugned ads. I have now received from Telus **Mobility** a similar undertaking, essentially that they did not intend to use the offensive advertising.

11 **Bell**, in their affidavits, took some measure to set out what efforts they took to comply with the concerns raised by Telus **Mobility** and those efforts involved activities over a number of weeks.

12 I now have determined in my reasons of February 3rd that Telus Mobiity's ads were offensive, and offensive in the sense of a breach, in my view, of the provisions of the *Competition Act.* And I now have from Telus **Mobility** an affidavit confirming that it is not their intention to continue to use those ads.

13 I was satisfied, after reviewing the affidavits provided by **Bell** including the affidavit of Mr. Jacques, that **Bell** made significant efforts to comply with Telus **Mobility's** concern, and based on that I determined that no injunctions were necessary. I concluded really that **Bell** could be trusted to abide by its word and could be trusted to act honourably despite Telus **Mobility's** argument that there was some necessary follow-up by them to confirm that **Bell** was in fact complying.

14 I now have from Telus **Mobility** an affidavit, just like the affidavit provided by **Bell**, and I have determined after hearing from counsel and reviewing the materials, that I can conclude, as I did with **Bell**, that Telus **Mobility** will act honourably based on the court's direction.

15 In terms of acting honourably, I note that Telus **Mobility** has made some significant efforts, though perhaps not foolproof efforts, or complete efforts, to turn around a large advertising campaign in a very short period of time. I note as well that Telus **Mobility** cooperated with **Bell** in bringing on their application before the court on relatively short notice. I note, again, that they have sworn an affidavit indicating their intention to comply. I note that after my concern on the 6th of February about

possible foot dragging, to use my words perhaps, that Telus **Mobility** has accelerated its efforts to deconstruct its advertising campaign, even at some loss of advertising space. And it seems, based on that action, that the balance of convenience test which is necessary for issuing an injunction has moved, in my view, significantly. I note as well that in regard to the allegations of non-compliance, that Telus **Mobility** has not had an opportunity to review all the **Bell** affidavits in that regard, and no criticism can be directed at either party for that, this matter ongoing and issues are developing quickly.

16 I have concluded that the respective rights of both parties, as well as the court's concern with enforcing provisions of the *Competition Act* against misleading or false advertising when called upon to do so can best be dealt with by the undertakings given. Telus **Mobility's** compliance, though not perfect, is to date significant. I will impose today a firm deadline for compliance, being 12 midnight on February 13th, 2006. After that, any advertisement by **Bell** which would be in breach of its undertaking, or its commitment to the court not to advertise in the fashion it did, would be, in my view, actionable by Telus **Mobility**. Likewise, any advertisement by Telus **Mobility** in regards to the court's directions of the banner ad and any failure to comply with the court's directions in regards to the banner ad by Telus **Mobility** after midnight of the 13th of February, 2006, would be actionable by **Bell**.

17 It is certainly not my hope, or my desire, for this matter to be brought continuously back before me by either party. I accepted from **Bell** that they made their best efforts to comply with their commitment to Telus **Mobility**, and I noted Telus **Mobility's** rigor in enforcing and reminding **Bell** of what it discovered to be its non-compliance. I would expect the same to happen here, that Telus **Mobility** would use all its corporate efforts that it can, to comply with the direction of the court, and I am quite satisfied that the rigor that **Bell** has shown thus far with bringing to the court's attention potential lack of compliance by Telus **Mobility** is a rigor which **Bell** would employ in the future to ensure that Telus **Mobility** is abiding by its commitment to the court.

18 As indicated, after that date, the 13th of February, 2006, if there is a breach of the commitment to the court, remedies would follow. I am satisfied, based on what I have before me, that these two large and responsible corporate citizens have both expressed to the court a desire to comply with the *Competition Act*. And based on that, I am satisfied that an injunctive remedy at this point is not necessary.

19 In conclusion, I am satisfied with the efforts made by Telus **Mobility** thus far. I am satisfied with the undertakings provided as indicated earlier in my reasons of February 3rd by **Bell**, and as indicated in my reasons of February 6th by Telus. As a result, no injunction will issue today.

20 I wish to comment, finally, in regards to the affidavit of Johanna Jutila and the new ad by Telus. And again, not wanting to invite litigation, I have concluded that this issue is really not before the court. If **Bell** is of the view that this ad is itself in breach of the *Competition Act*, then it must institute proceedings, either by amendment to these proceedings, or by separate proceedings. It would appear to me that there is, however, some significant difference between this ad and the ad which I have essentially enjoined Telus **Mobility** from using. Whether or not it is a breach of the *Competition Act* is a matter for a later day, perhaps for either myself at a later day or somebody else from this court at a later day.

Order accordingly.

End of Document

Her Majesty The Queen, as represented by the Department of Agriculture, and the Deputy Minister of Agriculture *Appellant*

v.

Robert Thomson *Respondent*

and

Security Intelligence Review Committee *Intervener*

INDEXED AS: THOMSON *v.* CANADA (DEPUTY MINISTER OF AGRICULTURE)

File No.: 22020.

1991: October 28; 1992: February 13.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Public Service — Security clearance — Successful candidate denied requisite security clearance — Security Intelligence Review Committee recommending security clearance — Deputy Minister refusing to follow Committee's recommendation — Whether Deputy Minister required to follow Committee's recommendation — Canadian Security Intelligence Service Act, S.C. 1984, c. 21, ss. 42, 52(1), (2).

Statutes — Interpretation — Public Service — Security clearance — Successful candidate denied requisite security clearance — Security Intelligence Review Committee recommending security clearance — Deputy Minister refusing to follow Committee's recommendation — Meaning of word "recommendations" in Canadian Security Intelligence Service Act.

Administrative law — Natural justice — Right to be heard — Public Service — Security clearance — Successful candidate denied requisite security clearance — Security Intelligence Review Committee recommending security clearance — Deputy Minister refusing to follow Committee's recommendation — Candidate not given hearing by Deputy Minister — Whether denial of natural justice.

Sa Majesté la Reine, représentée par le ministère de l'Agriculture, et le sous-ministre de l'Agriculture *Appelante*

c.

Robert Thomson *Intimé*

et

Comité de surveillance des activités de renseignement de sécurité *Intervenant*

RÉPERTORIÉ: THOMSON *c.* CANADA (SOUS-MINISTRE DE L'AGRICULTURE)

N° du greffe: 22020.

1991: 28 octobre; 1992: 13 février.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin et Stevenson.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Fonction publique — Habilitation de sécurité — Refus d'accorder l'habilitation de sécurité au candidat retenu — Recommandation du comité de surveillance des activités de renseignement de sécurité d'accorder l'habilitation de sécurité — Refus du sous-ministre de suivre la recommandation du comité — Le sous-ministre est-il tenu de suivre la recommandation du comité? — Loi sur le Service canadien du renseignement de sécurité, S.C. 1984, ch. 21, art. 42, 52(1), (2).

Législation — Interprétation — Fonction publique — Habilitation de sécurité — Refus d'accorder l'habilitation de sécurité au candidat retenu — Recommandation du comité de surveillance des activités de renseignement de sécurité d'accorder l'habilitation de sécurité — Refus du sous-ministre de suivre la recommandation du comité — Sens du mot «recommandations» dans la Loi sur le Service canadien du renseignement de sécurité.

Droit administratif — Justice naturelle — Droit d'être entendu — Fonction publique — Habilitation de sécurité — Refus d'accorder l'habilitation de sécurité au candidat retenu — Recommandation du comité de surveillance des activités de renseignement de sécurité d'accorder l'habilitation de sécurité — Refus du sous-ministre de suivre la recommandation du comité — Le sous-ministre n'a pas entendu le candidat — Y a-t-il eu déni de justice naturelle?

Respondent was offered a public service position in 1984, subject to his obtaining security clearance. The Canadian Security Intelligence Service conducted an investigation and advised the department against granting the requisite security clearance. The department's Deputy Minister considered the CSIS report, and after consulting with the Privy Counsel Office, denied the security clearance and rescinded the job offer. The respondent then filed a complaint with the Security Intelligence Review Committee pursuant to s. 42 of the *Canadian Security Intelligence Service Act*. The Committee conducted an investigation, held two meetings where the parties were present and/or represented by counsel, and issued a report pursuant to s. 52 which recommended that respondent be granted the security clearance. The Deputy Minister nevertheless decided to maintain his denial of the security clearance.

The respondent first commenced an action in the Federal Court of Appeal, pursuant to s. 28 of the *Federal Court Act*, to have the Deputy Minister's decision to deny the security clearance set aside. The court held that, while the Deputy Minister was bound by the Review Committee's recommendation, the court did not have jurisdiction under s. 28 to review and set aside his decision. The respondent then sought *certiorari* to set aside the Deputy Minister's decision and mandamus to require the Deputy Minister to grant him security clearance. The judge denied the application. He concluded that "recommendations", according to the ordinary meaning of the word, was not binding. The Federal Court of Appeal reversed that decision, set aside the Deputy Minister's decision to deny security clearance and ordered him to grant it.

At issue here is whether a Deputy Minister is bound to follow the "recommendations" of the Security Intelligence Review Committee, and more particularly, the meaning to be given the word "recommendations" in s. 52(2) of the *Canadian Security Intelligence Service Act*.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed.

Per La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ.: In order to interpret "recommendations" in s. 52(2), the *Canadian Security and Intelligence Service Act* must be read as a whole in order to ascertain its aim and object. When the words used in the

En 1984, l'intimé s'est vu offrir un poste dans la fonction publique à la condition qu'il obtienne une habilitation de sécurité. Après avoir mené une enquête, le Service canadien du renseignement de sécurité a conseillé au ministère de ne pas accorder l'habilitation de sécurité. Après avoir pris connaissance du rapport du SCRS et après avoir consulté le Bureau du Conseil privé, le sous-ministre a refusé d'accorder à l'intimé l'habilitation de sécurité et il a révoqué l'offre d'emploi. L'intimé a alors déposé une plainte auprès du comité de surveillance des activités de renseignement de sécurité en application de l'art. 42 de la *Loi sur le Service canadien du renseignement de sécurité*. Le comité a fait enquête, a tenu deux réunions au cours desquelles les parties étaient présentes ou représentées par un avocat et, conformément à l'art. 52, a rédigé un rapport qui recommandait l'octroi de l'habilitation de sécurité à l'intimé. Le sous-ministre a néanmoins maintenu sa décision de refuser l'habilitation de sécurité.

L'intimé a d'abord intenté une action devant la Cour d'appel fédérale en application de l'art. 28 de la *Loi sur la Cour fédérale*, pour demander l'annulation de la décision du sous-ministre de refuser l'habilitation de sécurité. La cour a conclu que, bien que le sous-ministre ait été tenu de donner suite à la recommandation, elle n'avait pas compétence, suivant l'art. 28 de la *Loi sur la Cour fédérale*, pour annuler sa décision. L'intimé a ensuite demandé la délivrance d'un bref de *certiorari* ayant pour effet d'annuler la décision du sous-ministre ainsi que celle d'un bref de *mandamus* enjoignant au sous-ministre de lui accorder l'habilitation. Le juge a rejeté la demande. Il a conclu que le mot «recommandations» conservait son sens ordinaire et n'imposait pas d'obligation. La Cour d'appel fédérale a infirmé ce jugement, annulé la décision du sous-ministre de refuser l'habilitation de sécurité et enjoint au sous-ministre de l'accorder.

Il s'agit ici de savoir si un sous-ministre est tenu de suivre les «recommandations» du comité de surveillance des activités de renseignement de sécurité et, plus particulièrement, quel sens il faut donner au mot «recommandations» qui figure à l'art. 52(2) de la *Loi sur le Service canadien du renseignement de sécurité*.

Arrêt (le juge L'Heureux-Dubé est dissidente): Le pourvoi est accueilli.

Les juges La Forest, Sopinka, Gonthier, Cory, McLachlin et Stevenson: Aux fins de l'interprétation du mot «recommandations» qui figure au par. 52(2), la *Loi sur le Service canadien du renseignement de sécurité* doit être considérée dans son ensemble afin d'en déga-

statute are clear and unambiguous, no other step is needed to identify the Parliament's intention.

The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision. There is nothing in either the section or the Act as a whole which indicates that the word "recommendations" should have anything other than its usual meaning.

The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that. The wording of this section would be strained by giving the statute any wider scope. The Deputy Minister bears the onerous responsibility not only for the granting of security clearance but also for the ongoing security in his or her department. Accordingly, the final decision as to security clearance should be left to the Deputy Minister, notwithstanding the recommendations of the Committee.

The word "recommendations" is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an Act. In s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in s. 52(2) to receive a different interpretation.

Finally, the Deputy Minister had evidence upon which he could reasonably have concluded that the respondent's security clearance should have been denied.

Per L'Heureux-Dubé J. (dissenting): The Deputy Minister was bound to follow the "recommendations" of the Security Intelligence Review Committee.

To determine the meaning of any particular statutory provision, the act must be read as a whole in order to ascertain its aim and object. Heed must be paid to the language used, the context of both the specific provision and the law itself, and the purpose or intent of the legislation. Although Parliament's intent can sometimes be discerned by the "plain meaning" of a statutory provision, "plain meaning" itself depends on the context of the provision and the overall scheme of the act. The

ger l'objet. Aucune autre démarche n'est nécessaire pour établir l'intention du législateur lorsque le texte de la loi est clair et sans ambiguïté.

Le terme «recommandations» doit être interprété suivant son sens ordinaire. «Recommandations» renvoie ordinairement au fait de conseiller et ne saurait équivaloir à une décision obligatoire. Ni la disposition en cause ni la Loi dans son ensemble ne permettent de conclure que le mot «recommandations» a un autre sens que son sens usuel.

La recommandation du comité est un rapport présenté comme étant digne d'acceptation. Elle sert à garantir l'authenticité des renseignements sur lesquels le sous-ministre fonde sa décision et lui donne l'avantage d'une seconde opinion, rien de plus. Ce serait forcer le sens de la disposition en cause de conférer à la Loi une portée plus grande. Le sous-ministre a la lourde responsabilité non seulement d'accorder les habilitations de sécurité, mais également d'assurer la sécurité de son ministère en général. Par conséquent, la décision finale concernant l'habilitation de sécurité devrait appartenir au sous-ministre quelles que soient les recommandations du comité.

Le mot «recommandations» est employé dans d'autres dispositions de la Loi et, à moins que le contexte ne s'y oppose clairement, un mot doit recevoir la même interprétation et avoir le même sens tout au long d'un texte législatif. Le mot «recommandations», au par. 52(1), a le sens ordinaire de conseils. Le législateur n'a certainement pas eu l'intention de donner un sens différent au mot «recommandations» au par. 52(2).

Enfin, le sous-ministre avait des éléments de preuve sur lesquels il pouvait raisonnablement s'appuyer pour refuser d'accorder à l'intimé l'habilitation de sécurité.

Le juge L'Heureux-Dubé (dissidente): Le sous-ministre était tenu de suivre les «recommandations» du comité de surveillance des activités de renseignement de sécurité.

Pour déterminer la portée d'une disposition législative donnée, une loi doit être considérée dans son ensemble afin d'en dégager l'objet. Il faut tenir compte des mots employés, du contexte dans lequel s'inscrivent tant la disposition en cause que la loi dans son ensemble ainsi que de l'objet de la loi ou de l'intention du législateur. Même si l'on peut parfois déceler l'intention du législateur en faisant appel au «sens littéral» d'une disposition législative, ce «sens littéral» dépend du con-

meaning of specific terms must also be reconciled with the intent of Parliament.

Reference to context and intent is important since the word "recommendations" does not lend itself automatically to a single, rigid definition. Dictionary definitions are all merely suggested meanings; the true meaning of the word must necessarily flow from its context within the entire statute. Thus, while "recommendations" often connotes advice or information which the recipient may disregard, the term might also refer to directions or orders which are binding.

The words in the Act must also be given a meaning consistent with both its French and English texts. Section 52(2) of the French text of the *Canadian Security and Intelligence Service Act* refers to "*recommandations*". The words "*commandement*" and "*ordre*" are dictionary synonyms for "*recommandation*".

Context refers both to the provisions immediately surrounding the provision under examination and to the overall scheme of the statute. Nothing necessarily compels that a permissive meaning be attributed to the term "recommendations". Other provisions in the Act, moreover, are consistent with the less restrictive interpretation.

The section 42 mechanism for review of denials of security clearance suggests something more than an advisory role for the Committee. The Deputy Minister's adversarial role in the Committee's hearing also indicates that the Committee's recommendations are more than suggestive. A fundamental tenet of natural justice is contradicted if the deputy minister can, following a hearing to which he or she has been a party and without any other reasons than those he or she expressed at the hearings, reverse the decision that resulted from the hearing.

Finally, a judge's fundamental consideration in statutory interpretation is the purpose of legislation. In setting up the review mechanism under s. 42, Parliament must have intended to provide a system of redress for parties who were unjustly deprived of employment due to erroneous or flawed CSIS reports. Parliament could not have intended to create a situation where a civil servant could be denied employment or promotion with-

texte de celle-ci et de l'économie générale de la loi. Le sens de termes particuliers doit également tenir compte de l'intention du législateur.

Il importe de tenir compte du contexte et de l'intention du législateur étant donné que le mot «recommandations» ne se prête pas automatiquement à une seule et rigide définition. Les dictionnaires ne font que suggérer des définitions, car le sens véritable d'un mot dépend nécessairement du contexte dans lequel il s'insère dans une loi considérée dans son entier. Par conséquent, bien que le mot «recommandations» renvoie souvent au fait de donner un conseil ou une information dont le destinataire peut ne pas tenir compte, il peut également signifier des directives ou des ordres obligatoires.

Les mots que la Loi emploie doivent également recevoir une interprétation que supportent les textes tant français qu'anglais. La version française du par. 52(2) de la *Loi sur le Service canadien du renseignement de sécurité* emploie le mot «recommandations». Les mots «commandement» et «ordre» figurent dans les dictionnaires parmi les synonymes du vocable «recommandation».

Le contexte s'entend des dispositions qui voisinent immédiatement la disposition en cause ainsi que de l'économie générale de la loi. Rien n'oblige nécessairement à donner au mot «recommandations» un sens facultatif. En outre, d'autres dispositions de la Loi vont dans le sens d'une interprétation moins restrictive.

La procédure d'examen du refus de l'habilitation de sécurité que prévoit l'art. 42 de la Loi incite à conclure que le comité a plus qu'un simple rôle consultatif. Le rôle que joue le sous-ministre dans la procédure contradictoire qui se déroule devant le comité indique également que les recommandations du comité ne sont pas que des suggestions. Un principe fondamental de justice naturelle est écarté si le sous-ministre peut à la suite de l'audience du comité à laquelle il a participé à titre de partie, sans autres motifs que ceux invoqués à l'audience, renverser la décision qui est ressortie de l'audience.

Enfin, il incombe fondamentalement au juge qui est appelé à interpréter un texte législatif de déterminer quel est l'objet de la loi en cause. En établissant la procédure d'examen prévue à l'art. 42, le législateur doit avoir voulu mettre sur pied un mécanisme de redressement à l'intention des personnes qui se voient injustement refuser un emploi en raison d'un rapport inexact du SCRS. Le législateur n'a pas pu vouloir créer une situation où

out any chance of righting a wrong done to him or her, especially given the context of today's labour relations.

Only where a candidate has proved to the Committee that the CSIS report contains spurious or unfounded allegations and the Committee recommends that the clearance be granted must the Deputy Minister accept the candidate. Although the Deputy Minister must bear ultimate responsibility for security even if acting on another body's directives, this situation is not unique.

Even if the Deputy Minister had the discretion to deny a security clearance notwithstanding the Committee's report, the appeal should be dismissed on the grounds that he did not exercise that discretion properly. The Deputy Minister's decision disregarded the Review Committee's recommendations on the strength of the original CSIS report. Since the Review Committee's findings served to correct and revise the CSIS report, the Deputy Minister should have relied almost exclusively on them rather than on the erroneous CSIS allegations.

The Deputy Minister also failed to respect the requirements of natural justice, since he neither gave the respondent reasons for his decision nor a chance to be heard.

Cases Cited

By Cory J.

Distinguished: *Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide* (1975), 11 S.A.S.R. 504; **referred to:** *Lee v. Attorney General of Canada*, [1981] 2 S.C.R. 90; *Attorney General of Canada v. Murby*, [1981] 1 F.C. 713; *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

By L'Heureux-Dubé J. (dissenting)

Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; *Cloutier v. The Queen*, [1979] 2 S.C.R. 709; *Quebec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662; *City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384; *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436; *R. v.*

un fonctionnaire pourrait se voir refuser un emploi ou une promotion sans que ne lui soit accordée quelque possibilité d'obtenir un redressement quant au préjudice subi, particulièrement dans le contexte actuel des relations de travail.

C'est uniquement lorsqu'un candidat convainc le comité que le rapport du SCRS renferme des données inexactes et sans fondement et que le comité recommande d'accorder l'habilitation de sécurité, que le sous-ministre doit retenir la candidature en cause. Bien que le sous-ministre doive supporter la responsabilité ultime quant à la sécurité même lorsqu'il agit suivant les directives d'un autre organisme, cette situation n'est pas unique.

Même si le sous-ministre avait le pouvoir de refuser l'habilitation de sécurité malgré le rapport du comité, le pourvoi serait rejeté pour le motif que ce pouvoir n'a pas été exercé adéquatement. Le sous-ministre n'a pas tenu compte des recommandations du comité et s'est fondé essentiellement sur le rapport initial du SCRS. Comme les conclusions du comité ont apporté des corrections et des modifications à ce rapport, le sous-ministre aurait dû s'appuyer presque exclusivement sur ces conclusions plutôt que sur les allégations erronées du SCRS.

Le sous-ministre n'a pas respecté les exigences de la justice naturelle puisqu'il n'a pas fourni à l'intimé les motifs de sa décision et ne lui a pas permis de se faire entendre.

Jurisprudence

Citée par le juge Cory

Distinction d'avec l'arrêt: *Myer Queenstown Garden Plaza Pty. Ltd. c. City of Port Adelaide* (1975), 11 S.A.S.R. 504; **arrêts mentionnés:** *Lee c. Procureur général du Canada*, [1981] 2 R.C.S. 90; *Procureur général du Canada c. Murby*, [1981] 1 C.F. 713; *R. c. Multiform Manufacturing Co.*, [1990] 2 R.C.S. 624; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643.

Citée par le juge L'Heureux-Dubé (dissidente)

Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne), [1987] 1 R.C.S. 1114; *Cloutier c. La Reine*, [1979] 2 R.C.S. 709; *Quebec Railway, Light, Heat and Power Co. c. Vandry*, [1920] A.C. 662; *City of Victoria c. Bishop of Vancouver Island*, [1921] 2 A.C. 384; *Attorney-General c. Prince Ernest Augustus of Hanover*,

Sommerville, [1974] S.C.R. 387; *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214; *Hands v. Law Society of Upper Canada* (1890), 17 O.A.R. 41; *Bridge v. The Queen*, [1953] 1 S.C.R. 8; *Labour Relations Board of Saskatchewan v. The Queen*, [1956] S.C.R. 82; *Cité de Côte St-Luc v. Canada Iron Foundries Ltd*, [1970] C.A. 62; *Reference as to the constitutional validity of certain sections of The Fisheries Act, 1914*, [1928] S.C.R. 457; *R. v. S.(S.)*, [1990] 2 S.C.R. 254; *Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide* (1975), 11 S.A.S.R. 504; *The King v. Christ's Hospital Governors*, [1917] 1 K.B. 19; *The Queen v. Compagnie Immobilière BCN Ltée*, [1979] 1 S.C.R. 865; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653.

Statutes and Regulations Cited

Cabinet Directive No. 35, August 9, 1978.
Canadian Security Intelligence Service Act, S.C. 1984, c. 21 (now R.S.C., 1985, c. C-23), ss. 5(i), 41, 42, 52(1), (2).
Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 28.
Financial Administration Act, R.S.C. 1970, c. F-10.
Official Languages Act, R.S.C. 1970, c. O-2, ss. 8(1), (2)(*d*).
Public Service Employment Act, R.S.C. 1970, c. P-32.

Authors Cited

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2nd ed. Cowansville, Qué.: Yvon Blais, 1991.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswell, 1985.
Petit Robert 1. Paris: Le Robert, 1984, "recommandation".

APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 820, setting aside a judgment of the Federal Court, Trial Division, [1989] 1 F.C. 86, dismissing an application for writs of *certiorari* and mandamus after the dismissal, for want of jurisdiction, of an application to the Fed-

[1957] A.C. 436; *R. c. Sommerville*, [1974] R.C.S. 387; *Julius c. Bishop of Oxford* (1880), 5 App. Cas. 214; *Hands c. Law Society of Upper Canada* (1890), 17 O.A.R. 41; *Bridge c. The Queen*, [1953] 1 R.C.S. 8; *Labour Relations Board of Saskatchewan c. The Queen*, [1956] R.C.S. 82; *Cité de Côte St-Luc c. Canada Iron Foundries Ltd*, [1970] C.A. 62; *Reference as to the constitutional validity of certain sections of The Fisheries Act, 1914*, [1928] R.C.S. 457; *R. c. S.(S.)*, [1990] 2 R.C.S. 254; *Myer Queenstown Garden Plaza Pty. Ltd. c. City of Port Adelaide* (1975), 11 S.A.S.R. 504; *The King c. Christ's Hospital Governors*, [1917] 1 K.B. 19; *La Reine c. Compagnie Immobilière BCN Ltée*, [1979] 1 R.C.S. 865; *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997; *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643; *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311; *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653.

Lois et règlements cités

Directive du Cabinet nº 35, 9 août 1978.
Loi sur la Cour fédérale, S.R.C. 1970 (2e supp.), ch. 10, art. 28.
Loi sur l'administration financière, S.R.C. 1970, ch. F-10.
Loi sur l'emploi dans la Fonction publique, S.R.C. 1970, ch. P-32.
Loi sur le Service canadien du renseignement de sécurité, S.C. 1984, ch. 21 (maintenant L.R.C. (1985), ch. C-23), art. 5(i), 41, 42, 52(1), (2).
Loi sur les langues officielles, S.R.C. 1970, ch. O-2, art. 8(1), (2)*d*).

Doctrine citée

Côté, Pierre-André. *Interprétation des lois*, 2e éd. Cowansville, Qué.: Yvon Blais, 1990.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Hogg, Peter W. *Constitutional Law of Canada*, 2nd ed. Toronto: Carswell, 1985.
Petit Robert 1. Paris: Le Robert, 1984, «recommandation».

POURVOI contre un arrêt de la Cour d'appel fédérale, [1990] 2 C.F. 820, qui a infirmé un jugement de la Cour fédérale, Section de première instance, [1989] 1 C.F. 86, qui rejetait une demande de brefs de *certiorari* et de *mandamus* après le rejet, pour défaut de compétence, d'une demande à

eral Court of Appeal under s. 28 of the *Federal Court Act*, [1988] 3 F.C. 108, 31 Admin. L.R. 14. Appeal allowed, L'Heureux-Dubé J. dissenting.

I. G. Whitehall, Q.C., and *B. S. Russell*, for the appellant.

Sean T. McGee and *Steven J. Welchner*, for the respondent.

Simon Noël and *Sylvie Roussel*, for the intervener Security Intelligence Review Committee.

The judgment of La Forest, Sopinka, Gonthier, Cory, McLachlin and Stevenson JJ. was delivered by

CORY J.—The prime issue on this appeal is whether a deputy minister is bound to follow the "recommendations" of the Security Intelligence Review Committee.

Factual Background

In 1984, Robert Thomson, the respondent, was offered a position with the International Affairs Directorate of Agriculture Canada. The offer was subject to the granting of security clearance to the respondent. The Canadian Security Intelligence Service ("CSIS") conducted an investigation. CSIS then reported to the Department of Agriculture. It advised that the respondent was not an individual in whom the Canadian government could repose full confidence or who should be in a position where he would have access to documents and matters that were classified for reasons of national interest. The conclusion was based upon the following findings by CSIS:

— that you may have revealed the classified contents of a message from the Canadian Ambassador in Santiago to the Department of External Affairs in Ottawa in 1973;

la Cour d'appel fédérale fondée sur l'art. 28 de la *Loi sur la Cour fédérale*, [1988] 3 C.F. 108, 31 Admin. L.R. 14. Pourvoi accueilli, le juge L'Heureux-Dubé est dissidente.

I. G. Whitehall, c.r., et *B. S. Russell*, pour l'appelante.

Sean T. McGee et *Steven J. Welchner*, pour l'intimé.

Simon Noël et *Sylvie Roussel*, pour l'intervenant le comité de surveillance des activités de renseignement de sécurité.

Version française du jugement des juges La Forest, Sopinka, Gonthier, Cory, McLachlin et Stevenson rendu par

LE JUGE CORY—La principale question dans le présent pourvoi est de savoir si un sous-ministre est tenu de suivre les «recommandations» du comité de surveillance des activités de renseignement de sécurité.

Les faits

En 1984, l'intimé, Robert Thomson, s'est vu offrir un poste à la Direction des affaires internationales d'Agriculture Canada à la condition qu'il obtienne une habilitation de sécurité. Après avoir mené une enquête, le Service canadien du renseignement de sécurité (le «SCRS») a remis au ministère de l'Agriculture un rapport selon lequel l'intimé n'était pas une personne en qui le gouvernement canadien pouvait avoir pleinement confiance ou qui devrait occuper un poste donnant accès à des affaires ou à des documents classifiés dans l'intérêt national. Cette conclusion s'appuyait sur les éléments suivants relevés par le SCRS:

[TRADUCTION]

— il est possible que vous ayez dévoilé le contenu classifié d'un message de l'ambassadeur du Canada à Santiago au ministère des Affaires extérieures à Ottawa, en 1973;

— that you revealed the contents of a classified telex to a Member of Parliament in 1973 and that you at first denied knowing the Member of Parliament;

— that you refused to name the person with whom you said you had discussed the contents of the classified telex . . . ;

— that by your own admission you transmitted letters in a clandestine fashion to a recipient in Guyana;

— that you have maintained contact, in a clandestine manner, with officials and/or agents of foreign governments and offered to provide classified information on at least one known occasion to them.

The Deputy Minister considered the CSIS report. After consulting with the Privy Counsel Office, he denied security clearance to the respondent and rescinded the job offer. The respondent then filed a complaint with the Security Intelligence Review Committee (the "Committee"). This was done pursuant to s. 42 of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21 (the "Act"). The Committee conducted an investigation. The Committee then held hearings on August 13, October 9 and November 7, 1985. Throughout the hearings the respondent was present with counsel. The Deputy Minister and the Committee were each represented by separate counsel. Pursuant to s. 52 of the Act, the Committee then issued a report which recommended the granting of security clearance to the respondent. The essential aspects of the report were as follows:

We find that, with one exception, the allegations concerning Mr. Thomson's activities since 1973 are not supported by the evidence. The exception is that Mr. Thomson was not forthright in his interview with the CSIS investigator when he was questioned in 1985 about the unauthorized release of telexes in 1973.

. . .

It remains that Mr. Thomson admitted to the unauthorized release of classified information . . . . This release was not, it should be noted, to a foreign power, but to a Canadian M.P. It was, nevertheless, a serious breach of trust, and the question which must be answered is: would Mr. Thomson do such a thing in the future if circumstances led to his becoming, once again, emotionally engaged?

— vous avez dévoilé le contenu d'un télex classifié à un député du Parlement, en 1973, en niant d'abord connaître ledit député;

— vous avez refusé de nommer la personne avec laquelle vous avez déclaré avoir discuté du contenu du télex classifié. . .;

— de votre propre aveu, vous avez transmis clandestinement des lettres à un destinataire en Guyane;

— vous avez, clandestinement, maintenu des contacts avec des fonctionnaires et agents de gouvernements étrangers à qui vous avez proposé, au moins à une occasion, de fournir des renseignements classifiés.

Après avoir pris connaissance du rapport du SCRS et après avoir consulté le Bureau du Conseil privé, le sous-ministre a refusé d'accorder à l'intimé l'habilitation de sécurité et il a révoqué l'offre d'emploi. L'intimé a alors déposé une plainte auprès du comité de surveillance des activités de renseignement de sécurité (le «comité») en application de l'art. 42 de la *Loi sur le Service canadien du renseignement de sécurité*, S.C. 1984, ch. 21 (la «Loi»). Le comité a fait enquête puis, les 13 août, 9 octobre et 7 novembre 1985, a tenu des audiences au cours desquelles l'intimé était assisté d'un avocat. Le sous-ministre et le comité étaient chacun représentés par avocat. Conformément à l'art. 52 de la Loi, le comité a rédigé un rapport dans lequel il recommande l'octroi de l'habilitation de sécurité à l'intimé. Voici les points essentiels de ce rapport:

[TRADUCTION] A l'exception d'une seule, les allégations relatives aux activités de M. Thomson depuis 1973 ne sont pas, à notre avis, appuyées par la preuve. L'exception relevée concerne le fait que M. Thomson a manqué de franchise lorsqu'il a été interrogé par l'enquêteur du SCRS en 1985 au sujet de la divulgation de télex sans autorisation en 1973.

. . .

Il reste que M. Thomson a admis avoir dévoilé sans autorisation [. . .] des renseignements classifiés [. . .] On notera cependant que le destinataire n'était pas une puissance étrangère, mais un député canadien. Il s'agissait malgré tout d'un grave abus de confiance et la question qui se pose est la suivante: M. Thomson agirait-il de la même façon à l'avenir si les circonstances l'amenaient encore une fois à s'engager émotivement?

The answer to that question must be entirely subjective. We believe that since the incidents took place some twelve years ago when Mr. Thomson was both less experienced and less mature, his actions then cannot, in the absence of other evidence, lead to the conclusion that, in similar circumstances, he would act in the same way now or in the future. There was no other evidence which would have led us to that conclusion.

We find, therefore, that Mr. Thomson would be unlikely to release classified information if he were once again employed in a position with access to such material.

Recommendation

We recommend that the Deputy Minister of Agriculture Canada grant Mr. Thomson a Secret security clearance so that he may continue his career in the position offered to him in 1984.

Despite the recommendation, the Deputy Minister decided to maintain his decision to deny security clearance. It was his opinion that he should not grant security clearance until his doubts as to the reliability of the respondent had been resolved. Neither the report of CSIS nor that of the Committee had resolved these doubts.

Decisions in the Courts Below

Federal Court of Appeal, [1988] 3 F.C. 108

The respondent first commenced an action in the Federal Court of Appeal, pursuant to s. 28 of the *Federal Court Act,* R.S.C. 1970 (2nd Supp.), c. 10, to have the Deputy Minister's decision set aside. Stone J.A. writing for the court recognized that the interpretation of the word "recommendations" as it appears in s. 52(2) of the Act was crucial. He concluded that the word was not used in its literal sense. It was his opinion that the Deputy Minister was not entitled to "re-make" a decision he had already rendered after the matter had become the subject of a "complaint" and of a "recommendation". Stone J.A. concluded that the Deputy Minister was bound by the recommendation. However, it was his view that the court did not have jurisdiction under s. 28 of the *Federal Court Act* to review and set aside the decision of the Deputy Minister denying security clearance.

La réponse à cette question est nécessairement tout à fait subjective. Pour notre part, nous croyons que ces incidents survenus il y a environ 12 ans, à une époque où M. Thomson avait moins d'expérience et de maturité, ne peuvent à eux seuls justifier la conclusion qu'en pareilles circonstances il agirait, aujourd'hui ou demain, de la même façon. Il n'y avait pas d'autre preuve nous permettant de tirer cette conclusion.

Nous concluons, par conséquent, qu'il serait improbable que M. Thomson dévoile des renseignements classifiés s'il obtenait une fois de plus un poste lui donnant accès à des renseignements de cette nature.

Recommandation

Nous recommandons que le sous-ministre d'Agriculture Canada accorde à M. Thomson l'habilitation de sécurité au niveau 'Secret' de façon à ce qu'il puisse poursuivre sa carrière dans le poste qui lui a été offert en 1984.

Malgré la recommandation, le sous-ministre a maintenu sa décision de refuser l'habilitation de sécurité. Selon lui, le refus s'imposait tant que persistaient ses doutes concernant la fiabilité de l'intimé. Or, ni le rapport du SCRS ni celui du comité n'avaient dissipé ces doutes.

Les décisions des tribunaux d'instance inférieure

La Cour d'appel fédérale, [1988] 3 C.F. 108

L'intimé a d'abord intenté une action devant la Cour d'appel fédérale en application de l'art. 28 de la *Loi sur la Cour fédérale*, S.R.C. 1970 (2e supp.), ch. 10, pour demander l'annulation de la décision du sous-ministre. S'exprimant au nom de la cour, le juge Stone a reconnu que l'interprétation donnée au mot «recommandations» utilisé au par. 52(2) de la Loi était cruciale. Il a conclu que le mot n'était pas employé au sens littéral. Selon lui, le sous-ministre ne pouvait pas «re-prendre» une décision qu'il avait déjà prise une fois que l'affaire avait fait l'objet d'une «plainte» puis d'une «recommandation». Il a par conséquent statué que le sous-ministre était tenu de donner suite à la recommandation, mais que la cour n'avait pas compétence, suivant l'art. 28 de la *Loi sur la Cour fédérale*, pour annuler sa décision de refuser l'habilitation de sécurité.

Federal Court, Trial Division, [1989] 1 F.C. 86

The respondent next applied for relief by way of *certiorari* to set aside the Deputy Minister's decision to deny the security clearance and by way of mandamus to require the Deputy Minister to grant security clearance to him. Dubé J. concluded that the word "recommendations" in the Act retained its ordinary meaning. That is to say that it was not a binding decision or conclusion but simply a recommendation to the Deputy Minister. He found that there was no obligation cast upon the Deputy Minister to follow the Committee's recommendation. Accordingly, Dubé J. denied the application. In his opinion, the Deputy Minister had acted fairly and, therefore, the Court would not interfere with the Deputy Minister's discretionary decision.

La Cour fédérale, Section de première instance, [1989] 1 C.F. 86

L'intimé a ensuite demandé la délivrance d'un bref de *certiorari* ayant pour effet d'annuler la décision du sous-ministre de refuser l'habilitation de sécurité ainsi que celle d'un bref de *mandamus* enjoignant au sous-ministre de la lui accorder. Le juge Dubé a conclu que le mot «recommandations» dans la Loi conservait son sens ordinaire. Par conséquent, il ne s'agissait pas d'une décision ou d'une conclusion obligatoire, mais simplement d'une recommandation au sous-ministre. Il a jugé que le sous-ministre n'était pas tenu de donner suite à la recommandation du comité. Le juge Dubé a donc rejeté la demande. Selon lui, le sous-ministre avait agi de manière équitable, de sorte que la cour ne devait pas modifier la décision que ce dernier avait prise dans l'exercice de son pouvoir discrétionnaire.

Federal Court of Appeal, [1990] 2 F.C. 820

The Federal Court of Appeal reversed the decision of the trial judge, set aside the Deputy Minister's decision to deny security clearance and ordered him to grant the required security clearance to Mr. Thomson.

La Cour d'appel fédérale, [1990] 2 C.F. 820

La Cour d'appel fédérale a infirmé le jugement de première instance, annulé la décision du sous-ministre de refuser l'habilitation de sécurité et enjoint au sous-ministre d'accorder l'habilitation à M. Thomson.

The Key Statutory Provisions

The *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21, s. 52 (now R.S.C., 1985, c. C-23) provides:

52. . . .

(2) On completion of an investigation in relation to a complaint under section 42, the Review Committee shall provide the Minister, the Director, the deputy head concerned and the complainant with a report containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant.

A reading of the section makes it clear that this case will turn upon the meaning given to the word "recommendations".

Les dispositions législatives

L'art. 52 de la *Loi sur le Service canadien du renseignement de sécurité*, S.C. 1984, ch. 21 (maintenant L.R.C. (1985), ch. C-23) prévoit, entre autres, ce qui suit:

52. . . .

(2) À l'issue d'une enquête sur une plainte présentée en vertu de l'article 42, le comité de surveillance envoie au ministre, au directeur, à l'administrateur général concerné et au plaignant un rapport des recommandations qu'il juge indiquées et des conclusions qu'il juge à propos de communiquer au plaignant.

Il ressort de la lecture de cette disposition que l'issue de la présente affaire dépend de l'interprétation donnée au mot «recommandations».

Background

A. *The Prerogative Power and Cabinet Directive No. 35*

So long as forms of government have existed they have engendered confidential conversations, confidential documents and confidential materials. All forms of government must have trust in their employees and officers to preserve that degree of security which a government requires to operate effectively. Democracies tend to be more open than other forms of governments. Although some governments are more open than others, it nonetheless remains true that all governments must maintain some degree of security and confidentiality in order to function. The most open democracy still requires a high degree of security and confidentiality with regard to many matters including, for example, the defence of the realm or trade negotiations. The degree of security required will vary with the position and role of the government employee. The higher the position, the greater will be the access to sensitive information, and the greater the need for security.

Originally, it was the monarch that appointed and managed the public service. The power of appointment was historically a royal prerogative. The ever expanding role of public service led to the passage of legislation in the 1960s establishing the Treasury Board, the Public Service Commission and the Public Service Staff Relation Board. The role of these bodies was to manage and control the federal public service. Nonetheless, the power to grant or deny security clearances as a condition of appointment remained part of the royal prerogative or more appropriately, in our times, a function of management controlled by the Crown.

This principle was recognized in *Lee v. Attorney General of Canada*, [1981] 2 S.C.R. 90. That case specifically approved the reasons of Le Dain J.A. (as he then was) in the Federal Court of Appeal

L'Historique

A. *La prérogative et la directive du Cabinet nº 35*

Depuis qu'ils existent, sous différentes formes, les gouvernements produisent des conversations et des documents confidentiels. Tous les gouvernements doivent avoir confiance en leurs fonctionnaires afin d'assurer la sécurité nécessaire pour fonctionner de manière efficace. Parmi les différentes formes de gouvernement, la démocratie tend à être la plus ouverte. Or, même si certains gouvernements sont plus ouverts que d'autres, il reste qu'ils doivent tous, pour bien fonctionner, maintenir, jusqu'à un certain point, la sécurité et la confidentialité de diverses informations. Même le régime démocratique le plus ouvert doit assurer un niveau élevé de sécurité et de confidentialité en ce qui concerne bon nombre de questions, notamment la défense du territoire et les négociations commerciales. Le niveau de sécurité requis varie en fonction du poste qu'occupe un fonctionnaire donné et du rôle qui lui est confié. Plus le poste est important, plus son titulaire a accès à des renseignements de nature délicate et plus le niveau de sécurité requis est élevé.

À l'origine, c'est au souverain qu'il incombait de gérer la fonction publique et d'en nommer les membres. Historiquement, ce pouvoir de nomination découlait de la prérogative royale. Le rôle sans cesse croissant de la fonction publique a entraîné, au cours des années 1960, l'adoption de lois constituant le Conseil du Trésor, la Commission de la fonction publique et la Commission des relations de travail dans la fonction publique. Ces organismes ont reçu pour mission de gérer et de surveiller la fonction publique fédérale. Cependant, le pouvoir d'accorder ou de refuser une habilitation de sécurité à titre de condition de nomination est demeuré du ressort de la prérogative royale ou, plus pertinemment de nos jours, une fonction de gestion contrôlée par l'État.

Ce principe a été confirmé dans *Lee c. Procureur général du Canada*, [1981] 2 R.C.S. 90. Cet arrêt a expressément approuvé les motifs que le juge Le Dain (alors juge à la Cour d'appel) a

decision of *Attorney General of Canada v. Murby*, [1981] 1 F.C. 713. There it was found that the authority to require security clearance as a condition of appointment and the authority to determine whether such clearance should be granted were part of the management authority. It was held that these functions had not been excluded or reassigned by the *Public Service Employment Act*, R.S.C. 1970, c. P-32.

Furthermore, the Federal Court of Appeal noted that Cabinet Directive No. 35 ("C.D. 35") was a directive from the government concerning the exercise of this component of the management authority. It was confirmed that the deputy head or Deputy Minister bore the responsibility for making the decision as to security clearance in any particular case. Le Dain J. concluded that the prerogative power to grant security clearance was delegated to the Deputy Minister in accordance with the requirements of C.D. 35. That directive was superseded in 1987 by a similar one entitled "Security Policy of the Government of Canada" issued by the Treasury Board of Canada, under the authority of the *Financial Administration Act*, R.S.C. 1970, c. F-10.

Cabinet Directive No. 35 is not, of course, legislative in nature. Rather, it is an internal directive which instructs civil servants as to the manner in which the royal prerogative is to be exercised. Specifically, the directive requires that a security clearance is mandatory for anyone who will have access to classified material. It outlines the procedures for obtaining information about individuals from appropriate sources. Two paragraphs in C.D. 35 are of particular significance:

> 13. . . . If . . . there is in the judgement of the deputy minister . . . a reasonable doubt as to the degree of confidence which can be reposed in the subject, the granting of a security clearance will be delayed until the doubt has been resolved to the satisfaction of the deputy minister. . . .
>
> 25. . . . The deputy head of department or agency will be responsible for granting or withholding a security clearance and will assume a continuing responsibil-

rédigés dans la décision de la Cour d'appel fédérale *Procureur général du Canada c. Murby*, [1981] 1 C.F. 713. La cour a statué que le pouvoir d'exiger une habilitation de sécurité à titre de condition de nomination et le pouvoir de déterminer s'il y avait lieu de l'accorder relevaient du pouvoir de gestion. Elle a en outre conclu que la *Loi sur l'emploi dans la Fonction publique*, S.R.C. 1970, ch. P-32, n'avait ni supprimé ni confié à d'autres ces pouvoirs.

Par ailleurs, la Cour d'appel fédérale a fait remarquer que la directive du Cabinet nº 35 (la «directive nº 35») était une directive du gouvernement sur l'exercice de cette composante du pouvoir de gestion. Elle a confirmé qu'il incombait à l'administrateur général ou au sous-ministre de prendre la décision relative à l'habilitation de sécurité dans un cas donné. Selon le juge Le Dain, la prérogative permettant d'accorder l'habilitation de sécurité a été déléguée au sous-ministre conformément aux exigences de la directive nº 35. Celle-ci a d'ailleurs été remplacée, en 1987, par une autre semblable intitulée «Politique du gouvernement du Canada sur la sécurité» et établie par le Conseil du Trésor du Canada en vertu de la *Loi sur l'administration financière*, S.R.C. 1970, ch. F-10.

Il va sans dire que la directive nº 35 n'est pas de nature législative. Il s'agit plutôt d'une directive interne renseignant les fonctionnaires sur la manière d'exercer la prérogative. Elle prévoit, plus précisément, que l'habilitation de sécurité est obligatoire pour quiconque aura accès à des documents classifiés. Elle fait état de la procédure à suivre pour obtenir des renseignements personnels auprès de sources appropriées. Voici le libellé de deux paragraphes de la directive nº 35 qui revêtent une importance particulière:

> 13. . . . Si [. . .] il existe, de l'avis du sous-ministre [. . .] un doute raisonnable quant à l'ampleur de la confiance pouvant être accordée au candidat, l'octroi de l'habilitation sera différé jusqu'à ce que le doute soit dissipé à la satisfaction du sous-ministre . . .
>
> 25. . . . Il incombera au sous-chef de tout ministère ou organisme d'accorder ou de refuser une habilitation au secret, et c'est de lui que relèvera en tout temps la

ity for a person's access to Top Secret, Secret and Confidential information.

It can thus be seen that before the Act came into existence, there was a system in place which ensured the security of the government.

B. *The Canadian Security Intelligence Service Act*

In 1984, the *Canadian Security Intelligence Service Act* was passed. It provided a statutory means for dealing with security matters in the public service. Part I of the Act established the Canadian Security Intelligence Service (CSIS). Part II provided for the judicial control of its operation. Part III applied to the control and review of CSIS through the Security Intelligence Review Committee. The Committee was given broad powers to investigate complaints by those individuals who were refused employment based on a denial of a security clearance.

The investigation pertaining to the denial of a security clearance may include a full hearing. At such a hearing, all parties are entitled to be represented by counsel, to call and examine witnesses and to make representations. Upon completion of the investigation, the Committee must provide the CSIS Director, the deputy head concerned, the Solicitor General of Canada and the complainant with a report "containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant".

This then is the background against which s. 52(2) of the Act should be considered. Consideration must now be given to the fundamental question of whether the "recommendations" of the Committee are binding upon the Deputy Minister.

Statutory Limitations on the Prerogative Power

It is beyond doubt that the prerogative power of the Crown can be abolished or limited by statute. Once a statute occupies the ground formerly occu-

responsabilité inhérente à l'accès qu'une personne pourra avoir à des informations classifiées Très secret, Secret et Confidentiel.

On peut donc constater que, avant l'entrée en vigueur de la Loi, il existait un système permettant d'assurer la sécurité de l'État.

B. *La Loi sur le Service canadien du renseignement de sécurité*

Adoptée en 1984, la *Loi sur le Service canadien du renseignement de sécurité* permet de résoudre les questions liées à la sécurité au sein de la fonction publique. La partie I de la Loi porte sur la constitution du Service canadien du renseignement de sécurité (le «SCRS»), la partie II, sur le contrôle judiciaire des activités du SCRC et, la Partie III, sur la surveillance de celui-ci par l'intermédiaire du comité de surveillance des activités de renseignement de sécurité. Le comité est investi de larges pouvoirs d'enquête quant aux plaintes de personnes s'étant vu refuser un emploi parce qu'elles n'ont pas obtenu l'habilitation de sécurité requise.

L'enquête sur le refus d'accorder l'habilitation de sécurité peut donner lieu à la tenue d'une audience en bonne et due forme pendant laquelle les parties ont le droit d'être représentées par avocat, d'assigner et d'interroger des témoins et de formuler des observations. À l'issue d'une enquête, le comité envoie au directeur du SCRS, à l'administrateur général concerné, au solliciteur général du Canada et au plaignant un rapport «des recommandations qu'il juge indiquées et des conclusions qu'il juge à propos de communiquer au plaignant».

Voilà donc le contexte dans lequel doit être examiné le par. 52(2) de la Loi. Il convient dès lors de se prononcer sur la question fondamentale de savoir si les «recommandations» du comité lient le sous-ministre.

Les restrictions législatives à la prérogative

Il ne fait aucun doute que la prérogative de l'État peut être supprimée ou restreinte par voie législative. Dès qu'une loi régit un domaine qui

pied by the prerogative power, the Crown must comply with the terms of the statute. See, for example, Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 11. Thus, if the "recommendations" of the Committee, referred to in s. 52(2), are interpreted as a decision binding upon the Deputy Minister, then the Act will limit the prerogative powers formerly exercised by the Deputy Minister.

The Interpretation of s. 52(2)

Positions of the Parties

The respondent and the intervening Committee contend that the Act introduces a three level system for dealing with security clearances. This system, as they see it, is based upon an interpretation of "recommendations" as a "binding decision". Their arguments proceed in this way. First, the Deputy Minister is solely responsible for granting or denying security clearance in accordance with C.D. 35, using the information received from CSIS. Second, if an individual lodges a complaint with the Committee, the Committee then conducts an investigation and reports its recommendations. Third, the Deputy Minister must give effect to the recommendations made by the Committee. In circumstances where the Deputy Minister considers fresh information which was not examined by the Review Committee, then the Deputy Minister may return to step one of the process and refuse a security clearance. At that point, the same three-step process would again be set in motion.

On the other hand, the appellant submits that the Act does not relieve Deputy Ministers of their responsibility to grant or to deny security clearances. The appellant contends that the "recommendations" of the Committee are advisory only. Moreover, it is argued that the purpose of the investigation is to disclose to the complainant the reasons for denial of clearance and to provide the complainant with an opportunity to be heard.

Meaning of "Recommendations"

All parties are in agreement that in order to interpret "recommendations" in s. 52(2), the *Canadian Security Intelligence Service Act* must be read as a whole in order to ascertain its aim and object.

relevait auparavant de la prérogative, l'État est tenu de s'y conformer. Voir à ce sujet Hogg, *Constitutional Law of Canada* (2e éd. 1985), à la p. 11. Ainsi, si les «recommandations» du comité visées au par. 52(2) sont assimilées à une décision liant le sous-ministre, alors la Loi a pour effet de restreindre la prérogative dont était auparavant investi le sous-ministre.

L'interprétation du par. 52(2)

Les prétentions des parties

L'intimé et le comité intervenant soutiennent que la Loi a pour effet de mettre sur pied un système en trois étapes d'octroi des habilitations de sécurité. Selon eux, ce système repose sur l'assimilation des «recommandations» à une «décision obligatoire». Ils présentent ainsi leurs arguments: premièrement, le sous-ministre est seul responsable de l'octroi ou du refus de l'habilitation de sécurité conformément à la directive nº 35, à partir des renseignements transmis par le SCRS. Deuxièmement, lorsqu'une personne présente une plainte au comité, celui-ci fait enquête et dépose un rapport faisant état de ses recommandations. Troisièmement, le sous-ministre doit donner suite aux recommandations du comité. Lorsqu'il prend en considération des éléments nouveaux dont le comité n'a pas été saisi, le sous-ministre peut revenir à la première étape de la procédure et refuser l'habilitation de sécurité. La même procédure en trois étapes serait alors à nouveau mise en branle.

Pour sa part, l'appelante prétend que la Loi ne relève pas le sous-ministre de son obligation d'accorder ou de refuser une habilitation de sécurité. Elle soutient que les «recommandations» du comité ne sont que des conseils. En outre, elle fait valoir que l'objet de l'enquête est de communiquer au plaignant les motifs du refus de l'habilitation de sécurité et de lui donner la possibilité d'être entendu.

Le sens du mot «recommandations»

Toutes les parties conviennent que, aux fins de l'interprétation du mot «recommandations» qui figure au par. 52(2), la *Loi sur le Service canadien du renseignement de sécurité* doit être considérée

As well, it is accepted that when the words used in the statute are clear and unambiguous, no other step is needed to identify the intention of Parliament. See, for example, *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624, at p. 630.

The respondent argues that the word "recommendations" should not automatically be given its ordinary meaning. Rather, it should be interpreted in the context of the statute. Great reliance is placed on the Australian case *Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide* (1975), 11 S.A.S.R. 504. In that case, it was found that in the context of a statute empowering the Governor to make regulations "on the recommendation" of a municipal authority or council, that the Governor's regulations must closely conform with the recommended draft. The *Myer* case is readily distinguishable from the case at hand. The wording of the legislation challenged in that case made it very clear that the "recommendation" had to be followed. The statute in the *Myer* case specifically contemplated some action being taken by one party "on the recommendation of" another party. By contrast, s. 52(2) does not concern itself with any action by a deputy head "on the recommendation" of the Committee.

The contention of the respondent should not, in my view, be accepted. The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision. I agree with the conclusion of Dubé J. of the Trial Division who noted, at p. 92, that:

> The grammatical, natural and ordinary meaning of the word "recommendation" is not synonymous with "decision". The verb "to recommend" is defined in the *Oxford English Dictionary* as "to communicate or report, to inform". In *Webster's Third New International Dictionary* it is defined as "to mention or introduce as being worthy of acceptance, use, or trial; to make a rec-

dans son ensemble afin d'en dégager l'objet. En outre, tous admettent qu'aucune autre démarche n'est nécessaire pour établir l'intention du législateur lorsque le texte de la loi est clair et sans ambiguïté. Voir à ce sujet l'arrêt *R. c. Multiform Manufacturing Co.*, [1990] 2 R.C.S. 624, à la p. 630.

L'intimé prétend que le mot «recommandations» ne doit pas nécessairement être interprété suivant son sens ordinaire. En fait, il estime que l'on doit tenir compte, à cette fin, du contexte dans lequel s'inscrit le texte législatif. Il s'appuie largement à cet égard sur le jugement australien *Myer Queenstown Garden Plaza Pty. Ltd. c. City of Port Adelaide* (1975), 11 S.A.S.R. 504. Dans cette affaire, le tribunal a statué que, dans le contexte d'une loi conférant au gouverneur le pouvoir de prendre des règlements [TRADUCTION] «sur la recommandation» de l'administration ou du conseil municipal, les règlements pris par le gouverneur doivent s'en tenir à la lettre aux dispositions recommandées. Une distinction peut facilement être établie entre cette affaire et la présente espèce. Dans l'affaire *Myer*, il ressortait en effet du texte législatif en cause que la «recommandation» devait être suivie, et la loi prévoyait expressément que certaines mesures devaient être prises par une partie «sur la recommandation» d'une autre. Par contre, dans la présente affaire, le par. 52(2) ne prévoit pas que l'administrateur général doit prendre quelque mesure «sur la recommandation» du comité.

On ne saurait, selon moi, faire droit à la prétention de l'intimé. Le terme «recommandations» doit être interprété suivant son sens ordinaire. «Recommandations» renvoie ordinairement au fait de conseiller et ne saurait équivaloir à une décision obligatoire. Je suis d'accord avec la conclusion du juge Dubé de la Section de première instance, à la p. 92:

> Dans son sens grammatical, naturel et courant, le mot «recommandation» n'est pas synonyme du mot «décision». L'*Oxford English Dictionary* définit comme suit le verbe «recommander»: [TRADUCTION] «communiquer ou faire état de; informer». Le *Webster's Third New International Dictionary* en donne la définition suivante: [TRADUCTION] «mentionner ou présenter comme

ommendatory statement; to present with approval; to advise, counsel".

There is nothing in either the section or the Act as a whole which indicates that the word "recommendations" should have anything other than its usual meaning. The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that. The wording of this section would be strained by giving the statute any wider scope. It should never be forgotten that it is the Deputy Minister who is responsible, not simply for the granting of security clearance, but for the ongoing security in his department. It is an onerous responsibility that is cast upon the Deputy Minister. Accordingly, it is reasonable and appropriate that the final decision as to security clearance is left to the Deputy Minister, notwithstanding the recommendations of the Committee. The conclusion that the words in the statute are clear and unambiguous is sufficient to dispose of the appeal. Nevertheless, I should make a brief reference to two of the other issues raised.

Harmonious Interpretation of "Recommendations" within the Sections and the Act.

There is another basis for concluding that "recommendations" should be given its usual meaning in s. 52(2).

The word is used in other provisions of the Act. Unless the contrary is clearly indicated by the context, a word should be given the same interpretation or meaning whenever it appears in an act. Section 52(1) directs the Committee to provide the Minister and Director of CSIS with a report containing the findings with regard to s. 41 investigations and any "recommendations" that the Committee considers appropriate. A section 41 investigation stems from a complaint to the Committee "with respect to any act or thing done by" CSIS.

étant digne d'acceptation, d'utilisation ou d'essai; faire une recommandation; présenter avec approbation; conseiller».

Ni la disposition en cause ni la Loi dans son ensemble ne permettent de conclure que le mot «recommandations» a un autre sens que son sens usuel. La recommandation du comité est un rapport présenté comme étant digne d'acceptation. Elle sert à garantir l'authenticité des renseignements sur lesquels le sous-ministre fonde sa décision et lui donne l'avantage d'une seconde opinion, rien de plus. Ce serait forcer le sens de la disposition en cause de conférer à la Loi une portée plus grande. Il importe de rappeler que c'est au sous-ministre qu'il incombe non seulement d'accorder les habilitations de sécurité, mais également d'assurer la sécurité de son ministère en général. Il s'agit là d'une lourde responsabilité. Par conséquent, il est raisonnable et opportun que la décision finale concernant l'habilitation de sécurité lui appartienne quelles que soient les recommandations du comité. La conclusion que le texte de la loi est clair et sans ambiguïté suffit à déterminer l'issue du pourvoi, mais je traiterai brièvement de deux des autres questions soulevées.

L'interprétation uniforme du mot «recommandations» dans les différentes dispositions et dans la Loi

Il existe un autre motif qui justifie de donner son sens ordinaire au mot «recommandations» au par. 52(2).

Ce mot est employé dans d'autres dispositions de la Loi et, à moins que le contexte ne s'y oppose clairement, un mot doit recevoir la même interprétation et avoir le même sens tout au long d'un texte législatif. Selon le par. 52(1), le comité envoie au ministre et au directeur du SCRS un rapport contenant ses conclusions concernant une plainte présentée en vertu de l'art. 41 et les «recommandations» qu'il juge indiquées. L'enquête visée à l'art. 41 découle d'une plainte présentée au comité «contre des activités du» SCRS.

It would be obviously inappropriate to interpret "recommendations" in s. 52(1) as a binding decision. This is so, since it would result in the Committee encroaching on the management powers of CSIS. Clearly in s. 52(1) "recommendations" has its ordinary and plain meaning of advising or counselling. Parliament could not have intended the word "recommendations" in the subsequent subsection of the same section to receive a different interpretation. The word must have the same meaning in both subsections.

Was there Evidence Upon Which the Deputy Minister Could Conclude that the Respondent's Security Clearance Should be Denied?

It is the respondent's position that the Deputy Minister had no evidence upon which he could reasonably have concluded that the respondent's security clearance should have been denied. I cannot accept this submission. It must be remembered that the Committee emphasized that its own conclusions were "entirely subjective". The Committee found that the respondent had in fact admitted to the unauthorized release of classified information while working for the Canadian International Development Agency. The Committee also determined that the respondent had lied to the CSIS investigators about the telex incidents. Thus, there was evidence upon which the Deputy Minister could conclude that the respondent's security clearance should be denied.

It is clear that the Deputy Minister, did, in fact, rely upon this evidence to support a clearance refusal. In a letter dated June 4, 1986, the Deputy Minister wrote to Mr. Thomson's solicitor and advised him that "the decision to deny security clearance is maintained". The letter also mentioned the report of the Committee. It can be readily inferred from this letter that the Deputy Minister maintained the clearance refusal only after considering the report. Further the Deputy Minister in his affidavit of September 5, 1986, explained, his reasons for continuing to deny security clearance. In paragraphs 17-19 of that affidavit he deposed that the refusal was based on "the said report from the Canadian Security Intelligence Service, even as commented upon or explained in the said report

Il serait de toute évidence inopportun d'assimiler le mot «recommandations», au par. 52(1), à une décision obligatoire. Il en résulterait, en effet, que le comité empiéterait sur les pouvoirs de gestion du SCRS. De toute évidence, le mot «recommandations», au par. 52(1), a le sens ordinaire de conseils. Le législateur n'a certainement pas eu l'intention de donner un sens différent au mot «recommandations» au paragraphe suivant du même article. Le mot doit avoir le même sens dans les deux cas.

Des éléments de preuve fondaient-ils la décision du sous-ministre de refuser l'habilitation de sécurité à l'intimé?

L'intimé soutient que le sous-ministre ne pouvait raisonnablement s'appuyer sur aucun élément de preuve pour refuser de lui accorder l'habilitation de sécurité. Je ne peux faire droit à sa prétention. Il convient de rappeler la remarque du comité selon laquelle ses propres conclusions étaient «tout à fait subjectives». Le comité a découvert que l'intimé avait de fait avoué avoir communiqué sans autorisation des informations classifiées pendant qu'il travaillait au service de l'Agence canadienne de développement international. Le comité a également conclu que l'intimé avait menti aux enquêteurs du SCRS concernant la divulgation de télex. Par conséquent, les éléments de preuve dont disposait le sous-ministre pouvaient fonder le refus d'octroyer l'habilitation de sécurité à l'intimé.

Il est évident que le sous-ministre a, en fait, fondé son refus d'accorder l'habilitation de sécurité sur ces éléments de preuve. Dans une lettre en date du 4 juin 1986, il écrivait au procureur de M. Thomson que [TRADUCTION] «la décision de refuser l'habilitation de sécurité est maintenue». La lettre faisait également mention du rapport du comité. On peut facilement présumer de la lettre que le sous-ministre a maintenu sa décision de refuser l'habilitation seulement après avoir examiné le rapport. En outre, dans son affidavit du 5 septembre 1986, le sous-ministre a expliqué pourquoi il continuait de refuser l'habilitation. Aux paragraphes 17 à 19 de cet affidavit, il a déposé que son refus était fondé sur [TRADUCTION] «le rapport du Service canadien du renseignement de

from the Security Intelligence Review Committee". This clearly indicates that the Deputy Minister made his decision only after considering the evidence of the Committee.

The Requirements of Natural Justice

This Court has repeatedly recognized the general common law principle that there is "a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual" (see *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653). It follows that the Deputy Minister was under a duty to comply with the principles of procedural fairness in the context of security clearance decision-making. Generally speaking, fairness requires that a party must have an adequate opportunity of knowing the case that must be met, of answering it and putting forward the party's own position. When all the surrounding circumstances are taken into account it is clear that the Deputy Minister fully satisfied these requirements.

Prior to the Committee hearing, Mr. Thomson had been apprised of the objections of the Deputy Minister in a document titled "Statement of Circumstances Giving Rise to the Denial of a Security Clearance to Robert Thomson by the Deputy Head of Agriculture Canada". This document listed the objections considered by the Deputy Minister in his clearance denial. Mr. Thomson was given a full opportunity to respond to the allegations against him at his hearing before the Committee. Despite his own explanations and the submissions made on his behalf, the Committee accepted that three of the five reasons for refusal in the above document were in fact well founded. It is thus apparent that Mr. Thomson was given proper notice and a full hearing in regard to the allegations which formed the basis of the Deputy Minister's decision. The requirements of natural justice have been satisfied.

sécurité, et même sur les commentaires que formule à son égard ou les explications que fournit le comité de surveillance des activités de renseignement de sécurité dans son propre rapport». Cela indique clairement que le sous-ministre n'a pris sa décision qu'après avoir étudié la preuve fournie par le comité.

Les exigences de la justice naturelle

Notre Cour a souvent reconnu le principe général de common law selon lequel «une obligation de respecter l'équité dans la procédure incombe à tout organisme public qui rend des décisions administratives qui ne sont pas de nature législative et qui touchent les droits, privilèges ou biens d'une personne» (voir *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, à la p. 653). Le sous-ministre était donc tenu de se conformer aux principes de l'équité procédurale dans le contexte des décisions en matière d'octroi des habilitations de sécurité. D'une manière générale, l'équité exige qu'une partie ait une possibilité suffisante de connaître la preuve contre laquelle elle doit se défendre, de la réfuter et de présenter sa propre preuve. Si l'on tient compte de toutes les circonstances, il est évident que le sous-ministre a pleinement satisfait à ces exigences.

Avant l'audience du comité, M. Thomson avait été mis au courant des objections du sous-ministre dans un document intitulé [TRADUCTION] «Résumé des circonstances qui ont donné lieu au refus d'une habilitation de sécurité à Robert Thomson par l'administrateur général d'Agriculture Canada». Ce document donnait la liste des objections dont avait tenu compte le sous-ministre pour refuser d'accorder l'habilitation de sécurité. Au cours de l'audience tenue par le comité, M. Thomson a eu la possibilité de répondre aux reproches qui lui étaient adressés. Malgré ses propres explications et les observations formulées en sa faveur, le comité a reconnu comme étant bien fondés trois des cinq motifs de refus donnés par le sous-ministre. Il semble donc que M. Thomson a reçu un avis approprié et a bénéficié d'une audience complète relativement aux allégations qui fondaient la décision du sous-ministre. Les exigences de la justice naturelle ont été respectées.

Summary

The word "recommendations" in the context of s. 52(2) should receive its plain and ordinary meaning. It should not be taken to mean a final or binding decision. Consequently, s. 52(2) does not detract from the Deputy Minister's authority to make the ultimate decision regarding security clearance. This conclusion flows from the wording of s. 52(2). It is supported by the compelling policy reasons for ensuring government security, a duty which is the responsibility of each deputy head.

Further, the Deputy Minister clearly had evidence upon which he could base his conclusion that security clearance should not be granted. In those circumstances, a court should not interfere with that decision.

Disposition

In the result, I would allow the appeal and deny the applications for *certiorari* and mandamus.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting)—I have read the reasons of my colleague Justice Cory and, with respect, I can agree neither with them nor with his conclusion. In my opinion, the Deputy Minister was bound to follow the "recommendations" of the Security Intelligence Review Committee (the "Committee") in the circumstances of the case at bar, largely for the reasons set forth by Stone J.A. for the unanimous Federal Court of Appeal, [1988] 3 F.C. 108.

The main issue in this case, as my colleague points out, is the interpretation of s. 52(2) of the *Canadian Security Intelligence Service Act*, S.C. 1984, c. 21 (the "Act") and, specifically, whether a Deputy Minister may ignore the recommendations of the Committee which has reviewed the security clearance of an applicant.

Résumé

Le mot «recommandations», employé au par. 52(2), doit recevoir son sens manifeste et ordinaire. Il ne doit pas être assimilé à une décision finale ou obligatoire. Par conséquent, le par. 52(2) ne porte pas atteinte au pouvoir du sous-ministre de prendre la décision finale concernant l'habilitation de sécurité. Cette conclusion découle du libellé même du par. 52(2). Elle s'appuie sur des motifs de politique générale impérieux visant à assurer la sécurité du gouvernement, obligation qui incombe à chaque sous-ministre.

De plus, le sous-ministre disposait manifestement d'éléments de preuve lui permettant de conclure que l'habilitation de sécurité ne devait pas être accordée. Par conséquent, un tribunal ne saurait modifier cette décision.

Dispositif

En définitive, je suis d'avis d'accueillir le pourvoi et de rejeter les demandes de *certiorari* et de *mandamus*.

Les motifs suivants ont été rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—J'ai eu l'occasion de lire les motifs de mon collègue le juge Cory, mais je ne puis, avec égards, y souscrire non plus qu'à sa conclusion. Selon moi, le sous-ministre était tenu de suivre les «recommandations» du comité de surveillance des activités de renseignement de sécurité (le «comité») dans les circonstances de la présente instance et ce, principalement pour les motifs invoqués par le juge Stone dans le jugement unanime de la Cour d'appel fédérale, [1988] 3 C.F. 108.

La principale question que pose cet appel, comme l'a souligné mon collègue, porte essentiellement sur l'interprétation du par. 52(2) de la *Loi sur le Service canadien du renseignement de sécurité*, S.C. 1984, ch. 21 (la «Loi») et, en particulier, sur le fait qu'un sous-ministre puisse ou non ignorer les recommandations du comité saisi d'une plainte concernant l'habilitation de sécurité d'un candidat à un emploi.

I agree with my colleague Cory J. that, to determine the meaning of any particular statutory provision, the act "must be read as a whole in order to ascertain its aim and object". While judges long ago might have thought that it was possible to confine their examination to the words of a particular provision alone, today it is well established that, in statutory interpretation, heed must be paid to the language used, the context of both the specific provision and the law itself, and the purpose or intent of the legislation. The current approach is aptly explained by Côté in *The Interpretation of Legislation in Canada* (2nd ed. 1991) at pp. 324:

> Interpretation founded on text alone is unacceptable, if only because words have no meaning in themselves. Meaning flows at least partly from context, of which the statute's purpose is an integral element. Not only does the strictly literal approach ask more of language than it can offer, but it also overestimates the foresight and skill of the drafter. The separation of powers should not necessarily exclude collaboration between them. Drafters are not clairvoyant, they cannot anticipate all circumstances to which their texts will apply. Courts should do more than simply criticize, and the drafter should be able to count on their positive cooperation in fulfilling the goals of legislation. Lord Denning said that the judge, because of the special nature of his role, cannot change the fabric from which the law is woven, but he should have the right to iron out the creases.

The well known passage by Driedger in *Construction of Statutes* (2nd ed. 1983) at p. 87, cited with approval by Chief Justice Dickson in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, emphasises these points:

> 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. [Emphasis added.]

Je souscris à l'opinion de mon collègue, le juge Cory, selon laquelle, pour déterminer la portée d'une disposition législative donnée, une loi «doit être considérée dans son ensemble afin d'en dégager l'objet». Même si, jadis, les juges ont pu croire qu'il était possible de s'en tenir à la seule analyse des mots d'une disposition donnée, il est désormais bien établi que, en matière d'interprétation des lois, il faut tenir compte des mots employés, du contexte dans lequel s'inscrivent tant la disposition en cause que la loi dans son ensemble ainsi que de l'objet de la loi ou de l'intention du législateur. Côté explique très bien l'approche courante dans *Interprétation des lois*, (2e éd. 1990), aux pp. 365 et 366:

> ... une interprétation qui n'insiste que sur le texte doit être rejetée, ne serait-ce que pour le motif que les mots n'ont pas de sens en eux-mêmes. Ce sens découle en partie du contexte de leur utilisation, et l'objet de la loi fait partie intégrante de ce contexte. Ajoutons que si l'interprétation strictement littérale présume beaucoup des possibilités du langage humain, elle surestime aussi la clairvoyance et l'habileté des rédacteurs de textes législatifs. La séparation des pouvoirs ne devrait pas exclure nécessairement la collaboration des pouvoirs. Le rédacteur, qui ne peut prévoir toutes les circonstances où son texte devra s'appliquer, doit pouvoir attendre des tribunaux autre chose que des critiques: il doit pouvoir compter sur leur collaboration dans l'accomplissement du but de la loi. Pour reprendre les paroles de lord Denning, le juge, en raison de la nature particulière de sa fonction, ne peut pas changer le tissu dans lequel la loi est taillée, mais il devrait pouvoir en repasser les faux plis.

Le juge en chef Dickson a cité avec approbation l'extrait bien connu de l'ouvrage de Driedger intitulé *Construction of Statutes* (2e éd. 1983), à la p. 87, dans *Compagnie des chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne)*, [1987] 1 R.C.S. 1114, à la p. 1134, où l'auteur met l'accent sur les points suivants:

> [TRADUCTION] De nos jours, un seul principe ou méthode prévaut pour l'interprétation d'une loi: les mots doivent être interprétés selon le contexte, dans leur acception logique courante en conformité avec l'esprit et l'objet de la loi et l'intention du législateur. [Je souligne.]

Or, as Justice Pratte wrote in *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, at p. 719:

A legislative provision should not be interpreted in isolation; its true meaning cannot be determined without giving consideration to the object of the statute in which it is contained and to the related provisions taken as a whole. Otherwise, there is a danger of arriving at an absurd conclusion.

Here, the crux of the case is the meaning of the word "recommendations" in s. 52(2) of the Act, which reads as follows:

52. . . .

(2) On completion of an investigation in relation to a complaint under section 42, the Review Committee shall provide the Minister, the Director, the deputy head concerned and the complainant with a report containing any recommendations that the Committee considers appropriate, and those findings of the investigation that the Committee considers it fit to report to the complainant. [Emphasis added.]

For my colleague Cory J., the Committee's report under this section cannot be binding because the term "recommendations" usually connotes advice, and because, in his view, there is nothing in the provision or in the Act which indicates that the word should have anything other than its ordinary meaning. In my opinion, however, the context of the Act and the intention of the legislation which can be deciphered from the whole statute, as well as the plain meaning of the words used, do not lead to my colleague's conclusion but to a contrary one.

Plain Meaning

In interpreting the plain meaning of a statute, the search for the one, true literal or dictionary definition is no longer paramount. According to Côté, *supra*, at p. 243:

Contemporary authorities have unequivocally rejected the idea that a statute's context can be ignored, and its interpretation founded on no more than the wording of the legislation.

Au même effet, l'opinion du juge Pratte dans *Cloutier c. La Reine*, [1979] 2 R.C.S. 709, à la p. 719:

Une disposition législative ne s'interprète pas isolément; pour en déterminer son véritable sens, il faut nécessairement tenir compte de l'objet même de la loi où elle se trouve et de l'ensemble des dispositions qui s'y rattachent. Autrement, l'on risque d'arriver à un résultat absurde.

Dans la présente affaire, l'issue du litige dépend de l'interprétation qu'il faut donner au mot «recommandations» au par. 52(2) de la Loi, dont le libellé se lit:

52. . . .

(2) À l'issue d'une enquête sur une plainte présentée en vertu de l'article 42, le comité de surveillance envoie au ministre, au directeur, à l'administrateur général concerné et au plaignant un rapport des recommandations qu'il juge indiquées et des conclusions qu'il juge à propos de communiquer au plaignant. [Je souligne.]

Selon mon collègue, le juge Cory, le rapport du comité dont fait mention ce paragraphe ne peut lier le sous-ministre puisque le mot «recommandations» a habituellement la même connotation que «conseil» et que ni la disposition en cause ni la Loi ne permettent de conclure que le mot en question devrait être interprété autrement que suivant son sens ordinaire. J'estime, pour ma part, que le contexte de la Loi et l'intention du législateur qui se dégagent de l'ensemble du texte législatif, de même que le sens littéral des mots employés, n'appuient pas la conclusion de mon collègue, mais justifient plutôt une conclusion contraire.

Le sens littéral

Pour déterminer la portée véritable d'une loi, la recherche du sens littéral ou de la définition du dictionnaire ne prévaut plus. Voici ce qu'écrit à ce sujet Côté, *op. cit.*, à la p. 271:

Aujourd'hui, la thèse voulant que l'interprète puisse se restreindre à l'exégèse de la seule formule de la loi et faire abstraction du contexte est répudiée nettement aussi bien par la doctrine que par la jurisprudence.

See *Quebec Railway, Light, Heat and Power Co. v. Vandry*, [1920] A.C. 662, at p. 672; *City of Victoria v. Bishop of Vancouver Island*, [1921] 2 A.C. 384, at p. 387; *Attorney-General v. Prince Ernest Augustus of Hanover*, [1957] A.C. 436, at p. 461; *R. v. Sommerville*, [1974] S.C.R. 387, at p. 395.

The limitations inherent in interpretation with reference to the text of a particular statutory provision alone are by now well known. As Driedger, *supra*, explains at p. 3:

> Words, when read *by themselves* in the abstract can hardly be said to have meanings. A dictionary may give many definitions of a word, but it cannot have meaning unless it is connected with other words or things so as to express an idea. [Emphasis in original.]

Côté expands on this idea at p. 221:

> The need to determine the word's meaning within the context of the statute remains. Dictionaries provide meanings for a number of standard and recurring situations. Even the best of them will only tersely indicate the context in which a particular meaning is used. The range of meanings in a dictionary is necessarily limited. It cannot be sufficiently repeated "how much context and purpose relate to meaning". [Emphasis added.]

Accordingly, although the intent of Parliament can sometimes be discerned by the "plain meaning" of a statutory provision, "plain meaning" itself depends on the context of the provision and the overall scheme of the act. As Driedger notes at p. 89:

> The general principles, as we have seen, are that if the words are clear and unambiguous they must be followed; but if they are not, then a meaning must be chosen or found. But the Act must be read as a whole first, for only then can it be said that the words are or are not clear and unambiguous.

Finally, the meaning of specific terms must also be reconciled with the intent of Parliament, as Driedger reiterates at p. 83:

Voir les arrêts suivants: *Quebec Railway, Light, Heat and Power Co. c. Vandry*, [1920] A.C. 662, à la p. 672; *City of Victoria c. Bishop of Vancouver Island*, [1921] 2 A.C. 384, à la p. 387; *Attorney-General c. Prince Ernest Augustus of Hanover*, [1957] A.C. 436, à la p. 461; *R. c. Sommerville*, [1974] R.C.S. 387, à la p. 395.

Les restrictions inhérentes à l'interprétation, lorsqu'il s'agit du libellé d'une disposition législative donnée, sont désormais bien connues. À ce sujet Driedger, *op. cit.*, explique à la p. 3:

> [TRADUCTION] Pris *isolément* et considérés de manière abstraite, les mots peuvent difficilement avoir un sens. Même si le dictionnaire donne plusieurs définitions d'un mot, celui-ci ne peut avoir de sens que s'il est relié à d'autres mots ou éléments, de manière à exprimer une idée. [Italiques dans l'original.]

Côté développe cette idée, à la p. 245:

> . . . il ne faut pas oublier que l'interprète doit rechercher le sens qu'un mot a dans le contexte d'une loi donnée, et non uniquement le sens des dictionnaires. Ceux-ci définissent le sens des mots d'après leur usage dans un certain nombre de contextes récurrents et standards. Les meilleurs ouvrages indiqueront d'ailleurs par une phrase le contexte dans lequel le mot a le sens défini. La gamme des sens définis au dictionnaire est nécessairement limitée et l'interprète doit en tenir compte: on ne répétera jamais assez «à quel point le contexte et le but visé peuvent faire varier le sens d'un mot». [Je souligne.]

En conséquence, même si l'on peut parfois déceler l'intention du législateur en faisant appel au «sens littéral» d'une disposition législative, ce «sens littéral» dépend du contexte de celle-ci et de l'économie générale de la loi. Driedger, *op. cit.*, fait d'ailleurs remarquer ce qui suit à la p. 89:

> [TRADUCTION] Selon les principes que nous avons déjà vus, lorsque le libellé d'une disposition est clair et sans ambiguïté, il doit être suivi à la lettre; dans le cas contraire, il faut trouver ou choisir un sens. Cependant, ce n'est qu'après avoir lu la loi dans son ensemble que l'on peut dire si le libellé d'une disposition est clair et sans ambiguïté.

Enfin, le sens de termes particuliers doit également tenir compte de l'intention du législateur, comme le rappelle Driedger, à la p. 83:

It is clear that today, the words of an Act are always to be read in the light of the object of the Act.

The classic example of the application of these principles arises in the context of legislation containing permissive or directory language. The expressions "may" or "it shall be lawful", for instance, have often been held by the courts to exclude the possibility of discretion; Côté, *supra*, p. 199 and generally at pp. 199-202. In *Julius v. Bishop of Oxford* (1880), 5 App. Cas. 214, the House of Lords held that the meaning of the term "it shall be lawful" must be inferred from the context of the statutory provision, rather than from the "plain and unambiguous" ordinary meaning of the expression. As the Lord Chancellor wrote at pp. 222-23:

The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. [Emphasis added.]

Similarly, the Ontario Court of Appeal held in *Hands v. Law Society of Upper Canada* (1890), 17 O.A.R. 41, at p. 50, that the presumption that "shall" was mandatory and "may" was facultative was not dispositive:

I see nothing in this case, or in any other case, to warrant our holding that whenever the Legislature has created a tribunal to try offences or exercise such powers of deprivation as are given in the case before us, and empowers that tribunal to compel the attendance of wit-

[TRADUCTION] Il appert de nos jours que le libellé d'une loi doit toujours être interprété en fonction de l'objet de la loi.

L'exemple classique de l'application de ces principes se retrouve dans le contexte d'une législation qui emploie un langage permissif ou mandatoire. Les tribunaux ont maintes fois statué que l'emploi, par exemple, de l'expression «*may*» (peut) ou «*it shall be lawful*» (il est licite) avait souvent pour effet d'exclure la possibilité de tout pouvoir discrétionnaire. (Côté, *op. cit.*, à la p. 222 et, en général, aux pp. 221 à 225). Dans l'arrêt *Julius c. Bishop of Oxford* (1880), 5 App. Cas. 214, la Chambre des lords a statué que le sens de l'expression «*it shall be lawful*» (il est licite) devait être déterminé en fonction du contexte de la disposition législative en cause, et non suivant son sens ordinaire, c.-à-d. «clair et sans ambiguïté». Le lord chancelier exprime l'opinion suivante aux pp. 222 et 223:

[TRADUCTION] L'expression «*it shall be lawful*» (il est licite) est non équivoque. Elle est claire et sans ambiguïté. Elle ne fait que rendre légal et possible ce qui, autrement, ne pourrait être accompli en vertu de quelque droit ou pouvoir. Elle ne fait qu'accorder la faculté ou le pouvoir, sans plus. Il se peut que de par l'objet même du pouvoir en cause, de par son but, de par les conditions de son exercice, de par la qualité de la ou des personnes qui en bénéficient, le pouvoir soit assorti d'une obligation, à savoir l'obligation pour celui qui en est investi de l'exercer lorsqu'il en est requis. [Je souligne.]

De même, dans l'arrêt *Hands v. Law Society of Upper Canada* (1890), 17 O.A.R. 41, à la p. 50, la Cour d'appel de l'Ontario a conclu que la présomption selon laquelle «*shall*» (doit) exprimait une obligation et «*may*» (peut), une faculté, n'était pas concluante:

[TRADUCTION] Je ne vois rien dans la présente instance, ni dans aucune autre, qui puisse nous amener à conclure que, lorsqu'une législature crée un tribunal chargé d'instruire des affaires liées à la perpétration d'infractions ou d'exercer des pouvoirs de répression semblables à ceux dont il est question en l'occurrence et qu'elle l'investit du pouvoir de contraindre des témoins

nesses and to examine them on oath, that it can be left to discretion to exercise such powers or not.

It has been suggested that our Interpretation Acts have stamped unalterable meanings on such words as "shall" and "may". I can hardly think that the Legislature intended any change in the law.

This approach was adopted by this Court in *Bridge v. The Queen*, [1953] 1 S.C.R. 8, at pp. 12-13:

> ... it is first submitted that as the permissive word "may" is used in section 5 of the by-law Council have left it to the City Clerk to decide whether permits shall be issued at all; but the by-law must, of course, be read and construed as a whole and it is obvious from other provisions that the Clerk must issue permits in the manner laid down in the by-law.

The Court emphasized in *Labour Relations Board of Saskatchewan v. The Queen*, [1956] S.C.R. 82, that looking beyond permissive language to the intent of the legislator is particularly important in the context of statutory provisions which give effect to legal rights. According to Locke J. at pp. 86-87:

> The language of s. 5, in so far as it affects this aspect of the matter, reads: —
>
> 5. The board shall have power to make orders: —
>
> .....
>
> (i) rescinding or amending any order or decision of the board.
>
> While this language is permissive in form, it imposed, in my opinion, a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application .... Enabling words are always compulsory where they are words to effectuate a legal right .... [Emphasis added.]

The Quebec Court of Appeal followed this example in *Cité de Côte-St-Luc v. Canada Iron Foundries Ltd.*, [1970] C.A. 62. At page 65, Trem-

à comparaître et de les interroger sous serment, ce tribunal peut avoir la faculté d'exercer ou non ces pouvoirs.

D'aucuns prétendent que nos lois d'interprétation ont établi, de manière définitive, le sens des mots «doit» et «peut». Je peux difficilement concevoir que le législateur ait pu vouloir modifier le droit applicable.

Notre Cour a souscrit à cette approche dans *Bridge c. The Queen*, [1953] 1 R.C.S. 8, aux pp. 12 et 13:

> [TRADUCTION] ... on soutient premièrement que, en employant le mot «peut», qui exprime une faculté, à l'article 5 du règlement, le conseil a délégué au greffier municipal le pouvoir de décider s'il convient de délivrer un permis. Or, le règlement doit être interprété dans sa globalité et il appert d'autres dispositions que le greffier doit délivrer les permis de la manière prévue au règlement.

Dans *Labour Relations Board of Saskatchewan c. The Queen*, [1956] R.C.S. 82, notre Cour a souligné qu'il est particulièrement important, indépendamment du fait que les termes employés dans une loi expriment une faculté, de prendre en considération l'intention du législateur, en particulier dans le contexte de dispositions législatives donnant effet à des garanties juridiques. Selon le juge Locke aux pp. 86 et 87:

> [TRADUCTION] La partie de l'art. 5 qui concerne cet aspect de la question est ainsi rédigée:
>
> 5. La Commission a le pouvoir de rendre des ordonnances:—
>
> .....
>
> (i) annulant ou modifiant toute ordonnance ou décision du Conseil.
>
> Bien que le texte soit rédigé dans une forme permissive, à mon avis il impose à la commission l'obligation d'exercer ce pouvoir lorsqu'une partie intéressée et ayant le droit de faire la requête lui en fait la demande [...] Les dispositions portant autorisation sont toujours obligatoires lorsqu'elles ont pour objet de reconnaître un droit ... [Je souligne.]

La Cour d'appel du Québec a souscrit à ce point de vue dans *Cité de Côte-St-Luc c. Canada Iron Foundries Ltd.*, [1970] C.A. 62, où le juge en chef

blay C.J. stressed the dangers of conferring discretion in certain circumstances:

[TRANSLATION] There would have to be a text of great clarity to lead me to conclude that the legislature was imprudent enough to confer on municipal councils the discretionary power to accept or refuse a review at their whim. What a risk of favouritism and persecution.

For other cases in which this Court has interpreted permissive or mandatory expressions, see also *Reference as to the constitutional validity of certain sections of The Fisheries Act, 1914*, [1928] S.C.R. 457, at pp. 476-77, and, more recently, *R. v. S.(S.)*, [1990] 2 S.C.R. 254, per Dickson C.J., at pp. 274-75.

In this case, reference to context and intent is important since, in my view, the word "recommendations" does not lend itself automatically to a single, rigid definition. As Dubé J. noted below, at p. 92, the meaning of the verb "to recommend" in the *Oxford English Dictionary* and *Webster's Third New International Dictionary* runs the gamut from "to communicate or report" to "to advise, counsel". Moreover, as Côté and Driedger point out, these dictionary definitions are all merely suggested meanings; the true meaning of the word must necessarily flow from its context within the entire statute. Thus, while "recommendations" often connote advice or information which the recipient may disregard, the term might also refer to directions or orders which are binding.

Accordingly, in *Myer Queenstown Garden Plaza Pty. Ltd. v. City of Port Adelaide* (1975), 11 S.A.S.R. 504, a court found that a governor was obliged to make regulations "on the recommendation" of a municipal authority, without departing substantially from the authority's directions. Wells J. wrote at p. 547, paraphrasing counsel's argument with which he ultimately agreed:

Tremblay a fait état, à la p. 65, des risques que comporte l'octroi de pouvoirs discrétionnaires dans certains cas:

Il faudrait un texte d'une clarté limpide pour m'amener à conclure que le législateur a commis l'imprudence de conférer aux conseils municipaux le pouvoir discrétionnaire d'accepter ou de refuser une révision suivant leur caprice. Quel risque de favoritisme et de persécution!

Notre Cour s'est également prononcée sur l'interprétation d'expressions permissives ou mandatoires dans *Reference as to the constitutional validity of certain sections of The Fisheries Act, 1914*, [1928] R.C.S. 457, aux pp. 476 et 477 et, plus récemment, *R. c. S.(S.)*, [1990] 2 R.C.S. 254 (le juge en chef Dickson), aux pp. 274 et 275.

Il importe ici de tenir compte du contexte et de l'intention du législateur étant donné que, selon moi, le mot «recommandations» ne se prête pas automatiquement à une seule et rigide définition. Comme l'a fait remarquer le juge Dubé en première instance, à la p. 92, l'*Oxford English Dictionary* et le *Webster's Third New International Dictionary* prévoient, à l'égard du verbe «recommander», une gamme de définitions allant de «communiquer ou faire rapport» à «conseiller». De plus, comme le mentionnent Côté et Driedger, ces dictionnaires ne font que suggérer des définitions, car le sens véritable d'un mot dépend nécessairement du contexte dans lequel il s'insère dans une loi considérée dans son entier. Par conséquent, bien que le mot «recommandations» renvoie souvent au fait de donner un conseil ou une information dont le destinataire peut ne pas tenir compte, il peut également signifier des directives ou des ordres obligatoires.

Ainsi, dans *Myer Queenstown Garden Plaza Pty. Ltd. c. City of Port Adelaide* (1975), 11 S.A.S.R. 504, le tribunal a conclu que le gouverneur était tenu de prendre des règlements «sur la recommandation» du conseil municipal sans s'écarter substantiellement des directives de celui-ci. Paraphrasant les prétentions de l'une des parties, auxquelles il a finalement souscrit, le juge Wells conclut ce qui suit à la p. 547:

Why should the legislature have gone to such lengths to ensure that the views of the public about proposed regulations should be thoroughly canvassed and that those regulations should conform with the provisions and objects of the authorized development plan, if no more was to be required of the Governor than that he should not act without consulting the Council, that he should not act in direct opposition to its advice, and that he should act simply on its instigation? Why invite and consider objections from the relevant public, and attempt, in advance, to ensure compliance with the authorized development plan, if such painstaking vigilance is to be set at naught by an interpretation of s. 36 that enables the Governor to depart substantially from the recommended draft? Should not the regulations, when made, therefore, conform closely with the recommended draft?

While I agree with Cory J. that *Myer* might be distinguished from the instant case because the meaning of the phrase "on the recommendation" may be different from that of the word "recommendations", *Myer* is still instructive with respect to the importance of the context of a statutory provision. It suggests that a very elaborate scheme for hearings provided by law shows a legislative intent to give the resulting report binding force, which in turn may imply that certain terms have something other than their "ordinary" meaning.

Similarly, in *The King v. Christ's Hospital Governors*, [1917] 1 K.B. 19, Darling J. wrote at p. 23:

The word "recommendation" is not there used in its ordinary sense as when one says "I recommend you to do so and so," or as when a doctor says to his patient "I recommend you to take a change of air." Although put in the form of a recommendation, the clause really empowers those bodies to say "We nominate such and such a person, and you must appoint him an almoner; we cannot put him there ourselves; you are the governors of the institution and you have the means of including him in the list". I think that what was in the minds of those who framed the scheme was something equivalent to a *congé d'élire*, which, though in words a permission or invitation to elect, is really a command to do it. So here a nomination is called a "recommendation". The most definite language has not been used, but, as I have said, I think the word "recommendation"

[TRADUCTION] Pourquoi le législateur serait-il allé aussi loin pour s'assurer que l'opinion du public sur les règlements proposés soit largement sollicitée et que les règlements soient conformes aux dispositions et objets du plan de développement autorisé, s'il n'était pas exigé davantage du gouverneur que l'obligation de ne pas agir sans consultation du conseil, de ne pas aller directement à l'encontre de ses avis et de n'agir qu'à son instigation? À quoi servirait-il d'inviter le public concerné, de prendre en considération ses objections et de tenter de s'assurer à l'avance de la conformité des propositions avec le plan de développement autorisé, si une vigilance aussi assidue devait être mise en échec par une interprétation de l'art. 36 qui permettrait au gouverneur de s'écarter substantiellement du projet recommandé? Les règlements ne devraient-ils pas, au contraire, être rédigés de façon étroitement conforme à ce projet?

Même si je conviens, à l'instar du juge Cory, qu'une distinction peut être établie entre l'affaire *Myer* et la présente du fait que le sens de l'expression «sur la recommandation» peut être différent de celui du mot «recommandations», l'arrêt *Myer* demeure pertinent en ce qui a trait à l'importance que revêt le contexte d'une disposition législative. En effet, il en ressort que l'existence, dans une loi, d'une procédure très élaborée d'audition manifeste l'intention du législateur de conférer au rapport qui en résulte une force obligatoire, de sorte que certains termes peuvent ne pas être utilisés suivant leur acception «ordinaire».

Le juge Darling s'exprime dans le même sens dans l'arrêt *The King c. Christ's Hospital Governors*, [1917] 1 K.B. 19, à la p. 23:

[TRADUCTION] Le mot «recommandation» n'y est pas utilisé dans son acception ordinaire, comme lorsqu'on dit: «Je vous recommande de faire ceci et cela» ou quand un médecin s'adresse à son patient en lui disant: «Je vous recommande un changement d'air». Bien qu'elle adopte la formule de la recommandation, cette clause confère en réalité aux organismes en cause le pouvoir de dire: «Nous désignons telle personne et vous devez la nommer assistante sociale; nous ne pouvons pas mettre nous-mêmes cette recommandation en œuvre mais c'est à vous, à titre d'administrateurs de l'établissement, qu'il appartient d'inscrire le nom de cette personne sur la liste». À mon avis, les rédacteurs de cette clause avaient à l'esprit un mécanisme semblable au congé d'élire qui, sous la forme d'une permission ou d'une invitation, équivaut en fait à un commandement.

is used not in the mild sense, but as really meaning a nomination.

The context of *Christ's Hospital Governors* again differs from that of the case at bar, and yet the interpretation, which emphasizes the intention of the legislature, supports the conclusion that the correct meaning of the word "recommendation" may not be discerned with reference to the strict language of s. 52(2) alone.

As well, I am bound to attribute the words in the Act a meaning which is consistent with both its French and English texts according to s. 8 of the *Official Languages Act*, R.S.C. 1970, c. O-2. It reads in part:

8. (1) In construing an enactment, both its versions in the official languages are equally authentic.

(2) In applying subsection (1) to the construction of an enactment,

. . .

(*d*) if the two versions of the enactment differ in a manner not coming within paragraph (*c*), preference shall be given to the version thereof that, according to the true spirit, intent and meaning of the enactment, best ensures the attainment of its objects. [Emphasis added.]

In dealing with s. 8 in *The Queen v. Compagnie Immobilière BCN Ltée*, [1979] 1 S.C.R. 865, at p. 872, this Court said:

. . . the narrower meaning of one of the two versions should not be preferred where such meaning would clearly run contrary to the intent of the legislation and would consequently tend to defeat rather than assist the attainment of its objects.

Section 52(2) of the French text of the Act refers to "recommendations". In *Le Petit Robert 1*, the words "*commandement*" and "*ordre*" are listed as synonyms for "*recommandation*".

Ainsi, en l'espèce, une «nomination» s'appelle une «recommandation». Le langage utilisé ne pêche pas par excès de précision, mais, je le répète, le mot «recommandation» n'est pas à mon avis employé ici au sens faible, mais au sens d'une véritable nomination.

Dans cette affaire, le contexte est différent de celui qui nous intéresse ici, mais l'interprétation qui y est donnée et qui met l'accent sur l'intention du législateur, nous mène à la conclusion que le sens véritable du mot «recommandations» ne puisse être déterminé uniquement à partir du libellé du par. 52(2).

De plus, je suis tenue de donner aux mots que la Loi emploie une interprétation que supportent les textes tant français qu'anglais, comme l'exige l'art. 8 de la *Loi sur les langues officielles*, S.R.C. 1970, ch. O-2, dont voici un extrait:

8. (1) Dans l'interprétation d'un texte législatif, les versions des deux langues officielles font pareillement autorité.

(2) Pour l'application du paragraphe (1) à l'interprétation d'un texte législatif,

. . .

d) s'il y a, entre les deux versions du texte législatif, une différence autre que celle mentionnée à l'alinéa *c*), on donnera la préférence à la version qui, selon l'esprit, l'intention et le sens véritables du texte, assure le mieux la réalisation de ses objets. [Je souligne.]

Relativement à l'art. 8, dans *La Reine c. Compagnie Immobilière BCN Ltée*, [1979] 1 R.C.S. 865, notre Cour a statué à la p. 872:

. . . il ne faut pas retenir la version la plus restrictive si elle va clairement à l'encontre du but de la loi et compromet la réalisation de ses objets au lieu de l'assurer.

La version française du par. 52(2) de la Loi emploie le mot «recommandations». Dans *Le Petit Robert 1*, les mots «commandement» et «ordre» figurent parmi les synonymes du vocable «recommandation».

Context

Context refers both to the provisions immediately surrounding the provision under examination and to the overall scheme of the statute. As Côté explains at pp. 236-37:

> First of all it includes the legal environment of the provision, the other provisions of the statute, the related statutes, etc. This is the narrow view of context. But "context" goes much further: it includes all ideas related to the wording that Parliament can reasonably consider to be sufficiently common knowledge as to obviate mention in the enactment. This may include the circumstances which led to the enactment, the aim and purpose of Parliament, the legislator's value system and linguistic habits, etc.

Turning first to the immediate context of s. 52(2), I find nothing that would necessarily compel me to attribute a permissive meaning to the term "recommendations". My colleague maintains that the same word should have exactly the same meaning throughout a statute. Since s. 41 empowers the Committee to review "any act or thing" done by the Canadian Intelligence Security Service ("CSIS") and give recommendations, he contends that giving the Committee's recommendations binding force would allow it to usurp the management powers of CSIS.

However, I must again emphasize the importance of not limiting ourselves to hard and fast rules lending to literal interpretation. As Driedger points out at p. 93:

> There is another draftsman's guide to good drafting and hence also a reader's guide, namely, the same words should have the same meaning, and, conversely, different words should have different meanings. But this too is only an initial guide and not a rule. [Emphasis added.]

Other provisions in the Act, moreover, are consistent with the less restrictive interpretation of "recommendations". As Stone J.A. pointed out in the first Federal Court of Appeal decision in this

Le contexte

Le contexte s'entend des dispositions qui voisinent immédiatement la disposition en cause ainsi que de l'économie générale de la loi, comme l'explique Côté aux pp. 263 et 264:

> Il s'agit, d'abord, de l'environnement légal d'une disposition, des autres dispositions de la loi, des lois connexes, des autres règles du système juridique. C'est le contexte au sens étroit. Le contexte d'énonciation d'une disposition inclut cela, mais bien davantage: il comprend toutes les idées liées au texte que le législateur peut présumer suffisamment connues des justiciables pour se dispenser d'avoir à les exprimer. Ces idées peuvent être relatives aux circonstances qui ont amené l'énonciation du texte, à l'objet qu'il cherche à accomplir, aux valeurs auxquelles le législateur est attaché, à ses habitudes d'expression, et ainsi de suite.

En ce qui concerne, premièrement, le contexte immédiat du par. 52(2), je ne vois rien qui m'obligerait nécessairement à donner au mot «recommandations» un sens facultatif. Mon collègue soutient qu'un mot doit toujours avoir le même sens tout au long d'un texte législatif. Selon lui, comme l'art. 41 investit le comité du pouvoir d'examiner les plaintes visant «des activités» du Service canadien du renseignement de sécurité (le «SCRS») et de faire des recommandations, le fait de rendre obligatoires les recommandations du comité permettrait à ce dernier d'usurper le pouvoir de gestion du SCRS.

Or, il est nécessaire d'insister à nouveau sur l'importance de ne pas se limiter à des règles strictes entraînant une interprétation littérale, comme le fait remarquer Driedger à la p. 93:

> [TRADUCTION] Il existe un autre principe à l'intention des rédacteurs et, partant, des lecteurs, savoir, lorsqu'un même mot est utilisé, il devrait recevoir le même sens et inversement, lorsqu'on utilise des mots différents, on devrait leur attribuer des sens différents. Mais il ne s'agit là que d'une piste, et non d'une règle. [Je souligne.]

En outre, d'autres dispositions de la Loi vont dans le sens d'une interprétation moins restrictive du mot «recommandations». Dans le premier jugement rendu par la Cour d'appel fédérale dans la

case ([1988] 3 F.C. 108), in which he held, at p. 138, that the Deputy Minister was bound to follow the Committee's recommendations but that the Federal Court did not have the jurisdiction to set the decision aside:

> . . . other provisions of the Act rather suggest that Parliament did not use the word "recommendations" in its literal sense. Thus, among the "consequential and related amendments" are provisions for the referral of a security question to investigation by the intervenant in accordance with the procedures I have already reviewed, and for the making of a report upon the completion of an investigation pursuant to the *Canadian Human Rights Act*, (subsection 36.1(7) . . .), or the *Citizenship Act* (subsection 17.1(5) . . .) or the *Immigration Act, 1976* (paragraphs 39(8)(*a*) . . . and 82.1(6)(*a*) . . .). It is significant, I think, that in none of these cases did Parliament authorize the intervenant to make any "recommendations" but merely "findings" or "conclusions" which the ultimate decision-maker is authorized to "consider".

It appears, then, that the legislation distinguishes between the binding force of the conclusions which the Committee could make with respect to investigations involving CSIS, and other investigations perhaps involving matters outside its expertise. While the effect of recommendations made concerning complaints under s. 41 of the Act is not at issue in this appeal, I am not prepared to assume that it would be outrageous to attribute to them a great weight or even a binding force. Accordingly, I do not think the use of the term "recommendations" in s. 52(1) mandates the literal interpretation of the same word in s. 52(2).

Turning then to the overall scheme of the Act, the mechanism for review of denials of security clearance set up by s. 42 of the Act is so elaborate that it suggests something more than an advisory role for the Committee. Stone J. began by detailing, at pp. 136-37, the extensive powers and obligations which the Committee has when undertaking investigations under s. 42:

présente affaire ([1988] 3 C.F. 108), où le tribunal statue, à la p. 138, que le sous-ministre était tenu de suivre les recommandations du comité, mais que la Cour fédérale n'avait pas compétence pour annuler la décision, le juge Stone précise ce qui suit:

> . . . d'autres dispositions de la Loi semblent indiquer que le mot «recommandations» n'a pas un sens littéral. Par exemple, au chapitre des «modifications consécutives et corrélatives», le paragraphe 36.1(7) de la *Loi canadienne sur les droits de la personne* [. . .], le paragraphe 17.1(5) de la *Loi sur la citoyenneté* [. . .] ou encore les alinéas 39(8)*a*) [. . .] et 82.1(6)*a*) [. . .] de la *Loi sur l'immigration de 1976* renferment des dispositions visant le renvoi devant l'intervenant, pour enquête et rapport conformément à la procédure examinée plus haut, de toute question où la sécurité est en cause. Il est significatif, à mon sens, que dans aucun de ces cas, il ne soit question de «recommandations» mais seulement de «conclusions» que celui auquel incombe la décision finale est autorisé à étudier.

Il appert donc que la Loi établit une distinction, quant à la force obligatoire, entre les conclusions que pourrait tirer le comité à la suite d'une enquête mettant en cause le SCRS et celles issues d'une enquête portant, par exemple, sur des questions qui ne relèvent pas de son domaine de compétence. Bien que la portée des recommandations formulées relativement à une plainte présentée en application de l'art. 41 de la Loi ne soit pas en cause aux fins du présent pourvoi, je ne crois pas qu'il serait extravagant de leur conférer une grande importance, voire une force obligatoire. Par conséquent, je ne suis pas d'avis que l'emploi du mot «recommandations» au par. 52(1) emporte obligatoirement l'interprétation littérale du même mot au par. 52(2).

Pour ce qui concerne l'esprit général de la Loi, le caractère très élaboré de la procédure d'examen du refus de l'habilitation de sécurité que prévoit l'art. 42 de la Loi incite à conclure que le législateur a voulu conférer au comité davantage qu'un simple rôle consultatif. Le raisonnement du juge Stone débute par l'énumération complète, aux pp. 136 et 137, des pouvoirs et des obligations du comité qui entreprend une enquête aux termes de l'art. 42:

In my view, the word "recommendations" in subsection 52(2) of the Act must be construed with an eye to the entire statutory scheme for the investigation of a "complaint" by an individual denied employment in the public service by reason of the denial of a security clearance. Certain features of that scheme impress me as indicating an intention of Parliament to provide the complainant with redress rather than with merely an opportunity of stating his case and of learning the basis for the denial. They include the care that was taken to establish eligibility for appointment to membership of the intervenant, the manner of selecting and tenure of office of those appointed (section 34); the requirement that each member subscribe to an oath of secrecy (section 37); the requirement that an adverse decision exist before the intervenant may commence an investigation (subsection 42(1)); the need for providing all concerned with a statement, or a copy thereof, "summarizing such information available to the Committee as will enable the complainant to be as fully informed as possible of the circumstances giving rise to the denial of the security clearance" (section 46); the requirement that both the Director and the deputy head be informed of the complaint before it is investigated (section 47); the opportunity made available to all concerned "to make representations to the Review Committee, to present evidence and to be heard personally or by counsel" (subsection 48(2)); the broad powers of the intervenant to summon and enforce the appearance of witnesses, and to compel the giving of evidence on oath and the production of "such documents and things as the Committee deems requisite to the full investigation and consideration of the complaint in the same manner and to the same extent as a superior court of record", to administer oaths, and to receive and accept evidence or other information, whether on oath or by affidavit or otherwise (section 50); the extent of access granted the intervenant to information "notwithstanding any other Act of Parliament or any privilege under the law of evidence", and the proscription against withholding of such information "on any grounds" unless it be a confidence of the Queen's Privy Council for Canada to which subsection 36.3(1) of the *Canada Evidence Act* applies . . . (subsections 39(2) and (3)). [Emphasis added.]

Based on this scheme, Stone J.A. concluded at pp. 137-38, that the Committee's recommendations must be something more than mere suggestions, since otherwise Parliament need not have established such a complex mechanism for investigation of complaints:

À mon avis, le mot «recommandations» contenu au paragraphe 52(2) de la Loi doit être interprété en tenant compte de l'ensemble du régime de la Loi auquel est soumise l'enquête relative à une «plainte» présentée par celui qui fait l'objet d'une opposition à engagement par suite du refus d'une habilitation de sécurité. J'ai été frappé, en la discernant dans certaines caractéristiques de ce régime, par la volonté du législateur d'accorder au plaignant un recours plutôt que la simple possibilité d'exposer sa cause et d'apprendre les motifs du refus. Parmi ces caractéristiques, je relève en particulier l'attention apportée aux critères de sélection et de nomination des membres de l'intervenant, de même qu'à la durée de leur mandat (article 34); leur obligation de prêter le serment de secret (article 37); la nécessité d'une décision défavorable comme préalable à l'ouverture d'une enquête (paragraphe 42(1)); l'obligation d'envoyer à toutes les parties concernées «un résumé des informations dont [le comité] dispose . . . [a]fin de permettre au plaignant d'être informé de la façon la plus complète possible des circonstances qui ont donné lieu au refus d'une habilitation de sécurité» (article 46); celle d'informer à la fois le directeur et l'administrateur général de la plainte avant de procéder à une enquête (article 47); la possibilité offerte à toutes les parties concernées de «présenter des observations . . . au comité de surveillance ainsi que d'être entendu en personne ou par l'intermédiaire d'un avocat» (paragraphe 48(2)); les vastes pouvoirs de l'intervenant d'assigner et de contraindre les témoins à comparaître devant lui, à déposer sous serment et à produire «les pièces qu'il juge indispensables pour instruire et examiner à fond les plaintes, de la même façon et dans la même mesure qu'une cour supérieure d'archives», son pouvoir de faire prêter serment et de recevoir des éléments de preuve ou des informations par déclaration verbale ou écrite sous serment ou par tout autre moyen (article 50); l'étendue de son accès aux informations «par dérogation à toute autre loi fédérale ou toute immunité reconnue par le droit de la preuve», et l'interdiction de lui refuser ces informations «pour quelque motifs que ce soit», à l'exception des renseignements confidentiels du Conseil privé de la Reine pour le Canada visés par le paragraphe 36.3(1) de la *Loi sur la preuve au Canada* [. . .] (paragraphes 39(2) et (3)). [Je souligne.]

Compte tenu de ce régime, le juge Stone conclut, aux pp. 137 et 138, que les recommandations du comité sont plus que de simples conseils, sinon le législateur n'aurait pas mis sur pied une procédure d'examen des plaintes aussi complexe:

In my view, the nature of this scheme indicates a desire by Parliament to provide a means of making full redress available to a complainant. It seems to me that a far less elaborate scheme would have sufficed had Parliament merely intended to provide means whereby a complainant might state his case to a third party and be made aware of the basis for denial of the clearance. The adoption of a detailed scheme by Parliament, which includes the obligation for a formal report in which "findings" and any "recommendations" are to be stated, suggests that this latter word was used other than in its literal sense. Secondly, the details of that scheme, including, for example, its emphasis on the need for prior notice, opportunity to be heard, summoning of witnesses, production of documents, access to sensitive information, etc., rather suggests an intention that the intervenant [the Committee] have the ability to examine the whole basis on which a denial rests to ensure such redress as its investigation may indicate. I can find no other acceptable explanation for arming it with such extensive powers. Given the lengths to which and the care with which Parliament dealt with this matter under the Act, I seriously doubt that it intended any "recommendations" to be merely advisory or suggestive. To view the scheme differently would be somewhat akin to saying that Parliament, like the mountains, though labouring mightily, brought forth a mouse.

À mon avis, la nature de ce régime témoigne du désir du législateur de mettre à la disposition du plaignant un mécanisme complet de redressement. Il me semble en effet que le législateur aurait pu se contenter d'un régime beaucoup moins complexe s'il ne s'était agi que de permettre au plaignant d'exposer sa cause devant une tierce partie et d'être informé des raisons du refus de l'habilitation. Au contraire, le caractère détaillé du régime adopté, y compris l'obligation de rédiger un rapport formel contenant des «conclusions» et des «recommandations», semblent indiquer que ce dernier mot n'est pas employé dans son sens littéral. De plus, il ressort des modalités de ce régime, notamment de l'importance accordée à l'avis préalable, à l'accès aux renseignements névralgiques, à la possibilité d'être entendu, d'assigner des témoins et de produire des pièces, etc., qu'on a voulu donner à l'intervenant [le comité] toute latitude pour examiner les raisons ayant pu motiver le refus et accorder, le cas échéant, le redressement approprié. Je ne puis trouver, à des pouvoirs aussi étendus, aucune autre explication acceptable. Vu l'importance que le législateur a attachée à cette question et le soin qu'il y a apporté, j'ai du mal à croire que toute «recommandation» puisse n'être que consultative ou faite à titre de simple suggestion. Conclure autrement reviendrait à dire que le législateur a, comme la montagne, accouché d'une souris.

The elaboration within the Act of the Deputy Minister's role in investigations provides another reason to conclude that the Committee's recommendations are more than suggestive. The Deputy Minister is a party to an adversarial process before the Committee. He has a full opportunity to state his case and defend his decision not to grant a security clearance, whether it was based on the CSIS report or other considerations. To conclude that, following the Committee hearings to which he has been a party, he may, without any other reasons than those he expressed at the hearings, reverse a decision which goes against his personal judgment, contradicts one of the fundamental tenets of natural justice. I agree with the respondent when he argues that: "It would be an absurd result for such a party to have a right at the end of the process to say that it is in fact the final decision-maker on the very issue being litigated".

Le fait que la Loi attribue un rôle au sous-ministre au cours de l'enquête permet également de conclure que les recommandations du comité ne sont pas que des suggestions. En effet, le sous-ministre est partie à la procédure contradictoire qui se déroule devant le comité. Il a pleinement l'occasion de faire valoir son point de vue et de justifier son refus d'accorder l'habilitation de sécurité, que sa décision se fonde sur le rapport du SCRS ou sur d'autres éléments. Lui reconnaître le droit de renverser une décision qui n'est pas conforme à son opinion personnelle, à la suite de l'audience du comité à laquelle il a participé à titre de partie, sans autres motifs que ceux invoqués à l'audience, va à l'encontre de l'un des principes fondamentaux de justice naturelle. Je souscris à l'argument de l'intimé selon lequel: [TRADUCTION] «Il serait absurde que la partie en cause puisse, à l'issue du processus, décider que la décision finale lui appartient quant à l'objet même du litige».

Purpose of the Legislation

Finally, a judge's fundamental consideration in statutory interpretation is the purpose of legislation. Côté writes at p. 249:

> The function of all interpretation is to discover the meaning conveyed by the enactment, either explicitly or implicitly. If it has been written that courts must not add words to a law unless they are already implicit, it can be asserted, *a contrario*, that courts must also clarify what can be inferred from the context of the legal expression. A judge would be neglecting his duty were he to say: "I can see clearly what the statute intends, but its formulation is not appropriate".

Appellant's counsel argues that the almost exclusive purpose of the Committee is the internal regulation of CSIS. The Committee's recommendations to a Deputy Minister carry some persuasive force in terms of the final decision he or she will make, but he suggests that they function primarily as a commentary on the behaviour of CSIS's agents. In his view, since the Act does not explicitly relieve Deputy Ministers of their duty to ensure reliability and loyalty in their employees, no transfer of this power to the Committee may be inferred.

In my opinion, however, in setting up the review mechanism under s. 42, Parliament must have intended to provide a system of redress for parties who were unjustly deprived of employment due to erroneous or flawed CSIS reports. It would be illogical for Parliament to create the Committee and invest it with such extensive powers if, in the end, its conclusions could be ignored and complainants left in no better a position than they would have enjoyed had their complaints been unfounded. A Committee hearing involves a complete investigation of the complainant's character and history. It is difficult to see why an individual who had been denied a security clearance because of a CSIS report would go ahead with a complaint, if he or she had no assurance that a positive recommendation by the Security Committee would have any result whatsoever.

L'objet de la Loi

Enfin, il incombe fondamentalement au juge qui est appelé à interpréter un texte législatif de déterminer quel est l'objet de la loi en cause. Voici ce qu'écrit Côté à ce sujet, aux pp. 278 et 279:

> La fonction de tout interprète est de découvrir le sens qui se dégage du texte soit expressément, soit implicitement. Si on a pu écrire que les tribunaux n'ajoutent pas des termes à une loi s'ils n'y sont implicites, on peut affirmer, *a contrario*, qu'il est dans la fonction du tribunal d'expliciter ce qui ressort du contexte de la formule légale. Un tribunal ne remplirait pas sa fonction qui dirait: «Nous voyons très bien ce que la loi veut dire, mais la formule n'est pas tout à fait appropriée».

L'avocat de l'appelante fait valoir que le mandat du comité consiste presque exclusivement à assurer la réglementation interne du SCRS. Selon lui, les recommandations du comité au sous-ministre ont une certaine force de persuasion en ce qui a trait à la décision finale qui sera prise, mais il s'agit essentiellement d'observations sur la conduite des agents du SCRS. Comme la Loi ne relève pas expressément les sous-ministres de leur obligation de s'assurer de la fiabilité et de la loyauté de leurs employés, l'appelante soutient qu'on ne saurait conclure que ce pouvoir a été confié au comité.

J'estime, toutefois, qu'en établissant la procédure d'examen prévue à l'art. 42, le législateur doit avoir entendu mettre sur pied un mécanisme de redressement à l'intention des personnes qui se voient injustement refuser un emploi en raison d'un rapport inexact du SCRS. Il serait illogique que le législateur ait mis sur pied le comité en lui conférant des pouvoirs aussi étendus si, en fin de compte, ses conclusions pouvaient être mises de côté, le sort réservé au plaignant étant alors le même qu'une personne dont la plainte n'est pas fondée. La procédure d'audition du comité comprend une enquête complète sur la réputation et les antécédents du plaignant. Il est difficile d'imaginer pourquoi une personne qui s'est vu refuser une habilitation de sécurité sur le fondement d'un rapport du SCRS présenterait une plainte si elle n'était pas convaincue qu'une recommandation favorable du comité pouvait avoir quelque effet.

Besides, a decision that a deputy minister could deny a security clearance, despite a report refuting CSIS allegations and a positive recommendation by the Committee, means that a complainant would be the only civil servant who could be denied employment or promotion without any chance of righting a wrong done to him, as admitted by counsel for the appellant during the oral hearing before this Court. When asked whether a complainant would indeed have no remedy or recourse according to his interpretation of the Act, he replied:

> He has no redress in the sense that he can compel or submit argument which would result in a legal right that he be granted a security clearance. He has the redress in the sense my lord Mr Justice La Forest has put, that he now has the opportunity to know why he was denied a security [clearance].

In the context of today's labour relations, it is hard to believe that Parliament would have had the intent to limit complainants' rights in the way that this admission suggests.

Finally, I must disagree with my colleague Cory J.'s view that the final decision as to the security clearance must be left to the Deputy Minister, since the Deputy Minister is responsible for ongoing security in his or her department.

Given the actual hiring process, the Deputy Minister has full discretion to eliminate anyone whom he or she does not like at the initial selection stage, without giving any reasons whatsoever. In fact, the provisions of Cabinet Directive No. 35 require Deputy Ministers, in the hiring process, to satisfy themselves that successful candidates are acceptable security risks. Deputy Ministers also have the ability to deny security clearances to candidates based on the CSIS reports they receive. It is only where a candidate has proved to the Committee that the CSIS report contains spurious or unfounded allegations, as in this case, and the Committee recommends that the clearance

En outre, le fait de statuer qu'un sous-ministre peut refuser une habilitation de sécurité malgré un rapport réfutant les prétentions du SCRS et une recommandation favorable du comité, signifierait que le plaignant serait le seul fonctionnaire auquel un emploi ou une promotion pourrait être refusé sans que ne lui soit accordée quelque possibilité d'obtenir un redressement quant au préjudice subi. L'avocat de l'appelante l'a d'ailleurs admis au cours de l'audience tenue par notre Cour et voici ce qu'il a répondu lorsqu'on lui a demandé si un plaignant avait, en fait, quelque recours suivant son interprétation de la Loi:

> [TRADUCTION] Il n'a aucun recours au sens où il ne peut faire valoir d'arguments lui conférant le droit d'obtenir une habilitation de sécurité. Son recours se limite, comme l'a fait remarquer le juge La Forest, à la possibilité de connaître les motifs pour lesquels l'habilitation [de sécurité] lui a été refusée.

Dans le contexte actuel des relations de travail, il est difficile de croire que le législateur ait pu avoir l'intention de limiter ainsi les droits du plaignant.

Enfin, je ne partage pas l'avis de mon collègue, le juge Cory, qui estime que la décision finale concernant l'habilitation de sécurité appartient au sous-ministre parce que ce dernier est responsable de la sécurité générale de son ministère.

En raison du mode de recrutement applicable, le sous-ministre a le pouvoir discrétionnaire de rejeter toute candidature qui ne lui convient pas dès la première étape de la sélection, sans avoir à donner quelque motif que ce soit. En fait, les dispositions de la directive du Cabinet nº 35 exigent des sous-ministres, à l'occasion du recrutement, qu'ils s'assurent que les personnes dont la candidature est retenue présentent un risque acceptable pour la sécurité. Un sous-ministre peut également refuser une habilitation de sécurité en s'appuyant sur le rapport que lui remet le SCRS relativement à un candidat. C'est uniquement lorsqu'un candidat convainc le comité que le rapport du SCRS renferme des données inexactes et sans fondement, comme c'est le cas en l'espèce, et que le comité recommande d'accorder l'habilitation de sécurité, que le sous-ministre doit retenir la candidature en

be granted, that the Deputy Minister must accept the candidate. As Stone J.A. wrote at pp. 138-39:

Obviously, the purpose of the Act goes well beyond that of protecting the individual interest in obtaining a security clearance, for it is primarily directed toward protecting the national interest in matters of security generally. On the other hand, the "complaints" procedure under Part III appears to take that objective into account by ensuring, especially by the composition and powers of the intervenant and the requirement for secrecy, that this interest not be sacrificed. The Act evidently reflects a careful balancing of the two interests. It does not address itself directly to the manner in which the initial decision to deny a clearance is to be made, entering the picture only subsequent to that decision and then only after a "complaint" has been lodged. At that point, in my view, the question whether a clearance was rightfully denied is taken away from a deputy head, and is thereafter committed to the determination of the intervenant acting in accordance with the procedures laid down by the Act including the full opportunity of the deputy head to defend his decision and of CSIS to defend its advice to the deputy head. I am satisfied that the entire basis for the denial is thus opened to investigation including any subjective assessment of the complainant's reliability that may be required. As I see it, a deputy head is not entitled, so to speak, to "re-make" a decision he has already rendered after the matter has become the subject of a "complaint" and a "recommendation". [Emphasis added.]

I agree with Stone J.A. that the Deputy Minister loses the discretion to refuse a security clearance where the initial decision to withhold it was based on an erroneous CSIS report. To conclude otherwise would imply that a candidate's employment chances might be irreparably damaged by the misconduct or mistake of the investigating agency, and that he can have no hope of redress. As for the spectre of the Deputy Minister's ultimate responsibility, this would certainly not be the only situation in which an official would be held accountable for a problem which resulted from acting on another body's directives.

Exercise of Discretion

In view of this analysis, once the Committee has conducted its investigation, a deputy minister does

cause, comme l'exprime le juge Stone, aux pp. 138 et 139:

Évidemment, le but de la Loi va bien au-delà de la protection de l'intérêt individuel dans le processus d'obtention d'une habilitation de sécurité. Son but premier est, en effet, de protéger l'intérêt national sur le plan général de la sécurité. Témoigne d'ailleurs de cet objectif la procédure de «plaintes» de la Partie III, particulièrement les dispositions concernant la composition et les pouvoirs de l'intervenant, de même que l'exigence du secret, qui vise à ce que l'intérêt national ne soit pas sacrifié. En fait, le texte se veut le reflet d'un juste équilibre entre ces deux intérêts. La procédure prescrite ne concerne pas la façon dont doit être prise la décision initiale de refuser une habilitation; elle n'entre en jeu qu'une fois cette décision rendue et encore seulement après le dépôt d'une «plainte». C'est à ce stade, à mon avis, que la question de juger du bien-fondé d'un refus cesse de relever de l'administrateur général pour tomber sous la juridiction de l'intervenant, lequel doit notamment, en conformité avec la procédure établie par la Loi, donner à l'administrateur général la pleine faculté de défendre sa décision et au SCRS, celle de défendre l'avis qu'il lui a donné. Je suis convaincu que l'enquête peut ainsi porter sur tous les motifs du refus, y compris toute appréciation subjective de la fiabilité du plaignant. D'après moi, l'administrateur général n'est, par conséquent, pas habilité à «re-prendre», pour ainsi dire, une décision déjà prise, une fois que l'affaire a fait l'objet d'une «plainte» puis d'une «recommandation». [Je souligne.]

Je souscris à l'opinion du juge Stone selon laquelle le sous-ministre perd la faculté de refuser l'habilitation de sécurité lorsque la décision initiale de refuser celle-ci était fondée sur un rapport inexact du SCRS. S'il n'en était pas ainsi, le candidat pourrait voir ses chances d'emploi irrémédiablement compromises par la faute ou l'erreur de l'organisme d'enquête et il pourrait alors être dépourvu de tout recours. En ce qui concerne la responsabilité ultime du sous-ministre, ce ne serait certainement pas la première fois qu'un agent de la Couronne serait tenu responsable d'un problème imputable à des mesures fondées sur des directives provenant d'un autre organisme.

L'exercice du pouvoir discrétionnaire

Compte tenu de l'analyse qui précède, une fois que le comité a effectué son enquête, le sous-

not retain discretion to deny a security clearance against its recommendations. However, even if the Deputy Minister did have such discretion, I would still be of the opinion that the appeal should be dismissed on the grounds that he did not exercise that discretion properly in this case.

In the English case of *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, the House of Lords ordered the Minister to send a case to the review committee set up by Parliament to investigate complaints. It held that, although the Minister could reject complaints which were frivolous or groundless, he could not use his discretion to defeat the purposes of the legislation. In the words of Lord Reid at p. 1030:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.

The CSIS Review Committee was established for various reasons. Its most important role is probably that of a watchdog agency over the Service, and its reports serve to alert the public of CSIS's misdoings and errors. But the Committee also functions as the only means of redress available to a candidate whose employment has been blocked by a flawed CSIS report. It is doubtful that Parliament would have set up this elaborate structure for review if a deputy minister could lightly disregard its findings and rely upon the original and mistaken CSIS report to make his or her decision.

ministre n'a plus le pouvoir discrétionnaire de refuser l'habilitation de sécurité en faisant fi des recommandations du comité. Toutefois, même si le sous-ministre demeurait investi d'un tel pouvoir discrétionnaire, je rejetterais tout de même le pourvoi pour le motif que ce pouvoir n'a pas été exercé adéquatement en l'espèce.

Dans l'arrêt britannique *Padfield c. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, la Chambre des lords a ordonné au ministre de renvoyer l'affaire au comité de surveillance mis sur pied par le législateur pour mener des enquêtes relativement à des plaintes. Le tribunal a statué que, même s'il pouvait rejeter une plainte frivole ou sans fondement, le ministre ne pouvait recourir à son pouvoir discrétionnaire à l'encontre des objets de la loi. Voici l'opinion exprimée par lord Reed à la p. 1030:

> [TRADUCTION] Le Parlement a dû attribuer ce pouvoir discrétionnaire avec l'intention qu'il soit exercé pour promouvoir la politique et les objets de la Loi. La politique et les objets de la Loi doivent être déterminés en interprétant la Loi dans son ensemble et l'interprétation est toujours une question de droit pour la cour. Dans une affaire semblable, il n'est pas possible de fixer des limites précises et inflexibles, mais si le ministre, parce qu'il a mal interprété la Loi ou pour toute autre raison, exerce son pouvoir discrétionnaire de façon à contrecarrer la politique ou les objets de la Loi ou à aller à l'encontre de ceux-ci, alors notre droit accuserait une grave lacune si les personnes qui en subissaient des préjudices n'avaient pas droit à la protection de la Cour.

Le comité a été mis sur pied pour divers motifs. Son principal rôle est probablement celui de chien de garde du SCRS, et ses rapports visent à rendre publiques les bavures et les erreurs du SCRS. Or, c'est auprès de ce comité que les personnes auxquelles on a refusé un emploi sur le fondement d'un rapport inexact du SCRS peuvent exercer le seul recours dont elles disposent. Il est impensable que le législateur ait établi une procédure d'enquête aussi élaborée tout en permettant qu'un sous-ministre puisse, à son gré, écarter les conclusions du comité et s'en remettre au rapport initial erroné du SCRS pour prendre sa décision.

In this case, however, the Deputy Minister admits that he made his decision to disregard the Committee's recommendations primarily on the strength of the original CSIS report. Cory J. contends that the letter sent by J.-J. Noreau to Mr. Jewitt on June 4, 1986 shows that the Deputy Minister considered the recommendations of the Committee before he made his decision to uphold the denial of the security clearance. In his view, the affidavit sworn by the Deputy Minister dated September 5, 1986 confirms that he based his final decision on both the initial CSIS report and the Committee report.

In my opinion, however, neither the letter nor the affidavit show that the Deputy Minister exercised his discretion properly under the test in *Padfield*, *supra*. The very brief letter reads as follows:

Dear Mr Jewitt:

I refer to your letter of May 16, 1986, concerning the recommendation made in the Security Intelligence Review Committee's report of April 9, 1985, pursuant to your client's complaint under section 42 of the Canadian Security Intelligence Service Act.

I wish to advise that the decision to deny security clearance is maintained.

Yours sincerely,

Jean-Jacques Noreau

Accordingly, the Deputy Minister in no way indicated in the letter why or on what basis he decided to defy the recommendations. In fact, his allusion to the Committee's report in the context is simply confusing, since the respondent would have expected a decision to grant the security clearance in light of its recommendations.

As for the affidavit, in paragraph 19 of his statement, Mr. Noreau attested that he decided to refuse the clearance after considering the "report from the Canadian Security Intelligence Service, even as

Cependant, dans la présente affaire, le sous-ministre reconnaît avoir décidé de ne pas tenir compte des recommandations du comité en se fondant essentiellement sur le rapport initial du SCRS. Le juge Cory est d'avis que la lettre de J.-J. Noreau à M. Jewitt en date du 4 juin 1986 montre que le sous-ministre a pris en considération les recommandations du comité avant de maintenir sa décision de refuser l'habilitation. Selon lui, l'affidavit du sous-ministre, en date du 5 septembre 1986, confirme que sa décision finale était fondée à la fois sur le rapport initial du SCRS et le rapport du comité.

J'estime, pour ma part, que ni la lettre ni l'affidavit ne démontrent que le sous-ministre a exercé correctement son pouvoir discrétionnaire, selon le critère établi dans l'arrêt *Padfield*, précité. Voici le texte de cette lettre très brève:

[TRADUCTION]

Monsieur,

La présente fait suite à votre lettre du 16 mai 1986 concernant la recommandation formulée par le comité de surveillance des activités de renseignement de sécurité dans son rapport du 9 avril 1985, relativement à la plainte présentée par votre client en application de l'art. 42 de la Loi sur le Service canadien du renseignement de sécurité.

Je tiens à vous informer que la décision de refuser l'habilitation de sécurité est maintenue.

Veuillez recevoir, Monsieur, mes salutations distinguées.

Jean-Jacques Noreau

Le sous-ministre n'indique donc aucunement dans sa lettre la raison ou le fondement de sa décision de ne pas tenir compte des recommandations. En fait, l'allusion qu'il fait au rapport du comité dans ce contexte porte à confusion puisque l'intimé se serait attendu, vu les recommandations qu'il contenait, à une décision lui accordant l'habilitation.

Pour ce qui est de l'affidavit, M. Noreau atteste, au paragraphe 19 de sa déclaration, qu'il a décidé de refuser l'habilitation après avoir examiné [TRADUCTION] «le rapport du Service canadien du ren-

commented upon or explained in the said report from the Security Intelligence Review Committee" and in paragraph 20, he said: "There was nothing in either the report by the Canadian Security Intelligence Service or in the report by the Security Intelligence Review Committee to resolve my doubts" (emphasis added). These statements indicate to me that, at best, the Deputy Minister placed an equal value on the CSIS report and the Committee recommendations. In fact, since the Committee's findings served to correct and revise the CSIS report, the Deputy Minister should have relied almost exclusively on them, rather than the erroneous CSIS allegations.

The Deputy Minister was also obliged to act in accordance with the principles of natural justice. As Le Dain J. wrote in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 659:

> The issue then is what did procedural fairness require of the Director in exercising his authority, pursuant to s. 40 of the *Penitentiary Service Regulations*, to continue the administrative dissociation or segregation of the appellants, despite the recommendation of the Board, if he was satisfied that it was necessary or desirable for the maintenance of good order and discipline in the institution. I agree with McEachern C.J.S.C. and Anderson J.A. that because of the serious effect of the Director's decision on the appellants, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution. [Emphasis added.]

See also *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311.

In *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, the majority of this Court held that a school board had a duty to comply with the rules of procedural fairness in dis-

seignement de sécurité, et même les commentaires que formule à son égard ou les explications que fournit le comité de surveillance des activités de renseignement de sécurité dans son propre rapport» et dit, au paragraphe 20, [TRADUCTION] «Rien dans le rapport du Service canadien du renseignement de sécurité ni dans celui du comité de surveillance des activités de renseignement de sécurité ne vient dissiper mes doutes» (je souligne). Ces déclarations indiquent, au mieux, que le sous-ministre a donné le même poids au rapport du SCRS et aux recommandations du comité. En fait, comme les conclusions du comité ont apporté des corrections et des modifications au rapport du SCRS, le sous-ministre aurait dû s'appuyer presque exclusivement sur ces conclusions plutôt que sur les allégations erronées du SCRS.

Le sous-ministre était également tenu d'agir en conformité avec les principes de justice naturelle. À ce sujet, le juge Le Dain écrivait dans *Cardinal c. Directeur de l'établissement Kent*, [1985] 2 R.C.S. 643, à la p. 659:

> La question est donc de savoir ce que l'équité dans la procédure exigeait du directeur dans l'exercice de son pouvoir, en application de l'art. 40 du *Règlement sur le service des pénitenciers*, de maintenir la ségrégation ou l'isolement administratifs des appelants, malgré la recommandation du Conseil, s'il était convaincu qu'elle était nécessaire ou souhaitable pour le maintien du bon ordre et de la discipline dans l'établissement. Je suis d'accord avec le juge en chef McEachern et le juge Anderson de la Cour d'appel qu'à cause des effets graves de la décision du directeur pour les appelants, l'équité dans la procédure exigeait qu'il leur fasse connaître les motifs de sa décision prochaine et leur donne la possibilité, même de façon informelle, de lui présenter des arguments relatifs à ces motifs et à la question générale de savoir s'il était nécessaire ou souhaitable de maintenir leur ségrégation pour assurer l'ordre et la discipline dans l'établissement. [Je souligne.]

Voir également l'arrêt *Nicholson c. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 R.C.S. 311.

Dans *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, la majorité des juges de notre Cour a statué qu'un conseil scolaire avait l'obligation de se conformer aux règles de l'équité

missing an employee because of the final and specific nature of the decision, the nature of the employer-employee relationship, and the effect of the decision on the individual's rights. With respect to this last point, we held at p. 677:

> Various courts have recognized that the loss of employment against the office holder's will is a significant decision that could justify imposing a duty to act fairly on the administrative decision-making body.

Aside from the serious impact that dismissal usually has upon an individual, the Court found, at p. 674, that there were practical reasons for requiring procedural fairness, even if this meant abandoning old classifications between the office held at pleasure and other types of employment:

> The justification for granting to the holder of an office at pleasure the right to procedural fairness is that, whether or not just cause is necessary to terminate the employment, fairness dictates that the administrative body making the decision be cognizant of all relevant circumstances surrounding the employment and its termination .... One person capable of providing the administrative body with important insights into the situation is the office holder himself .... To grant [the right to be heard] to the holder of an office at pleasure would not import into the termination decision the necessity to show just cause, but would only require the administrative body to give the office holder reasons for the dismissal and an opportunity to be heard.

My colleague Cory J. maintains that the requirements of procedural fairness set out in *Cardinal, supra*, were met in this case because the respondent was apprised of the original reasons for the denial of the security clearance in the document issued by the Committee before its hearing entitled "Statement of Circumstances Giving Rise to the Denial of a Security Clearance to Robert Thomson by the Deputy Head of Agriculture Canada". As well, the respondent got a full opportunity to respond to the CSIS allegations in the hearing

procédurale à l'occasion du congédiement d'un employé, en raison de la nature définitive et particulière de la décision, de la nature de la relation entre employeur et employé et de l'effet de cette décision sur les droits du particulier. Sur ce dernier point, la Cour a opiné à la p. 677:

> Plusieurs tribunaux ont reconnu qu'une décision privant une personne de son emploi contre son gré est une décision importante pouvant justifier l'imposition à l'organisme administratif qui la prend de l'obligation d'agir équitablement.

Outre les conséquences importantes qu'a habituellement le congédiement sur la personne qui en fait l'objet, la Cour a conclu, à la p. 674, que des motifs d'ordre pratique justifiaient l'application des principes d'équité procédurale, même s'il en résultait que la distinction traditionnelle entre les charges occupées selon bon plaisir et les autres était mise de côté:

> Si le droit à l'équité procédurale est accordé au titulaire d'une charge selon bon plaisir, cela se justifie par le fait que, peu importe qu'un motif valable de congédiement soit nécessaire ou non, l'équité exige que l'organisme administratif qui prend la décision soit au courant de toutes les circonstances pertinentes de l'emploi et de sa cessation [. . .] La personne qui est en mesure de fournir à l'organisme administratif d'importants éclaircissements sur la situation est le titulaire de la charge lui-même. [. . .] Accorder ce droit [d'être entendu] au titulaire d'une charge selon bon plaisir ne reviendrait pas à assujettir la décision de le congédier à l'obligation d'établir un motif valable; ce serait simplement exiger que l'organisme administratif donne au titulaire de la charge les raisons de son renvoi et lui permette de se faire entendre.

Mon collègue, le juge Cory, maintient que les exigences de l'équité procédurale énoncées dans l'arrêt *Cardinal*, précité, ont été respectées en l'espèce puisque l'intimé a été informé des raisons initiales du refus de l'habilitation par le document communiqué par le comité avant l'audience et intitulé [TRADUCTION] «Résumé des circonstances qui ont donné lieu au refus d'une habilitation de sécurité à Robert Thomson par l'administrateur général d'Agriculture Canada». L'intimé a eu la possibilité de réfuter les allégations du SCRS au cours de

before the Committee. Thus, in Cory J.'s opinion, the respondent got both notice and fair hearing.

I cannot agree. The facts in the present case closely parallel those in *Cardinal*, which stands for the principle that the ultimate decision-maker must give the subject of his or her decision a chance to be heard, and the reasons for the final decision. In that case, based on the report that he received from another institution about transferred prisoners' participation in a riot, the Director of Kent Institution made a segregation order. This order was reviewed by the Segregation Review Board, which recommended that the order be lifted. The Director refused, without giving the prisoners either a further opportunity to make representations or informing them of the basis for his decision to override the recommendations. In striking down the order, Le Dain J. wrote for the unanimous Court at p. 659, following the passage which I quoted, *supra*:

> With great respect, I do not think it is an answer to the requirement of notice and hearing by the Director . . . that the appellants knew as a result of their appearance before the Segregation Review Board why they had been placed in segregation. They were entitled to know why the Director did not intend to act in accordance with the recommendation of the Board and to have an opportunity before him to state their case for release into the general population of the institution. [Emphasis added.]

Similarly, in the case at bar, the Deputy Minister initially denied the security clearance based on information from a third party, CSIS. This decision was appealed to the Committee, which recommended that it be reversed. The Deputy Minister refused, without giving the respondent a further opportunity to make representations or informing him in a meaningful way of the reasons for his decision. He stated at paragraph 20 of his affidavit of September 5, 1986, that he saw "no point" in meeting with the respondent because he had already made representations to the Committee.

l'audience tenue par le comité. Selon le juge Cory, l'intimé a donc reçu un avis approprié et a bénéficié d'une audience équitable.

Je ne suis pas d'accord. Les faits en l'espèce sont très près de ceux de l'affaire *Cardinal*, qui affirme le principe selon lequel la personne qui prend la décision finale doit donner à la personne visée par sa décision la possibilité de se faire entendre et les motifs de sa décision. Dans cette affaire, le directeur de l'établissement Kent, se fondant sur un rapport communiqué par un autre établissement concernant la participation de prisonniers transférés à une prise d'otages, avait ordonné leur mise en ségrégation. Cette ordonnance avait été soumise au Conseil d'examen des cas de ségrégation, qui en avait ordonné la levée. Le directeur avait refusé, sans avoir donné aux prisonniers la possibilité de présenter des arguments et sans les avoir informés du fondement de sa décision de passer outre aux recommandations. Notre Cour, à l'unanimité, a annulé l'ordonnance et le juge Le Dain, qui a rédigé les motifs, écrit ceci, à la p. 659, dans un passage qui suit l'extrait cité plus haut:

> Avec égards, je ne crois pas que l'on ait satisfait à l'exigence d'avis et d'audition incombant au directeur [. . .] parce que les appelants savaient par suite de leur comparution devant le Conseil d'examen des cas de ségrégation pourquoi ils avaient été mis en ségrégation. Ils avaient le droit de savoir pourquoi le directeur n'avait pas l'intention de suivre la recommandation du Conseil et d'avoir la possibilité d'exposer devant lui leurs arguments en faveur de leur réintégration dans la population générale de l'établissement. [Je souligne.]

De la même manière, en l'espèce, le sous-ministre a d'abord refusé l'habilitation de sécurité sur le fondement de renseignements fournis par un tiers, le SCRS. Cette décision a été portée en appel devant le comité, qui a recommandé qu'elle soit infirmée. Le sous-ministre a refusé, sans donner à l'intimé une autre possibilité de présenter des arguments et sans l'informer suffisamment des motifs de sa décision. Il a déclaré au paragraphe 20 de son affidavit du 5 septembre 1986 qu'il ne voyait [TRADUCTION] «aucune raison» de rencontrer l'intimé puisque celui-ci avait déjà présenté ses arguments au comité.

But the Deputy Minister's belief, however sincerely held, that the respondent would not be able to add anything or persuade him is not sufficient to satisfy the requirements of natural justice. The Deputy Minister still had a duty to give the respondent some opportunity to respond. Furthermore, as I have already noted, the letter he sent to the respondent's lawyer (over a year after the Committee issued its recommendations, and only on the persistent demands of Mr. Jewitt) was inadequate in terms of informing the respondent of the basis of his decision.

The Deputy Minister's decision to withhold the security clearance must accordingly be set aside. As the Court concluded in *Cardinal* at p. 661:

> ... the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

For these reasons I am of the opinion that by his failure to afford the appellants a fair hearing on the question whether he should act in accordance with the recommendation of the Segregation Review Board that they be released from administrative segregation into the general population of the institution, the Director rendered the continued segregation of the appellants unlawful [Emphasis added.]

Conclusion

For these reasons, I would dismiss the appeal with costs.

Appeal allowed, L'HEUREUX-DUBÉ J. *dissenting.*

Toutefois, la croyance du sous-ministre, si sincère soit-elle, que l'intimé ne serait pas en mesure d'ajouter quoi que ce soit ou de le persuader ne suffisait pas pour qu'il soit satisfait aux exigences de la justice naturelle. Le sous-ministre avait encore l'obligation de donner à l'intimé la possibilité de répondre. De plus, comme je l'ai déjà souligné, la lettre envoyée à l'avocat de l'intimé (plus d'un an après que le comité eut fait ses recommandations et à la suite seulement de demandes persistantes de M. Jewitt) était inadéquate, en ce qu'elle ne donnait pas à l'intimé suffisamment de renseignements sur le fondement de la décision.

La décision du sous-ministre de refuser l'habilitation de sécurité doit donc être annulée. Je reprends la conclusion suivante dans l'arrêt *Cardinal* de notre Cour, à la p. 661:

> ... la négation du droit à une audition équitable doit toujours rendre une décision invalide, que la cour qui exerce le contrôle considère ou non que l'audition aurait vraisemblablement amené une décision différente. Il faut considérer le droit à une audition équitable comme un droit distinct et absolu qui trouve sa justification essentielle dans le sens de la justice en matière de procédure à laquelle toute personne touchée par une décision administrative a droit. Il n'appartient pas aux tribunaux de refuser ce droit et ce sens de la justice en fonction d'hypothèses sur ce qu'aurait pu être le résultat de l'audition.

Pour ces motifs, je suis d'avis qu'en omettant d'offrir aux appelants une audition équitable sur la question de savoir s'il devrait suivre la recommandation du Conseil d'examen des cas de ségrégation de lever leur ségrégation administrative et de les réintégrer dans la population générale de l'établissement, le directeur a rendu illégal le maintien de la ségrégation des appelants. Ils avaient donc droit, en vertu d'un bref d'*habeas corpus*, à la levée de leur ségrégation ou isolement administratifs et à leur réintégration dans la population générale du pénitencier. [Je souligne.]

Conclusion

Pour les motifs qui précèdent, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi accueilli, le juge L'HEUREUX-DUBÉ *est dissidente.*

Solicitor for the appellant: John C. Tait, Ottawa.

Solicitors for the respondent: Nelligan/Power, Ottawa.

Solicitors for the intervener: Noël, Berthiaume, Aubry, Hull.

Procureur de l'appelante: John C. Tait, Ottawa.

Procureurs de l'intimé: Nelligan/Power, Ottawa.

Procureurs de l'intervenant: Noël, Berthiaume, Aubry, Hull.

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants and R. Brian Burgess *Appellants*

v.

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*

White Burgess Langille Inman, faisant affaire sous la raison sociale WBLI Chartered Accountants et R. Brian Burgess *Appelants*

c.

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, auparavant 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. faisant affaire sous la raison sociale 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 et Woodland Building Supplies Limited *Intimées*

et

Procureur général du Canada et Criminal Lawyers' Association (Ontario) *Intervenants*

Indexed as: White Burgess Langille Inman *v.* Abbott and Haliburton Co.

2015 SCC 23

File No.: 35492.

2014: October 7; 2015: April 30.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Evidence — Admissibility — Expert evidence — Basic standards for admissibility — Qualified expert — Independence and impartiality — Nature of expert's duty to court — How expert's duty relates to admissibility of expert's evidence — Forensic accountant providing opinion on whether former auditors were negligent in performance of duties — Former auditors applying to strike out expert's affidavit on grounds she was not impartial expert witness — Whether elements of expert's duty to court go to admissibility of evidence rather than simply to its weight — If so, whether there is a threshold admissibility requirement in relation to independence and impartiality.

The shareholders started a professional negligence action against the former auditors of their company after they had retained a different accounting firm, the Kentville office of GT, to perform various accounting tasks and which in their view revealed problems with the former auditors' work. The auditors brought a motion for summary judgment seeking to have the shareholders' action dismissed. In response, the shareholders retained M, a forensic accounting partner at the Halifax office of GT, to review all the relevant materials 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 M's affidavit on the grounds that she was not an impartial expert witness.

The motions judge essentially agreed with the auditors and struck out M's affidavit in its entirety. The majority of the Court of Appeal concluded that the motions judge erred in excluding M's affidavit and allowed the appeal.

Répertorié : White Burgess Langille Inman *c.* Abbott and Haliburton Co.

2015 CSC 23

N° du greffe : 35492.

2014 : 7 octobre; 2015 : 30 avril.

Présents : La juge en chef McLachlin et les juges Abella, Rothstein, Cromwell, Moldaver, Wagner et Gascon.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Preuve — Admissibilité — Preuve d'expert — Normes fondamentales d'admissibilité — Expert qualifié — Indépendance et impartialité — Nature de l'obligation de l'expert envers le tribunal — Rapport entre l'obligation de l'expert et l'admissibilité de son témoignage — Opinion d'une juricomptable sur la négligence possible des vérificateurs précédents dans l'exercice de leurs fonctions — Requête en radiation de l'affidavit de l'expert présentée par les vérificateurs précédents au motif que l'expert n'était pas un témoin expert impartial — Les éléments de l'obligation de l'expert envers le tribunal jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci? — Dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

Les actionnaires ont intenté une action pour négligence professionnelle contre les anciens vérificateurs de leur compagnie après avoir engagé un autre cabinet comptable, GT, de Kentville, 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. En réponse, les actionnaires ont fait appel à M, une associée en juricomptabilité du cabinet GT de Halifax, pour qu'elle examine tous les documents pertinents et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M au motif qu'elle 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 intégralement l'affidavit de M. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M et ont accueilli l'appel.

Held: The appeal should be dismissed.

The inquiry for determining the admissibility of expert opinion evidence is divided into two steps. At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence that does not meet these threshold requirements should be excluded. At the second discretionary gatekeeping step, 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.

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. 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. These concepts, of course, must be applied to the realities of adversary litigation.

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. A proposed expert witness who is unable or unwilling to fulfill his or her duty to the court is not properly qualified to perform the role of an expert. If the expert witness does not meet this threshold admissibility requirement, his or her evidence should not be admitted. Once this threshold is met, however, remaining concerns about an expert witness'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.

Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. 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. Absent challenge, the

Arrêt : Le pourvoi est rejeté.

La démarche qui permet de déterminer l'admissibilité du témoignage d'opinion de l'expert est scindée en deux. Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *R. c. Mohan*, [1994] 2 R.C.S. 9, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en déterminant si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission.

L'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. 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. Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire.

C'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* 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 son obligation envers le tribunal ne possède pas la qualification suffisante pour exercer ce rôle. S'il ne satisfait pas à ce critère d'admissibilité, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. En l'absence d'une

expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met. However, if a party opposing admissibility shows that there is a realistic concern that the expert is unable and/or unwilling to comply with his or her duty, the proponent of the evidence has the burden of establishing its admissibility. 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.

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.

In this case, there was no basis disclosed in the record to find that M's evidence should be excluded because she was not able and willing to provide the court with fair, objective and non-partisan evidence. The majority of the Court of Appeal was correct in concluding that the motions judge committed a palpable and overriding error in determining that M was in a conflict of interest that prevented her from giving impartial and objective evidence.

Cases Cited

Applied: *R. v. Mohan*, [1994] 2 S.C.R. 9; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3; **adopted:** *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, leave to appeal refused, [2010] 2 S.C.R. v; **referred to:** *Lord Abinger v. Ashton* (1873), L.R. 17 Eq. 358; *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. Abbey*, [1982] 2 S.C.R. 24; *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th)

contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte. Toutefois, si la partie qui s'oppose à l'admission démontre un motif réaliste de croire que l'expert ne peut ou ne veut s'acquitter de son obligation, il revient à la partie qui produit la preuve d'en établir l'admissibilité. 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 sera 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. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

En l'espèce, le dossier ne révèle aucun élément qui permette de conclure que le témoignage de M devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. La majorité de la Cour d'appel a eu raison de conclure que le juge des requêtes avait commis une erreur manifeste et dominante en estimant que M était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial.

Jurisprudence

Arrêts appliqués : *R. c. Mohan*, [1994] 2 R.C.S. 9; *Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3; **arrêt adopté :** *R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, autorisation d'appel refusée, [2010] 2 R.C.S. v; **arrêts mentionnés :** *Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358; *R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275; *Graat c. La Reine*, [1982] 2 R.C.S. 819; *R. c. Abbey*, [1982] 2 R.C.S. 24; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290; *R. c.*

396; *National Justice Compania Naviera S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, rev'd [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187; *R. v. Docherty*, 2010 ONSC 3628; *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley v. Punnett*, 2003 BCSC 294; *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. v. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame v. Johnstone*, 2006 BCSC 271; *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. v. Tong*, 2010 BCSC 111; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. v. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. v. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. v. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. v. Fagenblat*, [2003] VSCA 33; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz v. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady v. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Statutes and Regulations Cited

Act to establish the new Code of Civil Procedure, S.Q. 2014, c. 1, arts. 22, 235 [not yet in force].

Civil Procedure Rules (Nova Scotia), rr. 55.01(2), 55.04 (1)(a), (b), (c).

C. (M.), 2014 ONCA 611, 13 C.R. (7th) 396; *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68, inf. par [1995] 1 Lloyd's Rep. 455; *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456; *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187; *R. c. Docherty*, 2010 ONSC 3628; *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394; *Handley c. Punnett*, 2003 BCSC 294; *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240; *Hutchingame c. Johnstone*, 2006 BCSC 271; *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19; *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594; *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115; *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77; *R. c. Violette*, 2008 BCSC 920; *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367; *R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381; *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464; *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474; *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067; *FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500; *Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (1993); *Tagatz c. Marquette University*, 861 F.2d 1040 (1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (2014); *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44; *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284; *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97; *Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385.

Lois et règlements cités

Loi instituant le nouveau Code de procédure civile, L.Q. 2014, c. 1, art. 22, 235 [non en vigueur].

Règles de la Cour du Banc de la Reine (Saskatchewan), règle 5-37.

Federal Courts Rules, SOR/98-106, r. 52.2(1)(*c*).
Queen's Bench Rules (Saskatchewan), r. 5-37.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 4.1.01(1), (2), 53.03(2.1).
Rules of Civil Procedure (Prince Edward Island), r. 53.03 (3)(g).
Rules of Court, Y.O.I.C. 2009/65, r. 34(23).
Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 11-2(1), (2).

Authors Cited

Anderson, Glenn R. *Expert Evidence*, 3rd ed. Markham, Ont.: LexisNexis, 2014.
Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*. Cowansville, Qué.: Yvon Blais, 2011.
Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24. Toronto: Carswell, 2014 (loose-leaf updated 2014, release 6).
Chamberland, Luc. *Le nouveau Code de procédure civile commenté*. Cowansville, Qué.: Yvon Blais, 2014.
Corpus Juris Secundum, vol. 32. Eagan, Minn.: Thomson West, 2008.
Cross and Tapper on Evidence, 12th ed. by Colin Tapper. Oxford: Oxford University Press, 2010.
Freckelton, Ian, and Hugh Selby. *Expert Evidence: Law, Practice, Procedure and Advocacy*, 5th ed. Pyrmont, N.S.W.: Lawbook Co., 2013.
Halsbury's Laws of Canada: Evidence, 2014 Reissue, contributed by Hamish C. Stewart. Markham, Ont.: LexisNexis, 2014.
Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed. Markham, Ont.: LexisNexis, 2014.
McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds. Toronto: Canada Law Book, 2013 (loose-leaf updated 2014, release 5).
Michell, Paul, and Renu Mandhane. "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635.
Ontario. *Civil Justice Reform Project: Summary of Findings & Recommendations* (Osborne Report). Toronto: Ministry of Attorney General, 2007.
Ontario. *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (Goudge Report). Toronto: Ministry of the Attorney General, 2008.
Ontario. *The Commission on Proceedings Involving Guy Paul Morin: Report* (Kaufman Report). Toronto: Ministry of the Attorney General, 1998.

Règles de procédure, Y.D. 2009/65, règle 34(23).
Règles de procédure civile, R.R.O. 1990, Règl. 194, règles 4.1.01(1), (2), 53.03(2.1).
Règles de procédure civile (Nouvelle-Écosse), règles 55.01(2), 55.04(1)a), b), c).
Règles des Cours fédérales, DORS/98-106, règle 52.2 (1)*c*).
Rules of Civil Procedure (Île-du-Prince-Édouard), règle 53.03(3)(g).
Supreme Court Civil Rules, B.C. Reg. 168/2009, règles 11-2(1), (2).

Doctrine et autres documents cités

Anderson, Glenn R. *Expert Evidence*, 3rd ed., Markham (Ont.), LexisNexis, 2014.
Béchard, Donald, avec la collaboration de Jessica Béchard. *L'expert*, Cowansville (Qc), Yvon Blais, 2011.
Canadian Encyclopedic Digest, Ontario 4th ed., vol. 24, Toronto, Carswell, 2014 (loose-leaf updated 2014, release 6).
Chamberland, Luc. *Le nouveau Code de procédure civile commenté*, Cowansville (Qc), Yvon Blais, 2014.
Corpus Juris Secundum, vol. 32, Eagan (Minn.), Thomson West, 2008.
Cross and Tapper on Evidence, 12th ed. by Colin Tapper, Oxford, Oxford University Press, 2010.
Freckelton, Ian, and Hugh Selby. *Expert Evidence : Law, Practice, Procedure and Advocacy*, 5th ed., Pyrmont (N.S.W.), Lawbook Co., 2013.
Halsbury's Laws of Canada : Evidence, 2014 Reissue, contributed by Hamish C. Stewart, Markham (Ont.), LexisNexis, 2014.
Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 4th ed., Markham (Ont.), LexisNexis, 2014.
McWilliams' Canadian Criminal Evidence, 5th ed. by S. Casey Hill, David M. Tanovich and Louis P. Strezos, eds., Toronto, Canada Law Book, 2013 (loose-leaf updated 2014, release 5).
Michell, Paul, and Renu Mandhane. « The Uncertain Duty of the Expert Witness » (2005), 42 *Alta. L. Rev.* 635.
Ontario. *Commission sur les poursuites contre Guy Paul Morin : Rapport* (Rapport Kaufman), Toronto, Ministère du Procureur général, 1998.
Ontario. *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (Rapport Osborne), Toronto, Ministère du Procureur général, 2007.

Paciocco, David. "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009), 13 *Can. Crim. L.R.* 135.
Paciocco, David M. "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 *Queen's L.J.* 565.
Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015.
Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds. London: Sweet & Maxwell, 2013.
Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd. Cowansville, Qué.: Yvon Blais, 2008.
Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*. Boston: Little, Brown and Co., 1898 (reprinted South Hackensack, N.J.: Rothman Reprints, Inc., 1969).
United Kingdom. *Access to Justice: Final Report* (Woolf Report). London: HMSO, 1996.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J. and Oland and Beveridge JJ.A.), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), setting aside in part a decision of Pickup J., 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Appeal dismissed.

Alan D'Silva, *James Wilson* and *Aaron Kreaden*, for the appellants.

Jon Laxer and *Brian F. P. Murphy*, for the respondents.

Michael H. Morris, for the intervener the Attorney General of Canada.

Matthew Gourlay, for the intervener the Criminal Lawyers' Association (Ontario).

Ontario. *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (Rapport Goudge), Toronto, Ministère du Procureur général, 2008.
Paciocco, David. « Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135.
Paciocco, David M. « Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565.
Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 7th ed., Toronto, Irwin Law, 2015.
Phipson on Evidence, 18th ed. by Hodge M. Malek et al., eds., London, Sweet & Maxwell, 2013.
Royaume-Uni. *Access to Justice : Final Report* (Woolf Report), London, HMSO, 1996.
Royer, Jean-Claude, et Sophie Lavallée. *La preuve civile*, 4e éd., Cowansville (Qc), Yvon Blais, 2008.
Thayer, James Bradley. *A Preliminary Treatise on Evidence at the Common Law*, Boston, Little, Brown and Co., 1898 (reprinted South Hackensack (N.J.), Rothman Reprints, Inc., 1969).

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Oland et Beveridge), 2013 NSCA 66, 330 N.S.R. (2d) 301, 361 D.L.R. (4th) 659, 36 C.P.C. (7th) 22, [2013] N.S.J. No. 259 (QL), 2013 CarswellNS 360 (WL Can.), qui a infirmé en partie une décision du juge Pickup, 2012 NSSC 210, 317 N.S.R. (2d) 283, 26 C.P.C. (7th) 280, [2012] N.S.J. No. 289 (QL), 2012 CarswellNS 376 (WL Can.). Pourvoi rejeté.

Alan D'Silva, *James Wilson* et *Aaron Kreaden*, pour les appelants.

Jon Laxer et *Brian F. P. Murphy*, pour les intimées.

Michael H. Morris, pour l'intervenant le procureur général du Canada.

Matthew Gourlay, pour l'intervenante Criminal Lawyers' Association (Ontario).

The judgment of the Court was delivered by

CROMWELL J. —

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

Version française du jugement de la Cour rendu par

LE JUGE CROMWELL —

I. Introduction et questions en litige

[1] Le témoignage d'expert peut constituer la pièce maîtresse dans la recherche de la vérité tout comme il peut présenter des dangers particuliers. Pour se prémunir contre ces dangers, la Cour depuis une vingtaine d'années resserre graduellement les règles d'admissibilité et renforce le rôle de gardien du juge de première instance. Ainsi, l'admission du témoignage d'expert est subordonnée au respect de certaines normes fondamentales. La question à trancher dans le cadre du présent pourvoi est de savoir si l'indépendance et l'impartialité de l'expert que l'on se propose de citer comme témoin devraient compter au nombre de ces normes fondamentales d'admissibilité. À mon avis elles devraient l'être.

[2] Le témoin expert a l'obligation particulière d'apporter au tribunal une aide juste, objective et impartiale. La personne que l'on se propose de citer à ce titre, mais qui ne peut ou ne veut se conformer à cette obligation, n'a pas la qualification pour témoigner à titre d'expert et ne devrait pas y être autorisée. Des réserves moins fondamentales quant à l'indépendance et à l'impartialité de l'expert devraient jouer dans l'analyse globale des coûts et des bénéfices de l'admission du témoignage.

[3] Appliquant ces principes, je partage la conclusion à laquelle sont parvenus les juges majoritaires de la Cour d'appel de la Nouvelle-Écosse et suis d'avis de rejeter le présent pourvoi avec dépens.

II. Rappel des faits et historique judiciaire

A. *Les faits et la procédure*

[4] Le présent pourvoi découle d'une action pour négligence professionnelle intentée par les intimées (ci-après « les actionnaires ») contre les appelants, les anciens vérificateurs de leur compagnie (ci-après « les vérificateurs »). Les actionnaires ont intenté cette poursuite après avoir engagé un autre cabinet

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.

comptable, Grant Thornton srl, de Kentville, pour effectuer diverses tâches comptables, qui, selon eux, avaient révélé des erreurs par les vérificateurs précédents. Les actionnaires reprochent essentiellement aux vérificateurs de ne pas avoir appliqué les normes de vérification et comptables généralement reconnues et de leur avoir ainsi causé une perte. La principale question dans le cadre de l'action est de savoir si les vérificateurs ont fait preuve de négligence dans l'exercice de leurs fonctions.

[5] En août 2010, les vérificateurs ont présenté une requête en jugement sommaire visant à faire rejeter l'action. En réponse, les actionnaires ont fait appel à M^me^ Susan MacMillan, une associée en juricomptabilité du cabinet Grant Thornton de Halifax, pour qu'elle examine tous les documents pertinents, notamment ceux déposés dans le cadre de l'action, et rédige un rapport de ses constatations. Son affidavit expose ces dernières, notamment que les vérificateurs, selon elle, ne se sont pas acquittés de leurs obligations professionnelles envers les actionnaires. Les vérificateurs ont présenté une requête en radiation de l'affidavit de M^me^ MacMillan au motif qu'elle n'était pas un témoin expert impartial. Ils ont fait valoir que l'action se résumait à une bataille d'opinions entre deux cabinets comptables, en l'occurrence celui des vérificateurs et celui du témoin expert. Le cabinet de M^me^ MacMillan pourrait être tenu responsable si sa démarche n'était pas acceptée par le tribunal et, en tant qu'associée, M^me^ MacMillan pourrait être tenue personnellement responsable. Sa responsabilité potentielle — si son opinion n'était pas acceptée — se traduit par un intérêt financier personnel dans le règlement du litige; or, de l'avis des vérificateurs, cela devrait suffire à la rendre inhabile à témoigner.

[6] Depuis, l'instance a été tout sauf sommaire et ne s'est toujours pas soldée par un jugement. Le litige a plutôt porté sur la question du témoignage de l'expert; la requête en jugement sommaire n'a pas encore été entendue sur le fond.

B. *Judgments Below*

(1) Nova Scotia Supreme Court: 2012 NSSC 210, 317 N.S.R. (2d) 283 (Pickup J.)

[7] Pickup J. essentially agreed with the auditors and struck out the MacMillan affidavit in its entirety: 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 (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 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,

B. *Les juridictions inférieures*

(1) Cour suprême de la Nouvelle-Écosse : 2012 NSSC 210, 317 N.S.R. (2d) 283 (le juge Pickup)

[7] Le juge Pickup s'est dit d'accord avec les vérificateurs pour l'essentiel et a radié intégralement l'affidavit de M[me] MacMillan (par. 106). Il était d'avis que, pour être admissible, le témoignage de l'expert [TRADUCTION] « doit être indépendant et impartial et être perçu comme tel » (par. 99) et, partant, a conclu qu'il s'agissait de l'un des « cas les plus évidents où la fiabilité de l'expert [. . .] ne satisfait pas aux critères d'admissibilité » (par. 101).

(2) Cour d'appel de la Nouvelle-Écosse : 2013 NSCA 66, 330 N.S.R. (2d) 301 (le juge Beveridge, avec l'appui de la juge Oland; le juge en chef MacDonald est dissident)

[8] Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait eu tort d'exclure l'affidavit de M[me] MacMillan. Le juge Beveridge a écrit que, si le tribunal peut, en vertu de son pouvoir discrétionnaire, écarter le témoignage de l'expert pour cause de partialité réelle, le critère retenu par le juge des requêtes, en l'occurrence que l'expert « doit être indépendant et impartial et être perçu comme tel », était mal fondé en droit. Il n'aurait pas dû déclarer inadmissible le témoignage de M[me] MacMillan ni radier son affidavit.

[9] Le juge en chef MacDonald, dissident, était d'avis de confirmer la décision du juge des requêtes, parce que ce dernier avait selon lui exposé et appliqué correctement les principes juridiques pertinents.

III. Analyse

A. *Aperçu*

[10] Selon moi, l'expert a l'obligation envers le tribunal de donner un témoignage d'opinion qui soit juste, objectif et impartial. Il doit être conscient de cette obligation et pouvoir et vouloir s'en acquitter. S'il ne satisfait pas à ce critère, son témoignage ne devrait pas être admis. Or, dès lors qu'il y est satisfait,

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 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, 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

les réserves quant à l'indépendance ou à l'impartialité du témoin expert devraient être examinées dans l'évaluation globale des coûts et des bénéfices de l'admission du témoignage. Cette démarche issue de la common law cède le pas bien sûr aux dispositions législatives et connexes établissant dans certains cas des règles d'admissibilité différentes.

B. *Impartialité et indépendance du témoin expert*

[11] Les préoccupations quant à savoir si les témoins experts retenus par les parties sont impartiaux — c'est-à-dire s'ils expriment leur opinion professionnelle sans parti pris — et indépendants — c'est-à-dire si leur opinion est le fruit des conclusions auxquelles ils sont parvenus de façon indépendante en se fondant sur leurs propres connaissances et jugement — ne datent pas d'hier (voir, p. ex., G. R. Anderson, *Expert Evidence* (3e éd. 2014), p. 509; S. N. Lederman, A. W. Bryant et M. K. Fuerst, *The Law of Evidence in Canada* (4e éd. 2014), p. 783). Comme le soulignait Sir George Jessel, maître des rôles, dans les années 1870, [TRADUCTION] « [i]l existe indubitablement une tendance naturelle à faire quelque chose d'utile pour celui qui nous emploie et nous rémunère bien. C'est tout à fait naturel et si infaillible que nous voyons constamment des personnes qui se considèrent, non pas comme des témoins, mais comme les mandataires rémunérés de la personne qui les emploie » (*Lord Abinger c. Ashton* (1873), L.R. 17 Eq. 358, p. 374).

[12] L'expérience récente n'a fait qu'aviver ces préoccupations; nous savons que trop bien que le manque d'indépendance et d'impartialité d'un expert peut donner lieu à de très graves erreurs judiciaires (*R. c. D.D.*, 2000 CSC 43, [2000] 2 R.C.S. 275, par. 52). Comme l'a souligné le juge Beveridge dans la présente affaire, la *Commission sur les poursuites contre Guy Paul Morin : Rapport* (1998), rédigé par l'honorable Fred Kaufman, et le *Rapport de la Commission d'enquête sur la médecine légale pédiatrique en Ontario* (2008), de l'honorable Stephen T. Goudge, donnent deux exemples concrets de cas où [TRADUCTION] « [l]'opinion apparemment solide et impartiale, mais erronée, d'un scientifique expert a joué un rôle de premier plan dans des erreurs judiciaires » (par. 105). D'autres rapports mettent en évidence la nécessité cruciale que l'expert

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., *Graat v. The Queen*, [1982] 2

soit impartial et indépendant dans les procès civils (*ibid.*, par. 106; voir le très honorable lord Woolf, *Access to Justice : Final Report* (1996); l'honorable Coulter A. Osborne, *Projet de réforme du système de justice civile : Résumé des conclusions et des recommandations* (2007)).

[13] Pour déterminer la meilleure solution en droit de la preuve à ces préoccupations, il nous faut nous poser plusieurs questions. Est-ce que les réserves au sujet du parti pris possible d'un expert jouent au regard de l'admissibilité de son témoignage ou seulement de la valeur probante de ce dernier? Dans le premier cas, devrait-on y répondre par un critère d'admissibilité, par un pouvoir discrétionnaire permettant d'écarter la preuve ou les deux? Quand justifient-elles que soit exclu un témoignage? Enfin, comment la solution s'inscrit-elle dans le cadre juridique actuel régissant l'admissibilité des témoignages d'experts? Pour répondre à ces questions, nous devons d'abord nous pencher sur ce cadre juridique, circonscrire les obligations du témoin envers le tribunal, puis voir comment ces dernières s'intègrent le mieux dans le cadre juridique.

C. *Le cadre juridique*

(1) La règle d'exclusion des témoignages d'opinion

[14] La règle générale moderne selon laquelle toute preuve pertinente est admissible est assortie de nombreuses exceptions. L'une d'elles a trait au témoignage d'opinion, lequel fait l'objet d'une règle d'exclusion complexe. La déposition des témoins doit relater les faits qu'ils ont perçus, et non présenter les inférences, ou opinions, qu'ils en tirent. Comme l'a dit il y a longtemps un éminent spécialiste de la preuve, [TRADUCTION] « c'est au jury de se faire une opinion et de tirer des inférences et des conclusions, pas au témoin » (J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; réimprimé 1969), p. 524; voir également C. Tapper, *Cross and Tapper on Evidence* (12e éd. 2010), p. 530). Même si plusieurs raisons ont été avancées pour expliquer cette règle d'exclusion, la plus convaincante est probablement celle selon laquelle ces inférences toutes faites ne sont

S.C.R. 819, 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 Prof. 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, 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. 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

pas utiles au juge des faits et peuvent même l'induire en erreur (voir, p. ex., *Graat c. La Reine*, [1982] 2 R.C.S. 819, p. 836; *Halsbury's Laws of Canada : Evidence* (2014 réédition), par. HEV-137 « General rule against opinion evidence »).

[15] Cependant, ce ne sont pas tous les témoignages d'opinion qui sont exclus. L'exception qui nous intéresse plus particulièrement dans le présent pourvoi est celle qui s'applique au témoignage d'opinion d'un expert sur des questions qui exigent des connaissances spécialisées. Pour reprendre les propos du professeur Tapper, [TRADUCTION] « le droit reconnaît que, dans la mesure où les questions exigent des connaissances ou des compétences particulières, les juges et les jurés ne sont pas forcément en mesure de tirer une véritable conclusion d'après les faits relatés par les témoins. Le témoin est par conséquent admis à faire part de son opinion sur ces questions, pourvu qu'il soit un expert en la matière » (p. 530; voir également *R. c. Abbey*, [1982] 2 R.C.S. 24, p. 42).

(2) Le cadre juridique actuel régissant le témoignage d'opinion d'un expert

[16] Depuis au moins le milieu des années 1990, la Cour a répondu à nombre de préoccupations concernant l'incidence d'une preuve d'expert d'une valeur douteuse sur le déroulement de l'instance. La jurisprudence a clarifié et resserré les critères d'admissibilité, établi de nouvelles exigences de fiabilité, notamment en ce qui concerne la preuve issue de sciences nouvelles, et renforcé l'important rôle de « gardien » du juge qui consiste à écarter d'emblée les témoignages dont la valeur ne justifie pas la confusion, la lenteur et les frais que leur admission risque de causer.

[17] Nous pouvons prendre comme point de départ de cette nouvelle tendance la décision de la Cour dans l'affaire *R. c. Mohan*, [1994] 2 R.C.S. 9. Cet arrêt a mis en lumière les dangers du témoignage d'expert et établi un critère à quatre volets pour en évaluer l'admissibilité. Ces dangers sont bien connus. Il y a notamment le risque que le juge des faits

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. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272, 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, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. 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.-L.J.*, 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.-L.J.*, 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, at para. 76.

[19] To address these dangers, *Mohan* established a basic structure for the law relating to the admissibility

s'en remette inconsidérément à l'opinion de l'expert au lieu de l'évaluer avec circonspection. Comme le souligne le juge Sopinka dans l'arrêt *Mohan* :

> La preuve d'expert risque d'être utilisée à mauvais escient et de fausser le processus de recherche des faits. Exprimée en des termes scientifiques que le jury ne comprend pas bien et présentée par un témoin aux qualifications impressionnantes, cette preuve est susceptible d'être considérée par le jury comme étant pratiquement infaillible et comme ayant plus de poids qu'elle ne le mérite. [p. 21]

(Voir également *D.D.*, par. 53; *R. c. J.-L.J.*, 2000 CSC 51, [2000] 2 R.C.S. 600, par. 25-26; *R. c. Sekhon*, 2014 CSC 15, [2014] 1 R.C.S. 272, par. 46.)

[18] Il s'agit de préserver le procès devant juge et jury, et non pas d'y substituer le procès instruit par des experts. Il y a un risque que le jury [TRADUCTION] « soit incapable de faire un examen critique et efficace de la preuve » (*R. c. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, par. 90, autorisation d'appel refusée, [2010] 2 R.C.S. v). Le juge des faits doit faire appel à son « jugement éclairé » plutôt que simplement trancher la question sur le fondement d'un « acte de confiance » à l'égard de l'opinion de l'expert (*J.-L.J.*, par. 56). Le danger de « s'en remettre à l'opinion de l'expert » est également exacerbé par le fait que la preuve d'expert est imperméable au contre-interrogatoire efficace par des avocats qui ne sont pas des experts dans ce domaine (*D.D.*, par. 54). La jurisprudence aborde un certain nombre d'autres problèmes connexes : le préjudice qui pourrait éventuellement découler d'une opinion d'expert fondée sur des informations qui ne sont pas attestées sous serment et qui ne peuvent pas faire l'objet d'un contre-interrogatoire (*D.D.*, par. 55); le danger d'admettre en preuve de la « science de pacotille » (*J.-L.J.*, par. 25); le risque qu'un « concours d'experts » ne distraie le juge des faits au lieu de l'aider (*Mohan*, p. 24). Un autre danger bien connu associé à l'admission de la preuve d'expert est le fait qu'elle peut exiger un délai et des frais démesurés (*Mohan*, p. 21; *D.D.*, par. 56; *Masterpiece Inc. c. Alavida Lifestyles Inc.*, 2011 CSC 27, [2011] 2 R.C.S. 387, par. 76).

[19] Pour parer à ces dangers, la Cour dans l'arrêt *Mohan* a établi une structure de base à deux volets

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.-L.J.*, 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.-L.J.*; *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239. The question remains, however, as to where the cost-benefit analysis

définissant les règles d'admissibilité du témoignage d'opinion d'un expert. En premier lieu, celui qui cherche à faire admettre une preuve d'opinion émanant d'un expert doit démontrer qu'elle satisfait à quatre critères : (1) la pertinence; (2) la nécessité d'aider le juge des faits; (3) l'absence de toute règle d'exclusion; (4) la qualification suffisante de l'expert (*Mohan*, p. 20-25; voir également *Sekhon*, par. 43). L'arrêt *Mohan* insiste par ailleurs sur le rôle important du juge du procès pour déterminer si une preuve d'expert par ailleurs admissible devrait être exclue parce que sa valeur probante est surpassée par son effet préjudiciable — un pouvoir discrétionnaire résiduel permettant d'exclure une preuve à l'issue d'une analyse coût-bénéfices (p. 21). Il s'agit du second volet de la structure, mis en évidence par la jurisprudence ultérieure (Lederman, Bryant et Fuerst, p. 789-790; *J.-L.J.*, par. 28).

[20] L'arrêt *Mohan* et la jurisprudence ultérieure ne précisent toutefois pas comment cette analyse « du coût et des bénéfices » s'inscrit dans l'analyse globale. La Cour dans cet arrêt procède à l'analyse coût-bénéfices relativement à certains des quatre critères, mais elle fait aussi observer qu'une telle analyse peut relever de l'exercice d'un pouvoir discrétionnaire général qui permet d'exclure une preuve dont la valeur probante ne justifie pas son admission, compte tenu de ses effets potentiellement préjudiciables (p. 21). Depuis l'arrêt *Mohan*, la jurisprudence s'est également intéressée à des aspects particuliers du témoignage d'opinion d'un expert, mais souvent sans expliciter la place qu'occupent ces autres préoccupations dans l'analyse. Cependant, la jurisprudence, dans son ensemble, tend indubitablement à resserrer les critères d'admissibilité et à renforcer le rôle de gardien du juge.

[21] Par exemple, le critère de nécessité a été mis en évidence dans des décisions telles que *D.D.* La majorité y souligne que l'exigence de nécessité « vise à ce que les dangers liés à la preuve d'expert ne soient pas traités à la légère », ajoutant que « [l]a simple pertinence ou "utilité" ne suffit pas » (par. 46). D'autres décisions ont abordé la fiabilité des principes scientifiques à la base d'une opinion et, en fait, des éléments de preuve techniques en général (*J.-L.J.*; *R. c. Trochym*, 2007 CSC 6, [2007] 1 R.C.S. 239). Toutefois, on ne sait toujours pas où exactement,

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.-L.J.*, 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.-L.J.*, 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, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, 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.-L.J.*, 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.

dans l'analyse globale, s'inscrivent l'analyse coût-bénéfices et les préoccupations comme celles relatives à la fiabilité.

[22] L'arrêt *Abbey* (ONCA) a apporté des précisions utiles en scindant la démarche en deux temps. Je suis d'avis de l'adopter, à peu de choses près.

[23] Dans un premier temps, celui qui veut présenter le témoignage doit démontrer qu'il satisfait aux critères d'admissibilité, soit les quatre critères énoncés dans l'arrêt *Mohan*, à savoir la pertinence, la nécessité, l'absence de toute règle d'exclusion et la qualification suffisante de l'expert. De plus, dans le cas d'une opinion fondée sur une science nouvelle ou contestée ou sur une science utilisée à des fins nouvelles, la fiabilité des principes scientifiques étayant la preuve doit être démontrée (*J.-L.J.*, par. 33, 35-36 et 47; *Trochym*, par. 27; Lederman, Bryant et Fuerst, p. 788-789 et 800-801). Le critère de la pertinence, à ce stade, s'entend de la pertinence logique (*Abbey* (ONCA), par. 82; *J.-L.J.*, par. 47). Tout témoignage qui ne satisfait pas à ces critères devrait être exclu. Il est à noter qu'à mon avis, la nécessité demeure un critère (*D.D.*, par. 57; voir D. M. Paciocco et L. Stuesser, *The Law of Evidence* (7e éd. 2015), p. 209-210; *R. c. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290, par. 13; *R. c. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396, par. 72).

[24] Dans un deuxième temps, le juge-gardien exerce son pouvoir discrétionnaire en soupesant les risques et les bénéfices éventuels que présente l'admission du témoignage, afin de décider si les premiers sont justifiés par les seconds. Cet exercice nécessaire de pondération a été décrit de plusieurs façons. Dans l'arrêt *Mohan*, le juge Sopinka parle du « facteur fiabilité-effet » (p. 21), tandis que, dans l'arrêt *J.-L.J.*, le juge Binnie renvoie à « la pertinence, la fiabilité et la nécessité par rapport au délai, au préjudice, à la confusion qui peuvent résulter » (par. 47). Le juge Doherty résume bien la question dans l'arrêt *Abbey*, lorsqu'il explique que [TRADUCTION] « le juge du procès doit décider si le témoignage d'expert qui satisfait aux conditions préalables à l'admissibilité est assez avantageux pour le procès pour justifier son admission malgré le préjudice potentiel, pour le procès, qui peut découler de son admission » (par. 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), c. 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 S.A. v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.). 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

[25] Le cadre analytique ainsi délimité, penchons-nous sur la nature de l'obligation de l'expert envers le tribunal et voyons comment elle s'inscrit dans ce cadre.

D. *L'obligation de l'expert envers le tribunal*

[26] Les grandes lignes de l'obligation du témoin expert envers le tribunal sont peu contestées. Comme Anderson l'écrit : [TRADUCTION] « L'obligation de fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris a été énoncée à de nombreuses reprises par les tribunaux de common law un peu partout dans le monde » (p. 227). J'ajouterais qu'une obligation semblable existe en droit civil québécois (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), par. 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), c. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non en vigueur); L. Chamberland, *Le nouveau Code de procédure civile commenté* (2014), p. 14 et 121).

[27] On trouve dans l'arrêt anglais *National Justice Compania Naviera S.A. c. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Q.B.), un énoncé des éléments de cette obligation qui fait autorité. Au terme d'un procès de 87 jours, le juge Cresswell a conclu qu'une méconnaissance des obligations et responsabilités des témoins experts avait contribué à prolonger le procès. Il a dressé, dans une remarque incidente, une liste des obligations et responsabilités des experts, dont les deux premiers points ont particulièrement influencé l'évolution du droit canadien :

> [TRADUCTION]
>
> 1. Le témoignage de l'expert présenté à la Cour devrait être le produit indépendant de l'expert n'ayant subi quant à la forme ou au fond aucune influence dictée par les exigences du litige et être perçu comme tel . . .
>
> 2. Le rôle du témoin expert consiste à fournir une aide indépendante au tribunal sous la forme d'avis objectif et exempt de parti pris sur des questions relevant de son champ d'expertise [. . .] La personne qui témoigne

never assume the role of an advocate. [Emphasis added; citation omitted; p. 81.]

(These duties were endorsed on appeal: [1995] 1 Lloyd's Rep. 455 (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*

comme expert devant la Haute Cour ne doit jamais s'arroger le rôle de défenseur. [Je souligne; référence omise; p. 81.]

(La Cour d'appel a confirmé ces obligations ([1995] 1 Lloyd's Rep. 455 (C.A.), p. 496).)

[28] Plusieurs provinces et territoires ont des directives expresses en ce qui concerne l'obligation du témoin expert. En Nouvelle-Écosse, par exemple, les *Règles de procédure civile* prévoient que le rapport d'expert, signé par ce dernier, déclare notamment qu'il fournit une opinion objective pour prêter assistance à la cour; qu'il est disposé à se former un jugement indépendant dans l'assistance qu'il prête à la cour; que son rapport comprend tout ce qu'il considère comme pertinent par rapport à l'opinion exprimée et attire l'attention sur tout ce qui pourrait mener raisonnablement à une conclusion différente (al. 55.04(1)a), b) et c)). Même si ces exigences n'ont aucune incidence sur les règles de preuve sur l'admissibilité d'une opinion d'expert, elles résument bien la conception assez largement partagée de l'obligation d'un témoin expert envers le tribunal.

[29] L'obligation de l'expert est définie de façon similaire dans les règles de procédure civile d'autres provinces et territoires du Canada (Anderson, p. 227; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, règle 5-37; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, par. 11-2(1); *Règles de procédure civile*, R.R.O. 1990, Règl. 194, par. 4.1.01(1); *Règles de procédure*, Y.D. 2009/65, par. 34(23); *Loi instituant le nouveau Code de procédure civile*, art. 22). De plus, les règles de la Saskatchewan, de la Colombie-Britannique, de l'Ontario, de la Nouvelle-Écosse, de l'Île-du-Prince-Édouard, du Québec et des Cours fédérales en la matière exigent que les experts certifient qu'ils sont informés de leur obligation envers le tribunal et s'en acquitteront (Anderson, p. 228; *Règles de la Cour du Banc de la Reine* de la Saskatchewan, par. 5-37(3); *Supreme Court Civil Rules* de la Colombie-Britannique, par. 11-2(2); *Règles de procédure civile* de l'Ontario,

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

par. 53.03(2.1); *Règles de procédure civile* de la Nouvelle-Écosse, al. 55.04(1)a); *Rules of Civil Procedure* de l'Île-du-Prince-Édouard, al. 53.03(3)(g); *Loi instituant le nouveau Code de procédure civile*, art. 235 (non en vigueur); *Règles des Cours fédérales*, DORS/98-106, al. 52.2(1)*c*)).

[30] Les *Règles de procédure civile* de l'Ontario énoncent sans doute le plus succinctement et complètement l'obligation de l'expert envers le tribunal, en l'occurrence celle de rendre un témoignage d'opinion qui soit équitable, objectif et impartial (al. 4.1.01(1)a)). Les *Règles* prévoient également expressément que cette obligation l'emporte sur toute obligation de l'expert envers la partie qui l'a engagé (par. 4.1.01(2)). De même, la *Loi instituant le nouveau Code de procédure civile* du Québec prévoit expressément, parmi ses principes directeurs, que la mission première de l'expert envers le tribunal prime les intérêts des parties et qu'il doit l'accomplir « avec objectivité, impartialité et rigueur » (art. 22; Chamberland, p. 14 et 121).

[31] Bon nombre de règles de procédure ne font que reprendre l'obligation à laquelle le témoin expert est tenu envers le tribunal en common law (Anderson, p. 227). À mon avis, c'est le cas des *Règles* de la Nouvelle-Écosse en la matière. Bien sûr, il est loisible à chaque province ou territoire d'établir des règles d'admissibilité différentes, mais à défaut d'indication claire en ce sens, ce sont les règles de la common law qui s'appliquent dans les affaires de common law. Je souligne qu'en Nouvelle-Écosse, les *Règles de procédure civile* disposent expressément qu'elles n'ont aucune incidence sur les règles de preuve servant à déterminer si l'opinion d'expert est admissible (par. 55.01(2)).

[32] 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

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.

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). Ces concepts, il va sans dire, doivent être appliqués aux réalités du débat contradictoire. Les experts sont généralement engagés, mandatés et payés par l'un des adversaires. Ces faits, à eux seuls, ne compromettent pas l'indépendance, l'impartialité ni l'absence de parti pris de l'expert.

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 go 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.

E. *Les obligations de l'expert et l'admissibilité de son témoignage*

[33] Comme nous l'avons vu, il existe un large consensus quant à la nature de l'obligation de l'expert envers le tribunal. Il n'en va toutefois pas de même du rapport entre cette obligation et l'admissibilité du témoignage de l'expert. Deux questions importantes se posent : les éléments de l'obligation de l'expert jouent-ils au regard de l'admissibilité du témoignage plutôt que simplement de la valeur probante de celui-ci et, dans l'affirmative, l'indépendance et l'impartialité constituent-elles un critère d'admissibilité?

[34] Dans la présente section, j'explique pourquoi je réponds par l'affirmative à ces deux questions : l'indépendance et l'impartialité de l'expert proposé jouent au regard de l'admissibilité de son témoignage plutôt que simplement de la valeur probante de celui-ci, et l'obligation de l'expert constitue un critère d'admissibilité. Une fois qu'il est satisfait à ce critère, toute réserve qui demeure quant à savoir si l'expert s'est conformé à son obligation devrait être examinée dans le cadre de l'analyse coût-bénéfices qu'effectue le juge dans l'exercice de son rôle de gardien.

(1) Admissibilité ou valeur probante?

a) *Le droit canadien*

[35] La jurisprudence dominante appuie solidement la conclusion qu'il convient, à un certain point, de juger inadmissible le témoignage de l'expert qui fait preuve d'un manque d'indépendance ou d'impartialité.

[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 the collaboration of 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, [2015] 2 S.C.R. 3, 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 (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); *Royal Trust Corp. of Canada v. Fisherman* (2000), 49 O.R. (3d) 187 (S.C.J.) (expert was the party's lawyer in related U.S. proceedings); *R. v. Docherty*, 2010 ONSC 3628 (expert was the defence counsel's father); *Ocean v. Economical Mutual Insurance Co.*, 2010 NSSC 315, 293 N.S.R. (2d) 394 (expert was also a party to the litigation); *Handley v. Punnett*,

[36] La Cour vient de confirmer cette position dans un arrêt dont ne disposaient pas les juridictions inférieures :

Il est acquis que l'expert doit fournir une opinion indépendante, impartiale et objective, en vue d'aider le décideur (J.-C. Royer et S. Lavallée, *La preuve civile* (4e éd. 2008), nº 468; D. Béchard, avec la collaboration de J. Béchard, *L'expert* (2011), chap. 9; *Loi instituant le nouveau Code de procédure civile*, L.Q. 2014, c. 1, art. 22 (non encore en vigueur)). Par contre, ces facteurs influencent généralement la valeur probante de l'opinion de l'expert et ne sont pas toujours des obstacles incontournables à l'admissibilité de son témoignage. Ils ne rendent pas non plus le témoin expert nécessairement « inhabile » (L. Ducharme et C.-M. Panaccio, *L'administration de la preuve* (4e éd. 2010), nos 590-591 et 605). Pour qu'un témoignage d'expert soit inadmissible, il faut plus qu'une simple apparence de partialité. La question n'est pas de savoir si une personne raisonnable considérerait que l'expert n'est pas indépendant. Il faut plutôt déterminer si le manque d'indépendance de l'expert le rend de fait incapable de fournir une opinion impartiale dans les circonstances propres à l'instance (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, p. 598-599).

(*Mouvement laïque québécois c. Saguenay (Ville)*, 2015 CSC 16, [2015] 2 R.C.S. 3, par. 106)

[37] Je renvoie à plusieurs autres affaires pour étayer mon opinion. Je procède ainsi pour illustrer mon propos, sans émettre d'avis sur l'issue des affaires en question. Dans certaines, l'intérêt de l'expert dans le procès ou ses liens avec l'une des parties ont mené à l'exclusion (voir, p. ex., *Fellowes, McNeil c. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (Div. gén.) (l'expert proposé était l'avocat de la défenderesse dans une affaire connexe et, dès le début de son mandat, il avait monté un dossier en vue d'une poursuite pour négligence contre la demanderesse); *Royal Trust Corp. of Canada c. Fisherman* (2000), 49 O.R. (3d) 187 (C.S.J.) (l'expert était l'avocat d'une des parties dans une instance connexe introduite aux États-Unis); *R. c. Docherty*, 2010 ONSC 3628 (l'expert était le père de l'avocat de la défense); *Ocean c. Economical Mutual Insurance Co.*, 2010 NSSC

2003 BCSC 294 (expert was also a party to the litigation); *Bank of Montreal v. Citak*, [2001] O.J. No. 1096 (QL) (S.C.J.) (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 (expert's retainer agreement was inappropriate); *Hutchingame v. Johnstone*, 2006 BCSC 271 (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., *Alfano v. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. v. Bank of Nova Scotia*, 2003 BCSC 617; *Gould v. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19.

[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; *R. v. INCO Ltd.* (2006), 80 O.R. (3d) 594 (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, and *Gallant v. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. *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. 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

315, 293 N.S.R. (2d) 394 (l'expert était également partie au litige); *Handley c. Punnett*, 2003 BCSC 294 (l'expert était également partie au litige); *Bank of Montreal c. Citak*, [2001] O.J. No. 1096 (QL) (C.S.J.) (l'expert était effectivement « coentrepreneur » dans cette affaire, notamment en raison du fait que 40 p. 100 de sa rémunération dépendait de l'issue favorable du procès (par. 7)); *Dean Construction Co. c. M.J. Dixon Construction Ltd.*, 2011 ONSC 4629, 5 C.L.R. (4th) 240 (les termes du mandat de l'expert étaient discutables); *Hutchingame c. Johnstone*, 2006 BCSC 271 (la responsabilité de l'expert risquait d'être engagée, selon l'issue du procès)). Dans d'autres affaires, l'attitude ou le comportement de l'expert, qui s'était fait le défenseur d'une partie, a justifié l'exclusion (voir, p. ex., *Alfano c. Piersanti*, 2012 ONCA 297, 291 O.A.C. 62; *Kirby Lowbed Services Ltd. c. Bank of Nova Scotia*, 2003 BCSC 617; *Gould c. Western Coal Corp.*, 2012 ONSC 5184, 7 B.L.R. (5th) 19).

[38] Dans un grand nombre d'autres affaires, les tribunaux, tout en acceptant en principe qu'un manque d'indépendance ou d'impartialité pouvait mener à l'exclusion du témoignage de l'expert, ont néanmoins estimé qu'il n'y avait pas lieu d'écarter ce témoignage eu égard aux faits particuliers de l'espèce (voir, p. ex., *United City Properties Ltd. c. Tong*, 2010 BCSC 111; *R. c. INCO Ltd.* (2006), 80 O.R. (3d) 594 (C.S.J.)). C'est le point de vue qu'a adopté la Cour d'appel dans le cas qui nous occupe (par. 109; voir également par. 121).

[39] Toutefois, certains tribunaux canadiens étaient d'avis que ces questions jouaient exclusivement au regard de la valeur de la preuve, et non au regard de son admissibilité. Les décisions les plus souvent citées à cet égard sont sans doute *R. c. Klassen*, 2003 MBQB 253, 179 Man. R. (2d) 115, et *Gallant c. Brake-Patten*, 2012 NLCA 23, 321 Nfld. & P.E.I.R. 77. Dans la première, le tribunal a déclaré admissible tout témoignage d'expert qui satisfaisait aux critères énoncés dans l'arrêt *Mohan* et précisé que le parti pris n'entrait en jeu que lorsqu'il s'agissait de déterminer la valeur probante du témoignage de l'expert (voir également

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 (Q.B.), 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": *R. (Factortame Ltd.) v. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003]

R. c. Violette, 2008 BCSC 920). De même, dans la deuxième, la cour a statué que la contestation du témoignage de l'expert fondée sur l'existence d'un rapport entre ce dernier et l'une des parties ou une question en litige ou sur une préconception de sa part ne pouvait être formulée à l'étape de l'admissibilité (par. 89).

[40] Je conclus que selon la conception prédominante en common law canadienne, l'indépendance et l'impartialité ont une incidence non seulement sur la valeur de la preuve, mais aussi sur son admissibilité. Je signale que, même s'ils soutiennent que les questions concernant l'indépendance de l'expert ne devraient jouer qu'au regard de la valeur probante, les actionnaires invoquent des affaires comme *INCO*, dans laquelle le tribunal reconnaît expressément qu'une conclusion quant au manque d'indépendance ou d'impartialité peut entraîner l'inadmissibilité dans certaines circonstances (m.i., par. 52-53).

b) *Ailleurs dans le monde*

[41] À l'extérieur du Canada, les questions d'indépendance et d'impartialité ont été abordées de diverses façons, dont certaines s'apparentent à la démarche canadienne.

[42] Par exemple, résumant les principes applicables en droit britannique, le juge Nelson, dans l'arrêt *Armchair Passenger Transport Ltd. c. Helical Bar Plc*, [2003] EWHC 367 (Q.B.), a souligné que lorsque l'expert a un intérêt dans un litige ou un rapport avec celui-ci ou avec une partie, l'exclusion est justifiée s'il est établi que l'expert ne peut ou ne veut pas s'acquitter de sa principale obligation envers la cour (voir également H. M. Malek et autres, dir., *Phipson on Evidence* (18e éd. 2013), p. 1158-1159). Le simple fait d'avoir un intérêt ou un rapport ne rend pas quelqu'un inhabile à témoigner, sauf dans certaines circonstances, selon la nature et l'importance de l'intérêt ou du rapport. Comme lord Phillips de Worth Matravers, maître des rôles, l'explique dans un arrêt de principe : [TRADUCTION] « Il est toujours souhaitable qu'un expert n'ait aucun intérêt réel ou apparent dans l'issue d'un procès dans lequel il témoigne, mais une telle neutralité n'est pas automatiquement essentielle à l'admissibilité de son témoignage »

Q.B. 381, at para. 70; see also *Gallaher International Ltd. v. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. v. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. v. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), 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, at para. 26 (AustLII); see also Freckelton and Selby, at pp. 186-88; *Collins Thomson v. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. v. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. v. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[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.*, 980 F.2d 1014 (5th Cir. 1993), at p. 1019; *Tagatz v. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), 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

(*R. (Factortame Ltd.) c. Secretary of State for Transport*, [2002] EWCA Civ 932, [2003] Q.B. 381, par. 70; voir également *Gallaher International Ltd. c. Tlais Enterprises Ltd.*, [2007] EWHC 464 (Comm.); *Meat Corp. of Namibia Ltd. c. Dawn Meats (U.K.) Ltd.*, [2011] EWHC 474 (Ch. D.); *Matchbet Ltd. c. Openbet Retail Ltd.*, [2013] EWHC 3067 (Ch. D.), par. 312-317).

[43] En Australie, l'objectivité et l'impartialité de l'expert jouent généralement au regard de la valeur de la preuve, et non de son admissibilité (I. Freckelton et H. Selby, *Expert Evidence : Law, Practice, Procedure and Advocacy* (5e éd. 2013), p. 35). Pour reprendre les propos de la Cour d'appel de l'État de Victoria : [TRADUCTION] « . . . dans la mesure où il est souhaitable que les témoins experts aient l'obligation d'aider le tribunal, on ne devrait pas juger inhabile à témoigner un expert du seul fait qu'il est "intéressé" » (*FGT Custodians Pty. Ltd. c. Fagenblat*, [2003] VSCA 33, par. 26 (AustLII); voir également Freckelton et Selby, p. 186-188; *Collins Thomson c. Clayton*, [2002] NSWSC 366; *Kirch Communications Pty Ltd. c. Gene Engineering Pty Ltd.*, [2002] NSWSC 485; *SmithKline Beecham (Australia) Pty Ltd. c. Chipman*, [2003] FCA 796, 131 F.C.R. 500).

[44] Aux États-Unis, au niveau fédéral, l'indépendance de l'expert joue au regard de la valeur de la preuve, et une partie peut témoigner à son propre procès à titre d'expert (*Rodriguez c. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), p. 1019; *Tagatz c. Marquette University*, 861 F.2d 1040 (7th Cir. 1988); *Apple Inc. c. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014), p. 1321). Il semble que la situation soit à peu près la même à l'échelle des États (*Corpus Juris Secundum*, vol. 32 (2008), p. 325 : [TRADUCTION] « Le parti pris ou l'intérêt du témoin n'influe pas sur son habilité à témoigner, mais seulement sur la valeur probante de son témoignage. »).

c) *Conclusion*

[45] Conformément à ce qui me semble le courant prédominant dans la jurisprudence canadienne, je suis d'avis que 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

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.-L.J.*: "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

témoignage, s'il est admis. Cette façon de voir semble s'accorder davantage avec l'économie générale de notre droit en ce qui concerne les témoignages d'experts et l'importance que notre jurisprudence accorde au rôle de gardien exercé par les juges de première instance. Le juge Binnie cerne bien l'optique canadienne dans l'arrêt *J.-L.J.* : « La question de l'admissibilité d'une preuve d'expert devrait être examinée minutieusement au moment où elle est soulevée, et cette preuve ne devrait pas être admise trop facilement pour le motif que toutes ses faiblesses peuvent en fin de compte avoir une incidence sur son poids plutôt que sur son admissibilité » (par. 28).

(2) Teneur du critère

[46] J'ai déjà exposé l'obligation du témoin expert envers le tribunal : il doit être juste, objectif et impartial. Selon moi, le critère d'admissibilité découle de cette obligation. Je suis d'accord avec le professeur Paciocco (maintenant juge de la Cour de justice de l'Ontario), selon qui [TRADUCTION] « la common law en est venue à concevoir [. . .] que les témoins experts ont l'obligation d'aider le tribunal, qui l'emporte sur celle qu'ils doivent à la partie qui les cite. Le témoin qui ne peut ou ne veut s'acquitter de cette obligation n'est pas habile à exercer son rôle d'expert et devrait être exclu » (« Taking a "Goudge" out of Bluster and Blarney : an "Evidence-Based Approach" to Expert Testimony » (2009), 13 *Rev. can. D.P.* 135, p. 152 (note de bas de page omise)). Par conséquent, les témoins experts doivent être conscients de leur obligation principale envers le tribunal et pouvoir et vouloir s'en acquitter.

[47] L'idée, en imposant ce critère supplémentaire, n'est pas de prolonger ni de complexifier les procès et il ne devrait pas en résulter un tel effet. Comme le souligne le professeur Paciocco, à raison : [TRADUCTION] « . . . si les débats sur la partialité deviennent chose courante pendant un voir-dire de type *Mohan*, le témoignage qui sera donné au procès ne sera plus qu'une répétition inefficace de l'audience sur l'admissibilité » (« Unplugging Jukebox Testimony in an Adversarial System : Strategies for Changing the Tune on Partial Experts » (2009), 34 *Queen's L.J.* 565 (« Jukebox »), p. 597). Sans aller jusqu'à affirmer qu'il faut présumer l'indépendance

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 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,

et l'impartialité de l'expert si elles ne sont pas contestées, je pense qu'en l'absence d'une telle contestation, il est généralement satisfait au critère dès lors que l'expert, dans son attestation ou sa déposition, reconnaît son obligation et l'accepte.

[48] Une fois que l'expert a produit cette attestation ou a déposé sous serment en ce sens, il incombe à la partie qui s'oppose à l'admission du témoignage 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. Si elle n'y parvient pas, le témoignage, ou les parties de celui-ci qui sont viciées par un manque d'indépendance ou d'impartialité, devrait être exclu. Cette démarche est conforme à la règle générale du cadre établi dans l'arrêt *Mohan*, et généralement en droit de la preuve, selon laquelle il revient à la partie qui produit la preuve d'en établir l'admissibilité.

[49] Ce critère n'est pas particulièrement exigeant, et il sera probablement très rare que le témoignage de l'expert proposé soit jugé inadmissible au motif qu'il ne satisfait pas au critère. Le juge de première instance doit déterminer, compte tenu tant de la situation particulière de l'expert que de la teneur du témoignage proposé, si l'expert peut ou veut s'acquitter de sa principale obligation envers le tribunal. Par exemple, c'est la nature et le degré de l'intérêt ou des rapports qu'a l'expert avec l'instance ou une partie qui importent, et non leur simple existence : un intérêt ou un rapport quelconque ne rend pas d'emblée la preuve de l'expert proposé inadmissible. Dans la plupart des cas, l'existence d'une simple relation d'emploi entre l'expert et la partie qui le cite n'emporte pas l'inadmissibilité de la preuve. En revanche, un intérêt financier direct dans l'issue du litige suscite des préoccupations. Il en va ainsi des liens familiaux étroits avec une partie et des situations où l'expert proposé s'expose à une responsabilité professionnelle si le tribunal ne retient pas son opinion. De même, l'expert qui, dans sa déposition ou d'une autre manière, se fait le défenseur d'une partie ne peut ou ne veut manifestement pas s'acquitter de

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

sa principale obligation envers le tribunal. Je tiens à souligner que 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 sera déterminée à l'issue d'une pondération globale du coût et des bénéfices de son admission.

[50] Comme nous l'avons vu en examinant la jurisprudence anglaise, la décision de permettre ou non à un expert de témoigner malgré son intérêt dans un litige ou son rapport avec celui-ci dépend de leur importance et des faits. 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. Lorsque l'on se penche sur l'intérêt d'un expert ou sur ses rapports avec une partie, il ne s'agit pas de se demander si un observateur raisonnable penserait que l'expert est indépendant ou non; il s'agit plutôt de déterminer si la relation de l'expert avec une partie ou son intérêt fait en sorte qu'il ne peut ou ne veut s'acquitter de sa principale obligation envers le tribunal, en l'occurrence apporter au tribunal une aide juste, objective et impartiale.

[51] Nous avons posé le cadre analytique, défini l'obligation de l'expert et établi que le respect de cette dernière joue au regard de l'admissibilité, et non simplement de la valeur probante. Voyons ensuite où cette obligation s'inscrit dans le cadre analytique régissant l'admissibilité du témoignage d'opinion d'un expert.

F. *L'analyse au sein du cadre établi par l'arrêt Mohan*

(1) L'analyse fondée sur les critères d'admissibilité

[52] Les tribunaux ont abordé la question de l'indépendance et de l'impartialité à divers stades de l'examen des critères d'admissibilité. Presque tous les volets du cadre établi par l'arrêt *Mohan* ont servi

way or another: the proper qualifications component (see, e.g., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. v. Kasamekas*, 2010 ONSC 166; *R. v. Demetrius*, 2009 CanLII 22797 (Ont. S.C.J.)); 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; *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (Ont. S.C.J.); *Prairie Well Servicing Ltd. v. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284. 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)), at 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, 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 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

à l'examen des préoccupations relatives au parti pris : la qualification requise (voir, p. ex., *Bank of Montreal*; *Dean Construction*; *Agribrands Purina Canada Inc. c. Kasamekas*, 2010 ONSC 166; *R. c. Demetrius*, 2009 CanLII 22797 (C.S.J. Ont.)); la nécessité (voir, p. ex., *Docherty*; *Alfano*); et l'analyse coût-bénéfices, qui appelle l'exercice d'un pouvoir discrétionnaire (voir, p. ex., *United City Properties*; *Abbey* (ONCA)). À d'autres occasions, les tribunaux en ont fait un critère distinct (voir, p. ex., *Docherty*; *International Hi-Tech Industries Inc. c. FANUC Robotics Canada Ltd.*, 2006 BCSC 2011; *Casurina Ltd. Partnership c. Rio Algom Ltd.* (2002), 28 B.L.R. (3d) 44 (C.S.J. Ont.); *Prairie Well Servicing Ltd. c. Tundra Oil and Gas Ltd.*, 2000 MBQB 52, 146 Man. R. (2d) 284). Des précisions s'imposent donc.

[53] À mon avis, c'est sous le volet « qualification suffisante de l'expert » du cadre établi par l'arrêt *Mohan* 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 (S. C. Hill, D. M. Tanovich et L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5e éd. (feuilles mobiles)), 12:30.20.50; voir également *Deemar c. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, par. 21; Lederman, Bryant et Fuerst, p. 826-827; *Halsbury's Laws of Canada : Evidence*, par. HEV-152 « Partiality »; *The Canadian Encyclopedic Digest* (Ont. 4e éd. (feuilles mobiles)), vol. 24, titre 62 — Evidence, §469). 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 (Hill, Tanovich et Strezos, 12:30.20.50; Paciocco, « Jukebox », p. 595).

(2) Le pouvoir discrétionnaire du juge en tant que « gardien »

[54] La constatation que le témoignage de l'expert satisfait aux critères ne met pas fin à l'analyse. Conformément au cadre établi dans la foulée de l'arrêt *Mohan* dont nous avons discuté précédemment,

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, at paras. 42-44, 87 and 98; *Fougere v. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, 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.

le juge doit encore 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.

G. *Témoignage d'expert et jugement sommaire*

[55] Je me dois de glisser quelques mots sur le contexte procédural dans lequel s'inscrit le présent pourvoi, en l'occurrence celui d'une requête en jugement sommaire. (Mes commentaires concernent le régime des jugements sommaires établi par les règles de la Nouvelle-Écosse. Je reconnais que d'autres considérations sont susceptibles de jouer dans un autre régime.) Il est bien reconnu que le tribunal saisi de la requête ne peut examiner que la preuve admissible. Cependant, suivant la jurisprudence néo-écossaise, qui n'est pas remise en question dans le présent pourvoi, il n'appartient pas au juge saisi d'une requête en jugement sommaire, en Nouvelle-Écosse, de soupeser la preuve, de tirer des inférences raisonnables de celle-ci ou de trancher des questions de crédibilité (*Coady c. Burton Canada Co.*, 2013 NSCA 95, 333 N.S.R. (2d) 348, par. 42-44, 87 et 98; *Fougere c. Blunden Construction Ltd.*, 2014 NSCA 52, 345 N.S.R. (2d) 385, par. 6 et 12). Si l'on considère ces deux principes ensemble, le résultat est à mon avis le suivant. 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.

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. MacMillan, 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.

H. *Application*

[56] J'aborde maintenant l'application de ces principes aux faits de l'espèce. À mon humble avis, le dossier appuie largement la conclusion à laquelle est parvenue la majorité de la Cour d'appel que le témoignage de M^me^ MacMillan était admissible pour l'instruction de la requête en jugement sommaire. Bien sûr, ni le juge des requêtes ni la Cour d'appel ne disposaient du cadre que j'établis dans les présents motifs.

[57] Le juge des requêtes n'a pas conclu que M^me^ MacMillan avait un parti pris, qu'elle n'était pas impartiale ou qu'elle se faisait le défenseur des actionnaires (motifs de la C.A., par. 122). Au contraire, M^me^ MacMillan a reconnu expressément connaître les normes et exigences voulant que l'expert soit indépendant. Elle était également au fait des directives précises dans le milieu de la comptabilité applicables aux comptables cités comme témoins experts. Elle était consciente à titre de témoin expert de sa principale obligation envers le tribunal (d.a., vol. III, p. 75-76; motifs de la C.A., par. 134). Même si, selon le juge des requêtes, il faut une « apparence » d'impartialité, ce facteur ne constitue pas un critère d'admissibilité, comme je l'explique précédemment.

[58] La prétention des vérificateurs selon laquelle M^me^ MacMillan manquerait d'objectivité repose sur deux principaux points que j'aborde successivement.

[59] D'abord, les vérificateurs soutiennent que le travail fait antérieurement à l'intention des actionnaires par le bureau de Grant Thornton à Kentville [TRADUCTION] « a servi de catalyseur et de fondement à l'action pour négligence » intentée contre les vérificateurs et que cela « empêche [Grant Thornton] d'agir comme expert "indépendant" en l'espèce » (m.a., par. 17 et 19). Selon les vérificateurs, M^me^ MacMillan se trouvait dans « une situation de conflit d'intérêts irréductible qui la forçait inévitablement à commenter et approuver les mesures prises et la norme de diligence observée soit par ses propres partenaires chez Grant Thornton » soit par les vérificateurs (m.a., par. 21). Ce premier argument doit cependant être rejeté.

[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

[60] 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. Dès lors que le travail initial est fait de façon indépendante et impartiale et que l'expert proposé comprend son obligation d'apporter au tribunal une aide juste, objective et impartiale et qu'il peut s'acquitter de cette obligation, il est satisfait au critère relatif à la qualification sur ce plan. Or, rien ne permet de penser ici que le cabinet Grant Thornton a été engagé pour exprimer un point de vue dicté par les actionnaires, ni qu'il y ait eu plus qu'une hypothétique possibilité que le cabinet soit tenu responsable envers ces derniers si, en fin de compte, le tribunal n'avait pas retenu son opinion. Le juge n'a pas conclu que M[me] MacMillan avait un parti pris, qu'elle a manqué d'impartialité ou qu'elle s'était faite le défenseur des actionnaires. De plus, l'argument des vérificateurs selon lequel M[me] MacMillan a en quelque sorte « admis » en contre-interrogatoire se trouver dans une situation de « conflit d'intérêts irréductible » n'est pas corroboré par une interprétation raisonnable de son témoignage dans son contexte (d.a., vol. III, p. 139-145). Au contraire, il ressort clairement de son témoignage qu'elle comprenait son rôle d'expert et son obligation envers le tribunal (*ibid.*, p. 75-76).

[61] Deuxièmement, M[me] MacMillan ne serait pas indépendante, puisqu'elle avait « incorporé » une partie du travail fait par son cabinet au bureau de Kentville. Cette prétention est également non fondée. D'abord, je n'accepte pas qu'un expert ne satisfasse 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. De plus, comme le juge Beveridge l'a conclu, ce qui a été « incorporé » consistait essentiellement en un exercice arithmétique qui n'avait rien à voir avec quelque opinion comptable qu'aurait exprimée le bureau de Kentville (motifs de la C.A., par. 146-149).

[62] Le présent dossier ne révèle aucun élément qui permette de conclure que le témoignage de

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 with costs.

Solicitors for the appellants: Stikeman Elliott, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Henein Hutchison, Toronto.

M[me] MacMillan devrait être exclu parce que celle-ci ne pouvait ou ne voulait rendre devant le tribunal un témoignage juste, objectif et impartial. Je conviens avec la majorité de la Cour d'appel que le juge des requêtes a commis une erreur manifeste et dominante en estimant que M[me] MacMillan était dans une situation de conflit d'intérêts qui l'empêchait de rendre un témoignage objectif et impartial (par. 136-150).

IV. Dispositif

[63] Je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens.

Procureurs des appelants : Stikeman Elliott, Toronto.

Procureurs des intimées : Lenczner Slaght Royce Smith Griffin, Toronto; Groupe Murphy Group, Moncton.

Procureur de l'intervenant le procureur général du Canada : Procureur général du Canada, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Henein Hutchison, Toronto.

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

R.S.C., 1985, c. C-34

L.R.C. (1985), ch. C-34

Current to February 6, 2024

Last amended on December 15, 2023

À jour au 6 février 2024

Dernière modification le 15 décembre 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

No jury

(2) The trial of an offence under Part VI or section 66 in the Federal Court shall be without a jury.

Appeal

(3) An appeal lies from the Federal Court to the Federal Court of Appeal and from the Federal Court of Appeal to the Supreme Court of Canada in any prosecution or proceedings under Part VI or section 66 of this Act as provided in Part XXI of the *Criminal Code* for appeals from a trial court and from a court of appeal.

Proceedings optional

(4) Proceedings under subsection 34(2) may in the discretion of the Attorney General of Canada be instituted in either the Federal Court or a superior court of criminal jurisdiction in the province but no prosecution shall be instituted against an individual in the Federal Court in respect of an offence under Part VI or section 66 without the consent of the individual.

R.S., 1985, c. C-34, s. 73; 1999, c. 2, s. 21; 2002, c. 8, ss. 183, 198, c. 16, s. 8; 2009, c. 2, s. 421.

74 [Repealed, 1999, c. 2, s. 22]

Absence de jury

(2) Le procès concernant une infraction visée à la partie VI ou à l'article 66, en la Cour fédérale, a lieu sans jury.

Appel

(3) Un appel peut être interjeté de la Cour fédérale à la Cour d'appel fédérale et de la Cour d'appel fédérale à la Cour suprême du Canada dans toutes poursuites ou procédures visées à la partie VI ou à l'article 66 de la présente loi, conformément à la partie XXI du *Code criminel* pour les appels d'un tribunal de première instance et d'une cour d'appel.

Procédures facultatives

(4) Des procédures engagées aux termes du paragraphe 34(2) peuvent, à la discrétion du procureur général du Canada, être intentées soit devant la Cour fédérale, soit devant une cour supérieure de juridiction criminelle dans la province, mais aucune poursuite ne peut être intentée contre un particulier devant la Cour fédérale à l'égard d'une infraction visée à la partie VI ou à l'article 66 sans le consentement de ce particulier.

L.R. (1985), ch. C-34, art. 73; 1999, ch. 2, art. 21; 2002, ch. 8, art. 183 et 198, ch. 16, art. 8; 2009, ch. 2, art. 421.

74 [Abrogé, 1999, ch. 2, art. 22]

PART VII.1

Deceptive Marketing Practices

Reviewable Matters

Misrepresentations to public

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

PARTIE VII.1

Pratiques commerciales trompeuses

Comportement susceptible d'examen

Indications trompeuses

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

c) ou bien des indications sous une forme qui fait croire qu'il s'agit :

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

(i) soit d'une garantie de produit,

(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,

si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

Drip pricing

(1.1) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.

Indication de prix partiel

(1.1) Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une loi fédérale ou provinciale.

Ordinary price: suppliers generally

(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Prix habituel : fournisseurs en général

(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

Ordinary price: supplier's own

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period

Prix habituel : fournisseur particulier

(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

References to time in subsections (2) and (3)

(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to

(a) the price at which products have been or are supplied; or

(b) the price at which products will be supplied.

Périodes visées aux paragraphes (2) et (3)

(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

Saving

(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

Réserve

(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

(6) [Repealed, 2009, c. 2, s. 422]

1999, c. 2, s. 22; 2009, c. 2, s. 422; 2022, c. 10, s. 259.

(6) [Abrogé, 2009, ch. 2, art. 422]

1999, ch. 2, art. 22; 2009, ch. 2, art. 422; 2022, ch. 10, art. 259.

False or misleading representation — sender or subject matter information

74.011 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

Indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet

74.011 (1) Est susceptible d'examen le comportement de quiconque envoie ou fait envoyer des indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet d'un message électronique aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques.

False or misleading representation — electronic message

(2) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent in an electronic message a representation that is false or misleading in a material respect.

Indications fausses ou trompeuses dans un message électronique

(2) Est susceptible d'examen le comportement de quiconque envoie ou fait envoyer dans un message électronique des indications fausses ou trompeuses sur un point important aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques.

False or misleading representation — locator

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business

Indications fausses ou trompeuses dans un localisateur

(3) Est susceptible d'examen le comportement de quiconque donne ou fait donner des indications fausses ou trompeuses dans un localisateur aux fins de promouvoir, directement ou indirectement, soit la fourniture ou

interest or the supply or use of a product, makes or causes to be made a false or misleading representation in a locator.

General impression to be considered

(4) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

Interpretation

(5) For the purposes of this section,

(a) an electronic message is considered to have been sent once its transmission has been initiated; and

(b) it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination.

2010, c. 23, s. 77.

Assisting foreign states

74.012 (1) The Commissioner may, for the purpose of assisting an investigation or proceeding in respect of the laws of a foreign state, an international organization of states or an international organization established by the governments of states that address conduct that is substantially similar to conduct that is reviewable under section 74.01, 74.011, 74.02, 74.04, 74.05 or 74.06,

(a) conduct any investigation that the Commissioner considers necessary to collect relevant information, using any powers that the Commissioner may use under this Act to investigate conduct that is reviewable under any of those sections; and

(b) disclose the information to the government of the foreign state or to the international organization, or to any institution of any such government or organization responsible for conducting investigations or initiating proceedings in respect of the laws in respect of which the assistance is being provided, if the government, organization or institution declares in writing that

(i) the use of the information will be restricted to purposes relevant to the investigation or proceeding, and

(ii) the information will be treated in a confidential manner and, except for the purposes mentioned in subparagraph (i), will not be further disclosed without the Commissioner's express consent.

l'usage d'un produit, soit des intérêts commerciaux quelconques.

Prise en compte de l'impression générale

(4) Dans toute poursuite intentée en vertu du présent article, il est tenu compte, pour déterminer si le comportement est susceptible d'examen, de l'impression générale que les indications donnent ainsi que de leur sens littéral.

Interprétation

(5) Pour l'application du présent article :

a) le fait d'amorcer la transmission d'un message électronique est assimilé à l'envoi de celui-ci;

b) ne sont pertinents ni le fait que l'adresse électronique à laquelle le message électronique est envoyé existe ou non ni le fait que ce message soit reçu ou non par son destinataire.

2010, ch. 23, art. 77.

Aide aux États étrangers

74.012 (1) Le commissaire peut, en vue d'aider une enquête, instance ou poursuite relative à une loi d'un État étranger ou d'une organisation internationale d'États ou de gouvernements visant des comportements essentiellement semblables à ceux susceptibles d'examen au titre des articles 74.01, 74.011, 74.02, 74.04, 74.05 ou 74.06 :

a) mener toute enquête qu'il juge nécessaire pour recueillir des renseignements utiles en vertu des pouvoirs que lui confère la présente loi pour enquêter sur un comportement susceptible d'examen au titre de l'un ou l'autre de ces articles;

b) communiquer ces renseignements au gouvernement de l'État étranger ou à l'organisation internationale, ou à tout organisme de ceux-ci qui est chargé de mener des enquêtes ou d'intenter des poursuites relativement à la loi à l'égard de laquelle l'aide est accordée, si le destinataire des renseignements déclare par écrit que ceux-ci :

(i) d'une part, ne seront utilisés qu'à des fins se rapportant à cette enquête, instance ou poursuite,

(ii) d'autre part, seront traités de manière confidentielle et, sauf pour l'application du sous-alinéa (i), ne seront pas communiqués par ailleurs sans le consentement exprès du commissaire.

Limitation

(2) Subsection (1) does not apply if the contravention of the laws of the foreign state has consequences that would be considered penal under Canadian law.

Mutual assistance

(3) In deciding whether to provide assistance under subsection (1), the Commissioner shall consider whether the government, organization or institution agrees to provide assistance for investigations or proceedings in respect of any of the sections mentioned in subsection (1).

2010, c. 23, s. 77.

Representation as to reasonable test and publication of testimonials

74.02 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that

(a) such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or

(b) such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

1999, c. 2, s. 22.

Representations accompanying products

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale,

Restriction

(2) Le paragraphe (1) ne s'applique pas lorsque la sanction de la contravention de la loi de l'État étranger serait considérée comme pénale sous le régime du droit canadien.

Réciprocité

(3) Pour décider s'il doit accorder son aide en vertu du paragraphe (1), le commissaire vérifie si l'État étranger, l'organisation internationale ou l'organisme accepte d'aider les enquêtes, instances ou poursuites relatives aux articles visés à ce paragraphe.

2010, ch. 23, art. 77.

Indications relatives à l'épreuve acceptable et publication d'attestations

74.02 Est susceptible d'examen le comportement de quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, donne au public des indications selon lesquelles une épreuve de rendement, d'efficacité ou de durée utile d'un produit a été effectuée par une personne, ou publie une attestation relative à un produit, sauf si la personne qui donne ces indications peut établir :

a) d'une part :

(i) soit que ces indications ont été préalablement données ou que cette attestation a été préalablement publiée par la personne ayant effectué l'épreuve ou donné l'attestation,

(ii) soit que ces indications ou cette attestation ont été, avant d'être respectivement données ou publiée, approuvées et que la permission de les donner ou de la publier a été donnée par écrit par la personne qui a effectué l'épreuve ou donné l'attestation;

b) d'autre part, qu'il s'agit des indications approuvées ou données ou de l'attestation approuvée ou publiée préalablement.

1999, ch. 2, art. 22.

Indications accompagnant les produits

74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale faite par tout moyen de télécommunication, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Representations from outside Canada

(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(a), (b), (c) or (e) is, for the purposes of sections 74.01 and 74.02, deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Indications provenant de l'étranger

(2) Dans le cas où la personne visée au paragraphe (1) est à l'étranger, les indications visées aux alinéas (1)a), b), c) ou e) sont réputées, pour l'application des articles 74.01 et 74.02, être données au public par la personne qui a importé au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Deemed representation to public

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

Présomption d'indications données au public

(3) Sous réserve du paragraphe (1), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné à l'article 74.01 est réputé donner ces indications au public.

Certain matters need not be established

(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that

(a) any person was deceived or misled;

(b) any member of the public to whom the representation was made was within Canada; or

(c) the representation was made in a place to which the public had access.

Preuve non nécessaire

(4) Il est entendu qu'il n'est pas nécessaire, dans toute poursuite intentée en vertu des articles 74.01 et 74.02, d'établir :

a) qu'une personne a été trompée ou induite en erreur;

b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;

c) que les indications ont été données à un endroit auquel le public avait accès.

General impression to be considered

(5) In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well

Prise en compte de l'impression générale

(5) Dans toute poursuite intentée en vertu des articles 74.01 et 74.02, pour déterminer si le comportement est susceptible d'examen, il est tenu compte de l'impression

as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

1999, c. 2, s. 22; 2009, c. 2, s. 423; 2010, c. 23, s. 78; 2014, c. 31, s. 35.

générale donnée par les indications ainsi que du sens littéral de celles-ci.

1999, ch. 2, art. 22; 2009, ch. 2, art. 423; 2010, ch. 23, art. 78; 2014, ch. 31, art. 35.

Definition of *bargain price*

74.04 (1) For the purposes of this section, ***bargain price*** means

(a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or

(b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily supplied.

Définition de *prix d'occasion*

74.04 (1) Pour l'application du présent article, ***prix d'occasion*** s'entend :

a) du prix présenté dans une publicité comme étant un prix d'occasion soit par rapport au prix habituel, soit pour d'autres raisons;

b) d'un prix qu'une personne qui lit, entend ou voit la publicité prendrait raisonnablement pour un prix d'occasion étant donné les prix auxquels le produit annoncé ou des produits similaires sont habituellement fournis.

Bait and switch selling

(2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

Vente à prix d'appel

(2) Est susceptible d'examen le comportement de quiconque fait de la publicité portant qu'il offre à un prix d'occasion un produit qu'il ne fournit pas en quantités raisonnables eu égard à la nature du marché où il exploite son entreprise, à la nature et à la dimension de l'entreprise qu'il exploite et à la nature de la publicité.

Saving

(3) Subsection (2) does not apply to a person who establishes that

(a) the person took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond the person's control that could not reasonably have been anticipated;

(b) the person obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed the person's reasonable expectations; or

(c) after becoming unable to supply the product in accordance with the advertisement, the person undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied with it during the time when the bargain price applied, and the person fulfilled the undertaking.

1999, c. 2, s. 22.

Réserve

(3) Le paragraphe (2) ne s'applique pas à la personne qui établit que, selon le cas :

a) bien qu'ayant pris des mesures raisonnables pour obtenir en temps voulu le produit en quantités raisonnables eu égard à la nature de la publicité, elle n'a pu obtenir ces quantités par suite d'événements indépendants de sa volonté qu'elle ne pouvait raisonnablement prévoir;

b) bien qu'ayant obtenu le produit en quantités raisonnables eu égard à la nature de la publicité, elle n'a pu satisfaire à la demande pour ce produit, celle-ci dépassant ses prévisions raisonnables;

c) elle a pris, après s'être trouvée dans l'impossibilité de fournir le produit conformément à la publicité, l'engagement de fournir le même produit, ou un produit équivalent de qualité égale ou supérieure, au prix d'occasion et dans un délai raisonnable à toutes les personnes qui en avaient fait la demande et qui ne l'avaient pas reçu au cours de la période d'application du prix d'occasion et a rempli son engagement.

1999, ch. 2, art. 22.

Sale above advertised price

74.05 (1) A person engages in reviewable conduct who advertises a product for sale or rent in a market and, during the period and in the market to which the advertisement relates, supplies the product at a price that is higher than the price advertised.

Saving

(2) This section does not apply

(a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained in it are subject to error if the person establishes that the price advertised is in error;

(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement;

(c) in respect of the supply of a security obtained on the open market during a period when the prospectus relating to that security is still current; or

(d) in respect of the supply of a product by or on behalf of a person who is not engaged in the business of dealing in that product.

Application

(3) For the purpose of this section, the market to which an advertisement relates is the market that the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

1999, c. 2, s. 22.

Promotional contests

74.06 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, conducts any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise disposes of any product or other benefit by any mode of chance, skill or mixed chance and skill whatever, where

(a) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the person that affects materially the chances of winning;

(b) distribution of the prizes is unduly delayed; or

Vente au-dessus du prix annoncé

74.05 (1) Est susceptible d'examen le comportement de quiconque fait de la publicité pour la vente ou la location d'un produit sur un marché et le fournit, pendant la période et sur le marché visés par la publicité, à un prix supérieur au prix annoncé.

Réserve

(2) Le présent article ne s'applique pas :

a) à la publicité figurant dans un catalogue qui prévoit clairement que le prix indiqué peut être inexact, si la personne établit cette inexactitude;

b) à la publicité indiquant un prix erroné, mais qui est suivie de près d'une autre publicité corrigeant ce prix;

c) à la fourniture d'une valeur mobilière obtenue sur le marché libre alors que le prospectus concernant cette valeur n'est pas encore périmé;

d) à la fourniture d'un produit par une personne ou au nom d'une personne qui n'exploite pas une entreprise portant sur ce produit.

Application

(3) Pour l'application du présent article, la publicité ne vise que le marché qu'elle peut raisonnablement atteindre; toutefois, elle peut le limiter notamment à un secteur géographique, à un magasin, à un rayon d'un magasin ou à la vente par catalogue.

1999, ch. 2, art. 22.

Concours publicitaire

74.06 Est susceptible d'examen le comportement de quiconque organise, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, un concours, une loterie, un jeu de hasard, un jeu d'adresse ou un jeu où se mêlent le hasard et l'adresse, ou autrement attribue un produit ou autre avantage par un jeu faisant intervenir le hasard, l'adresse ou un mélange des deux sous quelque forme que ce soit dans chacun des cas suivants :

a) le nombre et la valeur approximative des prix, les régions auxquelles ils s'appliquent et tout fait connu de la personne modifiant d'une façon importante les chances de gain ne sont pas convenablement et loyalement divulgués;

b) la distribution des prix est indûment retardée;

(c) selection of participants or distribution of prizes is not made on the basis of skill or on a random basis in any area to which prizes have been allocated.

1999, c. 2, s. 22.

c) le choix des participants ou la distribution des prix ne sont pas faits en fonction de l'adresse des participants ou au hasard dans toute région à laquelle des prix ont été attribués.

1999, ch. 2, art. 22.

Saving

74.07 (1) Sections 74.01 to 74.06 do not apply to a person who prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada, where the person establishes that the person obtained and recorded the name and address of that other person and accepted the representation in good faith for printing, publishing or other dissemination in the ordinary course of that person's business.

Non-application

(2) Sections 74.01 to 74.06 do not apply in respect of conduct prohibited by sections 52.1, 53, 55 and 55.1.

1999, c. 2, s. 22; 2002, c. 16, s. 9.

Civil rights not affected

74.08 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action.

1999, c. 2, s. 22.

Éditeurs et distributeurs

74.07 (1) Les articles 74.01 à 74.06 ne s'appliquent pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des indications, notamment de la publicité, pour le compte d'une autre personne se trouvant au Canada et qui établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de quelque autre façon ces indications dans le cadre habituel de son entreprise.

Non-application

(2) Les articles 74.01 à 74.06 ne s'appliquent pas aux actes interdits par les articles 52.1, 53, 55 et 55.1.

1999, ch. 2, art. 22; 2002, ch. 16, art. 9.

Droits civils non atteints

74.08 Sauf disposition contraire de la présente partie, celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

1999, ch. 2, art. 22.

Administrative Remedies

Definition of *court*

74.09 In sections 74.1 to 74.14 and 74.18, ***court*** means the Tribunal, the Federal Court or the superior court of a province.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

Recours administratifs

Définition de *tribunal*

74.09 Dans les articles 74.1 à 74.14 et 74.18, ***tribunal*** s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Décision et ordonnance

74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, the greater of

(A) $750,000 and, for each subsequent order, $1,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined, or

(ii) in the case of a corporation, the greater of

(A) $10,000,000 and, for each subsequent order, $15,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, correspondant au plus élevé des montants suivants :

(A) 750 000 $ pour la première ordonnance et 1 000 000 $ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur, si ce montant peut être déterminé raisonnablement,

(ii) dans le cas d'une personne morale, correspondant au plus élevé des montants suivants :

(A) 10 000 000 $ pour la première ordonnance et 15 000 000 $ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de la personne morale;

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

Duration of order

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Saving

(3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

Durée d'application

(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

Disculpation

(3) L'ordonnance prévue aux alinéas (1)b), c) ou d) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher le comportement reproché.

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

Aggravating or mitigating factors

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) the effect on competition in the relevant market;

(g) the gross revenue from sales affected by the conduct;

(h) the financial position of the person against whom the order is made;

(i) the history of compliance with this Act by the person against whom the order is made;

(j) any decision of the court in relation to an application for an order under paragraph (1)(d);

(k) any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and

(l) any other relevant factor.

Meaning of subsequent order

(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

But de l'ordonnance

(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b), c) ou d) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non pas à le punir.

Circonstances aggravantes ou atténuantes

(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) l'effet sur la concurrence dans le marché pertinent;

g) le revenu brut provenant des ventes sur lesquelles le comportement a eu une incidence;

h) la situation financière de la personne visée par l'ordonnance;

i) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

j) toute décision du tribunal à l'égard d'une demande d'ordonnance présentée au titre de l'alinéa (1)d);

k) toute somme déjà payée par la personne visée par l'ordonnance ou à payer par elle en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard du comportement;

l) tout autre élément pertinent.

Sens de l'ordonnance subséquente

(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

Amounts already paid

(7) In determining an amount to be paid under paragraph (1)(d), the court shall take into account any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the products.

Sommes déjà payées

(7) Dans la détermination de la somme à payer au titre de l'alinéa (1)d), le tribunal tient compte de toute somme déjà payée par le contrevenant ou à payer par lui en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard des produits.

Implementation of the order

(8) The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order's implementation, including terms

(a) specifying how the payment is to be administered;

(b) respecting the appointment of an administrator to administer the payment and specifying the terms of administration;

(c) requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator;

(d) requiring that potential claimants be notified in the time and manner specified by the court;

(e) specifying the time and manner for making claims;

(f) specifying the conditions for the eligibility of claimants, including conditions relating to the return

Exécution de l'ordonnance

(8) Le tribunal peut, dans l'ordonnance rendue au titre de l'alinéa (1)d), préciser les conditions qu'il estime nécessaires à son exécution, notamment :

a) prévoir comment la somme à payer doit être administrée;

b) nommer un administrateur chargé d'administrer cette somme et préciser les modalités d'administration;

c) mettre à la charge du contrevenant les frais d'administration de la somme ainsi que les honoraires de l'administrateur;

d) exiger que les réclamants éventuels soient avisés selon les modalités de forme et de temps qu'il précise;

e) préciser les modalités de forme et de temps quant à la présentation de toute réclamation;

of the products to the person against whom the order is made; and

(g) providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with.

f) établir les critères d'admissibilité des réclamants, notamment toute exigence relative au retour des produits au contrevenant;

g) prévoir la manière dont la somme éventuellement non réclamée ou non distribuée doit être traitée et les conditions afférentes.

Variation of terms

(9) On application by the Commissioner or the person against whom the order is made, the court may vary any term that is specified under subsection (8).

1999, c. 2, s. 22; 2009, c. 2, s. 424; 2022, c. 10, s. 260.

Modification des conditions

(9) Le tribunal peut, sur demande du commissaire ou de la personne visée par l'ordonnance, modifier les conditions qu'il a précisées en vertu du paragraphe (8).

1999, ch. 2, art. 22; 2009, ch. 2, art. 424; 2022, ch. 10, art. 260.

Deduction from administrative monetary penalty

74.101 (1) If a court determines that a person is engaging in or has engaged in conduct that is reviewable under section 74.011 and orders the person to pay an administrative monetary penalty under paragraph 74.1(1)(c), then the court shall deduct from the amount of the penalty that it determines any amount that the person

(a) has been ordered to pay under paragraph 51(1)(b) of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* in respect of the same conduct; or

(b) has agreed in a settlement agreement to pay on account of amounts referred to in paragraph 51(1)(b) of that Act in respect of the same conduct.

Déduction

74.101 (1) Lorsque le tribunal conclut qu'une personne a ou a eu un comportement susceptible d'examen visé à l'article 74.011, il déduit de toute sanction administrative pécuniaire qu'il fixe aux termes de l'alinéa 74.1(1)c) toute somme que la personne visée par l'ordonnance, à l'égard du même comportement :

a) ou bien a payée ou est tenue de payer en exécution d'une ordonnance rendue en vertu de l'alinéa 51(1)b) de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications*;

b) ou bien s'est engagée à payer, dans le cadre d'un règlement à l'amiable, au titre de l'alinéa 51(1)b) de cette loi.

Restitution and interim injunction

(2) If a court determines that a person is engaging in or has engaged in conduct that is reviewable under subsection 74.011(2), it may order the person to pay an amount under paragraph 74.1(1)(d), and may issue an interim injunction under section 74.111, as if the conduct were conduct that is reviewable under paragraph 74.01(1)(a).

2010, c. 23, s. 79.

Indemnisation et injonction

(2) Lorsque le tribunal conclut qu'une personne a ou a eu un comportement susceptible d'examen visé au paragraphe 74.011(2), il peut ordonner à celle-ci de payer une somme au titre de l'alinéa 74.1(1)d) et prononcer une injonction provisoire en vertu de l'article 74.111, comme si le comportement était susceptible d'examen visé à l'alinéa 74.01(1)a).

2010, ch. 23, art. 79.

Temporary order

74.11 (1) On application by the Commissioner, a court may order a person who it appears to the court is engaging in conduct that is reviewable under this Part not to engage in that conduct or substantially similar reviewable conduct if it appears to the court that

Ordonnance temporaire

74.11 (1) Sur demande présentée par le commissaire, le tribunal peut ordonner à toute personne qui, d'après lui, a un comportement susceptible d'examen visé par la présente partie de ne pas se comporter ainsi ou d'une manière essentiellement semblable, s'il constate que, en l'absence de l'ordonnance, un dommage grave sera

(a) serious harm is likely to ensue unless the order is issued; and

(b) the balance of convenience favours issuing the order.

vraisemblablement causé et que, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Temporary order — supply of a product

(1.1) On application by the Commissioner, a court may order any person named in the application to refrain from supplying to another person a product that it appears to the court is or is likely to be used to engage in conduct that is reviewable under this Part, or to do any act or thing that it appears to the court could prevent a person from engaging in such conduct, if it appears to the court that

(a) serious harm is likely to ensue unless the order is issued; and

(b) the balance of convenience favours issuing the order.

Ordonnance temporaire — fourniture d'un produit ou accomplissement d'un acte

(1.1) Sur demande présentée par le commissaire, le tribunal peut également ordonner à toute personne nommément désignée dans la demande de s'abstenir de fournir à une autre personne un produit qui, d'après lui, est ou sera vraisemblablement utilisé pour l'adoption d'un comportement susceptible d'examen visé à la présente partie ou lui enjoignant d'accomplir tout acte qu'il estime susceptible d'empêcher un tel comportement s'il constate que, en l'absence de l'ordonnance, un dommage grave sera vraisemblablement causé et que, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Duration

(2) Subject to subsection (5), an order made under subsection (1) or (1.1) has effect, or may be extended on application by the Commissioner, for any period that the court considers sufficient to meet the circumstances of the case.

Durée d'application

(2) Sous réserve du paragraphe (5), l'ordonnance rendue en vertu des paragraphes (1) ou (1.1) a effet ou peut être prorogée à la demande du commissaire pour la période que le tribunal estime suffisante pour répondre aux besoins en l'occurrence.

Notice of application

(3) Subject to subsection (4), at least 48 hours' notice of an application referred to in subsection (1), (1.1) or (2) shall be given by or on behalf of the Commissioner to the person in respect of whom the order or extension is sought.

Préavis

(3) Sous réserve du paragraphe (4), le commissaire, ou la personne agissant pour son compte, donne un préavis d'au moins quarante-huit heures à la personne à l'égard de laquelle est demandée l'ordonnance ou la prorogation prévue aux paragraphes (1), (1.1) ou (2).

Ex parte application

(4) The court may proceed *ex parte* with an application made under subsection (1) or (1.1) if it is satisfied that subsection (3) cannot reasonably be complied with or that the urgency of the situation is such that service of notice in accordance with subsection (3) would not be in the public interest.

Audition *ex parte*

(4) Le tribunal peut entendre *ex parte* la demande prévue aux paragraphes (1) ou (1.1), s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé, ou que la situation est à ce point urgente que la signification de l'avis aux termes du paragraphe (3) ne servirait pas l'intérêt public.

Duration of *ex parte* order

(5) An order issued *ex parte* shall have effect for such period as is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (3), the court extends the order for such additional period as it considers necessary and sufficient.

Durée d'application

(5) L'ordonnance rendue *ex parte* s'applique pour la période d'au plus sept jours qui y est fixée, sauf si, sur demande ultérieure présentée en donnant le préavis prévu au paragraphe (3), l'ordonnance est prorogée pour la période supplémentaire que le tribunal estime nécessaire et suffisante.

Duty of Commissioner

(6) Where an order issued under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 arising out of the conduct in respect of which the order was issued.

1999, c. 2, s. 22; 2002, c. 16, s. 10; 2010, c. 23, s. 80.

Obligations du commissaire

(6) Lorsqu'une ordonnance a force d'application aux termes du présent article, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête visée à l'article 10 à l'égard du comportement qui fait l'objet de l'ordonnance.

1999, ch. 2, art. 22; 2002, ch. 16, art. 10; 2010, ch. 23, art. 80.

Interim injunction

74.111 (1) If, on application by the Commissioner, a court finds a strong *prima facie* case that a person is engaging in or has engaged in conduct that is reviewable under paragraph 74.01(1)(a), and the court is satisfied that the person owns or has possession or control of articles within the jurisdiction of the court and is disposing of or is likely to dispose of them by any means, and that the disposal of the articles will substantially impair the enforceability of an order made under paragraph 74.1(1)(d), the court may issue an interim injunction forbidding the person or any other person from disposing of or otherwise dealing with the articles, other than in the manner and on the terms specified in the injunction.

Ordonnance d'injonction provisoire

74.111 (1) S'il constate, à la suite d'une demande présentée par le commissaire, l'existence d'une preuve *prima facie* convaincante établissant qu'une personne a ou a eu un comportement susceptible d'examen visé à l'alinéa 74.01(1)a) et s'il est convaincu, d'une part, que cette personne a entrepris de disposer ou disposera vraisemblablement de quelque façon que ce soit d'articles qui se trouvent dans son ressort et dont elle est propriétaire ou dont elle a la possession ou le contrôle et, d'autre part, que la disposition des articles nuira considérablement à l'exécution de l'ordonnance rendue en vertu de l'alinéa 74.1(1)d), le tribunal peut prononcer une injonction provisoire interdisant à cette personne ou à toute autre personne d'effectuer quelque opération à leur égard, notamment d'en disposer, si ce n'est de la manière et aux conditions précisées dans l'ordonnance d'injonction.

Statement to be included

(2) Any application for an injunction under subsection (1) shall include a statement that the Commissioner has applied for an order under paragraph 74.1(1)(d), or that the Commissioner intends to apply for an order under that paragraph if the Commissioner applies for an order under paragraph 74.1(1)(a).

Mention à ajouter

(2) Le commissaire signale, dans sa demande d'injonction, qu'il a présenté une demande d'ordonnance en vertu de l'alinéa 74.1(1)d) ou, s'il demande l'ordonnance au titre de l'alinéa 74.1(1)a), qu'il a l'intention de demander l'ordonnance au titre de l'alinéa 74.1(1)d).

Duration

(3) Subject to subsection (6), the injunction has effect, or may be extended on application by the Commissioner, for any period that the court considers sufficient to meet the circumstances of the case.

Durée d'application

(3) Sous réserve du paragraphe (6), l'ordonnance d'injonction a effet — ou peut être prorogée à la demande du commissaire — pour la période que le tribunal estime suffisante pour répondre aux besoins en l'occurrence.

Notice of application by Commissioner

(4) Subject to subsection (5), at least 48 hours' notice of an application referred to in subsection (1) or (3) shall be given by or on behalf of the Commissioner to the person in respect of whom the injunction or extension is sought.

Préavis

(4) Sous réserve du paragraphe (5), le commissaire ou la personne agissant pour son compte donne un préavis d'au moins quarante-huit heures à toute personne à l'égard de laquelle sont demandées l'ordonnance d'injonction prévue au paragraphe (1) ou la prorogation visée au paragraphe (3).

Ex parte application

(5) The court may proceed *ex parte* with an application made under subsection (1) if it is satisfied that subsection (4) cannot reasonably be complied with or where the urgency of the situation is such that service of the notice in accordance with subsection (4) might defeat the purpose

Audition *ex parte*

(5) Le tribunal peut entendre *ex parte* la demande présentée au titre du paragraphe (1) s'il est convaincu que le paragraphe (4) ne peut vraisemblablement pas être observé ou si la situation est à ce point urgente que la signification du préavis conformément au paragraphe (4)

of the injunction or would otherwise not be in the public interest.

Duration of *ex parte* injunction

(6) An injunction issued *ex parte* has effect for the period that is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (4), the court extends the injunction for any additional period that it considers sufficient.

Submissions to set aside

(7) On application of the person against whom an *ex parte* injunction is made, the court may make an order setting aside the injunction or varying it subject to any conditions that it considers appropriate.

Duty of Commissioner

(8) If an injunction issued under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete any inquiry under section 10 arising out of the conduct in respect of which the injunction was issued.

Definitions

(9) The following definitions apply in this section.

dispose, in relation to an article, includes removing it from the jurisdiction of the court, depleting its value, leasing it to another person or creating any security interest in it. (*disposer*)

security interest means any interest or right in property that secures payment or performance of an obligation and includes an interest or right created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, security, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for. (*garantie*)

2009, c. 2, s. 425.

Consent agreement

74.12 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of a court against that person, and may include other terms, whether or not they could be imposed by the court.

pourrait rendre l'ordonnance inutile ou ne servirait pas par ailleurs l'intérêt public.

Durée d'application

(6) L'ordonnance d'injonction rendue *ex parte* a effet pour la période d'au plus sept jours qui y est fixée, sauf si, sur demande ultérieure présentée au moyen du préavis prévu au paragraphe (4), elle est prorogée pour la période supplémentaire que le tribunal estime suffisante.

Demande d'annulation de l'ordonnance

(7) Sur demande de la personne visée par l'ordonnance d'injonction rendue *ex parte*, le tribunal peut annuler l'ordonnance ou la modifier aux conditions qu'il estime indiquées.

Obligation du commissaire

(8) Lorsqu'une ordonnance d'injonction a effet, le commissaire, avec toute la diligence possible, mène à terme toute enquête visée à l'article 10 à l'égard du comportement qui fait l'objet de l'ordonnance.

Définitions

(9) Les définitions qui suivent s'appliquent au présent article.

disposer S'agissant d'un article, s'entend notamment du fait de le retirer du ressort du tribunal, d'en faire diminuer la valeur, de le louer à une autre personne ou de le donner comme garantie. (*dispose*)

garantie Tout droit ou intérêt sur un bien qui garantit le paiement ou l'exécution d'une obligation. Sont notamment visés les droits ou intérêts nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, grèvements, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'ils soient créés, réputés exister ou prévus par ailleurs. (*security interest*)

2009, ch. 2, art. 425.

Consentement

74.12 (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie peuvent signer un consentement.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par un tribunal; il peut également comporter d'autres modalités, qu'elles puissent ou non être imposées par le tribunal.

Registration

(3) The consent agreement may be filed with the court for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the court.

1999, c. 2, s. 22; 2002, c. 16, s. 11.

Rescission or variation of consent agreement or order

74.13 The court may rescind or vary a consent agreement that it has registered or an order that it has made under this Part, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the court finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

1999, c. 2, s. 22; 2002, c. 16, s. 11.

Evidence

74.14 In determining whether or not to make an order under this Part, the court shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the court under this Act.

1999, c. 2, s. 22.

Unpaid monetary penalty

74.15 The amount of an administrative monetary penalty imposed on a person under paragraph 74.1(1)(c) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

1999, c. 2, s. 22.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du tribunal qui est tenu de l'enregistrer immédiatement.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du tribunal, notamment quant à l'engagement des procédures.

1999, ch. 2, art. 22; 2002, ch. 16, art. 11.

Annulation ou modification du consentement ou de l'ordonnance

74.13 Le tribunal peut annuler ou modifier un consentement qu'il a enregistré ou une ordonnance qu'il a rendue en application de la présente partie lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

1999, ch. 2, art. 22; 2002, ch. 16, art. 11.

Preuve

74.14 Dans sa décision de rendre ou de ne pas rendre une ordonnance en application de la présente partie, le tribunal ne peut refuser de prendre en compte un élément de preuve au seul motif que celui-ci pourrait constituer un élément de preuve à l'égard d'une infraction prévue à la présente loi ou qu'une autre ordonnance pourrait être rendue par le tribunal en vertu de la présente loi à l'égard de cet élément de preuve.

1999, ch. 2, art. 22.

Sanctions administratives pécuniaires impayées

74.15 Les sanctions administratives pécuniaires imposées au titre de l'alinéa 74.1(1)c) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

1999, ch. 2, art. 22.

Where proceedings commenced under section 52 or 52.01

74.16 No application may be made under this Part against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which proceedings have been commenced against that person under section 52 or 52.01.

1999, c. 2, s. 22; 2010, c. 23, s. 81.

Rules of Procedure

Power of courts

74.17 The rules committee of the Federal Court, or a superior court of a province, may make rules respecting the procedure for the disposition of applications by that court under this Part.

1999, c. 2, s. 22.

Appeals

Appeal to Federal Court of Appeal

74.18 (1) An appeal may be brought in the Federal Court of Appeal from any decision or order made under this Part, or from a refusal to make an order, by the Tribunal or the Federal Court.

Appeal to provincial court of appeal

(2) An appeal may be brought in the court of appeal of a province from any decision or order made under this Part, or from a refusal to make an order, by a superior court of the province.

Disposition of appeal

(3) Where the Federal Court of Appeal or the court of appeal of the province allows an appeal under this section, it may quash the decision or order appealed from, refer the matter back to the court appealed from or make any decision or order that, in its opinion, that court should have made.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Appeal on question of fact

74.19 An appeal on a question of fact from a decision or order made under this Part may be brought only with the leave of the Federal Court of Appeal or the court of appeal of the province, as the case may be.

1999, c. 2, s. 22.

Procédures en vertu des articles 52 ou 52.01

74.16 Aucune demande ne peut être présentée à l'endroit d'une personne au titre de la présente partie si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une procédure engagée à l'endroit de cette personne en vertu des articles 52 ou 52.01.

1999, ch. 2, art. 22; 2010, ch. 23, art. 81.

Règles de procédure

Pouvoir des tribunaux

74.17 Le Comité des règles de la Cour fédérale ou la cour supérieure d'une province peut établir des règles régissant le traitement des demandes prévues par la présente partie.

1999, ch. 2, art. 22.

Appels

Appel à la Cour d'appel fédérale

74.18 (1) Il peut être interjeté appel devant la Cour d'appel fédérale d'une décision ou d'une ordonnance rendue en vertu de la présente partie par le Tribunal ou la Cour fédérale.

Appel à la cour d'appel provinciale

(2) Il peut être interjeté appel devant la cour d'appel d'une province d'une décision ou d'une ordonnance rendue en vertu de la présente partie par la cour supérieure de la province.

Sort de l'appel

(3) La Cour d'appel fédérale ou la cour d'appel d'une province qui accueille l'appel peut annuler la décision ou l'ordonnance portée en appel, renvoyer l'affaire devant le tribunal qui a rendu la décision ou l'ordonnance ou rendre toute ordonnance qui, à son avis, aurait dû être rendue par celui-ci.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Questions de fait

74.19 L'appel d'une décision ou d'une ordonnance rendue par le tribunal en vertu de la présente partie et portant sur une question de fait est subordonné à l'autorisation de la Cour d'appel fédérale ou de la cour d'appel de la province, selon le cas.

1999, ch. 2, art. 22.

ARTICLES

ASSESSING GENERAL IMPRESSION UNDER THE *COMPETITION ACT*: THE CREDULOUS MAN WHO WAS NEVER THERE

Anita Banicevic*

When deciding whether an advertisement is false or misleading under the Competition Act, *one must take into account both the "general impression" and literal meaning of the representations at issue. Historically, the dominant approach taken by courts for the purposes of the* Competition Act *was to assess the advertisement from the perspective of the "average person" of the intended audience. For some commentators, the Supreme Court's 2012 decision in* Richard v. Time Inc. *signalled the end of the average person's role as the arbiter of truth and accuracy under the* Competition Act, *and it was argued, the "credulous consumer" would soon step in. However, neither a historical perspective nor cases decided after* Time *are supportive of a wholesale adoption of the viewpoint of a naïve consumer who is not overly sophisticated and accordingly, perhaps more easily misled. Rather, the legislative history and relevant jurisprudence under the* Competition Act *remains supportive of viewing the general impression from the perspective of an average consumer of the relevant product or services.*

Pour déterminer si une publicité est fausse ou trompeuse sous le régime de la Loi sur la concurrence, *il faut tenir compte de l'« impression générale » donnée par les termes employés ainsi que de leur sens littéral dans les représentations en cause. Historiquement, les tribunaux ont principalement adopté, aux fins de la* Loi sur la concurrence, *une approche de l'évaluation d'une publicité centrée sur le point de vue de la « personne moyenne » du public cible. À la lumière de la décision* Richard c. Time Inc. *rendue par la Cour suprême en 2012, certains commentateurs ont signalé la fin de la « personne moyenne » comme arbitre de la vérité et de l'exactitude des publicités en vertu de la* Loi sur la concurrence *en raison de l'arrivée prochaine du « consommateur crédule » qui la remplacerait. Toutefois, l'historique et la jurisprudence qui a suivi l'arrêt* Time *indiquent que l'approche suivant le point de vue d'un consommateur naïf, ayant un faible degré de discernement voulant qu'il soit peut-être plus facilement induit en erreur, n'a pas été retenue de façon intégrale. Au contraire, les antécédents législatifs et la jurisprudence connexe sous le régime de la* Loi sur la concurrence *continuent d'appuyer une interprétation de l'« impression générale » du point de vue du « consommateur moyen » des produits ou services visés.*

Introduction

When deciding whether an advertisement is false or misleading under the *Competition Act*[1], one must take into account both the "general impression" and literal meaning of the representations at issue. As any advertisement may be interpreted differently depending on a person's perspective, this raises an important issue for advertisers. From whose perspective, then, is the general impression of an advertisement to be assessed? Is it the average consumer of the product or service being advertised, or the most credulous member of society? Historically, the dominant approach taken by courts for the purposes of the *Competition Act* was to assess the advertisement from the perspective of the "average person" of the intended audience. Yet in 2012, the Supreme Court of Canada released its decision in *Richard v Time Inc*,[2] in which it held that, for the purposes of Quebec's *Consumer Protection Act*,[3] the appropriate perspective from which to assess the general impression of an advertisement was that of the "credulous" and "inexperienced" consumer.

For some commentators, the Supreme Court's decision in *Time* signalled the end of the average person's role as the arbiter of truth and accuracy under the *Competition Act*, and it was argued, the "credulous consumer" would soon step in. This belief was expressed most forcibly by Adam Newman in a 2013 comment for the Canadian Competition Law Review.[4] However, as discussed below, neither a historical perspective nor cases decided after *Time* are supportive of a wholesale adoption of the viewpoint of a naïve consumer who is not overly sophisticated and accordingly, perhaps more easily misled. Rather, the legislative history and relevant jurisprudence under the *Competition Act* remains supportive of viewing the general impression from the perspective of an average consumer of the relevant product or services. While such a distinction may appear to be a fine one, as discussed further below, it can have implications regarding the applicable threshold for determining whether a particular representation is considered false or misleading, particularly for advertising involving products or industries where the targeted consumer may have more knowledge or sophistication than a credulous and inexperienced Canadian.

A Short History of the Credulous Man

The idea that advertisements should be assessed from the perspective of the "credulous man" first emerged in Canadian competition law in 1970, with the Alberta Supreme Court's decision in *R v Imperial Tobacco Products Ltd.*[5] The case involved what is now referred to as a "scratch and win" contest, and was decided under the criminal misleading

advertising provisions of the *Combines Investigation Act*[6] before the introduction of the "general impression" test. The case concerned certain representations made by the accused in point-of-purchase display cards that were used to promote a new brand of cigarette. The cards stated there was five dollars "in every pack of New Casino" cigarettes, when in fact each pack contained a contest card with only the potential to win five dollars.[7]

At trial, Sinclair J. rejected the accused's argument that the "average person" or "reasonable man" would not have been misled by the promotion into thinking that five dollars was contained in each package.[8] In his view, this was not even the correct standard to apply. Relying on early American jurisprudence as persuasive authority, he held:

> It seems to me the protection afforded by the section [of the *Combines Investigation Act*] is for "the public - that vast multitude which includes the ignorant, the unthinking and the credulous", to use the expression that appears in Federal Trade Commission Prosecution cases in the United States, and of which *Charles of the Ritz Distributors Corporation. v Federal Trade Commission* (1944), 143 F (2d) 676, is an example.[9]

The Alberta Court of Appeal upheld the accused's conviction.[10] However, of the three members of the panel, only Clement J.A. addressed the issue of the proper perspective from which to interpret the advertisements at issue. Justice Clement acknowledged that the American authorities relied upon by the trial judge provided some guidance in determining the correct standard.[11] Ultimately, however, he refused to accept the "credulous man" test on the basis that "[t]he law does not recognize a particular class of the public as ignorant, unthinking and credulous; nor should it measure these matters by standards of the sceptical who have learned by bitter experience to beware of commercial advertisements."[12]

Curiously, although Clement J.A. never adopted the "credulous man" test, *Imperial Tobacco* would later form the basis for a prevailing line of cases under Quebec's *Consumer Protection Act*, where it has been cited as authority for the proposition that the "credulous man" is the proper perspective from which to assess the general impression of an advertisement for the purposes of consumer protection law. As a matter of competition law, however, *Imperial Tobacco* has been cited only occasionally in a handful of cases from the 1970s and 1980s in support of the "credulous consumer" test.[13] Accordingly, whereas the "credulous man" later assumed a prominent role in Quebec consumer protection jurisprudence, its lifespan in the field of competition law was decidedly short-lived.[14]

The Advent of the General Impression Test

Shortly after the decision in *Imperial Tobacco*, courts began to assess advertisements from the perspective of the "average person" of the intended audience. This shift in judicial approach was prompted, at least in part, by significant amendments to the *Combines Investigation Act* in 1976. In that year, Parliament enacted Bill C-2, which introduced, for the first time in Canadian competition law, the "general impression" test that now resides at the heart of all misleading advertising cases under the *Competition Act*.[15]

The provision introduced in Bill C-2 is substantially similar to the civil and criminal provisions dealing with misleading advertising under the *Competition Act* today. It provided:

> 36(5) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.[16]

The language of this provision marked a dramatic departure from a similar clause that had been incorporated in Bill C-256, an earlier attempt by the government to introduce significant competition law reform that was tabled in the House of Commons on June 29, 1971. Subsection 20(5) of that bill explicitly mandated the application of the "credulous man" test, as follows:

> 20(5) In any prosecution for a violation of this section, proof that a credulous man would be misled by the representation alleged to have been made by the accused is sufficient proof that the representation was misleading.[17]

Bill C-256 died on the order paper and never became law. On October 2, 1974, the government introduced Bill C-2, and in doing so, removed the proposed requirement that all advertisements be assessed from the perspective of the "credulous man".

The change in wording from the "credulous man" test in Bill C-256 to the "general impression" test in Bill C-2 was significant. As one witness and a member of the Standing Committee on Finance, Trade and Economic Affairs commented before the passage of Bill C-2, "the new general impression test was presumably designed to replace the credulous man test that appeared in Bill C-256".[18] At the very least, the revised wording reflected a legislative intention to reject the blanket application of the "credulous man" in future misleading advertising cases.

Indeed, the Supreme Court of Canada has consistently held that, when Parliament has considered and received submissions and has been urged to create rights that are nowhere to be found when legislation is enacted or amended, this is powerful evidence that the legislature made the deliberate decision not to provide for the rights in question.[19] In such circumstances, courts treat the absence of legislation enacting the requested rights as Parliament's answer to the denied requests.[20]

From this perspective, the *Competition Act*'s silence with respect to the "credulous man" standard is telling. Had Parliament intended all advertisements to be assessed from the perspective of a credulous and inexperienced person, it could have simply adopted the "credulous man" test that was expressly proposed in Bill C-256. It did not. Rather, Parliament left it to the courts to determine on a case-by-case basis the appropriate perspective to adopt when evaluating the general impression of an advertisement.

The Average Person of the Intended Audience

Following the advent of the "general impression" test in 1976, courts in the competition law context have examined the impression conveyed by advertisements predominantly from the perspective of the "average consumer", including the relevant demographics of the intended audience, relative intelligence levels and the level of care that the intended audience would apply in purchasing the product.

The movement towards the "average person" standard commenced with the Ontario Court of Appeal's decisions in *R. Viceroy Construction Co*[21] and *R v RM Lowe Real Estate Ltd.*[22] In *Viceroy*, the accused published an advertisement regarding certain homes that it had manufactured.[23] The advertisement conveyed the impression that one of the houses consisted of two stories, when in fact it only comprised one story.[24] Martin J.A., writing for a unanimous Court of Appeal, summarized the test for determining the general impression of the advertisement as follows:

> If the catalogue conveys, by the words used, the impression to the average person to whom it is directed, and who in the ordinary course would read it, that the home in question is a two-storey house, when in fact it is a one-storey house, then the advertisement is deceptive and misleading, notwithstanding that such impression might be dispelled by a careful examination of the specification sheet, together with the quoted price list and the architectural symbols used in relation to the floor plan of the "proposed lower level" by a person who possessed the necessary competence and experience to interpret such material.[25]

Similarly, in *Lowe*, the accused represented that the prices of the homes it was selling were "absolutely the lowest" in Erin Mills.[26] Arnup J.A., writing for a unanimous Court of Appeal, held that "the meaning to be placed upon the advertisement is that meaning which would be discerned by the average reader who was interested in making a purchase of a house in that locality".[27]

In *R v International Vacations Ltd*,[28] the Ontario Court of Appeal adopted Arnup J.A.'s approach in *Lowe* as a "common sense principle which should guide the interpretation of any advertisement".[29] The Court of Appeal then identified the attributes of the "average person" at issue. In that case, the central issue before the Court was whether the accused air travel marketer had held out to the public that seats were available on all flights listed in its advertisement at the time of publication. Writing for a unanimous Court of Appeal, Blair J. rejected this conclusion, holding as follows:

> The average reader interested in making an overseas trip can be taken to be literate, intelligent and unlikely to make a relatively large monetary commitment without carefully reading the advertisement. It seems to me that the import of the advertisement would be absolutely clear to such a discerning reader.[30]

Courts throughout Canada have adopted a similar approach in numerous other decisions since the advent of the "general impression" test. For example, in the 1992 decision of *R v Multitech Warehouse Inc*,[31] The Provincial Court of Nova Scotia cited the Ontario Court of Appeal's decisions in both *Lowe* and *International Vacations* approvingly before concluding that it is required, in such cases, "to examine the advertisement and apply a standard based upon the type of consumer to which the advertisement is directed."[32] According to the Court, "This determination is the foundation for a proper construction to be placed upon the advertisement."[33]

Similarly, in *Purolator Courier Ltd v United Parcel Service Canada Ltd*,[34] a competitor of UPS alleged that UPS had made false and misleading representations by claiming that its prices were "usually at rates up to 40% less than other couriers charge".[35] The competitor argued that this gave the false impression that UPS's rates were always 40% less than those of other couriers.[36] In considering the general impression conveyed by UPS's advertisement, Lederman J. noted that the general impression depends on a combination of factors, including: "the understanding of those who have listened to the commercial, as presented through survey evidence; the use of the qualifiers 'usually' and 'up to'; the nature of the consumers; and the nature of the medium".[37] Lederman J. dismissed the action on the basis that the consumers in

question were not "totally naïve" but rather business individuals "who make these kinds of decisions everyday based on service and price".[38]

More recently, in *Maritime Travel Inc v Go Travel Direct.Com Inc*,[39] the Nova Scotia Court of Appeal considered whether an advertisement comparing the prices of Go Travel Direct's southern vacation packages to those of Maritime Travel was false or misleading under the *Competition Act*. The Court of Appeal upheld the trial judge's assessment of the general impression conveyed by the advertisement from the eyes of its "intended audience", which the trial judge found to be "a literate person of average intelligence contemplating spending $700.00 to $1,000.00 per person for a Southern vacation, who would read the ad carefully and consider the dates of travel and the fact the flights are direct".[40]

Finally, it bears noting that the approach to general impression that has historically taken by the courts is also the standard articulated in the Competition Bureau's own guidance. For instance, the Bureau's most recent advertising-related guidelines issued in 2009 regarding the "*Application of the Competition Act to Representations on the Internet*" state: "In reviewing both on-line and off-line advertisements to determine the general impression conveyed by the representation, businesses should adopt the perspective of the average consumer who is interested in the product or service being promoted".[41] This position is consistent with the Bureau's historical viewpoint as stated in its various advertising guidelines and bulletins.[42]

In summary, the dominant approach taken by courts and the Bureau in cases pre-dating the Supreme Court's decision in *Time* involving misleading advertising under the *Combines Investigation Act*, and later the *Competition Act*, has been to consider the general impression of an advertisement from the perspective of the "average consumer" of the intended audience. Against this legislative and judicial history, it was therefore surprising when, in 2012, many assumed that the Supreme Court's decision in *Time* presaged the imminent return of the "credulous man" to Canadian competition law.

The Supreme Court of Canada's Decision in *Time*

The Supreme Court's decision in *Time* did not concern the misleading advertising provisions of the *Competition Act*. Rather, the case involved a direct mail campaign in which the recipient was promised that he would be awarded a cash prize upon subscribing to Time magazine.[43] Convinced that he had won $833,337, the plaintiff returned the reply coupon that accompanied the "Official Sweepstakes Notification".[44] In doing so, he also subscribed to *Time* magazine for two years.[45]

When Time Inc. refused to award the plaintiff his prize, he commenced proceedings in the Quebec Superior Court alleging that Time Inc. had engaged in prohibited business practices contrary to section 218 of Quebec's *Consumer Protection Act*, which states:

> 218. To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account.[46]

The Quebec Superior Court granted judgment in favour of the plaintiff at first instance.[47] The Court held that the notification document was specifically designed to mislead the recipient and contained false representations when assessed from the perspective of the average consumer.[48] The Quebec Court of Appeal reversed, however, holding that the "general impression" conveyed by the alleged misrepresentations in the notification document would not be false or misleading to the "average consumer" with "an average level of intelligence, skepticism and curiosity".[49]

The plaintiff appealed to the Supreme Court of Canada, arguing that the criteria used by the Court of Appeal to define the average consumer for the purposes of Quebec's *Consumer Protection Act* undermined certain foundations of Quebec consumer law.[50] The Supreme Court allowed the plaintiff's appeal. In coming to its decision, the Supreme Court analyzed a long line of Quebec cases that used terms such as "credulous" and "inexperienced" to describe the average consumer and concluded as follows:

> Thus, **in Quebec consumer law**, the expression "average consumer" does not refer to a reasonably prudent and diligent person, let alone a well-informed person. **To meet the objectives of the CPA**, the Courts view the average consumer as someone who is not particularly experienced at detecting the falsehoods or subtleties found in commercial representations.[51] [emphasis added]

Despite the superficial similarities in language between section 218 of Quebec's *Consumer Protection Act* and the misleading advertising provisions under the *Competition Act*, the Supreme Court's decision in *Time* contained a number of significant features that clearly distinguished the case from the litany of cases that had applied the "average person" test under the *Competition Act* in the preceding four decades.

First, the Supreme Court repeatedly stated in *Time* that its decision was aimed at determining the appropriate standard for the average consumer exclusively "for the purposes of the CPA".[52] Indeed, the Supreme Court prefaced its judgment by stating explicitly: "We will

not dwell here on the measures adopted by Parliament. Instead, we will be focusing on the Quebec legislation and on how it developed".[53]

Second, the Supreme Court noted that the purpose of Quebec's *Consumer Protection Act* is "to protect vulnerable persons from the dangers of certain advertising techniques".[54] As described in more detail below, this purpose and aim can be distinguished from that of the *Competition Act*.

Third, the representations at issue in *Time* were made to the public at large and not to a targeted group of consumers.[55] As a result, the Supreme Court did not consider the nature of any specific audience targeted by the representation at issue.

Finally, the Supreme Court acknowledged in *Time* that "obviously the adjectives used to describe the average consumer may vary from one statute to another" and that such variations "reflect the diversities of economic realities to which different statutes apply and of their objectives".[56] On this view, the Supreme Court held that "[t]he most important thing is not the adjectives used, but the level of sophistication expected of the consumer".[57]

This last statement is important for understanding the limits of the Supreme Court's holding in *Time*. The objectives of the *Competition Act* are much broader and more varied than the purposes of Quebec's *Consumer Protection Act*, which is concerned exclusively with consumer protection.[58] The misleading advertising provisions of the *Competition Act* were not enacted to protect the most naïve consumers, but passed for the purpose of regulating the marketplace as a whole. Accordingly, it was never clear that the credulous consumer standard could simply be transplanted from Quebec's *Consumer Protection Act* into a long-standing piece of Federal legislation, which was enacted for different purposes under different circumstances by a different legislative body. If anything, the legislative and judicial history of the "general impression" test appeared to foreclose any such outcome.

After *Time*: The Ontario Superior Court's Decision in *Chatr*

The proper role of the credulous and inexperienced consumer under the *Competition Act* moved out of the realm of academic debate and into the courtroom in *Canada (Competition Bureau) v Chatr Wireless Inc*,[59] a contested proceeding commenced by the Commissioner of Competition against Rogers Communications Inc. in November, 2010.

The case concerned representations made by Chatr Wireless Inc., a subsidiary of Rogers Communications Inc., in a number of comparative

advertisements regarding the reliability of its service.[60] The Commissioner claimed that two of Chatr's representations were false or misleading in a material respect, namely: (1) the representation that Chatr has fewer dropped calls than other new wireless carriers; and (2) the representation that Chatr customers have "no worries about dropped calls" on the Chatr network.[61]

At trial, the Commissioner of Competition argued, contrary to the Bureau's existing guidelines, that the general impression conveyed by the representations at issue should be assessed from the perspective of the credulous and inexperienced consumer.[62] In support of this argument, the Commissioner relied on the Supreme Court's decision in *Time* and on the apparent similarities between the "general impression" test found in section 218 of Quebec's *Consumer Protection Act*, which was at issue in *Time*, and the "general impression" test found in section 74.01(5) of the *Competition Act*.[63]

Justice Marrocco released his decision in the matter on August 19, 2013. In his reasons, Marrocco J. implicitly rejected the Commissioner's argument with respect to the appropriate standard for assessing the general impression of the advertisements at issue.[64] To be sure, he held that the "credulous" and "inexperienced" consumer test provided a useful starting point.[65] But in the careful set of reasons that followed, he ultimately refused to apply the "credulous" and "inexperienced" consumer test in exactly the same way that the Supreme Court had done in *Time*.[66]

To begin with, the Court specifically noted that the *Competition Act* and Quebec's *Consumer Protection Act* address different goals and purposes and that these goals must inform the perspective from which the representation at issue is viewed.[67] Specifically, the Court noted that the *Consumer Protection Act* is "intended to protect vulnerable persons from the dangers of certain advertising techniques" while the Competition Act is "intended to maintain and encourage competition in order to 'provide consumers with competitive prices and product choices'...".[68]

Having regard to these important distinctions, the Court ruled that the general impression of an advertisement must be viewed from the perspective of a consumer interested in the services offered.[69] This is an important distinction and signals a nuanced departure from the approach suggested in *Time*. That is, the Court chose to view the general impression from the perspective of consumers who had exposure to the wireless industry and thus, could be presumed to have a greater level of sophistication and awareness than consumers who have had no exposure to the wireless industry.[70] In doing so, the Court applied a

standard consistent with the average purchaser standard articulated in *Viceroy* and other similar cases that followed under the *Competition Act*.

On the facts, the Court found that the advertisements were directed at a segment of the wireless services market that wanted unlimited talking and texting services and that consumers in this segment were in fact knowledgeable with respect to claims regarding certain non-technical aspects of wireless service (such as unlimited zone plans, flat fee payment structures and no-term contracts).[71] Accordingly, the Court held that applying the "inexperienced" portion of the Supreme Court's test in *Time* was difficult in this case because the targeted consumer was clearly experienced with wireless services.[72] The Court therefore adopted a "credulous and technically inexperienced" standard, holding that the average consumer in this case was credulous (in the sense that he or she was willing to believe the representations at issue) but inexperienced only in respect of the advertisement's more technical information.[73]

In summary, the Court's approach in *Chatr* was to modify the approach of the Supreme Court and to not to consider the consumer inexperienced in the ways of the world or advertising more generally, as was the case in *Time*.[74] Rather, the consumer was considered to be inexperienced only in respect of the highly technical information conveyed in the advertisements at issue.[75] The Court thus paid significant attention to the context in which the representations at issue were made, and the character of the audience to whom they were directed. Again, this is an important distinction and the Court reaffirmed the dominant approach taken in earlier competition law cases in which the general impression of an advertisement was assessed from the perspective of the average consumer of the intended target audience.

The Quebec Superior Court's Decision in *Bell*

In a more recent case before the Quebec Superior Court, *Vidéotron senc c Bell Canada*[76], Vidéotron was seeking an interlocutory injunction against Bell, alleging that its advertisement regarding its FTTH (fibre to the home) service was misleading, and infringed both the *Competition Act* and Quebec's *Consumer Protection Act*. According to Videotron, since Bell's FTTH services were not available in the area, these advertisements were misleading and were an attempt by Bell to lure Videotron's customers away by offering them other services.[77]

As the starting point for its analysis, the Court noted the importance of the general impression test under subsections 52(4) and 74.03(5) of the *Competition Act* as well as under section 218 of Quebec's *Consumer Protection Act*.[78] While the Court did not analyze the representations

under each statute separately, the Court nevertheless determined that while *Time* called for the application of the perspective of a credulous and inexperienced consumer, assessing the general impression created by the advertisement in *Bell* required looking at the profile of the specific consumers who were looking into the FTTH services offered by Bell.[79] Effectively, the Court adopted the perspective of an average consumer in the intended audience, albeit without clearly relating this analysis to either the provincial consumer protection legislation or the *Competition Act*.

In particular, the Court found that the consumers in question were knowledgeable about the features of Videotron's services as well as those of Bell's regular and FTTH services.[80] The Court also held that these consumers would only be interested in FTTH because they were aware that FTTH offers faster speeds than Videotron's service, whereas Bell's regular service is slower.[81] Therefore, they would not be misled into opting for Bell's regular service over Videotron's service. As a result, the Court rejected Videotron's motion for interlocutory injunction.[82]

Implications

From a practical perspective, it appears that Courts have been reluctant to adopt the approach of a naïve or unexperienced or credulous consumer for the purpose of assessing the general impression under the *Competition Act*. While the distinction may appear, on its face, to be one of semantics rather than substance, the practical implications are borne out for advertisements where the targeted consumer has more knowledge or sophistication than the average Canadian. For example, if one were to consider the general impression of an advertisement for a product where the average consumer has a college or university degree and has facility with the product being advertised (such as a higher end smartphone), the perspective of how this consumer would be likely to interpret an advertisement could be very different than that of a an average Canadian (who perhaps may not have the same facility with the product or representations typically made in the industry). In cases such as these, applying the perspective of a credulous and inexperienced consumer is somewhat irrelevant. Furthermore, an application of this standard would serve to artificially lower the intended standard of proof for contraventions of the misleading advertising provisions of the *Competition Act*, contraventions that carry with them the potential for serious and significant remedies.

The perspective of the relevant consumer that Courts have consistently adopted is also more consistent with the purposes of the *Competition Act* and its legislative history. In particular, the *Competition*

Act's stated objectives are to protect competition and ensure consumers are provided with sufficient product choices and price competition. These broader aims necessarily warrant a more objective standard for evaluating whether a representation is false or misleading under the *Competition Act*.

Conclusions

Based on the relevant legislative history, the "credulous man" has appeared from time-to-time in the history of Canadian competition law. However, these appearances were fleeting and few. Important legislative changes in the 1970s empowered courts to consider advertisements from the perspective of the average person of the intended audience. Since then, the average person has become the predominant lens through which the general impression of advertisements are viewed for the purposes of the *Competition Act*.

While there was concern expressed when the Supreme Court's decision in *Time* was released that this may lead to a different approach for the purposes of the *Competition Act*, a review of recent jurisprudence relating to the issue suggests that the historical approach has not been displaced. While the "credulous and inexperienced consumer" may now provide courts with a more visible starting point from which to begin their analyses, the assessment of advertisements under the *Competition Act* appears to rightfully remain sensitive to context and contingent on the attributes of the intended audience to whom the advertisement is directed.

Endnotes

* The author would like to thank Nicholas Van Exan for his assistance in preparing this paper.

[1] RSC 1985, c C-34, as amended (the "Act").

[2] 2012 SCC 8 at paras 72, 78, [2012] 1 SCR 265 [*Time*].

[3] CQLR c P-40.1, s 218.

[4] See Adam Newman, "Richard v. Time: The Return of the 'Credulous Man'?" (2013) 26 Can Competition L Rev 275. Newman observes that the credulous consumer described in Time was reminiscent of the naïve and gullible "credulous man" described in earlier case law under the *Competition Act*'s predecessor statute, the *Combines Investigation Act*. In Newman's view, this judicial history, coupled with the Supreme Court's reasoning in *Time*, provided a clear impetus for the return of some form of credulous consumer test in Canadian competition law jurisprudence.

[5] 16 DLR (3d) 470 (SC), 2 CCC (2d) 533 [*Imperial Tobacco Trial Decision*], aff'd 22 DLR (3d) 51, 3 CPR (2d) 178 (CA) [*Imperial Tobacco Appellate Decision*].

[6] SC 1974-75-76, c 76.

[7] *Imperial Tobacco Trial Decision, supra* note 5.

[8] *Ibid.*

[9] *Ibid* at 11.
[10] *Imperial Tobacco Appellate Decision, supra* note 5.
[11] *Ibid* at 57, 64-66.
[12] *Imperial Tobacco Appellate Decision, supra* note 4 at 53.
[13] More recently, Justice Gans relied upon Clement J.A.'s reasons in the *Imperial Tobacco Appellate Decision* to expressly reject the application of the credulous consumer test under the *Competition Act*. See *R v Stucky*, 216 CCC (3d) 148 (Sup Ct), 53 CPR (4th) 369 at 71, rev'd on other grounds, 2009 ONCA 15, 303 DLR (4th) 1.
[14] Indeed, the last reported English-language decision to apply the "credulous man" standard under the *Competition Act* was decided in 1990. See *R v KT Promotions Ltd.*, [1990] BCJ No. 2893 (Prov Ct), which accepted the credulous consumer standard unless a representation is aimed at a specific group within the general public, in which case the interpretation must be made from the point of view of members of that group.
[15] Bill C-2, *An Act to amend the Combines Investigation Act and the Bank Act and to repeal an Act to amend an Act to amend the Combines Investigation Act and the Criminal Code*, 1st Sess, 30th Parl, 1974 (assented to 15 December 1975).
[16] *Ibid.*
[17] Bill C-256, *An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act*, 3rd Sess, 28th Parl, 1970-71, cl 20(5) (first reading 29 June 1971).
[18] House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl, 1st Sess, No 32 (25 March 1975) at 6 (JC Baillie). See also House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 30th Parl, 1st Sess, No 32 (25 March 1975) at 18 (Hon. Appolloni).
[19] *Tele-Mobile Co v Ontario*, 2008 SCC 12 at para 42, [2008] SCR 305; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68 at para 73, [2012] 3 SCR 489; *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25 at paras 27,43, [2011] 2 SCR 306.
[20] *Ibid.*
[21] *R v Viceroy Construction Co*, 11 OR (2d) 485 (CA), 23 CPR (2d) 281 [*Viceroy*]
[22] *R v Lowe Real Estate Ltd*, 39 CPR. (2d) 266, 40 CCC (2d) 529 [*Lowe*].
[23] *Viceroy, supra* note 21.
[24] *Ibid* at 4.
[25] *Viceroy, supra* note 21 at 15.
[26] *Lowe, supra* note 22 at 1.
[27] *Lowe, supra* note 22 at 3.
[28] 33 OR (2d) 327, 124 DLR (3d) 319 (CA) [*International Vacations*].
[29] *Ibid* at 10.
[30] *Ibid* at 11.
[31] 119 NSR (2d) 52, 18 WCB (2d) 297 (Prov Ct).
[32] *Ibid* at 18.
[33] *Ibid.*

[34] 60 CPR (3d) 473, 20 BLR (2d) 270 (Gen Div).
[35] *Ibid* at 1.
[36] *Ibid* at 18.
[37] *Ibid* at 43.
[38] *Ibid* at 58.
[39] 2009 NSCA 42, 276 NSR (2d) 327.
[40] *Ibid* at 18-31.
[41] Competition Bureau, "Application of the Competition Act to Representations on the Internet" (16 October 2009), online: Competition Bureau <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03134.html>.
[42] See also Competition Bureau, "Asterisks, Disclaimers and Other Fine Print", Misleading Advertising Bulletin (Gatineau: CB, 1 July – 31 December, 1990) at 3-4. While the Bureau has referenced the Supreme Court's approach in *Time* in its June 2015 issue of the Deceptive Marketing Digest, the Bureau also noted that this decision was under the Quebec *Consumer Protection Act*. See Competition Bureau, "Deceptive Marketing Practices Digest", (Gatineau: CB, 10 June 2015), online: Competition Bureau <www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-digest-deceptive-marketing-e.pdf/$FILE/cb-digest-deceptive-marketing-e.pdf>.
[43] *Time, supra* note 2 at 8.
[44] *Ibid* at 10.
[45] *Ibid* at 13-14.
[46] *Consumer Protection Act*, CRSQ c P-40.1 at s 218.
[47] *Richard v Time Inc*, 2007 QCCS 7870, [2007] RJQ 2008.
[48] *Ibid*.
[49] *Richard v Time Inc*, 2009 QCCA 2378 at para 50, [2010] RJQ 3.
[50] *Time, supra* note 2 at 2.
[51] *Time, supra* note 2 at 71.
[52] *Ibid* at 72.
[53] *Ibid* at 38.
[54] *Ibid* at 72.
[55] *Ibid* at 43, 139, 175.
[56] *Ibid* at 68.
[57] *Ibid* at 68.
[58] *Supra* note 1 at s 1.1.
[59] 2013 ONSC 5315 [*Chatr*].
[60] *Ibid* at 18.
[61] *Ibid* at 27.
[62] *Ibid* at 123.
[63] *Ibid* at 123-125.
[64] *Ibid* at 132.
[65] *Ibid* at 126-131
[66] *Ibid* at 132.
[67] *Ibid* at 127.
[68] *Ibid* at 126-127.
[69] *Ibid* at 131.
[70] *Ibid*.
[71] *Ibid*.
[72] *Ibid*.

[73] *Ibid* at 131-132.
[74] *Ibid* at 132.
[75] *Ibid* at 131
[76] 2015 QCCS 1663.
[77] *Ibid* at 1.
[78] *Ibid* at 30.
[79] *Ibid* at 55.
[80] *Ibid.*
[81] *Ibid.*
[82] *Ibid* at 66.

HOUSE OF COMMONS DEBATES

OFFICIAL REPORT

FIRST SESSION—THIRTY-THIRD PARLIAMENT

35 Elizabeth II

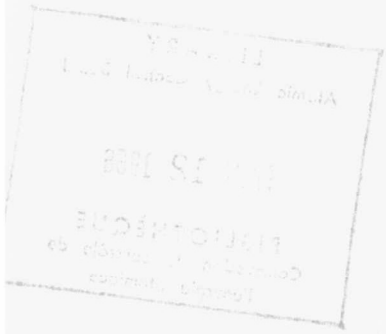
VOLUME VIII, 1986

COMPRISING THE PERIOD FROM THE THIRD DAY OF MARCH, 1986
TO THE EIGHTEENTH DAY OF APRIL, 1986

INDEX ISSUED IN A SEPARATE VOLUME

Published under authority of the Speaker of the House of Commons by the Queen's Printer for Canada

Available from Canadian Government Publishing Centre, Supply and Services Canada, Ottawa, Canada K1A 0S9.



HOUSE OF COMMONS

Monday, March 3, 1986

The House met at 11 a.m.

[*English*]

THE LATE PRIME MINISTER PALME

EXPRESSIONS OF SYMPATHY ON DEATH BY VIOLENCE

Right Hon. Brian Mulroney (Prime Minister): Mr. Speaker, I rise to mourn the loss of Olof Palme, the Prime Minister of Sweden, whose life was tragically cut short last Friday by an assassin's bullet. Olof Palme was not only a great Prime Minister of Sweden, he was a prince of peace and a champion of justice for all mankind. I had the honour of meeting with him on two occasions. I shall never forget his warmth, his vision and determination. It is thus with a personal sense of loss that I express the shock, the outrage and the grief of all Canadians.

Prime Minister Olof Palme was a rare and precious amalgam of idealism and action. His dreams were never idle. He had a vision of social justice in Sweden. He acted. He worked long and hard to help it come true for his own people. He had visions of international peace and progress, and he acted and worked to help those visions come true for all of the world's people.

[*Translation*]

Prime Minister Palme dedicated his intellect, his talents and his energies to the cause of social justice. He did so in his own country, where his passion for justice translated into a social system that has attracted the attention of many Canadians. He did so on the international scene, especially in the case of Third World countries, whose tenacious advocate he had become.

The economic and social development of these countries is one cause he championed at all international venues. The arms race was to him devoid of logic, because it deprived the Third World of resources that were absolutely essential to the well-being of so many people who were still deprived of social justice.

[*English*]

A peacemaker is dead, felled by an act of evil in a land where, until Friday night, a Prime Minister could walk the streets like any private citizen in freedom and complete safety. But though armed cowards have been able to end the life of this great man, they have not been able, and never will be able, to defeat his cause. The shining memory of Olof Palme and the legacy of his love and work will endure to inspire men and women of peace and goodwill throughout the world.

To his injured widow, to his family and to the people of Sweden, we extend our deepest sympathy. We share their grief. Sweden has lost a great Prime Minister. The world has lost a courageous statesman.

Some Hon. Members: Hear, hear!

Right Hon. John N. Turner (Leader of the Opposition): Mr. Speaker, on behalf of the Liberal Party of Canada, I rise to join with the Prime Minister (Mr. Mulroney) and with the Leader of the New Democratic Party (Mr. Broadbent) in offering words of condolence to the family of Olof Palme, to the Swedish Ambassador who is here in the Chamber, and to the people of Sweden for the tragic and yet unexplained shooting of their Prime Minister.

The world recoils in horror and shock that an eloquent voice for peace and human dignity has been so brutally silenced. It is doubly shocking that such an act could take place in one of the most highly civilized, progressive and peaceful nations on the face of the globe.

Mr. Palme, who I knew before and after he became Prime Minister of Sweden, was a dominant force in Swedish politics for the past two decades. He was also a dominant and leading force in that earnest yearning search for world peace. In fact, he shared the world's stage for a number of years with our former Prime Minister, the Right Hon. Pierre Trudeau, who was a close friend of Mr. Palme's, in their joint efforts to encourage the superpowers, the United States and the Soviet Union, to lessen tensions and seek common ground for a real and lasting peace.

I spoke to Mr. Trudeau this morning. He joins with me in sending his condolences to the family of Mr. Palme and to the people of Sweden in their loss. As Mr. Trudeau said, Sweden, under Olof Palme, was a neutral nation. It was non-aligned in the real sense of the word. Mr. Trudeau spoke of Mr. Palme as a "pioneer for peace" and I can only add my heartfelt agreement.

[*Translation*]

Olof Palme vigourously criticized U.S. intervention in Vietnam and had no hesitation in expressing his views on the subject. However, he also strongly denounced interference by the Soviet Union in various regions of the world, especially the invasion of Czechoslovakia and more recently, when the Soviet Union took part in the hostilities in Afghanistan.

[*English*]

Olof Palme was also a champion of the world's poor. Very few world leaders felt as passionately as he did that the plight of poor nations is one of the greatest challenges facing us today. In his own country, he led the fight during the last election in September 1985, to preserve and defend the social

Speaker, is that they recognize the need to take this opportunity, to roll up their sleeves, to amend the Act and to put an end to the uncertainty and the frustration this Act has caused them during the last 18 years.

[*English*]

As the Consumers' Association of Canada stated after I tabled this Bill in December: "The new Competition Act promises real progress for consumers and is a major improvement over current legislation".

The purpose of Bill C-91, as stated in the purpose clause in the Bill, is to maintain and encourage competition in Canada. However, the clause makes it abundantly clear that competition is not to be considered an end in itself. Rather, competition is sought for its effects on the Canadian economy.

There are four main objectives set out in the Bill. The first objective is to promote the efficiency and adaptability of the Canadian economy. This law will help the expansion of the economy and ensure that it can adapt to changing market conditions and create new jobs.

The second objective is to give us a law which allows Canadian companies to compete effectively in world markets and better meet foreign competition in the Canadian market. The Government is committed to making the Canadian economy world competitive.

The third objective in maintaining and promoting competition is to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and there is an urgent need for this, Mr. Speaker.

The fourth but not the least objective is to provide consumers with competitive prices and product choices. As such, this objective becomes the common denominator in what we are trying to achieve. This is the ultimate objective of the Bill.

It is a law which will benefit all Canadians. A competition law which measures up in these respects will benefit every sector of our economy. It will benefit small business by promoting fairness in the marketplace. It will benefit larger businesses by placing greater emphasis on efficiency and international competition. It will also benefit consumers by giving them a marketplace where there is a choice, which will result in better service, products and prices.

We do not have this kind of competition law now and there has been no such law for a long time. As I said when I tabled this Bill we now have before us, the existing law belongs in a museum, certainly not in the marketplace. Canada has changed tremendously since 1910, but not the Combines Investigation Act. Except for a few alterations, it is the same Act our predecessors passed in this House 76 years ago.

[*Translation*]

As for being different, Mr. Speaker, the world certainly was at that time, at least from an economic standpoint, as well as from all others, when the present legislation was originally developed. For instance, the population of Canada was only seven million, that of Montreal, 470,000, that of Vancouver, 124,000, and Canadian exports totalled only $274 million compared with $91 billion today.

However, Mr. Speaker, the economic context is not the only thing to have changed. There is also the legal environment. There was no Canadian Charter of Rights and Freedoms at the time.

In short, Mr. Speaker, that Act is now obsolete with respect to a number of important aspects, and this has become a very serious problem. Our prosperity as a nation depends on the quality of our economic participation in both domestic and external markets. We cannot afford the handicap of an "out of sync", inadequate Competition Act.

Those are the reasons why, Mr. Speaker, this Government has decided to revise the Competition Act, as indicated in the Throne Speech, in the budgets brought down by my colleague the Minister of Finance (Mr. Wilson), and in the statement made by the House Leader on regulatory reform. This legislation is the cornerstone of the Government initiatives designed to make Canada competitive internationally. For the first time, we will have a Competition Act that will reflect the special importance of international trade to the Canadian economy.

Canada is first and foremost a trading nation, and we must make sure that the Act accurately reflects that fact. This is why, Mr. Speaker, the preamble to Bill C-91 clearly states that the purpose of the Act is to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada. The importance of international competition is also emphasized in the proposals concerning mergers and specialization agreements. Moreover, unnecessary constraints resulting from the provisions relating to conspiracy would be abolished to encourage rather than hinder the establishment of export consortiums. Big is not necesseraly bad. In fact, when debating international markets and related goals, the bigger the stronger, the bigger the better.

Although they are strong in relation to the size of our economy, many Canadian businesses when involved on the global stage do not have the clout to compete efficiently with their foreign counterparts. The new provisions would indeed help Canadian businesses face up to their foreign competitors, both domestically and internationally. I would now like, Mr. Speaker, to turn to the major amendments put forward in this legislation—

• (1120)

[*English*]

In an area of law that relies so heavily on economics and business judgment it is very important to have a decision-making body that has the expertise to deal with complex competition cases while still providing the necessary legal protections. We propose to create an entirely new adjudicatory

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

44th PARLIAMENT, 1st SESSION

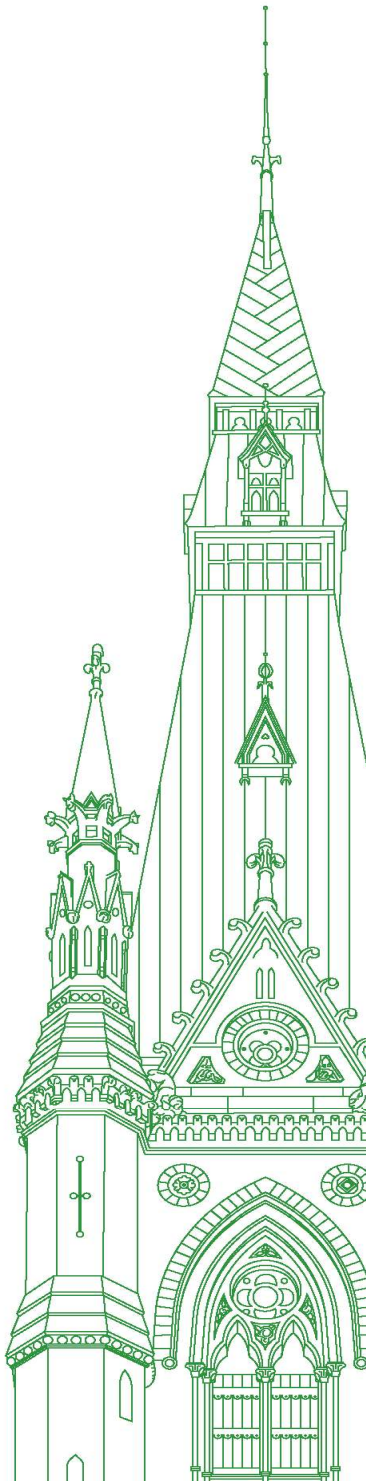
House of Commons Debates

Official Report

(Hansard)

Volume 151 No. 065

Thursday, May 5, 2022



Speaker: The Honourable Anthony Rota

Their goal is simple, which is to ensure that Canadians have a home, to create memories for them and their families. We need to build. That is what we will be doing, and that is what these individuals and these firms do. We will work with them and we will work with the municipalities to ensure that we increase the supply of new home construction across Canada and more than double housing construction over the next 10 years.

On my last topic, I am a strong believer in our free market economic system and in competition. Competition leads to innovation and, yes, disruption as well, but competition in our free market and our capitalist system has brought with it the highest standards of living and pulled literally billions of individuals across the globe out of poverty.

However, competition can be eroded. When anti-competitive practices take hold, and with that, I have long advocated for changes and the strengthening of Canada's Competition Act to ensure that business practices do not hold back innovation and competition, it can be detrimental to the interests of consumers and employees. We must hold back on that.

With that, I am pleased to see, in Bill C-19 significant amendments to the Competition Act, which I know are highly technical, but they are very important. They include a proposed criminal offence for so-called wage-fixing and no-poaching agreements between competitors; an explicit prohibition against drip pricing; private access to Canada's Competition Tribunal for abuse of dominance claims; an increase in administrative monetary penalties; an expansion of the scope of the competition bureau's evidence-gathering powers pertaining to section 7; an expansion of the list of factors that may be considered when assessing the prevention and lessening of competition for merger review and non-criminal competitor collaborations; and the amendment of the definition of anti-competitive act for abuse of dominance.

Competition is the essence of our free market and capitalist system. It is wonderful to see the Minister of Finance and Deputy Prime Minister, along with the Minister of Innovation and their teams, collaborating and working in unison to ensure that anti-competitor practices are both disallowed and that the Competition Act be modernized, which we will need to continue to work on for the penalties to be updated.

There is nothing more important to someone like me than to see healthy competition that leads to innovation, job creation and a growing and strong middle class, and there is nothing that makes me angrier and makes me speak out more than when I see anti-competitive practices take hold in any markets.

● (1240)

Mr. Dan Albas (Central Okanagan—Similkameen—Nicola, CPC): Mr. Speaker, I appreciate the hon. member's intervention today and his attendance at the occasional finance meeting, where we can discuss housing inflation, among other things.

He mentions, specifically, the so-called foreign buyers ban in Bill C-19. The minister has to, first of all, identify a particular property that falls outside the many loopholes and exemptions the government has given for all sorts of people, but if they legitimately find it, the minister has to go through a provincial court process, which can take years, and the ultimate slap on the wrist is $10,000.

Does the hon. member think that taking up court time and years of process to have someone who has violated the law of this country be fined $10,000 is sufficient? Does he think it should be much higher than that?

Mr. Francesco Sorbara: Mr. Speaker, I thank my hon. colleague and friend from the riding of Central Okanagan—Similkameen—Nicola, where they produce a lot of beautiful wine.

I will say this: We need to provide incentives to build and increase the supply of housing in Canada. We are going to be doing that, but we also need to restrain and lower the number of purchases being undertaken by foreigners. We need to have a plan for Canada's housing market to put Canadians first. That is what we are doing. We need to ensure middle-class Canadians and first-time homebuyers have the first opportunity to purchase homes here in the country where they live, work and pay taxes.

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Madam Speaker, I am pleased that my colleague is interested in the housing issue, but it is the construction of homes that is the urgent issue. Supply and demand is a game. The problem is that the supply is inadequate, and this is causing prices to skyrocket. That is the case in major centres, but all too often we forget that this is also happening in the regions and rural areas.

Could my colleague take action to ensure that the funding does not all go to the Toronto region, as is often the case in the Canadian economy with government projects?

Could he take action to ensure that remote and rural regions get their share of the pie and ensure that supply increases in the regions?

We want to address the labour shortage, but the first problem is that people cannot find housing.

Mr. Francesco Sorbara: Madam Speaker, I thank my colleague from Abitibi—Témiscamingue for his question.

[*English*]

I will say this: Housing is an issue from coast to coast to coast. We will act in the interests of all Canadians, be it urban, rural or semi-urban. In whatever category and whatever city, we will work with all our municipal partners and all our provincial partners to ensure that housing gets built, to get shovels in the ground and to increase that supply, which we know we need to do. Supply has not kept up to the need for several years. We need to make those adjustments very quickly.

EVIDENCE

OTTAWA, Wednesday, June 8, 2022

The Standing Senate Committee on National Finance met with videoconference this day at 12:01 p.m. [ET] to study the subject matter of all of Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures.

Senator Percy Mockler (*Chair*) in the chair.

[*English*]

The Chair: Honourable senators, before we begin, I would like to remind senators and witnesses to please keep their microphones muted at all times unless recognized by name by the chair.

[*Translation*]

Honourable senators, witnesses, should any technical challenges arise, particularly in relation to interpretation, please advise the chair or the clerk and we will try to resolve them. If you experience other technical challenges, please contact the ISD Service Desk with the technical assistance number provided.

[*English*]

The use of online platforms does not guarantee speech privacy or that eavesdropping won't be conducted. As such, while conducting committee meetings, all participants should be aware of such limitations and restrict the possible disclosure of sensitive, private and privileged Senate information. Participants should know to do so in a private area and to be mindful of their surroundings.

We will now begin with the official portion of our meeting. I wish to welcome all of the senators and the viewers across Canada who are watching us on sencanada.ca.

My name is Percy Mockler, senator from New Brunswick and Chair of the Standing Senate Committee on National Finance. Now, I would like to introduce the members of the National Finance Committee who are participating in this meeting: Senator Boehm, Senator Dagenais, Senator Duncan, Senator Forest, Senator Galvez, Senator Gerba, Senator Gignac, Senator Loffreda, Senator Marshall, Senator Moncion, Senator Pate and Senator Richards.

Today, we will continue our study on the subject matter of Bill C-19, An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures, which was referred to this committee on May 4, 2022, by the Senate of Canada.

TÉMOIGNAGES

OTTAWA, le mercredi 8 juin 2022

Le Comité sénatorial permanent des finances nationales se réunit aujourd'hui, à 12 h 1 (HE), avec vidéoconférence, pour étudier la teneur complète du projet de loi C-19, Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d'autres mesures.

Le sénateur Percy Mockler (*président*) occupe le fauteuil.

[*Traduction*]

Le président : Honorables sénateurs, avant de commencer, j'aimerais rappeler aux sénateurs et aux témoins que vous êtes priés de mettre votre micro en sourdine en tout temps, à moins que le président ne vous donne la parole.

[*Français*]

Honorables sénateurs et sénatrices, mesdames et messieurs les témoins, si vous éprouvez des difficultés techniques, notamment en matière d'interprétation, veuillez le signaler au président ou à la greffière et nous nous efforcerons de résoudre le problème. Si vous éprouvez d'autres difficultés techniques, veuillez contacter le Centre de services de la DSI en utilisant le numéro d'assistance technique qui vous a été fourni.

[*Traduction*]

L'utilisation de plateformes en ligne ne garantit pas la confidentialité des discours ou l'absence d'écoute. Ainsi, lors de la conduite des réunions de comités, tous les participants doivent être conscients de ces limitations et limiter la divulgation éventuelle d'informations sensibles, privées et privilégiées du Sénat. Les participants doivent savoir qu'ils doivent participer dans une zone privée et être attentifs à leur environnement.

Nous allons maintenant amorcer la portion officielle de notre réunion. Bienvenue à tous les sénateurs et sénatrices et aussi à tous les Canadiens qui nous regardent sur sencanada.ca.

Je m'appelle Percy Mockler; je suis sénateur du Nouveau-Brunswick, et président du Comité sénatorial permanent des finances nationales. J'aimerais maintenant vous présenter les membres du Comité des finances nationales qui participent à la réunion : le sénateur Boehm, le sénateur Dagenais, la sénatrice Duncan, le sénateur Forest, la sénatrice Galvez, la sénatrice Gerba, le sénateur Gignac, le sénateur Loffreda, la sénatrice Marshall, la sénatrice Moncion, la sénatrice Pate et le sénateur Richards.

Aujourd'hui, nous continuons notre étude sur la teneur complète du projet de loi C-19, Loi portant exécution de certaines dispositions du budget déposé au Parlement le 7 avril 2022 et mettant en œuvre d'autres mesures, qui a été renvoyé à notre comité par le Sénat du Canada le 4 mai 2022.

At a time when the government is trying to attract investment and rebuild our economy, a tax that guts homegrown manufacturing and retail businesses makes no sense. Instead of supporting our industry as a vital part of Canada's recovery, this tax is picking winners and losers in outdoor recreation.

The luxury tax also has the potential to damage Canada's trade relations. Concerns have been raised by the boating industry in the United States that this tax directly attacks our Canada-U.S.-Mexico Agreement. Similarly, our trading partnership in the U.K. and the European Union could be hurt by what many may see as an indirect tariff on boats.

In conclusion, I want to draw attention to the latest report released by the Parliamentary Budget Officer stating that there will be a $2.9 billion loss in sales from boats, aircraft and cars. However, $2.1 billion, which is 75% of the loss, is expected to come from boats. This is a complete assault on the boating industry.

I saw that yesterday there was an amendment passed removing the September 1, 2022, implementation date for the aerospace industry. That's wonderful news. However, if 75% of the loss is expected from the boating industry, it would be only logical to have a similar amendment for boats to save jobs and not decimate the industry in Canada.

Thank you, Mr. Chair.

The Chair: Thank you, Madam.

Now I will recognize Mr. Mark Agnew, Canadian Chamber of Commerce, to be followed by Ms. Rahmati and Mr. Barnable. The floor is yours, Mr. Agnew.

Mark Agnew, Senior Vice-President, Canadian Chamber of Commerce: Chair and honourable members, it is a pleasure to be here today to discuss Bill C-19. I will focus my remarks on both the competition policy aspects of the legislation as well as the luxury goods tax. I will start with competition policy.

Given the evolving nature of the economy, our competition policies need to keep pace. However, getting it right is critical. This means robust consultations with stakeholders, including not

propriétés de loisir, de nombreuses familles choisissent d'acheter un bateau comme chalet.

À un moment où les gouvernements tentent d'attirer les investissements et de reconstruire notre économie, cela n'a aucun sens d'imposer une taxe qui coupe les vivres des entreprises de fabrication et de ventes au détail locales. Au lieu de soutenir notre industrie, pourtant essentielle à la relance du Canada, cette taxe va déterminer qui seront les gagnants et les perdants dans le secteur des loisirs de plein air.

Cette taxe de luxe risque également d'affaiblir les relations commerciales du Canada. L'industrie américaine de la navigation de plaisance a soulevé des préoccupations quant au fait que cette taxe attaque directement l'Accord Canada—États-Unis—Mexique. Dans le même ordre d'idées, notre partenariat commercial avec le Royaume-Uni et l'Union européenne pourrait être miné par ce que beaucoup considèrent comme un tarif douanier indirect sur les bateaux.

Pour conclure, j'aimerais attirer votre attention sur le dernier rapport publié par le directeur parlementaire du budget selon lequel il pourrait y avoir des pertes de 2,9 milliards de dollars en ventes pour les bateaux, les aéronefs et les voitures. De plus, 2,1 milliards de dollars, c'est-à-dire 75 % de cette perte, seraient attribuables aux bateaux. Il s'agit absolument d'une attaque dirigée contre l'industrie nautique.

J'ai vu, hier, qu'un amendement avait été adopté pour retirer la date de mise en œuvre du 1er septembre 2022 pour l'industrie aérospatiale. C'est une excellente nouvelle, mais si on s'attend à ce que 75 % des pertes soient attribuables à l'industrie nautique, il ne serait que logique d'adopter un amendement similaire pour les bateaux afin de sauver les emplois et d'éviter de dévaster l'industrie canadienne.

Merci, monsieur le président.

Le président : Merci, madame.

Je donne maintenant la parole à M. Mark Agnew, de la Chambre de commerce du Canada, puis ce sera à Mme Rahmati et à M. Barnable. Vous avez la parole, monsieur Agnew.

Mark Agnew, premier vice-président, Chambre de commerce du Canada : Monsieur le président, honorables sénateurs et sénatrices, c'est un plaisir d'être ici aujourd'hui pour discuter du projet de loi C-19. Je vais surtout axer mes commentaires sur les dispositions de la loi qui traitent de la politique en matière de concurrence et de la taxe sur les produits de luxe. Je vais commencer par la politique en matière de concurrence.

Compte tenu de la nature changeante de l'économie, nos politiques en matière de concurrence doivent suivre le rythme, mais il est tout de même essentiel de bien faire les choses. Cela

only the business community but also representatives from the legal community, civil society and consumers, among others.

The chamber is particularly concerned with three elements and hopes that these will not be part of an omnibus bill but, rather, be part of the fuller review of the Competition Act that has been promised by Innovation, Science and Economic Development Canada, or ISED, for later this year.

First is the abuse of dominance provisions and the codifying of a number of definitions. An overly broad approach to defining what anti-competitive behaviour is particularly problematic because every act of competition may — at least in the eyes of a competitor — "impede" their progress or expansion. Indeed, an act seen to outdo a competitor is at the very heart of healthy and necessary competition in the economy. Clarity is also needed in areas like privacy given we have a separate privacy regulator at the federal level in this country. While some have argued that these proposals could codify existing practice, we should not be haphazard given that legislation cannot be changed on a whim.

Second is the changes to penalties. The proposed changes to administrative monetary penalties represent a significant overcorrection in our view. Such significant penalties of up to 3% of global revenues are problematic when the provisions are being expanded and companies are left without the benefit of jurisprudence to fall back on to understand their implications. The penalties additionally scope-in company activities that are not linked to violations that could potentially be occurring here in Canada.

Third are the no-poach provisions in the legislation. As others have pointed out in separate forums, this poses challenges in the franchise context, where companies have provisions written into contracts, often as a means to ensure that their investments in employee training are not being undermined. There are also interactions with provincial labour laws and how that would interact is not clear at the moment.

I don't have specific amendments to offer the committee today due to the time that we as a business organization need to consult our members that sit across different sectors.

veut dire de mener des consultations robustes avec les intervenants, y compris le milieu des affaires, mais aussi d'autres représentants du milieu juridique, de la société civile et des groupes de consommateurs, entre autres.

Il y a trois éléments en particulier qui préoccupent la Chambre, et nous espérons que ces éléments seront retirés du projet de loi omnibus, afin qu'ils soient placés sous l'égide de l'examen complet de la Loi sur la concurrence qu'Innovation, Sciences et Développement économique Canada — ou ISDE — a promis d'entreprendre plus tard cette année.

Le premier élément concerne les dispositions relatives à l'abus de position dominante et la codification d'un certain nombre de définitions. L'adoption d'une définition trop large de ce qui est anticoncurrentiel pose surtout particulièrement problème, puisque tout acte de concurrence peut — du moins, du point de vue d'un concurrent — « entraver » sa progression ou son expansion. En effet, une action visant à surpasser un concurrent est au cœur même de la concurrence saine et nécessaire. La clarté des définitions est aussi nécessaire dans des domaines comme la protection des renseignements personnels, puisque nous avons un organisme de réglementation fédéral distinct en matière de protection de la vie privée au Canada. Même si certains ont fait valoir que ces propositions pourraient codifier la pratique existante, nous ne devrions pas modifier à l'aveuglette le cadre législatif, étant donné qu'une loi ne peut être modifiée sur un coup de tête plus tard.

Le deuxième élément concerne les modifications apportées aux sanctions. Les modifications proposées aux sanctions administratives pécuniaires représentent une correction excessive, de notre point de vue. Des sanctions aussi lourdes, pouvant aller jusqu'à 3 % des revenus mondiaux, posent un problème lorsque les dispositions sont élargies et que les entreprises ne bénéficient plus de la jurisprudence existante pour les interpréter. Les sanctions s'appliquent en outre à des activités organisationnelles internes qui ne sont pas liées à des violations qui pourraient être commises au Canada.

Le troisième élément concerne les dispositions relatives aux accords de non-débauchage dans le projet de loi. D'autres ont souligné, dans des tribunes distinctes, que cela pose problème dans le contexte des franchises, où les contrats des entreprises comportent souvent les dispositions pour garantir que les investissements dans la formation de leurs employés ne sont pas minés. Il faut aussi tenir compte des interactions avec les lois du travail provincial, et nous ne voyons pas clairement, actuellement, comment tout cela va interagir.

Je n'ai pas de modifications précises à présenter au comité aujourd'hui, puisque nous, en tant qu'organisation commerciale, devons toujours prendre le temps de consulter nos membres appartenant aux différents secteurs.

Despite the assertions made by some that we should make the changes now and figure it out later through administrative guidance or reopening it in the phase two review, I'm not sure this is the right approach that we should take. Ultimately, we don't know what will happen with the review given that it hasn't yet begun. While there may be a tendency to view the Competition Act changes in the context of the current inflationary environment, the current drivers of inflation in the economy would not be addressed by what's included in the Budget Implementation Act.

I want to briefly shift now to the proposed luxury goods tax. Members will be aware from other witnesses that have spoken today about what the luxury goods tax means for the Canadian economy. The industry, especially the aerospace industry, is still in recovery mode from the pandemic. Many concerns that we've heard from our members echo what Mr. Mueller has said about the concerns that he's also heard from his members in the aerospace industry.

There are a number of specific amendments that we'd like to see if the legislation is advanced, including exemptions for exports and liabilities when it comes to usage by the buyer after the sale has occurred.

Again, as other witnesses have also pointed out, it's useful to know what the impact of such a tax has been in other jurisdictions and how, in particular, the United States experience can be something that we learn lessons from here in Canada.

Thank you for the opportunity to make these comments. I look forward to the questions from senators later.

Stuart Barnable, Director of Operations, Canada's Building Trades Unions: Thank you to the members of the committee for the invitation to appear today.

I'm joined by my colleague Rita, our government relations specialist. CBT represents 14 international construction unions with a combined membership of over 3 million unionized workers across North America of which 600,000 are in Canada. The men and women of the building trades are employed anywhere from small developments to billion-dollar construction projects through to the operation, renovation, maintenance and the repurposing of plants, factories and facilities. This construction and maintenance sector annually represents approximately 6% of Canada's GDP.

Today we're here to talk about how Bill C-19 impacts the building trades. This bill includes some important wins for workers, including something we have long advocated for, a

Même si certains affirment que nous devrions apporter ces modifications maintenant et régler les problèmes plus tard au moyen de directives administratives ou en rouvrant la loi lors de la deuxième phase de l'examen, je ne suis pas convaincu qu'il s'agit de la bonne façon de procéder. Au bout du compte, nous ne savons pas ce qui ressortira de cet examen, puisqu'il n'a pas encore commencé. Même si on peut avoir tendance à voir ces modifications de la Loi sur la concurrence dans le contexte de l'environnement inflationniste actuel, ce qu'on propose ici dans la Loi d'exécution du budget ne permettra pas de compenser les pressions inflationnistes actuelles dans l'économie.

Je vais maintenant aborder brièvement le sujet de la taxe proposée sur les produits de luxe. Compte tenu des témoignages précédents aujourd'hui, vous saurez quelles répercussions cette taxe sur les produits de luxe aura sur l'économie canadienne. L'industrie, en particulier l'industrie aérospatiale, tente toujours de se remettre de la pandémie. Nos membres partagent un grand nombre des préoccupations que M. Mueller a soulevées en parlant des préoccupations des membres de l'industrie aérospatiale.

Il y a un certain nombre de modifications précises que nous aimerions voir apporter au projet de loi, s'il doit aller de l'avant, notamment des exemptions pour les exportations et le traitement des dettes en ce qui concerne l'utilisation par l'acheteur après une vente.

Encore une fois, comme l'ont souligné les autres témoins, il est utile de comprendre les effets qu'une telle taxe a eus dans les autres pays. En particulier, nous devrions tirer des leçons ici au Canada de l'expérience des États-Unis.

Je vous remercie de m'avoir permis de présenter cet exposé. Je serai heureux de répondre aux questions des sénateurs et des sénatrices, plus tard.

Stuart Barnable, directeur des opérations, Syndicats des métiers de la construction du Canada : Je remercie les membres du comité de l'invitation à témoigner aujourd'hui.

Je suis accompagné de ma collègue, Mme Rahmati, qui est notre spécialiste en relations gouvernementales. Les Syndicats des métiers de la construction du Canada représentent 14 syndicats internationaux de la construction, qui regroupent plus de 3 millions de travailleurs syndiqués en Amérique du Nord, dont 600 000 au Canada. Les hommes et les femmes des métiers de la construction sont employés dans tout type de projets, des petits aménagements aux projets de construction de plusieurs milliards de dollars, que ce soit pour l'exploitation, la rénovation, l'entretien ou la réfection des usines et des installations. Le secteur de la construction et de l'entretien représente environ 6 % du PIB annuel du Canada.

Nous sommes ici aujourd'hui pour parler des conséquences du projet de loi C-19 sur les métiers de la construction. Ce projet de loi comprend d'importantes victoires pour les travailleurs, entre

Mr. Mueller: As senators well know, businesses thrive on consistency and predictability. We're encouraged by the amendment but not satisfied. We will need to have some pretty frank consultations, and we will have to see further amendments in order to mitigate the serious negative impacts of the tax.

There is still some uncertainty there. As I said before, we're seeing companies lose some sales because of it. I am looking forward to the discussions with the government on that to mitigate the seriously negative impacts of the bill as it is currently drafted.

Senator Loffreda: My question is for the Canadian Chamber of Commerce. We talked substantially about the luxury tax. Given the fact that you are here, I'm interested in knowing your perspective on other matters with the budget bill.

Are your members satisfied with the other elements in the budget bill, for example, the changes being proposed in Bill C-19 to the Competition Act? I am thinking, for instance, of the wage fixing and the no-poach agreements in Division 15 of Part 5 of the bill. Is this something the chamber has called for?

To what extent have your members been consulted for the budget bill? We discussed consultation with respect to the luxury tax in detail, but are there any other elements being disputed in the budget bill?

I know the government is making efforts to improve links to the business community which, according to many, was much needed. Do you see improvements? Are we getting there?

Mr. Agnew: Thank you, senator, for the question. The direct answer would be that no, we're not happy with certain changes that are in the budget with relation to the Competition Act. The three that we have concerns about are the changes to the abuse of dominance provisions, the penalties and the no-poach provisions.

Similar to some of the conversations earlier today about luxury goods, we were not consulted on those specific changes in the budget. We saw the budget document in April that alluded to the fact that these changes would be coming, but we saw the legislation at the same time everyone else did. These are complex legal matters and that is why we urged that these three measures be taken out for further consultation and be put into what the government has already committed to doing with a broader review of the Competition Act.

M. Mueller : Comme les sénateurs le savent bien, les entreprises prospèrent grâce à la constance et à la prévisibilité. Nous sommes encouragés par l'amendement, mais nous ne sommes pas satisfaits. Nous devrons mener des consultations assez franches, et voir d'autres amendements pour atténuer les graves répercussions négatives de la taxe.

Il subsiste une certaine incertitude. Comme je l'ai dit auparavant, nous voyons des entreprises perdre des ventes à cause de cette taxe. J'attends avec impatience les discussions avec le gouvernement à ce sujet afin d'atténuer les répercussions négatives graves du projet de loi tel qu'il est actuellement rédigé.

Le sénateur Loffreda : Ma question s'adresse à la Chambre de commerce du Canada. Nous avons beaucoup parlé de la taxe sur certains biens de luxe. Étant donné que vous êtes ici, j'aimerais connaître votre point de vue sur d'autres questions relatives au projet de loi d'exécution du budget.

Vos membres sont-ils satisfaits des autres éléments du projet de loi d'exécution du budget, par exemple, les changements proposés dans le projet de loi C-19 à la Loi sur la concurrence? Je pense par exemple à la fixation des salaires et aux accords de non-débauchage à la section 15 de la partie 5 du projet de loi. Est-ce quelque chose que la Chambre a demandé?

Dans quelle mesure vos membres ont-ils été consultés concernant le projet de loi d'exécution du budget? Nous avons discuté en détail de consultation concernant la taxe sur certains biens de luxe, mais y a-t-il d'autres éléments qui sont contestés dans le projet de loi d'exécution du budget?

Je sais que le gouvernement s'efforce d'améliorer les liens avec le milieu des affaires, ce qui, d'après de nombreuses personnes, était fort nécessaire. Voyez-vous des améliorations? Sommes-nous sur la bonne voie?

M. Agnew : Merci, monsieur le sénateur, de poser la question. La réponse directe serait que non, nous ne sommes pas heureux de certains changements dans le budget concernant la Loi sur la concurrence. Les trois qui nous préoccupent sont les changements des dispositions sur l'abus de position dominante, les sanctions et le non-débauchage.

Tout comme certaines des conversations qui ont eu lieu plus tôt aujourd'hui au sujet des biens de luxe, nous n'avons pas été consultés sur ces changements particuliers dans le budget. Nous avons vu en avril le document budgétaire qui faisait allusion au fait que ces changements allaient arriver, mais nous avons vu la loi en même temps que tout le monde. Il s'agit de questions juridiques complexes, et c'est pourquoi nous avons insisté pour que ces trois mesures soient retirées afin que l'on mène une consultation plus approfondie et intégrée dans ce que le

CT-2015-001

THE COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34 as amended;

AND IN THE MATTER of a Consent Agreement pursuant to section 74.12 of the *Competition Act* with respect to certain deceptive marketing practices of Aviscar Inc. and Budgetcar Inc. under paragraph 74.01(1)(a) and sections 74.05 and 74.011 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

AVISCAR INC. and BUDGETCAR INC. / BUDGETAUTO INC.

Respondents

CONSENT AGREEMENT

WHEREAS the Commissioner is responsible for the administration and enforcement of the *Competition Act*;

AND WHEREAS the Respondents Aviscar and Budgetcar operate a car rental services business across Canada and also offer Related Products such as GPS systems, child safety seats, insurance products and roadside assistance services;

AND WHEREAS the Respondents are indirect subsidiaries of ABC Rental and Avis Budget Group;

AND WHEREAS the Respondents made Representations to the public about the price at which consumers could rent cars and Related Products and also about percentage-off discounts;

AND WHEREAS one or both of the Respondents made these Representations to the public starting from at least 2009 on their Websites, Mobile Apps, and Emails, as well as in certain of their newspaper advertisements, television commercials, and flyers;

AND WHEREAS the Respondents charged consumers Non-Optional Fees in addition to the prices initially advertised;

AND WHEREAS the Commissioner has concluded that the Respondents' Non-Optional Fees may increase the cost of a car rental by 5% to 20%, depending on the rental location and vehicle type;

AND WHEREAS the Commissioner has concluded that certain of the Respondents' initial price representations created the general impression that consumers could rent cars and Related Products at prices that were not in fact attainable, because consumers were required to pay these additional Non-Optional Fees;

AND WHEREAS the Commissioner has concluded that certain of the Respondents' discount representations created the general impression that consumers could save on the cost of a car rental and Related Products at discounts that were not in fact attainable, because consumers were required to pay these additional Non-Optional Fees, certain of which were not discounted;

AND WHEREAS the Commissioner has concluded that the words chosen by the Respondents to describe certain of the Non-Optional Fees, where they were placed, and how they were combined with actual taxes, created the general impression that they were taxes, surcharges and/or fees that governments and authorized agencies required rental car companies to collect from consumers;

AND WHEREAS the Commissioner has concluded it was the Respondents who chose to impose Non-Optional Fees on consumers to recoup part of their own cost of doing business;

AND WHEREAS the Commissioner has concluded that the Respondents made Representations to the public that were false or misleading in a material respect for the purpose of promoting the supply or use of their rental cars and Related Products, and their business interests more generally;

AND WHEREAS the Commissioner has concluded that the Respondents engaged in conduct reviewable pursuant to paragraph 74.01(1)(a) and section 74.011 of the *Competition Act*;

AND WHEREAS the Commissioner acknowledges that the Respondents undertook a number of voluntary and proactive steps at least as early as December 2014 to address the conduct at issue, including changing many of their representations regarding certain Non-Optional Fees and redesigning certain of their Canadian websites in July 2015 so that consumers are shown the total estimated price for a rental, inclusive of Non-Optional Fees, the first time they are shown a price;

AND WHEREAS the Commissioner acknowledges that, since at least 2009, the Respondents informed consumers of the total estimated price for their rental before a car rental reservation was completed;

AND WHEREAS IT IS AGREED AND UNDERSTOOD that for the purposes of this Agreement only, including execution, registration, enforcement, variation or rescission of this Agreement, the Respondents do not contest the Commissioner's conclusions but nothing in this Agreement shall be taken as an admission or acceptance by the Respondents of any facts, wrongdoing, submissions, legal argument or conclusions for any other purpose nor shall it derogate from any rights or defences of the Respondents against third parties including any defences available under the *Competition Act*;

AND WHEREAS the Parties are satisfied that this matter can be resolved with the registration of this Agreement which, upon registration, shall have the same force and effect as an order of the Tribunal;

AND WHEREAS IT IS AGREED AND UNDERSTOOD that upon registration of this Agreement, these proceedings shall be terminated as against the Respondents, ABC Rental and Avis Budget Group pursuant to subsection 74.12(4) of the *Competition Act*;

NOW THEREFORE, in order to resolve the Commissioner's concerns, the Parties hereby agree as follows:

I. INTERPRETATION

1. For the purpose of the Agreement, the following definitions shall apply:

    a. "**ABC Rental**" means Avis Budget Car Rental Services, LLC, a limited liability corporation incorporated pursuant to the laws of Delaware;

    b. "**Affiliate**" means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the *Competition Act*;

    c. "**Agreement**" means this Consent Agreement entered into by the Parties pursuant to section 74.12 of the *Competition Act*, including Appendix "A" hereto;

    d. "**Avis Budget Group**" means Avis Budget Group, Inc., a corporation incorporated pursuant to the laws of Delaware;

    e. "**Aviscar**" means Aviscar Inc., a corporation incorporated pursuant to the laws of Canada, its directors, officers, employees, agents, representatives, successors and assigns, and all joint ventures, subsidiaries, divisions and Affiliates controlled by it within the meaning of subsection 2(4) of the

Competition Act, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

f. "**Base Rate**" means the price for a rental car and/or a Related Product for time and/or mileage only, exclusive of Non-Optional Fees and federal and provincial sales taxes;

g. "**Budgetcar**" means Budgetcar Inc. / Budgetauto Inc., a corporation incorporated pursuant to the laws of Canada, its directors, officers, employees, agents, representatives, successors and assigns, and all joint ventures, subsidiaries, divisions and Affiliates controlled by it within the meaning of subsection 2(4) of the *Competition Act*, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

h. "**Commissioner**" means the Commissioner of Competition appointed pursuant to section 7 of the *Competition Act*, and his or her authorized representatives;

i. "***Competition Act***" means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

j. "**Email**" means any electronic message sent by or on behalf of the Respondents to persons in Canada relating to car rental services or Related Products supplied directly by the Respondents;

k. "**Execution Date**" means the date on which the Agreement has been signed by both Parties;

l. *"**Interpretation Act**"*, means the *Interpretation Act*, R.S.C. 1985, c. I-21, as amended;

m. "**Mobile Applications**" means any Avis or Budget branded mobile application that display prices for rental cars or Related Products that the Respondents supply;

n. "**Non-Optional Fees**" means any charges, surcharges, fees, or other amounts, excluding applicable provincial and federal sales taxes, that are charged in addition to Base Rates and that consumers are required to pay to rent a car or Related Products. Non-Optional Fees include, but are not limited to, "Surtaxe Stationnement", "Surtaxe Emplacement Prestige", "Taxe de mise au rebut des pneumatiques", "Taxe environnementale de l'Ontario", "Taxe d'accise sur la climatisation", "Car Tax", "Vehicle License Fee/AC Excise Tax", "Ontario Environmental Fee", "Tire Management Fee", "Energy

Recovery Fee", "Parking Surcharge", "Concession Recovery Fee", "Premium Location Surcharge", "Other Charges", and "Fees";

o. "**Parties**" means the Commissioner and the Respondents collectively, and **"Party"** means any one of them;

p. "**Person**" means any individual, corporation, partnership, firm, association, trust, unincorporated organization, or other entity;

q. "**Related Products**" includes GPS systems, child safety seats, insurance products, and roadside assistance services;

r. "**Representations**" means any and all representations made, caused to be made, or permitted to be made by or on behalf of the Respondents including any representation on the Websites, Mobile Applications, and any Email, flyer, television commercial, or newspaper advertisement;

s. "**Respondents**" means Aviscar Inc., and/or Budgetcar Inc.;

t. "**Respondents' Marketing Personnel**" means all current and future Respondents' employees and Respondents' Senior Management who are materially involved in or responsible for the formulation or the implementation of advertising, marketing or pricing for products the Respondents supply;

u. "**Respondents' Senior Management**" means the current and future Chief Executive Officer, Chief Operating Officer, Chief Administrative Officer, Chief Financial Officer, Chief Accounting Officer, President, Vice Presidents, Secretary, Controller, General Manager, Managing Directors, and any individual who performs their functions;

v. "**Websites**" means Avis.ca, Avis.com, Budget.ca, and Budget.com, as used by those who identify themselves as residents of Canada; and

w. "**Tribunal**" means the Competition Tribunal established by subsection 3(1) of *Competition Tribunal Act*, R.S.C., 1985, c. 19 (2nd Supp.), as amended.

II. COMPLIANCE WITH THE DECEPTIVE MARKETING PRACTICES PROVISIONS OF THE *COMPETITION ACT*

2. Within 90 days of the Execution Date, the Respondents shall comply with Part VII.1 of the *Competition Act*.

3. Without limiting the generality of the foregoing, within 90 days of the Execution Date, the Respondents shall not make, cause to be made, or permit to be made on their behalf any representation to the public with respect to any product that

creates a materially false or misleading general impression that:

a. consumers can rent cars and Related Products at prices or percentage-off discounts that are not in fact attainable because of the existence of additional Non-Optional Fees; or

b. any Non-Optional Fees are taxes, surcharges or fees that governments and authorized agencies require rental car companies to collect from consumers, unless that is in fact the case.

4. If the Respondents become aware that there has been a breach or possible breach of any terms of this Agreement, the Respondents shall, within ten (10) days after becoming aware of the breach or possible breach, notify the Commissioner thereof, and shall provide details sufficient to describe the nature, date and effect (actual and anticipated) of the breach or possible breach, and the steps the Respondents have taken to correct the breach or possible breach.

III. PAYMENTS

ADMINISTRATIVE MONETARY PENALTY

5. The Respondents shall pay an administrative monetary penalty in the amount of $3,000,000 dollars.

COSTS

6. The Respondents shall pay $250,000 dollars for costs incurred by the Commissioner during the course of his investigation into this matter.

FORM AND TIME OF PAYMENT

7. The payments referred to in paragraphs 5 and 6 shall be made within 30 days after the Execution Date by certified cheque or by wire transfer payable to the Receiver General for Canada.

IV. CORPORATE COMPLIANCE PROGRAM

8. Within 90 days after the Execution Date, the Respondents shall establish, and thereafter maintain, a corporate compliance program, the goal of which will be to promote the compliance of the Respondents with the *Competition Act* generally, and Part VII.1 of the *Competition Act* specifically. The compliance program shall be framed and implemented in a manner consistent with the Commissioner's bulletin titled "Corporate Compliance Programs", as published (as of the Execution Date of this Agreement) on the Competition Bureau's website at www.competitionbureau.ca.

9. The Respondents' Senior Management shall fully support and enforce the compliance program and shall take an active and visible role in its establishment and maintenance.

10. Within 21 days after the establishment of the compliance program, each member of Respondents' Senior Management shall acknowledge his or her commitment to the compliance program by signing and delivering to the Commissioner a commitment letter in the form set out in Appendix "A" of this Agreement. Any individual that becomes a member of Respondents' Senior Management during the term of this Agreement shall sign and deliver to the Commissioner a commitment letter in the form set out in Appendix "A" of this Agreement, within 21 days of becoming a member of Respondents' Senior Management.

V. COMPLIANCE REPORTING AND MONITORING

11. The Respondents shall provide the Commissioner written confirmation that all Respondents' Marketing Personnel has received a copy of this Agreement, as required by paragraph 14, within 21 days after the registration of this Agreement.

12. For the purposes of monitoring compliance with this Agreement, the Respondents shall provide to the Commissioner information relating to any matters referred to in Parts II, IV and V of this Agreement that the Commissioner requests, within 30 days following receipt of a written request from the Commissioner.

13. No later than 120 days after the Execution Date, the Vice President and General Manager of the Respondents shall provide to the Commissioner a statement under oath or solemn affirmation that the compliance program required by Part IV of this Agreement has been implemented.

VI. GENERAL

14. During the term of this Agreement, (i) the Respondents shall provide a copy of this Agreement to all Respondents' Marketing Personnel within 14 days after the date of registration of this Agreement, and (ii) all future Respondents' Marketing Personnel will be provided with a copy of this Agreement within 14 days after his or her commencement of employment. Within 14 days after being provided with a copy of this Agreement, the Respondents shall secure from each such person a signed and dated statement acknowledging that he or she read and understood this Agreement and Part VII.1 of the Act.

15. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the Parties at the following addresses:

(a) <u>The Commissioner</u>:

Commissioner of Competition
Competition Bureau
Place du Portage, 21st Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9
Attention: Senior Deputy Commissioner of Competition, Cartels and Deceptive Marketing Practices Branch

Facsimile: (819) 956-2836

With a copy to:

Executive Director and Senior General Counsel
Competition Bureau Legal Services
Department of Justice
Place du Portage, 22nd Floor
50 Victoria Street, Phase I
Gatineau, Quebec K1A 0C9

Facsimile: (819) 953-9267

(b) <u>The Respondents</u>:

Aviscar Inc. and Budget Car Inc.
1 Convair Dr. E.
Etobicoke, ON M9W 6Z9
Attention: Vice President and General Manager

Facsimile: (416) 213-8505

With a copy to:

Kevin Ackhurst & D. Michael Brown
Norton Rose Fulbright Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4

Facsimile: (416) 216-3930

16. This Agreement shall be binding upon the Respondents for a period of 10 years following its registration.

17. The Parties consent to the immediate registration of this Agreement with the Tribunal pursuant to section 74.12 of the *Competition Act*.

18. The Commissioner may, in his sole discretion and after informing the Respondents in writing, extend any of the time frames in Parts IV and V of this Agreement.

19. The Commissioner may, with the consent of the Respondents, extend any of the time frames in Part VI of this Agreement.

20. Nothing in this Agreement precludes a Respondent or the Commissioner from bringing an application under section 74.13 of the *Competition Act*. The Respondents will not, for the purposes of this Agreement only, including execution, registration, enforcement, variation or rescission, contest the Commissioner's conclusions as stated herein.

21. The Respondents shall not make any public statements that contradict the terms of this Agreement.

22. The Respondents attorn to the jurisdiction of the Tribunal for the purposes of this Agreement and any proceeding initiated by the Commissioner relating to this Agreement for variation or rescission.

23. In the event of a dispute regarding the interpretation, implementation or application of this Agreement, any of the Parties shall be at liberty to apply to the Tribunal for an order or directions. In no event shall any dispute suspend any time period under the Agreement. The Parties agree that the Tribunal has jurisdiction to make such order as is required to give effect to this Agreement.

24. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.

25. The Agreement constitutes the entire and only agreement between the Parties and supersedes all previous negotiations, communications and other agreements, whether written or oral, unless they are incorporated by reference herein. There are no terms, covenants, representations, statements or conditions binding on the Parties other than those contained herein.

26. The computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*. For the purpose of this Agreement, the

definition of "holiday" in the *Interpretation Act* shall include Saturday. For the purposes of determining time periods, the date of this Agreement is the last date on which it is executed by a Party.

27. The Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein, without applying any otherwise applicable conflict of law rules.

The undersigned hereby agree to the filing of the Agreement with the Tribunal for registration.

DATED at Buenos Aires, Argentina this 30th day of May, 2016.

for: Aviscar Inc. and
Budgetcar Inc. / Budgetauto Inc.

"William Boxberger"

William Boxberger
Vice President and General Manager
I have authority to bind the corporation.

DATED at Gatineau, in the Province of Quebec this 1st day of June, 2016.

"John Pecman"

John Pecman
Commissioner of Competition

"APPENDIX A"

ACKNOWLEDGEMENT BY SENIOR MANAGEMENT

[Corporate Company Letterhead]

[date], 2016

CONFIDENTIAL

Commissioner of Competition
Competition Bureau
Place du Portage, Phase 1
50 Victoria Street, 21st Floor
Gatineau (QC) K1A 0C9

RE: Commitment to Establishment and Maintenance of Compliance Program

Further to Paragraph 10 of the Consent Agreement between the Commissioner of Competition (the "Commissioner") and Aviscar Inc., Budgetcar Inc. / Budgetauto Inc. ("Avis/Budget"), dated May __, 2016, I hereby commit to the successful implementation of Avis/Budget's corporate compliance program for the purpose of promoting compliance with the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), including the deceptive marketing practices provisions in Part VII.1 of the Act. I will take an active and visible role in the establishment and maintenance of the corporate compliance program.

Sincerely,

_____

(Name and title)

cc: Executive Director and Senior General Counsel, Competition Bureau Legal Services

Deputy Commissioner of Competition, Deceptive Marketing Practices Directorate, Cartels and Deceptive Marketing Practices Branch

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

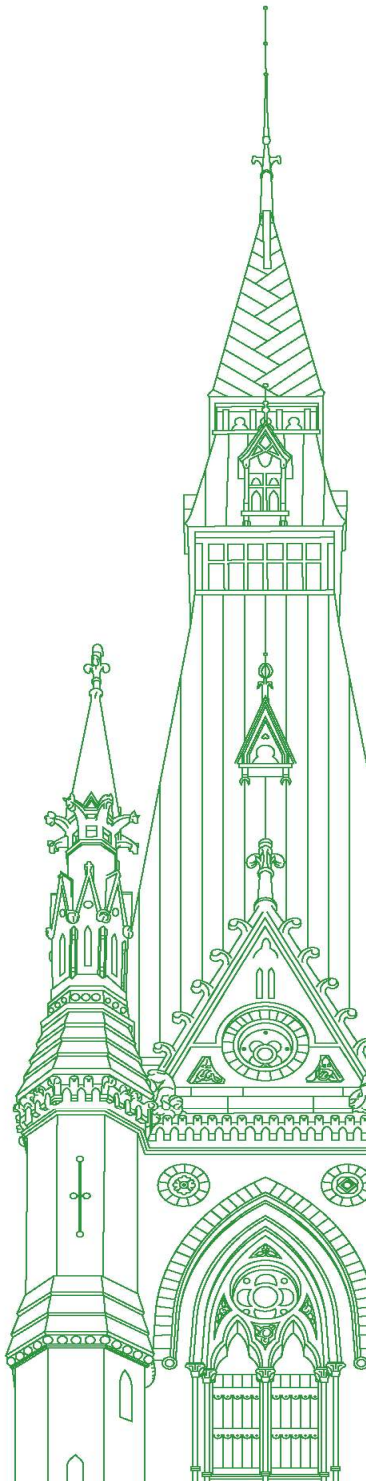
44th PARLIAMENT, 1st SESSION

Standing Committee on Finance

EVIDENCE

NUMBER 049

Thursday, May 19, 2022



Chair: Mr. Peter Fonseca

Let me just say that competition policy is a major focus of the provisions of Bill C-19. It's also a major focus for the C.D. Howe Institute, particularly of my colleague Ben Dachis, who has been introduced already. He's our internal lead on the institute's competition policy council, and I turn my remaining time over to Ben.

Mr. Benjamin Dachis (Associate Vice-President, Public Affairs, C.D. Howe Institute): Thank you very much, Bill.

The C.D. Howe Institute's competition policy council, which is comprised of top-ranked competition law academics and practitioners, noted support for the government's intention articulated in budget 2022 to consult broadly on the role and functioning of the Competition Act and its enforcement regime. However, the scope of changes to the Competition Act in the BIA does not fulfill that commitment. The BIA contains major changes that, even if in the right direction, consultation might have improved the outcome. Many more changes, especially on increasing administrative monetary penalties, will be harmful to the Canadian economy and may even be unconstitutional.

The government missed key opportunities to consult with the various constituencies affected by the legislation. The government and this committee should reconsider the BIA's approach on Competition Act amendments. Now, if carving division 15 isn't feasible, which is my recommendation, the committee should call for, at a minimum, setting the proclamation date for all provisions, not just some, for a year from passage.

We also need to hear more from government on their plans for further consultation, as they had promised, so that these proposed changes could then be seen in concert with other proposed changes that would come as part of a prompt second stage of the Competition Act amendments.

Given my limited time for opening remarks, I'll stop there and leave further discussion of specific problems for the questions.

● (1600)

The Chair: Thank you, Mr. Dachis.

Mr. Robson, I understand you're only here until 4:30. Is that correct?

Mr. William Robson: That's correct.

The Chair: Now we'll hear from the Canadian Labour Congress, please.

Ms. Siobhan Vipond (Executive Vice-President, Canadian Labour Congress): Good afternoon, Chair and honourable members.

My name is Siobhán Vipond. I am the executive vice-president of the Canadian Labour Congress. I am honoured to be joining you today from the traditional unceded territories of the Anishinabe and Algonquin peoples.

We at the CLC speak on behalf of working people in Canada in every industry, occupation and region of the country. The congress welcomes many aspects of the budget implementation bill. The introduction of a labour mobility tax deduction, improvements to Canada's trade remedy legislation and restoring the prohibition on wage-fixing in the Competition Act are all steps that Canada's unions have been urging the government to take.

However, there is a great deal that is missing from this bill. Budget 2022 provides an additional $2 billion one-time top-up to provinces and territories for health services, yet health workers are facing dire staffing shortages and growing burnout. The bill fails to take urgent action to improve the retention and recruitment needed to address this crisis.

Also missing is action to help Canada's care workers, including in early learning and child care and in long-term care. To appreciate the scale of this problem, in March, Statistics Canada estimated the value of unpaid care at between $515 billion and $680 billion.

The budget takes steps on housing affordability and transit shortfalls, but it falls short of addressing the affordability crisis facing working people. The cost of food, fuel and shelter has shot up while wages lag far behind. Workers' spending power is falling. Living standards are declining for workers whose real wages are dropping at the fastest rate in memory. Pensioners who lost inflation-protected pensions are seeing their fixed incomes quickly eroded by soaring inflation.

The government should be urgently responding to this crisis by taxing corporate superprofits, housing speculators and the concentrated wealth of the richest Canadians; allowing wages to rise by strengthening labour standards and removing barriers to unionization; and strengthening social programs by implementing national pharmacare and dental care, quickly getting child care fees down and expanding free high-quality public transit.

Instead, the government is ramping up employers' access to vulnerable migrant workers, while the Bank of Canada is preparing to hike interest rates in the hopes that it will cool inflation. These measures are going to hurt working-class households and worsen inequality while doing nothing to tackle the entrenched power and corporate greed responsible for price-gouging and pandemic profiteering.

Let me end with some specific recommendations for amending Bill C-19, starting with the EI board of appeal.

For many years, labour and community organizations have struggled to restore important elements of the EI boards of referees that were scrapped by Stephen Harper's government in 2012. EI appeals should be heard by worker and employer representatives: people who understand their communities and the realities of workplace life.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

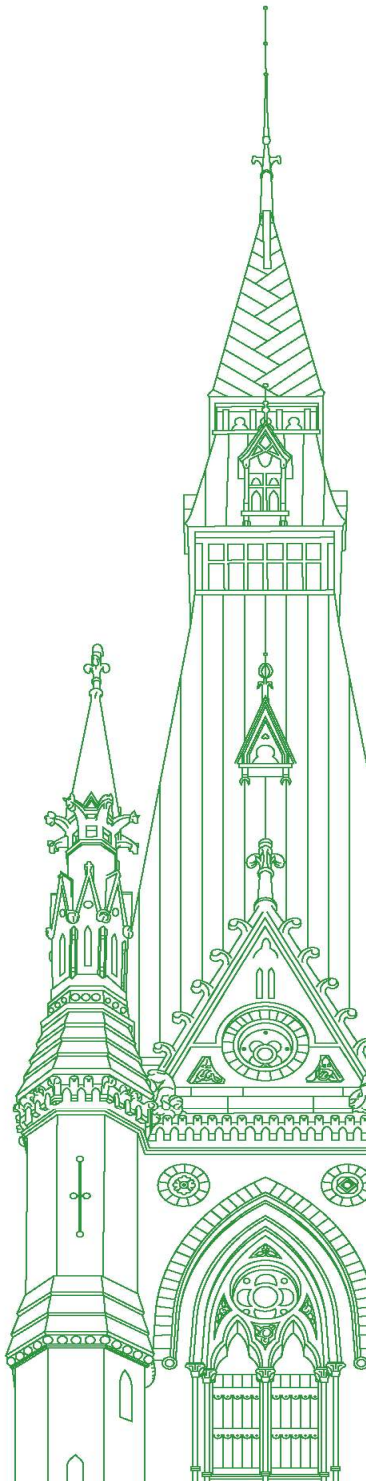
44th PARLIAMENT, 1st SESSION

Standing Committee on Industry and Technology

EVIDENCE

NUMBER 025

Friday, May 20, 2022



Chair: Mr. Joël Lightbound

On the modifications to the abuse of dominance provisions, I think these were proposed by Professor Iacobucci, who is very cautious about modifying the act, but he thinks there's a gap, and I tend to agree with him. Again, it's not perfect, and maybe we're going to restructure abuse of dominance completely differently after the consultation, but for now I'm not sure this is going to create a huge problem in the short term, as cases on abuse of dominance take time to bring together and analyze.

On the general anti-avoidance and the revisions to section 11, these were both requests by the commissioner, and I think we need to keep in mind that.... I can't substitute my judgment for what they think is necessary. Maybe this committee can ask them for further details and examples to give a dimension to the problem. Is there an anti-avoidance problem? I can't comment factually about whether this is an overreach or whether this is going to be a problem. I'm sure my friends from the CBA will have more to say on that.

I want to conclude—and I know I'm over time—by saying that this is step one. I'm trying to be practical and give you suggestions for how to get to step two, which is the really important game. We need this consultation; we need the substantive analysis.

● (1340)

[*Translation*]

I can't stress enough the importance of holding as broad of a consultation as possible.

Our economic policy and Competition Act must be updated, but it needs to be done in a way that helps define the main values we're seeking to promote through our economic policy. The creation of a robust governance architecture, particularly in terms of digital technology, and the passing of coherent laws are not possible without this essential step.

I'll stop here. I'm available to answer any questions from the members of the committee.

The Chair: Thank you very much, Ms. Quaid.

Mr. Wu, you now have the floor.

[*English*]

Mr. William Wu (Partner, Competition, Antitrust and Foreign Investment, McMillan LLP, As an Individual): Thank you very much for this opportunity to appear before the committee. My name is William Wu. I'm a partner in the competition and foreign investment group at McMillan in Toronto.

It has been almost 15 years since the last major review of Canadian competition law and competition policy. I think everybody here would agree that it is time for another review of Canadian competition law. In this regard, I applaud Minister Champagne for announcing a broad review of the Competition Act. That consultation will need to be broad and inclusive. I think everybody here would agree with that.

With that in mind, it is unclear to me why we need to have all these amendments done through this process right now, when the broader consultation is coming in the next couple of months, I believe. In relation to the wage-fixing and no-poaching provision in particular, in the bill itself that provision is only intended to come into force one year after the BIA receives royal assent. It already contemplates that something more needs to be done to that provision. With that delay already built in, I see no compelling reason why that provision in particular needs to be rushed through this regulatory process right now.

In terms of the substance of the no-poaching and wage-fixing provision, I share Professor Quaid's concern that using criminal law to deal with this issue may not be appropriate. Looking at the wage-fixing and no-poaching agreement, I think we can really conceive of it as a competition law issue or as a labour and employment law issue. To the extent that it is a competition law issue, the concern would be that employers are agreeing not to compete in their hiring or compensation practices. If that is a concern, I would say that using criminal law to create a per se prohibition is too blunt an instrument.

There are a lot of legitimate and pro-competitive reasons why employers might want to talk to each other about their hiring and compensation practices. I can speak to those in more detail later. It is not obvious at all that these types of agreements will always cause harm to employees by depriving them of higher wages or job opportunities. In that context, given that there can be harmful no-poaching and wage-fixing agreements and there can be legitimate ones as well, using the existing civil reviewable practices provision in section 90.1 of the act is an appropriate competition law framework to address these issues.

To the extent that the concern is the protection of workers, in particular low-wage workers, that is traditionally within the ambit of provincial labour and employment law and less of a competition law issue. I would submit that labour and employment law and labour and employment law regulators are better equipped and have better expertise and experience in dealing with those issues.

I will stop here for now, given the short time today. I would be happy to answer questions. I do have other views on other amendments, particularly the drip pricing provision, which I can speak to during questions.

● (1345)

The Chair: Thank you very much, Mr. Wu.

I will now move to Mr. Dachis.

Mr. Benjamin Dachis (Associate Vice-President, Public Affairs, C.D. Howe Institute): Thank you very much.

I have the great pleasure of working with the C.D. Howe Institute's competition policy council, which is comprised of top-ranked competition law academics and practitioners. Elisa Kearney, whom you will be hearing from later today in her role at the CBA, is the chair of the council.

The core concern of the council is that the scope of changes to the Competition Act and the BIA is not fulfilling the commitment articulated in budget 2022 to consult broadly on the role and functioning of the Competition Act and its enforcement regime. Let me address some of the problems that could have been fixed with consultation on the specifics of the bill.

First, the changes proposed in the BIA result in corporations now facing administrative monetary penalties, or AMPs, of up to 3% of annual worldwide gross revenues. The legal details really matter here. If an AMP is penal in nature rather than a deterrent, then it is effectively a criminal penalty. The alleged offender must be tried in accordance with the due process requirements of section 11 of the Charter of Rights and Freedoms. Neither the misleading advertising nor the abuse of dominance provisions that attract these significant penalties are criminal offences.

The burden of proof to be convicted is a lower balance of probability standard. The increase to the fines to be set on global revenues of a firm—this is a critical part—that are not directly related to the harms of the practice greatly raises the likelihood that the fines could be found as penal and therefore unconstitutional.

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chair. This is the second time that the interpreter has mentioned problems with sound while the witness was speaking.

[*English*]

Mr. Benjamin Dachis: Is that any better?

The Chair: It seems to be a network issue, but if you can, speak a little more slowly, Mr. Dachis.

Mr. Benjamin Dachis: Sure. I'm sorry about that.

With such large potential penalties, there's a risk of over-deterrence, and firms may shy away from practices that may be beneficial for Canadians. These potential fines raise reputational risks for Canada as not being supportive of foreign investment, given that fines will be disproportionately large for foreign multinationals.

The risks of over-deterrence are magnified by the changes in the BIA to allow private parties access to the tribunal to make a complaint about abuse of dominance. Although private litigants do not have the ability to receive damages themselves, the defendants in a privately brought case of abuse of dominance will face a large potential fine that will be paid to the government. This goes well beyond the appropriate role—and there is an appropriate role for private litigation in abuse of dominance—and risks creating “private sheriffs”, where competitor-driven complaints before the tribunal may result in government levying disproportionate fines against parties.

Moving to wage-fixing and no-poach agreements, there are very sound legal and economic reasons to address them. Price-fixing and wage-fixing are economically similar. However, as we've heard a couple of times today, the language of the new amendment is overly broad and creates great uncertainty.

There is uncertainty about whether the term “employee” captures all categories of workers. There's no definition of “employer” and “employee” in the Competition Act. Given the changing nature of employment, as well as the varying provincial definitions of employee-employer relationships, the proposed amendments would benefit from proper consultation with employment law experts directly from the government, rather than what a single committee like this or a single senator like Senator Howard Wetston can manage on their own.

I can get to various approaches on how to deal with wage-fixing in the questions, but William Wu is a real expert on this, so I defer to him in particular.

The last thing on substance is that the identification of privacy as a specific characteristic of non-price competition, separate from product quality, raises particular questions. If privacy is distinct from product quality, what does this really mean? Will competition law cases—mergers, for example—turn on a privacy issue even if competition issues are otherwise unproblematic? Once again, the amendment would have benefited from broader consultation.

Let me close on the core problem, and that's process. The problems of the BIA are reminiscent of similar process concerns that accompanied the legislative changes to the Competition Act in 2009 via the budget process. Some of the proposed amendments in the BIA now reflect legislative fixes to fix that flawed process, yet by following the same flawed process, the inevitable result is an overcorrection and the need for legislative amendments in the future, which, more importantly, do not achieve the government's objective of improving the operation of the Competition Act.

What's the practical bottom line? Carving division 15 out of the BIA would be the right approach. If that isn't feasible, the committee should call for setting the proclamation date for all provisions—not just some—for a year from passage. We also need to hear more from the government on their plans for further consultation, as they promised.

These proposed changes can be seen in concert with other proposed changes that would come as part of a prompt second stage of Competition Act reviews. Proceeding right to these amendments, especially ones that may be unconstitutional, taking force without further consultation could be potentially reckless. We can work out the details of the implementation of changes before they take effect, with a later proclamation.

I'll leave my opening remarks there, and I look forward to your questions.

Thank you again for the invitation to speak on this issue.

● (1350)

The Chair: Thank you very much, Mr. Dachis.

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

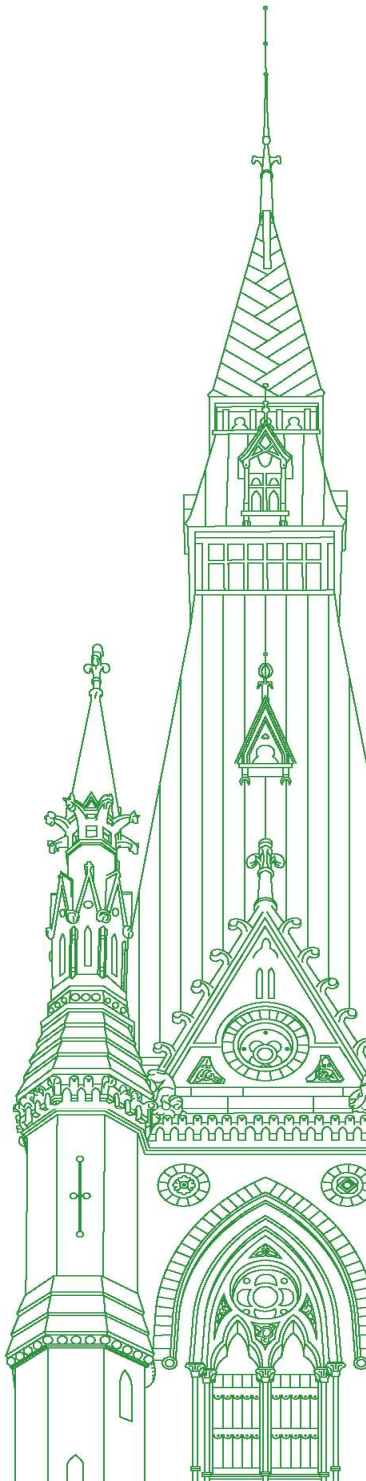
44th PARLIAMENT, 1st SESSION

Standing Committee on Finance

EVIDENCE

NUMBER 050

Tuesday, May 24, 2022



Chair: Mr. Peter Fonseca

The Chair: That concludes our first round of questions.

We're moving to our second round, members and witnesses, commencing with the Conservatives. We have MP Chambers for five minutes.

Go ahead, please.

Mr. Adam Chambers (Simcoe North, CPC): Thank you very much, Mr. Chair. It's nice to see everyone here. Thank you for taking time this week to be with us with excellent presentations.

I'd like to swing back to the chamber, if I may, for most of my time, Mr. Chair.

Mr. Agnew, you talked about two issues. I'd like to focus on both, but first let's talk about the Competition Act changes.

Are there challenges in principle with these changes or is it mostly around process and interpretation and having some ability to have feedback on some of this legislation before it becomes law?

Mr. Mark Agnew: Absolutely it is the latter. We don't have any challenge with discussing how to modernize the penalties, because admittedly they are quite small today. We don't have a problem with talking about abuse of dominance, because we want to make sure there is something in there that balances the needs of both businesses and consumers.

Unfortunately, what we saw in the budget document, which was going to be something that was a bit more narrow in scope, has ended up being quite a broad piece now in Bill C-19. Having a more robust consideration of those and a more structured process as part of the phase two the government has committed to doing already I think would be the way to go about having that conversation.

Mr. Adam Chambers: From your perspective, is there a pressing need that this has to become law by the end of this session—by June? Is it possible that we could perhaps consult on some of these changes over the summer, not at this committee but with respective stakeholders within industry, and then perhaps put a refined version of these in the budget bill in the fall?

Mr. Mark Agnew: That's correct. There is no need to press through with changes before the end of the spring sitting of Parliament.

As I alluded to in my opening comments, there has been a tendency by some to link the Competition Act changes to what can address the current inflationary environment. Certainly our views is that these changes, if they're enacted in June, are not going to move the dial on inflation. We need to make sure that we get it right as opposed to getting it done quickly.

Mr. Adam Chambers: Thank you.

We heard last week a stakeholder mention a question around constitutionality of at least one of the sections. Is that a view that you've looked at as the chamber, or have you sought external opinions that give you the same kind of concern?

Mr. Mark Agnew: Yes. We sought out the views of our members, and we have heard from some of them the concern about the scope of the penalty size and what that means from a constitutional perspective. Thankfully, despite all my sins, I'm not a lawyer—I didn't have to go to law school—but this is the sort of thing where we do need to have a fairly rigorous discussion about it. Again, some members have raised that constitutional concern with us.

Mr. Adam Chambers: Thank you.

I'll turn now to the recreation tax, or the boat tax, as we've talked about many times here at this committee. You mentioned the U.S. having gone down this road and reconsidering it.

What's the experience that we should be drawing on here in Canada?

Mr. Mark Agnew: I'm not familiar with all the ins and outs of the U.S. experience, but there are a couple of things to consider. One is the impact on manufacturing jobs, because this is a very real business cost that is imposed upon companies. Certainly in the current, again, inflationary environment and recovery from the pandemic, companies have an even thinner margin and less manoeuvre room to go with.

Then, of course, another thing is that if other jurisdictions aren't doing this, people are going to be looking for circumvention measures. Are those jobs just going to go away and move elsewhere? The people who are intended to be taxed are going to move the economic activity, and we will have nothing to show for it here on the domestic end.

Mr. Adam Chambers: Would it surprise you to learn that the government did not complete an economic impact assessment prior to the introduction of the tax? They have been talking about it for at least a couple of years, but we haven't seen any economic analysis.

Mr. Mark Agnew: I haven't seen any economic analysis.

Again, this goes back in some ways to the point about competition, and I think some of the other remarks that witnesses made today. There's a need to make sure we're doing this right and that, as people like to say, it's evidence-based policy-making. What is the evidence base around it, and what are going to be the real-world impacts if we go ahead with it?

● (1230)

Mr. Adam Chambers: I have one final question.

If you had any advice to the committee over the next couple of weeks, are there amendments that you could perhaps provide in writing to the Competition Act changes, if we're unsuccessful in having it separated out from the bill? That would be helpful.

Mr. Mark Agnew: Absolutely.

If the chair could just indulge us, the fact that we haven't been able to come forward with amendments from the discussions that we've had with our members thus far, I think underscores just how complex this really is.

To go back to the honourable member's opening question to me, we're not actually seeking to have the entirety of the Competition Act provisions removed from the BIA. We've really tried to give it some diligent thought to say what the real problems are that need to be consulted on more. Hence, that's why I've come to the committee today seeking for those three specific provision to be removed.

[1] Presumption against implicit alteration of law

The Construction of Statutes, 7th Ed.

Ruth Sullivan

The Construction of Statutes, 7th Ed. (Sullivan) > CHAPTER 15 Presumed Legislative Intent > § 15.05 Strict Construction of Legislation that Derogates from Established Law

CHAPTER 15 Presumed Legislative Intent

§ 15.05 Strict Construction of Legislation that Derogates from Established Law

[1] Presumption against implicit alteration of law

It is presumed that the legislature does not intend to change existing law or to depart from established principles or practices. This point is made by the Supreme Court of Canada in *Parry Sound (District) Social Services Administration Board v. Ontario Public Services Employees Union*,[1] where Iacobucci J. wrote:

> To begin with, I think it useful to stress the presumption that the legislature does not intend to change existing law or to depart from established principles, policies or practices. In *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, ... for example, Fauteux J. (as he then was) wrote that "a Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed".[2] In *Slaight Communications Inc. v. Davidson*,[3] Lamer J. (as he then was) wrote that "in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law".[4]

On its face, this presumption makes little sense. If the legislature did not intend to change existing law or practice, why was it enacting legislation? To the extent this presumption reflects mere conservatism, or a preference for common law values over legislative ones, it is difficult to justify. But the presumption also reflects rule of law concerns. The stability of law is enhanced by rejecting vague or inadvertent change while certainty and fair notice are promoted by requiring legislatures to be clear and explicit about proposed changes. In addition, the common law has always placed a high value on the harmonization of sources of law. In any event, for better or worse, the presumption is frequently invoked by modern courts and does not seem to have been weakened by reliance on the *Bell ExpressVu* case: that is, it does not seem to be treated as a presumption of last resort.[5]

The justification for the presumption against change was explained by Cromwell J. in *R. v. W. (D.L.)*:

> There is also the related principle of stability in the law. Absent clear legislative intention to the contrary, a statute should not be interpreted as substantially changing the law, including the common law.... This principle, if applied too strictly, may lead to refusal to give effect to intended legislative change. But it nonetheless reflects the common sense idea that Parliament is deemed to know the existing law and is unlikely to have intended any significant changes to it unless that intention is made clear:.... This principle is reflected in ss. 45(2) and 45(3) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provide that the amendment of an enactment does not imply any change in the law and that the repeal of an enactment does not make any statement about the previous state of the law.[6]

Footnote(s)

1 [2003] S.C.J. No. 42,[2003] 2 S.C.R. 157 (S.C.C.).

2 [1956] S.C.J. No. 37, [1956] S.C.R. 610 at 614 (S.C.C.).

3 [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038 at 1077 (S.C.C.).

4 *Parry Sound (District) Social Services Administration Board v. Ontario Public Services Employees Union*, [2003] S.C.J. No. 42, [2003] 2 S.C.R. 157 at paras. 39-40 (S.C.C.). See also *Canada (Attorney General) v. Thouin*, [2017] S.C.J. No. 46, 2017 SCC 46 at para. 19 (S.C.C.); *Lizotte v. Aviva Insurance Company of Canada*, [2016] S.C.J. No. 52, 2016 SCC 52 at paras. 56-57 (S.C.C.); *Heritage Capital Corp. v. Equitable Trust Co*., [2016] S.C.J. No. 19, 2016 SCC 19 at paras. 29-31 (S.C.C.); *Potter v. New Brunswick Legal Aid Services Commission*, [2015] S.C.J. No. 10, 2015 SCC 10 at para. 124 (S.C.C.); *R. v. Summers*, [2014] S.C.J. No. 26, 2014 SCC 26 at paras. 55-58 (S.C.C.); *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, *[2004] S.C.J. No. 19*, [2004] 1 S.C.R. 485 (S.C.C.); *R. v. T.(V.)*, [1992] S.C.J. No. 29, [1992] 1 S.C.R. 749 (S.C.C.).

5 For discussion of the *Bell ExpressVu* case, see above at §15.01[4].

6 *R. v. W. (D.L.)*, [2016] S.C.J. No. 22, 2016 SCC 22 at para. 21. See also para. 54. For a case in which the presumption was rebutted, see *Royal Bank of Canada v. Marmurra*, [2015] N.S.J. No. 44 , 2015 NSCA 12 at paras. 20*ff* (N.S.C.A.).

End of Document